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Beating the Odds: Greater New Orleans Broadcasting Association v. United States Strikes Congressional Ban on Commercial Speech Advertisements of Private Casino Gambling

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NOTES & COMMENTS

BEATING THE ODDS: *GREATER NEW ORLEANS BROADCASTING ASSOCIATION v. UNITED STATES* STRIKES CONGRESSIONAL BAN ON COMMERCIAL SPEECH ADVERTISEMENTS OF PRIVATE CASINO GAMBLING

I. INTRODUCTION

"Old ideas die hard."[1] This proved to be the case in *Greater New Orleans Broadcasting Ass'n v. United States*[2] when the Supreme Court, in a unanimous decision, recognized the importance of commercial speech protection under the First Amendment.[3] In this case, the Court reviewed an allegation made by the Greater New Orleans Broadcasting Association and a group of other television and radio stations licensed in New Orleans (collectively, "the Broadcasters").[4] The Broadcasters claimed the Federal Communications Act[5] unconstitutionally infringed upon their right to broadcast private casino gambling advertisements.[6] Despite the fact that private casino gambling was legal in New Orleans, the Broadcasters were prohibited from broadcasting advertisements that promoted gambling activity under the Federal Communications Act.[7] Because this severely limited the Broadcasters' freedom of speech, they challenged the Congressional Act as an infringement on their First Amendment rights.[8] The *Greater New Orleans* Court issued a pro-commercial speech decision. The Court found that "respondents cannot overcome the presumption that the speaker and the audience, not the Government, should be left to assess

1. Wendy Melillo, *Spirited Debate*, ADWEEK, Sept. 6, 1999, at 20.

2. 527 U.S. ___, 119 S. Ct. 1923 (1999).

3. *See* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. ___, 119 S. Ct. 1923 (1999).

4. *See id.*

5. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064, 1088 (1934) (codified as amended at 18 U.S.C. § 1304 (1994)).

6. *See generally Greater New Orleans*, 119 S. Ct. 1923.

7. *See Greater New Orleans*, 119 S. Ct. 1923; 18 U.S.C. § 1304 (1994).

8. *See id.*

the value of accurate and non-misleading information about lawful conduct."[9]

The Court's decision struck down the sixty-five year old Federal Communications Act[10] as it applied to casino broadcast advertisements in states where gambling was legal.[11] The impact this Supreme Court decision has had on casino advertising, both in states where private casino gambling is legal and in states where such gambling is illegal, has been substantial.[12]

Although commercial speech has historically been less protected than non-commercial speech, the exact level of judicial scrutiny applied to commercial speech regulation has been unclear.[13] In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[14] the Supreme Court developed a four-prong analysis for determining, on a case by case basis, whether a commercial speech regulation violates the First Amendment.[15]

This Note discusses how the *Central Hudson* test has been applied in the past, and how the current Supreme Court construed the test in favor of commercial speech protection in *Greater New Orleans Broadcasting Ass'n v. United States*.[16] This Note analyzes how the Supreme Court properly applied the *Central Hudson* test to strike down the 1934 Federal Communications Act as it applied to the Broadcasters that are located in states where gambling is legal.[17] Further, this Note discusses how the Federal Communications Commission ("FCC") and the Justice Department interpreted the Supreme Court's decision in *Greater New Orleans*.[18]

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9. *See id.* at 1935 (citing Edenfield v. Fane, 507 U.S. 761, 767 (1993)).

10. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064, 1088 (1934) (codified as amended at 18 U.S.C. § 1304 (1994)).

11. *See generally Greater New Orleans Broad.*, 119 S. Ct. 1923.

12. *See* Robert L. Sharpe, *Gambling Ads Legal Despite Gambling Bans*, 157 N.J. L.J. 633, 633 (1999) (citing Players Int'l, Inc. v. United States, 988 F. Supp. 497 (D.N.J. 1997)). The Justice Department and the Federal Communications Commission filed a brief stating they would no longer defend challenges made by broadcasters in regards to the unconstitutionality of Congressional prohibitions of private casino gambling advertisements in states where such gambling is illegal. *See id.*; *see also* Greg Stohr, *Casino Free to Air Ads*, LAS VEGAS REV. J., Aug. 10, 1999, at 1D ("The Justice Department Monday said it would no longer enforce the advertising ban anywhere in the country.").

13. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563 (1980); *see also* Dana M. Shelton, Greater New Orleans Broadcasting Association v. United States*: The Fifth Circuit Upholds the Federal Ban on Casino Gambling Advertising Against a First Amendment Challenge*, 70 TUL. L. REV. 1725, 1725 (1996).

14. 447 U.S. 557 (1980).

15. *See id.* at 566.

16. 119 S. Ct. 1923.

17. *See id.*

18. *See supra* note 12 and accompanying text.

Finally, this Note argues, although the Supreme Court strictly applied the *Central Hudson* test, the Court should have gone one step further and rejected it altogether. Rejecting the *Central Hudson* test would be a step in the right direction for affording the same level of First Amendment protection to commercial and non-commercial speech.

II. BACKGROUND

Although courts have grappled over the proper standard of review for commercial speech regulations, they agree commercial speech enjoys less First Amendment protection than non-commercial speech.[19] One rationale for this lesser protection is commercial speech is not essential to a democratic society.[20] Commercial speech is economically motivated and does not offer alternative political views.[21] As a result, it is typically viewed as though it is less valuable than political speech.[22]

Commercial speech was first acknowledged as protected speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.[23] In that case, the Court realized commercial speech should be protected because it fosters an indispensable part of the democratic market economy.[24] The Court stated:

> Advertising, however tasteless and excessive it may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions.[25]

While the *Virginia State Board* Court realized the state has the power to consistently regulate conduct within the U.S. market economy,[26] it also

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19. *See* Shelton, *supra* note 13, at 1726.

20. *See id.*

21. *See generally* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 (stating commercial speech is "expression related solely to the economic interests of the speaker and its audience").

22. *See id.*

23. *See* 425 U.S. 748, 765 (1976).

24. Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976) ("[I]f [the free flow of communication] is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.").

25. *Id.*

26. *See id.* at 770 ("Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. But it

recognized courts should afford more protection to speech regarding conduct.[27] Thus, the Court held speech related to marketplace services cannot be regulated to the same extent as activities and services.[28]

After *Virginia State Board* recognized First Amendment protection of commercial speech, the Supreme Court attempted to clarify how regulations of commercial speech should be reviewed.[29] In *Central Hudson*, the Supreme Court created a balancing test to determine the proper degree of protection commercial speech should be afforded under the First Amendment.[30] Although courts have repeatedly used the *Central Hudson* test to rule on commercial speech issues,[31] the application of the test has continually changed.[32]

A. The Development of the Four Prong Central Hudson *Test*

The *Central Hudson* Court developed a four-prong test to determine whether commercial speech regulations violate the First Amendment.[33] In *Central Hudson*, the Supreme Court struck down a state law mandating all New York electric utility companies to cease the production of advertisements that promote the use of electricity.[34] The Court conducted a four-part analysis and held the state law was over-inclusive, and thus unconstitutional.[35]

The first prong of the *Central Hudson* test questions whether the regulated speech concerns lawful activity and is non-misleading.[36] If the commercial speech concerns unlawful activity or is misleading, it is not protected under the First Amendment.[37] However, if the regulated

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may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering." (citation omitted)).

27. *See id.*

28. *See id.*

29. *See Central Hudson*, 447 U.S. at 566.

30. *See generally id.* (The four prongs of the *Central Hudson* test are: 1) the speech must be lawful and not misleading; 2) the regulation must advance a substantial governmental interest; 3) the regulation must directly advance that interest; and 4) the challenged regulation must be no more extensive than necessary).

31. *See, e.g.*, Greater New Orleans Broad. Ass'n v. United States, 527 U.S. ___, 119 S. Ct. 1923, 1930 (1999) (stating the Supreme Court uses the *Central Hudson* test to review commercial speech regulations).

32. *See infra* Part II.A.–D.

33. *See generally Central Hudson*, 447 U.S. at 566 (creating a four-part test to strike down the advertisement ban placed on electrical utility companies).

34. *See id.* at 570.

35. *See id.* at 566.

36. *See id.*

37. *See id.*

commercial speech concerns lawful activity, and is non-misleading, the regulation is upheld provided it satisfies the remaining three prongs.[38]

The second prong of the *Central Hudson* test requires any regulation of commercial speech concerning lawful activity that is non-misleading furthers a substantial governmental interest.[39] Prong three mandates a commercial speech regulation directly advance that interest.[40] Finally, prong four requires the challenged law be no more extensive than necessary to serve a substantial governmental interest.[41]

The *Central Hudson* Court reviewed the regulation imposed on advertising that promoted the use of electricity and held the regulation met the first three prongs of the test.[42] Therefore, the Court focused its analysis on the fourth prong.[43] According to the Court, the advertising ban failed the fourth prong of the *Central Hudson* test—the law be no more extensive than necessary to serve the asserted substantial governmental interest—because it "suppress[ed] speech that in no way impair[ed] the State's interest in energy conservation . . . ."[44] Specifically, the Court found the advertising regulation prohibited all promotional advertising of energy use.[45] Therefore, although the regulation had an important goal of decreasing energy consumption, the Court could not justify suppressing information that would not increase total energy use.[46] In its decision, the *Central Hudson* Court used heightened scrutiny when it applied prong four, thereby furthering First Amendment protection of commercial speech.[47]

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38. *See id.*

39. *See Central Hudson*, 447 U.S. at 566.

40. *See id.*

41. *See id.*

42. *See id.* at 567–69.

43. *See id.* (holding 1) the speech was lawful and non-misleading; 2) the state had a substantial interest in prohibiting the advertising; and 3) the asserted interest was directly advanced by the ban). The Court also found the two governmental interests asserted by the commission, energy conservation and the promotion of fair and efficient utility rates, were substantial. *See id.* at 568–69. Finally, the Court held the link between the promotion of fair and efficient energy rates and the regulation was tenuous, but the link between the asserted interest in energy conservation and the regulation was directly related. *See id.* at 569. Thus, there was a direct link, and prong three was satisfied. *See id.*

44. *Central Hudson*, 441 U.S. at 570 (stating the regulation applies to all advertising that promotes use of electrical utilities, regardless of impact). The Court acknowledged the regulation applied to uses that would have had no effect on total use, and therefore, the state failed to show a lesser restriction would serve the state's asserted substantial interests. *See id.*

45. *See Central Hudson*, 447 U.S. at 570.

46. *See id.*

47. *See id.* (noting the state failed to show how a lesser restriction would not have adequately served the asserted interests).

B. Central Hudson *Begins as a Broad Deferential Analysis, Unfavorable to Commercial Speech*

While *Central Hudson* generally marked a victory for commercial speech, some courts subsequently applied the *Central Hudson* test broadly, allowing legislatures to regulate commercial advertising of certain activities. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,*[48] the Supreme Court deferred to the legislature when it reviewed a law that regulated casino gambling advertisements.[49] The Court concluded gambling can be banned completely because it is a "vice activity."[50] Further, the *Posadas* Court used a "greater includes the lesser" rationale, reasoning the "power to completely ban casino gambling necessarily include[s] the lesser power to ban advertising of casino gambling . . . ."[51]

In *Posadas*, the Court applied the second and third prongs of the *Central Hudson* test and subsequently upheld a state statute prohibiting the advertisement of legalized casino gambling directed at Puerto Rican citizens.[52] The *Posadas* Court deferred to the Puerto Rican legislature's reasoning that the ban was necessary to protect local citizens from immoral activities, crime, prostitution and corruption, all of which the legislature believed to be a product of casino gambling.[53]

The *Posadas* Court applied the second prong of the *Central Hudson* test[54] so as to give the legislature power when it regulated commercial speech.[55] The Court held the Puerto Rican legislature was furthering a substantial interest in protecting the health, safety and welfare of its citizens by instituting a ban on casino gambling.[56] The Court merely

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48. 478 U.S. 328 (1986).

49. *See generally* Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 346–48 (1986) (noting casino gambling is a socially harmful evil and holding a ban on casino gambling advertisements is constitutional under the First Amendment).

50. *Id.* at 346.

51. *Id.* at 345–46 (explaining the "greater includes the lesser" rationale, which instructs if the government has the power to completely ban an activity, it certainly has the power to ban speech related to that activity as well).

52. *See id.* at 345–48.

53. *See id.* at 341–42.

54. *Central Hudson*, 447 U.S. at 566. The second prong of the *Central Hudson* test requires that a commercial speech regulation furthers a substantial governmental interest. *See id.*

55. *See Posadas*, 478 U.S. at 341–42.

56. *See id.* The Court quoted the Tourism Company's brief, which stated:

> [E]xcessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such

accepted the Puerto Rican legislature's proposed governmental purpose as substantial, without any further inquiry.[57]

Under the third prong of the *Central Hudson* test,[58] the *Posadas* Court's analysis proved to be similarly deferential.[59] The Court conceded it was reasonable for the Puerto Rican legislature to believe such regulation would directly serve the substantial governmental purpose of protecting citizens from the evils related to gambling.[60] Under the third prong, the regulation was challenged as underinclusive because the regulation prohibited the advertisement of only one specific type of chance game, casino gambling, but permitted the advertisement of various other types of chance games.[61] The Court once again deferred to the legislature and found it was reasonable to believe casino games were more dangerous to the welfare of Puerto Ricans than other chance games.[62] The Court reasoned this relative danger justified the regulation's underinclusive character.[63]

Finally, under the fourth prong of the *Central Hudson* test,[64] the *Posadas* Court held the restriction on advertisements was no more extensive than necessary to serve the government's interest.[65] The Court found the advertisement ban was narrowly tailored because it applied only to advertisements directed at Puerto Rican residents and because the ban

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> as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime.

Id.

57. *See id.* at 341 (holding the Puerto Rican legislature's asserted interest constituted a substantial governmental interest without further exploring the way gambling affects the health, safety and welfare of citizens).

58. *See Central Hudson*, 447 U.S. at 566. Prong three requires the commercial speech regulation directly advance the asserted substantial governmental interest. *See id.*

59. *See Posadas*, 478 U.S. at 341–42.

> The Puerto Rican Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised . . . Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales.

Id. (quoting *Central Hudson*, 447 U.S. at 569).

60. *See id.*

61. *See id.* at 342 (noting horse racing, cockfighting and the lottery may be advertised to the residents of Puerto Rico).

62. *See id.* at 342–43.

63. *See id.* at 343.

64. *See Central Hudson*, 447 U.S. at 566. The fourth prong of the *Central Hudson* test requires the challenged law be no more extensive than necessary to serve the asserted substantial governmental interest. *See id.*

65. *See Posadas*, 478 U.S. at 343.

was instituted in order to protect the residents from dangers associated with casino gambling.[66] Once again, using a deferential approach,[67] the Court did not seek empirical evidence or proof the ban had no effect on advertisements that targeted tourists visiting Puerto Rico.[68]

C. *The Supreme Court Narrows the* Central Hudson *Test*

Seven years after *Posadas*, the Supreme Court narrowed the *Central Hudson* test by putting an end to its previous approach.[69] In *Edenfield v. Fane*,[70] the court demanded empirical proof the commercial speech regulation directly advanced the asserted governmental interest under prongs two and three. In addition, in *Rubin v. Coors Brewing Co.*,[71] the Court was responsive to an allegation that the regulation at issue was overinclusive under prong four.[72]

Under the third prong of the *Central Hudson* test, the *Edenfield* Court struck down a state law that banned business solicitations by certified public accountants.[73] The Court stated satisfying the third prong of the *Central Hudson* test necessitates a showing of more than ineffectiveness or remote support for the proposed substantial purpose.[74] In effect, the Court narrowed the third prong of the *Central Hudson* test by requiring the party seeking to uphold the restriction on commercial speech provide empirical evidence to show that the commercial speech regulation directly advances the asserted governmental interest.[75] The Court explained under *Central Hudson's* third prong, the regulating body must demonstrate the commercial speech restriction would prevent foreseeable harm to a material degree.[76] Thus, the *Edenfield* Court asked the Florida Board of

66. *See id.*

67. *See id.*

68. *See id.* The Court avoided the issue and stated, "[t]he narrowing constructions of the advertising restrictions announced by the Superior Court ensure that restrictions will not affect advertising of casino gambling aimed at tourists, but will apply only to such advertising when aimed at the residents of Puerto Rico." *Id.*

69. *See id.*

70. 507 U.S. 761, 770 (1993) (holding to satisfy the *Central Hudson* test, the government must prove with empirical evidence that the regulation placed on commercial speech advances a substantial governmental purpose, and the substantial purpose is directly asserted by the regulation).

71. 514 U.S. 476 (1995).

72. *See generally* Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).

73. *See* Edenfield v. Fane, 507 U.S. 761 (1993).

74. *See id.*

75. *See id.* at 770–71.

76. *Id.*

Accountancy to present studies or anecdotal evidence in order to satisfy this requirement.[77] Ultimately, the law was struck down because the Board could not meet this burden.[78]

In *Rubin*, the Court followed *Edenfield's* application of the *Central Hudson* test[79] when the Supreme Court reviewed the Federal Alcohol Administration Act,[80] which banned the display of alcohol content on beer labels.[81] The *Rubin* Court struck down the Act, finding it violated First Amendment commercial speech principles.[82] The government asserted the purpose of the Act was to prevent beer companies from raising the alcohol content of their beer products to promote sales.[83] The *Rubin* Court held, although such an interest was substantial, the regulation failed the third prong of the *Central Hudson* test because the government could not adequately demonstrate the restriction would materially and directly achieve its asserted purpose.[84] The government offered anecdotal evidence and educated guesses[85] to demonstrate a direct connection between prohibiting the display of alcohol content on beer labels and preventing "strength wars"[86] among beer producers.[87] However, the government's proffered evidence proved insufficient to show this connection.[88] The *Rubin* Court required concrete, empirical proof the government's interest was directly achieved by the regulation, which was more than what the government offered.[89]

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77. *Id.*

78. *Id.* at 771 (stating "[t]he only suggestion that a ban on solicitation might help prevent fraud and overreaching or preserve CPA independence is the affidavit of Louis Dooner, which contains nothing more than a series of conclusory statements that add little if anything to the Board's original statement of its justifications").

79. *See Rubin* 514 U.S. at 486–87. ("In *Edenfield*, we decided that the Government carries the burden of showing that the challenged regulation advances the Government's interest 'in a direct and material way.'").

80. Federal Alcohol Administration Act of 1935 ("FAAA"), § 5(e)(2), 27 U.S.C. § 205(e)(2) (1994).

81. *Id.*

82. *See Rubin*, 514 U.S. at 491.

83. *See id.* at 483–85 (explaining the government argued, pursuant to its twenty-first Amendment power to regulate alcohol, the regulation was aimed at curbing "strength wars" among beer producers and would regulate alcohol levels of beverages).

84. *See id.* at 491.

85. *See id.* at 490.

86. *Id.* at 483.

87. *See id.*

88. *See Rubin*, 517 U.S. at 490.

89. *See id.* (rejecting the anecdotal evidence and educated guesses offered by the government's brief as insufficient evidence, which could not "overcome the irrationality of the governmental scheme and the weight of the record").

Further, the Supreme Court in *Rubin* struck down the ban placed on beer labeling because, under the fourth prong of the *Central Hudson* test, it did not survive the challenge that it was overinclusive.[90] The government argued the ban was sufficiently tailored because the regulation only applied to disclosures of alcohol content in labeling and advertising, rather than prohibiting all alcohol content disclosures.[91] Coors Brewing Company challenged the regulation and argued there existed alternative, less speech-restrictive means of serving the government's purpose.[92] Coors Brewing Company explained specific restrictions, such as limiting the label ban to malt liquors, would be less restrictive alternatives available to the government.[93] Ultimately, the Court agreed and held the ban was more extensive than necessary to achieve the government's asserted substantial purpose.[94]

Although the *Rubin* Court did not overrule *Posadas*, it broadened the *Central Hudson* test by distinguishing *Posadas*[95] and held it would not create an exception to *Central Hudson*.[96] In *Rubin* the government relied on the "vice theory" and argued alcohol, like casino gambling in *Posadas*, was socially harmful.[97] The Court stated this argument was irrelevant under the *Central Hudson* four-prong test. This was because the *Posadas* Court struck down the regulation under this vice theory only *after* it had applied *Central Hudson* and found the regulation passed all four prongs.[98] As a result, the *Rubin* Court declined to subject laws to a more deferential standard of review solely because they regulated socially harmful vice activities.[99] Rather, the court chose to review such regulations under *Central Hudson's* strict application.[100] As a result, the *Rubin* Court struck

90. *See id.*

91. *See id.*

92. *See id.*

93. *See id.* at 490–91 (noting the malt liquor market was a specific segment of the alcohol market that was involved in the strength war).

94. *See Rubin,* 517 U.S. at 491 (holding "the availability of these options, all of which could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights, indicates that § 205(e)(2) is more extensive than necessary").

95. *See id.* at 482 & n.2 (explaining although the government urged the *Rubin* Court to defer to the legislature because the regulated speech promoted alcohol consumption, the Court disagreed and strictly applied *Central Hudson*).

96. *See id.*

97. *See id.*

98. *See id.* at 482 n.2.

99. *See id.*

100. *See Rubin,* 514 U.S. at 482 & n.2.

down the prohibition of beer labels advertising alcohol content information.[101]

D. 44 Liquormart, Inc. v. Rhode Island*: Tightening the* Central Hudson *Test*

44 Liquormart, Inc. v. Rhode Island [102] continued the Supreme Court's trend by narrowing the *Central Hudson* test in rendering pro-commercial speech decisions.[103] *44 Liquormart* clearly rejected the deferential approach and the greater includes the lesser argument used in *Posadas*.[104] The Court in *44 Liquormart* held two state laws banning[105] liquor price advertising were unconstitutional, despite the state's argument the Court should defer to the legislature's judgment in creating these bans.[106] The Court concluded blanket regulations must be reviewed with special care, as singling out truthful and non-misleading commercial speech is "particularly dangerous."[107] The Court was "skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."[108]

In the tradition of the *Rubin* decision, the *44 Liquormart* Court strictly applied the third prong of *Central Hudson* and required a showing of empirical evidence to prove the ban on advertisements achieved a substantial government interest.[109] The state failed to present empirical evidence supporting the position that the ban on price advertisements directly achieved the government's interest in reducing alcohol consumption.[110] The state's attempts to appeal to common sense were not

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101. *See id.* at 491.

102. 517 U.S. 484 (1996).

103. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996). ("The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them.").

104. *See id.* at 509–10.

105. *See* R.I. GEN. LAWS § 3-8-7 (1987) (prohibiting out-of-state and in-state alcohol manufacturers, distributors and retailers from advertising the price of alcoholic beverages, but making an exception for price signs or tags accompanying such merchandise); *see also* R.I. GEN. LAWS § 3-8-8.1 (1987) (prohibiting Rhode Island news media from publishing or broadcasting any alcoholic beverage advertisements).

106. *See 44 Liquormart*, 517 U.S. at 504 & n.14 (noting the state argued it enacted the legislation at issue to "reduce consumption among irresponsible drinkers").

107. *Id.* at 501.

108. *Id.* at 503.

109. *See id.* at 505.

110. *See id.* (citing *Edenfield*, 507 U.S. at 771; *Rubin*, 514 U.S. at 486–88).

sufficient.[111] Thus, the legislature's burden of proof under the third prong continued to be more difficult to meet after the *44 Liquormart* decision.[112] Additionally, the third prong was narrowed even further in *44 Liquormart* because the Court held a commercial speech regulation must not only directly advance a governmental interest, but also must *significantly* advance such an interest.[113]

Under the fourth prong of *Central Hudson*, the Court held it was "perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance."[114] For example, the state legislature could ensure prices placed on alcoholic beverages were maintained at high levels by directly regulating prices or by employing direct taxation.[115] Accordingly, the Court found the state regulation failed the fourth prong of the *Central Hudson* test.[116]

More significantly, the *44 Liquormart* Court rejected the "greater includes the lesser" rationale of *Posadas*.[117] The state argued the ban on liquor price advertisements would directly achieve temperance.[118] In addition, as in *Posadas* the state legislature in *44 Liquormart* argued because it had the greater power to ban alcohol consumption, it also had the greater power to ban speech related to alcohol consumption.[119] Ultimately the *44 Liquormart* Court disagreed with the state's position, and refused to defer to the legislature as the Supreme Court had done in *Posadas*.[120] Instead, the Court concluded banning speech rather than conduct is "far

111. *See id.* at 505 (stating "we can agree that common sense supports the conclusion . . . [h]owever without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion").

112. *44 Liquormart,* 517 U.S. at 505.

113. *See id.* at 506 (holding "[a]lthough the record suggests that the price advertising ban may have some impact on the purchasing patterns of temperate drinkers of modest means . . . the State has presented no evidence to suggest that its speech prohibition will *significantly* reduce marketwide consumption").

114. *Id.* at 507.

115. *See id.*

116. *See id.* (finding the state did not demonstrate a reasonable connection between the regulations at issue and the asserted substantial governmental interest).

117. *See id.* at 508–13 (holding the deferential standard and the greater includes lesser argument from *Posadas* no longer applies when defending against First Amendment challenges to commercial speech regulations, and is therefore overruled). The greater includes the lesser rationale refers to the court's reasoning that because a vice activity can be regulated, speech related to that activity may be regulated as well. *See Posadas*, 478 U.S. at 346.

118. *See 44 Liquormart*, 517 U.S. at 508.

119. *See id.*

120. *See id.* at 509.

more intrusive"[121] under First Amendment principles.[122] The Court refused to follow *Posadas* and declined to give the Rhode Island legislature the discretion to "suppress truthful, nonmisleading information for paternalistic purposes."[123]

In *44 Liquormart*, Rhode Island also asserted the vice activity argument the Court recognized earlier in *Posadas*.[124] The government claimed the legislature should be able to regulate speech related to socially harmful vice activities more freely than other types of speech.[125] The *44 Liquormart* Court noted *Rubin* did not permit speech about a vice activity[126] to be regulated as readily as the *Posadas* Court had.[127] The Court reasoned any activity harmful to the public could be labeled a vice, and would thus justify a blanket ban on speech regarding that activity.[128] Accordingly, the *44 Liquormart* Court rejected the *Posadas* vice activity argument.[129]

The journey from the *Central Hudson's* tests inception in 1980,[130] to the *44 Liquormart* Court's interpretation of the test in 1996, is evidence the Supreme Court has taken a more protective position with regard to commercial speech.[131] In *Posadas*, the Court was deferential in its application of the *Central Hudson* test, but it applied the test more stringently in *Edenfield* and *Rubin* when it began to second-guess regulations placed on commercial speech.[132] However, despite stricter application of the *Central Hudson* test, the ultimate victory for commercial speech could only arise if it were given protection, under the First Amendment, equal to non-commercial speech.

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121. *Id.* at 511.

122. *See id.*

123. *Id.* at 510.

124. *See 44 Liquormart*, 517 U.S. at 513 (stating Rhode Island asserted "the price advertising ban should be upheld because it targets commercial speech that pertains to a 'vice' [category]").

125. *See id.* at 513–14.

126. *See id.* at 513.

127. *See id.* at 513–14, (citing *Rubin*, 514 U.S. at 478–82 & 482 n.2, which did not apply the *Posadas* principle that indicates socially harmful, vice activities may be more freely regulated).

128. *See id.* at 515.

129. *See id.*

130. *See generally Central Hudson*, 447 U.S. 557 (developing the four-prong test to review commercial speech regulations).

131. *See generally 44 Liquormart*, 517 U.S. 484.

132. *See Edenfield*, 507 U.S. at 770; *see also Rubin*, 514 U.S. at 490.

III. *GREATER NEW ORLEANS BROADCASTING ASS'N V. UNITED STATES* MAKES ITS WAY THROUGH THE COURTS WITH GREAT IMPACT

The journey *Greater New Orleans*[133] made through the court system exemplifies the great confusion that exists regarding what level of protection commercial speech should be afforded under the First Amendment.[134] Ultimately, in *Greater New Orleans* and *Players International, Inc. v. United States*,[135] the Supreme Court gave commercial speech greater protection under the First Amendment.[136] However, these cases demonstrate "old ideas die hard"[137] because the Supreme Court maintained different levels of review for commercial and non-commercial speech regulations.[138] This inconsistency was a direct result of the Court's failure to overrule *Central Hudson.*

A. Statement of Facts

Section 1304 of the Federal Communications Act[139] prohibits radio and television broadcast advertisements for privately run casino gambling in any state, regardless of whether gambling is legal in the state in which the broadcaster is licensed.[140] However, this ban has been subject to many exceptions.[141] For instance, non-profit activities, such as state-conducted lotteries[142] and Indian gaming,[143] are exempt from § 1304.[144] Therefore, these activities may be freely advertised without violating the Act.[145]

Greater New Orleans Broadcasting Association was a radio and television broadcasting company, licensed in Louisiana, a state where private casino gambling was legal.[146] Greater New Orleans Broadcasting Association, for fear of criminal prosecution, refrained from broadcasting

133. Greater New Orleans Broad. Ass'n v. United States, 527 U.S. ___, 119 S. Ct. 1923 (1999).

134. *See infra* Part III.B.

135. 988 F. Supp. 497 (D.N.J. 1997).

136. *See generally Greater New Orleans*, 119 S. Ct. at 1923.

137. *See* Melillo, *supra* note 1, at 20.

138. *See id.*

139. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064, 1088 (1934) (codified as amended at 18 U.S.C. § 1304 (1994)).

140. 18 U.S.C. § 1304 (1994).

141. *See* 18 U.S.C. §§ 1305–1307 (1994).

142. *See id.* § 1307.

143. *See* 47 C.F.R. § 73.1211(c)(3) (1998).

144. 18 U.S.C. § 1304.

145. *Id.*

146. *See* Shelton, *supra* note 13, at 1725.

private casino gambling advertisements in Louisiana and Mississippi, even though such gambling was legal in those states.[147] Because the Greater New Orleans Broadcasting Association and a group of New Orleans-based television and radio stations (collectively, "the Broadcasters") wanted to freely advertise private casino gambling they challenged § 1304 as an unconstitutional commercial speech regulation.[148]

B. Procedural History: To the Supreme Court and Back Again

The Broadcasters' challenge to § 1304 was rigorous, lengthy and ultimately victorious.[149] The Broadcasters initially met unfavorable results in both the Louisiana District Court[150] and the United States Court of Appeals for the Fifth Circuit.[151] After the Broadcasters petitioned the Supreme Court for review, the Court granted certiorari, vacated the judgment and remanded the case, in light of *44 Liquormart*.[152] When the Supreme Court heard the Broadcasters' claim for the second time, it interpreted *Central Hudson* in favor of commercial speech.[153]

1. The Broadcasters' First Journey to the Supreme Court Received Unfavorable Results for Commercial Speech

The Broadcasters filed suit in a Louisiana District Court hoping the Court would decide in their case, § 1304 violated the First Amendment.[154] In granting the government a motion for summary judgment, the Court held the statute was constitutional.[155] The district court held under § 1304, the Broadcasters could broadcast advertisements about non-gambling related activities, such as food services, that occur within casinos.[156] Furthermore, it held the Broadcasters could advertise the types of gambling that fell

147. *See id.*

148. *See id.*

149. *See infra* Part III.B.1–2.

150. *See generally* Greater New Orleans Broad. Ass'n v. United States, 866 F. Supp. 975 (E.D. La. 1994) (upholding 18 U.S.C. § 1034).

151. *See generally* Greater New Orleans Broad. Ass'n v. United States, 69 F.3d 1296 (5th Cir. 1995), *aff'g* 866 F. Supp. 975 (E.D. La. 1994) (upholding 18 U.S.C. § 1304).

152. Greater New Orleans Broad. Ass'n v. United States, 519 U.S. 801 (1996) (*cert. granted, judgment vacated, and case remanded*).

153. *See Greater New Orleans*, 119 S. Ct. at 1923 (striking down 18 U.S.C. § 1304 as it applied to the Broadcasters).

154. *See Greater New Orleans*, 866 F. Supp. at 975–76.

155. *See id.* at 976.

156. *See id.* at 980.

under the statute's exemptions.[157] Nevertheless, the Broadcasters still could not advertise actual gambling activities.[158]

The United States Court of Appeals for the Fifth Circuit found the statute was not an unconstitutional restriction under *Central Hudson.*[159] The Fifth Circuit relied on *Posadas,*[160] and upheld § 1304 as applied to the Broadcasters.[161] Dissatisfied, the Broadcasters then filed a petition to the Supreme Court.[162]

While this petition was pending, a plurality of the Supreme Court decided *44 Liquormart.*[163] Because the *44 Liquormart* decision changed the application of the *Central Hudson* test,[164] the Supreme Court granted the Broadcasters' petition for review.[165] The Supreme Court noted the third prong of the *Central Hudson* test was more difficult to satisfy under *44 Liquormart,*[166] vacated the decision and remanded the suit to the Fifth Circuit.[167]

On remand, the Fifth Circuit reviewed the Broadcasters' claims in light of the *44 Liquormart* decision, reaffirming the district court's decision by upholding § 1304 as it applied to the Broadcasters.[168] The Fifth Circuit practically ignored the *44 Liquormart* decision when it deferred to the legislature under the third prong of the *Central Hudson* test.[169] The Court found § 1304 advanced the government's interest to a greater extent than the regulation in *44 Liquormart.*[170] In doing so, the Fifth Circuit failed to

157. *See id.*

158. *See id.* ("The plaintiffs acknowledge that under certain circumstances it is entirely lawful to broadcast casino advertisements. However, advertisements must pertain to the casino's amenities, such as food and rooms.").

159. *See Greater New Orleans*, 69 F.3d at 1302.

160. 478 U.S. 328 (1986).

161. *See Greater New Orleans*, 69 F.3d at 1302 (stating the regulation directly advanced the asserted governmental interest and the regulation was no more restrictive than necessary).

162. *See Greater New Orleans*, 519 U.S. at 801.

163. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996). *See supra* notes 86–108 and accompanying text; *see also* Case Comment, *First Amendment – Commercial Speech – Fifth Circuit Upholds a Federal Ban on Casino Advertising*, 112 HARV. L. REV. 1112, 1112 (1999).

164. *See* Case Comment, *supra* note 163, at 1112.

165. *See id.*

166. *See id.* at 1113.

167. *See Greater New Orleans*, 519 U.S. at 801.

168. *See Greater New Orleans*, 149 F.3d at 334 (upholding 18 U.S.C. § 1304).

169. *See id.* at 337.

170. *See id.*

consider *44 Liquormart* had rejected the *Posadas* Court's deferential review.[171]

2. The Broadcasters' Second Journey to the Supreme Court Receives Favorable Results for Commercial Speech

On its second appeal to the Supreme Court, the Broadcasters received favorable results.[172] The Supreme Court held § 1304 could not be used to place a ban on broadcasters who wished to advertise legal, private casino gambling.[173] The Court applied the *Central Hudson* test, focusing on the third and fourth prongs.[174]

First, the Supreme Court found the government failed to satisfy the third prong because it failed to show § 1304 directly achieved the substantial governmental interest of decreasing gambling activity.[175] The Court reasoned decreasing advertisements would not necessarily decrease the demand for gambling.[176] The Court indicated this might instead merely channel gamblers to advertised casinos.[177] Therefore, because it was not proven § 1304 decreased the demand for private casino gambling, the regulation failed the third prong and was ultimately struck down.[178]

In addition, the Supreme Court held the exemptions under § 1304 made the government's case extremely weak under the third prong of the *Central Hudson* test.[179] For example, Indian gaming advertisements and broadcasts that referred to the "Vegas style excitement" within private casinos were exempt from § 1304.[180] According to the Court, these holes and inconsistencies were at odds with the government's interest in

171. *See generally* Greater New Orleans Broad. Ass'n v. United States, 149 F.3d 334 (5th Cir. 1998); *see also* Case Comment, *supra* note 163, at 1115 ("[I]n particular, 44 Liquormart embraced a heightened protection of commercial speech and rejected several lines of reasoning first articulated in *Posadas de Puerto Rico Ass'n v. Tourism Co.* The Greater New Orleans Court ignored both of these doctrinal shifts.").

172. *See Greater New Orleans*, 119 S. Ct. at 1923.

173. *See id.* at 1926.

174. *See supra* notes 161–168 and accompanying text.

175. *See Greater New Orleans*, 119 S. Ct. at 1933 ("[A]s the Court of Appeals recognized, the Government fails to 'connect casino gambling and compulsive gambling with broadcast advertisement for casinos'—let alone broadcast advertising for non-Indian commercial casinos.").

176. *See id.* at 1932–33.

177. *See id.*

178. *See id.*

179. *See id.* at 1933.

180. *See id.* (stating "[w]e can hardly fault the FCC in view of the statute's focus on the suppression of certain types of information, the agency's practice is squarely at odds with the governmental interests asserted in this case").

exterminating the social ills of gambling.[181] Therefore, the Court held the "interpretation and application of § 1304 . . . underscore[d] the statute's infirmity."[182] Here, the Court strictly analyzed § 1304 under the third prong of the *Central Hudson* test by looking beyond the text of the statute.[183]

Because § 1304 was overbroad, the Supreme Court held the government also failed to satisfy the fourth prong of the *Central Hudson* test.[184] The Court noted the government's argument that Indian gaming was exempt from § 1304 because it was a highly regulated area.[185] Therefore, the Court required Congress consider comparable regulations on private casino gambling, similar to those placed on Indian casino gaming activities, before regulating speech related to private casino gambling.[186]

The Supreme Court's *Greater New Orleans* opinion was consistent with the *44 Liquormart* Court's decision that the government's right to prohibit conduct does not necessarily give the government the right to prohibit speech regarding that conduct.[187] Although it may be within reason for the government to regulate private casinos more extensively than Indian casinos, this does not mean it is also within reason for the government to limit private casino advertisements to a greater extent than Indian casino advertisements.[188]

The Supreme Court closely scrutinized § 1304 and the government's motivation for enacting the regulation under the third and fourth prongs of

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181. *Greater New Orleans*, 119 S. Ct. at 1933 (citation omitted).

182. *Id.* at 1933.

183. *See id.*

184. *See generally id.* at 1933–35.

185. *See id.* at 1934 (noting "[i]ronically, the most significant difference identified by the Government between tribal and other classes of casino gambling is that the former are 'heavily regulated'"). Furthermore, "the Government cites revenue needs of States and tribes that conduct casino gambling, and notes that net revenues generated by the tribal casinos are dedicated to the welfare of the tribes and their members." *Id.*

186. *See id.*

> If such direct regulation provides a basis for believing that the social costs of gambling in tribal casinos are sufficiently mitigated to make their advertising tolerable, one would have thought that Congress might have at least experimented with comparable regulation before abridging the speech rights of federally *un* regulated casinos.

Id.

187. *See Greater New Orleans*, 119 S. Ct. at 1934 (citing *44 Liquormart*, 517 U.S. at 509–11).

188. *See id.* at 1934. The Court recognized "there may be valid reasons for imposing commercial regulations on non-Indian businesses that differ from those imposed on tribal enterprises. It does not follow, however, that those differences also justify abridging non-Indians' freedom of speech more severely than the freedom of their tribal competitors." *Id.*

the *Central Hudson* test.[189] The Court actively reached outside the bounds of § 1304 and compared § 1304 to Congress' treatment of speech relating to Indian casino gaming.[190] However, the Supreme Court's decision in *Greater New Orleans* did not complete the victory for commercial speech protection under the First Amendment.[191] The greatest victory for commercial speech came in the aftermath of this landmark Supreme Court decision.[192]

C. Greater New Orleans *Greatly Impacted Broadcasts for Private Casino Gambling*

Greater New Orleans created vast implications for broadcasters because it held broadcasters licensed in states where private casino gambling was legal could broadcast their advertisements without fear of prosecution.[193] However, the Court failed to indicate whether § 1304 could apply to broadcasters licensed in states where private casinos were illegal.[194] In effect, the FCC took advantage of this decision by narrowly interpreting *Greater New Orleans* to ensure § 1304 would survive.[195] After *Greater New Orleans*, the FCC warned these broadcasters they would be sanctioned if they broadcast advertisements promoting private casino gambling.[196]

Many legal commentators argued the *Greater New Orleans* decision should be read to apply to all states regardless of the fact that various broadcasters were located in the twenty-two states where gambling was illegal.[197] They argued, if the FCC adopted regulations that clearly struck down § 1304 in all jurisdictions, vast amounts of litigation could be

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189. *See id.* at 1932–35.

190. *See id.* at 1934–35.

191. *See infra* Part III.C.

192. *See infra* Part III.C.

193. *See* David S. Savage, *High Court Trims Ban on Gambling Ad Broadcasts*, L.A. TIMES, June 15, 1999, at A12.

> [B]roadcasters in the New Orleans area now have the right to carry ads promoting gambling in private casinos in Louisiana 'where such gambling is legal,' the court said. This frees radio and television broadcasters in 10 other states, including Nevada and New Jersey, to advertise casino gambling because private casinos operate lawfully in those jurisdictions.

Id.; *see also* Robert L. Sharpe, *supra* note 12, at 633 (stating "[n]ow casinos gave the opportunity to advertise their product the same as any other business").

194. *See* David O. Stewart, *Casino Ad Ban Goes Bust Louisiana Broadcasters Prevail on First Amendment Grounds*, LEGAL TIMES, July 12, 1999, at S34.

195. *See* Stewart, *supra* note 193, at S34.

196. *See id.*

197. *See id.*

avoided.[198] Although commentators focused on the fact that the Supreme Court found § 1304 to unconstitutionally infringe on free speech under *Central Hudson*,[199] a literal reading of the opinion demonstrates the Court did not strike down the regulation in its entirety.[200]

On August 6, 1999, the government, in response to *Greater New Orleans*, filed a supplemental brief in the Third Circuit where a suit, *Players International, Inc. v. United States*,[201] was pending appeal.[202] The government's brief stated it would not defend suits like *Player's International*, which argued § 1304 should apply to broadcasts of casino gambling advertisements in states where private casino gambling was illegal.[203]

In *Players International*, Players International and several other petitioners filed suit to challenge § 1304 as it applied to them.[204] Petitioners were broadcasters located near, but not actually in, a state where private casino gambling was legal.[205] Due to the pressures the government felt after the Supreme Court decision in *Greater New Orleans*, it stated it would allow broadcasters like Players International to broadcast truthful, non-misleading casino gambling advertisements.[206] This resulted in wider protection for commercial speech.[207]

IV. *GREATER NEW ORLEANS* RESULTED IN GREAT STRIDES FOR COMMERCIAL SPEECH PROTECTION BUT FAILED TO REJECT *CENTRAL HUDSON*

Greater New Orleans properly incorporated pro-commercial speech principles advanced by *44 Liquormart*, but failed to directly clarify the application and status of the *Central Hudson* test.[208] After *44 Liquormart*, commentators suggested the *Central Hudson* test was "ripe for

198. *See id.*

199. *See id.*

200. *See* Savage, *supra* note 191, at A12.

201. 988 F. Supp. 497 (D.N.J. 1999).

202. *See* Sharpe, *supra* note 12 and accompanying text.

203. *See id.*

204. *See* Robert L. Sharpe, *Gambling Ads Legal Despite Gambling Bans*, LEGAL INTELLIGENCER, Aug. 12, 1999, at 3.

205. *See id.*

206. *See id.* at 4.

207. *See id.*

208. *See* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. ___, 119 S. Ct. 1923, 1930 (1999); *see also infra* Part IV.B.

rejection."[209] However, the Supreme Court avoided this question in *Greater New Orleans*, leaving the *Central Hudson* test technically intact.[210]

A. Greater New Orleans *Court Clarified Prong Three of* Central Hudson

Emphasizing *44 Liquormart's* significant tightening of the third prong of the *Central Hudson* test, the Supreme Court reversed the Fifth Circuit's deferential review under this prong.[211] From the test's inception, commercial speech regulation could be upheld under the third prong of *Central Hudson* only if it directly advanced the asserted governmental interest.[212] The Fifth Circuit deferred to the state claiming the level of proof required under prong three was left unclear after *44 Liquormart*.[213] However, the Fifth Circuit, in *Greater New Orleans*, improperly interpreted *44 Liquormart*, which made the third prong of the *Central Hudson* test substantially more difficult to satisfy.[214]

44 Liquormart held a regulation banning speech must significantly advance an asserted governmental interest under the third prong.[215] In addition, the relationship between the regulation and the interest had to be scrutinized in favor of protecting commercial speech.[216] The *44 Liquormart* court also required evidence and factual findings to show the regulation advanced the interest to a material degree.[217]

Unlike the Fifth Circuit, the Supreme Court in *Greater New Orleans* followed *44 Liquormart* and tightened the third prong.[218] It quoted the *Rubin* Court, which indicated prong three was "a critical requirement."[219]

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209. Marrie K. Stone, *The Price Isn't Right: 44 Liquormart, Inc. v. Rhode Island Promotes Free Speech in Commercial Advertising*, 18 LOY. L.A. L. REV. 133, 162 (1997).

210. *See Greater New Orleans*, 119 S. Ct. at 1930.

211. *See id.*

212. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980).

213. Greater New Orleans Broad. Ass'n v. United States, 149 F.3d 334, 337 (5th Cir. 1998). "[I]f the government's burden were to establish a direct, quantitative evidentiary link among these phenomena, we do not believe it has done so. But *44 Liquormart*, though more demanding on the fourth prong of *Central Hudson*, does not appear to establish an insurmountable test." *Id.* at 339.

214. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 505 (1996) (stating "[t]he need for the State to make such a showing is particularly great given the drastic nature of its chosen means—the wholesale suppression of truthful, non-misleading information").

215. *See id.* at 507.

216. *See id.* (indicating "the State has presented no evidence to suggest that the speech prohibition will *significantly* reduce marketwide consumption"); *see also id.* at 505 (holding "the state bears the burden to show that the regulation advanced its interest to a *material* degree" (quoting Edenfield v. Scott Fane, 507 U.S. 761, 771 (1993)).

217. *See 44 Liquormart*, 517 U.S. at 505.

218. *See Greater New Orleans*, 119 S. Ct. at 1932.

219. *See id.*

Furthermore, the Court noted, if heightened scrutiny was not applied to prong three, the government could easily restrict commercial speech for hidden purposes that did not justify burdening commercial speech.[220] The Court then looked closely at whether the state had met its burden of showing restricting commercial speech of casino gambling activities directly advanced the substantial interest of eliminating social ills.[221] The Court decided, while it was reasonable to simply assume such a burden had been met, it would require more than mere assumptions.[222] Consequently, this application correctly incorporated both *44 Liquormart* and *Rubin*.[223]

Greater New Orleans held the "significant advancement" required under the third prong of the *Central Hudson* test called for much more than mere deference or conjecture.[224] Rather, it found an analysis under the third prong called for actual proof and empirical evidence.[225] Consequently, *Greater New Orleans* strengthened the third prong of the *Central Hudson* test[226] in that it was no longer a toothless test through which commercial speech regulations could pass without regard for First Amendment principles.

B. Greater New Orleans *Court Clarified Prong Four of* Central Hudson

When *44 Liquormart* strictly applied the fourth prong of the *Central Hudson* test, it became highly probable very few regulations would pass *Central Hudson* in the future.[227] Ultimately, less speech-restrictive alternatives would foreseeably be available to meet any substantial state

220. *See id.* (quoting *Rubin*, 514 U.S. at 487).

221. *See Greater New Orleans*, 119 S. Ct. at 1932. The government argued the ban would decrease the quantity of gamblers, which in turn would decrease the social costs associated with casino gambling. *See id.*

222. *See id.* at 1933–35.

223. *See generally 44 Liquormart*, 517 U.S. 484; *Rubin*, 514 U.S. 476 (explaining the *44 Liquormart* and the *Rubin* court both sought evidentiary facts to show the regulations at issue directly advanced the asserted governmental interest).

224. *See Greater New Orleans*, 119 S. Ct. at 1932.

225. *See id.*

226. *See id.*

227. *See generally 44 Liquormart*, 517 U.S. at 501 (stating "as our review of the case law reveals, Rhode Island errs in concluding that *all* commercial speech regulations are subject to a similar form of constitutional review simply because they target a similar category of expression"). Justice Thomas stated "[b]oth Justice Stevens and Justice O'Connor appear to adopt a stricter, more categorical interpretation of the fourth prong of *Central Hudson* than that suggested in some of our other opinions, one that could, as a practical matter, go a long way toward the position I take." *Id.* at 524; *see also id.* at 504 (stating "we must review the price advertising ban with 'special care'").

goal.[228] As Justice Thomas predicted in *44 Liquormart*, this application of the fourth prong would strike down virtually all regulations on commercial speech because "directly banning a product . . . would virtually always be at least as effective in discouraging consumption as merely restricting advertising regarding the product would be, and thus virtually all restrictions with such a purpose would fail the fourth prong of the *Central Hudson* test."[229] Therefore, the plurality's holding in *44 Liquormart* suggested any state regulation of commercial speech would inevitably fail the fourth prong of the *Central Hudson* test.[230]

In light of *44 Liquormart*, the Court in *Greater New Orleans* applied the fourth prong of *Central Hudson* even more strictly than it previously had.[231] The Court held, before the government could ban broadcasts of private casino gambling, Congress had to attempt to use less intrusive, non-speech related forms of regulation.[232] With this step, the Court actively protected commercial speech and in doing so suggested other means of curbing the social ills associated with gambling would be necessary.

C. Greater New Orleans *Appropriately Rejected* Posadas

In *Greater New Orleans*, the Supreme Court rejected the Fifth Circuit's reliance on the greater includes the lesser rationale and the social evils argument,[233] both of which originated in the *Posadas* decision.[234] To the contrary, the Fifth Circuit *Greater New Orleans* court ignored the fact that *44 Liquormart* rejected the *Posadas* court's reasoning.[235] The Fifth Circuit held because the state could regulate casino gambling activities, under the theory that it was a social evil, it could regulate speech related to casino gambling as well.[236] Essentially, this argument denigrated the First

228. *See 44 Liquormart*, 517 U.S. at 507.

229. *Id.* at 524.

230. *See id.* at 524–26.

231. *See Greater New Orleans*, 119 S. Ct. at 1929.

232. *Id.* at 1934. "[A] prohibition or supervision of gambling on credit; limitations on the use of cash machines on casino premises; controls on admissions; pot or betting limits; location restrictions; and licensing requirements – that could more directly and effectively alleviate some of the social costs of casino gambling." *Id.*

233. *See Greater New Orleans*, 119 S.Ct. at 1929.

234. *See generally* Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328 (1986).

235. *See* Greater New Orleans Broad. Ass'n v. United States, 866 F. Supp. 975, 976 (E.D. La. 1994).

236. *See Greater New Orleans*, 149 F.3d at 341 (stating if the regulation is unconstitutional, it will have negative effects on society, but that "[n]o local prohibition of gambling will be meaningful, and communities will be less capable of insulating themselves and their children from the deleterious influence of gambling").

Amendment values of commercial speech that had evolved in *44 Liquormart*.[237] Since *Virginia State Board*, the Supreme Court has recognized commercial speech as an indispensable part of a democratic market society, which cannot be regulated as readily as conduct,[238] Accordingly, in *44 Liquormart*, the Court held:

> Contrary to the assumption made in *Posadas*, we think it quite clear that banning speech may sometimes prove far more intrusive than banning conduct. As a venerable proverb teaches, it may prove more injurious to prevent people from teaching others how to fish than to prevent fish from being sold.[239]

In completely rejecting the *Posadas* court's anti-First Amendment principles and deferential review, and in affirming the speech protective principles of *44 Liquormart*, the *Greater New Orleans* court took another step toward recognizing full First Amendment protection of commercial speech.

D. Greater New Orleans *Applied Stricter Scrutiny but Did Not Address the Possibility of a Diminished Status for* Central Hudson

Unlike *44 Liquormart*, *Greater New Orleans* intentionally failed to address what remained of *Central Hudson* after its decision.[240] *44 Liquormart* consisted of many fractured opinions, each of which commonly spoke to two issues.[241] First, each Justice applied *Central Hudson* so as to invalidate the regulation of commercial speech at issue under the facts of the case.[242] Second, and more importantly, each Justice scrutinized the continued value and validity of the *Central Hudson* test.[243] While Justice

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237. The Fifth Circuit ignored most of the important implications of *44 Liquormart*. *See generally id.*

238. *See* Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976).

239. *44 Liquormart*, 517 U.S. at 511.

240. *See Greater New Orleans*, 119 S. Ct. at 1930.

241. *See generally 44 Liquormart*, 517 U.S. 484. The United States Supreme Court Justices were unable to agree as to the proper standard that should be used to determine the validity of the statute at issue. *See id.* However, the Justices agreed unanimously the statute should be struck down under the First Amendment. *See id.*

242. *See 44 Liquormart*, 517 U.S. 484.

243. *See generally id.* Justice Stevens applied the *Central Hudson* test strictly. *See id.* at 487. Justice O'Connor stated the test need not be abolished, but for the fact that it was sufficient to strike the regulation under the facts of the case. *See id.* at 528, 532 (O'Connor, J., concurring). Finally, Justice Scalia stated the *Central Hudson* test is not ready to be struck down. *See id.* at 518 (Scalia, J., concurring).

Stevens and Justice Thomas criticized the *Central Hudson* test,[244] Justice O'Connor and Justice Scalia continued to recognize the value of it.[245]

Justice Stevens, writing for the majority in *44 Liquormart*, did not reject the *Central Hudson* four-prong test. However, according to Justice Thomas, Justice Stevens did drastically narrow its application.[246] Focusing on the plurality's interpretation of the fourth prong of *Central Hudson*, Justice Thomas surmised no regulation of commercial speech would survive.[247] Therefore, Justice Thomas argued commercial speech should be placed on equal footing with non-commercial speech.[248] Moreover, he urged there is nothing about commercial speech that justifies greater regulation than noncommercial speech.[249] Justice Thomas also stated no philosophical or historical basis, expressly or impliedly, asserts commercial speech is less valuable than noncommercial speech.[250]

In contrast to the opinions in *44 Liquormart*, the Justices writing for the Court in *Greater New Orleans* intentionally declined to acknowledge that case precedent radically narrowed the *Central Hudson* test.[251] Writing for the majority in *Greater New Orleans*, Justice Stevens recognized the opinions in *44 Liquormart* seriously drew into question the merits of *Central Hudson*, but the Court nonetheless declined to overrule it. Justice Stevens found it to be "an established part of [the Court's] constitutional jurisprudence . . . [to] not ordinarily reach out to make novel or

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244. *See generally 44 Liquormart*, 517 U.S. at 518–24 (Thomas, J., concurring).

245. *See id.* at 532. Justice O'Connor stated the *Central Hudson* test should not be rejected because its application would reject the regulation at issue. *See id.* at 528–32 (O'Connor, J., concurring). Justice O'Connor stated, "I would resolve this case more narrowly, however, by applying our established *Central Hudson* test to determine whether this commercial speech regulation survives the First Amendment scrutiny." *See id.* at 528. Justice Scalia stated:

> Since I do not believe we have before us the wherewithal to declare *Central Hudson* wrong—or at least the wherewithal to say what ought to replace it—I must resolve this case in accord with our existing jurisprudence. . . . I am not disposed to develop new law, or reinforce old, on this issue, and accordingly I merely concur in the judgment of the Court.

Id. at 518 (Scalia, J., concurring).

246. *See id.* at 524 (Thomas, J., concurring).

247. *See id.* at 524.

248. *See id.* at 522–23.

249. *See id.* at 522. Justice Thomas stated:

> I do not join the principal opinion's application of the *Central Hudson* balancing test because I do not believe that such a test should be applied to a restriction of 'commercial' speech, at least when, as here, the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark . . . This contradicts *Virginia Bd. of Pharmacy's* rationale for protecting 'commercial' speech in the first instance.

Id. at 523.

250. *See id.* at 522.

251. *See Greater New Orleans*, 119 S. Ct. at 1930.

unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground."[252]

Therefore, the *Greater New Orleans* Court consciously exercised judicial restraint and failed to end the debate over the validity of the *Central Hudson* test.[253] The Court made certain not to tread on new ground and steered clear of answering any questions *44 Liquormart* had left unanswered regarding the continued validity of the *Central Hudson* test.[254] While the *44 Liquormart* court took a significant step toward rejecting the *Central Hudson* test completely, the *Greater New Orleans* Court should have taken the final step. However, the Court was not prepared to do so and it alternatively applied the *Central Hudson* test with heightened scrutiny, evading the more difficult issue of determining the test's current status.[255] It is foreseeable that the Court could expressly overrule *Central Hudson* in the future, and grant equal levels of protection for commercial speech and non-commercial speech under the First Amendment.

V. CONCLUSION

Justice Stevens, in *Greater New Orleans*, wrote that it was unnecessary to strike down the *Central Hudson* test because it was a sufficient basis upon which to reject § 1304.[256] As a result, if an analysis under *Central Hudson* were to have led the *Greater New Orleans* Court to uphold the regulation, the Supreme Court might have rejected the test and developed new principles within the First Amendment commercial speech doctrine.[257] The Supreme Court should do just that. The Court should, as suggested by Justice Thomas in *44 Liquormart*,[258] realize the fourth prong of the *Central Hudson* test may always lead courts to strike down

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252. *Id.*

253. *See id.*

254. *See id.* The Court clearly did not want to apply the *Central Hudson* test broadly. *See id.* The court stated "petitioners as well as certain judges, scholars, and *amici curiae* have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech." *Id.*

255. *See Greater New Orleans*, 119 S. Ct. at 1930.

256. *See* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. ___, 119 S. Ct. 1923, 1930 (1999).

257. *See id.* Justice Stevens stated "there is no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision." *Id.* Accordingly, Justice Stevens probably would have broken new ground if application of the *Central Hudson* test did not strike down 18 U.S.C. § 1304.

258. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 524 (1996) (Thomas, J., concurring).

regulations on commercial speech as unconstitutional because less speech-restrictive ways to achieve the government's asserted interest in regulating speech will surely exist. Thus, the Court should overrule *Central Hudson* and place commercial speech on equal footing with noncommercial speech. Then, commercial speech would be protected at an appropriate level and the principles identified by the *Virginia State Board* Court will be fully recognized. People will no longer be left in the dark by government. Rather, they will be able to make well-informed decisions. These decisions will not only be informed by non-commercial speech, but by commercial speech as well. Only the nine Justices of the United States Supreme Court can decide whether this final step will be taken. However, one idea appears to remain certain: "Old ideas die hard."[259]

*Fara Blecker**

259. Melillo, *supra* note 1, at 20.

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