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A Brief History of the Commercial Speech Doctrine (With Some Implications for Tobacco Regulation)

by ASHUTOSH BHAGWAT*

I. Introduction

This essay is based on a paper presented at a symposium of legal and health policy experts gathered together to discuss implementation of the Tobacco Control Act by the Food and Drug Administration (“FDA”). The target audience for this paper was thus substantially composed of non-lawyers. What follows is a brief, idiosyncratic, and highly opinionated summary of the evolution of the Supreme Court’s case law regarding the constitutionality under the First Amendment of regulations of “commercial speech,” tracing developments from the origin of the commercial speech doctrine in 1976 into the modern era. I conclude with some thoughts regarding the implications of this history for efforts (by the FDA in particular) to regulate the advertising, marketing, and promotion of tobacco products. The description that follows should not be taken as an endorsement or as a critique of the Supreme Court’s jurisprudence, but merely as an interpretation of the path taken by the Court. Similarly, the discussion of tobacco regulation that closes this article does not endorse or attack particular regulatory proposals, but merely seeks to predict what the judicial response to such proposals may be. Finally, I exclude from my history the important line of commercial speech cases dealing with regulation of advertising by professionals such as lawyers and accountants, because of the distinct questions raised in that context that have little relevance to tobacco regulation.

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II. *Virginia Pharmacy* and the Definition of 'Commercial Speech'

The Supreme Court defines commercial speech as speech that does "no more than propose a commercial transaction."¹ The Court has made clear that this is an extremely narrow definition. Speech is not commercial speech merely because it is paid for or disseminated with a profit motive—that, after all, would cover the *New York Times*.² For the same reasons, not all advertising or all solicitations of funds constitute commercial speech, as demonstrated by the political advertisement soliciting funds that was at the center of the *New York Times v. Sullivan* case.³ Even a purely factual advertisement for services can fall outside the commercial speech rubric if it contains factual materials of a clear public interest.⁴ Admittedly, the Court has held that an advertisement cannot avoid the commercial speech designation simply by including discussion of, or references to, matters of public concern.⁵ Nonetheless, the narrowness of the definition is critically important, because if speech does *not* fall within the narrow definition of commercial speech (or within some other unprotected category, such as obscenity⁶) it is fully protected, and any attempt to regulate it will be subject to full, searching First Amendment scrutiny.

Even when defined so narrowly, there is no question that commercial speech, or commercial advertising, constitutes *speech*. It is presented in the same formats as other kinds of speech, including highly protected political speech, from which it is indistinguishable, except in terms of content. As such, when a government enacts or enforces rules restricting or banning commercial speech, obvious issues arise under the First Amendment. The Free Speech Clause of the First Amendment states that "Congress shall make no law . . . abridging the freedom of speech," and the Supreme Court has held that the First Amendment, through the Due Process Clause of the Fourteenth Amendment, also restricts the powers of state and local

1. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Hum. Rel. Comm'n*, 413 U.S. 376, 385 (1973); see also *Bigelow v. Va.*, 421 U.S. 809, 822 (1975).

2. *Va. Pharmacy*, 425 U.S. at 761.

3. 376 U.S. 254 (1964).

4. *Bigelow*, 421 U.S. at 822.

5. *Bolger v. Young Drug Products Corp.*, 463 U.S. 60, 67–68 (1983).

6. *Roth v. United States*, 354 U.S. 476 (1957).

governments.⁷ A law restricting or banning particular forms of commercial advertising would seem on its face to “abridge the freedom of speech.” Nevertheless, prior to 1976, the Supreme Court’s view was that commercial speech constituted a completely unprotected category of speech and that states had unlimited discretion to restrict it.⁸

All of this changed in 1976 with the Supreme Court’s decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* (henceforth *Virginia Pharmacy*).⁹ In *Virginia Pharmacy*, the Court unambiguously held that commercial speech did not sit completely outside of First Amendment protection, rejecting earlier decisions holding to the contrary.¹⁰ In reaching this conclusion, the Court emphasized the value of commercial information to both consumers and the functioning of the free market. It also, importantly, introduced a strong anti-paternalistic element into commercial speech law, arguing that the First Amendment required states to trust the ability of consumers to make good use of truthful, non-misleading commercial information.¹¹ By imposing substantial constraints on the power of government to suppress or limit commercial speech, the Court’s emphasis on the social value of commercial advertising and hostility toward paternalistic regulations opened a new era in the constitutional treatment of commercial speech regulations.

This is not to say that the *Virginia Pharmacy* Court treated commercial speech as indistinguishable from or entitled to the same level of protection as, say, political speech. To the contrary, *Virginia Pharmacy* recognizes important limitations to the protection of commercial speech, in effect creating exceptions to the constitutional protection the Court announced. Among the most important of these exceptions are:

7. *Gitlow v. New York*, 268 U.S. 652 (1925).

8. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942); *see also* *Breard v. City of Alexandria*, 341 U.S. 622, 642–43 (1951).

9. 425 U.S. 748 (1976).

10. *Id.* at 761–70.

11. *Id.* at 770 (“There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.”).

1. False or misleading commercial speech receives no constitutional protection;¹²
2. Commercial speech about illegal transactions receives no protection;¹³
3. Advertising through electronic media (meaning, in 1976, broadcast television and radio) *may* receive lower protection;¹⁴
4. Disclosure and warning requirements, as well as regulation of the form of advertising, may be more permissible in the commercial speech arena than elsewhere;¹⁵ and,
5. The prior restraint doctrine may not apply to commercial speech regulations.¹⁶

In combination, these restrictions clearly grant the government far greater discretion to regulate commercial speech than other, fully protected forms of speech such as political speech. At the same time, however, they in no way undermine the basic message of *Virginia Pharmacy* that commercial speech has social value and cannot be fully suppressed merely because of the government's paternalistic concerns that consumers will misuse information.

III. *Central Hudson*, the 1980s, and the 'Vice' Exception

After *Virginia Pharmacy*, the next critical step in the evolution of the Court's commercial speech jurisprudence was its decision in *Central Hudson Gas v. Public Service Commission of New York* in 1980.¹⁷ In *Central Hudson*, the Court announced a four-part test for commercial speech regulations, which it described as follows:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted,

12. *Virginia Pharmacy*, 425 U.S. at 771-72.

13. *Id.* at 772.

14. *Id.* at 773.

15. *Id.* at 772 n.24.

16. *Id.*

17. *Central Hudson Gas. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

and whether it is not more extensive than is necessary to serve that interest.”¹⁸

This test establishes an “intermediate” level of scrutiny for commercial speech regulations, less protective than strict scrutiny, but with some teeth nonetheless. The *Central Hudson* Court employed its new test to strike down a New York rule forbidding utilities from engaging in promotional advertising to encourage electricity consumption.

Despite this protective language, however, *Central Hudson* seemed to back away from some of the premises of *Virginia Pharmacy*, reducing the level of protection accorded to commercial speech. In particular, *Central Hudson* appeared to reject *Virginia Pharmacy*’s strong anti-paternalism principle, because the *Central Hudson* majority accepted the possibility that a properly tailored regulation *could* suppress advertising for the sole purpose of shielding consumers from information as a means of discouraging consumption. Justice Blackmun, the author of *Virginia Pharmacy*, refused to join the majority opinion for precisely this reason.¹⁹

The decision in *Central Hudson* introduced a period of greater toleration for regulations of commercial speech. There were two key developments during this era exemplifying this greater tolerance. One was the Court’s decision in *Board of Trustees of the State University of New York v. Fox*²⁰ (henceforth *SUNY v. Fox*), in which the Court held that the fourth element of the *Central Hudson* test, that a regulation be “not more extensive than is necessary to serve [the government’s] interest,” did not require the government to use the least speech-restrictive means possible; it only required a “reasonable” fit between the regulation and the government’s goals.²¹ The Court also confirmed that the First Amendment overbreadth doctrine did not apply to commercial speech.²² The *SUNY v. Fox* decision thus established (or perhaps confirmed) that the *Central Hudson* test granted governments substantial discretion in regulating commercial speech, so long as they had strong reasons for doing so.

The second key development in the post-*Central Hudson* era was the Court’s decision in *Posadas de Puerto Rico Associates v. Tourism*

18. *Central Hudson Gas*, 447 U.S. at 566.

19. *Id.* at 573–79 (Blackmun, J., concurring in the judgment).

20. 492 U.S. 469 (1989).

21. *Id.* at 480.

22. *Id.* at 481.

Co. of Puerto Rico.²³ In *Posadas*, the Court upheld a ban imposed by the government of Puerto Rico on casino advertising directed at residents of Puerto Rico, despite the fact that casino gambling was legal in Puerto Rico. The Court held that the ban was a reasonable and legitimate means for Puerto Rico to reduce demand for gambling among its citizens—a flat rejection of the anti-paternalism principles announced in *Virginia Pharmacy*.²⁴ In a crucial passage supporting its result, the Court stated that Puerto Rico's ban was justified because "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."²⁵ In combination, these two aspects of the *Posadas* decision appeared not only to spell the end of the anti-paternalism principle, but also to create a "vice" exception to the commercial speech doctrine, under which governments would appear to enjoy essentially unlimited power to ban or restrict advertising for products that are themselves widely subjected to restrictions or bans.

IV. The Revival of the Commercial Speech Doctrine

As a consequence of the *Central Hudson*, *Posadas*, and *SUNY v. Fox* decisions, by the end of the 1980s the commercial speech doctrine appeared to have retreated greatly from the strong promise of the *Virginia Pharmacy* decision. But in the mid-1990s, the Court took a surprising turn, substantially reviving the doctrine, to a point perhaps even beyond the rhetoric of *Virginia Pharmacy*. The first inkling of this development was the Court's 1993 decision in *City of Cincinnati v. Discovery Network*, in which the Court struck down Cincinnati's decision to revoke a company's permit to place news racks on public property (the City revoked the permit because the materials distributed by the company were primarily advertising; news racks distributing newspapers were still permitted).²⁶ The key decision, however, occurred in 1995 in *Rubin v. Coors Brewing Co.*²⁷ Here, the Court *unanimously* struck down a federal statute prohibiting beer companies from displaying alcohol content on beer labels. In applying the *Central Hudson* test, the Court placed the burden of proof on the government and applied the fourth prong of the test in a

23. *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).

24. *Id.* at 341-42.

25. *Id.* at 345-46.

26. *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993).

27. *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

very aggressive fashion, suggesting that the existence of less restrictive alternatives doomed the regulation, all without even mentioning *SUNY v. Fox*.²⁸ Moreover, in a concurring opinion Justice Stevens argued that *Central Hudson* was not applicable to this situation because in this case the government was not trying to protect consumers from false, misleading, or incomplete commercial speech. This concurrence seems to suggest that prohibitions on truthful, non-misleading speech were simply impermissible. The commercial speech doctrine had returned.

In the years since *Rubin*, the Court has issued a series of broad decisions invalidating commercial speech restrictions in a number of areas. Prominent examples include:

1. *44 Liquormart, Inc. v. Rhode Island*,²⁹ in which the Court invalidated a Rhode Island statute banning the advertising of alcoholic beverage prices. Although the Court splintered heavily in this case, producing no majority opinion, all nine justices concurred in the result and all (including Chief Justice Rehnquist, the author of *Posadas*) joined opinions distancing the Court from the reasoning of *Posadas*.
2. *Greater New Orleans Broadcasting Ass'n v. United States*,³⁰ in which the Court struck down a federal law banning advertising by commercial casinos on radio and television broadcast stations, as applied in states where casinos were legal. Again, the Court was unanimous as to the result.
3. *Lorillard Tobacco Co. v. Reilly*,³¹ in which the Court struck down a series of regulations adopted by the State of Massachusetts restricting outdoor advertising of tobacco products (as well as certain point-of-sale advertisements). Massachusetts defended the restrictions as designed to shield children from tobacco advertising, an interest that the Court deemed important, but the Court held that the broad Massachusetts regulations excessively limited the ability of tobacco companies to advertise to adult customers.
4. *Thompson v. Western States Medical Center*,³² in which the Court struck down a federal statute that allowed a pharmacy

28. *Rubin*, 514 U.S. at 490–91.

29. *44 Liquormart v. R.I.*, 517 U.S. 484 (1996).

30. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999).

31. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

32. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002).

to sell “compounded drugs” (drugs mixed-to-order for customers, which have not undergone the standard regulatory approval process) only if the pharmacy did not advertise these products.

Examining these cases as a group, several important lessons emerge. First and foremost, the cases clearly demonstrate that the Court has completely abandoned the *Posadas* “vice” exception; all but one of the cases (*Thompson*) involved “vice” products, but that in no way reduced the Court’s scrutiny. Second, the cases demonstrate an important revival of the anti-paternalism principle. In *44 Liquormart*, several of the Justices joined opinions asserting that when the government regulates commercial speech not to protect consumers from being misled, but rather simply to shield them from truthful, non-misleading information for fear that it would be convincing, full First Amendment scrutiny should apply, rather than the relaxed *Central Hudson* test.³³ And in the *Thompson* case, a majority of the Court explicitly adopted an anti-paternalism rationale (quoting *Virginia Pharmacy*) to reject the government’s argument that a ban on compounded drug advertising was necessary to prevent consumers from demanding such drugs when they are not needed.³⁴ Third, the cases, especially *Thompson*, show that the commercial speech doctrine applies with full force even when the advertised product is subject to expansive direct regulation. Finally, and perhaps most significantly, the cases demonstrate an abandonment of *SUNY v. Fox* and a substantial tightening of the narrow tailoring requirement of *Central Hudson*’s fourth prong. The Court seemed to acknowledge this development in *Greater New Orleans Broadcasting, Lorillard, and Thompson*;³⁵ and in any event the results in these cases speak for themselves. Taken together, these cases herald an extraordinary revival of the commercial speech doctrine, to a point where, at least with respect to truthful, non-misleading advertising, it may be doubted whether such speech truly does receive less constitutional protection than other forms of speech.

33. *44 Liquormart*, 517 U.S. at 501–04 (plurality opinion); *id.* at 517 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 518–27 (Thomas, J., concurring in part and concurring in the judgment).

34. *Thompson*, 535 U.S. at 374–75.

35. *Greater New Orleans Broadcasting Assn.*, 527 U.S. at 184; *Lorillard*, 533 U.S. at 554–55; *Thompson*, 535 U.S. at 368.

The cases also hint at the direction in which the Court's commercial speech jurisprudence may evolve in the coming years. Most significantly, there are serious doubts about the long-term viability of *Central Hudson*, at least as an across-the-board test for commercial speech regulations. As noted above, in *44 Liquormart* a number of justices joined opinions suggesting that government regulation of truthful, non-misleading commercial speech may deserve a higher level of protection, perhaps even full First Amendment protection. This would entail strict scrutiny for content-based restrictions of non-misleading commercial speech, resulting in an upholding of the law only if it is narrowly tailored to advance a compelling governmental interest—a standard that is generally fatal. Of course, the addition of Justices Alito and Sotomayor and Chief Justice Roberts to the Court in recent years adds some uncertainty about where the Court now stands, but in fact the Justices they replaced (Rehnquist, O'Connor, and Souter) were among the strongest adherents to the *Central Hudson* test; if anything, support for the test may be weaker now than in the past and the heightened version of *Central Hudson* employed in more recent years may soon be replaced by an even more stringent standard.

The potential demise of the intermediate scrutiny aspect of *Central Hudson* also raises questions about the viability of the exceptions to commercial speech protection identified in *Virginia Pharmacy*. In particular, if commercial speech is treated as fully protected, the inapplicability of the prior restraint doctrine, as well as the lesser protection accorded to electronic advertising, might be brought into question. With respect to electronic advertising in particular, the possibility of a major change in this area was brought to the fore in Justice Thomas's concurring opinion in the recent *FCC v. Fox Television Stations* decision. Here, Thomas argued (in a context not involving commercial speech) for the abandonment of the traditionally deferential approach taken by the Court regarding regulation of the broadcast medium.³⁶ If the Court does move in this direction, it may do so for commercial speech as well as other speech. On the other hand, at least for now there seems to be no movement towards questioning *Virginia Pharmacy's* conclusions that false and misleading commercial speech and advertising of illegal transactions remain unprotected. Regulators can probably remain confident that restrictions on those sorts of commercial speech will continue to be

36. 129 S. Ct. 1800, 1819–22 (2009) (Thomas, J., concurring).

upheld, even though similar restrictions of, for example, political speech would surely be struck down.³⁷

V. Some Thoughts About Tobacco Regulation

I conclude by considering some of the implications of the above history and predictions for some of the proposals made by conference speakers to regulate the marketing and advertising of tobacco products. By no means can I discuss every proposal advanced, so I focus on the proposals that in my view raise the most serious First Amendment concerns.

A key preliminary point to recognize is that smoking remains legal for adults in this country. That fact, combined with the demise of the “vice” exception, means that tobacco advertising regulations will receive the same scrutiny as any other commercial speech regulations. Moreover, the rebirth of the anti-paternalism principle means that restrictions on tobacco advertising *cannot* be justified as a way to prevent adults from smoking. On the other hand, the sale of tobacco products to minors *is* illegal, and so tobacco advertising targeted at minors remains unprotected. However, *Lorillard* makes clear that even regulations designed to shield children from tobacco advertising will not be upheld if they restrict too much advertising directed at adults.

A. Restrictions on the Depiction of Smoking in Movies

Due to the positive image of smoking conveyed by many movies, a number of recent proposals have called for restriction of this imagery. To begin with, the simple cinematic depiction of smoking is *not* commercial speech, even if a particular brand of cigarette is highlighted, because the purpose of such a depiction is not to merely sell a product. As such, any effort to flatly ban the depiction of smoking in movies would be subject to strict scrutiny, and would surely be struck down as vastly overbroad. A ban on the depiction of smoking in movies targeted at minors, however, raises a more difficult question. Such a ban would still be subject to strict scrutiny, but the Court may well recognize protecting children from smoking to be a compelling governmental interest. A flat ban on smoking in *all* movies targeted at minors is probably still overbroad, because so many movies targeted at teenagers also have very significant adult

37. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

audiences (indeed, there is no clear division between “teenage” and “adult” movies). A narrower ban for movies targeted at young children—say, children’s cartoons—might be upheld, but because smoking is rarely depicted in such movies the benefit of such a proposal is doubtful.

A more complicated question arises if the regulation is directed at paid product placement of tobacco products in movies. Such product placement might well be treated as commercial speech, even if the movie as a whole is not. On the other hand, it will be difficult to argue that such placement is false or misleading; as a result, a flat ban on product placement in movies again is probably overbroad. Under current law, a narrower ban on product placement in movies where the primary audience consists of minors (such as the Harry Potter movies, say, as well as cartoons) might survive constitutional scrutiny.

B. Regulation of the Internet and Social Media

Proposals have also been advanced to ban or severely restrict tobacco companies’ marketing of products through online social networks and interactive websites. A flat ban or severe restrictions on such marketing would not survive the *Central Hudson* test, much less strict scrutiny, given that this would close an entire medium of communication and eliminate enormous amounts of protected speech. It may be that a narrower ban, forbidding certain forms of marketing particularly likely to be attractive to minors, such as online games, might be permissible. As with movies, however, drafting such regulation poses a challenge because of the large overlap between the sorts of things that attract minors, and those that attract young adults aged 18 and over (to whom advertising is fully protected). If too much marketing to adults is swept in, the *Lorillard* decision suggests that the regulation will be struck down.

C. Prohibitions on Sponsorship of Sporting and Cultural Events

Another area of potential regulation concerns the broad banning of tobacco companies’ name brand sponsorship of sporting and cultural events. Compared to the restrictions concerning movies and the Internet discussed above, this is a narrower prohibition, which suggests that it may survive First Amendment scrutiny. Again, however, there are reasons to be cautious. Of course, it would almost certainly be permissible to ban sponsorship of events where the primary audience is minors (e.g., Disney on Ice), but such sponsorships are hardly common. Other athletic and cultural events are *not* primarily targeted at children, and so following the reasoning

of *Lorillard* a reviewing court might well conclude that such a restriction is overbroad because it suppresses too much protected speech. A better, more tailored solution may be to ban only sponsorships of those events where minors are an unusually large percentage of the audience.

D. Premarket Testing of Advertising to Assure Lack of Appeal to Children

Finally, proposals have been advanced to require tobacco companies to permit a government agency (presumably the FDA) to pre-screen proposed advertisements to ensure that they are not especially likely to appeal to children. Under current law, this proposal is probably permissible. Tobacco advertising directed at children is probably unprotected speech, because the sale of tobacco to minors is illegal (I add the caveat probably because unlike an advertisement to sell heroin, which is clearly unprotected, there is no clear line between tobacco advertisements directed at children, which are unprotected, and advertisements directed at adults, which are not). Furthermore, it remains the case today that the prior restraint doctrine does not apply to commercial speech, and so a prescreening system is permissible, even though in most other contexts licensing of speech would most likely be invalidated.³⁸ The only caveat that is necessary here is that if the Court does abandon *Central Hudson* in the near future, it may also question some of the *Virginia Pharmacy* exceptions, including the prior restraint exception. If the Court did so, a prescreening requirement would be invalid as a classic prior restraint.

VI. Conclusion

The commercial speech doctrine has taken a long, twisted path since its birth in the *Virginia Pharmacy* decision. Today, however, the doctrine appears to be as potent as at any time in its history. Indeed, there is a significant chance that at least with respect to truthful, non-misleading commercial speech, the doctrine may be in the process of merging with the Supreme Court's general Free Speech jurisprudence.

That said, regulators do retain some authority to regulate tobacco advertising. For one thing, any false or misleading

38. See *Lovell v. Griffin*, 303 U.S. 444 (1938) (holding unconstitutional a municipal ordinance that required written permission to distribute printed materials of any kind).

advertising, such as that which raises doubts about the health risks of smoking, for example, can clearly be prohibited. In addition, advertising clearly targeted at minors can be prohibited, because advertising of illegal transactions (such as the sale of tobacco to minors) remains unprotected. As long as tobacco products remain legal, however, regulators do not have the authority to shield adults from tobacco advertising simply to prevent smoking. And even with respect to regulations designed to protect minors, if the burden imposed on advertising to adults is too great, these regulations will likely be invalidated.
