Digital Commons @ LMU and LLS

Loyola Marymount University and Loyola Law School
Digital Commons at Loyola Marymount University and Loyola Law School

Loyola of Los Angeles Law Review | Law Reviews

6-1-2011

Reducing the Inherent Malleability of Mid-Level Scrutiny in Commercial Speech: A Proposed Change to the Second, Third, and Fourth Prongs of the Central Hudson Test

Kayla R. Burns
Loyola Law School, Los Angeles

Recommended Citation
Kayla R. Burns, *Reducing the Inherent Malleability of Mid-Level Scrutiny in Commercial Speech: A Proposed Change to the Second, Third, and Fourth Prongs of the Central Hudson Test* , 44 Loy. L.A. L. Rev. 1579 (2011).
Available at: http://digitalcommons.lmu.edu/llr/vol44/iss4/7

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons at Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons at Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

REDUCING THE INHERENT MALLEABILITY OF MID-LEVEL SCRUTINY IN COMMERCIAL SPEECH: A PROPOSED CHANGE TO THE SECOND, THIRD, AND FOURTH PRONGS OF THE *CENTRAL HUDSON* TEST

*Kayla R. Burns**

In 1980, in Central Hudson Electric Corp. v. Public Service Commission of New York*, the Supreme Court established the current framework for determining the constitutionality of commercial speech restrictions. It has been six years since the Third Circuit made its decision in* The Pitt News v. Pappert*, holding, under the* Central Hudson *test, that a state ban on alcohol advertisements in a college newspaper violated the First Amendment right to free speech. Recently, the Fourth Circuit, in* Educational Media Co. at Virginia Tech v. Swecker*, applied the same test and came to an entirely different conclusion when it held that a similar state ban was constitutional, having met the four prongs of the* Central Hudson *test. These two cases, and the resulting circuit split, highlight the extreme unrest and uncertainty that permeates the lower courts' decisions on the constitutionality of restrictions on commercial speech. The* Central Hudson *test is a malleable standard that has resulted in inconsistent outcomes. What level of scrutiny should apply to restrictions on commercial speech? How much paternalism is acceptable? This Note proposes a change to the second, third, and fourth prongs of the* Central Hudson *test, which will increase to a level of intermediate scrutiny the evidentiary standard that courts apply, reduce paternalism in commercial speech, and place an emphasis on the protection of consumers. In order to prevent a chilling effect on commercial speech, the Supreme Court must acknowledge the deficiencies of the* Central

* J.D. Candidate, May 2012, Loyola Law School Los Angeles; B.Comm., University of British Columbia, Vancouver. I would like to thank the editors and staff of the *Loyola of Los Angeles Law Review* for their invaluable efforts toward publishing this Note. A special thanks to Professor Allan Ides for his guidance and insight. Most importantly, thank you to my family for their endless love and support.

Hudson *test and replace that flawed standard with a workable commercial speech test.*

TABLE OF CONTENTS

I. INTRODUCTION 1583
II. BACKGROUND AND STATEMENT OF EXISTING LAW 1585
A. The Build-up to *44 Liquormart* 1585
B. *44 Liquormart*: A New Inquiry 1587
C. The Third Prong Standard of Review 1589
1. Common Sense and the Third Prong Unite 1589
2. More than "Mere Speculation or Conjecture" 1591
3. The Third Prong Is "Critical" 1592
4. Protecting the Right of Consumers to Assess the Value of Truthful and Lawful Information 1593
5. The State Action Must Be "Necessary as Opposed to Merely Convenient" 1595
D. Paternalism in the Fourth Prong 1596
E. A Comparison of the Third Circuit's and the Fourth Circuit's Interpretations of the *Central Hudson* Test.... 1597
III. CRITIQUE OF THE EXISTING LAW—A SUMMARY OF *PITT NEWS* AND *EDUCATIONAL MEDIA* 1599
A. *Pitt News*'s Application of Intermediate Scrutiny 1599
B. *Educational Media*'s Rationalization 1602
C. Critique of the Existing Law—Weakness in the *Central Hudson* Test 1606
IV. PROPOSAL—THE "CONSUMER PROTECTION" INQUIRY AND THE "MATERIAL EVIDENCE" TEST COMBINED 1607
A. The "Consumer Protection" Inquiry 1607
B. The "Material Evidence" Test 1608
1. The Procedural Component Draws from the Burden Shifting in *McDonnell Douglas* 1609
2. The Substantive Component Does Away with "Common Sense" 1610
a. The government's initial burden—"some quantum of evidence" 1610
b. The plaintiff's burden—an open forum to challenge paternalism 1611
c. The government's rebuttal—not paternalism and therefore not a pretext 1612
V. JUSTIFICATION 1612
A. Benefits of the "Consumer Protection" Inquiry 1612

B. Benefits of the "Material Evidence" Test 1614
VI. APPLICATION OF THE "CONSUMER PROTECTION" INQUIRY AND THE "MATERIAL EVIDENCE" TEST TO *PITT NEWS* AND *EDUCATIONAL MEDIA* 1616
A. The "Consumer Protection" Inquiry 1616
B. The "Material Evidence" Test: The Government's Initial Burden 1618
C. The "Material Evidence" Test: The Complainant's Claim of Paternalism and Pretext 1620
D. The "Material Evidence" Test: The Government's Rebuttal Burden 1621
VII. CONCLUSION 1623

I. INTRODUCTION

In 1980, in *Central Hudson Electric Corp. v. Public Service Commission of New York*, the Supreme Court established the current framework for determining the constitutionality of commercial speech restrictions.[1] This landmark case considered a challenge to a New York statute that prohibited advertising by public utility companies.[2] The test consists of four prongs. First, the court must determine whether the First Amendment protects the speech at issue. Second, the court must find that the government interest behind the restricting provision is substantial. Third, the court must determine whether the regulation directly advances a substantial governmental interest. Finally, the court must determine whether the regulation is "not more extensive than . . . necessary to serve the [asserted] interest."[3]

Two key issues arise out of the uncertainty regarding the proper scope and application of the third and fourth prongs of the *Central Hudson* test: (1) the appropriate level of scrutiny is unclear and permits the courts to treat government law with a deference that undermines the First Amendment right to free speech, and (2) the third and fourth prongs raise concerns of paternalism.[4]

However, these problems begin well before a court analyzes the third prong. The *Central Hudson* test has been used improperly as a commercial speech test; instead, courts should apply the test uniquely in their analysis of overbreadth issues.[5] This Note proposes modifications that will alter the second, third, and fourth prongs of the current *Central Hudson* test.

1. 447 U.S. 557, 566 (1980).

2. *Id.* at 558.

3. *Id.* at 566.

4. *See* Shannon M. Hinegardner, Note, *Abrogating the Supreme Court's De Facto Rational Basis Standard for Commercial Speech: A Survey and Proposed Revision of the Third* Central Hudson *Prong*, 43 NEW ENG. L. REV. 523, 528–31 (2009).

5. Melissa S. Skilken, Casenote, *This Ban's for You:* 44 Liquormart, Inc. v. Rhode Island, 65 U. CIN. L. REV. 1387, 1416 (1997); *see also* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 502–08 (1996) (holding that when a challenged regulation is a blanket ban on commercial speech, the Court should apply an overbreadth analysis).

The First Amendment right to free speech has long been one of the most contentious and rigorously protected constitutional rights.[6] It has been six years since the Third Circuit made its decision in *The Pitt News v. Pappert*,[7] holding, under the *Central Hudson* test, that a state ban on alcohol advertisements in a college newspaper violated the First Amendment right to free speech.[8]

But, the *Central Hudson* test is a malleable standard that has resulted in inconsistent outcomes. Recently, the Fourth Circuit, in *Educational Media Co. at Virginia Tech v. Swecker*,[9] applied the same test and came to an entirely different conclusion when it held that a similar state ban was constitutional, having met the four prongs of the *Central Hudson* test. These two cases, and the resulting circuit split, highlight the extreme unrest and uncertainty that permeates lower courts' decisions on the constitutionality of restrictions on commercial speech. The confusion surrounds the correct application of the third and fourth prongs of the *Central Hudson* test.

In response to the Fourth Circuit's decision in *Educational Media*, the American Civil Liberties Union (ACLU) petitioned the Supreme Court for certiorari.[10] Regrettably, the Supreme Court

6. *See* Palko v. Connecticut, 302 U.S. 319, 327 (1937) (discussing the importance of free speech). Justice Cardozo described freedom of speech as "[t]he matrix, the indispensable condition, of nearly every other form of freedom." *Id.*; *see also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."); JOHN E. NOWAK & RONALD A. ROTUNDA, CONSTITUTIONAL LAW 986–87 (5th ed. 1995) (explaining the history and development of the freedom of speech in Western democracy); *cf.* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985) (noting that courts have "long recognized that not all speech is of equal First Amendment importance"); New York v. Ferber, 458 U.S. 747, 773 (1982) (holding that child pornography is generally not entitled to First Amendment protection); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269, 283 (1964) (holding that libelous statements are not absolutely protected under the First Amendment); Roth v. United States, 354 U.S. 476, 485 (1957) (holding that obscene speech is not protected under the First Amendment); Roth v. United States, 354 U.S. 476, 485 (1957) (holding that obscene speech is not protected under the First Amendment).

7. 379 F.3d 96 (3d Cir. 2004).

8. *Id.* at 113.

9. 602 F.3d 583 (4th Cir. 2010).

10. Lindsey A. Zahn, *Virginia Ban on Alcohol Advertisements in Student Publications May Reach SCOTUS*, ON RESERVE A WINE LAW BLOG (Aug. 24, 2010) http://www.winelawonreserve.com/?ps=virginia+ban+on+alcohol (arguing that the link between a decreased demand for alcohol by college students and a restriction on alcohol advertisements in student publications does not exist; instead the ban violates the constitutional right to free speech, which the Third Circuit's 2004 decision in *Pitt News* supports).

denied certiorari[11] and consequently eliminated a unique opportunity that would settle the courts' difficulties in applying the *Central Hudson* test in order to determine the constitutionality of commercial speech restrictions.[12]

The next part will discuss the key cases leading up to the opinion in *44 Liquormart, Inc. v. Rhode Island*[13] that provides the foundation for this Note's proposed commercial speech test. Should the issue of the proper application of the *Central Hudson* test reach the Supreme Court, the Court should follow the application of the *Central Hudson* test in *Pitt News* (intermediate scrutiny) and apply the proposed "consumer protection" inquiry[14] and, if applicable, the "material evidence" test.[15]

II. BACKGROUND AND STATEMENT OF EXISTING LAW

A. The Build-up to 44 Liquormart

A state may not completely suppress the dissemination of truthful information about lawful activity out of fear for the effect that such information will have on consumers.[16] This was the Supreme Court's essential holding in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.[17] At issue there was a Virginia statute prohibiting licensed pharmacists from

11. Educ. Media Co. at Va. Tech, Inc. v. Swecker, 602 F.3d 583 (4th Cir. 2010), *cert. denied*, 131 S. Ct. 646 (2010).

12. *See* Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 184 (1999) (discussing the malleability of the *Central Hudson* standard and the argument for its repudiation).

13. 517 U.S. 484 (1996).

14. *Id.* The plurality opinion alludes to a new inquiry in commercial speech restrictions that would change the second prong of the *Central Hudson* test. *Id.*

15. *See* Hinegardner, *supra* note 4, at 554–55 (proposing a new standard, the "material evidence" test, for the third prong of the *Central Hudson* test).

16. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 773 (1976); *see also* Rubin v. Coors Brewing Co., 514 U.S. 476, 497–98 (1995) (Stevens, J., concurring) (stating that state action to restrict the flow of accurate information to the public because of a "perceived danger" goes against the essential freedom of speech purpose of the First Amendment); Skilken, *supra* note 5, at 1394–95 (describing the Court's reasoning in *Va. Pharmacy*, 425 U.S. 748, that the unrestricted flow of information was in the best interests of the public, and rejecting the state's paternalistic prohibition of prescription-drug advertising).

17. *Va. Pharmacy*, 425 U.S. at 773.

advertising any price for prescription drugs.[18] Virginia residents challenged the measure as a violation of their First Amendment right to receive information that the pharmacists endeavored to communicate through advertisements.[19] The Court confirmed consumers' right to receive advertised information where there was a willing speaker and a right to advertise.[20]

However, the Court rejected Virginia's arguments in favor of the statute as being contrary to the First Amendment.[21] The Court recommended a non-paternalistic approach: "[P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them."[22]

The Court saw the issue in *Virginia Pharmacy* as one of information dissemination.[23] The Court ultimately struck down the Virginia statute because it restricted truthful information; that restriction was inconsistent with the First Amendment.[24]

Following *Virginia Pharmacy*, the Court made a second attempt at defining the parameters of commercial-speech protection under the First Amendment.[25] As previously described, the Court developed the four-part *Central Hudson* test, which remains the current standard for determining the validity of commercial speech regulations.[26] In addition, Justice Blackmun articulated in his *Central Hudson*

18. *Id.* at 749–50.

19. *Id.* at 753–54.

20. Skilken, *supra* note 5, at 1392–93 (summarizing the Court's holding in *Va. Pharmacy*, 425 U.S. at 756–57).

21. *Va. Pharmacy*, 425 U.S. at 770. Virginia tried to justify the prohibition, maintaining that the quality of the pharmacists' work and their patients' health would be compromised by price-competition distractions that would exist if it were to allow the price advertisements. *See id.* at 767–68.

22. *Id.* at 770. The Court criticized the paternalistic notion that patients would benefit from being "kept in ignorance." *Id.* at 769.

23. *Id.* at 773 (explaining that the issue is "whether a State may completely suppress the dissemination of concededly truthful information").

24. *Id.* In accordance with this, Justice Stewart's concurrence emphasized the intuitive conclusion that, in contrast to truthful information, false and misleading advertisements may be subject to government regulation. *Id.* at 776–77 (Stewart, J., concurring).

25. Skilken, *supra* note 5, at 1396–98.

26. *See id.* (describing the development and use of the *Central Hudson* test).

concurrence that paternalism is never a valid justification for restrictions on commercial speech.[27]

The First Amendment allots less protection to commercial speech because of the potential danger that false and misleading information will reach consumers.[28] This highlights the essential weakness in the *Central Hudson* test: the constitutionality of commercial-speech restrictions should not be determined based on whether the government interest is substantial, but "should depend upon the extent to which [the] regulations protect consumers and prevent misleading information."[29]

B. 44 Liquormart*: A New Inquiry*

Relying on *Virginia Pharmacy* and *Central Hudson*, the Supreme Court in *44 Liquormart* implied a new inquiry for commercial-speech restrictions. The Court considered two Rhode Island statutes that broadly prohibited the advertising of alcohol prices.[30] The plurality opinion first recognized the immense value of truthful, nonmisleading information in consumer decision-making.[31] The plurality further noted the Court's growing tendency to invalidate broad bans on truthful, nonmisleading information and commercial speech unrelated to consumer protection.[32]

---

27. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 575 (1980) (Blackmun, J., concurring) (stating that under the First Amendment, it is never permissible for the government to limit expression for the purpose of influencing consumer choices); *see also* Skilken, *supra* note 5, at 1399 (noting that Justice Blackmun argued against paternalistic government interests, which could never justify a restriction on commercial speech).

28. Rubin v. Coors Brewing Co., 514 U.S. 476, 493 (1995) (Stevens, J., concurring) ("[T]hat is, the importance of avoiding deception and protecting the consumer from inaccurate or incomplete information in a realm in which the accuracy of speech is generally ascertainable by the speaker."). In his concurrence, Justice Stevens described the rationale for treating commercial speech differently under the First Amendment. *Id.* at 491. In particular, consumers are more likely to react to commercial speech before they have time to reflect on its message. *Id.* at 496. Furthermore, commercial speech presents a greater risk of misleading consumers because of its persuasive character. *Id.*

29. Skilken, *supra* note 5, at 1404–05 (describing Justice Stevens's opinion on the purpose of the commercial speech doctrine in *Coors Brewing*, 514 U.S. at 496).

30. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 (1996).

31. *Id.* at 497 ("It is a matter of public interest that [consumer] decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.").

32. *Id.* at 497–98 & n.8 (1996) (citing Bates v. State Bar of Ariz., 433 U.S. 350, 355 (1977); Carey v. Population Servs. Int'l, 431 U.S. 678, 700 (1977); Linmark Assocs., Inc. v. Willingboro,

First, the plurality classified the price-advertising ban as a "blanket prohibition against truthful, nonmisleading speech about a lawful product."[33] Next the plurality expanded the second prong of the *Central Hudson* test with a new inquiry.[34] In addition to determining whether the government interest was substantial, the plurality assessed whether the ban served an end related to consumer protection.[35] Under this revised prong, the plurality found that the ban in question did not.[36] Consequently, the plurality accorded "special care"[37] in reviewing the price-advertising ban,[38] subjecting the ban to the increased scrutiny of the *Central Hudson* test. This new analysis moves the focus of the traditional commercial-speech test to be more in line with the anti-paternalistic foundation of the First Amendment.

The plurality then continued with a traditional *Central Hudson* analysis of the third and fourth prongs.[39] Ultimately, the Court invalidated the ban for lack of evidentiary support.[40]

The next section will discuss the history and difficulties in applying the third and fourth prongs of the *Central Hudson* test.

---

431 U.S. 85, 92–94 (1977); and Va. State Bd. of Pharmacy v. Va. Citizens Consumers Council, 425 U.S. 748 (1976)).

33. *44 Liquormart*, 517 U.S. at 504.

34. *Id.*

35. *Id.* at 502–03 (explaining that, counterintuitive to the government's stated substantial interest, "bans that target truthful, nonmisleading commercial messages rarely protect consumers" from the harms that the government claims it seeks to protect against); *see also* Skilken, *supra* note 5, at 1408 (describing the increased qualitative evaluation of the governmental interest that the *44 Liquormart* plurality introduced in its analysis of the second prong of the *Central Hudson* test).

36. *Id.* at 504 ("There is . . . no question that the ban serves an end unrelated to consumer protection.").

37. *Id.* (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 n.9 (1980)).

38. *Id.* Justice Stevens cautioned that such regulations rarely survive constitutional scrutiny. *Id.* (citing *Cent. Hudson*, 447 U.S. at 566 n.9).

39. *Id.* at 505–08. This will be discussed in more detail in Part II.D, *infra*, of this Note.

40. *Id.* at 508 ("[T]he price advertising ban cannot survive the more stringent constitutional review that *Central Hudson* itself concluded was appropriate for the complete suppression of truthful, nonmisleading commercial speech."). The plurality further concluded that there were other, less intrusive means for Rhode Island to meet its goal of reducing alcohol consumption. *Id.* at 507 (suggesting that the government could maintain higher prices either by direct regulation or by increased taxation, that the government could limit per capita purchases in a similar manner as prescription drugs, or that "educational campaigns focused on the problems of excessive, or even moderate, drinking might prove to be more effective").

C. The Third Prong Standard of Review

Since the Court first established the *Central Hudson* test, chaos has swirled around the proper standard of review for the "direct advancement prong."[41] Lower courts have ranged widely in their applications of the third prong: some argue for the use of a common sense review, while others demand the use of strict scrutiny.[42] Although the standard of review varies in practice, the Court has clearly expressed that *Central Hudson* protection requires intermediate scrutiny,[43] not rational basis review.[44]

1. Common Sense and the Third Prong Unite

Legal scholars have critiqued the common sense standard of review for its complete failure to provide any basis for the judicial review of legislative decisions.[45] The "common sense" standard is closely related to rational basis review. Rational basis—and common sense as courts apply it under the *Central Hudson* test—looks to whether the law reasonably relates to some legitimate government purpose. Moreover, this level of scrutiny is highly deferential to the legislature—any conceivable purpose will suffice.[46]

---

41. Hinegardner, *supra* note 4, at 527 (referring to the third prong of the *Central Hudson* test).

42. *See, e.g.*, Fla. Bar v. Went for It, Inc., 515 U.S. 618, 635 (1995) (finding that a 106-page summary of a statistical support was sufficient evidence that the state regulation directly and materially advanced the state interest under a common sense review); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 560 (1981) (applying common sense to uphold the government's articulation of harm under the third prong of the *Central Hudson* test). *But see, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 575 (2001) (Thomas, J., concurring in part) (calling for the application of strict scrutiny in the Court's application of the third *Central Hudson* prong for purposes of combating paternalism).

43. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 719 (3d ed. 2009) ("Under intermediate scrutiny, a law is upheld if it is substantially related to an important government purpose."); *see, e.g.*, Lehr v. Robertson, 463 U.S. 248, 266 (1983); Craig v. Boren, 429 U.S. 190, 197 (1976).

44. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 573 (1980) (Blackmun, J., concurring) ("Under this four-part test a restraint on commercial 'communication [that] is neither misleading nor related to unlawful activity' is subject to an intermediate level of scrutiny . . . ."); *see also* Edenfield v. Fane, 507 U.S. 761, 768 (1993) (stating that judicial deference to the legislature is limited to rational-basis review).

45. Hinegardner, *supra* note 4, at 529.

46. Randolph Kline, et al., Note, *Beyond Advertising Controls: Influencing Junk-Food Marketing and Consumption with Policy Innovations Developed in Tobacco Control*, 39 LOY. L.A. L. REV. 603, 608 (2006); *see also* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314 (1993) (requiring only "any reasonably conceivable state of facts that could provide a rational basis for

Metromedia v. City of San Diego[47] was the first decision to apply common sense review under the *Central Hudson* test to determine whether the challenged regulation directly advances the government's substantial purpose in a commercial speech context.[48] The Court upheld the contended city restriction on outdoor billboards based on "meager"[49] evidence of the harm that commercial billboards caused by distracting drivers.

The Court found "little controversy" regarding the application of the first, second, and fourth prongs of the *Central Hudson* test.[50] Subsequently, the Court focused its analysis on the third prong to determine whether the ordinance "directly advanc[ed]" governmental interests in traffic safety and in the appearance of the city.[51] Addressing the first governmental interest, the Court noted that "[b]illboards are intended to, and undoubtedly do, divert the driver's attention from the roadway," and "hesitate[d] to disagree with the accumulated, commonsense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety."[52] The Court also recognized that billboards "by their very nature"[53] could be viewed as an "esthetic harm"[54] and found that there was no evidence that the city had an "ulterior motive" for the restriction on speech.[55] Ultimately, finding nothing "unreasonable" in the previous judgments,[56] the Court held that the city ordinance was constitutional under the *Central Hudson* test.[57]

the" statute); McGowan v. Maryland, 366 U.S. 420, 426 (1961) ("A statutory discrimination will not be set aside, if any state of facts reasonably may be conceived to justify it.").

47. 453 U.S. 490 (1981).

48. *Id.*

49. *Id.* at 508–09.

50. *Id.* at 507–08. The Court held that the ordinance's "twin goals" of promoting traffic safety and improving the appearance of the city were substantial government interests. *Id.* The Court then rejected the appellant's claim that the ordinance was more extensive than necessary, such that it should fail the fourth criterion of the *Central Hudson* test. *Id.* at 508. The Court based its opinion largely on the fact that the city had refrained from prohibiting *all* billboards; it permitted on-site advertising and some other specific exceptions. *Id.*

51. *Id.*

52. *Id.* at 508–09.

53. *Id.* at 510.

54. *Id.*

55. *Id.*

56. *Id.* at 509.

57. *Id.* at 512.

This decision highlights the Court's early deference to the legislature, finding a minimal showing of evidence to be sufficient to satisfy the third prong.

2. More than "Mere Speculation or Conjecture"

Next, the Supreme Court tightened its view on common sense review in *Edenfield v. Fane*,[58] proclaiming "mere speculation or conjecture"[59] to be insufficient evidence to satisfy the government's "direct advancement" assertion that its state ban on direct solicitation by certified public accountants (CPAs) to new clients prevented fraud and overreaching.[60]

First, under the second prong of the *Central Hudson* test, the Court acknowledged that the government's asserted interests—protecting consumers from fraud or overreaching by CPAs, maintaining CPA independence, and guarding against conflicts of interest—were substantial.[61] The Court relied on case precedent and recognized, without question, the importance of "ensuring the accuracy of commercial information in the marketplace"[62] and "in maintaining standards of ethical conduct in the licensed professions."[63]

Next, the Court expressed that in order to satisfy the third prong, the regulation at issue must "directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose."[64] The Court gave significant weight to the plaintiff's assertion that "in soliciting potential clients, [he] s[ought] to communicate no more than truthful, nondeceptive information."[65] The Court also expressed

58. 507 U.S. 761 (1993).

59. *Id.* at 770.

60. *Id.*

61. *Id.* at 768–70.

62. *Id.* at 769.

63. *Id.* at 770.

64. *Id.* (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980)). The Florida Board of Accountancy (Board) relied on the affidavit of one of its former chairmen, Louis Dooner. *Id.* at 764. Dooner contended that the solicitation ban was necessary to preserve the independence of CPAs rendering opinions on clients' financial statements because a CPA who solicits clients "is obviously in need of business and may be willing to bend the rules." *Id.*

65. *Id.* at 765.

concerns that Florida's law "threaten[ed] societal interests in broad access to complete and accurate commercial information" that the First Amendment protected.[66]

Overall, the Court held that the Board had failed to demonstrate that the ban on CPA solicitation advanced its stated purposes in a direct and material way.[67] In particular, the Court noted the lack of anecdotal evidence or studies available to support the Board's fears.[68]

Here, the Court distinguished the *Central Hudson* standard, stating that, "[u]nlike rational-basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions."[69] The Court's remark makes clear that not any common sense rationale will suffice; instead, the government's stated purpose must be the one to meet the direct advancement threshold of the third prong.

3. The Third Prong Is "Critical"

In *Rubin v. Coors Brewing Co.*,[70] the Court emphasized the "critical"[71] role of the third prong. It recognized the prevention of "strength wars" by brewers in alcohol content as a substantial interest in protecting the health, safety, and welfare of the public. Namely,

66. *Id.* at 766.

67. *Id.* at 771. Over time, the Court has progressively moved toward a heightened level of scrutiny in its application of the third prong of the *Central Hudson* test. Greater New Orleans Broad. Ass'n, Inc. v. United States, 149 F.3d 334 (5th Cir. 1998) (recognizing that the *Central Hudson* inquiry had "become a tougher standard . . . to satisfy"). For example, the Court in *44 Liquormart* relied on *Edenfield*'s "advance . . . 'to a material degree'" standard and established that the third prong required "significant" advancement of the asserted state goal. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 505 (1996) (quoting *Edenfield*, 507 U.S. at 771) (requiring that the state show that "the price advertising ban will significantly reduce alcohol consumption"); *see also Edenfield*, 507 U.S. at 771 ("This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."). Chiefly, the Court called for greater scrutiny where the state law resulted in "[w]holesale suppression of truthful, nonmisleading information." *44 Liquormart*, 517 U.S. at 505. Under this higher threshold, the Court found that the state's ban on "advertising in any manner whatsoever" the price of alcoholic beverages, did not "significantly reduce alcohol consumption," such that the third prong was not met. *Id.* at 489, 505. In essence, the Court raised the evidentiary bar.

68. *Edenfield*, 507 U.S. at 771. Additionally, the Court pointed to a report by the American Institute of Certified Public Accountants that directly contradicted the Board's claims. *Id.*

69. *Id.* at 767–68.

70. 514 U.S. 476 (1995).

71. *Id.* at 487.

such a ban prevented the social costs and harms of increased alcoholism that may result from consumers selecting the product based on its potency.[72]

However, the Supreme Court found that the evidence failed to show that the ban would achieve its purpose in a "direct and material" way.[73] The Court highlighted the "irrationalit[ies]" of the regulatory framework, and explained that they would ensure that the labeling ban would fail to advance its purpose.[74] *Coors Brewing* brings to light the Court's growing inclination to be less deferential and apply a stricter standard of intermediate scrutiny.

4. Protecting the Right of Consumers to Assess the Value of Truthful and Lawful Information

The Supreme Court next considered the public's right to receive truthful and lawful information. *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*[75] involved a federal act that prohibited television and radio broadcasting of gambling advertisements in states where casino gambling was not permitted.[76] Despite the government's substantial interests, the Court found a need for heightened scrutiny where the governmental purpose was to suppress truthful speech.[77] The Court articulated this belief, stating that "the challenged regulation should indicate that its proponent 'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition."[78]

72. *Id.* at 484.

73. *Id.* at 491. The Court found the state's common sense arguments, "anecdotal evidence," and "educated guesses" insufficient to support a state ban prohibiting the display of alcohol content on beer labels. *Id.* at 490.

74. *Id.* at 489. In particular, the Court questioned the contradictory terms of the provision, which undermined its efforts to prevent strength wars. *See id.* at 488. For example, although the regulation prohibited numerical disclosures of alcohol content, it permitted descriptive terms, such as "malt liquor," to indicate higher alcohol content. *Id.* at 488–89. Similarly, stronger beverages such as wines and spirits, unlike beers, were not subject to the labeling restrictions. *Id.* at 488.

75. 527 U.S. 173 (1999).

76. *Id.* at 177.

77. *Id.* at 193–95.

78. *Id.* at 188 (quoting City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993)).

First, the Court found the government's interests in (1) reducing the social costs associated with casino gambling and (2) assisting states where casino gambling is prohibited to control the activity to be substantial interests.[79] However, the Court noted Congress' unwillingness to adopt a single national policy that consistently endorsed or discouraged casino gambling.[80] The Court weighed the related social costs and economic benefits related to gambling and concluded that the federal policy of discouraging casino gambling was "equivocal."[81]

Next the Court analyzed the ban to determine whether the ban directly and materially advanced its stated goals. The Court found that the regulatory scheme was "so pierced by exemptions and inconsistencies" that it could not materially advance its stated interest in reducing the social costs of casino gambling.[82] Overall, the Court held that under this "partial" broadcast ban there was "little chance" that the speech restriction could directly and materially advance its goals, "while other provisions . . . directly undermined and counteracted its effects."[83]

Finally, the Court held that the benefits of combating the social ills associated with casino gambling did not outweigh the "intolerable amount of truthful speech about lawful conduct" that would be sacrificed under the policy.[84] Moreover, the Court reiterated the plurality opinion in *44 Liquormart* that the power to regulate or prohibit certain activity does not necessarily include the power to regulate or prohibit speech about that conduct.[85] The *Greater New Orleans* holding effectively placed a thumb on the scale against paternalism.

79. *Id.* at 185–86.

80. *See id.* at 187 (noting the government's attempts to minimize the social costs of gambling, as well as Congress' simultaneous sanction of casino gambling for Indian tribes).

81. *Id.*

82. *Id.* at 190. For example, while a broadcaster could not advertise about privately operated casino gambling, irrespective of the location of the casino or the place of broadcast, certain tribal casino gambling advertisements and "[g]overnment-operated, nonprofit, and 'occasional and ancillary' commercial casinos" were exempt. *Id.*

83. *Id.* at 193 (quoting Rubin v. Coors Brewing Co., 514 U.S. 476, 489 (1995)). Similarly, the Court failed to see how the ban could further the stated interest in assisting states prohibiting gambling when the government failed to achieve the same goal on a federal level. *Id.* at 194.

84. *Id.*

85. *Id.* at 193 (citing 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 509–11 (1996)).

5. The State Action Must Be "Necessary as Opposed to Merely Convenient"

Thompson v. Western States Medical Center[86] brought the third prong of the *Central Hudson* test one step further away from a rational basis standard when it held that the state action must be "necessary as opposed to merely convenient."[87] At issue was a Food and Drug Administration (FDA) policy that exempted compound drugs from FDA approval standards on the condition that providers not promote the compounded drugs to the public.[88] The FDA sought, in the interest of public health, to prevent the large-scale production of compound drugs by limiting public access to the medication to pharmacist distribution only.[89] The purposes of the regulation were: (1) to preserve the effectiveness and integrity of the Federal Food Drug and Cosmetic Act's (FDCA) new drug-approval process, and (2) to ensure the availability of compounded drugs to meet the unique medical needs of individuals who were unable to use commercially available products.[90]

The Court, analyzing the third prong, made clear that "if the Government could achieve its interests in a manner that does not restrict commercial speech, or that restricts less speech, [then it] must do so."[91] The Court then articulated multiple non-speech-related alternatives that could achieve the FDA's goals, and it thus found that the regulation did not satisfy the *Central Hudson* test.[92] In holding that the FDA had failed to meet its burden of establishing that the regulation alone would be sufficient for its purpose, the Court made clear that "regulating speech must be a last—not first—resort."[93]

This Note's in-depth analysis of the application of the *Central Hudson* test and the Court's application of the third prong demonstrates the lack of clarity surrounding the oft-used standard.

86. 535 U.S. 357 (2002).
87. *Id.* at 373.
88. *Id.* at 360.
89. *See id.* at 363.
90. *Id.* at 368.
91. *Id.* at 371.
92. *See id.* at 372.
93. *Id.* at 373.

As some have noted, the "standard of proof is a sliding scale . . . [t]he more logical the restriction appears to the justices, the more lenient they will be with the evidence supporting the restriction."[94] Additionally, the test applies differently to different categories of commercial speech—some requiring a higher standard of review.[95]

D. Paternalism in the Fourth Prong

The courts have long held an overriding disapproval of paternalism in the First Amendment arena.[96] The fourth prong of the *Central Hudson* test addresses this exact issue in its assessment of whether the government regulation is narrowly tailored to achieve its stated objectives.[97]

Despite the Court's distaste for paternalism, the *Central Hudson* test remains unchanged and fails to reflect the anti-paternalistic leanings of the justice system.[98] The *Thompson* Court first struck down the idea that the government has an interest in protecting the public from truthful information.[99] Next, the concurrence in *Lorillard Tobacco Co. v. Reilly*[100] articulated its anti-paternalistic sentiments in its disapproval of the Court's content-based reasoning that the third

94. Hinegardner, *supra* note 4, at 545 (comparing Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995), with *Thompson*, 535 U.S. at 357, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001), and 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996)).

95. *See, e.g.*, Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy, 512 U.S. 136, 143 (1994) (suggesting that regulation of professional solicitation deserves a higher level of scrutiny: "the State's burden is not slight"); *see also* Albert P. Mauro, Jr., Comment, *Commercial Speech After* Posadas *and* Fox*: A Rational Basis Wolf in Intermediate Sheep's Clothing*, 66 TUL. L. REV. 1931, 1951 n.134 (1992) (remarking that in comparison to traditional commercial speech restrictions, "restrictions on lawyer advertising seem to merit a different standard"). *But see, e.g.*, *44 Liquormart*, 517 U.S. at 504 (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 n.9 (1980) (suggesting that the courts must proceed with "special care" in the case of broad restrictions on commercial speech)).

96. Consequently, it should come as no surprise that the Supreme Court has time and time again stuck down paternalist restrictions. *See* Hinegardner, *supra* note 4, at 545 n.162.

97. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

98. *See* Hinegardner, *supra* note 4, at 548 & n.183.

99. Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002) (rejecting the argument that "the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information").

100. 533 U.S. 525 (2001).

prong had been met.[101] The regulation at issue in *Lorillard* sought to limit or prevent underage children's exposure and access to tobacco products by prohibiting outdoor and point-of-sale advertising.[102] Justice Thomas felt that the government was paternalistically suppressing speech about tobacco "because it object[ed] to the content of that speech," and thus he encouraged courts to use strict scrutiny for such content-based regulations of speech.[103]

Likewise, the Court remained unpersuaded by the "vice" exception to the First Amendment that Rhode Island proposed in *44 Liquormart*.[104] The state contended that the Court should have upheld the price advertising ban on alcohol because the prohibition "target[ed] commercial speech . . . pertain[ing] to a 'vice' activity": the sale and consumption of liquor.[105] Here, the Court emphasized its concern that the legislature might abuse the ability to deem a product that poses a danger to public health as a "vice" in order to create a "common law of vice" to "justify [its] censorship."[106]

Thus, although the Court broadly opposes paternalistic restrictions, it has yet to modify the "archaic"[107] *Central Hudson* test to reflect its important anti-paternalism concerns. The result is that courts continue to inconsistently apply the *Central Hudson* test.

E. A Comparison of the Third Circuit's and the Fourth Circuit's Interpretations of the Central Hudson *Test*

There are several fundamental differences between the Third Circuit's application of the *Central Hudson* test and that of the

101. *See id.* at 571–72 (Kennedy, J., concurring in part); *see also id.* at 576 (Thomas, J., concurring in part) (stating that "the government may not engage in content discrimination for reasons unrelated to those characteristics of the speech that place it within the category," regardless of whether a lower standard of protection was applicable to this type of regulation).

102. *See id.* at 533 (majority opinion).

103. *Id.* at 574 (Thomas, J., concurring in part and concurring in the judgment). Justice Thomas also expressed particular concern for the "malleability" of the *Central Hudson* test. *Id.*

104. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 514 (1996).

105. *Id.* at 513.

106. *Id.* (defining "vice" products to include "alcoholic beverages, lottery tickets, or playing cards, that may be lawfully purchased on the open market").

107. Hinegardner, *supra* note 4, at 548.

Fourth Circuit. The Third Circuit has consistently required speech restrictions to "substantially further the asserted [state] interest."[108]

In contrast, the Fourth Circuit has leaned toward applying a more lenient standard, requiring only a logical nexus between the challenged law and the stated harm.[109] For example, in *Anheuser-Busch, Inc. v. Schmoke*[110] the court held that the government need not conclusively prove "that the steps undertaken will solve the problem."[111] The court emphasized that "[t]he proper standard for approval must involve an assessment of the reasonableness of the legislature's belief that the means it selected will advance its ends."[112]

Similarly, in *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore*,[113] the court permitted the city to take minor steps to address problems, although "the fit between the City's objectives and the means selected to achieve them [was] not . . . perfect."[114] The state law at issue prohibited "the placement of stationary, outdoor advertising that advertises cigarettes."[115] Relying on *Anheuser-Busch*, the court concluded that "the City must be given some reasonable latitude."[116]

108. *See id.* at 551 (describing the Third Circuit's *Central Hudson* analysis in *Pitt News* and the Second Circuit's similar line of reasoning). *Pitt News*, the key Third Circuit case, exemplified this notion: while the court acknowledged that "advertising in general tends to encourage consumption," it remained unconvinced that the prohibition of alcoholic beverage advertisements in student publications "had the effect of greatly reducing the quantity of alcoholic beverage ads viewed by underage and abusive drinkers on the Pitt campus." Pitt News v. Pappert, 379 F.3d 96, 107 (3d Cir. 2004). Other circuits have followed the Third Circuit's lead. For example, the Second Circuit in *Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.*, struck down a ban on offensive beer labels used with the objective to protect children. 134 F.3d 87, 90 (2d Cir. 1998). The court rejected the measure because of its limited impact given the "wide currency of vulgar displays throughout contemporary society, including comic books targeted directly at children." *Id.* at 99.

109. *See* Hinegardner, *supra* note 4, at 551 (supporting the conclusion that "[s]ome circuit courts find the third prong has been met when the causation involves the legislative presumption that advertising increases consumption").

110. 63 F.3d 1305 (4th Cir. 1995).

111. *Id.* at 1314. The court reasoned that if third prong of the *Central Hudson* test required complete assurance of the success of the proposed measures, "communities could never initiate even minor steps to address their problems." *Id.*

112. *Id.* at 1314–15.

113. 63 F.3d 1318 (4th Cir. 1995).

114. *Id.* at 1326.

115. *Id.* at 1320 (internal quotation marks omitted).

116. *Id.* at 1326 (quoting *Anheuser-Busch*, 63 F.3d at 1316).

The division between the circuit courts' applications of the *Central Hudson* test[117] is highlighted in the conflicting holdings in *Pitt News* and *Educational Media*.

III. CRITIQUE OF THE EXISTING LAW— A SUMMARY OF *PITT NEWS* AND *EDUCATIONAL MEDIA*

A. Pitt News*'s Application of Intermediate Scrutiny*

The Third Circuit in *Pitt News* struck down a Pennsylvania statute restricting alcohol advertising in college newspapers.[118] The Third Circuit held that the state had failed to satisfy the third prong of the *Central Hudson* test because the regulation did not directly advance the state interest of reducing underage drinking on campus.

117. In addition to the Third Circuit, several other circuits have applied intermediate scrutiny and required substantive evidence under the *Central Hudson* test. *See, e.g.*, Pagan v. Fruchey, 492 F.3d 766, 771–72 (6th Cir. 2007) ("*Central Hudson* requires more from the government than bald assertions that a particular speech restriction serves its articulated interests . . . . [T]he government must come forward with some quantum of evidence, beyond its own belief in the necessity for regulation, that the harms it seeks to remedy are concrete and that its regulatory regime advances the stated goals."); El Dia, Inc. v. P.R. Dep't of Consumer Affairs, 413 F.3d 110, 116 (1st Cir. 2005) (holding that a complete absence of evidence is insufficient to satisfy the third prong of the *Central Hudson* test); Valley Broad. Co. v. United States, 107 F.3d 1328, 1335 (9th Cir. 1997) (holding that where a regulation is irrational and contradicts itself, the regulation cannot directly and materially advance its stated interest). To complicate the issue, the Eleventh Circuit has differed within its own decisions with regard to the correct approach to the third prong of the *Central Hudson* test. *Compare* Mason v. Fla. Bar, 208 F.3d 952, 957–58 (11th Cir. 2000) (finding that "simple common sense" and a single affidavit did not constitute sufficient evidence to satisfy the third prong of the *Central Hudson* test because "[t]his court is unwilling to sustain restrictions on constitutionally protected speech based on a record so bare as the one relied upon by the Bar here"), *with* Borgner v. Brooks, 284 F.3d 1204, 1211 (11th Cir. 2002) (finding that two phone surveys constitute sufficient evidence to satisfy the third prong of the *Central Hudson* test).

In contrast, several circuits have joined the Fourth Circuit's interpretation of the *Central Hudson* standard. *See, e.g.*, IMS Health Inc. v. Ayotte, 550 F.3d 42, 58–59 (1st Cir. 2008) (permitting the legislature "leeway to experiment with different methods of combating a social and economic problem of growing magnitude," and demonstrating significant deference to the state's legislative record); Pruett v. Harris Cnty. Bail Bond Bd., 499 F.3d 403, 411–12 (5th Cir. 2007) (holding that a regulation that restricted an inherently dangerous activity directly advanced a substantial governmental interest even though the government did not provide any evidentiary support). In line with the Fourth Circuit's more deferential standard to satisfy the *Central Hudson* test's third prong, other circuits have held that the government satisfies the third prong of the test if it provides a study or survey in favor of the restriction. *See, e.g.*, Missouri *ex rel.* Nixon v. Am. Blast Fax, Inc., 323 F.3d 649, 654 (8th Cir. 2003); Borgner v. Brooks, 284 F.3d 1204, 1211 (11th Cir. 2002); Chambers v. Stengel, 256 F.3d 397, 404 (6th Cir. 2001); Moore v. Morales, 63 F.3d 358, 362 (5th Cir. 1995).

118. Pitt News v. Pappert, 379 F.3d 96, 101 (3d Cir. 2004).

In particular, the court rejected the state's assertion that advertising increases demand, finding the assertion speculative and not a sufficient reason for the court to uphold the regulation. Although the court did not disagree with the general proposition that advertising encourages consumption, it remained unconvinced that prohibiting alcohol advertisements in college media "had the effect of greatly reducing the quantity of alcoholic beverage ads viewed by underage and abusive drinkers on the Pitt campus."[119]

In contrast, the district court had upheld the restriction based on its reasoning that the prohibition had not violated the paper's free speech—the paper "remain[ed] free to say whatever it wishe[d] about alcoholic beverages as long as it was not paid for engaging in the expression."[120]

The Third Circuit then reversed the district court's holding and found the state ban unconstitutional because (1) it failed to satisfy the third prong of the *Central Hudson* test, and (2) "it unjustifiably impos[ed] a financial burden on a particular segment of the media."[121]

First, the Third Circuit found that the state ban on alcohol advertising in student publications failed to satisfy the *Central Hudson* test because, under the third prong, the ban did not directly advance the interest of reducing underage drinking. Namely, the court criticized the commonwealth for its reliance on "nothing more than 'speculation' and 'conjecture.'"[122]

Furthermore, the court found the stated purpose of the regulation "counterintuitive" and took issue with the fact that, regardless of the prohibited advertisements in *Pitt News*, "[students] w[ould] still be exposed to a torrent of beer ads on television and the radio, and they w[ould] still see alcoholic beverages ads in other publications" available on campus.[123] Overall, the court found that the

119. *Id.* at 107 (opinion by Supreme Court Justice Samuel Alito, then a Third Circuit judge).

120. *Id.* at 96.

121. *Id.* at 108–09 (referring to the segment of the media associated with universities and colleges).

122. *Id.* at 108.

123. *Id.* at 107.

commonwealth had failed to provide any evidence to support its claims.[124]

Second, the court held that, under the fourth prong of the *Central Hudson* test, the state legislature failed to sufficiently tailor the regulation to achieve its stated objective.[125] In particular, the court found the restriction to be "both severely over- and under-inclusive."[126] The court relied on *Lorillard*, which held that a restriction on tobacco advertising was not narrowly tailored because it prevented the dissemination to adults of "truthful information about products that adults could lawfully purchase and use."[127] Here, the court found similar paternalism in the facts of *Pitt News*, where the majority of the university population was over the legal drinking age,[128] such that the regulation denied those individuals access to legal and truthful information. The court suggested that there are alternatives that do not affect First Amendment rights and more directly achieve the commonwealth's purpose of preventing underage and abusive drinking.[129]

The Third Circuit also distinguished *Pitt News* from *Anheuser-Busch*, a case in which the court struck down a ban on outdoor tobacco advertising. The Third Circuit found that, while *Anheuser-Busch* applied to an "entire medium of communication (outdoor advertising)," the restriction in *Pitt News* was overly narrow in that it only applied to a limited sector of the media (college publications) and was thus less likely to achieve its objective of reducing underage drinking.[130] The court further pointed out that, unlike *Anheuser-Busch*, where enforcement was an impractical alternative measure due to the large citywide area at issue, enforcement was a valid and

124. *Id.* ("The suggestion that the elimination of alcoholic beverage ads from *The Pitt News* and other publications connected with the University will slacken the demand for alcohol by Pitt students is counterintuitive and unsupported by any evidence that the Commonwealth has called to our attention. Nor has the Commonwealth pointed to any evidence that the elimination . . . will make it harder for would-be purchasers to locate places near campus where alcoholic beverages may be purchased.").

125. *Id.* at 108.

126. *Id.*

127. *Id.* (referencing Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 564 (2001)).

128. *Id.* ("[M]ore than 67% of Pitt students and more than 75% of the total University population is over the legal drinking age.").

129. *Id.*

130. *Id.* at 108–09.

more direct alternative available to the commonwealth in *Pitt News* given the manageable and limited size of college campuses.[131]

Finally, the Third Circuit found the regulation to be unconstitutional on the independent basis that it "unjustifiably impose[d] a financial burden on a particular segment of the media, i.e., media associated with universities and colleges."[132] The court then held that "laws that impose financial burdens on a broad class of entities, including media, do not violate the First Amendment";[133] however, "[a] law is presumptively invalid if it 'single[s] out the press' or 'a small group of speakers.'"[134]

Overall, the court applied intermediate scrutiny in its *Central Hudson* analysis. Unlike cases in the long history of deference that the courts have exercised *Pitt News* demonstrated a heightened suspicion of restrictions on commercial speech. Moreover, the court remained wary of paternalistic measures that might in effect limit the dissemination of truthful and lawful information.

B. Educational Media*'s Rationalization*

Similar to *Pitt News*, *Educational Media* concerned a regulation that restricted alcohol advertising in college newspapers. The Virginia Alcoholic Beverage Control Board's ("Board") restriction prohibited the publication of brand names or prices of alcoholic beverages in student publications but permitted limited wording such as "beer" and "cocktails."[135]

However, in contrast to how the Third Circuit ruled in *Pitt News*, the Fourth Circuit concluded that the ban was not facially unconstitutional and met both the third and fourth prongs of the *Central Hudson* test. Particularly, the court found that the commonwealth's evidence of a link between college students' decreased demand for alcohol and the challenged law was

131. *Id.* at 108. "[I]ncreased enforcement could target very limited, easily identifiable areas—namely, university and college campuses and surrounding neighborhoods." *Id.* (noting that the Commonwealth had failed to engage in aggressive enforcement of alcoholic beverage control laws on college campuses).

132. *Id.* at 109.

133. *Id.* at 110.

134. *Id.* at 111 (citing Leathers v. Medlock, 499 U.S. 439, 447 (1991)).

135. Educ. Media Co. at Va. Tech, Inc. v. Swecker, 602 F.3d 583, 586–87 (4th Cir. 2010).

convincing.[136] The court applied a common sense rationale, finding that because vendors *want* to advertise in college papers, those advertisements must be effective, and a prohibition on such advertisements would logically reduce college students' underage drinking.[137]

Under a "history, consensus, and simple common sense" approach, the Fourth Circuit found that the Board's regulation directly advanced its goals of reducing underage drinking.[138] The court felt that the link was "amply supported by the record" and was "strengthened because 'college student publications' primarily target college students and play an inimitable role on campus."[139] Moreover, the court noted that the college newspapers had failed to provide evidence "*specifically* contradict[ing]" the existence of the link.[140] Accordingly, the Fourth Circuit found that the state regulation had satisfied the third prong.

Next, in its analysis of the fourth prong and whether the speech restriction was sufficiently "narrowly drawn,"[141] the court emphasized that the "restrictions do not need to be the least restrictive means possible," but must have a "reasonable fit with the government's interest."[142] Here the court found that the Board narrowly tailored the statute to achieve its purpose of reducing underage and dangerous drinking among college students.[143]

Unlike the Third Circuit in *Pitt News*, the Fourth Circuit thought it significant that the ban at issue was not a complete ban but allowed for certain exceptions. For example, the Board's regulation permitted "restaurants to inform readers about the presence and type of alcohol they serve."[144] In addition, the ban applied only to "college student publications," which the court clarified did not include "all possible

136. *Id.* at 590.

137. *See id.*

138. *Id.* at 589 (noting that the relationship or link between the State's interests and the advertising ban "need not be proven by empirical evidence").

139. *Id.* at 590.

140. *Id.*

141. *Id.* (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 565 (1980)).

142. *Id.*

143. *Id.*

144. *Id.* at 591.

student publications on campus," but only those "targeted at students under twenty-one."[145] Based on this reasoning, the court concluded that the law was sufficiently narrow to satisfy the fourth prong.[146]

Furthermore, in contrast to the facts in *Pitt News*, where the court found that the state had not undertaken sufficient alternative action to reduce underage drinking,[147] the Board had implemented education and enforcement programs to additionally combat underage drinking on college campuses.[148] The Fourth Circuit held the Board's complimenting methods of prevention to be significant evidence in its finding that the regulation was not overly broad and was a "reasonable fit to serve its interests."[149]

Judge Moon's dissent, however, found the government's evidence to be overly speculative and insufficient to satisfy the third prong.[150] The dissent pointed to the fact that the law had existed since Prohibition, yet statistical evidence showed that underage drinking had steadily increased since the law's implementation.[151] Citing the Third Circuit in *Pitt News*, Judge Moon also discussed factors such as the modern multimedia environment and the fact that other publications available at the school would still expose students to alcohol advertisements.[152]

Additionally, Judge Moon found fault in the Fourth Circuit's logic that the Board's restaurant exception made the law narrowly tailored to the state's objectives. Judge Moon suggested that the exemption undermined the legitimacy of the law, making it inconsistent with its stated objectives:

It is inconsistent to maintain that a regulation that permits

145. *Id.*

146. *Id.*

147. *See* Pitt News v. Pappert, 379 F.3d 96, 108 (3d Cir. 2004) (noting that the Commonwealth had failed to engage in aggressive enforcement of alcoholic beverage control laws on college campuses).

148. *Educ. Media*, 602 F.3d at 587 (describing how the Board published educational pamphlets and enforced its regulations by using officers in targeted efforts on campuses).

149. *Id.* at 591 (holding that "[t]he possible existence of more effective methods does not undermine [the advertising statute], especially in light of its role in a comprehensive scheme to fight underage and abusive drinking").

150. *Id.* at 593–94 (Moon, J., dissenting).

151. *Id.* at 593 n.5.

152. *Id.* at 594 n.6.

> advertisements for "beer night" or "mixed drink night" "in reference to a dining establishment" forms a reasonable fit with the goal of curbing underage or excessive drinking merely because it forbids advertisements for keg delivery, "mojito night," or the "Blacksburg Wine Festival."[153]

The decision in *Educational Media* has also been criticized for basically shifting the burden of proof onto the plaintiff.[154] The court upheld the Board's ban stating that the newspapers had "failed to produce 'specific' evidence to overcome this 'commonsense' proposition."[155] In his dissent, Judge Moon emphasized that under the *Central Hudson* test, it is the government, not the person bringing the challenge, that has the burden to prove that speech regulation materially advances the stated interest.[156]

Next, Judge Moon took issue with the violation of the rights of readers and advertisers. He argued for the reader's right to "receiv[e] truthful, non-misleading information about a lawful product" and the advertiser's right to communicate such information.[157] This is another example of the judiciary articulating anti-paternalistic sentiments, suggesting a need for modification of the *Central Hudson* test.

Finally, Judge Moon identified the existence of a more direct alternative means to achieving the stated objective of reducing underage and abusive drinking. His dissent discussed increased taxation, as well as counteradvertising, as alterative measures "which ha[ve] been empirically verified and quantified as a means to combat underage and binge drinking."[158]

To summarize, commentators have significantly criticized the Fourth Circuit's decision in *Educational Media*, with many siding with the Third Circuit's application of the *Central Hudson* test in *Pitt News*.

---

153. *Id.*

154. Katherine A. Fallow et al., *Fourth Circuit Upholds Ban on Alcohol Advertising*, WASH. LEGAL FOUND. Aug. 20, 2010, at 2, *available at* http://www.wlf.org/Upload/legalstudies/legalopinionletter/082010FallowLegal_Opinion_Letter.pdf.

155. *Id.* at 1.

156. *Educ. Media*, 602 F.3d at 594 (Moon, J., dissenting).

157. *Id.*

158. *Id.* at 596 n.8.

C. Critique of the Existing Law—Weakness in the Central Hudson *Test*

Several concerns have arisen out of the varied applications of the *Central Hudson* test. One source of unease has been the inconsistency in the standard of review that courts apply in the third prong and their resulting deference to government laws. The Supreme Court has articulated the "critical"[159] importance of the third prong for fear that, otherwise, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression."[160] The Court's statement highlights the overly deferential way in which courts have applied the *Central Hudson* test, providing insufficient scrutiny in their analyses of the third prong. The Supreme Court has pushed toward the application of intermediate scrutiny, which "requires the government regulation to achieve 'important' ends through 'substantially related' means."[161] Although the standard of review that is applicable under the third prong remains unclear, the historically predominant use of a rational basis standard is questionable and itself deserves heightened scrutiny.[162]

A second major concern is that "[g]overnment authorities could use the majority's paternalistic approach to justify other forms of commercial speech restrictions based on disapproval of the underlying product and the belief that it is inappropriate for minors."[163] Essentially, this is the classic slippery-slope argument that *Educational Media* illustrated. There, the concern was that the Board's ban on alcohol advertisements in college newspapers denied both adults and minors their right to receive truthful information

159. Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995).

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

161. Hinegardner, *supra* note 4, at 528 (citing KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 774 (15th ed. 2004) (quoting Craig v. Boren, 429 U.S. 190, 220–21 (1976)).

162. *See, e.g.*, Fla. Bar v. Went for It, Inc., 515 U.S. 618 (1995) (applying a common sense review to find that the government regulation directly and materially advanced the stated interest); Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy, 512 U.S. 136 (1994); Edenfield v. Fane, 507 U.S. 761 (1993); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (plurality opinion) (applying a common sense review to uphold the government's articulation of the harm caused to drivers by outdoor billboards).

163. Fallow, *supra* note 154, at 2.

about lawful products and activities. Here, in sum, the overarching fear is that this reasoning could all too easily be extended by government authorities to uphold other restrictive laws to "reduce the content of advertising on billboards, transit systems, or other public venues based on a purported concern to protect minors."[164] Where government laws limit the First Amendment right to free speech, courts should meet paternalism with increased scrutiny.

IV. PROPOSAL— THE "CONSUMER PROTECTION" INQUIRY AND THE "MATERIAL EVIDENCE" TEST COMBINED[165]

The case law concerning the constitutionality of commercial speech restrictions under the *Central Hudson* test provides little concrete guidance to the courts for future decisions. Instead, the courts are left to their own subjective views in determining what level of scrutiny they should apply and how deferential they should be toward paternalistic government measures. This Note proposes combining the "consumer protection" inquiry[166] and the "material evidence" test[167] to ameliorate these concerns.

A. The "Consumer Protection" Inquiry

The "consumer protection" inquiry[168] originated in the *44 Liquormart* plurality opinion and added to the second prong, substantial-government-interest analysis, of the *Central Hudson* test. The "consumer protection" inquiry asks whether the regulation is related to consumer protection and the dissemination of truthful commercial speech.[169] If the regulation relates to consumer protection or the communication of truthful information, then the regulation

164. *Id.*

165. *See* Hinegardner, *supra* note 4, at 554–55 (proposing a new standard for the third *Central Hudson* prong).

166. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 500–04 (1996) (plurality opinion); Skilken, *supra* note 5, at 1414–21 (describing the potential benefits of the commercial speech analysis in *44 Liquormart*).

167. *See* Hinegardner, *supra* note 4, at 554–55 (proposing a new standard for the third *Central Hudson* prong).

168. This Note adapts the standard that the plurality introduced in *44 Liquormart* to pair it with the "material evidence" test, a variant of the *Central Hudson* test.

169. *See* Skilken, *supra* note 5, at 1418.

will receive "less than strict review,"[170] defined here as rational basis review. Under rational basis review, the regulation need only have a "reasonable fit" with the stated government interest.[171] On the other hand, if the regulation satisfies neither criterion, a court will analyze it under the "material evidence" test.[172]

B. The "Material Evidence" Test

The "material evidence" test was first introduced to provide a more tangible standard for the amount of evidence required for the government to support its stated interest.[173] In addition, where the government restriction appears paternalistic, the test calls for a heightened standard of review.[174] This section will first describe the "material evidence" test and how it functions.

The "material evidence" test consists of a procedural component and a substantive component.[175] The procedural standard is based largely on the influential employment law case *McDonnell Douglas Corp. v. Green*.[176] *McDonnell Douglas* established a burden shifting process that permits the court to determine which party bears the burden of proof in the context of discrimination cases.[177]

The *McDonnell Douglas* burden shifting test has three prongs: (1) the complainant must establish a prima facie case of racial discrimination;[178] (2) if the plaintiff has successfully established a prima facie case, the burden of proof shifts to the employer to provide a legitimate nondiscriminatory reason for its rejection of the employee;[179] and (3) if the employer satisfies this burden, the

170. *44 Liquormart*, 517 U.S. at 500.

171. Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989); *see, e.g.*, Fla. Bar v. Went for It, Inc., 515 U.S. 618, 641 (1995); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (plurality opinion).

172. *See* Skilken, *supra* note 5, at 1415 (citing *44 Liquormart*, 517 U.S. at 504).

173. *See* Hinegardner, *supra* note 4, at 555 (describing the benefits of the "material evidence" test).

174. *See id.*

175. *Id.*

176. 411 U.S. 792 (1973).

177. *Id.* at 802.

178. *Id.*

179. *Id.*

complainant must then demonstrate that the employer's explanation is but a mere pretext for another discriminatory motive.[180]

1. The Procedural Component Draws from the Burden Shifting in *McDonnell Douglas*

Procedurally, the "material evidence" test mimics the burden shifting in *McDonnell Douglas*, with one key difference: the initial burden is on the party seeking to uphold the restriction on commercial speech.[181] This is consistent with the requirement that "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it."[182] When a party challenges a government restriction of speech, it is usually the government that must justify the disputed regulation.[183] This is essentially the first prong in the "material evidence" test.

Thus, the "material evidence" test would function under three prongs: (1) the government, as the party trying to uphold the regulation, must justify the regulation's existence; (2) the burden then shifts to the complainant to prove that the regulation is paternalistic such that the justification is a mere pretext to control undesirable conduct that the government achieves through the restriction of free speech;[184] and (3) if the complainant succeeds, the burden shifts back to the government to prove that its justifications are not paternalistic and thus not pretextual.[185]

Overall, the "material evidence" test addresses two of the key problems that this Note has identified with the current *Central Hudson* test: (1) lack of an evidentiary standard, and (2) paternalism. The "material evidence" test allows a party to present more evidence than it could under the classic "common sense" standard.[186] Both parties have several opportunities, as the burden of proof shifts, to present evidence to support their respective positions. In addition, the

180. *Id.* at 804.

181. *See* Hinegardner, *supra* note 4, at 556 (differentiating the "material evidence" test from the *McDonnell Douglas* test).

182. Edenfield v. Fane, 507 U.S. 761, 770 (1993) (alteration in original) (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 71 n.20 (1983)).

183. *See* Hinegardner, *supra* note 4, at 556 n.253.

184. *Id.*

185. *Id.*

186. *Id.* at 556–57.

second prong of the "material evidence" test permits the complainant to question whether the restriction is paternalistic. This adds an extra level of scrutiny to the analysis and avoids the court itself having to challenge the regulation for possible paternalistic leanings. The test also provides advance warning to the legislature that it must be able to adequately support its reasoning in its restriction of free speech.[187]

2. The Substantive Component Does Away with "Common Sense"

The substantive component of the "material evidence" test abandons the "common sense" standard.[188] Under the first procedural burden, the government may not use a "common sense" justification.[189] Instead, the government's legitimate interest must satisfy intermediate scrutiny.

a. The government's initial burden— "some quantum of evidence"[190]

This Note's previous discussion of case precedent demonstrates the lack of clarity as to the amount of evidence that the government needs to justify its restriction of commercial speech. However, under the "material evidence" test, "the government must put forth a significant, verifiable, and reasonable quantum[191] of evidence beyond common sense and 'mere speculation or conjecture' to satisfy the third prong."[192] Although the Court has provided little guidance as to what constitutes sufficient evidence, there must be "ample documentation."[193] The evidence cannot be "'bare,' 'irrational[],' 'puzzling,' lacking in 'any evidentiary support whatsoever,' fundamentally flawed, or based on 'hypothesized justifications.'"[194]

187. *See id.* at 557.

188. *See id.*

189. *Id.*

190. Pagan v. Fruchey, 492 F.3d 766, 771 (6th Cir. 2007) (requiring the government to show "some quantum of evidence, beyond its own belief in the necessity of regulation, that the harms it seeks to remedy are concrete and that its regulatory regime advances the stated goals").

191. Hinegardner, *supra* note 4, at 557 (referring to BLACK'S LAW DICTIONARY 1276 (8th ed. 2004), which defines "quantum" as "the required, desired, or allowed amount").

192. *Id.* (citing Edenfield v. Fane, 507 U.S. 761, 770–71 (1993)).

193. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 561 (2001).

194. Hinegardner, *supra* note 4, at 558 (quoting various Supreme Court commercial speech cases).

Finally, the regulations must be more than a mere convenience, and legislatures should take care to ensure that the regulation is a "last—not first—resort."[195]

In short, "simple common sense"[196] is insufficient to support a justification for a restriction of commercial speech. A "common sense" standard is subjective, "reasonable minds differ"[197] on what is reasonable, and a "common sense" standard does not meet any of the requirements detailed above.

Instead, the "material evidence" test calls for intermediate scrutiny: an examination more searching than that of the "common sense" standard in the third prong of the *Central Hudson* test. Courts must balance the interests of the state and those of the constitutional right to free speech, "weighing the circumstances"[198] and requiring more than mere deference. There must be some quantum of evidence.[199]

b. The plaintiff's burden—
an open forum to challenge paternalism

In its analysis of the government's justification, the court must consider all relevant information tending to show pretext.[200] A facially neutral regulation may in fact be a content-based regulation.[201] For example, arguably the laws at issue in both *Pitt News* and *Educational Media* were facially neutral—the laws prohibited alcohol advertisements generally, encompassing both pro-alcohol and anti-alcohol advertisements. In practice however, the measures were content-based restrictions uniquely prohibiting pro-alcohol advertisements. Where there is a content-based regulation, the courts will use closer scrutiny.[202] The "material evidence" test

195. Thompson v. W. States Med. Ctr., 535 U.S. 357, 373 (2002).

196. Hinegardner, *supra* note 4, at 558 (citation omitted).

197. *Id.*

198. *See id.* at 560 (quoting William E. Lee, *Manipulating Legislative Facts: The Supreme Court and the First Amendment*, 72 TUL. L. REV. 1261, 1261 (1998)).

199. Pagan v. Fruchey, 492 F.3d 766, 771 (6th Cir. 2007).

200. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804–05 (1973).

201. Hinegardner, *supra* note 4, at 561.

202. Wilson Huhn, *Scienter, Causation, and Harm in Freedom of Expression Analysis: The Right Hand Side of the Constitutional Calculus*, 13 WM. & MARY BILL RTS. J. 125, 127 (2004)

thus provides for a "content distinction that is missing from the *Central Hudson* analysis."[203] Articulating a need to substantiate the third prong of the *Central Hudson* test, Professor Huhn, a scholar on content-based regulations, suggests that the more a regulation restricts freedom of expression, the more proof of harm the government must establish to justify its actions.[204]

c. The government's rebuttal— not paternalism and therefore not a pretext

The final prong of the "material evidence" test is an effective means of "putting legislatures on notice"[205] that they must be able to provide a "quantum"[206] of evidence beyond rational basis to support their restrictions on commercial speech. Contrary to the Fourth Circuit's holding in *Educational Media*, "[a] fear of the persuasive influence of nondeceptive speech concerning lawful products and services is a presumptively invalid rationale for commercial speech regulations."[207] By providing advance warning of the threshold evidence requirements that such a restriction must meet, the test goes toward preventing the enactment of paternalistic measures. Legislators may be more cautious in approving laws that they cannot adequately justify with "ample"[208] evidence.

V. JUSTIFICATION

A. Benefits of the "Consumer Protection" Inquiry

The "consumer protection" inquiry is an effective tool in helping the judiciary decide the appropriate level of review without having to define the speech as commercial[209]—relating to a commercial

("[T]ypically content based laws have been evaluated under a stricter standard of review than content neutral laws.").

203. *See* Hinegardner, *supra* note 4, at 562 (citation omitted).

204. *Id.* at 562 (discussing Huhn, *supra* note 202, at 125–26).

205. *Id.* at 564.

206. *Id.* at 557.

207. *Id.* at 564 (quoting William E. Lee, *Manipulating Legislative Facts: The Supreme Court and the First Amendment*, 72 TUL. L. REV. 1261, 1288 (1998)).

208. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 561 (2001) ("ample documentation").

209. *See* Skilken, *supra* note 5, at 1419 (arguing that under the *44 Liquormart* plurality analysis, definitional distinctions would not be necessary).

transaction or economic interests of the speaker[210]—or place the speech under the broader category of noncommercial speech. Instead, in deciding the type and level of review to apply, the new inquiry asks simply: "whether the regulation promotes the dissemination of truthful, nonmisleading information."[211]

This approach will also provide much needed clarity to legislatures in dealing with commercial speech regulations. Previous commercial speech regulations involved subjective judgments about how substantial the government interest was and how closely the regulation fit those interests.[212] The *44 Liquormart* plurality explained that governments may regulate commercial speech, but only in the interest of protecting consumers and the dissemination of truthful information.[213] Consequently, legislatures will have to provide "full disclosure of objectively verifiable information"; however, the standard allows regulations of false and misleading advertisements.[214] Under this new standard, a regulation that (1) "protect[s] consumers from misleading commercial messages,"[215](2) "promote[s] dissemination of truthful information,"[216] or (3) "ensure[s] the fair bargaining process"[217] will be constitutional under the First Amendment.

Finally, the "consumer protection" inquiry encourages legislatures to avoid paternalism in creating commercial speech regulations. Previous decisions under the *Central Hudson* test have permitted paternalistic justifications for restrictions on commercial speech. For example, in *Posadas de Puerto Rico Associates v. Tourism Co.*,[218] at issue was a commercial speech restriction that

210. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561–62 (1980).

211. *See* Skilken, *supra* note 5, at 1419 (summarizing the new commercial speech inquiry proposed in *44 Liquormart*, 517 U.S. 484, 500–02 (1996)).

212. *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 485–86 (1995); Posadas de P.R. Assocs. v. Tourism Co., 478 U.S. 328, 341 (1986); *Cent. Hudson*, 447 U.S. at 568–69; Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 766–68 (1976).

213. *44 Liquormart*, 517 U.S. at 500–04.

214. Skilken, *supra* note 5, at 1420 (interpreting the *44 Liquormart* Court's analysis).

215. *Id.*

216. *Id.*

217. *Id.*

218. 478 U.S. 328 (1986).

prohibited casino advertisements directed toward local citizens but permitted advertisements directed at tourists.[219] Puerto Rico had the right to regulate gambling, and in upholding the restriction, the Court justified that "the power to regulate a particular activity directly included the lesser power to regulate speech about that activity."[220] However, the *44 Liquormart* plurality expressly contradicted this rationale, holding that the government's authority to regulate a product or activity will never justify restricting speech in that domain.[221] The holding in *44 Liquormart* clarifies that a commercial speech regulation will not pass constitutional muster where the defense is based on paternalism.[222]

In short, the "consumer protection" inquiry clarifies the standard of review that courts should apply when they evaluate commercial speech restrictions, provides much needed guidance to legislatures, and discourages paternalism. The inquiry balances the government's power to regulate commercial speech and society's interest in "the fullest possible dissemination of information."[223]

B. Benefits of the "Material Evidence" Test

The proposed "material evidence" test improves on the current *Central Hudson* test in three ways. First, it rejects the "common sense" standard and upholds intermediate scrutiny in courts' analyses of the evidence that governments offer to support a justification for a challenged restriction of commercial speech. Although the judiciary has not defined the precise amount of evidence necessary, intermediate scrutiny requires more evidence than the "common sense" standard requires. A more exacting analysis will appropriately place a heavier burden of proof on any party wishing to suppress the constitutional right to free speech. The test also permits each party additional opportunities to present evidence to support its respective

219. *Id.* at 331–32.

220. Skilken, *supra* note 5, at 1401 (citing *Posadas*, 478 U.S. at 344–47).

221. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 510–13 (1996) (plurality opinion).

222. *See* Skilken, *supra* note 5, at 1420 (citing *44 Liquormart*, 517 U.S. at 509–14).

223. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561–62 (1980); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12–15, at 903 (2d ed. 1988) ("The entire commercial speech doctrine, after all, represents an accommodation between the right to speak and hear expression *about* goods and services and the right of government to regulate the sales *of* such goods and services.").

claims. Furthermore, a heightened evidentiary requirement will serve to moderate the wide variation of justifications that courts deemed acceptable in previous cases.

On the other hand, opponents to the notion of a heightened inquiry under the third prong of the *Central Hudson* test have shared concerns that such an action would result in a "leveling effect" that would devalue the objectives of the First Amendment.[224] Their concern is that commercial speech[225] may be protected at the expense of "other forms of speech deserving greater 'constitutional moment.'"[226] However, this argument lacks force. Regardless of the level of scrutiny that courts apply to commercial speech, this in no material way detracts from the protections that the First Amendment accords to noncommercial speech.[227] A heightened protection for commercial speech only serves to better guard fundamental free speech principles.[228]

The "material evidence" test will also provide for much needed protection from paternally motivated restrictions by placing an added burden on the government to justify the regulation at issue. Where the government seeks to deny a constitutional right, a simple "because it's in your best interests" justification will not suffice without a further showing of evidentiary support. When considering First Amendment issues, it is the right and responsibility of the public, not the state, to decide the value of the information being communicated.[229]

224. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 506 (1981) ("To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978))).

225. Bd. of Trs. v. Fox, 492 U.S. 469, 473 (1989) (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976)) (defining commercial speech as speech that "propose[s] a commercial transaction").

226. Hinegardner, *supra* note 4, at 563 (quoting *Cent. Hudson*, 447 U.S. at 563 n.5).

227. *See id.* (supporting the idea that increasing the amount of inquiry for commercial speech "will not disrupt the key distinctions between commercial and noncommercial speech").

228. *See id.* at 559 n.280.

229. *See* Fla. Bar v. Went for It, Inc., 515 U.S. 618, 645 (1995) (Stevens, Kennedy, Souter, Ginsburg, JJ., dissenting) ("[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented." (quoting Edenfield v. Fane, 507 U.S. 761, 767 (1993))).

In sum, the "material evidence" test empowers the people to raise concerns of paternalism and to take action to protect the right to "truthful information about lawful products and activities"[230] to prevent a chilling effect on commercial speech.

VI. APPLICATION OF THE "CONSUMER PROTECTION" INQUIRY AND THE "MATERIAL EVIDENCE" TEST TO *PITT NEWS* AND *EDUCATIONAL MEDIA*

Educational Media applied a rational basis review under the third prong of the *Central Hudson* test to uphold a paternalistic restriction on the content of college publications. *Educational Media* is important not only because it provides precedent for the amount of evidence that the *Central Hudson* test requires but also for its direct contradiction of the Third Circuit's decision in *Pitt News*. This part will demonstrate the application of the "consumer protection" inquiry and of the "material evidence" test. In doing so, it will show what the likely outcome in *Educational Media* would have been if the Supreme Court had rejected a default rational basis review and clarified the standards that must be met under the *Central Hudson* test.

A. The "Consumer Protection" Inquiry

The "consumer protection" inquiry replaces the *Central Hudson* second prong, which assesses whether the government interest is substantial. Instead, the inquiry asks "whether the regulation promotes the dissemination of truthful, nonmisleading information."[231] To meet this standard, the regulation may be one that: (1) "protect[s] consumers from misleading commercial messages,"[232] (2) "promote[s] dissemination of truthful information,"[233] or (3) "ensure[s] the fair bargaining process."[234]

230. Fallow, *supra* note 154.

231. *See* Skilken, *supra* note 5, at 1419 (summarizing the new commercial speech inquiry proposed in 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 500–02 (1996)).

232. *Id.* at 1420 (summarizing the *44 Liquormart* Court's analysis).

233. *Id.*

234. *Id.*

In *Educational Media* the government sought to "combat[] the serious problem of underage . . . and abusive drinking by college students."[235] Although the state's goal arguably went toward protecting underage student consumers from the dangers of alcohol,[236] this noble objective would likely fail to satisfy the "consumer protection" inquiry.

First, a complete ban (with the exception of limited restaurant advertisements)[237] prohibiting student publications from publishing alcohol advertisements does not protect student consumers from receiving misleading information.[238] Advertisements for happy hour specials, alcohol brands, and prices of alcohol beverages are generally not misleading. Although advertisements by nature are persuasive, the actual content of these messages is factual. The *Educational Media* court supported this argument, reasoning that "[the Board] ha[d] not provided evidence that the speech [was] actually misleading, and there [was] no evidence that the advertising restrictions were enacted to prevent the dissemination of misleading information."[239]

Second, it would be difficult to say that a complete ban on alcohol advertisements somehow promotes truthful commercial speech. Legislatures primarily enact complete bans to prevent the dissemination of particular messages.[240] "[R]ather than protecting the consumer, a complete ban serves only to deprive the consumer of potentially valuable information and inhibits discussion of public policy choices."[241] Here, the ban denies student consumers information that will allow them to make informed decisions in the alcoholic beverages that they choose to consume.[242] The state ban

235. Educ. Media Co. at Va. Tech, Inc. v. Swecker, 602 F.3d 583, 589 (4th Cir. 2010).

236. *Id.*

237. *Id.* at 587 (prohibiting advertisements for alcoholic beverages unless the advertisements are in reference to a restaurant and the permitted restaurant advertisements are limited to "five approved words and phrases").

238. *Id.* at 589. The Court assumed that the speech is not misleading.

239. *Id.* (quoting W. Va. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave, 553 F.3d 292, 302 (4th Cir. 2009)).

240. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996).

241. Skilken, *supra* note 5, at 1407–08.

242. Educ. Media Co., 602 F.3d at 587 (restricting advertisements that refer to the brand or price of beer, wine, or mixed beverages).

strictly removes speech and in no way supplements or provides truthful, valuable information to the student consumer.

Finally, the ban does not "ensure . . . fair bargaining."[243] If anything, the prohibition deprives students of valuable information about brand and price that is essential to a fair bargaining process.[244] For example, students who are not aware of the reasonable cost of a certain alcohol product may easily be misled and induced to pay exorbitant prices.

Overall, a court would likely conclude that the Board's interest in banning alcohol advertisements in student newspapers was not related to protecting consumers from misleading commercial speech, and that the regulation should receive the "special care"[245] that the *Central Hudson* test demands.

Consequently, this Note's analysis will turn to the "material evidence" test, a variant of the *Central Hudson* test, to evaluate the constitutionality of the Board's ban. Yet because the statute deprives consumers of truthful, nonmisleading information and acts as a blanket ban, it will likely not survive First Amendment review.[246]

B. The "Material Evidence" Test: The Government's Initial Burden

Under the "material evidence" test, a court would first consider whether the Board, in seeking to uphold a prohibition on "advertisements [in college student publications] for beer, wine, or mixed beverages unless the ads are 'in reference to a dining establishment,'"[247] satisfied its initial burden to justify the restriction. The evidence must show that the government "'carefully calculated' the costs and benefits associated with the burden on speech imposed

243. Skilken, *supra* note 5, at 1420.

244. Peter M. Gerhart, *The "Competitive Advantages" Explanation for Intrabrand Restraints: An Anti-trust Analysis*, 1981 DUKE L.J. 417, 428 (1981) (explaining the importance of price and brand in fair bargaining).

245. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 n.9 (1980).

246. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 504 (1996) (explaining that "speech prohibitions of this type rarely survive constitutional review").

247. *Educ. Media*, 602 F.3d at 587.

by its prohibition."[248] The Board asserted that "history, consensus, and common sense support the link between advertising bans in college newspapers and a decrease in demand for alcohol among college students."[249] The Board relied on "judicial decisions recognizing this general link," and, moreover, it felt that the link was "extraordinarily strong" because of the heightened level of influence that college papers have over students.[250] The Board went on to argue that, given the large amount of money that advertisers spend in student publications, the logical conclusion was that such advertisements must be effective and increase demand.[251]

Here, the Board has failed to provide even a "quantum"[252] of evidence to support its assertion that there is a link between the ban and decreased alcohol demand by students. Instead, the Board seems to rely on logical and rational thought, stating that it is "illogical to think that alcohol ads do not increase demand"; if the ads were removed, common sense dictates that demand must decrease. However, "reasonable minds [can] differ,"[253] and one might find that eliminating such advertisements does not necessarily lead to the conclusion that demand should decrease. It may in fact remain static, or even increase due to other factors. Nothing in the Fourth Circuit's discussion of *Educational Media* suggests that the Board carefully "weigh[ed] the circumstances"[254] to balance the costs that the ban would impose on the papers financially, the rights of the college population who have a "protected interest in receiving truthful, non-misleading information," the advertiser's "right to communicate such information."[255]

Given the common sense arguments that the Board has made, combined with the lack of any evidentiary support for the ban, a

248. Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 188 (1999) (quoting City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993)).

249. *Educ. Media*, 602 F.3d at 589.

250. *Id.* (noting that the link with college papers is extraordinarily strong because as "a targeted form of media bearing the name of the college, [college papers] attract more attention among college students than other forms of mass media").

251. *Id.*

252. Hinegardner, *supra* note 4, at 557.

253. *Id.* at 558.

254. *Id.* at 560 n.292.

255. *Educ. Media*, 602 F.3d at 594 (Moon, J., dissenting).

court under the first prong of the "material evidence" test might well find that the government has failed to meet its burden. If the court were to come to this conclusion, the analysis would be complete, and the court could not uphold the prohibiting statute. However, if the court were to find that the Board had provided "ample documentation,"[256] as the Fourth Circuit in fact did,[257] then the analysis would proceed to the second prong of the "material evidence" test.

C. The "Material Evidence" Test: The Complainant's Claim of Paternalism and Pretext

The second prong of the "material evidence" test shifts the burden of proof to the complainant to show that the government's measure is paternalistic and that the government's justifications are but a mere pretext for controlling undesirable behavior through the restriction of free speech.[258] The pretext is that, although neutral on its face, the restriction is actually a content-based regulation of truthful, lawful commercial speech that the government designed to deprive the public of lawful information.[259]

The college papers, which suffered an approximately $30,000 per year loss in advertising revenue, rebutted the Board's arguments and criticized the Board's lack of evidence that showed that the advertising ban actually decreased demand among students.[260] In addition, the papers found the ban to be ineffective because outlets in other forms of media were still able to advertise alcohol, and thus alcohol ads nonetheless reached students.[261] Finally, the papers suggested that the ban's exemption for restaurants undermined the effectiveness of the measure.[262]

Here, the college papers have raised valid concerns as to the amount of evidence that the government presented to support the

256. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 561 (2001).

257. *Educ. Media*, 602 F.3d at 590 (concluding that the advertising ban satisfied *Central Hudson*'s third prong and finding the proffered link to "be amply supported by the record").

258. Hinegardner, *supra* note 4, at 556.

259. *Id.* at 561.

260. *Educ. Media*, 602 F.3d at 590.

261. *Id.*

262. *Id.*

restriction, as well as the restriction's actual effectiveness based on the exposure that students receive from other forms of media.

Although the Fourth Circuit found that the "college newspapers fail[ed] to provide evidence to *specifically* contradict [the] link or to recognize the distinction between ads in mass media and those in targeted local media,"[263] a court applying the second prong of the "material evidence" test might alternatively find that the papers had triggered a higher evidentiary standard by raising concerns of perceived paternalistic restrictions. Under such a holding, the court would then analyze the third prong of the "material evidence" test.

D. The "Material Evidence" Test: The Government's Rebuttal Burden

The third and final prong of the "material evidence" test permits the government to rebut the complainant's accusations of paternalism and pretext. The government must show that the regulation "either [is] not paternalistic . . . or is justifiably paternalistic."[264] To do so, the government may not rely on common sense but must show that a "reasonable legislator" could believe that the regulation was not for the purpose of depriving the public of valuable information.[265]

First, the Board defended the prohibition stating that it had narrowly drawn the ban to meet the objective of a "comprehensive scheme attacking the problem of underage and dangerous drinking by college students."[266] The Board noted that the ban was not a complete ban on all alcohol advertisements but that the ban allowed for advertisements "in reference to . . . dining establishment[s]."[267] Moreover, the ban only applied to "college student publications" and did not impose itself on "all possible student publications on campus."[268]

In addition, the Board did not rely solely upon the advertisement restriction in achieving its goals; it also considered "non-speech

263. *Id.*
264. Hinegardner, *supra* note 4, at 564.
265. *Id.*
266. *Educ. Media*, 602 F.3d at 590.
267. *Id.* at 587.
268. *Id.* at 591.

related mechanisms,"[269] such as educational pamphlets and enforcement officers, to uphold its regulations.[270]

The Board's "multi-pronged attack" on underage drinking swayed the Fourth Circuit.[271] In analyzing the government's burden to rebut the complainant's accusations of paternalism and pretext, a court might also find that the Board's ban is narrow. Moreover, a court could determine that the Board's use of non-speech-related mechanisms is compelling evidence that the ban is not paternalistic and that the legislators truly believe that it is necessary to achieve the important goals of reducing underage and abusive drinking. Such a court would then conclude that the government had successfully rebutted the paper's claims of paternalism and that it should uphold the law.

On the other hand, although the ban need not be the least restrictive means to achieve the legislature's purpose, the ban must be "one whose scope is in proportion to the interest served."[272] A court might equally find that, similar to the ban in *Pitt News*, the ban is simultaneously over- and under-inclusive because the prohibition is overbroad in its effect on campus members over the age of twenty-one and is not limited to those under the legal drinking age.[273] A court might also find the measure underinclusive in that it only applies to student papers, while it permits other similar publications on campus targeted at the same audience to publish alcohol advertisements.[274] Following this analysis, a court might conclude that the ban is merely a guise for the government's true intentions of controlling the undesirable, unruly behavior in youth at educational establishments and that restricting speech is just a "convenient"[275] way for the government to achieve its goals.

As the above application to *Educational Media* of the "material evidence" test suggests, the outcome of the Fourth Circuit's decision

269. *Id.*

270. *Id.* at 587.

271. *See id.* at 591.

272. *Id.* (quoting W. Va. Ass'n of Club Owners and Fraternal Servs., Inc. v. Musgrave, 553 F.3d 292, 305 (4th Cir. 2009)).

273. *Id.* at 589.

274. *Id.* at 591.

275. *See* Hinegardner, *supra* note 4, at 558.

may very well have been the same under both the *Central Hudson* test and the "material evidence" test. However, the "material evidence" test did, under the burden-shifting approach, increase the amount of evidence that each party had to provide to support its respective assertion.

Additionally, the "material evidence" test does not simply cast aside and leave the issue of paternalism to the subjective views of the court. Instead, the second and third prongs of the test highlight paternalism.

VII. CONCLUSION

Public policy indicates that courts should avoid inconsistent and unpredictable outcomes in the context of the First Amendment. The current *Central Hudson* test leaves businesses and the legal community guessing the outcomes of future cases.[276]

The proposed "consumer protection" inquiry acts early on in the *Central Hudson* analysis to guide courts as to whether they should apply rational basis review or intermediate scrutiny. The modification of the second prong shifts the focus from whether the government interest is substantial to whether the regulation relates to both consumer protection and the dissemination of truthful commercial speech.[277] In effect, the inquiry focuses on the practical effects that the challenged restriction will have on consumers, rather than on the restriction's theoretical goals.

By combining the "consumer protection" inquiry with the "material evidence" test, courts will apply a heightened evidentiary standard that will significantly reduce the unpredictability of the *Central Hudson* test and prevent the intermediate scrutiny standard of review from falling to an inappropriate rational basis level. Moreover, the heightened evidentiary standard that the combination places on the government will provide additional protections against the inherent malleability of mid-level scrutiny devices such as

276. The Supreme Court's protection for commercial speech has been a "Supreme Court made roller coaster ride." Andrew S. Gollin, *Improving the Odds of the* Central Hudson *Balancing Test: Restricting Commercial Speech as a Last Resort*, 81 MARQ. L. REV. 873, 909 n.224 (1998) (quoting Felix H. Kent, *Re-Affirmation of First Amendment in Commercial Speech*, N.Y. L.J., Apr. 6, 1993, at 3).

277. *See* Skilken, *supra* note 4, at 1418.

paternalism.[278] This is consistent with the core of the *Central Hudson* test as well as with the First Amendment's "anti-paternalistic premise."[279]

If Congress is aware of its responsibility to create law with more thoughtful consideration of the people's rights and their need for knowledge, such awareness will act as a preventative measure against paternalistic restrictions on commercial speech. The simple precautions that the "consumer protection" inquiry and the "material evidence" test propose will serve to better protect citizens' fundamental free speech interest by requiring a greater evidentiary showing that a regulation directly and materially advances its stated purpose and is not paternalistic.

"[T]he greatest menace to freedom is an inert people."[280] In order to prevent a chilling effect on commercial speech, the Supreme Court must acknowledge the deficiencies of the *Central Hudson* test and replace that flawed standard with a workable commercial speech test.

278. *See* E-mail from Allan Ides, Professor, Loyola Law School Los Angeles, to Author (Dec. 7, 2010, 07:09 PST) (on file with Author).

279. Skilken, *supra* note 5, at 1415–16.

280. CONSTITUTIONAL LAW, *supra* note 43, at 1208 (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)) (explaining why freedom of speech is protected).