9-1-1997

The Price Isn't Right: 44 Liquormart, Inc. v. Rhode Island Promotes Free Speech in Commercial Advertising

Marrie K. Stone

Recommended Citation
Available at: http://digitalcommons.lmu.edu/elr/vol18/iss1/5
NOTE

THE PRICE ISN'T RIGHT:
44 LIQUORMART, INC. V. RHODE ISLAND
PROMOTES FREE SPEECH IN COMMERCIAL
ADVERTISING

I. INTRODUCTION

It was an early morning in 1993 when a Rhode Island woman reached for her Sunday paper and a cup of coffee. As she was flipping through the numerous advertising inserts, she glanced over the items on sale at 44 Liquormart. The store advertised low prices on peanuts, potato chips, and Schweppes mixers. The advertisement included pictures of vodka and rum bottles and the printed exclamation "WOW." The woman gave the insert little thought before turning to the next page. The state of Rhode Island gave it plenty of thought, however, and fined 44 Liquormart $400 for its advertisement.¹

To the Rhode Island state legislature, the word "WOW" implied that 44 Liquormart's prices were lower than average²—a direct violation of their price advertising ban on liquor.³ Presumably, this type of advertisement would lead to price wars on liquor and necessarily contribute to greater alcohol consumption among Rhode Island citizens.⁴

2. Id.
3. R.I. GEN. LAWS § 3-8-7 (1987). The statute regarding the advertising price of malt beverages, cordials, wine or distilled liquor states:
   No manufacturer, wholesaler, or shipper from without this state and no holder of a license issued under the provisions of this title and chapter shall cause or permit the advertising in any manner whatsoever of the price of any malt beverage, cordials, wine or distilled liquor offered for sale in this state; provided, however, that the provisions of this section shall not apply to the price signs or tags attached to or placed on merchandise for sale within the licensed premises in accordance with rules and regulations of the department.
   Id.
4. See 44 Liquormart, Inc. v. Racine, 829 F. Supp. 543, 545 (D.R.I. 1993). The district court heard testimony from three experts and evaluated numerous research studies regarding the effects of advertising on alcohol consumption. Although the experts conceded that some studies have shown a slight correlation between liquor advertising and alcoholism, each stated that there
Depending upon the product advertised, the government may take an active role in restricting or regulating the methods by which merchants can market their products. This is particularly true where the item is considered to be a "vice product." State legislatures justify this type of regulation by asserting the state's interest in thwarting excessive indulgence in such products.

Several jurisdictions have implemented statutes similar to Rhode Island's price advertising ban that effectively govern the commercial advertising of liquor. Some states prohibit the advertising of alcohol with figures such as the Easter Bunny, Santa Claus, or any deceased president. Other statutes forbid references to Mother's Day, Holy Week, or biblical themes in liquor advertisements. Still other states restrict any aerial advertisements of beer or wine.

is no empirical evidence supporting the proposition that the presence or absence of such advertising significantly impacts alcohol consumption. Id. at 546.

5. 44 Liquormart, 116 S. Ct. at 1512. Commercial advertising, whether contained in newspapers, billboards, television, radio, or otherwise, is a powerful tool in inducing consumers to purchase products or services. Id. at 1504. Newspapers and magazines generally derive substantial revenues from liquor advertisers. Felix H. Kent, A Significant First Amendment Decision, N.Y.L.J., June 21, 1996, at 3.

6. "Vice products" include those goods or activities, such as alcohol, tobacco, or gambling, that are thought to be harmful to consumers. See Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 341 (1985).


8. See, e.g., CONN. AGENCIES REGS. § 30-6-A31a (1964). Section (a)(7) of the law states:
   An advertisement of alcoholic liquor shall not contain any statement, picture or illustration referring to Easter, Holy Week, Mother's Day or "Santa Claus," including names synonymous with "Santa Claus," or the name of any reference to or depiction of any biblical character, provided nothing herein shall operate to prohibit references to the Christmas holiday season if such references do not include statements, pictures or illustrations on strictly religious themes.

Id. (emphasis added); see also OHIO ADMIN. CODE § 4301:1-1-44(C) (1984) (prohibiting the portrayal of any "military subject" or picture or reference to Santa Claus in alcohol advertisements); N.Y. COMP. CODES R. & REGS., tit. 9, § 83.3(c)(2)(xiii) (1995) (prohibiting interior signs advertising alcohol with biblical characters).

9. See, e.g., CONN. AGENCIES REGS. § 30-6-A31a (1964).

10. See, e.g., MICH. COMP. LAWS ANN. § 750.42 (West 1991).
   Any person who shall distribute or post or cause or procure to be distributed or posted any advertisement of any form or nature whatsoever of spirituous or intoxicating liquors, which advertisement contains any reference whatever to any deceased ex-president of the United States of America, either by the use of his name, his picture, quotations from his writings or utterances, scenes purporting to be from his life or otherwise, shall be guilty of a misdemeanor.

Id. (emphasis added); see also infra Part II.B.

11. See, e.g., CONN. AGENCIES REGS. § 30-6-A31a (1964).

In *Liquormart, Inc. v. Rhode Island*, the United States Supreme Court dealt a striking blow to such restrictions on commercial advertising. The Court held that Rhode Island’s price advertising ban on alcohol violated the First Amendment. This case marked a dramatic shift in the Court’s approach to the constitutional protection afforded to commercial speech.

This Note examines the impact of *Liquormart* on commercial advertising and asserts that states have less burdensome means to achieve their goals. The Note ultimately concludes that the current test for commercial speech, as applied by the Court, no longer provides sufficient analysis. Rather, the correct analysis should be strict scrutiny, which is afforded to all levels of speech under the First Amendment. A free marketplace of ideas through counter-advertising or educational campaigns is a better reasoned approach to tempering public consumption of vice products than banning product advertisements altogether.

Part II explores the historic treatment of commercial speech under the First Amendment by tracing the Court’s struggle with the level of discretion to afford state legislatures. Part III explains and analyzes the *Central Hudson* test as a method for evaluating the constitutionality of state regulations. *Central Hudson* provides an essential background to understand the constitutional impact of *Liquormart* on commercial speech. Part IV provides a detailed discussion of *Liquormart v. Rhode Island* and examines how the *Central Hudson* test has changed in light of the Court’s divided application of the test. Part V analyzes the constitutional implication of *Liquormart*, including the Court’s express rejection of judicial precedent, the restructuring of the *Central Hudson* test, and the impact of the case on numerous state restrictions governing alcohol advertising. Finally, Part VI concludes that the Court has applied a standard even greater than strict scrutiny to blanket bans on commercial advertising. While such bans may pass strict scrutiny analysis, they still may fail the Court’s current constitutional test.

---

14. *Id.* at 1501.
16. *Liquormart*, 116 S. Ct. at 1510 (Stevens, J., plurality opinion); see also discussion *infra* Part IV.C.3.a.
II. A Timeline Analysis of the Protection Afforded to Commercial Speech

A constitutional evolution has occurred over the last fifty years in the commercial speech arena. Since the early 1940s, the Supreme Court has essentially reversed its position on the amount of protection afforded to commercial speech.18 This section traces the evolution and provides a perspective to better understand the current commercial speech doctrine. It begins with a discussion of current statutory law and places the law in historical context by examining some earlier commercial advertising cases.

A. Modern Impacts

Despite the Court’s moderate protection of commercial speech prior to 44 Liquormart,19 state legislatures continue to exert enormous control over the substance of advertising. For example, Connecticut prohibits liquor advertisements from referring to Easter, Holy Week, Mother’s Day, or Santa Claus;20 Michigan law mandates that no deceased president be referred to in liquor ads;21 North Carolina authorizes the State to prohibit the advertising of alcohol in any newspaper, pamphlet or other print media;22 and Ohio restricts the use of references to any military subject in liquor advertisements.23

Other states take an even broader approach to liquor advertisement regulation. New York, for example, gives regulators unfettered discretion to require that liquor advertisements be “dignified, modest and in good taste.”24 Similarly, North Carolina affords peace officers unrestricted authorization to destroy, upon discovery, any billboard visible from a street or public highway that advertises liquor.25 Similar statutes prohibit reference to the curative or therapeutic effects of alcohol, even if truthful.26

---

20. CONN. AGENCIES REGS. § 30-6-A31a (1964).
25. Wilson, supra note 12, at 8-14.
26. OHIO ADMIN. CODE § 4301:1-1-03 (1994). Section (j) states: “The advertisement shall not contain any statement, design, or device representing that the use of any wine has curative or therapeutic effects, if such statement is untrue in any particular, or tends to create a misleading impression.” Id.; see also N.Y. COMP. CODES R. & REGS., tit. 9, § 83.3(c)(2)(vii) (1995).
These laws illustrate the invasive control that various states have taken with respect to commercial advertising, demonstrating that Rhode Island's price advertising ban on alcohol is not unique.

B. The Early Cases

Historically, the Court did not regard commercial speech worthy of First Amendment protection. In 1942, Valentine v. Chrestensen\footnote{316 U.S. 52 (1942).} upheld state-created restrictions on the distribution of handbills, reasoning that speech which is primarily commercial in nature does not deserve constitutional protection.\footnote{Id; see also Business Executives Move for Vietnam Peace v. FCC, 450 F.2d 642, 658 n.38 (D.C. Cir. 1971) (stating that commercial speech is afforded less constitutional protection because it does not communicate ideas and is not related to the purpose of the First Amendment); Urowsky v. Board of Regents, 342 N.E.2d 583 (N.Y. 1975) (upholding a regulation imposed by commissioner of education prohibiting the advertising of discount prescription prices by pharmacies).}

Within the last two decades, however, the Court has reconsidered its position that commercial advertisements were an unprotected category of speech. In the 1975 decision Bigelow v. Virginia,\footnote{421 U.S. 809 (1975).} the Court reversed a conviction for the violation of a Virginia statute prohibiting the circulation of any publication encouraging or promoting the practice of abortion.\footnote{Id. at 825–26.}

The Bigelow Court held that commercial speech was entitled to constitutional protection and that it was not devoid of value in the marketplace of ideas.\footnote{Id.}

The next step in the protection of commercial speech came in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.\footnote{425 U.S. 748 (1976).} That Court held that the dissemination of truthful information regarding consumer products, in this case pharmaceuticals, constituted a category of speech worthy of First Amendment protection.\footnote{Id.}

Justice Blackmun, delivering the majority opinion of the Court, reasoned that:

Advertising, however tasteless and excessive it sometimes 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 predominately free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic
decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.\(^{34}\)

According to the Court, the public’s right to accurate and nonmisleading information supported the rationale for affording First Amendment protection to commercial speech.\(^{35}\) The State’s paternalistic attitude that the public would make poor decisions even after receiving accurate information did not justify the blanket ban on such advertising.\(^{36}\) The better reasoned alternative provides the public with truthful information and allows the public to perceive its own best interest, assuming that such choices are based on well-informed decisions.\(^{37}\) "[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."\(^{38}\)

In 1980, the landmark decision of *Central Hudson Gas & Electric Corp. v. Public Service Commission*\(^{39}\) restructured and refined the Court’s view on the degree of constitutional protection given to advertising.\(^{40}\) Prior to *Central Hudson*, the Court took a pragmatic, yet lenient, approach to commercial speech. In *Virginia State Board of Pharmacy*, the Court declared that all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible.\(^{41}\) The Court’s decision in *Central Hudson* required states to justify their restrictions under a four-prong test\(^{42}\) designed to ensure that advertising was afforded some degree of protection. However, the *Central Hudson* test has been neither uniformly nor fairly applied,\(^{43}\) particularly with regard to advertisements relating to "vice" products such as alcohol, tobacco, and gambling.\(^{44}\)

\(^{34}\) Id. at 765.
\(^{35}\) Id.
\(^{36}\) Id. at 770.
\(^{37}\) Id.
\(^{38}\) *Virginia State Bd. of Pharmacy*, 425 U.S. at 770; see also 44 Liquormart, 116 S. Ct. at 1505 (Stevens, J., plurality opinion) (citing Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)). Justice Brandeis, objecting to prohibitions on political speech, stated, "the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." *Whitney*, 274 U.S. at 377.
\(^{39}\) 447 U.S. 557 (1980).
\(^{40}\) Id.; see also infra Part III.
\(^{41}\) *Virginia State Bd. of Pharmacy*, 425 U.S. at 748; see also *Central Hudson*, 447 U.S. at 574 (Blackmun, J., joined by Brennan, J., concurring).
\(^{42}\) See discussion infra Part III.A.
\(^{43}\) See discussion infra Part III.B.
\(^{44}\) See discussion infra Part III.B. Compare Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (holding that a labeling ban restricting the advertisement of alcohol content on beer
III. THE CENTRAL HUDSON TEST: THE COURT’S INABILITY TO STAY ON THE BALANCE BEAM

A. The Central Hudson Four-Prong Test

The Central Hudson Court held that a complete ban on the advertising of electric utility companies was an unconstitutional abridgment of the First and Fourteenth Amendments. For the first time, the Court established a four-part test to analyze when encroachment on commercial speech through state legislation is acceptable.

The first prong demands that the commercial speech concern a lawful activity, and that the substance of the advertisement not be misleading. The second prong necessitates that the government assert a substantial interest to justify speech regulations. The third prong mandates that the regulation directly advance the interest asserted. Finally, the fourth prong requires that the proposed regulation not be more restrictive than necessary to accomplish the asserted end.

Justices Blackmun and Brennan both held that strict scrutiny should apply whenever the government attempts to suppress speech where the restriction “deprive[s] consumers of information about products or services that are legally offered for sale . . . .” Justice Rehnquist, in a dissenting opinion, argued that great deference must be given to state legislatures in determining states’ interests and whether the imposed restrictions are the least restrictive means of accomplishing such interests. In this manner, the fourth prong represents a compromise between strict scrutiny and a legislative deference approach.

While the test provides a general guideline for evaluating commercial advertising under the Constitution, the courts have applied it on an


45. Central Hudson, 447 U.S. at 570.
46. Id. at 566.
47. Id.
48. Id.
49. Id. at 556.
50. Id. at 574 (Blackmun, J., concurring).
52. Steven Younger, Comment, Alcoholic Beverage Advertising on the Airwaves: Alternatives to a Ban or Counteradvertising, 34 UCLA L. REV. 1139, 1164 (1987).
inconsistent basis.53 Furthermore, the fourth prong, which requires that the regulation be "no more extensive than necessary," gives the courts enormous discretion.54 Some commentators argue that the test represents a compromise by the Court in determining the proper level of scrutiny afforded to commercial speech.55 As the Note concludes, this "compromise" may result in affording commercial speech greater than strict scrutiny protection.56

In many respects, Central Hudson's fourth prong is pivotal in the court's determination of upholding or denouncing the state's regulation of commercial advertising.57 The first two prongs generate little controversy. If the advertising is false, misleading, or deceptive, the court need not reach the question of First Amendment protection.58 Likewise, if the state fails to show an interest in regulating the speech, the issue is moot.59

The third prong is more problematic and tends to turn on the specific facts involved.60 In commercial speech cases, courts primarily focus on whether or not the regulation directly advances the state's interest; this is generally a matter of the evidence introduced at trial.61

The bulk of the Court's analysis, however, centers on the fourth prong.62 Commercial speech cases turn on whether a less restrictive method of achieving the state's interest exists.63 However, as the following cases illustrate, this element of the test serves as a pragmatic justification for the Court's capricious holdings.

53. See infra Part III.B.
54. Central Hudson, 447 U.S. at 569-70.
55. Younger, supra note 52, at 1164.
56. See discussion infra Part VI.
57. Central Hudson, 447 U.S. at 569-70.
58. Id. at 566-69.
59. Id.
60. Id. at 557.
61. See 44 Liquormart, Inc. v. Rhode Island, 39 F.3d 5 (1st Cir. 1994) (finding expert testimony revealed there was no connection between the price advertising ban and the level of alcohol sales or consumption among Rhode Island citizens); see also discussion infra Part IV.B and accompanying notes.
63. See discussion infra Part IV.B and accompanying notes.
B. The Central Hudson Test in Action

1. The Original Application

In *Central Hudson*, the Court determined that although the State had a substantial interest in attempting to conserve energy by banning utility advertising, and such a ban would directly further that interest, the ban was more restrictive than necessary to achieve the State’s goal. 64 The Court reasoned that disseminating information regarding energy-saving practices or restricting the format or content of the advertisements would further the State’s interest in a less intrusive manner. 65

Six years later, in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 66 the Court upheld an advertising restriction on casino gambling aimed at residents of Puerto Rico, but permitted the same advertising if directed toward tourists. 67 Writing for the majority, Chief Justice Rehnquist, the primary dissenter in *Central Hudson*, held that the advertising restriction survived the *Central Hudson* test. 68 The ban involved a legal activity that was not misleading to the public. 69 The State had a substantial interest in reducing the practice of casino gambling by Puerto Rican residents; indeed the legislature could reasonably find that:

Excessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime. 70

The Court found a clear fit between Puerto Rico’s interest in regulating gambling by its own residents and the ban on casino advertising. 71 Chief Justice Rehnquist largely disregarded the fourth prong, stating only:

We also think it clear beyond peradventure that the challenged statute and regulations satisfy the fourth and last step of the

---

64. *Central Hudson*, 447 U.S. at 569–71.
65. *Id.* at 571.
67. *Id.*
68. *Id.* at 340–44.
69. *Id.* at 340–41.
70. *Id.* at 341 (alteration in original).
71. *Id.*
Central Hudson analysis, namely, whether the restrictions on
commercial speech are no more extensive than necessary to
serve the government’s interest. The narrowing constructions
of the advertising restrictions announced by the Superior Court
ensure that the 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.72
Thus, the Court conveniently swept the “least restrictive means” restriction
under the “constitutional carpet” and upheld Puerto Rico’s advertising ban.73

2. Central Hudson Justifies Government Intrusion

Prior to 44 Liquormart, both the Supreme Court as well as lower
courts used Posadas as sufficient justification for upholding several
advertising restrictions on alcohol, tobacco, and casino gambling.74 In
United States v. Edge Broadcasting Co.,75 the Supreme Court held that a
federal statute prohibiting the broadcast of lottery advertising in states that
prohibit lotteries, while allowing such advertising by broadcasters in states
that support lotteries, did not violate the First Amendment.76

Defendant Edge, a Virginia broadcaster, was licensed to broadcast in
a North Carolina community that prohibited state lotteries.77 Edge derived
ninety-five percent of its advertising revenue from Virginia and argued
that the North Carolina advertising restriction deprived the company of
substantial sums of money.78 The government, arguing directly from the
Court’s opinion in Posadas, contended that the restriction was justified; if
the State could prohibit the vice activity altogether, it certainly could
prohibit the advertising of such conduct.79

In applying Central Hudson, the Court found that the first three
prongs were easily satisfied.80 First, the advertising of Virginia’s lottery

72. Posadas de Puerto Rico Assocs., 478 U.S. at 343.
73. Id. at 328.
76. Id.
77. Id.
78. Id. at 424.
79. Id. at 425; see also Posadas de Puerto Rico Assocs., 478 U.S. at 345–46 (“[T]he greater
power to completely ban [an activity] necessarily includes the lesser power to ban advertising of
[that activity].”).
80. Edge Broad. Co., 509 U.S. at 429 (citing Board of Trustees v. Fox, 429 U.S. 469, 480
(1989)).
was legal and neither misleading nor fraudulent. Second, the North Carolina government had a substantial interest in regulating gambling among its residents, and third, the advertising ban reasonably accomplished that interest.

The fourth prong again failed to generate much debate among the Court. Justice White, writing for the majority, reiterates the Court’s holding in *Board of Trustees v. Fox*. In *Fox*, the Court announced a liberal interpretation of *Central Hudson*’s fourth prong, requiring only a “reasonable fit” between the government’s interest and the restriction. The fit need not be perfect, only reasonable.

In 1995, the Court used the fourth prong to strike down a federal statute that prohibited the advertising of alcohol content on beer labels. In *Rubin v. Coors Brewing Co.*, the Court held that a federal statute prohibiting the inclusion of alcohol content on beer labels violates the First Amendment. Coors applied to the U.S. Bureau of Alcohol, Tobacco and Firearms for approval of its labels disclosing the alcohol content of the beer. The Bureau denied the application due to Coors’ violation of the statute. The government attempted to justify the statute as a necessary measure to prevent “strength wars” among brewers who might otherwise increase the potency of their beer to effectively compete in the marketplace.

The Court found that the government had a “substantial interest” in protecting the health, safety, and welfare of its citizens and that prohibiting alcohol content labeling would prevent strength wars between brewers. Applying *Posadas*, the Court reasoned that just as the government had a “substantial” interest in regulating gambling among its citizens, it also has

---

81. Id. at 428.
82. Id. at 429.
83. Id. at 429–31.
84. 492 U.S. 469 (1989) (holding that the court need only find a “reasonable fit” between the government’s asserted interest and the means chosen to accomplish those ends where state regulation sought to prohibit commercial transactions in state-funded dormitories).
85. Id. at 480.
88. Id.
91. Id. at 478.
92. Id.
93. Id. at 479.
94. Id. at 485.
a "substantial" interest in tempering alcoholism and the social costs accompanying alcohol use. Surprisingly, the statute was ultimately struck down because it failed to comply with the fourth prong of Central Hudson. The Court held that while the government may have a sufficient interest in regulating strength wars, the statute failed to advance that interest in a manner justifying the ban.

3. The End of Central Hudson's Legacy

44 Liquormart marked the end of the "reasonable fit" and "substantial governmental interests" tests. The Court's recent holding essentially overruled Posadas, thereby making any state regulation of commercial speech an extremely difficult task. 44 Liquormart also expressly rejected the "greater includes lesser power" argument advanced in Edge, reasoning that banning speech is far more intrusive than banning conduct.

Essentially, 44 Liquormart emasculated the fourth prong of Central Hudson. Justice O'Connor announced a variety of less restrictive alternatives to a complete ban on alcohol price advertising, ranging from increases in taxation, to price regulation, and educational campaigns targeting the adverse effects of alcohol. According to the Court, a complete ban on alcohol would presumably be a less restrictive alternative than governing the advertising of the product.

While restrictions on commercial speech may pass strict scrutiny, they can ultimately fail the narrow interpretation of the fourth prong

95. Id.
96. Rubin, 514 U.S. at 486.
97. See Wilson, supra note 12, at S-14 ("After the pounding that any government restriction on truthful commercial speech took in 44 Liquormart, and the eagerness of all the justices to favor non-speech alternatives, at best Central Hudson just barely survives.").
98. 44 Liquormart, 116 S. Ct. at 1511.
99. Id. at 1512 (Stevens, J., plurality opinion) ("In short, we reject the assumption that words are necessarily less vital to freedom than actions, or that logic somehow proves that the power to prohibit an activity is necessarily 'greater' than the power to suppress speech about it.").
100. Id. at 1510.
101. Justice Stevens, in overruling Posadas, stated: 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. Similarly, a local ordinance banning bicycle lessons may curtail freedom far more than one that prohibits bicycle riding within city limits.
Id. at 1512.
announced in 44 Liquormart. This holding essentially grants commercial speech a greater degree of protection than noncommercial speech.

IV. 44 LIQUORMART, INC. V. RHODE ISLAND:
THE COURT DEALS A BLOW TO CENTRAL HUDSON

A. Background

Liquor retailers in Rhode Island brought suit seeking declaratory relief from a state statute instituting a blanket advertising ban on liquor prices. 44 Liquormart allegedly violated the statute by printing the word “WOW” next to pictures of vodka and rum bottles. Although the advertisement noted that “State law prohibits advertising liquor prices,” the State nonetheless found that 44 Liquormart’s advertisement made an implied reference to bargain prices for liquor. The State reasoned that this implication undermined the State’s interest in reducing alcohol consumption by avoiding price wars between alcohol retailers.

After paying the $400 fine mandated by the statute, 44 Liquormart filed an action in the federal district court against the Rhode Island Liquor Control Administrator. The store sought a declaratory judgment that the two Rhode Island statutes violated its First Amendment right to free speech. After analyzing expert testimony, which concluded that bans on liquor advertising did not significantly affect alcohol abuse, the district court held that the statute was unconstitutional because it failed to directly advance the State’s interest in tempering consumption. The district

---

102. See Henry Cohen, Cigarette Ad Bans: What About Strict Scrutiny?, CONN. L. TRIB., June 3, 1996, at 26; see also discussion infra Part VI.

103. Id. The term “noncommercial speech” encompasses that speech which does not propose a commercial transaction, but instead articulates a particular point of view. This category may include books, articles, oral presentations or other speech that does not induce the listener to purchase a product or service. See generally Board of Trustees v. Fox, 492 U.S. 469, 473–74 (1989).


106. 44 Liquormart, 116 S. Ct. at 1503.

107. Id.

108. Id.


110. Id. at 545.
court found the ban was more extensive than necessary, and therefore failed the *Central Hudson* test.\textsuperscript{111}

The court further recognized that Rhode Island bore the burden of justifying the blanket restriction. The district court held that the Twenty First Amendment, which allows the states to control the transport or import of liquor within their borders,\textsuperscript{112} does not shift or diminish the states' burden under the First Amendment.\textsuperscript{113}

The First Circuit reversed the district court's holding.\textsuperscript{114} The court of appeals narrowly construed the fourth prong of *Central Hudson*. The court only required that the State employ a reasonable method to accomplish its interest; there is no additional burden to prove that some other means (i.e., taxation or regulation) would have been less effective.\textsuperscript{115}

Additionally, the First Circuit found "inherent merit" in the State's asserted claim that a price advertising ban would prohibit liquor retailers from lowering prices, which in turn would temper consumption.\textsuperscript{116} The court stated that retailers would not expend vast amounts of money on advertisements if those advertisements were not effective in inducing consumers to purchase their products.\textsuperscript{117} The First Circuit thus concluded that Rhode Island’s ban on price advertising survived the *Central Hudson* analysis and found against 44 Liquormart.\textsuperscript{118}

### B. The Supreme Court's Holding

The Supreme Court reversed the court of appeals' decision, holding that blanket price advertising bans on liquor directly violate the First Amendment.\textsuperscript{119} Justice Stevens, in Part VII of the opinion, addressed the

\begin{itemize}
\item \textsuperscript{111} *Id.* at 555.
\item \textsuperscript{112} "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2 (emphasis added).
\item \textsuperscript{113} 44 Liquormart, Inc., v. Racine, 829 F. Supp. at 551–54.
\item \textsuperscript{114} 44 Liquormart, Inc. v. Rhode Island, 39 F.3d 5 (1st Cir. 1994).
\item \textsuperscript{115} *Id.*
\item \textsuperscript{116} *Id.* at 7.
\item \textsuperscript{117} *Id.* at 8.
\item \textsuperscript{118} *Id.*
\item \textsuperscript{119} 44 Liquormart, 116 S. Ct. at 1495. Justice Stevens delivered the opinion of the Court with respect to Parts I, II, VII, and VIII. Justice Stevens was joined by Justices Kennedy, Souter, and Ginsburg with respect to Parts III and V. Justices Kennedy and Ginsburg joined Justice Stevens with respect to Part IV. Justices Kennedy, Thomas, and Ginsburg also joined Justice Stevens' opinion in Part VI. Separate concurring opinions were entered by Justice Scalia and Justice Thomas. Justice O'Connor, joined by the Chief Justice and Justices Souter and Breyer, delivered a fourth concurring opinion. In all, four separate opinions were delivered, none of which commanded a majority of the Court. *Id.* at 1498–1500.
\end{itemize}
State's argument that the Twenty-First Amendment\textsuperscript{120} granted the state legislature the regulatory authority to prohibit commerce in, or the use of, alcoholic beverages.\textsuperscript{121} Justice Stevens unequivocally stated that the Twenty-First Amendment could not rescue Rhode Island's price ban because that provision does not abridge or override other amendments to the Constitution, namely the First Amendment.\textsuperscript{122} In other words, although states are given general authority to regulate liquor within their jurisdiction, they are not exempt from complying with other provisions of the Constitution.\textsuperscript{123}

In addition, Justice Stevens noted in Part V of the opinion that "special care" is required when states institute blanket bans on advertising.\textsuperscript{124} Citing \textit{Edenfield v. Fane},\textsuperscript{125} the Court stated:

>The commercial market-place, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.\textsuperscript{126}

In assessing the proper standard of review Justice Stevens, joined by Justices Kennedy and Ginsburg, recognized that not all forms of commercial speech are afforded "standard" First Amendment protection.\textsuperscript{127} State regulations, which seek to protect consumers from fraudulent, misleading, or deceptive information, are consistent with constitutional protections and are subject to a lesser standard of review.\textsuperscript{128} However, when a state imposes a restriction that entirely prohibits the dissemination of truthful, legal, and nonmisleading information, there is little reason for departing from the rigid standards of First Amendment

\textsuperscript{120.} U.S. CONST. amend. XXI, § 2.
\textsuperscript{121.} 44 Liquormart, 116 S. Ct. at 1514 (Stevens, J., plurality opinion).
\textsuperscript{122.} Id. at 1501.
\textsuperscript{123.} Id. at 1514 ("[T]he Amendment does not license the States to ignore their obligations under other provisions of the Constitution.") (quoting Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712 (1984)).
\textsuperscript{124.} Id. at 1508.
\textsuperscript{125.} 507 U.S. 761 (1993).
\textsuperscript{126.} 44 Liquormart, 116 S. Ct. at 1508 (Stevens, J., plurality opinion) (citing \textit{Edenfield}, 507 U.S. at 767).
\textsuperscript{127.} Id. at 1506.
\textsuperscript{128.} Id. at 1507.
In the instant case, Rhode Island's blanket ban on the price advertising of liquor was subject to heightened scrutiny.

Rhode Island's ban failed for two primary reasons. First, the advertising ban did not directly advance the State's interest in promoting temperance. Second, Rhode Island's ban failed the fourth prong of the *Central Hudson* test because it was more restrictive than necessary to accomplish the State's goal of tempering alcohol consumption. Both Justice O'Connor's and Justice Stevens' plurality suggested a number of less restrictive alternatives to promoting the State's interest. The O'Connor plurality argued that the fit between Rhode Island's method of employing a blanket ban on price advertising and its goal of tempering alcohol consumption was not reasonable. By employing any one of the numerous alternatives previously suggested, Justice O'Connor argued the State could more effectively achieve its goal without compromising First Amendment rights.

C. The Current Hurdles of Constitutional Review

In many respects, *44 Liquormart* undermined the *Central Hudson* test. While *Central Hudson* still exists in theory, the Court's current interpretation of the test is now very narrowly defined. Before a court can begin applying the test, it must determine whether the speech is actually "commercial" and the appropriate standard of review. If the court

129. *Id.*
130. *Id.* at 1508.
131. *Id.* at 1509. A commercial speech regulation will not be upheld if it provides only ineffective or remote support for the government's purpose. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980). The state bears the burden of showing that the regulation will advance its interest to a "material degree." *Edenfield*, 507 U.S. at 770–71. Rhode Island failed to meet its burden of showing that a blanket price advertising ban on liquor would "materially" reduce alcohol consumption among its citizens. *44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994). The district court found there was a "pronounced lack of unanimity among researchers who have studied the impact of advertising on the level of consumption of alcoholic beverages." *44 Liquormart*, 116 S. Ct. at 1503 (Stevens, J., plurality opinion). The court relied on a 1985 Federal Trade Commission study showing that there was no evidence of a connection between liquor advertising and alcohol abuse. *Id.*

132. *44 Liquormart*, 116 S. Ct. at 1510 (Stevens, J., plurality opinion).
133. *Id.* (suggesting that maintenance of higher prices through increased taxation or government regulation, rationing of per capita purchases, or implementation of educational campaigns are all aimed at reducing drinking problems); see also *Id.* at 1522 (O'Connor, J., plurality opinion) (same).
135. *Id.* at 1522.
136. See Wilson, supra note 12, at S-14.
137. *44 Liquormart*, 116 S. Ct. at 1507 (Stevens, J., plurality opinion); see infra Parts
categorizes the expression as truthful, nonmisleading commercial speech, then the government faces a substantial burden in justifying the regulation.\textsuperscript{138}

1. Assessing Whether Speech Is Truly "Commercial"

In determining the proper standard of review, the Court unanimously agreed that not all commercial speech is subject to the same level of constitutional review merely because the speech is categorized as "commercial."\textsuperscript{139} The courts face an arduous task in determining whether the speech is commercial in nature.\textsuperscript{140}

In \textit{Rubin v. Coors Brewing Co.},\textsuperscript{141} although both parties conceded that the alcohol content on beer labels constituted commercial speech,\textsuperscript{142} Justice Stevens stated that the "borders of the commercial speech category are not nearly as clear as the Court has assumed . . . ."\textsuperscript{143} Justice Stevens further noted:

> The case before us aptly demonstrates the artificiality of a rigid commercial/noncommercial distinction. The speech at issue here is an unadorned, accurate statement, on the label of a bottle of beer, of the alcohol content of the beverage contained therein. This, the majority finds is "commercial speech." The majority does not explain why the words "4.73% alcohol by volume" are commercial . . . . It thus appears, from the facts of this case, that whether or not speech is "commercial" has no necessary relationship to its content.\textsuperscript{144}

The Stevens plurality noted that Rhode Island erred in assuming that if a particular form of speech suggests a commercial transaction, it should be labeled "commercial" and thus subject to a lesser standard of review.\textsuperscript{145} The appropriate distinction is between speech that seeks to disseminate truthful, nonmisleading information versus those deceptive advertisements

\footnotesize

\textsuperscript{138} 44 Liquormart, 116 S. Ct. at 1507 (Stevens, J., plurality opinion).
\textsuperscript{139} \textit{Id.}
\textsuperscript{140} See \textit{Rubin v. Coors Brewing Co.}, 514 U.S. 476, 491 (1995) (Stevens, J., concurring) (stating that applying the \textit{Central Hudson} test is not sufficiently related to the Court's reasons for heightened regulation of commercial speech).
\textsuperscript{141} 514 U.S. 476 (1995).
\textsuperscript{142} \textit{Id.} at 481.
\textsuperscript{143} \textit{Id.} at 493.
\textsuperscript{144} \textit{Id.} at 494 (citation omitted).
\textsuperscript{145} 44 Liquormart, 116 S. Ct. at 1507 (Stevens, J., plurality opinion). \textit{See generally supra Part II.A.}
that induce consumer purchases. Courts analyze these two categories of "commercial speech" under very different levels of constitutional review.

2. Standard of Review

Government regulations that seek to impose blanket bans on speech, such as Rhode Island's price advertising ban, are subject to the highest level of judicial scrutiny. In these cases, the Court draws a distinction between three categories of speech: (1) complete bans; (2) "content-neutral restrictions" on the time, place or manner of commercial expression; and (3) those advertisements that are misleading or deceptive.

The category of commercial speech that is granted the lowest level of constitutional protection is speech that aggressively targets consumers and induces them to purchase products through misleading or deceptive information. According to Justice Stevens, governmental regulation of this type of speech is generally justified. The intent of the regulation is to protect consumers from misleading or erroneous information. The purpose of regulating misinformation is consistent with the goals of the First Amendment. Because commercial speech is subject to a lower standard of review, such restrictions are usually upheld.

Justice Stevens suggested that the second category of advertisements, those that are "content-neutral," is subject to a lesser standard of review. Content-neutral restrictions control only the time, place, or manner for disseminating advertisements, unlike those regulations that govern the substance of what may be printed or broadcast. Such restrictions do not

146. 44 Liquormart, 116 S. Ct. at 1507 (Stevens, J., plurality opinion).
147. Id.
148. Id.
149. See discussion infra Part V.C.
150. 44 Liquormart, 116 S. Ct. at 1507 (Stevens, J., plurality opinion).
151. Id.
152. Id. ("When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.").
153. Id.
154. See id. "[C]omplete speech bans, unlike content-neutral restrictions on the time, place, or manner of expression are particularly dangerous because they all but foreclose alternative means of disseminating certain information." Id. (citation omitted).
155. For example, a regulation may restrict billboard advertisement of alcoholic products near schools, parks, or sporting events where children will frequently encounter the advertisements. Rather than restricting what liquor companies may print, the government restricts where such printing appears. Likewise, content-neutral restrictions may not completely
pose the same First Amendment concerns because they allow alternative methods for disseminating the information.\textsuperscript{156}

Assessing whether an advertising restriction is "content-based" or "content-neutral" is not a particularly clear-cut distinction.\textsuperscript{157} However, this distinction is necessary to assess the level of review applicable to restrictions on billboard advertising\textsuperscript{158} or prohibitions on vice product advertising near school zones.\textsuperscript{159} In other words, companies wishing to advertise "vice products" in selected areas of a city will likely fail constitutional challenges to state prohibitions on billboard advertising of their products. The Court suggests that these restrictions will not be subject to the same level of heightened scrutiny as blanket bans on advertising of "vice products," and may likely pass constitutional muster.\textsuperscript{160}

The third category deals with truthful and nonmisleading commercial speech, which receives the greatest level of protection.\textsuperscript{161} Justice Stevens explicitly stated that where the government seeks to keep the public uninformed for what it perceives as being for the public good, the courts must be extremely skeptical.\textsuperscript{162}

The price advertising ban in \textit{44 Liquormart} was unquestionably a blanket restriction on the advertising of truthful, nonmisleading speech about a legal product.\textsuperscript{163} Further, the end sought by the regulation, specifically consumer protection, does not sufficiently relate to the ban.\textsuperscript{164} Therefore, 44 Liquormart's advertisements fall into the third category and must be reviewed under a "special care" analysis.\textsuperscript{165}

---

\textsuperscript{156} 44 \textit{Liquormart}, 116 S. Ct. at 1507 (Stevens, J., plurality opinion).

\textsuperscript{157} See \textit{Linmark Assocs. v. Willingboro}, 431 U.S. 85 (1977) (holding that state action restricting "For Sale" signs constituted a content-based ban and therefore failed to provide a satisfactory alternative form of communication).


\textsuperscript{160} 44 \textit{Liquormart}, 116 S. Ct. at 1507 (Stevens, J., plurality opinion).

\textsuperscript{161} \textit{Id.} at 1507–08.

\textsuperscript{162} \textit{Id.} at 1508. "[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." \textit{Id.} at 1507.

\textsuperscript{163} \textit{Id.} at 1508.

\textsuperscript{164} \textit{Id.}

\textsuperscript{165} \textit{Id.}
3. **Central Hudson: A Test Redefined**

Although the Court unanimously agreed that Rhode Island’s price advertising ban was unconstitutional, the Court split in applying the *Central Hudson* test. While the Court remains divided over the level of protection for commercial speech, the differences are less pronounced than in the past.\(^{166}\)

**a. The Stevens Plurality**

Justice Stevens remained consistent with his prior opinions in holding that truthful, nonmisleading commercial speech should receive full protection under the First Amendment.\(^{167}\) Joined by Justices Kennedy, Souter, and Ginsburg, Justice Stevens advocated a heightened standard of review under *Central Hudson*.\(^{168}\)

The opinion described three categories of commercial speech, as previously discussed, and their respective levels of judicial scrutiny.\(^{169}\) Justice Stevens concluded that bans on truthful or nonmisleading speech rarely protect the public. Rather, such restrictions impermissibly deny consumers access to truthful information when the government perceives it is for the public good.\(^{170}\) The Stevens plurality believed that the Rhode Island price advertising ban was an example of offensive paternalism and thus subject to “special care” or strict scrutiny.\(^{171}\) However, the level of judicial scrutiny Stevens proposed may, in fact, have been even greater than strict scrutiny.\(^{172}\) The Court noted that such blanket bans on speech rarely passed constitutional muster.\(^{173}\)

---

166. Kent, supra note 5, at 3.
167. See, e.g., Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) (holding that city’s categorical ban on the distribution of handbills via news racks was inconsistent with First Amendment principles, Justice Stevens warned against devaluing commercial speech and thus cabining advertising into a separate and distinct category of speech); Rubin v. Coors Brewing Co., 514 U.S. 476, 491 (1995) (Stevens, J., concurring) (concurring in the Court’s holding that the labeling ban violated the First Amendment but urging a lower standard of First Amendment protection only for “transaction-driven speech” which generally does not incite public debate).
168. *44 Liquormart*, 116 S. Ct. at 1508–09 (Stevens, J., plurality opinion).
169. See discussion supra Part IV.C.2. The three categories include deceptive or fraudulent speech, “content-neutral” restrictions, and truthful or nonmisleading speech. *44 Liquormart*, 116 S. Ct. at 1507–08 (Stevens, J., plurality opinion).
170. *44 Liquormart*, 116 S. Ct. at 1508 (Stevens, J., plurality opinion).
171. Id.
172. See discussion infra Part IV.C.3.e.
173. *44 Liquormart*, 116 S. Ct. at 1508 (Stevens, J., plurality opinion); see id. at 1522 (O’Connor, J., plurality opinion) ("[W]e must review the price advertising ban with ‘special care,’ mindful that speech prohibitions of this type rarely survive constitutional review.") (citations omitted).
The Stevens plurality also concluded that Rhode Island’s price advertising ban failed the third and fourth prong of the *Central Hudson* test.\(^{174}\) Under the third prong, the State bears the burden of demonstrating that the proposed regulation advances its interest to a “material degree.”\(^ {175}\) Based on the absence of any evidentiary support or factual findings, the Court concluded that the State failed to satisfy its burden.\(^ {176}\)

The statute also failed *Central Hudson’s* fourth prong. The Stevens and O’Connor pluralities both acknowledged numerous alternatives proposed by 44 Liquormart to a complete ban on truthful, nonmisleading information including: (1) the maintenance of higher prices through direct regulation or increased taxation; (2) limitations on per capita purchases; or (3) educational campaigns focused on the dangers of excessive drinking.\(^ {177}\) Each of these alternatives provided a less restrictive means than a blanket ban on price advertising. Even under a less stringent standard of review, Rhode Island’s statute could not meet constitutional standards.\(^ {178}\)

By applying the *Central Hudson* test under heightened judicial review, the fourth prong essentially swallows the test. Virtually every proposed alternative is available to state legislatures and is less restrictive than banning the product’s advertisement.\(^ {179}\) The consequence of *Central Hudson’s* fourth prong, if narrowly construed, is that there are no circumstances under which the price advertising ban could be upheld. As noted in Justice Thomas’ concurrence, no speech regulation could possibly survive Stevens’ application of the fourth prong.\(^ {180}\) Because direct regulation of the activity itself will always prove to be a less restrictive means, regulation of speech regarding the activity will always be more extensive than necessary.\(^ {181}\)

---

174. Id. at 1508–10.
175. Id. at 1508.
176. Id.
177. Id. at 1510 (Stevens, J., plurality opinion); see also id. at 1522 (O’Connor, J., plurality opinion).
178. Id.
179. See 44 Liquormart, 116 S. Ct. at 1519 (Thomas, J., concurring). State legislatures have various options available, including the ability to heavily tax or regulate alcohol, or the ability to prohibit it altogether. Each of these alternatives are preferable to the regulation of speech surrounding the product. Therefore, any attempts to directly regulate or prohibit distribution of alcohol will always be viewed as “less restrictive” alternatives to a price advertising ban. There are no circumstances in which such a ban could survive *Central Hudson’s* fourth prong. Id.
180. Id.; see discussion infra Part IV.C.3.c and accompanying notes.
181. 44 Liquormart, 116 S. Ct. at 1519 (Thomas, J., concurring). Justice Thomas stated, in pertinent part:

The opinions would appear to commit the courts to striking down restrictions on speech whenever a direct regulation (i.e., a regulation involving no restriction on
The Stevens plurality therefore suggests that, although *Central Hudson* survives in theory, any state regulation of truthful or nondeceptive information will undoubtedly fail the fourth prong. The opinion reflects Justice Stevens' dissatisfaction with the historic treatment of commercial speech under the First Amendment. *44 Liquormart* marks the end of the Court's treatment of commercial speech as a category less worthy of constitutional protection than noncommercial speech.

The Stevens plurality essentially obliterates the distinction between commercial speech (where that speech is truthful and not misleading) and noncommercial speech, applying strict scrutiny to both categories. A significant query, therefore, is whether any restriction can survive the fourth prong. Presumably, under the Stevens' approach, there will always be a less restrictive alternative, even if it requires banning the product or activity altogether. As Part VI will address, Justice Stevens may actually be affording greater protection to commercial speech than noncommercial speech.

b. The O'Connor Plurality

Chief Justice Rehnquist and Justices Souter and Breyer have joined Justice O'Connor in routinely applying the *Central Hudson* test. The plurality, adopting Justice Stevens' reasoning, concluded that Rhode Island's statute failed *Central Hudson's* fourth prong:

The fit between Rhode Island's method and this particular goal is not reasonable. If the target is simply higher prices generally

---

speech regarding lawful activity at all) would be an equally effective method of dampening demand by legal users. But it would seem that directly banning a product (or rationing it, taxing it, controlling its price, or otherwise restricting its sale in specific ways) 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.

Id.

182. Id. at 1508 (Stevens, J., plurality opinion).


185. *44 Liquormart*, 116 S. Ct. at 1520–21 (O'Connor, J., plurality opinion). It is noteworthy that, historically, Chief Justice Rehnquist has been the principal supporter of governmental restrictions on commercial speech. Many commentators have said that "Justice Rehnquist had never yet seen a restriction on commercial speech that he did not like." Kent, *supra* note 5, at 3. The Chief Justice wrote the opinion of the Court in *Posadas*, an opinion he now denounces. Id.
to discourage consumption, the regulation imposes too great, and unnecessary, a prohibition on speech in order to achieve it. The State has other methods at its disposal—methods that would more directly accomplish this stated goal without intruding on sellers’ ability to provide truthful, nonmisleading information to customers . . . . A tax, for example, is not normally very difficult to administer and would have a far more certain and direct effect on prices, without any restriction on speech.\textsuperscript{186}

The principal difference between the O'Connor and the Stevens approach is the standard of review they choose to apply. Justice O'Connor rejects Stevens’ “special care” standard of scrutiny.\textsuperscript{187} Because the Rhode Island statute could not withstand the less stringent level of review under a normal \textit{Central Hudson} analysis, Justice O’Connor saw no need to adopt a higher standard of review.\textsuperscript{188}

While the Court unanimously arrives at the same conclusion, the O’Connor plurality does so on much narrower grounds.\textsuperscript{189} Because the State failed to establish a reasonable fit between the price advertising ban and its asserted interest in temperance, Justice O’Connor did not find it necessary to consider overruling \textit{Central Hudson}.\textsuperscript{190}

c. Justice Thomas Rejects \textit{Central Hudson}

Justice Thomas emerges as the champion supporter of affording full First Amendment protection to commercial speech.\textsuperscript{191} He denounces the Stevens approach of categorizing speech in order to determine the proper level of review.\textsuperscript{192} Thomas stated, “I do not see a philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial’ speech. Indeed, some historical materials suggest to

\textsuperscript{186} 44 \textit{Liquormart}, 116 S. Ct. at 1521–22 (O’Connor, J., plurality opinion).
\textsuperscript{187} Id. at 1522.
\textsuperscript{188} Id.
\textsuperscript{189} Id. at 1523. Chief Justice Rehnquist, as well as Justices Souter and Breyer, joined Justice O’Connor in this opinion. Id. at 1520.
\textsuperscript{190} Id. at 1522.
\textsuperscript{191} 44 \textit{Liquormart}, 116 S. Ct. at 1517–18 (Thomas, J., concurring).
\textsuperscript{192} Id. at 1515–16. Justice Thomas stated: In cases such as this, in which the government’s asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in \textit{Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.}, should not be applied, in my view. Rather, such an “interest” is \textit{per se} illegitimate and can no more justify regulation of “commercial” speech than it can justify regulation of “noncommercial” speech.
Id. (citation omitted).
the contrary." Justice Thomas concludes it was an error to apply any form of the Central Hudson test. Where the state imposes blanket bans on truthful and nonmisleading advertising, the restriction must be immediately denounced as per se unconstitutional. He illustrated the flaw in Stevens' reasoning by stating the following:

Application of the advancement-of-state-interest prong of Central Hudson makes little sense to me in such circumstances. Faulting the State for failing to show that its price advertising ban decreases alcohol consumption "significantly," as Justice Stevens does, seems to imply that if the State had been more successful at keeping consumers ignorant and thereby decreasing their consumption, then the restriction might have been upheld.

Justice Thomas further criticizes Stevens' approach by noting that in every instance where the state seeks to temper undesirable behavior, there is always a "least restrictive means." The state may opt to heavily tax, ration the distribution, or otherwise restrict access to vice products. The Stevens opinion held that such methods provide a less restrictive alternative to banning commercial advertisements. The result is that "virtually all restrictions with such a purpose would fail the fourth prong of the Central Hudson test." Although Justice Thomas agreed with Justice Stevens' conclusion, he argued that they employed flawed reasoning in invalidating the statute. Rather than applying Central Hudson's fourth prong, the Court should merely invalidate "all attempts to dissuade legal choices by citizens by keeping them ignorant . . . ."

d. Justice Scalia Stands Alone

Justice Scalia concurs only in the judgment, denying a majority to either the Stevens or O'Connor pluralities. Justice Scalia shares Justice Thomas' discomfort with the application of Central Hudson. He further shares Justice Stevens "aversion towards paternalistic governmental
policies that prevent men and women from hearing facts that might not be good for them.” Justice Scalia asserts, however, that the Court took an equally paternalistic position in preventing a democratic society from enacting laws that the Court itself deems paternalistic. He argues that the Court should be guided by the practices of the American people and focus on state legislative policies toward commercial speech at the time the First Amendment was adopted. Because such determinations could not be made based on the facts before the Court, Justice Scalia was compelled to follow existing jurisprudence, and thus applied the Central Hudson test.

e. Analysis

The spectrum of opinions announced in 44 Liquormart ranges from Justice O’Connor’s reaffirmation of Central Hudson to Justice Thomas’ unequivocal rejection of the test. While all the justices arrive at the same conclusion, they do so under four separate approaches.

Justice Thomas, while arguably the most extreme, sets the best precedent for future commercial speech cases. By expressly rejecting Central Hudson and eliminating the arbitrary line between commercial and noncommercial speech, Justice Thomas attempts to broaden First Amendment protection of commercial speech.

The First Amendment, on its face, does not delineate between types of speech, nor does it consider whether one category deserves higher protection than another. Indeed, all speech is equally worthy of constitutional protection. The answer must be in advocating more speech, not in enforcing silence. By analyzing commercial speech under strict scrutiny, the doctrine applicable to noncommercial speech, consumers will still be amply protected. Strict scrutiny analysis does not per se invalidate every restriction on speech; rather, it merely applies a heightened level of review.

203. Id.
204. Id.
205. Id.
206. Id.
207. See supra note 119 for a listing of the various opinions.
209. 44 Liquormart, 116 S. Ct. at 1505 (Stevens, J., plurality opinion).
Central Hudson is essentially nothing more than a case-by-case balancing test. As a threshold matter, this approach mandates a delineation between categories of speech. Under the commercial speech doctrine, whether or not speech is worthy of protection depends upon what the speech advocates or proposes. Justice Thomas stated, as this author agrees, that such a delineation between categories of speech is unwarranted. The principles underlying speech should not determine whether or not that speech merits greater constitutional protections.

As this Note concludes in Part VI, all speech is in some sense commercial.\(^2\) The speaker, in most situations, expects or encourages the audience to "buy" a particular viewpoint. The existence of a commercial context should not change the standard of review. All speech is equally worthy of protection under the First Amendment regardless of what it may be promoting, whether a controversial political viewpoint, an unpopular set of beliefs, or a commercial transaction.

V. THE IMPACT OF 44 Liquormart

44 Liquormart has received a mixed reception in the legal community. As some scholars predicted, the Supreme Court's ruling has thus far had little impact on subsequent cases restricting the time, place, or manner in which vice products, such as alcohol or tobacco, can be advertised.\(^2\) Those cases have limited the Court's holding to blanket bans and complete prohibitions against advertising.\(^2\) Therefore, 44 Liquormart has not impacted state statutes that narrowly tailor their restrictions to the time, place, or manner of advertising.\(^2\)

210. See infra Part VI.

211. See discussion infra Part V.C; see also Stewart, supra note 184, at 44.

212. For example, on two occasions, the Baltimore City Council successfully argued that a distinction should be made between blanket bans on advertising and "content-neutral bans" on the time, place, and manner of such restrictions. See Anheuser-Busch, Inc. v. Schmoke, 101 F.3d 325 (4th Cir. 1996) (holding that city ordinance prohibiting placement of stationary outdoor advertising that advertised alcoholic beverages in areas where it was likely to be encountered by minors merely restricted time, place and manner of such advertisements and did not violate First Amendment's commercial speech guarantees), cert. denied, 117 S. Ct. 1569 (1997); Penn Adver., Inc. v. Mayor of Baltimore, 63 F.3d 1318 (4th Cir. 1995) (holding that city statute banning tobacco advertising on billboards did not violate the First Amendment), vacated sub nom. Penn Adver., Inc. v. Schmoke, 116 S. Ct. 2575 (1996), on remand sub nom. Penn Adver., Inc. v. Mayor of Baltimore, 101 F.3d 332, 333 (4th Cir. 1996) ("We have read the opinion in 44 Liquormart and have considered its impact on the judgment in this case [63 F.3d 1318]. . . . [W]e conclude that 44 Liquormart does not require us to change our decision. . . ."), cert. denied sub nom. Penn Adver., Inc. v. Schmoke, 117 S. Ct. 1569 (1997).

213. See cases cited supra note 212.
In contrast, other scholars argue that *44 Liquormart* essentially affords a greater degree of protection to commercial advertising than to noncommercial speech.\(^{214}\) This section analyzes the specific impact of the case by addressing: (1) the overruling of *Posadas*; (2) the impact of the Supreme Court’s holding on the *Central Hudson* test; and (3) the results of those cases that were remanded in light of *44 Liquormart*.

A. Posadas Overruled

*44 Liquormart* essentially overruled *Posadas*.\(^{215}\) *Posadas* was widely criticized from the beginning. As one scholar noted, “*Posadas* ... 'Twas Strange, 'Twas Passing Strange, 'Twas Pitiful, 'Twas Wondrous Pitiful.’”\(^{216}\) *Posadas* held that, under *Central Hudson*, it was within the legislature’s power to determine the best manner to support the State’s interest; Rhode Island utilizes this reasoning to uphold its own price advertising ban.\(^{217}\)

Justice Stevens concluded that *Posadas* “erroneously performed the First Amendment analysis.”\(^{218}\) The effect of *Posadas* was to keep truthful, nonmisleading information from the public for the purpose of controlling behavior. Puerto Rico’s anti-gambling policy was therefore immune “from the public scrutiny that more direct, nonspeech regulation would draw.”\(^{219}\) Justice Stevens then concluded:

Given our longstanding hostility to commercial speech regulation of this type, *Posadas* clearly erred in concluding that it was “up to the legislature” to choose suppression over a less speech-restrictive policy. The *Posadas* majority’s conclusion on that point cannot be reconciled with the unbroken line of prior cases striking down similarly broad regulations on truthful, nonmisleading advertising when non-speech-related alternatives were available.\(^{220}\)


\(^{215}\) *44 Liquormart*, 116 S. Ct. at 1511 (Stevens, J., plurality opinion).

\(^{216}\) Philip B. Kurland, *Posadas de Puerto Rico v. Tourism Company: 'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful,'* 1986 SUP. CT. REV. 1, 12-15.

\(^{217}\) *44 Liquormart*, 116 S. Ct. at 1511 (Stevens, J., plurality opinion).

\(^{218}\) *Id.*

\(^{219}\) *Id.* (citing Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 351 (1986) (Brennan, J., dissenting)).

\(^{220}\) *Id.*
The Court thus rejected the majority's conclusion in *Posadas*. A state legislature no longer has broad power to suppress truthful, nonmisleading information that it perceives as being against the public good.\(^221\)

*Posadas* has since been denounced as a "gross perversion[... of First Amendment law]."\(^222\) In its ten-year legacy, however, *Posadas* successfully justified numerous government regulations on commercial speech.\(^223\) The opinion granted enormous deference to state legislatures, permitting them to employ any "reasonable" means to achieve their asserted end.\(^224\) Unfortunately, such deference infringed upon the First Amendment. The Court ultimately concludes that the *Posadas* legacy has ended.\(^225\) As Justice Thomas noted in his concurrence, commercial speech should not be "less of a constitutional moment" than noncommercial speech.\(^226\)

**B. The Current Status of Central Hudson**

As discussed in Part IV, while the Court does not uniformly apply the *Central Hudson* test, all justices agree that commercial speech must be afforded greater protection.\(^227\) Although the *Central Hudson* test survives in theory, it allows very few restrictions to survive, particularly those pertaining to wide bans on speech.\(^228\)

Justice Thomas emerged as the primary supporter of abandoning the test.\(^229\) Given an appropriate case, Justice Scalia indicated he is likely to follow Justice Thomas' lead in the future.\(^230\) The O'Connor plurality did not reach the issue of whether the test should be abandoned only because the Rhode Island statute was blatantly unconstitutional.\(^231\) Finally, as previously discussed, Justice Stevens' strict application of the fourth prong essentially subsumed the *Central Hudson* test.\(^232\)

\(^{221}\). *Id.*
\(^{224}\). See *Posadas de Puerto Rico Assocs.*, 478 U.S. at 328.
\(^{225}\). See generally *44 Liquormart*, 116 S. Ct. at 1510–14 (Stevens, J., plurality opinion).
\(^{226}\). *44 Liquormart*, 116 S. Ct. at 1517–18 (Thomas, J., concurring).
\(^{227}\). See generally *id.* at 1498–1500 (Stevens, J., plurality opinion).
\(^{228}\). See discussion *supra* Part IV.C.3.a–d.
\(^{229}\). *44 Liquormart*, 116 S. Ct. at 1515–16 (Thomas, J., concurring).
\(^{230}\). *Id.* at 1515 (Scalia, J., concurring).
\(^{231}\). *Id.* at 1522 (O'Connor, J., plurality opinion).
\(^{232}\). See discussion *supra* Part IV.C.3.a.
C. The Lasting Effects of 44 Liquormart

The effects of 44 Liquormart are reverberating throughout the nation. Although protection of commercial speech has been strengthened, the implications are unknown. In fact, those cases remanded in light of 44 Liquormart have not been forced to address the constitutional validity of commercial speech.233 In particular, Anheuser-Busch, Inc. v. Mayor of Baltimore234 was remanded within days of the Supreme Court’s decision in 44 Liquormart. This section analyzes Anheuser-Busch and assesses the impact 44 Liquormart is likely to have on future commercial speech cases.

1. Anheuser-Busch, Inc. v. Mayor of Baltimore235

In 1994, Anheuser-Busch challenged the validity of a Maryland statute authorizing the Mayor of Baltimore to implement an ordinance banning billboard advertising of alcoholic beverages.236 The district court applied the Central Hudson test and found that the City was justified in restricting the advertising.237 The decision was affirmed by the Fourth Circuit Court of Appeals.238 The Fourth Circuit’s decision, however, was vacated and remanded for further review in light of the Supreme Court’s holding in 44 Liquormart.239 The Fourth Circuit ultimately held that, consistent with 44 Liquormart, the City’s ban on advertising did not violate the First Amendment.240

235. Id.
236. MD. ANN. CODE art. 2B, § 21-105(c)(1) (1996):
The Mayor and City Council of Baltimore may adopt an ordinance restricting the placement of signs, posters, placards, devices, graphic displays, or any other forms of advertising or on the sides of the building of the licensed premises that advertise alcoholic beverages in publicly visible locations if:
   (i)The ordinance is necessary for the promotion of the welfare and temperance of minors exposed to advertisements for alcoholic beverages placed in publicly visible locations; and
   (ii)The restrictions do not unduly burden legitimate business activities of persons licensed under this article to sell alcoholic beverages on a retail basis.
The district court in *Anheuser-Busch* distinguished the case from *44 Liquormart*, and a similar holding in *Adolph Coors Co. v. Bentsen*,\(^\text{241}\) explaining that the link between alcohol consumption and price advertising bans or content labeling is far more tenuous than the link between consumption and consumer advertising.\(^\text{242}\) The court stated that while commercial advertising may induce some consumers to drink who otherwise would not, it is doubtful that blanket bans on price advertising would serve the same function.\(^\text{243}\)

Neither the ordinance challenged in *Anheuser-Busch* nor the ordinance challenged in *Adolph Coors Co.* involved a blanket restriction on advertising. Therefore, *44 Liquormart* does not explicitly extend far enough to save either challenge. While both would likely survive the first three prongs of *Central Hudson*, presumably each ordinance would not survive the fourth prong. Applying the reasoning in *44 Liquormart*, a state could be equally effective in reducing alcohol consumption through increased taxation, per capita limitations on distribution, or educational campaigns addressing the dangers of using alcohol.\(^\text{244}\) Applying the reasoning of the Stevens plurality, the bans on billboard advertising in *Anheuser-Busch* involve "content-neutral" restrictions and are subject to a lesser standard of review. However, given the Court’s current application of *Central Hudson*’s fourth prong, it is unlikely that a content-based ordinance would survive *any* level of judicial scrutiny.

2. The Next Step

The status of commercial speech is far from resolved in the wake of *44 Liquormart*. Although all the Justices agree that price advertising bans are unconstitutional, the level of judicial scrutiny afforded to commercial advertising remains unclear. Given the Court’s current construction, the *Central Hudson* test is ripe for rejection.

Justice Thomas is likely the principal supporter of an outright rejection of the test.\(^\text{245}\) He unequivocally indicated his distrust of legislative attempts to suppress truthful information from consumers under the guise of acting in the public’s "interest."\(^\text{246}\) Given this

\(^{241}\) 2 F.3d 355 (10th Cir. 1993) (holding that a regulation prohibiting the alcohol content on malt beverages violated First Amendment protections).

\(^{242}\) *Anheuser-Busch, Inc.*, 855 F. Supp. at 817.

\(^{243}\) *Id.*

\(^{244}\) *44 Liquormart*, 116 S. Ct. at 1510 (Stevens, J., plurality opinion).

\(^{245}\) *Id.* at 1515–16 (Thomas, J., concurring).

\(^{246}\) *Id.*
uncompromising position, there is little doubt how Justice Thomas will hold in future commercial speech cases.

Similarly, Justice Scalia expressed discomfort with the Central Hudson test.247 Ultimately, Scalia was guided by precedent, stating that the Court did not currently have the "wherewithal to declare Central Hudson wrong—or at least the wherewithal to say what ought to replace it . . . ."248 Absent an ideological belief that Central Hudson should survive as the principal test for commercial speech, Justice Scalia will likely reject the test in the future.

Additionally, it is likely that Justice Stevens, supported by Justices Kennedy and Ginsburg, will follow Justice Thomas' lead. The Stevens' plurality rejected the methodical application of Central Hudson, opting instead to apply the standards of strict scrutiny.249 Because the plurality expressed their discomfort with the test, they restructured the fourth prong so that it would essentially strike down any commercial advertising restriction, should Central Hudson survive.250

Those most likely to entrench the existing test are Justices O'Connor, Souter, and Breyer and Chief Justice Rehnquist. Following the established precedent, the O'Connor plurality methodically applied Central Hudson.251 Although this plurality proposed a number of less restrictive alternatives likely to invalidate any blanket ban on advertising, they nonetheless followed the existing structure of the test.252

VI. CONCLUSION

Henry Cohen wrote a persuasive editorial in response to 44 Liquormart addressing the issue of whether truthful tobacco advertising, which passes strict scrutiny, could survive Central Hudson.253 In light of a recent United States Court of Appeals decision that held protecting teenagers from indecency (including "four-letter words") was a "compelling interest,"254 Mr. Cohen argued that protecting them from cancer was certainly equally compelling, if not more so.255 The editorial

247. 44 Liquormart, 116 S. Ct. at 1515 (Scalia, J., concurring); see discussion supra Part IV.C.3.d and accompanying notes.
248. 44 Liquormart, 116 S. Ct. at 1515 (Scalia, J., concurring).
249. Id. at 1508–09 (Stevens, J., plurality opinion).
250. See discussion supra Part IV.C.3.a.
251. 44 Liquormart, 116 S. Ct. at 1521 (O'Connor, J., plurality opinion).
252. Id. at 1521–22.
ultimately concluded that it is now possible “that a ban on tobacco advertising would be struck down under Central Hudson, but would survive strict scrutiny. In other words, commercial speech may now have more protection than noncommercial speech.” As Justice Thomas held, and as the Cohen editorial implies, Central Hudson’s fourth prong per se invalidates any restriction on commercial speech.

Clearly, this strict application of Central Hudson’s fourth prong commanded a majority of the Court (with all except Justice Thomas concurring). We may therefore assume that in any instance where conduct may be controlled through other means, such as taxation, regulation, or counter-speech, restrictions on advertising will fail. The editorial seems to suggest that such a result is counter-intuitive. Such a result, however, is not necessarily a negative one.

Although the State has a compelling interest in protecting teenagers from cancer, there are more effective means of achieving that interest other than controlling speech. As 44 Liquormart suggests, educational campaigns, counter-advertising, “content-neutral” restrictions, taxation and per capita regulation all provide viable alternatives to advertising bans.

All speech is in some sense commercial. Every dialogue advertises ideas; the speaker is encouraging the listener to adopt (or “buy”) a particular point of view. Simply because the object of the speech is to exchange a product for financial profit, the category is no less worthy of First Amendment protection.

While consumers may be induced to purchase alcohol after learning that the “price is right,” they may be equally discouraged from consuming it upon learning of the dangers inherent in alcohol consumption. The point, however, is that the choice must ultimately be left with the consumer, not the government. Wherever the State can achieve its goal through alternate means, suppressing speech comes at too high a constitutional price.

Marrie K. Stone*

---

256. Id.
257. 44 Liquormart, 116 S. Ct. at 1519 (Thomas, J., concurring).

* This Note is dedicated to my parents, in loving appreciation of their support and encouragement. Special thanks are also extended to the editors and staff of the Loyola of Los Angeles Entertainment Law Journal, particularly Scott McPhee, Daniel Walanka, and Cynthia Martinez, who expended great time and effort on my behalf.