1-1-1996

Seeing beyond the Smoke and Mirrors: A Proposal for the Abandonment of the Commercial Speech Doctrine and an Analysis of Recent Tobacco Advertising Regulations

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Scott Joachim, Seeing beyond the Smoke and Mirrors: A Proposal for the Abandonment of the Commercial Speech Doctrine and an Analysis of Recent Tobacco Advertising Regulations, 19 HASTINGS COMM. & ENT. L.J. 517 (1996), Available at: https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol19/iss2/7

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Seeing Beyond the Smoke and Mirrors: A Proposal for the Abandonment of the Commercial Speech Doctrine and an Analysis of Recent Tobacco Advertising Regulations

by
SCOTT JOACHIM*

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Introduction

In Western culture, money and politics are inseparably intertwined. Politicians depend on lobbying interests and corporate sponsorship not only for election, but for enough "support" to appear on the ballot. Once elected, this symbiosis permeates all political decisions. In drafting tax laws and consumer laws, for example, Congress regularly solicits input into its decision-making process from Corporate America. Corporate America, in turn, re-elects those politicians who have helped Corporate America.

The integration of money and politics reflects itself in speech, as well. Beyond the simple example of a corporate advertisement in support of a political candidate or issue, the commercial exploitation of politically controversial products—whether or not for profit—is not readily discernible as either political or commercial. The effect of pigeon-holing such "dual aspect speech" as either commercial or political, however, is not merely the topic of bow-tied academics debating theory; it is the difference between constitutionally protected speech and paternalistically induced silence.

Despite this overlap, the Supreme Court has historically distinguished between the constitutional protections afforded political, religious, and scientific speech and those afforded commercial speech. While the former have always enjoyed the fullest First Amendment protection, commercial speech went unprotected at common law, and modern commercial speech doctrine imposes on advertising

3. See, e.g., Don Van Natta, Jr., $250,000 Buys Donors 'Best Access to Congress,' N.Y. TIMES, Jan. 27, 1997, at A1 ("For elite donors who contributed at least $250,000, the Republican Party offered a new enticement . . . [:] staff members to help with problems in Washington. . . . The link between political donations and access to government officials is [also] at the core of the fund-raising controversy that has enveloped the Democratic Party.").
4. This Note will refer to speech which contains both commercial and non-commercial, or public-interest, aspects as "dual-aspect" speech.
5. See discussion infra Part I.
regulations a four-part intermediate scrutiny test which lacks the full measure of constitutional protection. 6

The difficulty of dissecting the political and commercial aspects of speech poses an inherent definitional obstacle in classifying speech as either purely commercial or political. "Commercial speech" may be discernible in a sub-category of "purely commercial speech," which is narrowly defined as the interchange of information proposing a particular business transaction. 7 An advertisement simply identifying a product and listing its selling price falls into this category. Speech, however, is not always so precisely categorized in one box or another. For example, how should a Planned Parenthood advertisement offering abortion services be categorized? What about a Marlboro advertisement which both glorifies its product and denounces government efforts to regulate tobacco? A gun advertisement? Moreover, is it the speaker's intent, the recipient's understanding, the objective information, or some other variable that is dispositive of the classification? Courts have grappled with these issues in vain for decades. The culmination is an unpredictable, logically unsound distinction between commercial and noncommercial speech based on assumptions that cannot be validated.

Last term, the Supreme Court decided 44 Liquormart, Inc. v. Rhode Island, 8 in which a majority of the Court cast doubt on the continuing efficacy of the commercial speech doctrine. In declaring unconstitutional Rhode Island's blanket ban on the advertising of liquor prices, Justice Stevens' plurality opinion fell just short of advocating that commercial speech protection be raised to the level enjoyed by political speech. 9 In his concurrence, Justice Thomas explicitly argued for the abandonment of the dichotomized approach. 10

Recent efforts to regulate tobacco advertising serve as a prime illustration of the need to eradicate the illusory distinction between commercial and non-commercial speech. 11 On August 10, 1995, President Clinton proposed a partial ban on tobacco advertising for

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7. See discussion infra Part III.A.1.
8. 116 S. Ct. 1495 (1996). For a full discussion of the opinions in this case, see discussion infra Part I.E.
9. See infra Part I.E.
10. 44 Liquormart, 116 S. Ct. at 1575-1620 (Thomas, J. concurring).
11. See discussion infra Part III.
the purpose of decreasing smoking among children. Nearly one year later, the FDA declared nicotine a "drug," and imposed strict limits on tobacco advertising. Similar proposals and state regulations have been pervasive in recent years. In turn, tobacco companies immediately challenged the legality of such regulations. However, legal scholars anticipate a long battle destined for the Supreme Court. An analysis of commercial speech jurisprudence reflected through the lens of a ban on tobacco advertising, therefore, demonstrates the need to overhaul this unworkable commercial speech doctrine.

Part I traces the history of the commercial speech doctrine, focusing on Central Hudson and the Court's subsequent attempt to fine-tune its requirements. This historical overview is necessary to elucidate the Supreme Court's struggles both in discerning commercial and noncommercial speech and in justifying the distinction. This Part also outlines the recent 44 Liquormart decision, illustrating the fractured Court's general reluctance to relegate commercial speech to secondary status. Part II summarizes President Clinton's and the Food and Drug Administration's recent regulations on tobacco advertising. Finally, Part III argues that the Supreme Court should eradicate the untenable distinction between political and commercial speech, and provide the latter the full protections enjoyed by the former. Concordantly, this Note argues that President Clinton's proposed tobacco advertising regulation should be declared unconstitutional.

15. FDA, Tobacco Firms May Reach Settlement, WEST'S LEGAL NEWS, Dec. 23, 1996 (noting tobacco companies have filed briefs in Beahm v. FDA, No. 95-CV00591 (M.D. N.C. 1995)).
17. While this Note focuses on the First Amendment implications of Clinton's proposed tobacco advertising ban, opponents of the ban also argue that the Food and Drug Administration lacks jurisdiction to regulate tobacco. See, e.g., Comment, An Exercise in Administrative Creativity: The FDA's Assertion of Jurisdiction Over Tobacco, 45 CATH. U. L. REV. 991 (1996); Susan H. Carchman, Should the FDA Regulate Nicotine-Containing Cigarettes? Has the Agency Established a Legal Basis and, If Not, Should Congress Grant It?, 51 FOOD & DRUG L.J. 85 (1996);
Moreover, Part III illustrates the unconstitutionality of Clinton’s proposed tobacco advertising ban under the current intermediate scrutiny standard articulated in *Central Hudson*. Toward this end, this Part critiques and disproves two recent decisions in which the United States Court of Appeals for the Fourth Circuit both misconstrued and misapplied the intermediate scrutiny standard of *Central Hudson*, as modified by recent Supreme Court decisions, including *44 Liquormart*.

I

The Commercial Speech Doctrine

A. Early Case-Law

The Supreme Court first dichotomized commercial and noncommercial speech in *Valentine v. Chrestensen* in 1942 but cited no support for the distinction. In *Chrestensen*, plaintiff challenged a local ordinance which prohibited the distribution of handbills, and argued that the First Amendment protected commercial speech. The Court disagreed—without citing any precedent—and held that “purely commercial” speech is not protected under the First Amendment. While *Chrestensen*’s holding narrowly applied to purely commercial speech, the Court did not offer any guidelines with which lower courts could discern purely commercial from noncommercial speech, or speech which contained aspects of both. *Chrestensen* implied, however, that the speaker’s motive is dispositive in classifying the speech.

The implied rationale that the speaker’s motive defines the speech is logically unsound and has not survived judicial and academic scrutiny. Consider, for example, a politician’s memoirs. While the

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18. 316 U.S. 52 (1942).


21. Id.

22. Id.


24. *Chrestensen*, 316 U.S. at 55 (characterizing commercial speech in terms of the speaker’s “promot[ion]” and “pursuit” of money, and concluding “[i]f the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition . . . was lawful[”])(emphasis added).

speaker's profit motive is likely the driving force behind the speech, few would doubt that the book contains political speech deserving of full constitutional protection. And so, with Chrestensen, the Supreme Court created the commercial/noncommercial distinction with neither precedential support nor sound logic.\textsuperscript{26}

In subsequent years, the Court was reluctant to judicially classify speech as either purely commercial or non-commercial.\textsuperscript{27} In \textit{Breard v. City of Alexandria}, the plaintiff challenged a public nuisance ordinance which prohibited merchants from soliciting business on private property.\textsuperscript{28} The Court held that speech created “for profit” was not beyond the First Amendment’s ambit merely because of the speaker’s economic motive.\textsuperscript{29} In reaching that decision, the Court balanced the defendant-magazine publisher’s interest in soliciting subscriptions against the privacy interests of property owners.\textsuperscript{30} The Court upheld Breard’s conviction, finding that the property owners’ privacy interests outweighed Breard’s interest in soliciting commercial transactions.\textsuperscript{31}

\textbf{B. Subsequent Protection}

The Supreme Court’s inability to define the parameters of commercial speech has been pervasive, and that inability has perhaps been the only static variable in commercial speech jurisprudence. While Chrestensen categorized speech by assessing the speaker’s motive, subsequent cases followed Breard in questioning the logic of that approach. In \textit{Pittsburgh Press Co. v. Pittsburgh Commission on Human Rights},\textsuperscript{32} the plaintiff, a newspaper company, violated a city ordinance by utilizing a classification system of employment advertisements on the basis of sex.\textsuperscript{33} The Court held that a newspaper’s “want-ads” were purely commercial, and thus unprotected under Chrestensen.\textsuperscript{34} The Court focused on the content of

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item \textit{Id.}
\item \textit{Id.}
\item Breard, 341 U.S. at 624-25.
\item \textit{Id.}
\item Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943)(holding religious organization’s door-to-door solicitation, while commercial in nature, does not transform it into a “commercial enterprise.”)
\item \textit{Breard}, 341 U.S. at 644.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 388, 391.
\end{enumerate}
\end{footnotesize}
the speech, rather than the speaker's motive, and found that the newspaper's want-ads promoted illegal discrimination because they classified ads on the basis of sex.

The following term, the Supreme Court in dicta severely undermined Chrestensen, casting doubt on whether that case had "survived reflection." In Bigelow v. Virginia, plaintiff was convicted of violating a state statute proscribing the publication of advertisements which encouraged or aided abortions. The Virginia Supreme Court ruled that the First Amendment was inapplicable to paid commercial advertisements and upheld the statute. The Supreme Court disagreed and held that dual-aspect speech was not stripped of its First Amendment protection solely on the basis of its commercial aspects. The Court expressly renounced its motive test, in favor of a content-based inquiry. The Court applied a balancing test to determine whether the regulation was reasonable and served a "legitimate public interest." The Court found that the public's interest in receiving information regarding abortions outweighed the state's interest in maintaining an educational atmosphere in its college dormitories, and held that abortion advertisements in a university's underground newspaper were protected by the First Amendment.

In the 1970's, the Court seemed ready to admit its mistake and dispose of the illusory and indefinite distinction between commercial and noncommercial speech. In Virginia State Board of Pharmacy v.

35. Id. at 388.
36. Id.; cf. New York Times Co. v. Sullivan, 376 U.S. 254 (1964)(holding newspaper publisher's editorial advertisement denouncing local government's suppression of civil rights activism protected by the First Amendment; fact that papers were sold "for-profit" was not dispositive of "pure commercial speech" classification).
38. Id. at 812.
39. Id. at 814, 818.
40. Id. at 818.
41. Id. at 820-22.
43. Bigelow, 421 U.S. at 826. The Court's illustrative list of factors to be considered in regulating advertising included the relationship of the speech to the commercial activity; the public's interest served by regulation; the extent of fraud and/or deceit contained in the message; the hearers' privacy interests; and the extent to which the audience is held captive to the speech. Id at 826-29.
Virginia Citizens Consumer Council, the Court re-addressed specifically the Chrestensen issue: whether purely commercial speech is protectable under the First Amendment. A Virginia statute prohibited licensed pharmacists from advertising the prices of prescription drugs. The Board argued that the regulation was necessary to maintain the high professional standards of licensed pharmacists. The Court disagreed. It struck down the ordinance and affirmed the Bigelow approach of evaluating the content, and not the motive, of speech in assessing its First Amendment protection. Despite the pharmacists’ “purely economic” motive, the Court emphasized a broad range of interests in securing the free flow of advertising. “As to the particular consumer’s interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.” Along with the speaker’s and hearer’s interests in advertising, the Court noted a general societal interest in the free flow of information.

The Court reasoned that the free flow of commercial information was integral to a free-enterprise society: “So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions.” The Court refused to adhere to blurred lines separating commercial and political speech, and declared that, in a democracy, the free flow of information enlightens commercial as well as political decisionmaking. Thus, Virginia State Board’s balancing test mandated a case-by-case approach, the outcome of which was largely dependent upon the content of the speech and the public’s interest in access to a free flow of information—commercial as well as political.

44. 425 U.S. 748 (1976).
45. Id. at 760-61.
46. Id. at 749-50.
47. Id. at 751.
48. Id. at 761.
49. Id. at 763-64.
50. Id. (emphasis added).
51. Id. at 764 (citing Bigelow v. Virginia, 421 U.S. 809 (1975)(protecting abortion advertisements)).
52. Id. at 765.
53. Id.
54. See Comment, Up In Smoke, supra note 14, at 706. For example, in one line of cases, the Court has noted the special circumstances of lawyer advertising, and has subjected commercial
C. Intermediate Scrutiny

The Court never did take the next step after Virginia State Board and eradicate the commercial speech distinction. Instead, the Court created a standard commercial speech test aimed at assuring consistency, but resulting in an ad hoc, unpredictable, case-by-case assessment. In Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, the Court created the modern test for commercial speech, adopting an intermediate scrutiny standard.

Under the Central Hudson test, the threshold inquiry is whether the communication is misleading or related to unlawful activity. If it is not, then the speech is protectable under the First Amendment and the regulation must satisfy the second, third, and fourth prongs in order to withstand scrutiny. Under the second prong, the government must assert a substantial interest in regulating the commercial speech. Third, the government must show that its regulation directly advances its interest. Fourth, the government must show that its interest could not be served as well by a more limited restriction on commercial speech. Because the result under prongs three and four vary according to the weight a court gives both to the legislature’s purported interest and to the corroborating evidence that the proffered regulation will secure that interest, courts have inconsistently applied Central Hudson’s framework.


55. Kozinski & Banner, supra note 19, at 631.
57. Id. at 566.
58. Id.
59. Id.
60. Id.
61. Id. Courts have varied in their interpretation of Central Hudson’s fourth prong. While some cases have construed a least-restrictive-means mandate, see, e.g., City of Lakewood v. Plain Dealer Publ’g Co., 486 U.S. 750 (1988), other cases have sustained the regulation upon a lesser showing, see, e.g., Posadas De Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986).
63. Central Hudson, 447 U.S. at 559.
utilities was justified in furthering energy conservation and counterbalancing utilities’ monopolistic practices in New York. The Court disagreed and invalidated the ban because the Commission failed to satisfy its burden with a showing that a more limited restriction would fail to serve the state’s interests.

While it did not posit an explicit evidentiary standard, Central Hudson did require the state to advance “authoritative findings” that its interests would be advanced by regulation, and that it lacked an alternative to chilling commercial speech. And while Central Hudson’s heightened protection of commercial speech seems in part a combination of prior decisions which balanced the competing interests of particular communications, it was also a clarification of the Court’s First Amendment policy in the context of commercial speech. Although commercial speech gets less protection than political speech, the public has a strong interest in both classes of speech, namely receiving the “fullest possible dissemination of information” to use in making its own decisions—political as well as commercial—free from paternalism.

In his concurring opinion, Justice Stevens emphasized the inherent subjectivity in distinguishing commercial from non-commercial speech: “[E]ven Shakespeare may have been motivated by the prospect of pecuniary reward.” Similarly, Justices Brennan and Blackmun expressed concern over the potential breadth and subjective application of Central Hudson, doubting “whether suppression of information concerning the availability and price of a legally offered product is ever a permissible method for the State to ‘dampen’ demand for or use of the product.” Justice Blackmun ardently opposed the commercial/noncommercial dichotomy:

No differences between commercial speech and other protected speech justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information. . . . [Advertising regulations are] a covert attempt by the State to manipulate the choices of its citizens, . . . [protecting

64. Id. at 568.
66. Central Hudson, 447 U.S. at 570.
67. Id.
68. See Comment, Up In Smoke, supra note 14, at 712.
69. Central Hudson, 447 U.S. at 561-62
70. Id. at 580.
71. Id. at 574 (Blackmun, J., concurring).
the State] from the visibility and scrutiny that direct regulation would entail.\textsuperscript{72}

The Court in \textit{Central Hudson} presumably intended to displace lower courts' inconsistency and confusion in analyzing commercial speech by creating a standard test for its regulation, that has resulted in an oft-criticized, ad hoc test resting on unfounded assumptions and illogical distinctions.\textsuperscript{73}

After \textit{Central Hudson}, the Supreme Court generally rejected as paternalistic government claims that its regulation of commercial speech was the proper means of protecting the public from the influences of advertising.\textsuperscript{74} However, the Court sustained such a regulatory purpose and sanctioned such paternalistic regulation of commercial speech in \textit{Posadas De Puerto Rico Associates v. Tourism Co. of Puerto Rico}.\textsuperscript{75} The Court in \textit{Posadas} upheld a Puerto Rico statute which prohibited gambling casinos from advertising to residents.\textsuperscript{76} The casinos argued that the regulation was underinclusive because it permitted the advertising of other gambling such as horse racing and lottery games.\textsuperscript{77} The Court disagreed, citing, as its primary rationale, Puerto Rico's history of prohibiting casino gambling through 1948.\textsuperscript{78}

"It is precisely because the government could have enacted a wholesale prohibition of the underlying conduct\textsuperscript{79} that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising."\textsuperscript{80} This rationale, known as the "greater includes the
lesser" rationale, is an enigma in First Amendment jurisprudence and has since been renounced by the Supreme Court.81

The Posadas Court focused on prongs three and four of the Central Hudson test, reducing the state’s burden to a showing of “the ‘fit’ between the legislature’s ends and the means chosen to accomplish those ends.”82 The Court found the legislature’s conclusions—that advertising bans would reduce resident gambling—“reasonable,”83 and upheld the regulation.84 While Posadas seemingly undermined Central Hudson’s intermediate scrutiny standard, the Court has not gratuitously extended its deferential approach and has repeatedly struggled in reconciling Posadas with Central Hudson and commercial speech jurisprudence.85 Recently, a unanimous Supreme Court declared Posadas an aberration in commercial speech doctrine, and hammered the long-awaited nail in its coffin.86

Loudermill, Posadas wrongly deferred to Puerto Rico’s legislature merely because it “could have” made gambling illegal. Furthermore, irrespective of Loudermill, Central Hudson requires a regulation to satisfy its intermediate scrutiny standard so long as the communication involves a legal activity—not a constitutionally protected activity. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y., 447 U.S. 557, 564 (1980). For a comprehensive discussion of Posadas and the Supreme Court’s subsequent attempt to reconcile Posadas with commercial speech doctrine, see infra, text accompanying notes 144-148, 156, 223-228.

82. Posadas, 478 U.S. at 341; see also Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 476 (1989)(same). In Fox, the Court refused to interpret Central Hudson’s “necessary” requirement as a least-restrictive-means approach. Construing the word “necessary” by analogy to Article I, section 8 “Necessary & Proper” Clause case-law, see, e.g., McCulloch v. Maryland, 17 U.S. 316 (1819), the Court reduced the government’s burden under prong four of Central Hudson to a showing of “reasonableness.” Fox, 492 U.S. at 480. To the extent that this is wholly inconsistent with Central Hudson and its progeny, Fox, as well as Posadas, should be overruled. Moreover, the Court in Fox conceded that “Necessary & Proper” Clause case-law “do[es] not of course govern [commercial speech analysis]” and cited only Posadas for its reduction of Central Hudson’s intermediate scrutiny standard to a rational basis approach. Fox, 492 U.S. at 479. The Court has not construed Fox, however, as a deferential rule, and has maintained the government’s burden in proving that the regulation effectuates its proffered goal. See, e.g., City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n.13 (1993). In Discovery Network, the Court clarified its holding in Fox:

[W]hile [Fox] rejected the least-restrictive-means test for judging restrictions on commercial speech, so too have we rejected mere rational basis review. A regulation need not be “absolutely the least severe that will achieve the desired end,” [under Fox], but if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the “fit” between ends and means is reasonable.

Id. (citations omitted).
83. Posadas, 478 U.S. at 342.
84. Id. at 344.
In 1993 the Court explicitly resurrected the efficacy of *Central Hudson*’s third and fourth prongs.\(^{87}\) In *Edenfield v. Fane*, the plaintiff, an accountant, challenged a state ban on in-person solicitation by certified public accountants.\(^{88}\) The plaintiff argued that the ban violated the First Amendment and precluded him from competing within his profession.\(^{89}\) The Court emphasized *Central Hudson*’s third and fourth prongs and required the government to show that the regulation advances its interests in a “direct and material way,” imposing an evidentiary standard by which the government should satisfy this burden.\(^{90}\)

>[T]he regulation may not be sustained if it provides only ineffective or remote support for the government’s purpose. . . . This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.\(^{91}\)

The Court invalidated the Florida Board of Accountancy’s ban on in-person solicitation by CPAs because the Board had failed to provide any studies or anecdotal evidence “validat[ing]” the Board’s supposition that in-person solicitation furthers fraud and is overreaching.\(^{92}\)

During the same term, the Court in *United States v. Edge Broadcasting Co.*\(^{93}\) upheld a federal statute prohibiting radio broadcasts of lotteries to states which do not allow lotteries.\(^{94}\) In his dissent, Justice Stevens argued that the state failed to satisfy its burden of demonstrating a reasonable fit between the legislature’s interests and the means used to further those ends.\(^{95}\) The majority’s holding, however, did not jeopardize *Edenfield*’s resurrection of *Central Hudson* because the Court’s basis for upholding the ban in *Edge* was that the broadcasting reached North Carolina, a state in which


\(^{88}\) *Id.* at 763-64.

\(^{89}\) *Id.* at 764.

\(^{90}\) *Id.* at 762.

\(^{91}\) *Id.* at 770-71 (citations omitted)(emphasis added).

\(^{92}\) *Id.* at 770-71. The Court’s strict evidentiary requirement in *Edenfield*, while not explicitly overruling *Posadas* and *Fox*, severely undermined and plausibly reduced them to narrow, practically uncitable holdings.

\(^{93}\) 509 U.S. 418 (1993).

\(^{94}\) *Id.* at 436.

\(^{95}\) *Id.*
lotteries were illegal. Thus, under *Central Hudson*, *Edge* did not satisfy its threshold requirement of communicating a "legal activity" and the Court's application of *Central Hudson*’s intermediate scrutiny test was mere dicta. Justice Stevens' derision of commercial speech regulation would soon garner support and re-appear in majority and plurality opinions in subsequent terms.

D. 1995 Decisions

The current Supreme Court has grown impatient in grappling with the commercial/noncommercial distinction. In three decisions over the past two years, the Court has recognized that paternalism under the guise of advertising regulation does not withstand First Amendment scrutiny.

In *Rubin v. Coors Brewing Co.*, the plaintiff, a beer manufacturer and distributor, challenged the Federal Alcohol Administration Act which prohibited beer labels from displaying alcohol content. The government argued that the ban was necessary to prevent "strength wars" between competing beer companies. The Court held that the Act failed the *Central Hudson* test and thus violated the First Amendment. Because the parties stipulated to the labels' truthful and nonmisleading characteristics, the *Coors* decision focused on *Central Hudson*’s second, third, and fourth prongs, essentially deciding whether the labeling ban had an "acceptable fit" with the government’s substantial interests, and whether the regulation was more extensive than necessary. The government argued that its dual interests of curbing "strength wars" to protect beer drinkers who purchase beer on the basis of alcohol content and facilitating states' efforts in regulating alcohol under the 21st Amendment justified its regulation.

96. *Id.* at 429-30.
99. *Id.* at 1588.
100. *Id.*
101. *Id.* at 1596.
102. *Id.* at 1590.
103. *Id.*
104. "Strength wars" are the competitions among beer brewers who, in an attempt to market their product, advertise the alcohol content of their beers. *Id.*
105. The 21st Amendment repealed the 18th Amendment, thereby ending Prohibition. U.S. Const. amend. XXI.
The Court rejected these claims, finding insubstantial the government's interest in suppressing competition through regulating promotion and marketing strategies. Justice Thomas, in the majority opinion, rationalized that the "general thrust of federal alcohol policy appears to favor greater disclosure of information, rather than less," citing the Nutrition Labeling and Education Act of 1990, which requires labels of food products to display nutritional information. The Court did not provide an extensive analysis of Central Hudson's second prong, but rather deferred to the Court of Appeals' conclusion that the government's interest in promoting the general health, safety and welfare of its citizens was "substantial."

Under prongs three and four, the Court noted that Central Hudson, as modified by Edenfield and Posadas, requires consideration of the "fit" between the government's substantial interests and the means chosen to accomplish those ends. Justice Thomas emphasized that Edenfield's requirements—that the government demonstrate that the harms were real and that its regulation would actually alleviate them to a material degree—were "critical."

The government argued that the suppression of alcohol content on beer labels would thwart strength wars as a matter of "common sense." The Court rejected this argument, holding that the FAAA's ban could not directly and materially reduce strength wars because of the inconsistency of federal policy regarding the dissemination of alcohol information. First, the Court criticized the FAAA ban as underinclusive because it prohibited alcohol on beer labels, but did not regulate advertising. Thus, the FAAA would not directly advance the government's stated purpose because consumers could

106. Coors, 115 S. Ct. at 1591.
107. Id. at 1590-91. Similarly, if not identically, federal tobacco policy also favors disclosure under both the Nutrition Labeling and Education Act of 1990, cited in Coors, and the Cigarette Labeling Advertising Act of 1965, which requires cigarette labels and advertising to include warnings by the Surgeon General. See infra text accompanying notes 213-214.
108. Coors, 115 S. Ct. at 1591. The Court's brief discussion of the government's "substantial interest" is noteworthy. In conceding the "substantiality" of the government's interest in regulating beer labels, the Court allowed itself to address the merits of prongs three and four, where the Court highlighted the extent to which the government must prove that its interests would be advanced in a "direct and material" way. If it had not acquiesced on the efficacy of prong two, the remainder of its decision would have been dicta.
109. Id.
110. Id. at 1592.
111. Id.
112. Id. at 1593.
113. Id. at 1592.
still discover the disparity in competing manufacturers' products.\textsuperscript{114} Second, the FAAA regulated only beer, not stronger alcoholic beverages such as wine and hard liquor.\textsuperscript{115} The Court emphasized the government's lack of "convincing evidence that the labeling ban ha[d] inhibited strength wars," and found that the Court would not assume any correlation between the ban and the absence of strength wars without hard data.\textsuperscript{116}

The Court also stated that the government failed to show that the fit between the regulation was "sufficiently tailored" to its goal under Central Hudson's fourth prong.\textsuperscript{117} The government's alternative options—"directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high alcohol strength . . . or limiting the labeling ban only to malt liquors"\textsuperscript{118}—indicated that the FAAA was "more extensive than necessary."\textsuperscript{119}

In his concurring opinion, Justice Stevens advocated the abandonment of a rigid commercial/noncommercial distinction in First Amendment analysis.\textsuperscript{120} Because the constitutionality of a commercial communication is assessed independently of both the speaker's motive and the content of the speech, Justice Stevens argued that Central Hudson has been "artificially" applied,\textsuperscript{121} stating "[n]either can the value of speech be diminished solely because of its placement on the label of a product. . . . I see no reason why the fact that such

\begin{footnotesize}
\begin{itemize}
\item[114.] Id. at 1593.
\item[115.] Id. at 1592.
\item[116.] Id. at 1593.
\item[117.] Id. While highly persuasive, the Court's analysis of Central Hudson's fourth prong is arguably dicta, because the Court initially held that the regulation violated the First Amendment under Central Hudson's third prong.
\item[118.] Id. The Court implies that, for First Amendment purposes, an outright ban on a product is less restrictive than maintaining its legality and prohibiting its advertising. This has strong implications for tobacco advertising bans. See infra note 255 and accompanying text.
\item[119.] Coors, 115 S. Ct. at 1594. This language strongly suggests that the Court in Coors rejected Posadas' quasi-rational basis, deferential standard in applying Central Hudson's fourth prong. Coors also rejected Posadas' affirmation of a government's regulation of harmful, legal activity under a less restrictive standard than Central Hudson requires.
\item[120.] Coors, 115 S. Ct. at 1595.
\item[121.] Id.
\end{itemize}
\end{footnotesize}
information is disseminated on the labels of [commercial] products should diminish that constitutional protection.”  

The Supreme Court strengthened Central Hudson in another 1995 decision. In Florida Bar v. Went For It, Inc., the Court held that the Florida Bar’s regulation prohibiting lawyers from using direct mail to solicit personal injury or wrongful death clients within thirty days of an accident passed constitutional muster under Central Hudson. While the Court has analyzed attorney advertising and solicitation decisions under less stringent standards than other commercial standards, if only implicitly, Florida Bar provides insight into the evidentiary standards a government is required to satisfy under Central Hudson’s third and fourth prongs. In Florida Bar, the Court affirmed the regulation because the Bar had conducted a two-year study of attorney advertising and solicitations. The lengthy summary submitted to the court showed that lawyer solicitation of accident victims effectuated pervasive invasions of privacy.

Most interesting about Florida Bar is the potential for a swing-vote for future commercial speech cases. In an ardent dissent, Justice Kennedy, joined by Justices Stevens, Souter, and Ginsburg, demanded “actual surveys” accompanied by “procedures,” explanations of methodology, “and discussion of excluded results.” The four dissenters would require that the government strictly adhere to Central Hudson’s burden, as modified by Edenfield’s “direct and material” requirement: “[t]he general rule is that the speaker and the audience, not the government, assess the value of the information presented.”

E. 44 Liquormart, Inc. v. Rhode Island

In 1996, a plurality of the Supreme Court cast serious doubt on the commercial/noncommercial distinction in the context of a State’s blanket ban on advertising liquor prices. The fractured Court garnered

122. Id. at 1595-96.
124. Id. at 2381.
126. Florida Bar, 115 S. Ct. at 2377. The Court also noted that the government’s factual basis was not refuted. Id. at 2378.
127. Id. at 2384.
128. Id. at 2386 (citing Edenfield v. Fane, 507 U.S. 761, 767 (1993)).
a majority only for its holdings that Rhode Island's blanket ban on liquor price advertising violated the First Amendment and that the Twenty-First Amendment did not provide authority for the State's abridgment of otherwise protected speech. Justice Stevens' plurality opinion, however, was devoid of any express application of Central Hudson, and its rationale was couched in terms broadly protective of commercial speech. Additionally, Justice Thomas, concurring, argued explicitly for eradicating the commercial/noncommercial distinction.

Rhode Island enacted a statutory scheme prohibiting: (1) the advertisement of liquor prices, except for displays and price tags within licensed premises which were not visible from outside the premises, and (2) the "publication or broadcast" of any advertisements referring to liquor prices. The state imposed a fine on 44 Liquormart, a liquor store, for violating the statute. 44 Liquormart paid the fine, but sought a declaratory judgment that the statute violated the First Amendment.

The District Court declared the advertising ban unconstitutional because the ban did not "directly advance the state's purported interest in reducing alcohol consumption." The Court of Appeals reversed, deferring to the legislature's judgment that the statute would decrease competitive pricing, thereby driving up prices and reducing alcohol consumption.

The Supreme Court's opinions in 44 Liquormart reveal more directly that which the 1995 Court implied in Coors: at least four Justices can no longer keep a straight face in relegating commercial speech to second-class status. Nor could a majority figure out how Posadas fits into the commercial speech puzzle.

In the principal opinion written on behalf of himself and a fluctuating plurality throughout, Justice Stevens dismissed any purported justification for maintaining diminished protection for commercial speech:

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

130. Id. at 1515.
131. Id.
132. Id. at 1518
133. Id. at 1501.
134. Id. at 1503.
135. Id. at 1501.
136. Id. at 1503.
regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when 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 \textit{rigorous review that the First Amendment generally demands}.\footnote{Id. at 1507 (emphasis added). In this section of the opinion, Part IV, Stevens was joined by Justices Kennedy and Ginsburg.}

Speaking for himself and Justices Kennedy and Ginsburg, Justice Stevens rejected the proposition that "commonsense distinctions" exist between commercial and noncommercial speech,\footnote{Id. See also \textit{City of Cincinnati v. Discovery Network Inc.}, 507 U.S. 412, 428 (1993) (disparaging rhetoric emphasizing distinctions between commercial and noncommercial speech and declaring city's blanket ban on commercial newsracks unconstitutional).} and asserted that "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."\footnote{\textit{Liquormart}, 116 S. Ct. at 1508.} The Stevens plurality picked up Justice Thomas for its analysis of Rhode Island's blanket ban against liquor price advertising which the plurality described as "truthful, nonmisleading speech about a lawful product."\footnote{Id. at 1508.} The plurality analyzed the ban in terms resembling the intermediate scrutiny standard, but neither cited \textit{Central Hudson} nor expressly applied its framework. The plurality rejected Rhode Island's assertion that the price advertising ban would significantly advance the State's interest in promoting temperance because the State had not proffered any evidence supporting the proposition that higher prices yield less consumption.\footnote{Id. at 1509. "Although the record suggests that the price advertising ban may have some impact on the purchasing patterns of temperate drinkers of modest means, ... the State has presented no evidence to suggest that its speech prohibition will \textit{significantly reduce market-wide consumption}." Id.} "[S]peculation certainly does not suffice when the State takes aim at accurate commercial information for paternalistic ends."\footnote{Id. at 1510.} The plurality also deemed Rhode Island's ban more extensive than necessary because the State could achieve its purported goal of promoting temperance through other alternatives, such as direct regulation, taxation, and educational campaigns.\footnote{Id.}

Justices Stevens, Kennedy, Thomas, and Ginsberg also rejected the State's arguments that \textit{Posadas} supported the advertising ban.
Rhode Island argued that under *Posadas*, the State enjoys legislative deference because it could have banned the sale of alcoholic beverages outright. The four Justices declared that while *Posadas* would support that argument, *Posadas* applied an erroneous First Amendment analysis:

The reasoning in *Posadas* does support the State's argument, but, on reflection, we are now persuaded that *Posadas* erroneously performed the First Amendment analysis. . . . 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 in truthful, nonmisleading advertising when non-speech-related alternatives were available.\(^4\)

Joined with the separate opinions by Justices Thomas\(^4\) and O'Connor,\(^1\) *Posadas* has been effectively overruled as an aberration in First Amendment jurisprudence.

The plurality rejected the greater-includes-the-lesser argument—which accords a legislature deference in choosing to abridge speech about a product that it could directly regulate or ban outright—as "inconsistent with both logic and well-settled doctrine."\(^4\) The plurality noted that under the First Amendment, direct regulation of a product is less restrictive than curtailing speech about that product, and, therefore, *Posadas'* greater-includes-the-lesser logic was erroneous. The plurality also rejected the State's argument that commercial speech regarding a "vice" activity enjoys less protection than other commercial speech regarding less controversial activity.\(^4\)

Justice Thomas concurred in the result, but dissented from the principal opinion's application of a balancing test for commercial speech.\(^1\) Justice Thomas would eradicate the distinction between commercial and noncommercial speech and afford commercial speech full First Amendment protection. His reasons are highly persuasive. First, practically all advertising bans would fail *Central Hudson's*...
fourth prong because direct regulation or banning of a product, taxing, or price control devices would always be as effective as discouraging consumption by restricting advertising. Additionally, the state could never meet its burden because any calculus showing the effect of speech regulation is inherently unattainable and imprecise. “[T]he Central Hudson test asks the courts to weigh the incommensurables—the value of knowledge versus the value of ignorance—and to apply contradictory premises—that informed adults are the best judges of their own interests, and that they are not.” Furthermore, Justice Thomas doubted the ability to discern commercial from noncommercial speech. Justice Thomas would therefore overrule Central Hudson and afford commercial speech the full measure of protection under the First Amendment.

Justice Scalia shared Justice Thomas’ disdain for Central Hudson. He, however, found that the Court lacked any basis for disturbing Central Hudson’s framework because Rhode Island’s ban was unconstitutional under it, thus mooting any arguments for modifying existing law.

Justice O’Connor, concurring on behalf of herself, Chief Justice Renquist, and Justices Souter and Breyer, agreed that Rhode Island’s advertising ban was unconstitutional, but, purportedly in contradistinction to Justice Stevens’ plurality, would preserve Central Hudson’s intermediate scrutiny standard.

44 Liquormart is decisive on few points: that Rhode Island’s ban was unconstitutional; that Posadas is overruled; and that the

150. Id. at 1518-19. There are two exceptions to this assumption. First, where a government has no power to directly regulate a product or activity because the underlying activity is constitutionally protected, the less restrictive means of direct regulation is unavailable. Id. at 1519 n.7. For example, if the Second Amendment was read to preclude the states from prohibiting the possession of guns, a State could arguably satisfy Central Hudson because it lacks the lesser restrictive alternative to chilling speech, e.g., direct regulation. Second, when the sale of the product occurs outside the State’s borders, the State is similarly devoid of jurisdiction to regulate the activity. Id.

151. Id. at 1520.
152. Id. at 1517.
153. Id. at 1518.
154. Id. at 1515.
155. Id. at 1521.
156. Accord Anheuser-Busch, Inc. v. Schmoke, 101 F.3d 325, 331 (4th Cir. 1996)[hereinafter Anheuser-Busch II](Butzner, J., dissenting)(noting “[a]t least seven members of the Court expressly decided not to follow Posadas, concluding that a legislature’s decision to suppress commercial speech, even if reasonable, is not entitled to deference.”); but see Nordyke v. County
Supreme Court cannot agree on the standard by which to analyze commercial speech regulation. Amusingly, Justices O'Connor and Thomas could not even agree on whether Justice Stevens' principal opinion applied Central Hudson's framework in the first place. While a careful reading of the principal opinion suggests that Justice Stevens applied the intermediate scrutiny standard—analyzing the state's interest, assessing whether the State's regulation was "no more extensive than necessary," and citing alternatives to regulating speech—this point of contention illustrates the degree of confusion and fracture within the Supreme Court as to the state of the commercial speech doctrine. This uncertainty harms not only lower courts struggling to prevent reversal on appeal, but real people who must make real decisions within the law. The Court's lack of consensus sustains the same reprehensible impact on society as does Central Hudson itself—unpredictability. Neither non-consensus nor an imprecise, ad hoc balancing test are acceptable. The Court should therefore raise the constitutional protection of commercial speech commensurate with that provided political speech.

II

President Clinton's Regulation of Tobacco Advertising

On August 10, 1995 President Clinton issued a proposal to regulate tobacco advertising via the Food and Drug Administration (FDA) for the purpose of preventing "aggressive[ ] market[ing] to our young people." Nearly one year later, the FDA declared nicotine a...
drug and imposed strict limits on tobacco advertising.163 Along with other restrictions, the new regulations164 would: (1) "[l]imit all outdoor and in-store advertising of cigarettes to black-and-white text except in adult-only facilities 'totally inaccessible to persons under 18;"165 (2) "[a]llow only black-and-white text advertising of cigarettes in publications with significant youth readership, including People, Sports Illustrated, Car and Driver, Rolling Stone, and Glamour;"166 (3) "[p]rohibit cigarette brand names on hats, T-shirts and back-packs;"167 and (4) "[b]an billboards advertising cigarettes within 1,000 feet of schools and playgrounds."168

Clinton's proposal has sparked vehement debate, and has motivated both proponents and opponents to search for empirical data regarding the effect of tobacco advertising on children.169 Such data is crucial under the current intermediate scrutiny test because the government must satisfy its burden of showing that its regulation will, in a direct and material way, advance its interest in curbing tobacco use.170 Moreover, the government must show that other less restrictive means of achieving that goal are insufficient.

Tobacco is an easy target for advertising regulation. The Surgeon General identifies smoking as the number one preventable cause of death in the United States.171 It is single-handedly responsible for nearly 434,000 deaths per year.172 It affects the global health system and insurance premiums, and it kills our loved ones. Because tobacco is generally considered potentially the most evil legal product on the


164. This Note focuses on Clinton's ban as an example of many pending or enacted tobacco advertising regulations on both the federal and state levels. For other proposed regulations, see, for example, Drugs: Ford Offers Legislative Alternative to FDA Regulation of Tobacco Products, BNA HEALTH CARE DAILY, Sept. 21, 1995, at d7; Comment, Up In Smoke, supra note 14, at 703-04 n.2.


166. Id. "Significant" is defined as greater than fifteen percent youth readership or greater than two million young readers. Id.

167. Id.

168. Id.


171. Carchman, supra note 17, at 89.

172. Id. (citing Centers for Disease Control, Smoking-Attributable Mortality and Years of Potential Life Lost, 40 MORTALITY & MORBIDITY WKLY. REV. 62 (1991)).
American market, it is the perfect lens through which the importance of speech—including commercial speech—can be observed.

The acceptability of tobacco advertising regulation at first glance, solely based on tobacco’s harmful effects, detracts from the focus of First Amendment protection. The potential snowball effect of paternalism under the guise of protectionism would become a troubling reality if government regulation of tobacco advertising is sanctioned. Practically every product in the marketplace has a potentially harmful component—sugar, fat, sodium, saccharin, caffeine, and so forth. While such products—including tobacco—are often subject to advertising regulation requiring affirmative disclosure of the risks associated with the products, consumers have always made the final assessment, namely, whether or not the benefits of the product outweigh the risks. A consumer’s choice regarding tobacco is no different, except, potentially, for the addictive nature of the product which may negate a true “choice” in consumerism. Addiction pervades the marketplace, however, and should not be accepted as a justification for commercial speech regulation in the context of tobacco where other preferred products, such as caffeine and alcohol, are exempted, despite their similar characteristics. Moreover, the addictive nature of tobacco is disclosed on all tobacco products and advertisements under mandate of federal law. Therefore, tobacco speech is not misleading with respect to addictiveness.

III
Argument

A. The Supreme Court Should Eradicate the Illusory Commercial/Noncommercial Speech Dichotomy

The commercial/noncommercial speech dichotomy is illusory, undefinable, based on erroneous assumptions, and should be eradicated. In order to understand why the distinction is illusory and undefinable, it is important to first consider what the Supreme Court has meant by “commercial speech.”

173. See infra text accompanying notes 213-214
174. Professor Redish calls this conundrum, “reverse dilution,” and warns that if the government is permitted to regulate tobacco advertising on the basis that consumers cannot be trusted in making individual decisions, “it is difficult to see how government could be denied the exact same power when political choices are involved.” Martin H. Redish, Tobacco Advertising and the First Amendment, 81 IOWA L. REV. 589, 606 (1996).
175. Id. at 609.
1. The Supreme Court's "Definition" of Commercial Speech Cannot Be Applied in Cases Beyond Those Proposing Simple Quid Pro Quo Exchanges

The Supreme Court has defined commercial speech as speech which "proposes a commercial transaction."\(^{176}\) On the flipside, the Court has excluded the following factors as irrelevant in classifying commercial speech as such: (1) whether the speech is sold for profit;\(^ {177}\) (2) whether the speech solicits money;\(^ {178}\) and (3) whether the underlying subject matter is commercial in nature.\(^ {179}\) These exclusions result both from the Supreme Court's recognition that the speaker's motive is not a factor and the fact that dual aspect speech encompassing political dialogue regarding commercial matters deserves the higher First Amendment protection afforded political speech.\(^ {180}\)

The clearest example of "pure" commercial speech is that which was litigated in *Virginia Pharmacy Board*. In that case, the State prohibited pharmacists from advertising the price of prescription drugs.\(^ {181}\) The advertisement at issue did not imply a political message and the speaker's motive was indisputably profit-oriented, resembling the simple proposal, "I will sell to you ten widgets for three dollars." The Court recognized the advertisement as "purely commercial speech."\(^ {182}\)

Most advertisements, however, are not as direct or solely commercial in nature. Consider, for example, the dairy industry's creative "Got Milk?" advertising campaign. Variations of the print ads depict deliciously tempting cakes and cookies with a simple statement: "Got Milk?" In the television commercials, snackers are portrayed in the unenviable predicament of having their cake and eating it, too—

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178. Similarly, this exclusion recognizes the overlap of political and commercial speech. This exclusion protects political organizations seeking contributions to fund their political purpose. *Id.* See also *Virginia State Bd.*, 425 U.S. at 763.

179. *Id.*

180. *Id.* at 640.


182. *Id.*
but without milk. These advertisements do not fit squarely within the Court's definition of commercial speech because there is no express invitation to purchase the product. While at first glance no one would doubt that the dairy industry’s motive for the speech is to sell its product, as discussed above, the speaker’s motive is irrelevant. Moreover, this apparent motive overlooks the fact that every product on the market contains a potentially political component.

In fact, it is usually a third-party such as a public interest group or a governmental entity which “politicizes” the product. For example, following a protest by vegetarians criticizing consumer purchases of meat and fur, companies selling those products regularly address those politics in counter-advertising designed to both sell a product and state a political counter-message. Similarly, consider the following hypothetical competitive campaign among the chicken industry. Following criticism of “inhumane” chicken-raising practices, some chicken producers advertise that they did not employ such practices, implying that their politically incorrect competitors did so. While the seller’s political counter-speech in these examples may aim at an ultimate commercial goal, the content of the speech itself—which is the sole factor in classifying speech—is inherently political.

Tobacco advertising is a prime example of this overlap between politics and commercialism. Consider the case of In Re R.J. Reynolds Tobacco Co., where R.J. Reynolds printed an advertisement disputing a health study showing that smoking causes heart disease. The advertisement challenged the study’s methodology, and read, “We at R.J. Reynolds do not claim this study proves that smoking doesn’t cause heart disease. But we do wish to make a point . . . [T]he controversy over smoking and health remains an open one.” Although the FTC erroneously characterized R.J. Reynolds’ speech as commercial (the error lay in the FTC’s reliance

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183. See supra text accompanying notes 176-180.
184. See generally Ad War Brewing, Seattle Times, Jan. 23, 1995, at E1 (discussing advertising wars between beer companies and State government).
185. Trade Reg. Rep. (CCH) ¶ 22,385, at 23,467 (1986), rev’d, Trade Reg. Rep. (CCH) ¶ 22,522 at 22,180 (1980), stay denied, Trade Reg. Rep. (CCH) ¶ 22,54 at 22,231 (1988), cited in DeVore & Sack, supra note 125, at 504-07. The FTC determined that R.J. Reynolds’ speech was “commercial” and therefore subject to more permissive regulation. DeVore & Sack, supra note 125, at 504-07. While this finding was clearly erroneous because the FTC based its determination on R.J. Reynolds’ economic motive, the parties entered into a consent decree, preempting any further review. See id.
186. Id.
on the speaker's motive), the advertisement clearly contained political language.

In another controversy, Phillip Morris responded to a congressional ban on television advertisements of cigarettes by releasing commercials "discuss[ing] the importance of the Bill of Rights to our way of life and encourag[ing] viewers to become acquainted with its provisions." The ad neither depicted nor discussed anything regarding cigarettes, but merely displayed the Phillip Morris logo and offered free copies of the Bill of Rights to viewers. Commercial or political?

Politics surrounding current efforts to regulate tobacco raise the identical problem. The relatively recent war against tobacco has sparked massive advertising and counter-advertising between governments—both federal and state—and the tobacco companies. While the first tobacco ads ever produced may have been solely to propose a commercial transaction—in both motive and substance, tobacco has evolved into one of the hottest and most controversial political issues. For example, where libertarian political groups join with tobacco companies to lobby against government regulation, the simple, commonly-visible advertisement with the word "Marlboro" can no longer be deemed purely commercial, because the name has become associated with a political crusade. Thus, the government inevitably creates for itself a catch-22: a product may be born purely commercial; the government endeavors to regulate it; the seller is coerced into the political arena; and finally, the seller's advertisements

187. Kozinski & Banner, supra note 19, at 644. The authors cite this controversy to illustrate the same problem discussed here, namely, the difficulty in discerning whether dual aspect speech (which Judge Kozinski calls "advertorials") is commercial or political. Id. See also From Diets to Underwear, 10 Ads Were Real Turkeys, ST. PETERSBURG TIMES, Dec. 5, 1990, at 1E (describing Phillip Morris' campaign as "a new low even for cigarettes manufacturers.")

188. Id.


190. See generally Ron Scherer, Tobacco Firms Face a Pack of Lawsuits in '97, SAN DIEGO UNION-TRIB., Dec. 13, 1996, at A-38 (describing debate over sale and regulation of tobacco products as "hot political issue").

191. Mike Brown, Critics Say Tobacco Seeks FDA Overhaul But GOP Denies An Industry Role, COURIER-J., April 20, 1996, at 1A (describing how both conservative and libertarian think tanks have joined tobacco companies in their challenge to prospective regulation).
intertwine both commercialism and politics. Advertisements of a "post-politicized" product serve more than the single purpose of "proposing a commercial transaction" and, therefore, cannot be regulated according to the lesser standard applied to commercial speech cases—even under current law. And while a Marlboro advertisement identical to the one in Virginia Pharmacy Board could arguably be characterized as purely commercial, rest assured that tobacco companies will rise to the challenge of intertwining their political and commercial ambitions to circumvent the purely commercial speech category.

2. So-Called "Distinguishing Characteristics" of Commercial Speech 
   Do Not Justify Lesser Constitutional Protection

   The Court has identified the following distinguishing characteristics of commercial speech: (1) that commercial speech is more objectively verifiable; and (2) that commercial speech, the offspring of economic self-interest, is supposedly a hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation.” Justice Thomas has criticized these distinctions as meaningless: “[N]either of these rationales provides any basis for permitting the government to keep citizens ignorant as a means of manipulating their choices in the commercial or political marketplace.” Justice Blackmun similarly rejected the proposition that “commonsense differences” between commercial and noncommercial speech justify the two-tiered approach. Recognizing that the definition of commercial speech cannot be applied in most cases, Judge Kozinski of the Court of Appeals for the Ninth Circuit recently analyzed whether the commercial/noncommercial distinction is justifiable because of the distinguishing characteristics of commercial speech and concluded that the proffered distinctions do not justify the dichotomy.

192. See also Jeff I. Richards, Politicizing Cigarette Advertising, 45 CATH. U. L. REV. 1147, 1151 (1996) (noting anti-smoking forces “have made tobacco advertising into a major political issue, effectively transforming it into ‘political speech.’”).
194. Id. (Thomas, J., concurring).
The first distinction is based on the premise that a listener can more readily determine the truth of commercial speech. While this assumption is true for simple cases where the seller proclaims, "widgets cost one dollar," most advertising is indirect, suggestive, and rhetorical. Concordantly, Judge Kozinski argues: "[N]ot all commercial speech is so objective. What about the statement 'America is turning 7-Up?' Is that true? How would you tell?" Similar examples pervade the advertising industry. Is it true that nobody can eat just one "Lay's" potato chip? Are green M&Ms a sexual stimulant? Are Jeep Cherokee owners fun-loving and rugged? The point is straightforward: modern advertising is more sophisticated and suggestive and therefore eludes any objectively verifiable component which may have persisted in traditional advertising.  

The second distinction is premised on the idea that a commercial speaker will not be side-lined by regulation because his or her profit incentive will inspire competitive measures to circumvent the potential pitfalls of speech regulation. The Supreme Court, however, has made clear that the speaker's motive is not a factor in classifying speech as commercial or noncommercial. The assumption that the speaker's profit motive renders his or her speech more durable is directly inapposite to this principle. Moreover, in an industry such as the tobacco business, where an entire industry is faced with the prospect of imminent dissolution, either by regulation or by bankruptcy resulting from protracted massive litigation, speech may be its only tool with which to save itself. Thus, as Justice Brennan has stated, "[n]o differences between commercial and other kinds of speech justify protecting commercial speech less extensively where . . . the government seeks to manipulate private behavior by depriving the citizens of truthful information concerning lawful activities."  

Even if these distinctions were logically sound, they do not imply a justification for the paternalistic manipulation of information in the

197. Id. at 635.
198. Id.
199. See supra text accompanying notes 177-180.
200. Posadas De Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 351 (1986) (Brennan, J., dissenting). See also Central Hudson, 447 U.S. at 574-75 (Blackmun, J., concurring) (Justice Blackmun argued: "Even though 'commercial' speech is involved, [advertising regulation] strikes at the heart of the First Amendment. This is because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice.").
In fact, the most logical reason why the government would want to curtail the free flow of commercial information is that the government has reached a political compromise in fear of the political backlash that direct regulation would create. The present tobacco controversy demands such a compromise. Could the President and Congress realistically threaten the demise of an entire industry netting $2.74 billion annually? The tobacco industry would likely view substantial political contributions as a sound investment to sustain profitability, wouldn't it? Moreover, the government would not quickly resolve to render thousands of tobacco company employees unemployed. In reality, then, President Clinton's efforts to regulate tobacco advertising seem the result of a political compromise aimed at avoiding the political backlash which would arise out of direct regulation. Accordingly, the Supreme Court's traditional distinctions between commercial and noncommercial speech are suspect at best, and are certainly inapplicable in the context of tobacco advertising regulation.

The free market economy in the United States depends on the free flow of information. The system is based on the premise that consumers will evaluate commercial information and make informed decisions. As a result, high demand products are perpetuated, while low demand products are driven out. While this simple description of...
the economy may seem obvious and elementary, the integral role of information or commercial speech cannot be overstated.206

Consider the effect of information in commerce. Where company X sells high-fat, over-priced potato chips with statistically proven low satisfaction, its competitor, Y, would likely wish to inform prospective consumers that its potato chips, in comparison to X's, are lower in fat, cheaper, and have a high statistical consumer satisfaction ratio. Such competitive advertising pervades the media. The effect of such advertising is beneficial both to consumers and to Y. While X may be detrimentally affected, competitive forces will drive X either to improve its product or to fade away. So the free market system flourishes, protecting both consumers and the economy by maximizing quality and minimizing the exploitation of profit by monopoly.207

Now consider the same scenario without such competitive information. The busy consumer stops at a supermarket and, not having four spare hours to siphon through vast information on potato chip bags, grabs either the cheapest or the most attractively packaged bag of chips. Under this system, the commercial survivors are selected at random, irrespective of comparative quality or pricing. Accordingly, both the free market and the consumer suffer.208

Of course, while the above hypothetical exemplifies the utility of information in commerce, this truism can only survive if the information is truthful and neither fraudulent nor deceptive. Obviously, this is because consumer reliance on false information by definition precludes the consumer from making an informed decision. Accordingly, consumer laws in the United States have perpetuated the exchange of truthful information regarding products—at times even affirmatively requiring manufacturers to provide consumers with information necessary to make an informed decision—while preventing the exchange of false or misleading information.209

206. Herbert Hovenkamp, Economics and Federal Antitrust Law § 1.6, at 36-39 (1989)(noting imperfect competition is facilitated “[i]f one group of buyers does not know enough about . . . the content of the product”); id. at § 1.1, at 1-14.
207. See id.
209. Posadas, 478 U.S. at 350 (Brennan, J., dissenting)(noting Supreme Court has “consistently invalidated restrictions designed to deprive consumers of accurate information about products and services legally offered for sale.”)(citations omitted).
The government has long prohibited the dissemination of false and misleading information in the commercial context.\textsuperscript{210} For example, trademark law prohibits the deceptive utilization of a competitor’s name or symbol, thus protecting consumers from confusion as to the seller and its reputation.\textsuperscript{211} Similarly, the Federal Trade Commission Act prohibits false and misleading advertising.\textsuperscript{212} Again, such statutes further the goal of ensuring that consumers have sufficiently truthful information to make informed decisions.

Consumer statutes require the disclosure of truthful information regarding certain products, as well. For example, the Nutrition Labeling and Education Act of 1990\textsuperscript{213} requires that food and beverage packages contain specific nutritional information, including fat and calorie content. In the spirit of informing consumers, Congress has required similar disclosures for tobacco products. In the Cigarette Labeling and Advertising Act,\textsuperscript{214} Congress described its goal as assuring that “the public may be adequately informed” about the health risks of cigarette smoking and required warning notices on cigarette packages and advertisements. Thus, consistent with those laws which prohibit false and misleading advertising, labelling laws further the common goal of informing consumers by disseminating truthful information.

Absent from this scheme, however, is any recognition of a governmental interest in prohibiting the dissemination of truthful


\textsuperscript{211} The Federal Lanham Act provides:

\begin{quote}
Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person [is subject to civil liability].
\end{quote}


information regarding legal products. The reason is simple: the government has no legitimate interest. While, as discussed above, the government may seek a political compromise in regulating advertising rather than directly regulating the product, the government should not be able to coerce disclosure of certain information to purportedly benefit consumers, and then prevent others from responding. Such a result is hypocritical, paternalistic, and violative of the First Amendment because, as discussed above, direct regulation is less restrictive, for First Amendment purposes, than speech regulation.

B. Alternatively, President Clinton's Proposed Ban is Unconstitutional

Applying Central Hudson's Intermediate Scrutiny Standard

1. Applying Central Hudson

Clinton's proposed regulation of tobacco advertising fails the less stringent intermediate scrutiny test of Central Hudson, as well. This realization is critical, assuming that the Clinton administration's true interest is battling tobacco itself to prevent health crises, rather than politicizing a hot topic for good press. Because the proposal is clearly unconstitutional under current standards—irrespective of the reform proffered above—the Clinton administration should endeavor to create more realistic solutions to the tobacco health crisis. Such solutions could include: (1) creating a tobacco consumer statute, including class action provisions, attorneys fees, punitive damages, or other incentives to make the tobacco industry accountable for its actions; (2) counter-speech campaigns to reduce smoking; (3) taxes on

215. Concurring in Central Hudson, Justice Blackmun stated: "Permissible restraints on commercial speech have been limited to measures designed to protect consumers from fraudulent, misleading, or coercive sales techniques. Those designed to deprive consumers of information about products or services that are legally offered for sale consistently have been invalidated." Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 574 (1980) (citations omitted).

216. The Fourth Circuit has upheld against First Amendment challenges a city ordinance prohibiting tobacco billboards. Penn Adver., Inc. v. Mayor of Baltimore, 63 F.3d 1318, 1326 (4th Cir. 1995). For an analysis and critique of that decision, see Johnson, supra note 62. For an analysis of the Fourth Circuit's decision after remand, see 101 F.3d 332 (4th Cir. 1996), for determination in light of 44 Liquormart, see infra text accompanying notes 256-277.

217. First Amendment lawyers have criticized: "Politics is what's going on here, despite painfully obvious First Amendment problems." Richard Cavelli, Constitution Cited As Blocking Rules on Cigarette Ads, SEATTLE TIMES, Sept. 7, 1996, at A3. See also Claudia McLachlan, Tobacco's Road is Smooth: FDA Regs Face Legal Fight, NAT'L J., Sept. 9, 1996, at B1 (stating "[a]bout the only thing everyone agrees on in the contentious debate over government regulation of cigarettes is the Clinton administration's brilliant political timing in releasing its final tobacco regulations.").
tobacco to decrease demand; or (4) the sociological extreme solution of tobacco prohibition. While this list is not suggested as an exhaustive, or even a realistic, solution to the tobacco crisis, it illustrates that President Clinton has circumvented the tougher issues by taking aim at speech which is constitutionally protected even under *Central Hudson*.

Under *Central Hudson*’s first prong, tobacco advertising is protectable so long as the content is truthful, not misleading, and relates to a legal activity. While proponents of the ban argue that tobacco advertisements are misleading because they depict a healthy life-style among smokers, advertising campaigns such as Joe Camel and the rugged Marlboro horseman cannot be subverted under this prong because such a result would re-invent the advertising industry and render unconstitutional practically every modern advertisement ever published. Suggestive advertising is simply not implicated under *Central Hudson*’s first prong. Moreover, tobacco’s ill effects are mandatorily disclosed by law, thereby precluding any deceptive or misleading component of tobacco advertising.

The second prong of the test requires that the government assert a substantial interest in regulating tobacco advertising. Prior to *Coors*, the Court had generally applied a substantially diminished prong-two burden (if any) upon the state, most often finding a substantial governmental interest. In *Coors*, the Court continued its deferential approach to prong two, stating it had “no reason to think that strength wars, if they were to occur, would not produce the type of social harm that the Government hopes to prevent.” A majority in *44 Liquormart* similarly nodded its head at the State’s purported interest in promoting temperance, but this deference is likely the

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218. *Central Hudson*, 447 U.S. at 566.

219. President Clinton has accused tobacco companies of displaying misleading ads “show[ing] rugged men and glamorous women lighting up and blissful couples sharing their cigarettes.” *Fox*, supra note 12, at 13. Other authorities have made similar claims. Weber & Marks, *supra* note 14, at 70. Such a claim is meritless, however, because the general nature of advertising is to depict a product’s users as happy with the product. *See id.*

220. *See Kozinski & Banner, supra* note 19, at 635-36.

221. *See infra* text accompanying notes 244-245.

222. *Central Hudson*, 447 U.S. at 564.


result of two aspects of prong-two analysis.\textsuperscript{225} First, a state’s interest or motive can rarely be contradicted—it is what the state says it is. Second, the regulation is much more easily challenged under the third and fourth prongs, where the state has the burden of validating the correlation between the regulation and its effect on the targeted state interest.

Because Clinton’s ban purportedly aims at protecting children, a prong-two analysis requires an analysis of whether that interest would warrant more deference than otherwise accorded. While the Court could likely recognize the state’s interest in protecting children because the underlying activity, \textit{e.g.}, selling tobacco to minors, is illegal, the regulation would have to be quite narrow to fit this rationale.\textsuperscript{226} This is because the Court has struck down regulations which prohibit advertising to adults, using a purported goal of protecting children as a pretext.\textsuperscript{227} In \textit{Bolger}, the state argued that its interest in protecting children justified its ban on unsolicited mailing of advertisements for contraceptives.\textsuperscript{228} The Court rejected this claim, stating that “parents must already cope with the multitude of external stimuli that color their children’s perception of sensitive subjects. . . . \textit{The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.}.”\textsuperscript{229} Under \textit{Bolger}, then, the government’s interest in protecting children from tobacco advertising could reasonably be deemed overbroad because it reaches media which is directed at both children and adults.\textsuperscript{230}

Under prong three, the government has the burden of showing that regulating tobacco advertising would, in a “direct and material

\begin{footnotesize}
\textsuperscript{226} Redish, \textit{supra} note 174, at 607-08.
\textsuperscript{228} Id.
\textsuperscript{229} Id. at 73-74 (emphasis added).
\textsuperscript{230} Redish, \textit{supra} note 174, at 608 (arguing “[while] restrictions on tobacco advertising within a certain distance of a school or playground are constitutional, . . . more general restrictions on tobacco advertising cannot constitutionally be regulated on the grounds that minors will also be exposed to it. To allow such restrictions would be to reduce all of society to a community of children for purposes of the First Amendment.”). \textit{But see} FCC v. Pacifica Found., 438 U.S. 726, 746-49 (1978)(upholding partial ban of specified “filthy words” on broadcast radio during hours when children are likely listening); Denver Area Educ. Telecomm. Consortium v. FCC, 116 S. Ct. 2374, 1996 U.S. LEXIS 4261, at *137 (Kennedy, J., concurring)(noting in First Amendment indecency analysis, “Congress . . . [has] a compelling interest in protecting children from indecent speech . . . . So long as society gives proper respect to parental choices, it may, under an appropriate standard, intervene to spare children exposure to material not suitable for minors.”).
\end{footnotesize}
way,” reduce tobacco use by children. In 44 Liquormart, the Stevens plurality rejected Rhode Island’s unsubstantiated claim that its prohibition on advertisements stating the price of liquor would raise prices and reduce consumption. The plurality demanded a State showing that the regulation would advance its interest, “to a material degree” under Edenfield. The Court demanded specific findings of specific results, and warned: “[S]peculation certainly does not suffice when the State takes aim at accurate commercial information for paternalistic ends.”

Moreover, while the Court has fluctuated in the quantum of evidence required, Coors and 44 Liquormart severely undermine—if not overrule—Posadas’ deferential approach to prong three. Coors reversed the government’s labeling ban because the government failed to offer “convincing evidence” that a labeling ban effectuated a reduction in strength wars. Despite a positive correlation showing that the government achieved its goal through its ban, the Court was unwilling to assume that the regulation caused the reduction without hard data corroborating such claimed causation. The Coors Court’s analysis essentially defines Edenfield’s “direct and material” test in terms of an evidentiary requirement and evinces a clear choice by the Supreme Court to strictly enforce the regulator’s burden of proof. While Posadas diminished a legislature’s prong-three burden of showing with conclusive evidence that its regulation will effect a contemplated change, Posadas can no longer be cited for the proposition that speech related to a harmful but legal activity is entitled to less protection than other protectable commercial speech under the First Amendment merely because the government could have directly regulated that activity.

234. See supra notes 80, 82, 92, 156.
236. Id. See also Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2381 (1995)(Kennedy, J., dissenting)(advocating the Supreme Court require the government to show actual surveys, sample size or selection procedures, explanations of methodology, and discussion of excluded results).
238. Coors, 115 S. Ct. at 1592.
While the FDA has proffered evidence that its advertising regulations would reduce smoking by children, the tobacco lobby has produced counter-statistics of comparable weight. This battle illustrates the unworkable nature of Central Hudson because any judicial determination of prong three is necessarily subjective and practically arbitrary depending on the relative credibility recognized by any particular court. Furthermore, because both sides can point to studies regarding the effects of tobacco advertising on children smoking and the burden is clearly on the government to “convinc[e]” the court that its regulation will advance its purported interest in a direct and material way, the Court should strike the ban on prong-three grounds.

Conflicting regulatory policy regarding disclosure of tobacco information poses a problem for the government, as well. Coors summarily rejected the government’s claim that a labeling ban would directly and materially advance its interests in curbing strength wars, primarily because the government’s general regulatory scheme regarding alcohol favored information dissemination. Chilling tobacco advertising would sanction the very same inconsistency Coors rejects, because the general thrust of tobacco policy has mandated disclosure closely akin to alcohol.

Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305, 1315 (4th Cir. 1995) (Anheuser-Busch I) (holding “restricting the outdoor advertising of alcoholic beverages directly and materially advances the campaign against underage drinking.”).

240. Noah & Noah, supra note 17, at 57.
244. Similarly, the Supreme Court of Canada recently overturned a law banning all tobacco advertising in the country because it found a lack of direct scientific evidence showing a causal link between advertising bans and decrease in tobacco use. RJR-MacDonald, Inc. v. Attorney General of Canada, No. 23460-23490 (Can. 1995).
245. See supra text accompanying note 107.
246. For example, the Cigarette Labeling and Advertising Act of 1965 requires that all cigarette labels and advertising include rotational warnings:

“SURGEON GENERAL’S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

SURGEON GENERAL’S WARNING: Quitting Smoking Now Greatly Reduces Serious Risk to Your Health.

SURGEON GENERAL’S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.
44 Liquormart and Coors also reflect the Court's revived emphasis on Central Hudson's fourth prong. While the Court has applied varying levels of scrutiny under prong four, these recent decisions mark (at a minimum) a revival of Central Hudson's mandate for intermediate scrutiny. A unanimous Court in 44 Liquormart found that Rhode Island's regulation violated the First Amendment because the State had less restrictive means of achieving its purported purpose of temperance. The State could have levied taxes, initiated educational campaigns, limited per capita purchases, or even directly regulated the product. These alternatives are readily available in the war against tobacco and render the FDA's regulations unconstitutional at least at this early stage of aggressive regulation.

In combatting tobacco, the most obvious and effective alternative to chilling speech is counter-speech. Counter-speech directly furthers the First Amendment's purpose of encouraging pervasive and open dialogue. Such dialogue has proven not only viable, but extremely effective, in furthering recent social concerns. For example, Nancy Reagan's campaign against drugs via massive advertising and

SURGEON GENERAL'S WARNING: Cigarette Smoke Containis Carbon Monoxide."

247. Under Central Hudson, a regulation of commercial speech violates the First Amendment if it is more extensive than necessary. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980). In subsequent cases the Court reduced the fourth prong to a requirement of a reasonable “fit” between the governmental interest and the regulation. Posadas De Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 341 (1986); Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 4769 (1989). In Fox, the Court refused to apply a “least restrictive means” approach, and ruled that the regulation should not “burden substantially more speech than is necessary to further” its interests. 492 U.S. at 478 (citation omitted). Posadas and Fox misapply the Central Hudson test. Coors implicitly corrects this misapplication and reverts to a quasi-“least restrictive means approach.” Coors, 115 S. Ct. at 1594 (labeling ban fails prong four because it is “more extensive than necessary.”).


public forums directly effectuated a decrease in drug use.\textsuperscript{250} Safe sex campaigns prompted by the AIDS epidemic have achieved similar success.\textsuperscript{251} In fact, it was precisely what the Clinton ban seeks—less information—which sustained the pervasiveness of both drug use and the AIDS virus.

Other viable alternatives include imposing excise taxes on tobacco products,\textsuperscript{252} creating statutory tort claims against tobacco companies,\textsuperscript{253} banning smoking in public, imposing heavy fines and revoking licenses from stores which sell cigarettes to minors,\textsuperscript{254} or even banning outright the production, sale, and use of tobacco.\textsuperscript{255} From a purely political standpoint, perhaps the FDA is shunning its responsibility by not declaring illegal the production and sale of cigarettes, a product known to be a leading cause of death in the United States. That decision is within its discretion. The decision to regulate speech, however, is not within the FDA’s discretion. The existence of any one of these alternatives alone precludes, under \textit{Central Hudson}, a Clinton-type tobacco advertising ban. Accordingly, the ban fails the \textit{Central Hudson} test under prong four as well.

2. Assessing Recent Fourth Circuit Opinions

While some legal scholars and opponents to the FDA proposal have declared \textit{44 Liquormart} a “very powerful victory for the entire
advertising community," proponents—including President Clinton, as well as the Court of Appeals for the Fourth Circuit, have narrowly construed 44 Liquormart’s impact on tobacco advertising regulations aimed at protecting minors. In **Penn Advertising of Baltimore v. Baltimore**, plaintiff challenged a city ordinance which prohibited all cigarette advertisements “in a publicly visible location”—including “outdoor billboards, sides of building[s] and freestanding signboards.” **Anheuser-Busch v. Schmoke** involved a similar Baltimore ordinance aimed at liquor advertisements. In their respective first appeals, the Fourth Circuit held that both ordinances were constitutionally sound under **Central Hudson**. On appeal, the Supreme Court vacated and remanded both cases for consideration in light of 44 Liquormart. In affirming judgment in both cases, the Fourth Circuit erroneously applied 44 Liquormart because it did not compel the government to satisfy its strict burden of proving a correlation between the regulations and their effects on the city’s proffered goals and because it read 44 Liquormart too narrowly.

The Fourth Circuit reconciled **Penn I** and **Anheuser-Busch I** with 44 Liquormart on the following grounds:

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257. *Id.*


259. See supra text accompanying note 251, infra text accompanying note 265.

260. **Penn Adver. of Baltimore, Inc. v. Baltimore**, 63 F.3d 1318, 1321 (4th Cir. 1995)[hereinafter **Penn II**].

261. **Anheuser-Busch II**, 101 F.3d at 327.

262. **Penn I**, 63 F.3d at 326; **Anheuser-Busch I**, 63 F.3d at 327.


264. While this section provides a critique of the Fourth Circuit’s interpretation and application of **Central Hudson** in light of 44 Liquormart, it does not criticize directly the Fourth Circuit’s pre-44 Liquormart decisions in **Penn I** and **Anheuser-Busch I**. The Fourth Circuit’s holdings and rationales in those cases, however, are indirectly addressed throughout this Note. For a detailed review of the Fourth Circuit’s pre-44 Liquormart decisions, see Johnson, supra note 62; Thomas D. Blue, Jr., Note, *Over the Edge: The Fourth Circuit’s Commercial Speech Analysis in Penn Advertising and Anheuser-Busch*, 74 N.C.L. REV. 2086 (1996).

265. In **Penn II**, the Fourth Circuit issued a one paragraph opinion essentially bootstrapping its reconciliation of 44 Liquormart in **Anheuser-Busch II**, stating, “we affirm [Penn] for the reasons previously given and readopt our previous decision as modified by **Anheuser-Busch II**,” 101 F.3d at 333. Accordingly, this Part will address **Penn II** and **Anheuser-Busch II** collectively, referring to the Fourth Circuit’s approach in general.
was merely a plurality opinion, its holding must be viewed "as that position taken by those Members who concurred in the judgments on the narrowest grounds;" 266 (2) in 44 Liquormart, the state issued a blanket ban "in any manner whatsoever" on price advertising, while the Baltimore ordinances only prohibited advertisements in particular areas where children are likely to walk or play; (3) Baltimore's ordinances target only those persons who cannot be legal users of alcoholic beverages and tobacco, not legal users as in 44 Liquormart; and (4) while the Supreme Court in 44 Liquormart feared that Rhode Island was circumventing public scrutiny by substituting a direct ban on advertising for a ban on the product, no such attempt to undermine democratic processes is evident with regard to the Baltimore ordinances.

The Fourth Circuit read 44 Liquormart narrowly, finding that the only rationale agreed upon by a majority was that Rhode Island's ban failed Central Hudson's fourth prong because there were other, less restrictive methods of reducing alcohol consumption available. 267 Despite the obvious parallel between Rhode Island's and Baltimore's ordinance, the Fourth Circuit failed to even mention, let alone justify, how Baltimore satisfied prong four without a showing that the lesser alternatives specifically cited in 44 Liquormart—taxes, educational programs, direct regulation, the establishment of minimum prices—could not advance the city's interests in protecting children. The Fourth Circuit's failure to address this issue proves the point Justice Thomas articulated in his concurrence in 44 Liquormart: an advertising regulation could rarely, if ever, satisfy Central Hudson's fourth prong as literally read and currently applied. 268 This is because even direct regulation of the product is less restrictive for First Amendment purposes. 269

Nor was the fact that Rhode Island issued a "blanket" ban a determinative factor in 44 Liquormart. While the Fourth Circuit sanctioned Baltimore's regulations because the city left undisturbed advertising channels to adults, 44 Liquormart is devoid of any mention

266. Anheuser-Busch II, 101 F.3d at 328 (citing Marks v. United States, 430 U.S. 188, 193 (1977)).

267. Anheuser-Busch II, 101 F.3d at 328 (noting eight justices, in three separate opinions, found alternative forms of regulation which could promote temperance without impinging upon speech).

268. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1519-1520 n.7 (Thomas, J., concurring).

269. See id.
of the relative quantity of advertising prohibited and retained as a variable justifying advertising regulation. The Fourth Circuit committed clear legal error in relying on this factor. A partial ban which leaves open other channels of advertising communication is no less subject to intermediate scrutiny than a blanket ban.\textsuperscript{270} Moreover, Baltimore presented no evidence corroborating the correlative effect of the regulation on children, and the ordinance did not clearly mark the boundaries of the advertising limitations. Thus, the Court took the city at its word—without requiring Baltimore to satisfy its evidentiary burden\textsuperscript{271}—and sanctioned a ban which, while purportedly aimed at children, certainly had the effect of limiting the amount of information disseminated to adult consumers. This is undoubtedly inapposite to \textit{44 Liquormart} and \textit{Coors}, both of which reiterated the strong burden on the state to prove that the regulation would directly and materially advance its interests.\textsuperscript{272}

The Fourth Circuit’s emphasis on the fact that the Baltimore ordinances were aimed at protecting children utterly lacks support in commercial speech jurisprudence. While it is clear that the standards by which First Amendment speech may be assessed in other contexts sometimes include variable levels of scrutiny when aimed at protecting children,\textsuperscript{273} the Court has sanctioned this “children exception” only in limited areas such as child pornography and indecency.\textsuperscript{274} In fact, the

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\textsuperscript{271} See also Blue, Jr. supra note 264.  
\textsuperscript{272} See, e.g., \textit{44 Liquormart}, 116 S. Ct. at 1509; \textit{Anheuser-Busch II}, 101 F.3d at 331 (Butzner, J., dissenting).  
\textsuperscript{273} Compare \textit{Stanley v. Georgia}, 394 U.S. 557, 566-68 (1969)(establishing right to private possession of adult pornography in home), \textit{with Osborne v. Ohio}, 495 U.S. 103, 111 (1990) (upholding legislation prohibiting use of children in pornography). \textit{See also FCC v. Pacifica Found.}, 438 U.S. 726, 750 (1978)(distinguishing indecent speech during hours when children have radio access, as compared to late evening hours, when children are asleep). These cases—all cited by the Fourth Circuit in support of its children exception—are not persuasive authority in the context of commercial speech regulation. There is a stark difference between protecting a child from behavior—e.g., posing for pornography—and from being exposed to speech. Moreover, there is no indecent speech implicated in most commercial speech contexts, most importantly, the speech at issue in \textit{Penn} and \textit{Anheuser-Busch}. Thus, while the Court has distinguished children in the contexts of pornography and indecent speech cases, it has clearly precluded advertising regulations aimed at protecting children. Erznoznik v. City of Jacksonville, 422 U.S. 205, 213-14 (1975)(“Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.”). \textit{See generally Bolger v. Yangs Drug Prod. Corp.}, 463 U.S. 60 (1983).  
\textsuperscript{274} Id. at 73.
\end{flushleft}
Court has specifically rejected such an exception in the context of commercial speech.\textsuperscript{275} Despite this clear precedent, the Fourth Circuit found support in the dicta of a 1944 case wherein the Supreme Court declared: "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens."\textsuperscript{276} For some perspective in considering the persuasiveness of this authority, consider this: at the time of this quote, only two years had passed since the Supreme Court first identified the concept of commercial speech, and defined its parameters in a much more permissive manner than the Court currently employs.

The Fourth Circuit's final factor—that the Baltimore ordinances did not reflect a legislative intent to circumvent political accountability—can be dismissed briefly. First, if a legislature were hiding behind political subterfuge, how can its true motive be discovered? Because such a motive can rarely be discerned, there is no practical way to apply this factor on a case-by-case basis. Second, the discussions regarding political accountability in \textit{44 Liquormart} were far broader than the case before the Court. Using very general terms, Justice Stevens stated:

It is the State's interest in protecting consumers from 'commercial harms' that provides 'the typical reason' why commercial speech can be subject to greater governmental regulation than noncommercial speech.\textsuperscript{277} Yet bans that target truthful, nonmisleading commercial messages rarely protect consumers from such harms. Instead, such bans often serve only to obscure an 'underlying governmental policy' that could be implemented without regulating speech.

Justice Thomas was similarly broad in his language, discussing how, "in case after case following \textit{Virginia Pharmacy Board}," the Court recognized, "the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly."\textsuperscript{278} Accordingly, the political subterfuge rationale in \textit{44 Liquormart} should be read as a general concern in commercial speech regulation, and not as a factor to be applied in fact-specific cases.

\textsuperscript{275} Id.

\textsuperscript{276} \textit{Anheuser-Busch II}, 101 F.3d at 330 (citing Prince v. Massachusetts, 321 U.S. 158, 168 (1944)).

\textsuperscript{277} \textit{44 Liquormart Inc. v. Rhode Island}, 116 S. Ct. 1495, 1508 (1996)(emphasis added) (citations omitted).

\textsuperscript{278} Id. at 1517 (Thomas, J., concurring).
IV

Conclusion

The commercial/noncommercial speech dichotomy is based on an illusory definition and faulty premises, and should be eradicated in favor of heightening the protection of commercial speech to the level at which political speech is protected. The Court's definition of commercial speech—"speech which proposes a commercial transaction"—is too basic for broad application because most speech historically categorized as commercial speech is multi-faceted, containing both commercial and political components. Furthermore, the Court's proffered distinguishing characteristics of commercial speech are illusory because the distinctions are illogically applied outside the context of the simplest commercial transaction.

Moreover, while the public has a strong interest in accessing commercial information to make informed decisions, the government has no legitimate interest in curtailing commercial speech. In fact, as Justices Blackmun and Thomas have criticized, the government's only possible interest in curtailing commercial speech is its interest in procuring a political compromise and circumventing tougher political considerations, such as direct regulation. As discussed throughout this Note, President Clinton's recent effort to regulate tobacco advertising illustrates these realities and their paternalistic effect on both commercial and public interests in the free flow of commercial information. Accordingly, the Court should elevate commercial speech protection to that which political speech enjoys.

Alternatively, Clinton's proposed ban on tobacco advertising should be held unconstitutional under *Central Hudson*'s intermediate scrutiny standard for protecting commercial speech. The government could fail its prong-two burden of showing a substantial interest in protecting children because the Court has been reluctant to chill speech for the sole purpose of protecting children. Moreover, because federal regulations regarding tobacco have, in the past, encouraged the flow of information, the Court should not be receptive to the government's claim of a substantial interest in chilling speech. The ban would also fail prong three because there is conflicting evidentiary data—at best—and the government cannot meet its burden of convincing the Court that its regulation will, in a direct and material way, achieve the government's contemplated goals. The ban also violates prong four because there are several viable alternatives to
banning tobacco advertising, including counter-advertising, excise taxes, and direct regulation.