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# Vice Advertising and the Commercial Speech Doctrine

Laura Elizabeth McNally

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## I. Introduction

As a result of one potentially inadvertent sentence in a 1942 Supreme Court opinion,<sup>1</sup> commercial speech has been plagued with second-class status within the First Amendment.<sup>2</sup> After receiving no First Amendment protection for over three decades, commercial speech finally entered the realm of constitutional protection in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.<sup>3</sup> Years later, the Supreme Court's landmark opinion in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*<sup>4</sup> established a four-part balancing test to assess validity of governmental regulations on commercial speech.<sup>5</sup> While courts have uniformly applied the *Central Hudson* test to commercial speech regulations, the outcomes of the analyses have proven to be anything but uniform.<sup>6</sup>

No area of commercial speech has better displayed the stark contrast in judicial review under *Central Hudson* than vice advertising. Vice advertising, as used throughout this Comment, refers to the promotion of products or activities that are legal but may pose a threat to the health and morals of the public.<sup>7</sup> The Court has done an about-face in its evaluation of vice advertising restrictions, casually deferring to the government's discretion in the earliest cases and rigorously

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<sup>1</sup> Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?* 76 VA. L. REV. 627, 629 (1990) (opining that the Court "plucked the commercial speech doctrine out of thin air"). See also *infra* Part II.A.

<sup>2</sup> *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 n.5 (1980) ("This Court's decisions on commercial expression have rested on the premise that such speech, although meriting some protection, is of less constitutional moment than other forms of speech.").

<sup>3</sup> 425 U.S. 748 (1976).

<sup>4</sup> 447 U.S. 557 (1980).

<sup>5</sup> *Id.* at 566.

<sup>6</sup> See e.g., Michael Hoefges, *Protecting Tobacco Advertising Under the Commercial Speech Doctrine: The Constitutional Impact of Lorillard Tobacco Co.*, 8 COMM. L. & POL'Y 267, 267-68 (2003) (stating that the Court has been applying *Central Hudson* with "varying degrees of rigor" to commercial speech); Arlen W. Langvardt, *The Incremental Strengthening of First Amendment Protection for Commercial Speech: Lessons From Greater New Orleans Broadcasting*, 37 AM. BUS. L. J. 587, 588-589 (2000) ("[T]he Court's decisions have offered inconsistent signals about the intensity--or lack of intensity--of the First Amendment protection for commercial speech."); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 3 (2000) ("Lacking firm jurisprudential foundations, commercial speech doctrine has veered wildly between divergent and inconsistent approaches."); Daniel E. Troy, *Advertising Not "Low Value" Speech*, 16 YALE J. REG. 85, 123 (1999) (arguing that "the subjective *Central Hudson* test . . . has produced an inconsistent Supreme Court commercial speech jurisprudence and sowed confusion in the lower courts. . . .").

<sup>7</sup> See generally 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 514 (U.S. 1996).

scrutinizing the vice regulations in the most recent cases.<sup>8</sup> While the evolution of *Central Hudson* can be viewed as a victory for commercial speech, it also demonstrates a problem: the *Central Hudson* analysis may be so malleable and subjective that it can no longer effectively safeguard the First Amendment interests at stake.

The *Central Hudson* issue becomes most concerning in the vice advertising context, where the government often has laudable interests in enacting legislation that restricts advertising certain products to certain groups of people or in certain locations. However commendable the government's objectives may be, an encroachment on First Amendment freedoms demands consistent and scrupulous review by the judiciary, which the Supreme Court eventually made clear throughout the vice cases.<sup>9</sup> Nevertheless, *Central Hudson* still leaves room to maneuver, and the Court has failed to agree on some important aspects of the analysis.<sup>10</sup> These downfalls are evident in the Third and Fourth Circuits' conflicting determinations when scrutinizing similar vice advertising restrictions.<sup>11</sup>

This comment examines special issues within the vice advertising subset of the commercial speech doctrine. Part II provides a history of the commercial speech doctrine, from its misunderstood inception to its analytical framework as set out in *Central Hudson*. Part III focuses on the Supreme Court's application and refinement of *Central Hudson* in vice advertising regulations. Part IV explores the Third and Fourth Circuits' application of *Central Hudson* to similar alcohol advertisement regulations in their respective circuits. Part V analyzes the Fourth Circuit's decision and its deviance from Supreme Court precedent and speculates on

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<sup>8</sup> Compare *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) with *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

<sup>9</sup> See *infra* note 6.

<sup>10</sup> *Lorillard*, 533 U.S. at 554 (“[S]everal Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases.”).

<sup>11</sup> See discussion *infra* Parts IV, V.

why such deviations are likely to occur. Finally, Part VI summarizes the progression of *Central Hudson*'s application to vice advertising and opines on the future of the doctrine.

## II. Underpinnings of the Commercial Speech Doctrine

In a 1942 decision, the Supreme Court declared that advertising was not within the scope of the First Amendment.<sup>12</sup> Whether the Court's decision was "ill-conceived"<sup>13</sup> or merely a sign of the times,<sup>14</sup> commercial speech remained unprotected until the 1970s. In *Virginia Board*, the Court recognized the value of commercial speech and the First Amendment interests at stake and expressly afforded constitutional protection to advertising for the first time.<sup>15</sup> *Central Hudson* tied up *Virginia Board*'s loose ends by creating a four-pronged adaptation of intermediate scrutiny to assess the validity of regulations on commercial speech.<sup>16</sup>

### A. The Pre-Protection Period

The Justices of the Supreme Court, in a unanimous decision, created the commercial speech doctrine in *Valentine v. Chrestensen*,<sup>17</sup> whether they realized it or not. Mr. Chrestensen, an entrepreneur, had attempted to promote his business by distributing handbills in the streets of New York City until Police Commissioner Valentine notified him that such activity was in violation of §318 of the Sanitary Code, which forbade distribution of commercial advertisements.<sup>18</sup> Instead of taking his business elsewhere, a clever Chrestensen chose to print double-sided handbills, with one side remaining a commercial advertisement and the other side consisting of a political protest against the City Dock Department.<sup>19</sup> The police restrained

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<sup>12</sup> *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

<sup>13</sup> See *infra* text accompanying note 28.

<sup>14</sup> See *infra* text accompanying notes 23-26.

<sup>15</sup> See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, (1976).

<sup>16</sup> See *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

<sup>17</sup> 316 U.S. 52 (1942).

<sup>18</sup> *Id.* at 55.

<sup>19</sup> *Id.*

Chrestensen from distributing his double-sided handbills and a lawsuit followed.<sup>20</sup> In its decision, the Court laid the foundation for a brand new subclass of speech in one sentence: “We are . . . clear that the Constitution imposes no . . . restraint on government as respects purely commercial advertising.”<sup>21</sup> The Court did not cite any authority or discuss reasons for its assertion. Moreover, the opinion was written, circulated, and approved by the Justices in only nine days, suggesting that this case was not a particularly important one.<sup>22</sup>

Considering the significance of this case to the commercial speech doctrine, it is puzzling that the most esteemed judiciary in the country did not hesitate in concluding that commercial speech did not enjoy First Amendment protection. It seems likely that the holding in *Valentine* has little to do with commercial speech as it is known today and a lot to do with the status of “advertising” in 1942.<sup>23</sup> A mere five years after “the switch in time that saved nine” when the Court abandoned the notion of economic substantive due process, the *Valentine* Court would have been reluctant to strike down a state’s economic regulation.<sup>24</sup> At that time, Chrestenson’s advertising was not viewed as speech, but rather as occupational activities subject to state regulation.<sup>25</sup> In fact, the term “commercial speech” did not enter the courtroom vocabulary until the 1970s.<sup>26</sup>

Fortunately, the broad, hasty exclusion of commercial speech from constitutional protection was transient. Justice Douglas, who was a member of the *Valentine* Court, later

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 58.

<sup>22</sup> Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 757 (1993).

<sup>23</sup> Kozinski, *supra* note 22, at 763 (suggesting the Court’s opinion appeared to address an economic due process issue, not a speech issue). *See also* Troy, *supra* note 6, at 122.

<sup>24</sup> *See, e.g.,* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (adopting rational basis review of economic legislation). *See also* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

<sup>25</sup> *Valentine*, 316 U.S. at 54 (“Whether, and to what extent, one may promote or pursue a gainful occupation in the streets . . . are matters for legislative judgment.”).

<sup>26</sup> Kozinski, *supra* note 22, at 756.

opined that the Court's ruling was "casual, almost offhand . . . [a]nd it has not survived reflection."<sup>27</sup> He subsequently reiterated that the ruling was "ill-conceived" and contended that the commercial form or content of a publication should not render speech unprotected.<sup>28</sup>

Several other Justices eventually joined Justice Douglas and began to express concern over the validity of *Valentine's* holding in dissenting opinions.<sup>29</sup> Meanwhile, the *New York Times Co. v. Sullivan*<sup>30</sup> and *Pittsburgh Press* holdings displayed the gradual erosion of *Valentine*. In *Sullivan*, the Court conveyed full First Amendment protection to an allegedly libelous, political statement even though it was a paid advertisement.<sup>31</sup> *Pittsburgh Press* followed *Sullivan's* lead, stating that the "critical feature" of *Valentine's* handbill was that "it did no more than propose a commercial transaction."<sup>32</sup> While the Court's decisions did not go so far as to abrogate the doctrine, they certainly qualified *Valentine's* holding to "purely commercial advertising," or speech that did not also include noncommercial elements.<sup>33</sup>

The First Amendment's protection of advertisements was somewhat recognized in *Bigelow v. Virginia*.<sup>34</sup> The Court expressly limited *Valentine* to its facts, finding the case "obviously does not support any sweeping proposition that advertising is unprotected *per se*."<sup>35</sup> The Court emphasized that the constitutionality of a speech regulation, regardless of how the speech is labeled, is to be determined by weighing the alleged governmental interest against the

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<sup>27</sup> *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas J., concurring).

<sup>28</sup> *Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898, 904-05 (1971) (Douglas J., concurring).

<sup>29</sup> *See, e.g., Lehman v. Shaker Heights*, 418 U.S. 298, 314-15 & n.6 (1974) (Brennan, J., dissenting, joined by Stewart, Marshall & Powell, JJ.); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 401 & n.6 (1973) (Stewart, J., dissenting); *id.* at 404 (Blackmun, J., dissenting).

<sup>30</sup> 376 U.S. 254 (1964).

<sup>31</sup> *Sullivan* held that unlike the handbills in *Valentine*, the political advertisement at issue received full First Amendment protection because it conveyed information, opinions, and ideas. 376 U.S. at 266.

<sup>32</sup> *Pittsburgh Press*, 413 U.S. at 385.

<sup>33</sup> *Id.*; *Sullivan*, 376 U.S. at 266.

<sup>34</sup> 421 U.S. 809 (1975).

<sup>35</sup> *Id.* at 819-20.

First Amendment interests.<sup>36</sup> Therefore, the court concluded advertisements are not exempt from the First Amendment's purview.<sup>37</sup> However, *Bigelow* went on to note that the advertisement at issue went beyond merely proposing a commercial transaction by including "factual material of clear public interest."<sup>38</sup> Because of this allusion to the advertisement's noncommercial subject matter, a small gray area remained around speech that solely promoted commercial matters.

### *B. The Virginia Board Case*

If *Bigelow* was the death knell of *Valentine*, consider *Virginia Board* to be its funeral. The regulation at issue was a Virginia statute prohibiting the advertisement of prescription drug prices, aimed at protecting consumers by preserving the integrity of the pharmaceutical profession.<sup>39</sup> Unlike *Bigelow*, the Court was now dealing with speech that was void of noncommercial elements, that did "no more than propose a commercial transaction,"<sup>40</sup> and asked "whether this communication is wholly outside the protection of the First Amendment."<sup>41</sup> The Court answered that question in the negative and invalidated the statute, upholding First Amendment protection to pure commercial speech for the first time.<sup>42</sup>

In making its decision, the Court reached three noteworthy conclusions. Firstly, the Court stated that the First Amendment protects not only the right to speak, but also the right to receive information.<sup>43</sup> Consequently, protected speech encompasses both the right to advertise and the right to receive the advertising.<sup>44</sup>

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<sup>36</sup> *Id.* at 826.

<sup>37</sup> *Id.* at 825.

<sup>38</sup> *Id.* at 822. The Court highlighted that sections of the advertisement relayed factual information that was potentially valuable to a wide range of readers, namely that abortion was legal in New York. *Id.*

<sup>39</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 752, 766 (U.S. 1976).

<sup>40</sup> *Id.* at 762.

<sup>41</sup> *Id.* at 761.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 756-57.

<sup>44</sup> *Id.* at 757.

Second, the Court rejected that the State's paternalistic motives in suppressing price information were sufficient to outweigh the First Amendment rights of the advertiser, the consumer, and society in general.<sup>45</sup> As to the First Amendment interests at stake, the Court declared that the advertiser's purely financial interest in the commercial speech does not rescind his or her constitutional protection.<sup>46</sup> The consumer's interest in "the free flow of commercial information" could be just as strong as his or her interest in receiving political information.<sup>47</sup> This particular interest was especially relevant in this instance because the individuals most affected by the price ban were the poor, the ill, and the elderly.<sup>48</sup> Finally, the Court speculated that society, as part of a free enterprise economy, benefits from uninhibited dissemination of commercial information because it ensures that economic decision-making is well-informed.<sup>49</sup>

The Court conceded that upholding the high standards of pharmacists and thereby protecting consumers was a strong interest, but was troubled by the implications of the State's method.<sup>50</sup> The Court reasoned that the ban had no direct effect on pharmacists' professionalism, but instead operated on the presumption that consumers with the free flow of price information will make decisions against their own best interests.<sup>51</sup> It went on to propose a different assumption: "information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."<sup>52</sup> Neither the Court nor the legislature is entitled to choose between the two approaches because it is the First Amendment that makes the

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<sup>45</sup> *Id.* at 770.

<sup>46</sup> *Id.* at 762.

<sup>47</sup> *Id.* at 763.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 766.

<sup>50</sup> *Id.* at 768-69.

<sup>51</sup> *Id.* at 769-70.

<sup>52</sup> *Id.* at 770.

determination.<sup>53</sup> Thus, Virginia could not maintain the standards of its pharmacists “by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering.”<sup>54</sup>

Finally, the Court set out two “commonsense differences” between commercial speech and other forms of expression that “justified a different degree of protection . . . to insure that the flow of truthful and legitimate commercial information is unimpaired.”<sup>55</sup> First off, commercial speech is more objective than other forms of speech because it is easier to verify its accuracy.<sup>56</sup> Second, commercial speech is more durable than other types of speech because it essential to commercial profits.<sup>57</sup> The Court suggested that such features “may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.”<sup>58</sup> These differences are meaningful because it is one of the few occasions in which the Court explained why commercial speech may be less deserving of full First Amendment protection.<sup>59</sup> It also is worth noting that the Court sanctioned a different degree of First Amendment protection only for the purposes of achieving veracity,<sup>60</sup> and not to allow the State to suppress information it may deem harmful.

### *C. The Central Hudson Analysis*

*Virginia Board*'s call for a “different degree of protection” for commercial speech was answered by *Central Hudson*,<sup>61</sup> the foundation of the modern commercial speech doctrine. The majority opinion recapitulated prior commercial speech caselaw and a found that the cases developed a four-step judicial analysis for evaluating a restriction on commercial speech:<sup>62</sup> “At

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 772 n.24.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> KOZINSKI, *supra* note 1, at 634.

<sup>60</sup> *Virginia Board*, 425 U.S. at 722 n.24 (“Even if the differences do not justify the conclusion that commercial speech is valueless . . . they nonetheless suggest that a different degree of protection is necessary to *insure that the flow of truthful and legitimate commercial information is unimpaired.*”(emphasis added)).

<sup>61</sup> *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

<sup>62</sup> *Id.* at 561-66.

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.”<sup>63</sup> This prong reflects the view that the First Amendment seeks to protect the informational purpose of commercial speech, and therefore the Constitution permits suppression of deceptive or illicit commercial communication.<sup>64</sup> “Next, we ask whether the asserted governmental interest is substantial.”<sup>65</sup> If the first two criteria have been met, the analysis will move on to the third and fourth inquiries, which consider “whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”<sup>66</sup>

Justices Blackmun, Brennan, and Stevens, although concurring with the judgment, did not subscribe to the majority’s reasoning.<sup>67</sup> Justice Blackmun denied that a lower level of judicial scrutiny is appropriate when the State seeks to outlaw accurate and lawful communication in order to depress consumer demand for a product.<sup>68</sup> He found that governmental restraint on information regarding a legal product is “a covert attempt . . . to manipulate the choices of its citizens . . . by depriving the public of the information needed to make a free choice.”<sup>69</sup> By avoiding direct regulation of the underlying commercial object, the government may shield its primary motives from the public eye and attain its ultimate goal by withholding information that its citizens need to make a voluntary choice.<sup>70</sup> This *modus operandi* goes against the very essence of the First Amendment.<sup>71</sup> Justice Blackmun also

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<sup>63</sup> *Id.* at 566.

<sup>64</sup> *Id.* at 563-64.

<sup>65</sup> *Id.* at 566.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 572 (Brennan, J., concurring); *Id.* at 573 (Blackmun, J., concurring, joined by Stevens, J).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 574-75.

<sup>70</sup> *Id.* at 575.

<sup>71</sup> *Id.*

criticized the majority's interpretation of the cases from which the four-step test was derived.<sup>72</sup> The majority's approach, allowing the State to suppress truthful, nonmisleading, and lawful commercial communication in order to manipulate public choices, is discordant with *Virginia Board* and the other Supreme Court precedent that the majority cited, all of which outright rejected such a proposition.<sup>73</sup>

Justice Stevens found little need to ruminate upon the majority's test because he did not view *Central Hudson* as a commercial speech case.<sup>74</sup> His concurrence illuminated one of the central problems with the doctrine: the difficulty of defining "commercial speech."<sup>75</sup> He analyzed two definitions described by the majority and found neither to be satisfactory.<sup>76</sup> Defining commercial speech as "expression related solely to the economic interests of the speaker and its audience" subsumes far too much expression that is entitled to the greatest degree of protection, such as utterances at a labor strike and an economist's financial study.<sup>77</sup> Neither the financial motives of the speaker nor the audience, in Justice Stevens' view, should confine the constitutional protection afforded to the message.<sup>78</sup> He found that the second definition, "speech proposing a commercial transaction," might be too constricted to be an adequate description.<sup>79</sup> Regardless of how the term is defined, Justice Stevens stated that New York's ban on "promotional advertising" effectively proscribed too many types of expression to fall within the commercial speech category.<sup>80</sup>

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<sup>72</sup> *Id.* at 576-579 & n.3.

<sup>73</sup> *Id.* (citing *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977); *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976)).

<sup>74</sup> *Id.* at 583 (Stevens, J., dissenting).

<sup>75</sup> *Id.* at 579-80.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 579-80.

<sup>78</sup> *Id.* at 580.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 580-81.

### III. The Vice Cases

Despite its shortcomings, the *Central Hudson* test was a step in the right direction. The majority opinion solidified the protection given to commercial speech and assured a consistent analytical framework for reviewing commercial speech restrictions. Or did it? In the three decades since *Central Hudson*, the Supreme Court has dealt with First Amendment challenges to regulations on vice advertising six times, and the opinions demonstrate irresolute levels of scrutiny.<sup>81</sup> In the early cases, *Posadas* and *Edge Broadcasting*, the Court unraveled the very core purposes of the commercial speech doctrine by deferring to paternalistic legislative goals and insinuating that vice advertising could be banned entirely.<sup>82</sup> In the four cases that followed, *Rubin*, *44 Liquormart*, *Greater New Orleans*, and *Lorillard*, the Court abandoned the rationale it adopted in the prior vice cases and became progressively more demanding of the government to sustain the evidentiary burdens of the third and fourth prongs.<sup>83</sup>

#### A. The Early Cases

In *Posadas*, the Supreme Court applied *Central Hudson* produced a 5-4 decision upholding Puerto Rico's prohibition on casino advertisements targeting Puerto Rico citizens.<sup>84</sup> The legislature argued that the ban reduced residents' demand for gambling and protected its citizens from gambling's "serious harmful effects on the health, safety and welfare."<sup>85</sup> Finding that the speech was lawful and not deceptive and that Puerto Rico's interest in the welfare of its

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<sup>81</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999); *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993); *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).

<sup>82</sup> See discussion *infra* Part III.A.

<sup>83</sup> See discussion *infra* Part III.B.

<sup>84</sup> *Posadas*, 478 U.S. at 344.

<sup>85</sup> *Id.* at 341.

citizens was substantial, the Court went on to evaluate the relationship between the Legislature's means and ends.<sup>86</sup>

*Posada's* majority opinion, written Justice Rehnquist, concluded that the regulation "clearly" furthered the government's interest simply because the legislature reasonably believed casino advertisements would increase residents' demand for gambling.<sup>87</sup> The majority also "th[ought] it clear beyond peradventure" that the advertising prohibition was narrowly tailored to advance the legislature's interests because the casinos were permitted to target tourists.<sup>88</sup> The challenging casino asserted that the First Amendment obliges Puerto Rico to propagate counter-speech to discourage gambling, rather than banning speech that may promote gambling.<sup>89</sup> The Court again deferred to the legislature and dispelled the suggestion: "The legislature could conclude, as it apparently did here, that residents of Puerto Rico are already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct."<sup>90</sup> In addition to greatly diminishing the force of the third and fourth prongs by yielding to the government's judgments and protective motives, the majority found that a State's power to proscribe an activity or product, especially vice products like cigarettes or alcoholic beverages, includes the lesser power to decrease demand for that object by suppressing speech.<sup>91</sup> Justice Rehnquist asserted that it would be "a strange constitutional doctrine" to permit the state to entirely prohibit an activity but deny the state's power to "forbid the stimulation of demand for the product or activity through advertising."<sup>92</sup>

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<sup>86</sup> *Id.* at 340-41.

<sup>87</sup> *Id.* at 342.

<sup>88</sup> *Id.* at 343.

<sup>89</sup> *Id.* at 344.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 345-46.

<sup>92</sup> *Id.* at 346. The majority's "greater includes the lesser" rationale was not very well-received by the dissenters. *Id.* at 355 n.4 ((Brennan, J., joined by Marshall and Blackmun, JJ., dissenting). As Justice Brennan poignantly noted,

Seven years later, *Edge Broadcasting* exhibited another lenient application of the *Central Hudson* analysis.<sup>93</sup> The Court upheld a federal lottery regulation that, among other things, prohibited broadcasters from advertising state lotteries unless the broadcaster was licensed in that state.<sup>94</sup> In its commercial speech analysis, the Court declared that the third query of the *Central Hudson* test should consider whether the regulation directly advanced the government's legitimate interest in a general sense, regardless of whether it did so in a particular case.<sup>95</sup> Deferring to Congressional "commonsense judgment," the Court established that the statutory ban directly pursued the interest in supporting the policies of lottery and nonlottery States.<sup>96</sup> In regard to the final *Central Hudson* factor, the Court clarified that the "no more extensive than necessary" requirement of the test does not require a perfect fit between the restriction and the governmental interest, only a reasonable one.<sup>97</sup> Suggesting that Congress could have banned all broadcast advertisements of lotteries, the Court concluded the ban was sufficiently narrow.<sup>98</sup>

In essence, *Posadas* and *Edge Broadcasting* displayed the Supreme Court's flimsiest application of *Central Hudson* yet.<sup>99</sup> In both cases, the Court blindly assumed that the regulations furthered the asserted interests at stake, relying on nothing more than legislative speculation to pass the third prong of *Central Hudson*.<sup>100</sup> Also, the Court in both instances determined the restrictions were narrowly tailored because they were not complete bans.<sup>101</sup>

Finally, *Posadas* reasoned, and *Edge Broadcasting* agreed, that governmental ability to prohibit

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lawful speech and not the act of gambling receives constitutional protection, and the "strange constitutional doctrine" prohibiting such speech bans is called the First Amendment. *Id.*

<sup>93</sup> *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993).

<sup>94</sup> *Id.* at 422.

<sup>95</sup> *Id.* at 430.

<sup>96</sup> *Id.* at 428.

<sup>97</sup> *Id.* at 357.

<sup>98</sup> *Id.* at 357.

<sup>99</sup> Since *Posadas* and *Edge Broadcasting*, the Court has required the State to meet higher evidentiary standards in the third and fourth prongs. *See infra* Part III.B.

<sup>100</sup> *See supra* notes 90, 93, 99 and accompanying text.

<sup>101</sup> *See supra* notes 91, 101 and accompanying text.

an activity translates into the power to constrain advertising about that activity.<sup>102</sup> Remarkably, these two cases, the only “vice” cases between 1986 and 1993, were the only decisions that upheld regulations on commercial speech under *Central Hudson*.<sup>103</sup> While First Amendment protection of commercial speech was flourishing in most areas, it certainly was dwindling in the “vice” subset of commercial expression.

*B. The later cases*

In *Rubin*, the Supreme Court unanimously agreed to strike down a federal ban on disclosure of the alcohol content on beer labels as a means to prevent alcohol strength wars.<sup>104</sup> Slightly retreating from *Posadas*, the *Rubin* Court refused to concede that the government has greater freedom to regulate speech promoting “socially harmful activities” that could be banned.<sup>105</sup> The Court duly noted that *Posadas*’ “greater includes the lesser” argument was not the basis for the Court’s decision upholding the ban, but came later in the opinion.<sup>106</sup> The *Rubin* Court also refused to accept the government’s “common sense” theory,<sup>107</sup> adopting a strengthened version of the *Central Hudson*’s third prong that required the government to “demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”<sup>108</sup> The overall irrationality of the regulatory scheme and the government’s failure to supply persuasive evidence prevented the restriction from directly advancing the

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<sup>102</sup> See *supra* notes 94-95, 101 and accompanying text.

<sup>103</sup> See Michael Hoefges & Milagros Rivera-Sanchez, “Vice” Advertising under the Supreme Court’s Commercial Speech Doctrine: The Shifting Central Hudson Analysis, 22 HASTINGS COMM. & ENT. L.J. 345, 362 (2000).

<sup>104</sup> *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478 (1995). Justice Stevens is the only member of the Court who did not join the majority opinion. *Id.* at 491 (Stevens, J., concurring in the judgment). He concurred reasoned that *Central Hudson* should not apply to a regulation that bans “truthful, unadorned, informative speech” to keep consumers uninformed. *Id.* at 491, 496. Justice Stevens later advocated this position when he wrote his plurality opinion in *44 Liquormart*. See *44 Liquormart v. R.I.*, 517 U.S. 484, 501-04 (1996).

<sup>105</sup> *Rubin*, 514 U.S. at 482 n.2.

<sup>106</sup> *Id.*

<sup>107</sup> The government attempted to pass the third prong by appealing to the common sense rationale, suggesting “a restriction on the advertising of a product characteristic will decrease the extent to which consumers select a product on the basis of that trait.” *Id.* at 487.

<sup>108</sup> *Id.*

substantial interest of preventing alcohol strength wars.<sup>109</sup> The Court went on to reject the government's position that the regulation was narrowly tailored because it was not a complete ban on alcohol content disclosures, an argument that the Court sustained in *Posadas* and *Edge Broadcasting*.<sup>110</sup> Instead, the Court concluded that the statute was broader than necessary because Congress could have achieved its interest without implicating First Amendment rights.<sup>111</sup>

In its *44 Liquormart* decision, the Court struck down a Rhode Island ban on price advertising for alcoholic beverages in four separate opinions.<sup>112</sup> Justice Stevens penned the principal opinion and reaffirmed the stance he took in *Rubin*'s concurrence, which stressed the need to carefully scrutinize the government's objectives in suppressing speech.<sup>113</sup> An intention to protect consumers from deception or overreaching warrants less than strict scrutiny because it is consistent with the "commonsense distinctions" between commercial and noncommercial speech.<sup>114</sup> But "bans that target truthful, nonmisleading commercial messages rarely protect consumers . . . . Instead, such bans often serve only to obscure an 'underlying governmental policy' that could be implemented without regulating speech."<sup>115</sup>

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<sup>109</sup> *Id.* at 488-89. The Court found the legitimacy of the government's goal to be weakened by the statute's other provisions, mandating the disclosure of alcohol content in wines and spirits and allowing brewers to label their product as "malt liquor." *Id.* Such inconsistencies would "ensure[] the labeling ban will fail to achieve [its] end." *Id.* at 489.

<sup>110</sup> *Id.* at 490.

<sup>111</sup> *Id.* at 491.

<sup>112</sup> See *44 Liquormart v. R.I.*, 517 U.S. 484, 495-514 (1996) (opinion of Stevens, J.); *Id.* at 517-18 (Scalia, J., concurring in part and concurring in the judgment); *Id.* at 518-28 (Thomas, J., concurring in part and concurring in the judgment); *Id.* at 528-34 (O'Connor, J., concurring in the judgment).

<sup>113</sup> *Id.* at 501-504. See also *supra* note 104.

<sup>114</sup> *44 Liquormart*, 517 U.S. at 501-02. The "commonsense distinctions" are the greater objectivity and hardiness of commercial speech. *Id.* at 502 (citing *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24) (1976)).

<sup>115</sup> *Id.* at 502-03.

Nevertheless, Justice Stevens, joined by Justices Ginsburg, Kennedy, and Souter, applied *Central Hudson* and first determined the first two prongs were met.<sup>116</sup> Under the third prong, Rhode Island relied on the theory that a ban on prices would lead to higher prices for alcohol, which would in turn decrease consumption.<sup>117</sup> Stevens found this conclusion to be speculative and insufficient to satisfy the third prong, which required the state to show evidence that the regulation significantly and directly furthered its goal.<sup>118</sup> The fourth prong was equally fruitless for the state, as Stevens opined that it was "perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance."<sup>119</sup>

Justice O'Connor wrote the other major opinion in *44 Liquormart*, joined by Chief Justice Rehnquist and Justices Souter and Breyer.<sup>120</sup> In applying *Central Hudson*, she did not feel the need to elaborate on the third prong because she concluded Rhode Island failed the fourth prong of the analysis.<sup>121</sup> In accordance with Justice Stevens' opinion, Justice O'Connor determined the regulation compelled an overly broad and needless restriction on truthful information because the state had various other means to directly achieve its goal.<sup>122</sup> Significantly, a majority of the *44 Liquormart* Court expressly or impliedly rejected *Posadas*' highly deferential approach and "greater includes the lesser" rationale, advocating for a more stringent judicial review of the government's goals and speech restrictions.<sup>123</sup>

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<sup>116</sup> *Id.* at 504.

<sup>117</sup> *Id.* at 505.

<sup>118</sup> *Id.* at 505, 507.

<sup>119</sup> *Id.* at 507.

<sup>120</sup> *Id.* at 528 (O'Connor, J., concurring).

<sup>121</sup> *Id.* at 529.

<sup>122</sup> *Id.* at 130.

<sup>123</sup> *Id.* at 509-10 (opinion of Stevens, J.) (*Posadas* clearly erred in concluding that it was "up to the legislature" to choose suppression over a less speech-restrictive policy. . . . We also cannot accept the State's second contention, which is premised entirely on the "greater-includes-the-lesser" reasoning . . . ); *Id.* at 531 (O'Connor, J., concurring) ("Since *Posadas*, however, this Court has examined more searchingly the State's professed goal, and the speech

In *Greater New Orleans Broadcasting*, the Court struck down part of a federal regulation that, in part, banned broadcast advertising for private casinos.<sup>124</sup> Stevens again wrote for the Court, this time with a majority of the Justices joining, and concluded that the government had failed to satisfy its evidentiary burdens under the third and fourth prongs of *Central Hudson*.<sup>125</sup> In determining whether the regulation directly advanced the government's interests, the Court drew attention to the government's lack of empirical evidence and declined to accept the government's "causal chain" hypothesis.<sup>126</sup> However, the Court found an even bigger flaw was at hand.<sup>127</sup> Examining the regulatory scheme as a whole, the Court found it was "so pierced with exemptions and inconsistencies that the Government cannot hope to exonerate it."<sup>128</sup> Furthermore, the Court concluded that the regulation was overly broad because the government had alternative, more direct measures to attain its goal in decreasing the harmful social effects of gambling.<sup>129</sup>

In *Lorillard*, the Supreme Court invalidated Massachusetts' outdoor and point-of-sale advertising restrictions on tobacco products.<sup>130</sup> Stating that the first two prongs of *Central Hudson* were met, the Court addressed whether the regulations were narrowly tailored and directly advanced Massachusetts' interests.<sup>131</sup> To establish that the outdoor advertising ban would advance its interest, the state proffered various FDA and institutional studies to support

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restriction put into place to further it, before accepting a State's claim that the speech restriction satisfies First Amendment scrutiny.).

<sup>124</sup> *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 176, 178 (1999).

<sup>125</sup> *Id.* at 176, 188-95.

<sup>126</sup> *Id.* at 189. The government theorized that promoting casino gambling inflates demand, which stimulates the amount of gambling, producing detrimental social effects. *Id.*

<sup>127</sup> *Id.* at 190.

<sup>128</sup> *Id.* The statute forbade broadcast advertising about private casinos but contained exemptions for tribal casinos, government-operated casinos and non-profit casinos. *Id.*

<sup>129</sup> *Id.* at 192.

<sup>130</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565-67 (2001). The regulation prohibited outdoor advertisements for tobacco products within 1,000 feet of a school or playground and required point-of-sale advertisements to be at least five feet above the floor in stores located within 1,000 feet of a school or playground. *Id.* at 561-62, 566.

<sup>131</sup> *Id.* at 555. The state conceded that the speech was protected by the First Amendment and the state's interest in restraining tobacco use by minors was substantial. *Id.*

the notion that “product advertising stimulates demand for products, while suppressed advertising may have the opposite effect.”<sup>132</sup> The Court determined that although this evidence was sufficient to pass the third prong’s muster, “[t]he broad sweep of the regulations indicate[d] that the Attorney General did not ‘carefully calculate the costs and benefits associated with the burden on speech imposed’ by the regulations.”<sup>133</sup> The regulation not only would have effectually banned tobacco ads in some metropolitan areas, but it also impermissibly infringed on the First Amendment interests of adult buyers and sellers alike.<sup>134</sup> As to the point-of-sale advertising ban, the state could satisfy neither the third nor the fourth prong of *Central Hudson*.<sup>135</sup> The five-foot height rule was futile because some children were below five-feet tall and the others could simply look up, and it was also insufficiently tailored.<sup>136</sup>

In their entirety, the four aforementioned cases represent the Supreme Court’s significant turnaround in its attitude toward commercial speech. The Court no longer surrenders to legislative discretion under the third prong, and instead demands that the government provide meaningful evidence to demonstrate the regulation directly advances its purpose. Further, a restriction will be invalid if the regulation or other statutory provisions contain exemptions that undermine the effectiveness of the regulation in achieving the asserted goal. As to the fit between the restriction and the goal, the Court no longer upholds regulations if the government failed to consider or utilize non-speech alternatives. Finally, a speech ban will be overly broad if

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<sup>132</sup> *Id.* at 557-61.

<sup>133</sup> *Id.* at 561 (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993) (internal quotation marks omitted)).

<sup>134</sup> *Id.* at 562-65 (“We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products. In a [previous] case . . . we explained that ‘the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults.’” (citing *Reno v. ACLU*, 521 U.S. 844, 875 (1997))).

<sup>135</sup> *Id.* at 566-67 (determining that “the blanket height restriction does not constitute a reasonable fit with that goal.”)

<sup>136</sup> *Id.*

it significantly violates the protected interests of others in disseminating and receiving commercial information.

#### **IV. The Third and Fourth Circuit Split in Applying *Central Hudson* to Vice Advertising**

In the wake of the Supreme Court's latest application of *Central Hudson* to vice advertising, two restrictions on alcohol advertisements in college publications were challenged under the First Amendment, *Pitt News* and *Educational Media Co.* The Third and Fourth Circuit Courts of Appeals, respectively, evaluated the constitutionality of two similar state laws and applied the *Central Hudson* analysis in markedly different ways.

##### *A. The Third Circuit*

In 1996, the Pennsylvania legislature enacted an amendment to the Liquor Code known as "Act 199,"<sup>137</sup> which in relevant part applied the following to all alcoholic and malt beverage advertising: "No advertisement shall be permitted, either directly or indirectly, in any booklet, program book, yearbook, magazine, newspaper, periodical, brochure, circular, or other similar publication published by, for or in behalf of any educational institution."<sup>138</sup> A violation of the statute resulted in a misdemeanor, punishable by fines up to \$500 or imprisonment for 3 months on a first charge, and a minimum jail sentence of 3 months for subsequent offenses.<sup>139</sup> While the history of the Act did not mention its purpose, the State claimed the relevant provision of the statute tackled both underage drinking and binge drinking by adults and minors on college campuses.<sup>140</sup> The Pennsylvania Liquor Control Board (PLCB) interpreted the Act in Advisory Notice No. 15 and explained that advertisements in media that are distributed at a school, but that

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<sup>137</sup> H.R. 2292, 180th Gen. Assem., Reg. Sess. (Pa. 1996), 47 Pa. Cons. Stat. §4-498 (e)(5) (2002).

<sup>138</sup> 47 PA. CONS. STAT. §4-498 (e)(5) (2002).

<sup>139</sup> 47 PA. STAT. ANN. § 4-494(a); *See also* *Pitt News v. Fisher*, 215 F.3d 354, 358 (3d Cir. 2000).

<sup>140</sup> *Id.*

are otherwise not connected with the school, are permissible.<sup>141</sup> In 1999, The Pitt News, a student-run newspaper at the University of Pittsburgh, sought to enjoin enforcement of Act 199 after losing over \$17,000 in advertising revenue as a result of the statute's enactment.<sup>142</sup>

The readers of The Pitt News consisted primarily of the university population, about 75% of which was of the legal drinking age.<sup>143</sup> The paper was distributed for free and was available at 75 campus locations, along with other free, local newspapers that were not connected with the university.<sup>144</sup> The Pitt News acquired revenue solely from advertising, and a substantial portion of this revenue came from alcohol ads before Act 199 took effect.<sup>145</sup> After a local restaurant that had placed alcohol advertisements in The Pitt News was cited for a violation of the Act in 1997, the newspaper lost many advertising contracts.<sup>146</sup> The paper unsuccessfully attempted to minimize the loss of revenue by encouraging liquor licensees to place ads unrelated to alcohol.<sup>147</sup> This proved to be unsuccessful, and The Pitt News was forced to shorten the newspaper and eliminate space for student speech after losing about \$17,000 in income in 1998.<sup>148</sup> The loss of a significant portion of its revenue also threatened the paper's ability to purchase essential equipment and to effectively compete in the marketplace.<sup>149</sup> As a result, the paper sued Pennsylvania state officials and claimed that Act 199 violated the First Amendment rights of the newspaper, its advertisers, and its adult readers.<sup>150</sup>

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<sup>141</sup> Advertising of Alcoholic Beverages in Pennsylvania, Pa. Liquor Control Bd. Advisory Notice No. 15 (4th Revision) (2007), available at [http://www.portal.state.pa.us/portal/server.pt/community/legal\\_issues/17503](http://www.portal.state.pa.us/portal/server.pt/community/legal_issues/17503) (follow "Advisory Notices" hyperlink; then follow Advisory Notice No. 15 hyperlink); Pitt News v. Pappert, 379 F.3d 96, 102 (3d Cir. Pa. 2004).

<sup>142</sup> *Fisher*, 215 F.3d. at 357, 359.

<sup>143</sup> *Pappert*, 379 F.3d at 101.

<sup>144</sup> *Id.* at 102.

<sup>145</sup> *Id.* at 103.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

The district court denied the paper’s request for a preliminary injunction to enjoin the enforcement of Act 199, finding that The Pitt News lacked standing because the paper suffered an indirect, economic injury.<sup>151</sup> On appeal, the Third Circuit affirmed, finding that although The Pitt News had standing to bring its claim, it nevertheless did not show a likelihood of success on the merits of its claim.<sup>152</sup> The court reasoned that Act 199 did not *directly* harm the newspaper, and the injury asserted by the paper was merely a secondary effect of a statute directed at the advertisers.<sup>153</sup> Additionally, the regulation did not prevent The Pitt News from publishing information on alcoholic beverages so long as the paper did not get paid for it.<sup>154</sup> Thus, the court concluded, the incidental injury caused by Act 199 was not an infringement on newspaper’s First Amendment rights.<sup>155</sup>

Four years later, the Third Circuit reversed the district court’s grant of summary judgment for the Commonwealth and found that Act 199 was unconstitutional as an impermissible restriction on commercial speech.<sup>156</sup> The court’s opinion, written by Justice Alito before he joined the Supreme Court, first determined that the imposition of a financial burden on certain types of speech, what the court previously deemed an “incidental economic effect,”<sup>157</sup> was indeed a restriction on commercial speech subject to the *Central Hudson* test.<sup>158</sup> Under the first prong, the Third Circuit found that the contemplated advertisements were not misleading and related to the legitimate sale of alcohol.<sup>159</sup> The court then stated that the Commonwealth’s

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Fisher*, 215 F.3d at 367.

<sup>154</sup> *Id.* at 366.

<sup>155</sup> *Id.*

<sup>156</sup> *Pappert*, 379 F.3d at 113. The 3rd Circuit also found that Act 199 was unconstitutional for another reason: the Act unjustifiably imposed a financial burden on a particular segment of the media. *Id.* at 111.

<sup>157</sup> See *Fisher*, 215 F.3d at 366 (concluding that the plaintiff’s advertising loss “amounts to nothing more than an incidental economic effect of a regulation aimed closely at third parties.”).

<sup>158</sup> *Pappert*, 379 F.3d at 106.

<sup>159</sup> *Id.*

interests in minimizing underage and binge drinking were substantial.<sup>160</sup> However, Act 199 failed to satisfy the third and fourth prongs of the analysis.<sup>161</sup>

Under the third prong, the State failed to prove that an advertising ban in a small segment of the media furthered its interests in curbing abusive and underage drinking.<sup>162</sup> While the court acknowledged a general link between alcoholic beverage ads and increased consumption, it opined that the State could not rely on such a general connection when the Act did not “greatly reduc[e] the quantity of alcoholic beverage ads viewed by underage and abusive drinkers on the Pitt campus.”<sup>163</sup> Despite the ban on ads in collegiate publications, the students would still be bombarded by alcohol ads in other media, such as the other local newspapers available for free next to The Pitt News.<sup>164</sup> The State’s contention that abolishing alcohol ads in educational publications would stifle abusive and underage drinking was, in the court’s opinion, “counter intuitive and unsupported by any evidence” that the State proffered.<sup>165</sup>

In evaluating the fourth prong, the court rejected that Act 199 was sufficiently tailored to combat problem drinking in college students for two reasons.<sup>166</sup> The court first noted that a substantial majority of Pitt students were of the legal drinking age and so the regulation, like the one in *Lorillard*,<sup>167</sup> infringed upon the rights of adults to receive accurate information pertaining to products they were permitted to buy.<sup>168</sup> Second, the court declared that strictly enforcing consumption laws on college campuses was the most direct method of achieving the State’s

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 107.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 108.

<sup>167</sup> *See supra* note 137 and accompanying text.

<sup>168</sup> *Pappert*, 379 F.3d at 108.

goals.<sup>169</sup> The State did not establish that it utilized the more direct, non-speech alternative and thus did not demonstrate a reasonable fit between the Act and its goals.<sup>170</sup>

Because the regulation could not meet the *Central Hudson* criteria, the court enjoined the State from enforcing Act 199 against The Pitt News advertisers.<sup>171</sup> Furthermore, the PLCB cited to *Pitt News* in an Advisory Notice and a Legal Opinion, clarifying that the Third Circuit’s holding extended beyond just the alcohol ads in The Pitt News.<sup>172</sup> The notice stated that “[u]ntil recently, colleges and universities were considered to be subject to the print advertisement ban affecting educational institutions,” but that the Third Circuit found the ban unconstitutional when applied to college newspapers.<sup>173</sup> The official opinion issued in 2009 left little room for ambiguity when it advised a licensee that in light of the court’s ruling, “college print media is an open venue for alcohol advertisements.”<sup>174</sup> The interpretations of Act 199 in the Advisory Notice and the Legal Opinion bind the board’s enforcement division,<sup>175</sup> and consequently it seems that the Act’s prohibition on alcohol ads in college publications is no longer viable.

### *B. The Fourth Circuit*

The Virginia Alcoholic Beverage Control (“ABC”) Board issued the regulation at issue in the Fourth Circuit, 3 VAC 5-20-40(B)(3), which bans advertising beer, wine, or mixed drinks in college student publications unless the advertisement was for a dining establishment.<sup>176</sup> A

“college student publication” is defined as “any college or university publication that is prepared,

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 113.

<sup>172</sup> Advertising of Alcoholic Beverages in Pennsylvania, Pa. Liquor Control Bd. Advisory Notice No. 15 (4th Revision) (2007), available at [http://www.portal.state.pa.us/portal/server.pt/community/legal\\_issues/17503](http://www.portal.state.pa.us/portal/server.pt/community/legal_issues/17503) (follow “Advisory Notices” hyperlink; then follow Advisory Notice No. 15 hyperlink); Pa. Liquor Control Bd. Legal Op. No. 08-538 (2009), available at [http://www.lcbapps.lcb.state.pa.us/webapp/legal/PublicAdvOpnDisplay.asp?opinion\\_year=2008&opinion\\_sequence=538](http://www.lcbapps.lcb.state.pa.us/webapp/legal/PublicAdvOpnDisplay.asp?opinion_year=2008&opinion_sequence=538)

<sup>173</sup> See Advisory Notice No. 15.

<sup>174</sup> See Legal Opinion No. 08-538.

<sup>175</sup> 47 PA. STAT. ANN. § 2-211.1 (1993).

<sup>176</sup> 3 VA. ADMIN. CODE § 5-20-40 (2010).

edited or published primarily by students at such institution, is sanctioned as a curricular or extra-curricular activity by such institution and which is distributed or intended to be distributed primarily to persons under 21 years of age.”<sup>177</sup> Although dining establishments are permitted to advertise under the regulation, such advertisements could not refer to specific brands or prices and were limited to using the following terms: "A.B.C. on-premises," "beer," "wine," "mixed beverages," "cocktails," or a combination of the words.<sup>178</sup> The suggested first offense penalty for violating the regulation is a \$500 fine or a 7-day liquor license suspension.<sup>179</sup> The ABC Board contended that the regulation, which had been in existence since at least the 1970's, furthered the State's interests in diminishing underage and binge drinking on college campuses.<sup>180</sup>

*The Collegiate Times* at Virginia Tech and *The Cavalier Daily* at the University of Virginia (UVA) were “college student publications” subject to 3 VAC 5-20-40(B).<sup>181</sup> Both publications were distributed free of charge on their respective campuses and in the surrounding communities, generating revenue almost exclusively through advertising.<sup>182</sup> Like the publication in *Pitt News*, both papers were available alongside competing, non-student run newspapers that were not subject to the regulation.<sup>183</sup> The majority of readers of either publication was at least twenty-one years old.<sup>184</sup> The *Collegiate Times* and *The Cavalier Daily* each approximated

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.* The regulation was amended in 2010 to eliminate the permissibility of certain words. See 26:11 VA.R. February 1, 2010, available at <http://register.dls.virginia.gov/vol26/iss11/v26i11.htm#f3v520>.

<sup>179</sup> 3 VA. ADMIN. CODE § 5-70-210 (2001).

<sup>180</sup> *Educ. Media Co. at Va. Tech v. Swecker*, No. 3:06CV396, 2008 U.S. Dist. LEXIS 45590, at \*28, \*33 (E.D. Va. Mar. 31, 2008).

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<sup>182</sup> *Educ. Media Co.*, 2008 U.S. Dist. LEXIS 45590, at \*5-6, \*10.

<sup>183</sup> *Id.* at \*8, \*11-12.

<sup>184</sup> *Id.* at \*6, \*10-11. In the appellate court's opinion, the undisputed fact that over half of the papers' readers were over 21 rendered the applicability of 3 VAC 5-20-40(B) debatable, as the papers were thus not “distributed primarily to persons under 21 years of age.” *Educ. Media Co. at Va. Tech, Inc. v. Swecker*, 602 F.3d 583, 587 n.1 (4th Cir. 2010). The court went on to opine that even if the regulation was inapplicable to the papers, both had shown a sufficient, credible fear of prosecution. *Id.*

annual losses of \$30,000 in alcohol advertisement sales and asserted that the regulation was an impermissible restriction of commercial speech under the First Amendment.<sup>185</sup>

The Eastern District of Virginia granted summary judgment for the newspapers, finding that 3 VAC 5-20-40(B) failed the *Central Hudson* test and hence violated the First Amendment.<sup>186</sup> The court determined that the First Amendment afforded protection to alcohol advertisements in the publications, noting that the sale of alcohol is not inherently illegal and a majority of readers could lawfully purchase alcohol.<sup>187</sup> The plaintiffs stipulated, and the court agreed, that Virginia's interest in reducing underage and excessive consumption of alcohol was substantial.<sup>188</sup> The court's focus then shifted to the third and fourth prong, where the Commonwealth of Virginia could not meet its evidentiary burden.<sup>189</sup>

While assessing whether 3 VAC 5-20-40(B) alleviated problem drinking on college campuses, the district court stated that the absolute dearth of data regarding the regulation's effect on underage or abusive drinking had created "an insurmountable barrier" to sustaining its validity.<sup>190</sup> The court also refuted the testimony of the Commonwealth's expert witness, who asserted that prohibiting alcohol advertisements in college newspapers would curb consumption because such newspapers are unique media outlets with no adequate substitutes.<sup>191</sup> The court found his claim regarding the inimitability of college newspapers was unfounded, and further determined that his theory completely disregarded the media-saturated world that students live in today.<sup>192</sup> The court, citing to *Pitt News*, refused to overlook the fact that 3 VAC 5-20-40(B)

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<sup>185</sup> Educ. Media Co., 2008 U.S. Dist. LEXIS 45590, at \*8, \*11-12.

<sup>186</sup> *Id.* at \*55.

<sup>187</sup> *Id.* at \*33.

<sup>188</sup> *Id.* at \*33-34.

<sup>189</sup> *See id.* at \*34-53.

<sup>190</sup> *Id.* \*43-44.

<sup>191</sup> *Id.* at \*46.

<sup>192</sup> *Id.*

closed off only one method of advertising, leaving a vast array of other forms of media unregulated.<sup>193</sup>

The regulation's inconsistencies and overly broad sweep led the Commonwealth to founder on the fourth prong.<sup>194</sup> The Commonwealth argued that exception for dining establishments and the proscription of only specific words demonstrated that the law was narrowly tailored.<sup>195</sup> The court rejected that assertion, pointing out some of the illogical outcomes of the regulation as it was written.<sup>196</sup> Moreover, the ABC Board did not establish that it actually had contemplated these exceptions when creating the law, and the court was not keen to accept the Board's "retrospective gloss" on the matter.<sup>197</sup> The district court proceeded to mention the overabundance of persons affected by the restriction, many of whom have a First Amendment interest in receiving accurate information about alcohol products and distributors.<sup>198</sup>

The Fourth Circuit reversed the district court's decision, concluding that the ban on alcohol advertisements in college student publications passed the third and fourth prongs of the *Central Hudson* test.<sup>199</sup> Judge Dennis Shepp, writing for the majority, stated that the regulation's link to decreasing alcohol demand was "amply supported by the record."<sup>200</sup> He referred to the generally accepted connection between advertising and demand for products in judicial decisions<sup>201</sup> and found the link was especially strong in this situation because college student publications are inimitable and are directed at college students.<sup>202</sup> Judge Shepp also accepted the

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at \*48.

<sup>195</sup> *Id.* at \*50-51.

<sup>196</sup> *Id.* at 51 ("For instance, as written, the regulation prohibits an academic department from advertising an on-campus wine and cheese reception honoring a visiting or distinguished scholar.").

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at \*51-52.

<sup>199</sup> See *Educ. Media Co. at Va. Tech, Inc. v. Swecker*, 602 F.3d 583 (4th Cir. 2010).

<sup>200</sup> *Id.* at 590.

<sup>201</sup> *Id.* (citing *West Virginia Ass'n of Club Owners and Fraternal Serv. Inc. v. Musgrave*, 553 F.3d 292, 304 (4th Cir. 2009)).

<sup>202</sup> *Id.*

Board's claim that the link was further legitimized by commonsense; vendors would not want to advertise in college newspapers unless they believed the ads stimulated college students' demand for alcohol.<sup>203</sup>

As for the fourth prong, the majority found the regulation was narrowly tailored to serve the state's "interest [in] establishing a comprehensive scheme attacking the problem of underage and dangerous drinking by college students."<sup>204</sup> The court supported this conclusion by stressing that the regulation did not apply to every college student publication, but only to those aimed at students under the age of 21.<sup>205</sup> The law also permitted dining establishments to advertise the alcohol they serve.<sup>206</sup> Judge Shepp emphasized that the ABC Board used the regulation as a "cost-effective" complement, not substitute, to other efforts combating underage and abusive drinking.<sup>207</sup> He maintained that the Board would have to increase its alternative prevention efforts without the regulation, which would strain its already limited resources.<sup>208</sup> Finally, the majority dismissed the newspapers' claim that other non-speech methods could better curtail underage consumption, determining that the law need not be the best approach, only that it be reasonable to the governmental interest.<sup>209</sup>

Judge Norman Moon, a district judge sitting by designation, dissented from the majority's conclusion at length.<sup>210</sup> Relying heavily on *Pitt News*, Judge Moon determined that the Board's evidence regarding §5-20-40(B)(3)'s effect on underage drinking was "speculative, at best," which is insufficient to satisfy the third prong.<sup>211</sup> He noted that the Commonwealth's

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 591.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* (Moon, J., dissenting).

<sup>211</sup> *Id.* at 592-93.

own expert revealed that there was no evidence proving the ban advances the desired objective, and that the evidence suggested the college drinking problem had been worsening in spite of the inveterate regulation.<sup>212</sup> Even if Judge Moon accepted the Board’s “commonsense” assertion that alcohol vendors advertise to increase demand by college students, he found that such a claim conflicts with the regulation directly advancing its purpose, which is to decrease *underage* and *abusive* drinking, not drinking in general.<sup>213</sup>

Judge Moon followed up on the district court’s observation that the regulation’s exceptions created inconsistencies that discredited the Board’s narrow tailoring argument.<sup>214</sup> The regulation allowed a restaurant to promote “beer night” or “mixed drink night” but banned any advertiser from promoting things such as a wine festival or a “mojito night.”<sup>215</sup> The Board did not provide any practical reason for allowing one kind of advertisement but not the other and Judge Moon questioned how a restriction could fit its purpose in reducing underage or excessive drinking when it permits the former advertisements but forbids the latter.<sup>216</sup> He then reasoned that the regulation was not narrowly tailored because, in effect, it applied to newspapers that were mostly read by those 21 and older.<sup>217</sup>

## **V. Analysis of the Circuit Split**

The divergent outcomes in the Third and Fourth Circuits illustrate the gaps in the third and fourth prongs of *Central Hudson* that have yet to be closed by the Supreme Court. The Third Circuit’s assessment of Act 199 adopted the Supreme Court’s most recent holdings regarding the state’s evidentiary burdens. Firstly, then Judge Alito refused to accept the general link between advertising and demand as adequate proof of direct advancement of the state’s

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<sup>212</sup> *Id.* at 594 n.5.

<sup>213</sup> *Id.* at 594.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 595.

<sup>217</sup> *Id.*

interest without more, consistent with *Lorillard*,<sup>218</sup> *Greater New Orleans*,<sup>219</sup> and *44 Liquormart*.<sup>220</sup> In addition, the Third Circuit appreciated the logical loopholes in Act 199, which only banned alcohol advertisements in college newspapers and left alternate media outlets unregulated.<sup>221</sup> This type of regulatory inconsistency rendered commercial speech restrictions invalid in *Greater New Orleans*<sup>222</sup> and *Rubin*.<sup>223</sup> While assessing the fit between Act 199 and the state's interest, the *Pappert* court determined the restriction was overly broad as it infringed valuable First Amendment rights of adults.<sup>224</sup> The Supreme Court similarly protected the speech interests of buyers and sellers in *Lorillard*, where it decided a government's goal in protecting children does not validate an exceedingly extensive speech prohibition.<sup>225</sup> Finally, the Third Circuit followed the Supreme Court's trend by requiring that the state show it had utilized non-speech alternatives in order to satisfy the fourth prong.<sup>226</sup> In *Greater New Orleans*,<sup>227</sup> *44 Liquormart*,<sup>228</sup> and *Rubin*,<sup>229</sup> the Supreme Court focused on the availability of alternative, direct means of regulation.

To the contrary, the Fourth Circuit displayed deference to the Virginia ABC reminiscent of *Posadas* and *Edge Broadcasting*. Judge Shepp cited to the language in *Lorillard* to accept the state's "history, consensus, and common sense" assertions to establish that the ban directly

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<sup>218</sup> See *supra* text accompanying note 135 (explaining that Massachusetts proffered empirical evidence in addition to asserting the general idea that advertising is causally linked to demand for the product).

<sup>219</sup> See *supra* note 129 and accompanying text (stating that the Court did not accept the government's causal chain hypothesis without any empirical evidence).

<sup>220</sup> See *supra* text accompanying notes 120-121 (noting that the Supreme Court found Rhode Island's reliance on the advertising-demand theory to be insufficient under the third prong).

<sup>221</sup> *Pitt News v. Pappert*, 379 F.3d 96, 107 (3d Cir. 2004).

<sup>222</sup> See *supra* text accompanying note 131 (noting that the Court rejected the government's statute because the statutory framework was inconsistent).

<sup>223</sup> See *supra* note 112 and accompanying text (explaining that the state failed the third prong because the statute's other provisions made sure the restriction would fail its essential purpose).

<sup>224</sup> *Pappert*, 379 F.3d at 108.

<sup>225</sup> See *supra* note 137 and accompanying text.

<sup>226</sup> *Pappert*, 379 F.3d at 108.

<sup>227</sup> *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 192 (1999).

<sup>228</sup> *44 Liquormart v. R.I.*, 517 U.S. 484, 507 (1996) (opinion of Stevens, J.); *Id.* at 530 (O'Connor, J., concurring).

<sup>229</sup> *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995).

advanced the goal.<sup>230</sup> In doing so, the Fourth Circuit majority relied on the link between advertising and demand as support of the regulation's effectiveness. However, *Lorillard's* holding made it clear that the Court did not solely rely on correlation between demand for a product and advertising because the state presented studies to support that claim.<sup>231</sup> Similarly, the Fourth Circuit dismissed the statute's gaping loophole for restaurants by declaring that "its limited exception for restaurants does not render it futile."<sup>232</sup> However, this exception seems similar to the exceptions found in the casino advertising ban for various types of casinos in *Greater New Orleans*, or the exceptions to the alcohol content ban for wines and spirits in *Rubin*.

Under the narrow-tailoring prong, Judge Shepp was content that the speech restriction was narrowly tailored because it did not completely ban alcohol advertising in college newspapers.<sup>233</sup> This reasoning emulated the Supreme Court's analyses in *Edge Broadcasting* and *Posadas*.<sup>234</sup> The Virginia ABC Board proffered no evidence that it had ever implemented alternative measures that its own expert recognized as more effective, anti-alcohol advertising and increased taxes on alcohol.<sup>235</sup> Moreover, the Board also failed to establish that the speech restriction was a necessary ingredient to the effectiveness of its contemporaneous education and enforcement programs, as opposed to a convenient option.<sup>236</sup> Allowing the legislature to choose a convenient, speech-prohibiting measure over a less restrictive policy was a hallmark of *Posadas* that was outright rejected in *44 Liquormart*.<sup>237</sup>

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<sup>230</sup> *Educ. Media Co. at Va. Tech, Inc. v. Swecker*, 602 F.3d 589 (4th Cir. 2010) (citing *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001)).

<sup>231</sup> [231] See *supra* text accompanying note 135.

<sup>232</sup> *Educ. Media Co.*, 602 F.3d. at 590 n.5.

<sup>233</sup>

<sup>234</sup> See *supra* text accompanying note 104.

<sup>235</sup> See *Educ. Media Co.*, 602 F.3d. at 596 n.8 (Moon, J., dissenting) (describing that the state's own expert recognized that "increased taxation on alcohol, which has been empirically verified and quantified as a means to combat underage and binge drinking . . . [and] counter-advertising to correct students' perceptions about their peers' drinking habits" is a more direct means to combat underage drinking).

<sup>236</sup>

<sup>237</sup> See *supra* note 126 and accompanying text.

## VI. Conclusion: An Unclear Future for Vice Advertising

All in all, the Supreme Court has drastically altered its *Central Hudson* analysis, especially with respect to vice advertising cases, which went from being effectively outside the First Amendment's protection in *Posadas* and *Edge Broadcasting* to receiving equal protection along with other forms of commercial speech. The Court, however, remains ambivalent on how to apply the test when it comes to the sufficiency of evidence needed to establish "direct advancement" and "narrow tailoring." Aside from the ambiguities surrounding the third and fourth factors, the *Central Hudson* framework itself is extremely malleable as evidenced by the fact that the Supreme Court has utilized the same four-pronged approach for over 30 years to produce an entire spectrum of decisions.<sup>238</sup>

The Fourth Circuit's approach to the *Central Hudson* analysis was a considerable deviation from the Supreme Court's latest analyses of vice advertising regulations. The court erred under the third prong by accepting the State's deficient evidentiary record and by overlooking the inconsistent and irrational aspects of the regulatory scheme.<sup>239</sup> In addition, the Fourth Circuit did not fully consider non-speech alternatives and First Amendment interests, which have been the focus of the Supreme Court's application of the narrow tailoring requirement.<sup>240</sup>

The Fourth Circuit's departure from the Supreme Court's recent application of the *Central Hudson* in vice cases may be a manifestation of the court's desire to take a more deferential approach to government legislature concerning vice advertising's effect on youth. On the other hand, it is possible that the court was simply a victim of the overwhelming amount

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<sup>238</sup> [238] See discussion *infra* Part III

<sup>239</sup> See discussion *infra* Part V.

<sup>240</sup> *Id.*

of conflicting language in Supreme Court opinions over the past two decades, all of which remain valid as *Central Hudson* still controls. Either way, the *Central Hudson* framework permits lower courts to reach the opposite conclusion when faced with similar laws. This jeopardizes one of society's most unique and fundamental rights and should be resolved by the Supreme Court, either by overruling *Central Hudson* and providing full First Amendment protection to commercial speech, or by clarifying the specific hurdles the government must overcome under the third and fourth prongs of the analysis.