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"Vice" Advertising under the Supreme Court's Commercial Speech Doctrine: The Shifting *Central Hudson* Analysis

by

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&

MILA GROS RIVERA-SANCHEZ**

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Introduction

For nearly two decades, the Supreme Court has tinkered with the analysis used for measuring the constitutionality of official restrictions on commercial speech as first set out in *Central Hudson Gas and Electric Corp. v. Public Service Commission* in 1980.¹ Since deciding that case, the Court has ruled in five “vice” advertising cases: *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico* in 1986,² *United States v. Edge Broadcasting Co.* in 1993,³ *Rubin v. Coors Brewing Co.* in 1995,⁴ *44 Liquormart, Inc. v. Rhode Island* in 1996,⁵ and most recently, *Greater New Orleans Broadcasting Association v. United States* in 1999.⁶

The extent to which government ought to regulate the promotion of so-called “vice” products like tobacco and alcohol, and activities such as gambling, is one of the most controversial contemporary advertising issues.⁷ Advertisers spend massive amounts of money each year seeking customers for legal products such as cigarettes, smokeless tobacco, beer, wine, and distilled spirits; and lawful gambling facilities such as state lotteries, private and public casinos, and horse and dog racing tracks, among others.

Often, when federal or state governments seek to curtail the potentially harmful effects of these products and activities, restrictions on advertising are politically attractive. The legislative rationale often assumes that curtailing advertising for a product like alcohol, for instance, will dampen consumer demand and thus alleviate social costs related to harmful secondary effects, like alcoholism.

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7. This article focuses on legal questions, particularly constitutional ones, surrounding this issue. The authors acknowledge that the advertising of potentially harmful “vice” products raises serious ethical issues in addition to legal ones. This paper does not address the ethical side of this realm, leaving that to other commentators. See generally, e.g., A. DAVID KITROSS AND JOHN MICHAEL GORDON, CONTROVERSIES IN MEDIA ETHICS 239-55 (2d ed. 1999) (overview of ethical issues in advertising including advertising potentially harmful products). For an interesting ethical framework for application in the context of persuasive communications, such as advertising and public relations messages, see generally Sherry Baker, Five Baselines for Justification in Persuasion, 14 J. MASS MEDIA ETHICS 69 (1999).
Even with laudable regulatory goals, government does not have free reign to restrict commercial messages. Truthful, non-deceptive advertising has been explicitly protected as "commercial" speech under the free speech clause of the First Amendment since 1976. However, the Supreme Court has held that "pure" commercial speech—speech that does no more than propose a commercial transaction—does not merit the full First Amendment protection afforded to other forms of expression, such as political and social speech. The extent to which government may regulate protected commercial speech in general, and "vice" advertising in particular, is an issue that continues to test First Amendment free speech principles and jurisprudence. This article attempts to examine how the Supreme Court has dealt with "vice" advertising within the constitutional framework of commercial speech protection. For purposes of this article, "vice" advertising is defined as the advertising or promotion of products or activities that, while legal for adults, can have harmful consequences for consumers and society.

The article first examines the commercial speech doctrine and the *Central Hudson* analysis. In subsequent sections, the article examines the progression of "vice" advertising cases from 1986 through 1999 in the overall context of the Supreme Court's commercial speech doctrine. The article focuses on the language and rationale employed by various justices in relevant commercial speech opinions.

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9. See Virginia Bd., 425 U.S. at 760. It should be noted here that a communication message can contain both commercial and non-commercial speech, but the point is that the Court has, in its jurisprudence, distinguished between messages that are commercial in nature and those that are not for purposes of First Amendment treatment of those messages. See id. at 761-62. This article will not cover the commercial/non-commercial dichotomy, as other commentators have explored that topic. See, e.g., Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 YALE J. ON REG. 85, 121-22 (1999).


11. This paper focuses primarily on the commercial speech doctrine as articulated by the Supreme Court in its commercial speech opinions. The paper does not deal with lower court opinions except for those lower court opinions directly relevant to the Supreme Court opinions discussed and analyzed in this paper.
and "vice" advertising cases. Consequently, this article appears to be unique in tracing the progression of "vice" advertising cases in detail through the 1999 holding in *Greater New Orleans Broadcasting Association*.  

What is remarkable about this line of cases is that the Court has completely reversed its position on "vice" advertising. Originally, "vice" advertising was effectively excluded from First Amendment commercial speech protection. The article argues that after 1999, the Supreme Court has virtually eliminated the "vice" advertising distinction and now requires equal treatment under the First Amendment of all truthful, non-deceptive advertising for lawful products and services. In doing so, the Court appears to be retreating from a longstanding practice of assuming as axiomatic a positive correlation between advertising and consumer demand and consumption. More broadly, the article argues that the decisions in *Rubin*, *44 Liquormart*, and *Greater New Orleans Broadcasting* elevated First Amendment protection for commercial speech to its highest level, approaching that of fully protected political and social speech. The article concludes with a summary of established principles and implications derived from the cases analyzed.

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I

Commercial Speech and the First Amendment

Until the mid-1970s, the Supreme Court characterized selling messages in advertising as "commercial activity" and not as protected speech under the First Amendment. In a landmark 1976 ruling, the Court assimilated commercial speech into the protection of the First Amendment free speech clause. Subsequently, in 1980, the Court set out a four-factor, constitutional test of intermediate scrutiny for governmental regulations of protected commercial speech.

A. The Virginia Board Case (1976)

In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., the Court stated explicitly for the first time that pure commercial speech – speech intended solely to "propose a commercial transaction" – is protected under the First Amendment. In Virginia Board, the Court struck down a state regulation that banned licensed pharmacists from advertising prescription drug prices. In so holding, the Court said the First Amendment protects not only commercial speakers and their messages, but also the public's right to receive these messages.

Writing for the majority, Justice Blackmun said that consumers have an interest in commercial information that "may be as keen, if not keener by far, than [their] interest in the day's most urgent political debate." For instance, he pointed out, individuals – especially the poor, sick, and aged – need prescription drug price information to determine where their limited medical dollars might be best spent. Blackmun stated:

Advertising, however tasteless and excessive it sometimes may seem, nonetheless is dissemination of information as to who is

16. See Virginia Bd., 425 U.S. at 762. In 1975, the year prior to deciding the Virginia Bd. case, the Court decided Bigelow v. Virginia, 412 U.S. 809, 825 (1975), and began to recede from the notion that commercial speech was wholly unprotected under the First Amendment, but it did not squarely address the issue. See Virginia Bd., 425 U.S. at 760-61.
17. See id. at 756 (stating that "[f]reedom of speech presupposes a willing speaker" and "the protection afforded is to the communication, to its source, and to its recipients").
18. Id. at 763.
19. See id.
producing and selling what product and for what reason. 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. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.\(^{20}\)

In addition, Blackmun said, some commercial advertisements provide information on significant public issues.\(^{21}\) For instance, an advertisement for American-made products might inform the public about alternatives to imported products that could be harmful to the domestic job market.\(^{22}\) However, Blackmun was careful to point out that advertising need not contain such an "important" message in order to merit constitutional protection.\(^{23}\)

### B. The Central Hudson Case (1980) and Four-Factor Analysis

The Virginia Board Court said government can regulate commercial speech but left undecided how much regulation the First Amendment would tolerate. In 1980, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Court set out a variation of intermediate scrutiny to test the constitutionality of government regulations on commercial speech.\(^{24}\) That four-factor analysis was first articulated as follows:

[First], we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern a lawful activity and not be misleading. [Second], we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must [third] determine whether the regulation directly advances the governmental interest asserted, and [fourth] whether it is not more extensive than is necessary to serve that interest.\(^{25}\)

Most of the Supreme Court’s commercial speech decisions since *Central Hudson* have turned on the application of the third and fourth factors. The Court has since described the third factor as the "direct-advancement inquiry" because the regulation must advance the asserted interest in a direct and material way.\(^{26}\) Under the fourth factor, the regulation must be narrowly tailored. This means the

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20. Id. at 765 (emphasis added).
21. See id. at 764.
22. See id. (citing Chicago Joint Bd. v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970), cert. denied, 402 U.S. 973 (1971)).
23. See id. at 765 (suggesting that there is no constitutional need to draw a line between “important” and merely “interesting” commercial messages).
25. Id.
regulation may not be more restrictive of speech than needed to accomplish the asserted regulatory goal, although the least restrictive means is not required.\textsuperscript{27}

The assumption that advertising fuels consumer demand and consumption was the foundation of the \textit{Central Hudson} opinion. In the case, the Supreme Court struck down a New York ban on promotional advertising by electrical utilities because the ban was too broadly worded.\textsuperscript{28} However, the Court agreed with New York that the state had a sufficiently substantial regulatory interest in energy conservation.\textsuperscript{29} The Court said there was a "direct link" between the advertising regulation and the regulatory goal of energy conservation because of the "\textit{immediate connection} between advertising and the demand for electricity."\textsuperscript{30} There was no empirical evidence in the record on this point, but the Court presumed that the utility company "would not contest the advertising ban unless it believed that promotion would increase sales."\textsuperscript{31}

II

Early Gambling Advertising Cases

After the \textit{Central Hudson} case, the first two Supreme Court cases addressing the constitutionality of government restrictions on "vice" advertising were \textit{Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico},\textsuperscript{32} decided in 1986, and \textit{United States v. Edge Broadcasting Company},\textsuperscript{33} decided in 1993.\textsuperscript{34} In both cases the Court

\begin{itemize}
\item \textsuperscript{27} See Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989). The Court said in \textit{Fox}:
\begin{quote}
[\textit{W}e have not gone so far as to impose ... the burden of demonstrating ... that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decision requires is a "\textit{fit} between the legislature's ends and the means chosen to accomplish those ends ..." a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served.""
\end{quote}
\textit{Id.} (internal citations omitted). One commentator has called this point from \textit{Fox} a "blow" to commercial speech protection that provides "legislative bodies more discretion in fashioning limits on commercial speech." Richards, \textit{supra} note 12, at 157.

\item \textsuperscript{28} See \textit{Central Hudson}, 447 U.S. 557.

\item \textsuperscript{29} See \textit{id.} at 568.

\item \textsuperscript{30} See \textit{id.} at 568-569.

\item \textsuperscript{31} \textit{Id.} In a concurring opinion, Justice Blackmun pointed out that the Court had cited no empirical support for this assertion. \textit{Id.} at 574 (Blackmun, J., concurring).

\item \textsuperscript{32} 478 U.S. 328 (Brennan, J., and Stevens, J., dissenting). The appellee, Tourism Company of Puerto Rico, was a governmental agency charged with regulating the casino industry in Puerto Rico.

\item \textsuperscript{33} 509 U.S. 418.

\item \textsuperscript{34} In 1971, the U.S. District Court, District of Columbia, upheld provisions in the
used the *Central Hudson* analysis and upheld government restrictions of advertising for legalized gambling. Also, in both cases, the Court deferred to governmental regulatory interests over the First Amendment rights of commercial speakers and those of the public to receive truthful, non-deceptive commercial messages. In addition, the Court continued to rely upon the assumed causal connection between advertising and demand and consumption.

A. The *Posadas* Case (1986)

In *Posadas*, a narrow 5-4 majority of the Supreme Court upheld Puerto Rican restrictions on casino gambling advertisements. The Puerto Rican legislature had legalized casino gambling in the 1948 Games of Chance Act ("1948 Act") to encourage tourism. However, the 1948 Act, including subsequent enabling regulations, banned casinos from targeting gambling ads to the "public of Puerto Rico." The 1948 Act only allowed casinos to advertise in "publicity media" subject to regulation by the Federal Communications Commission. See *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), aff'd sub nom *Capital Broad. Co. v. Kleindienst*, 405 U.S. 1000 (1972). The Supreme Court affirmed in 1972 without opinion. This case was decided before the Supreme Court assimilated commercial speech into the First Amendment in 1976, and the district court said that "Congress has the power to prohibit the advertising of cigarettes in any media." See *Capital Broad.*, 333 F. Supp. at 584. The district court also relied on Supreme Court precedent allowing regulation of broadcast media as a public resource that must be operated in the interest of the public. See id. at 586 (citing *Red Lion Broad. Co. v. Federal Comm. Comm'n*, 395 U.S. 367 (1969)).

35. See *Posadas*, 478 U.S. at 344. Justice Rehnquist wrote the majority opinion and was joined by Justices Burger, White, Powell, and O'Connor. Justice Brennan wrote a dissenting opinion, joined by Justices Marshall and Blackmun. See id. at 348-59 (Brennan, J., dissenting). Justice Stevens also wrote a dissenting opinion and was joined by Marshall and Blackmun. See id. at 359-363 (Stevens, J., dissenting). For law review treatment of the *Posadas* case, see generally Phillip B. Kurland, *Posadas de Puerto Rico v. Tourism Company: "'Twas Strange, 'Twas Passing Strange, 'Twas Pitiful, 'Twas Wondrous Pitiful,"* 1986 Sup. Ct. Rev. 1 (1986).


37. See id. at 332-33 (citations omitted). The Games of Chance Act of 1948 provided that "[n]o gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico." Id. (citing Games of Chance Act of 1948, Act No. 221 of May 15 1948, § 8, codified, as amended, at P.R. Laws Ann., Tit. 15, § 77 (1972)). Enabling regulations enacted by the Tourism Company of Puerto Rico, a public company with official regulatory authority, also provided that "[n]o concessionaire, nor his agent or employee is authorized to advertise the gambling parlors to the public in Puerto Rico." *Posadas*, 478 U.S. at 332 (citing 15 R. & R.P.R. § 76a-1(7) (1972)).
outside Puerto Rico."³⁸ Despite this restriction, Puerto Rican residents were not prohibited from gambling in the casinos.

A Texas company operating a casino in Puerto Rico was fined for violating the advertising restrictions. The company challenged the regulations on First Amendment grounds in the Superior Court of Puerto Rico.³⁹ The court found the restrictions constitutional, but limited their scope with "narrowing constructions."⁴⁰ In sum, the court limited the ban to "advertisement[s]... contracted with an advertising agency, for consideration, to attract the [Puerto Rican] resident to bet at the dice, card, roulette and bingo tables."⁴¹ But, the court said, the restrictions did not prohibit casino advertising that only incidentally reached the Puerto Rican public. For instance, the narrowing constructions allowed advertisements placed in U.S. media like the New York Times newspaper and the CBS television network, which also reached Puerto Ricans.⁴² On appeal, the Puerto Rican Supreme Court concluded the advertising restrictions, as modified by the narrowing constructions, did not raise a significant constitutional issue.⁴³

On appeal, the Supreme Court considered the advertising restrictions as modified by the narrowing constructions.⁴⁴ The Court said the restricted advertising was "pure commercial speech"⁴⁵ and thus subject to scrutiny under the four-factor Central Hudson

³⁸. See Posadas at 332-33. Official regulations stated:
The advertising of our games of chance is hereby authorized through newspapers, magazines, radio, television and other publicity media outside Puerto Rico subject to the prior editing and approval by [the regulatory agency] of the advertisement to be submitted to the Tourism Development Company of the advertisement to be submitted in draft to the Company.

Id. (citations omitted). In addition, in 1979, the Tourism Company of Puerto Rico, a public company with official regulatory authority over licensed casinos, had sent an official memo to casinos franchise holders advising that use of the word "casino" was prohibited on items such as matchbooks, napkins, menus, glasses, flyers, and directories, and "any object that might have been accessible to the public in Puerto Rico." Id. at 333 (citation to memo omitted).

³⁹. See id. at 334.

⁴⁰. See id. at 335-37.

⁴¹. Id. at 335 (citation to Superior Court order omitted).

⁴². See id. The narrowing constructions also would allow advertising in Puerto Rico's international air and seaports serving tourists and Puerto Ricans alike.

⁴³. See id. at 337 (quoting the Supreme Court of Puerto Rico) (citation omitted). Actually, the Supreme Court of Puerto Rico dismissed the appeal. See id.

⁴⁴. See id. (stating "in reviewing the facial constitutionality of the challenged statute and regulations, we must abide by the narrowing constructions announced by the Superior Court and approved sub silento by the Supreme Court of Puerto Rico").

⁴⁵. Id. at 340 (quoting Virginia Bd., 425 U.S. at 762).
analysis. Under the first factor, the Court said casino ads aimed at Puerto Ricans are protected commercial speech because they involve a legal activity and are not inherently misleading.

Puerto Rico asserted a governmental interest in protecting the “health, safety, and welfare” of its citizens by reducing the “demand for casino gambling by the residents of Puerto Rico.” Puerto Rico claimed that increased casino gambling by Puerto Ricans would lead to “the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime.” Under the second Central Hudson factor, the Posadas Court agreed that this regulatory interest was sufficiently substantial.

The Posadas Court said the third and fourth factors “involve a consideration of the ‘fit’ between the legislature’s ends and the means chosen to accomplish those ends.” Under the third step, the Posadas majority simply agreed with Puerto Rico that the advertising ban “directly advance[d]” the asserted regulatory goal. Writing for the majority, Justice Rehnquist relied on Central Hudson and the assumed causal link between advertising and consumer demand and consumption, stating:

The Puerto Rican Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature’s belief is a reasonable one, and the fact that [Puerto Rico] has chosen to litigate this case all the way to this Court indicates that [Puerto Rico] shares the legislature’s view.

46. See id. (citing generally Central Hudson, 447 U.S. at 557-606).
47. See id. at 340-41.
48. Id. at 341 (emphasis added).
49. Id.
50. See id. (comparing Renton v. Playtime Theatres Inc., 475 U.S. 41, 54 (1986)). In his dissenting opinion, Brennan, joined by Marshall and Blackmun, suggested wryly it was “not farfetched to suppose that the [Puerto Rican] legislature chose to restrict casino advertising not because of the ‘evils’ of casino gambling, but because it preferred that Puerto Ricans spend their gambling dollars on the Puerto Rico lottery.” Id. at 353-54 (Brennan, J., dissenting).
51. Id. at 341.
52. Id.
53. Id. at 342 (emphasis added) (citing Central Hudson, 447 U.S. at 569) (stating, “There is an immediate connection between advertising and demand for electricity”) (other citation omitted). The majority found the ban also was “no more extensive than necessary,” satisfying the fourth part of the Central Hudson analysis, since the ban applied only to “advertising when aimed at the residents of Puerto Rico.” Id. at 343.
Under the fourth Central Hudson factor, the Court concluded the modified restrictions were sufficiently narrow because they allowed advertisements targeted to tourists instead of banning all casino gambling ads. Rehnquist said it did not matter that Puerto Rico regulated casino gambling advertising while allowing advertising for other forms of more “traditional” and less-sophisticated forms of gambling, such as horse racing, cock fighting, and lotteries. Clearly endorsing the paternalistic approach taken by Puerto Rico, Rehnquist wrote: “[T]he [Puerto Rican] legislature felt that for Puerto Ricans the risks associated with casino gambling were significantly greater than those associated with the more traditional kinds of gambling in Puerto Rico.”

Rehnquist also said Puerto Rico had the power to ban casino gambling altogether, so it was constitutionally permissible to “take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising,” The majority found this rationale particularly persuasive in the context of “harmful” products like cigarettes and alcoholic beverages. Rehnquist wrote:

It would be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand.

As mentioned, the Posadas majority was narrow, with four of the nine justices casting dissenting votes. Justice Stevens, representing the acerbic tone of the dissenters, said the restrictions were “blatantly” discriminatory and established both a “regime of prior restraint” and a “hopelessly vague and unpredictable” standard. He

54. See Posadas, 478 U.S. at 343-44.
55. See id.. The Posadas majority concluded the casino gambling advertising restrictions were not unconstitutionally underinclusive. See id. at 342-43.
56. Id. at 343 (emphasis added).
57. Id. at 346 (stating “[i]t would surely be a Pyrrhic victory for casino owners . . . to gain recognition of a First Amendment right to advertise their casinos to the residents of Puerto Rico, only to thereby force the legislature into banning casino gambling by residents altogether”).
58. See id.
59. Id.
60. Brennan wrote a dissenting opinion in which Marshall and Blackmun joined. See id. at 348-60 (Brennan, J., dissenting). Stevens wrote a dissenting opinion in which Marshall and Blackmun again joined. See id. at 360-63 (Stevens, J., dissenting).
61. Id. at 359 (Stevens, J., dissenting). Marshall and Blackmun joined in the dissenting opinion of Stevens. See id. The Posadas majority had concluded in the principal opinion that the advertising restrictions as modified by the narrowing constructions of the lower court were not unconstitutionally vague. See id. at 347-48.
stated: "The First Amendment surely does not permit Puerto Rico's frank discrimination among publications, audiences, and words. Nor should sanctions for speech be as unpredictable and haphazard as the roll of dice in a casino." 62

B. The Edge Broadcasting Case (1993)

In United States v. Edge Broadcasting Company, decided in 1993, the Court upheld part of a longstanding federal broadcast ban on gambling advertising. 63 The specific provisions at issue were 18 U.S.C. § 1304 (hereinafter "section 1304"), which bans gambling ads on licensed broadcast media; and 18 U.S.C. § 1307 (hereinafter "section 1307"), which, in relevant part, exempts ads for state-sponsored lotteries aired by broadcasters licensed in lottery states. 64 The case arose when WMYK-FM, a North Carolina radio station owned by Edge Broadcasting, wanted to broadcast paid advertising for the state-sponsored lottery in bordering Virginia. Most of the station's listeners were located in Virginia, 65 but the federal ban still applied

62. Id. at 363 (Stevens, J., dissenting).
Enabling regulations enacted by the Federal Communications Commission contain substantially the same language. See 47 C.F.R. § 73.1212 (1990) (first enacted at 40 FED. REG. 6,210 (1975), as amended at 45 FED. REG. 6,401 (1980); 54 FED. REG. 20,856 (1989); 55 FED. REG. 18,888 (1990)). The FCC regulations define "lottery" as "the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers." 47 C.F.R. § 73.1211(d)(1) (1990).
because WMYK-FM was licensed in North Carolina, a non-lottery state. 66

*Edge Broadcasting* challenged the ban on First Amendment grounds in federal district court in Virginia. 67 The district court used the *Central Hudson* analysis to find the ban unconstitutional as applied to WMYK-FM. The district court suggested that the regulatory goal of discouraging citizens in non-lottery states from participating in lotteries was not served by applying the ban to a station whose listeners were mostly located in a neighboring lottery state. Thus, the district court said, the ban failed the third part of the *Central Hudson* analysis under the facts of the case. 68 The federal court of appeals affirmed the district court. 69

On appeal, the Supreme Court reversed 7-2 and upheld the ban under the *Central Hudson* analysis. Under the first *Central Hudson* factor, the *Edge Broadcasting* Court said the federal regulations effectively banned protected commercial speech, meaning non-misleading advertising about a legal state lottery. 70 Under the second factor, the Court summarily concluded that Congress had substantial regulatory interests at stake: “[S]upporting the policy of nonlottery States, as well as not interfering with the policy of States that permit lotteries.” 71 Invoking language from *Posadas*, the Court reiterated that gambling is not a constitutionally protected activity, but is instead appropriately characterized as a “‘vice’ activity” that states may lawfully ban. 72

66. See id. at 422-23. As of January 2000, North Carolina still did not have a state-run lottery.
67. See id. at 424.
68. See id. at 424-25.
69. See id. at 425. The Supreme Court noted that the appeals court had issued an unpublished *per curiam* opinion, which the Court deemed “remarkable and unusual” given the constitutional gravity of the case. See id. at 425 n.3.
70. See id. at 426.
71. Id. Earlier in the opinion the Court noted relevant legislative history, stating that the exemption allowing broadcast licensees in lottery states to air advertisements for state-run lotteries was passed “[t]o accommodate the operation of legally authorized State-run lotteries consistent with continued Federal protection to the policies of non-lottery States.” Id. at 422 (quoting S. REP. NO. 93-1404, at 2 (1974), and citing also H.R. REP. NO. 93-1517 (1974), reprinted in U.S.C.C.A.N. 7007 (1974)). The dissenters said the Court’s conclusion on this part of the *Central Hudson* was made “[w]ith barely a whisper of analysis.” Id. at 440 (Stevens, J., dissenting, joined by Blackmun, J.).
72. See id. at 426 (citing generally *Posadas*, 478 U.S. 328). The United States tried to avoid the constitutional issue altogether. Relying on the *Posadas* rationale, the government argued that the power to ban an activity like gambling necessarily includes the “lesser” power to constitutionally ban advertisements for that activity. See id.
Under the third *Central Hudson* factor, the Court concluded that the federal broadcast ban “directly served” to protect the lottery policies of individual states. Writing for the majority, Justice White stated: “[T]he congressional policy of balancing the interests of lottery and nonlottery States is . . . substantial [and] satisfies *Central Hudson*.” 3 The majority looked at the general application of the ban and refused to consider the individual impact on stations like WMYK-FM that are licensed in non-lottery states but border on lottery states and have most of their listeners there. As to the final *Central Hudson* factor, the *Edge Broadcasting* Court concluded the ban was sufficiently narrow. Suggesting that Congress could have banned all broadcast lottery advertising, the Court characterized the ban and exemption scheme as “reasonable.”

However, the *Edge Broadcasting* Court specifically declined to rule on this issue, stating that the ban otherwise passed constitutional muster under the *Central Hudson* analysis. See *id.* at 425. It should be noted here that the 5-4 majority in *Posadas*, discussed earlier in the text of this article, had strongly suggested that the governmental power to ban an activity like gambling included the power to regulate advertising about that activity. See *supra* notes 39-41 and accompanying text.

73. See *id.* at 428.
74. *Id.* at 428-29.
75. See *id.* White seemed to admit that application of the ban in such border situations only marginally advanced the asserted regulatory interest, but he found this insufficient to strike down the ban under the third *Central Hudson* factor. See *id.* He said that the “courts below were wrong in holding that as applied to Edge itself, the restriction at issue was ineffective and gave only remote support to the Government’s interest.” *Id.* at 431. Later in the opinion, White said “we judge the validity of the restriction in this case by the relation it bears to the general problem of accommodating the policies of both lottery and nonlottery States, not by the extent to which it furthers the Government’s interest in an individual case.” *Id.* at 430-31. Only four justices joined with White in these parts of the opinion (III-A, B, and C). In a concurring opinion, Justice Souter, joined by Justice Kennedy, said that he found the ban constitutional under the *Central Hudson* analysis, even as applied individually to WMYK-FM, the North Carolina station in question. See *id.* at 436 (Souter, J., concurring, joined by Kennedy, J.). Souter thus found it “unnecessary to decide whether the restriction might appropriately be reviewed at a more lenient level of generality.” *Id.* at 436 (Souter, J., concurring, joined by Kennedy, J.).

76. See *id.* 429-30.
77. *Id.* at 428.
78. See *id.* at 429. In this part of the Court opinion (III-B), White said the constitutional analysis must be guided by general application of the ban and exemption scheme, without consideration of how it might apply to individual stations like WMYK-FM. See *id.* at 430-31. Of the six other votes in the majority, only four supported the rationale articulated by White in this part of the Court opinion (III-B). See *supra* note 75. Moreover, in *dicta*, White pointed out that WMYK-FM was actually licensed to serve Elizabeth City, North Carolina, and had only directed its signal north to reach the larger market of Hampton Roads, Virginia. Seemingly, White was unconvinced that the station had a truly legitimate argument based on reaching Virginia residents. White noted that the WMYK-FM signal still reached nine North Carolina counties and allowing it to broadcast lottery ads “would be in derogation of the substantial federal interest in supporting North
Stevens and Blackmun dissented in *Edge Broadcasting*, which was not surprising since both had been among the four dissenters in *Posadas* in 1989. In his *Edge Broadcasting* dissent, Stevens stated: “I would hold that suppressing truthful advertising regarding a neighboring State’s lottery, an activity which is, of course, perfectly legal, is a patently unconstitutional means of effectuating the Government’s asserted interest in protecting the policies of nonlottery States.”

Stevens pointed to the Court’s 1975 decision in *Bigelow v. Virginia*. In *Bigelow*, the Court overturned the criminal conviction of a Virginia newspaper editor who had published an advertisement for legal abortion services in New York. Abortions were illegal in Virginia, and a state criminal statute banned all ads for abortion services, including legalized abortion services in other states. In his *Edge Broadcasting* dissent, Stevens said: “[The *Bigelow* Court] flatly rejected the notion... that a State could... [suppress] truthful, nonmisleading information regarding a legal activity in another State” and “held that a State ‘may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State.”

He went on to state:

In seeking to assist nonlottery States in their efforts to shield their citizens from the perceived dangers emanating from a neighboring State’s lottery, the Federal Government has not regulated the content of such advertisements to ensure that they are not misleading, nor has it provided for the distribution of more speech, such as warnings or educational information about gambling. Rather, the United States has selected the most intrusive, and dangerous, form of regulation possible – a ban on truthful information regarding a lawful activity imposed for the purpose of Carolina’s laws making lotteries illegal.” *Id.*

79. *Id.* at 437 (Stevens, J., dissenting, joined by Blackmun, J.).
80. *See id.* (citing *Bigelow v. Virginia*, 421 U.S. 809 (1975)).
82. *See id.* at 811-15. While the criminal case was pending, the Virginia legislature amended the statute to ban only ads for “an abortion illegal in Virginia and to be performed there.” *Id.* at 813, 831 n.3 (*quoting VA. CODE ANN. §§ 18.1-62.1 and 18.1-62.3 (Supp. 1975)). There was no dispute that the amended statute would not ban the advertisement in question in *Bigelow*, but the editor had been convicted before the statute was amended. *See id.* It also should be noted here that after the editor was convicted and before the statute was amended, the Supreme Court issued landmark rulings protecting abortion rights. *See id.* at 813 n.3 (*citing Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973)).
manipulating, through ignorance, the consumer choices of some of its citizens.

Similarly, Stevens rejected what he called the government’s “extremely paternalistic” approach to the regulation of broadcast lottery advertising. Stevens’ dissent is important because, as will be discussed in a later section, the Court adopted portions of this rationale in striking down a federal broadcast ban on private casino gambling advertising in the 1999 case, Greater New Orleans Broadcasting.

C. Significance of Posadas and Edge Broadcasting

Taken together, the Posadas and Edge Broadcasting opinions ratified paternalistic governmental regulation of “vice” advertising. To this day, the Posadas opinion stands as perhaps the Court’s most lenient application of intermediate scrutiny under the Central Hudson analysis. The majority deferred without question to Puerto Rico’s asserted regulatory interests and, more importantly, blindly assumed that regulation of gambling advertising would be effective in curing potentially harmful secondary effects of gambling related to behavior. The Court assumed, without evidence, that gambling advertising would lead to increases in casino gambling, including compulsive gambling, which in turn would lead to adverse secondary effects, such as increased crime and financial ruin, related to compulsive gambling. In addition, the majority opinions gave credence to the reasoning that governmental power to ban an activity – especially a so-called “vice” activity like gambling – provides for some level of constitutional leniency to officially regulate truthful, non-misleading advertising about that activity. It is perhaps not surprising that one commentator recently described the Posadas decision as “perhaps the quintessential example of Central Hudson gone awry.”

The Edge Broadcasting Court seemingly transplanted from Posadas the highly deferential application of the direct-advancement

84. Id. at 439.
85. See id. The dissenters noted that at the time of the Edge Broadcasting ruling, the majority of states – 34 plus the District of Columbia – had state-sponsored lotteries. See id. at 440-41 (citation omitted).
86. See also Schiller, supra note 63, at 158-59.
88. See id.
89. See id.
90. Troy, supra note 9, at 132.
inquiry under the third Central Hudson factor. In *Edge Broadcasting*, the Court concluded that the federal broadcast ban on lottery advertising in non-lottery states was necessary to protect the gambling policies of those non-lottery states.  

However, the Court implicitly assumed, without explanation, that such a ban served the policies of non-lottery states in an efficacious manner. In addition, the *Edge Broadcasting* Court applied the same anemic version of the fourth Central Hudson factor as did the *Posadas* Court. Both simply concluded that the respective restrictions were "narrowly tailored" because there were exemptions that rendered them less than complete bans.  

*Posadas* and *Edge Broadcasting* are aberrations when compared to other commercial speech cases decided by the Supreme Court after *Central Hudson*. Indeed, *Posadas* and *Edge Broadcasting* were the only two "vice" advertising cases decided between 1986 and 1993. They were also the only cases in which the Court directly upheld official regulations of protected commercial speech.  

Subsequently, in the 1994-95 and 1995-96 terms, the Supreme Court decided two more "vice" advertising cases that radically altered commercial speech jurisprudence and undermined the validity of *Posadas* and *Edge Broadcasting*.

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92. For instance, the restrictions in *Posadas* allowed for casino gambling advertising aimed primarily at tourists, and the restrictions in *Edge Broadcasting* allowed broadcast advertising for state-sponsored lotteries by licensees in lottery states.

93. *See* Ibanez v. Florida Dept. of Bus. and Prof. Reg., 512 U.S. 136 (1994) (finding it unconstitutional for state accounting board to punish attorney for including in her law practice advertising truthful and non-misleading information about her designation as a certified public accountant); Edenfield v. Fane, 507 U.S. 761 (1993) (striking down state ban on in-person commercial solicitations by certified public accountants); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) (finding unconstitutional an official ban on newsrack distribution of primarily commercial publications like weekly "shoppers" under a city ordinance that prohibited distribution of "commercial handbills" on public property); Peel v. Attorney Reg. & Disciplinary Comm’n of Ill., 496 U.S. 91 (1990) (holding that attorney had First Amendment commercial speech right to truthfully advertise his certification as a trial specialist recognized by a national trial advocacy organization despite a state bar rule that did not permit that type of advertising claim); Shapero v. Kentucky Bar Ass’n, 486 U.S. 466 (1988) (striking down state ban on targeted solicitation letters sent by lawyers to potential clients); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985) (striking down a state bar rule that imposed a blanket ban on the use of graphics and illustrations in lawyer advertising); Bolger v. Young Drug Products Corp., 463 U.S. 60 (1983) (striking down federal statute that prohibited unsolicited direct mail advertisements for contraceptives).
III
Recent Alcohol Advertising Cases

In Rubin v. Coors Brewing Co.\textsuperscript{94} and 44 Liquormart, Inc. v. Rhode Island,\textsuperscript{95} the Supreme Court struck down government restrictions banning truthful, non-misleading commercial speech concerning alcoholic beverages. In each case, the government asserted a goal of regulating commercial speech as a means of decreasing alcohol demand, consumption, and ultimately, social costs associated with alcoholism. These cases represented an important shift toward more stringent protection of commercial speech.\textsuperscript{96} It is particularly significant that this heightened protection emerged from “vice” advertising cases.

A. The Rubin Case (1995)

In Rubin, decided in 1995, a unanimous Supreme Court ruled unconstitutional a long-standing federal ban on disclosure of alcohol content percentages on beer labels.\textsuperscript{97} Coors Brewing Company had challenged the ban on First Amendment grounds in federal district court in Denver. The district court found the ban unconstitutional.\textsuperscript{98} On appeal, the U.S. Court of Appeals, Tenth Circuit, affirmed the district court.\textsuperscript{99} The government appealed to the U.S. Supreme Court, which affirmed the decisions of the lower courts.

\textsuperscript{94} 514 U.S. 476 (1995).
\textsuperscript{95} 517 U.S. 484 (1996).
\textsuperscript{96} See Recent Cases, 112 HARV. L. REV. 1112, 1115 (1999) (internal citation omitted) (stating that “44 Liquormart embraced a heightened protection of commercial speech and rejected several lines of reasoning first articulated in Posadas,” calling this an important “doctrinal shift” in the commercial speech arena).
\textsuperscript{97} See Rubin v. Coors Brewing Co., 514 U.S. at 491. The case dealt with regulations enacted pursuant to the Federal Alcohol Administration Act. See id. at 478-79 (citing 27 U.S.C. § 201 et seq.). In relevant part, specific federal regulations prohibited printing the numerical alcohol content percentage on beer labels. Id. at 481 (citing 27 C.F.R. § 7.26(a) (1994)). Regulations also prohibited descriptive words suggestive of high alcohol content, such as “full strength,” “high test,” and “high proof.” Id. (citing 27 C.F.R. § 7.29(f) (1994)).
\textsuperscript{98} See id.
\textsuperscript{99} Adolph Coors Co. v. Bentsen, 2 F. 3d. 355, 358-359 (1993). This was the second appeal of the case to the Tenth Circuit. On the first appeal from the district court, the Tenth Circuit found the record incomplete regarding the third and fourth Central Hudson factors and remanded to the district court for further proceedings. See generally Adolph Coors Co. v. Brady, 944 F.2d 1543 (1991). On remand, the district court again found the labeling ban unconstitutional but upheld a similar ban on alcohol content information in beer advertising. See Rubin v. Coors Brewing Co., 514 U.S. at 479. Coors Brewing Co. did not appeal the district court’s ruling on the advertising ban. See id. The U.S. Supreme Court noted that an exemption to the advertising ban applied in all but 18 states, meaning that alcohol percent information could legally be included in beer advertising in a majority...
In an opinion penned by Justice Thomas, the Supreme Court reaffirmed the *Central Hudson* analysis as the appropriate constitutional litmus test for commercial speech regulations. However, in footnote two, the *Rubin* Court flatly rejected the government's argument that the *Central Hudson* analysis should be relaxed in favor of regulating advertising that promotes "socially harmful" but legal activities, such as alcohol consumption and gambling by adults. Thomas said the *Edge Broadcasting* Court had specifically declined to decide this issue in the context of gambling advertising. In addition, in a partial retreat from *Posadas*, Thomas said: "To be sure, *Posadas* did state that the Puerto Rican Government could ban promotional advertising of casino gambling because it could have prohibited casino gambling altogether. However, the Court reached this argument only after it already had found that the state regulation survived the *Central Hudson* test." Finally, Justice Thomas pointed out that neither *Posadas* nor *Edge Broadcasting* required stratification of the *Central Hudson* analysis to create a safe harbor for governmental regulation of "vice" advertising.

Under the first *Central Hudson* factor, the *Rubin* Court treated the alcohol percent information as constitutionally protected commercial speech. There was no dispute that the ban prohibited Coors from providing consumers with truthful and non-misleading information about a legal product. Under the second factor, the *Rubin* Court said the government had a sufficiently substantial regulatory interest at stake: "[P]rotecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength, which could lead to greater alcoholism and its attendant social costs."

Thomas noted that the Court had recently tightened the
"critical" third factor in *Edenfield v. Fane*, a 1993 case decided the same term as *Edge Broadcasting*.\textsuperscript{107} He said that *Edenfield* now required the government to demonstrate that its regulation of protected commercial speech "advances the Government's interest in a direct and material way."\textsuperscript{108} Quoting from *Edenfield*, Thomas wrote: "[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.'\textsuperscript{109}

Applying the third factor, the *Rubin* Court concluded that the label ban was part of an irrational regulatory scheme and, thus, did not directly advance the government's interest in stemming "strength war" marketing.\textsuperscript{110} The Court pointed out that federal regulations allowed alcohol content information in most beer advertising and on labels for distilled spirits, even requiring affirmative disclosure for wines with alcohol content exceeding 14 percent.\textsuperscript{111} Thomas said that the government presented no evidence that lifting the beer label ban would cause an outbreak of "strength war" marketing.\textsuperscript{112} He said the government presented only "anecdotal evidence and educated guesses" about the impact of the labeling ban on beer marketing efforts, but found this insufficient under the third *Central Hudson* factor.\textsuperscript{113}

Under the fourth *Central Hudson* factor, the *Rubin* Court found...
that the labeling ban was not sufficiently tailored to the government interest because the government had more direct means to combat “strength war” marketing by beer manufacturers.\textsuperscript{114} These included limits on the alcohol content of beer products and regulations against beer advertisements emphasizing high alcohol content as a product attribute.\textsuperscript{115} As to the latter, Thomas wrote in \textit{dicta} that a ban on disclosing the percentage of alcohol content in advertising “would seem to constitute a more influential weapon in any strength war than labels.”\textsuperscript{116}

Although the holding in \textit{Rubin} was unanimous, Stevens split with the other justices on his rationale. He said in his concurring opinion that the \textit{Central Hudson} analysis should not be applied to regulations that do not aim to protect consumers from misleading or incomplete information.\textsuperscript{117} He stated: “In my opinion, the Government’s asserted interest, that consumers should be misled or uninformed for their own protection, does not suffice to justify restrictions on protected speech in any context, whether under ‘exact scrutiny’ or some other standard.”\textsuperscript{118} This position was consistent with his dissents in \textit{Posadas} and \textit{Edge Broadcasting}, as well as with the position he would take in a case the very next term.

\textbf{B. The 44 Liquormart Case (1996)}

In \textit{44 Liquormart, Inc. v. Rhode Island}, decided in 1996, a unanimous Supreme Court struck down a Rhode Island statute that had for years banned price information in liquor advertising.\textsuperscript{119} A

\begin{footnotesize}
\begin{enumerate}
\item Id. at 490-91.
\item See id.
\item Id. at 488.
\item See id. at 491 (Stevens, J., concurring with the judgement only).
\item Id. at 497-98. Stevens also stated: “As a matter of common sense, any description of commercial speech is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech’s potential to mislead.” \textit{Id.} at 494-95 (citations omitted). Stevens also said it made no sense to characterize truthful information about alcohol content as commercial speech when printed by Coors on a beer label but as non-commercial speech when published, for instance, by a non-profit organization in a magazine. \textit{See id.} at 494.
\item See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 (1996). For a thorough analysis of the various opinions in \textit{44 Liquormart}, \textit{see generally} Sullivan, \textit{supra} note 8. One statute at issue in \textit{44 Liquormart} prohibited advertising the price of “malt beverages, cordials, wine or distilled liquor. R.I. GEN. L. § 3-8-7 (1987). Another prohibited the media from accepting such advertising. \textit{See R.I. GEN. GEN. L. § 3-8-8.1} (1987). There was an exemption to the ban for point-of-sale price advertising that was not visible to the public from outside the premises. \textit{See R.I. GEN. L. § 3-8-7} (1987); REG. 32, R. & REG. of the Liquor Control Administrator.
\end{enumerate}
\end{footnotesize}
Rhode Island retailer was fined $400 for a newspaper advertisement that depicted liquor in bottles next to the statement “WOW!” The retailer then challenged the ban in federal district court on First Amendment grounds.

Rhode Island argued that lifting the ban would lead to price competition among retailers, lower alcohol prices, and increased alcohol consumption. However, the district court ruled the ban unconstitutional because Rhode Island did not present enough evidence that the ban was effective in decreasing alcohol consumption in the state. The U.S. Court of Appeals, First Circuit, reversed on appeal, finding “inherent merit” in [Rhode Island’s] submission that competitive price advertising would lower prices and that lower prices would produce more sales.

On appeal to the U.S. Supreme Court, there was no dispute under the first Central Hudson factor that the ban applied to truthful, non-misleading information about a legal product or, under the second factor, that Rhode Island had a substantial regulatory interest in promoting temperance. At issue was application of the third and fourth Central Hudson factors: Whether the ban advanced in a direct and material way Rhode Island’s interest in promoting temperance.


120. The advertisement in question, placed in a local newspaper, did not contain actual price information. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. at 492. The Rhode Island Liquor Control Administrator concluded that this advertisement contained an implicit reference to price. See id. at 492-93.

121. See id. at 493. The retailers originally sued the Rhode Island Liquor Control Administrator. The Rhode Island Liquor Stores Association and the State of Rhode Island intervened and became the principal plaintiff and defendant, respectively. See id.

122. See id. at 503 n.13; and 530 (O’Connor, J., concurring).

123. See id. at 494-95 (citing 44 Liquormart, Inc. v. Racine, 829 F.Supp. 543, 555 (D. R.I. 1993)). In support of its ruling, the court cited a 1985 Federal Trade Commission study that found no link between alcoholism and alcohol advertising. Id. at 494 (citing 44 Liquormart Inc. v. Racine, 829 F.Supp at 549). The district court also cited another study that found that alcohol consumption was lower in states that allowed price advertising. Id. Another study cited by the court indicated that even with the price ban, Rhode Island ranked in the upper 30% in per capita alcohol consumption and that states with price advertising had lower alcohol consumption rates than Rhode Island. See id.

124. Id. at 494.

125. See id. at 493; and see also id. at 529 (O’Connor, J., concurring).
and, if so, whether the ban was more restrictive than necessary. Stevens, who wrote the principal opinion for the Court, said the ban was an unconstitutional attempt to suppress the public flow of accurate information about a legal product in the marketplace. Although unanimous in this part of the opinion, the justices then split quite dramatically on their rationale and views of the *Central Hudson* analysis.

Stevens – joined by Justices Kennedy, Souter, and Ginsburg – said Rhode Island “failed to establish a ‘reasonable fit’ between its abridgement of speech and its temperance goal.” Stevens said Rhode Island “presented no evidence to suggest that its speech prohibition would significantly reduce market-wide consumption” and thus failed to prove direct advancement of the regulatory goal under the third *Central Hudson* factor. Under the fourth factor, Stevens concluded that the price ban was more restrictive than necessary, finding it “perfectly obvious” that Rhode Island could regulate liquor prices more directly by imposing minimum price regulations, taxes on liquor sales, or limits on liquor purchases, for instance.

Consistent with the position from his *Rubin* concurrence, Stevens suggested that strict scrutiny – not intermediate scrutiny under the *Central Hudson* analysis – is appropriate when government seeks to regulate truthful, non-misleading commercial messages about a lawful product and there is no consumer protection goal, such as curbing unfair bargaining or overly aggressive marketing. He stated: “The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government

126. See id. at 489 (stating that “Rhode Island’s statutory prohibition against advertisements that provide the public with accurate information about retail prices of alcoholic beverages is ... invalid” under the First Amendment).

127. Justice Scalia, in his concurring opinion, said that while he was uncomfortable with the *Central Hudson* analysis in this case, he was not inclined to “reinforce” the analysis or “develop new law.” See id. at 517-18 (Scalia, J., concurring). Instead, he merely agreed with the result. See id. at 518.

128. Id. at 508-509 (quoting Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)).

129. Id. at 505-506, 508. Stevens noted that the evidence in the record suggested that the ban “may have some impact on the purchasing patterns of temperate drinkers of modest means,” but the “abusive drinker [would] probably not be deterred by a marginal price increase and that the true alcoholic may simply reduce his purchases of other necessities.” Id. at 506.

130. See id. at 507. Stevens also suggested the use of public information campaigns informing the public of the dangers of abuse. See id.

131. See id. at 501-504. See also Sullivan, supra note 8, at 142 (calling this position a sharp “departure” from the ‘pro-paternalism premise of *Central Hudson’”).
perceives to be its own good.’” However, only Kennedy and Ginsburg joined him on this point. In another part of the principal opinion, Stevens said that because the Rhode Island ban failed intermediate scrutiny under the Central Hudson analysis, the ban certainly would not survive more stringent strict scrutiny. Kennedy and Ginsburg joined him again on this point, with the addition of Souter this time.

In a concurring opinion, Justice O’Connor – joined by Chief Justice Rehnquist, and Justices Souter and Breyer – agreed with Stevens that the “fit” between the price advertising ban and the goal of promoting temperance was not “reasonable.” O’Connor agreed with Stevens that Rhode Island could keep liquor prices from falling through direct means, such as taxation, without suppressing protected commercial speech. Thus, she concluded, the Central Hudson analysis was adequate to answer the constitutional questions presented and needed not be “displaced” under these facts. “Nothing here,” she said, “requires adoption of a new analysis for the evaluation of commercial speech regulation.”

Thomas, in a concurring opinion, said it was “per se illegitimate” for the government to “keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace,” a position that one recent commentator called the most “radical” of the approaches taken in the case. Thomas alone favored a categorical rule prohibiting what he described as an “impermissible” brand of governmental regulation. However, he seemed appeased by the

133. See id. at 508. This comment by Stevens was made in a part of the opinion joined by Justices Kennedy, Souter, and Ginsburg.
134. See id.
135. See id. at 530 (O’Connor, J., concurring). See also Sullivan, supra note 8, at 143.
137. Id. at 532 (O’Connor, J., concurring) (stating it was not necessary here to “undertake the question whether the test we have employed since Central Hudson should be displaced”).
138. Id. at 518 (Thomas, J., concurring). See also Sullivan, supra note 8, at 141-42 (calling the position of Thomas in 44 Liquormart the most radical approach taken by the Justices in the case).
139. See Sullivan, supra note 8, at 141-42. See also Richards, supra note 12, at 162 (calling the position of Thomas “revolutionary”).
140. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. at 524-26 (Thomas, J., concurring). Thomas stated: “I would adhere to the doctrine . . . that all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible.” Id. at 526. This was not a new position. Blackmun, joined by Brennan, had raised the same point in a concurring opinion when the Central Hudson analysis was adopted in 1980. Blackmun
combined impact of the opinions of Stevens and O'Connor, which he said significantly tightened the fourth *Central Hudson* factor. He wrote:

The opinions [of Stevens and O'Connor] would appear to commit the courts to striking down restrictions on speech whenever a direct regulation (i.e., a regulation involving no restriction on speech regarding a lawful activity) would be an equally effective method of dampening demand by legal users. But it would seem that directly banning a product (or rationing it, taxing it, controlling its price, or otherwise restricting its sale in specific ways) would virtually always be at least as effective in discouraging consumption as merely restricting advertising... and thus virtually all restrictions with such a purpose would fail the fourth [part] of the *Central Hudson* analysis.14

In separate opinions, a majority of the justices in *44 Liquormart* gutted the holding and rationale of *Posadas* and seemingly eroded the continued validity of *Edge Broadcasting*.142 In the principal opinion, Stevens – joined on this point by Kennedy, Thomas, and Ginsburg – concluded that the *Posadas* majority erred with its “highly deferential approach.”143 He said that a “legislature does not have the broad

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142. See *id.* at 508-514 (principal opinion penned by Stevens and joined in this part by Kennedy, Thomas, and Ginsburg) and 531-32 (O'Connor, J., concurring, joined by Chief Justice Rehnquist and Souter and Breyer). Scalia expressed no opinion on this issue, merely concurring with the judgment of the Court. See *id.* at 517-18 (Scalia, J., concurring). See also, P. Cameron Devore, *First Amendment Protection of “Vice” Advertising: Current Commercial Speech Hot Buttons*, 15 COMM. LAW. 3 (1997) (prominent commercial speech attorney stating that the opinions in *44 Liquormart* act as a “substantial overruling of *Posadas*”).

143. See *44 Liquormart*, Inc. v. Rhode Island, 517 U.S. at 510 (1996) (noting the slim 5-4 majority vote in *Posadas*). Stevens also stated: “As we explained in *Virginia Pharmacy Bd.*, ‘it is precisely this kind of choice, between the dangers of suppressing information ,
discretion to suppress truthful, nonmisleading information for paternalistic purposes that the Posadas majority was willing to tolerate."

Stevens and colleagues sharply rejected the "greater-includes-the-lesser" rationale used by the Posadas majority, which had presumed that government power to ban an activity necessarily included the "lesser" power to ban advertising of that activity. Stevens said:

The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society. As a result, the First Amendment directs that government may not suppress speech as easily as it may suppress conduct.

Stevens clearly repudiated the idea of a "'vice' exception" to the Central Hudson analysis and said that the Court had "effectively rejected" that proposition in footnote 2 of the Rubin opinion, penned by Thomas.

In her concurring opinion, O'Connor — joined by Rehnquist, Souter, and Breyer — seemed to agree with Stevens that the Posadas rationale was no longer valid. She said that the "Court [since

and the dangers of its misuse if it is freely available, that the First Amendment makes for us." Id. (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976)).

Id. at 510. Stevens was joined in this part of the opinion by Kennedy, Thomas, and Ginsburg.


Id. at 512 (emphasis added).

See id. at 513-14 (citing Rubin v. Coors Brewing Co., 514 U.S. 476, 482 n.2 (1995)). Stevens said:

Moreover, the scope of any "vice" exception to the protection afforded by the First Amendment would be difficult, if not impossible, to define. Almost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to "vice activity." Such characterization, however, is anomalous when applied to products such as alcoholic beverages, lottery tickets, or playing cards, that may be lawfully purchased on the open market. The recognition of such an exception would also have the unfortunate consequence of either allowing state legislatures to justify censorship by the simple expedient of placing the "vice" label on selected lawful activities....

Id.

See id. at 531-32 (O'Connor, J., concurring). The various criticisms of Posadas by the justices in 44 Liquormart echoed those articulated by Justice Brennan in his Posadas dissent in 1986. Back then, Brennan faulted the Posadas majority for merely assuming that Puerto Rico's restrictions on gambling ads were efficacious in reducing the number of local residents who gambled in Puerto Rico's legalized casinos. See id. at 355-56 (Brennan, J., dissenting). Marshall and Blackmun joined in the dissenting opinion of Brennan.
"Posadas" has examined more searchingly the [legislature’s] professed goal, and the speech restriction put into place to further it, before accepting the [legislature’s] claim that the speech restriction satisfies First Amendment scrutiny." In his concurring opinion, Thomas said that in both Posadas and Edge Broadcasting, the majorities had "simply presumed that advertising of a product or service leads to increased consumption." While his opinion arguably stands with those of Stevens and O'Connor as a rejection of the Posadas rationale, Thomas explicitly stated that he was not addressing the validity of Edge Broadcasting. Likewise, neither Stevens' principal opinion nor O'Connor's concurrence addressed the Edge Broadcasting decision.

C. Significance of Rubin and 44 Liquormart

The decisions in Rubin and 44 Liquormart taken together significantly tightened the third and fourth Central Hudson factors. Rubin, in particular, stands for the proposition that irrational and inconsistent regulations of protected commercial speech will not likely pass constitutional muster. In addition, the Rubin Court refused to relax the Central Hudson analysis for regulations of "vice" advertising. Instead, the Court demanded evidence under the third (direct advancement) factor and crafted a direct-means analysis under the fourth (narrowly tailored) factor, the latter of which became a strong point of agreement for the justices in 44 Liquormart.

The 44 Liquormart opinion is most remarkable for the otherwise dramatic split among the justices on the Central Hudson analysis. As discussed, Stevens, Kennedy, and Ginsburg suggested that strict

However, what he seemed to find more constitutionally troubling was the added assumption that banning casino advertising would alleviate the gambling-related social problems asserted by Puerto Rico. See id. at 356. Brennan also criticized the Posadas majority at the time for allowing Puerto Rico to restrict protected commercial speech instead of using more direct means to alleviate potential problems associated with casino gambling. He said that such means included strictly enforcing existing laws against prostitution and other crimes, enacting betting limitations, and using informational campaigns to inform citizens about the dangers of excessive gambling. See id. at 356-57.

149. Id. at 531.

150. See id. at 521 (Thomas, J., concurring). See also id. at 528 (stating that "[i]n Posadas, Edge, and other cases, the Court has presumed that advertising bans decrease consumption") (Thomas, J., concurring).

151. Thomas said: "Because the issue of restrictions on advertising of products or services to be purchased legally outside a State that has itself banned or regulated the same purchases within the State is not squarely presented in this case, I will not address here whether the decision in Edge can be reconciled with the position I take today." Id. at 527 (Thomas, J., concurring).
scrutiny should apply when government seeks to regulate protected commercial speech in order to manipulate lawful consumer choices in the marketplace. Thomas was stronger on this point stating that such a paternalistic regulatory goal never would pass constitutional muster. O'Connor, Rehnquist, Souter, and Breyer said it was unnecessary to even consider a new level of scrutiny for commercial speech, and Justice Scalia abstained on this issue altogether.\textsuperscript{152}

D. Evidentiary Issue

As discussed above, seven justices in \textit{44 Liquormart} agreed that the Rhode Island statute was not narrowly tailored under the fourth \textit{Central Hudson} factor because more direct means of regulation were available for the state to achieve its goal.\textsuperscript{153} Thus, there was near unanimous agreement that the Rhode Island ban was not sufficiently narrow under the fourth factor. However, only Kennedy, Ginsburg, and Souter joined Stevens in his discussion of the evidentiary issue under the third factor. Still, even these justices did not reach the issue of what quality and quantity of evidence is necessary to satisfy the burden of proving that a governmental regulation directly advances the asserted regulatory interest.

After \textit{Rubin} and \textit{44 Liquormart}, the evidentiary parameters in commercial speech cases remained unclear. In \textit{Florida Bar v. Went For It, Inc.}, a commercial speech case decided after \textit{Rubin}, but before \textit{44 Liquormart}, a narrow 5-4 majority of the Supreme Court upheld a state ban on targeted, direct-mail solicitations by lawyers to accident victims within 30-days of their accidents.\textsuperscript{154} Under the first \textit{Central Hudson} factor, there was no question that the ban restricted protected commercial speech. Under the second factor, the majority found that Florida had asserted sufficiently substantial regulatory interests in protecting the privacy of accident victims and the reputations of lawyers.\textsuperscript{155}

Writing for the majority, Justice O'Connor said that under the third \textit{Central Hudson} factor, Florida needed to demonstrate that the "harm[s] it recites are real and that [the regulation] will alleviate them..."

\textsuperscript{152} See supra note 127.
\textsuperscript{153} These seven justices were Stevens, joined by Kennedy, Ginsburg, and Souter in the principal opinion (Part V); and O'Connor, joined in her concurring opinion by Rehnquist and Souter, and Breyer.
\textsuperscript{155} See \textit{id.} at 624-25. The dissenters disagreed on the characterization of these interests as sufficiently substantial for purposes of the \textit{Central Hudson} analysis. See \textit{id.} at 637-40 (Kennedy, J., dissenting).
to a material degree." On this point, the majority accepted as adequate proof a summary of the results of empirical studies of lawyer advertising that the Florida Bar had commissioned. For instance, the summary reported that in a survey of Florida adults, over half of those who responded agreed with the statement that contacting accident victims is an invasion of privacy. The summary also reported that in a survey of accident victims who had received lawyer solicitations in the mail, approximately 25% of those polled agreed with survey statements that the solicitations they received had invaded their privacy and lowered their opinions of lawyers. Florida also submitted anecdotal evidence, including newspaper articles containing negative coverage of lawyer solicitation activity in the state.

For the majority, O'Connor – joined by Rehnquist, Scalia, Thomas, and Breyer – said that the summary was sufficient evidence, and that the Court need not analyze the actual studies or data. In the opinion, O'Connor noted that the studies cited by Florida were conducted by a "nationally renowned consulting firm" and pointed out that in prior speech restriction cases, the Court had allowed litigants to refer to studies without offering direct empirical support. In a strongly worded dissent, Kennedy – joined by Stevens, Souter, and Ginsburg – sharply criticized the majority for relying on Florida's summary of empirical studies and anecdotal evidence. On this point, he stated: "[The state's summary] includes no actual surveys, few indications of sample size or selection procedures, no

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156. Id. at 625-26 (citations omitted).
157. Id. at 627-29.
158. Id. at 627.
159. Id. at 626-27.
160. Id. at 627. The articles included those with headlines such as "Scavenging Lawyers" appearing in The Miami Herald and "Solicitors Out of Bounds" in The St. Petersburg Times. Id. The majority said the anecdotal evidence was "noteworthy for its breadth." Id. The summary also included excerpts from complaint letters that the Florida Bar had received about lawyer solicitations. See id. at 627-28.
161. Id. at 628-29 (stating, "[W]e do not read our case law to require that empirical data come to us accompanied by a surfeit of background information").
162. Id. at 628. The company identified was Magid Associates. Id.
163. Id. (citing Burson v. Freeman, 504 U.S. 191 (1992) (upholding 100-foot campaign-free zone around polling places); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1992) (upholding state anti-nudity law on allegations that nude dancing would lead to social ills such as crime, including prostitution); City of Renton v. Playtime Theatres, Inc., 475 U.S. 191 (1986) (upholding zoning ordinance prohibiting adult motion picture theaters within 1,000 feet of residential neighborhoods, schools, and churches on allegation that these types of theaters would lead to harmful secondary effects like crime and reduction in surrounding property values).
explanations of methodology, and no discussion of excluded results. There is no description of the statistical universe or scientific framework that permits any productive use of the information in [the summary].”  
While the majority was satisfied with the sufficiency of the evidence presented by Florida, Kennedy and the dissenters concluded that the evidence was inadequate to satisfy the direct advancement prong of the *Central Hudson* analysis.

The evidence issue notwithstanding, *Rubin* and *44 Liquormart* went a long way toward strengthening commercial speech protection under the First Amendment. However, questions still remained after *44 Liquormart* as to how the Court might deal with then-pending constitutional challenges to a federal broadcast ban on casino gambling advertising.

**IV**

**Gambling Advertising Revisited: Greater New Orleans Broadcasting (1999)**

In 1997, prominent First Amendment lawyer Cameron Devore characterized the governmental regulation of “vice” advertising as a “hot button” issue in commercial speech litigation. He noted that lower federal courts were in conflict over the constitutionality of federal laws that effectively banned broadcast ads for legalized gambling in private, for-profit casinos. Other commentators predicted that the casino advertising issue was on track for Supreme Court review.

In 1999, the Supreme Court revisited the issue of gambling advertising in *Greater New Orleans Broadcasting Association Inc. v. United States*. In that case, the Supreme Court struck down a

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165. *Id.* at 641 (stating that “we are cited to no material in the record” that the “regulation advances the interest of protecting persons who are suffering trauma and grief”).


167. *Id.* (citing *Valley Broad. Co. v. United States*, 107 F.3d 1328 (9th Cir. 1997); *Greater New Orleans Broad. Ass’n v. United States*, 69 F.3d 1296 (5th Cir. 1995); *Players Int’l Inc. v. United States*, Civil Action No. 96-4911 (D.N.J. 1997)).


portion of the federal broadcast ban on gambling advertisements. As in *Edge Broadcasting*, the *Greater New Orleans Broadcasting* case involved 18 U.S. Code section 1304 and the related FCC regulations that generally prohibit broadcast gambling ads. The *Greater New Orleans Broadcasting* opinion is significant as the Supreme Court’s most recent application of the *Central Hudson* analysis in a “vice” advertising case. Lower court rulings leading up to the decision, including a conflict between the Fifth and Ninth U.S. Circuits, are worthy of discussion here as evidence of the discrepant manner in which the *Central Hudson* analysis was applied by lower federal courts in the wake of *Rubin* and *44 Liquormart*.

A. District Court Opinion (1994)

In 1994, a coalition of Louisiana broadcasters challenged the ban on constitutional grounds because it prevented them from accepting paid television and radio ads for private casino gambling, a legal activity in Louisiana and neighboring Mississippi. In 1988, Congress had enacted exemptions to the broadcast ban for casinos lawfully operated by Native American tribes and state and local governments. However, the ban continued to prohibit broadcast ads for private, for-profit casino gambling even in states that had legalized that activity. Thus, the Louisiana broadcasters asked a federal district judge in that state to invalidate the ban on First Amendment grounds.

The district judge found the ban constitutional under the *Central Hudson* analysis and granted the government’s motion for summary judgement. Under the first *Central Hudson* factor there was “no dispute” that the proposed ads involved a legal activity and would be non-misleading. Under the second factor, he relied on *Edge Broadcasting* and *Posadas* to find that the government had asserted sufficiently substantial regulatory goals of “protecting the interest of nonlottery states” and “reducing participation in gambling and thereby minimizing the social costs associated therewith.” The judge

170. *Id.* at 1926.
171. *See supra* note 64.
175. *Id.* at 979.
176. *Id.*
relied on *Edge Broadcasting* and said that casino gambling is a "vice" activity" that may be eliminated by the government, clearly invoking the "greater-includes-the-lesser" rationale.\(^\text{177}\) Under the third *Central Hudson* factor, the judge again cited *Edge Broadcasting* and concluded without explanation that the ban directly advanced the asserted regulatory interests.\(^\text{178}\) Finally, under the fourth factor, the judge said that the ban was narrowly tailored because in rulings interpreting the ban, the FCC had allowed broadcast ads for private casinos touting amenities like hotel rooms and food service as long as the ads did not explicitly mention gambling.\(^\text{179}\)

**B. Initial Fifth Circuit Opinion (1995)**

In 1995, the U.S. Court of Appeals, Fifth Circuit, affirmed.\(^\text{180}\) Although the appeals court had the benefit of the Supreme Court’s 1995 ruling in *Rubin*, the 1996 ruling in *44 Liquormart* was still forthcoming. Calling the application of the *Central Hudson* analysis the “crux” of the case,\(^\text{181}\) the Fifth Circuit said under the first factor that the ban applied to truthful, non-misleading speech about a lawful activity.\(^\text{182}\) Proceeding to the second factor, the Fifth Circuit agreed with the district judge that the government’s two asserted regulatory interests were sufficiently substantial.\(^\text{183}\) The Fifth Circuit relied squarely on *Posadas* to conclude that the federal government had a substantial interest in the “health, safety, and welfare of its citizens”

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178. Greater New Orleans, 866 F. Supp. at 979-80 (stating “the subject restrictions on the advertisement of casino gambling are materially indistinguishable from those which so directly served the government interest in *Edge Broadcasting*”). Under the third *Central Hudson* factor, the district judge also relied on the notion that broadcast media are more easily regulated than other media forms because of the scarcity rationale approved and reaffirmed by the Supreme Court. See id. at 980 (citing Turner Broadcasting Sys. Inc. v. F.C.C., 512 U.S. 622 (1994); and Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969)).

179. See id. at 980-81. The district court noted that under FCC regulations, the word “casino” could appear in such broadcast ads if part of the name of the establishment. See id. at 980 (citation to FCC regulations not in original).


181. Greater New Orleans, 69 F.3d at 1299. Before reaching the *Central Hudson* analysis, the appellate court summarily rejected a claim by the broadcasters that section 1304 was not intended to apply to casino gambling. See id. at 1298-99.

182. See id. at 1299.

183. See id.
including the “goal of discouraging gambling.”[184] In addition, the court relied on *Edge Broadcasting* to conclude that the broadcast ban protected the policies of non-casino states.[185]

Addressing the third *Central Hudson* factor, the Fifth Circuit bluntly stated:

[The broadcasters] cannot seriously dispute that a prohibition of advertising casino gambling directly advances the governmental interest in discouraging such gambling and fulfills the third *Central Hudson* prong. *It is axiomatic that the purpose and effect of advertising is to increase consumer demand. As noted in both Posadas and Edge [Broadcasting], the vigor with which the statute has been challenged confirms the efficacy of the prohibition.*[186]

Amazingly, despite *Rubin*, the Fifth Circuit relied on *Posadas* to also reject the broadcaster’s claim that numerous statutory exemptions to section 1304 rendered it ineffective.[187] The court also relied on *Edge Broadcasting* to similarly reject the broadcasters’ argument that the federal ban was underinclusive because it singled out broadcast media.[188] With these arguments dispatched, the Fifth Circuit also rejected claims by the broadcasters that the federal government could not assert a regulatory interest in the case other than protecting state policies on gambling. See *id.* at 1299-1300 (rejecting an argument by the broadcasters that the Supreme Court’s decision in *Edge Broadcasting* supported their argument here). The Fifth Circuit also rejected the broadcasters’ claim that the federal government could not use its power to regulate interstate commerce over a state activity like casino gambling. See *id.* at 1300. The Fifth Circuit called this argument audacious and said “[t]he validity as well as substantiality of the federal interest in regulating gambling’s interstate manifestations, are . . . as old as the legislation prohibiting use of the federal mails for advertising state-chartered lotteries.” *Id.* (citing Act of July 12, 1876, ch. § 2, 19 Stat. 90. upheld in *Ex parte Jackson*, 96 U.S. 727 (1877)).


185. *See id.* at 1301. This comment by the court actually was made in the discussion of the third *Central Hudson* factor. *See id.*

The Fifth Circuit also rejected claims by the broadcasters that the federal government could not assert a regulatory interest in the case other than protecting state policies on gambling. See *id.* at 1299-1300 (rejecting an argument by the broadcasters that the Supreme Court’s decision in *Edge Broadcasting* supported their argument here). The Fifth Circuit also rejected the broadcasters’ claim that the federal government could not use its power to regulate interstate commerce over a state activity like casino gambling. See *id.* at 1300. The Fifth Circuit called this argument audacious and said “[t]he validity as well as substantiality of the federal interest in regulating gambling’s interstate manifestations, are . . . as old as the legislation prohibiting use of the federal mails for advertising state-chartered lotteries.” *Id.* (citing Act of July 12, 1876, ch. § 2, 19 Stat. 90. upheld in *Ex parte Jackson*, 96 U.S. 727 (1877)).


188. *See id.* at 1301-02. The court said that a majority of the Supreme Court had rejected that type of argument in *Edge Broadcasting*. *See id.* (citing *Edge Broad.*, 509 U.S. at 433-434). In addition, the Fifth Circuit said in a footnote “Congress is permitted more
Circuit had little trouble concluding that section 1304 "easily" surpassed the third Central Hudson factor.\textsuperscript{189}

Under the fourth Central Hudson factor, the Fifth Circuit continued to find Posadas compelling and said that section 1304 was sufficiently tailored "because it prohibits only broadcast advertising aimed at the promotion of casino gambling."\textsuperscript{190} The court stated:

\textit{To the extent public demand for casino gambling is reduced by section 1304, one governmental interest is fulfilled. To the extent the broadcasters cannot beam casino gambling advertisements into neighboring states that do not license private casinos, the federal government's goal of assisting states' anti-gambling policies is fulfilled.}\textsuperscript{191}

The Fifth Circuit said it was "too bad" the Supreme Court in Rubin had backed off the proposition that government could more readily regulate "vice" advertising than other forms.\textsuperscript{192} The court stated:

\begin{quote}
Drawing a distinction for traditional vice activity, such as gambling or prostitution, would provide a clear constitutional guideline, would free legislatures to make the delicate judgements required when legislating about these activities, and would avoid repetitious litigation over Central Hudson in a limited category of cases. Clarity is a virtue seldom attained and too seldom even prized in constitutional law.\textsuperscript{193}
\end{quote}

\section{C. Fifth Circuit on Remand (1998)}

In 1996, the Supreme Court vacated the Fifth Circuit's 1995 opinion in Greater New Orleans Broadcasting and remanded for further consideration in light of its 1996 ruling in 44 Liquormart.\textsuperscript{194} In 1998, the Fifth Circuit amended its earlier opinion but, again, found section 1304 constitutional as applied to broadcast ads for legal, private casino gambling.\textsuperscript{195} In its 1998 opinion, the Fifth Circuit

\begin{footnotes}
\item[189] See \textit{id.} at 1302.
\item[190] \textit{id.}
\item[191] \textit{id.} (emphasis added).
\item[192] \textit{id.}
\item[193] \textit{id.}
\item[195] Greater New Orleans Broad. Ass'n v. United States, 149 F.3d 334, 335, 341 (5th Cir. 1998). For discussion of this opinion, see generally Recent Cases, \textit{supra} note 96 (concluding that the Fifth Circuit misapplied the Central Hudson analysis as reformulated by the Supreme Court in 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996)).
\end{footnotes}
focused primarily on the application of the third and fourth *Central Hudson* factors.\(^{196}\)

Revisiting the third factor, the Fifth Circuit said the *44 Liquormart* decision did not “disturb the series of decisions that has found a commonsense connection between promotional advertising and the stimulation of consumer demand for the products advertised.”\(^{197}\) The Fifth Circuit said there is a direct connection between the broadcast ban on casino gambling ads and the government’s asserted goal of squelching consumer demand for casino gambling.\(^{198}\) The court distinguished the price-advertising ban struck down in *44 Liquormart* as a speech restriction aimed at reducing liquor demand by “indirectly . . . affecting liquor prices.”\(^{199}\)

Under the fourth *Central Hudson* factor, the Fifth Circuit again concluded the broadcast ban on casino gambling ads was not overly broad. The court said the ban operated more like a “time, place and manner restriction” because, for instance, it allowed private casino gambling ads in other media like newspapers, magazines, and billboards.\(^{200}\) The Fifth Circuit said the regulation “targets the powerful sensory appeal of gambling conveyed by television and radio, which are also the most intrusive advertising media, and the most readily available to children.”\(^{201}\) The court found in particular the federal broadcast ban was needed to protect the citizens of non-

\(^{196}\) See id.

\(^{197}\) See id. at 337 (citing as an example Central Hudson Gas & Elec. Co. v. Public Serv. Comm’n of N.Y., 447 U.S. 557, 569 (1980)) (emphasis added).

\(^{198}\) See id. The Fifth Circuit noted that Stevens said in *44 Liquormart* that the third *Central Hudson* factor required an evidentiary showing, but found that rationale less than compelling stating that part of Stevens’ opinion did not draw a majority of the justices. See id. In addition, the Fifth Circuit said *44 Liquormart* did not require the federal government in *Greater New Orleans Broadcasting* to establish a “direct, quantitative evidentiary link” connecting “casino gambling and compulsive gambling with broadcast advertising for casinos” and the government clearly had not done so. Id. at 339. Strangely, this comment was made in connection with the court’s discussion of the fourth *Central Hudson* prong requiring narrow tailoring and not the third prong requiring direct advancement. See id. at 338-39.

\(^{199}\) Id. at 337 (emphasis added).

\(^{200}\) See id. at 340 (stating “there is no blanket ban on advertising”).

\(^{201}\) Id. The Fifth Circuit also pointed out that the broadcast advertising ban did not prohibit private casinos from advertising non-gambling amenities like food and accommodations. See id.

The Fifth Circuit also said the broadcasters had not pointed out any “non-speech-related alternatives” to replace the federal broadcast advertising ban but said the “efficacy of non-advertising-related means of discouraging casino gambling is purely hypothetical, as such measures would have to compete with the message of social approbation that would simultaneously be conveyed by unbridled television advertising.” Id.
casino states from the “influence of broadcast advertising for privately owned casinos.”

The Fifth Circuit said it was not necessary for the government to prove a “direct, quantitative link” between broadcast advertising, casino gambling, and social ills like organized crime, violence, embezzlement, fraud, and personal bankruptcies. Indeed, the appeals court admitted the government had failed to prove such a link. The Fifth Circuit seemed to suggest that such proof was unnecessary and stated: “The remaining advertising limits reflect congressional recognition that gambling has historically been considered a vice; that it may be an addictive activity; that the consequences of compulsive gambling addiction affect children, the family, and society; and that organized crime is often involved in legalized gambling.”

D. Conflict with Ninth Circuit in Valley Broadcasting Co.

In its 1998 opinion in Greater New Orleans Broadcasting, the Fifth Circuit acknowledged a conflict with the Ninth Circuit ruling in Valley Broadcasting Co. v. United States. In Valley Broadcasting, the Ninth Circuit struck down section 1304 under the third factor of the Central Hudson analysis after Nevada broadcasters challenged the statute on First Amendment grounds. Like the Fifth Circuit in Greater New Orleans Broadcasting, the Ninth Circuit in Valley Broadcasting said the government had asserted sufficiently substantial interests in discouraging public participation in gambling and protecting the policies of non-casino states.

202. See id. The court said it was “disturbing” to think that “whatever gambling is legal anywhere may be advertised everywhere.” Id. at 341 (emphasis added).
203. Id. at 338-39, 338 n.9.
204. See id. at 339.
205. Id. at 339.
207. See id. at 1331, 1334.
However, the *Valley Broadcasting* court found that section 1304 failed to directly advance the government interests because of exemptions like those for broadcast advertising of state-run lotteries, not-for-profit gaming, and casino gambling operated by Native Americans. The Ninth Circuit said that allowing broadcast advertising for some forms of gambling and not others undermined both of the government's asserted interests. Although the Ninth Circuit also assumed a "common sense" connection between advertising and increased demand for casino gambling, the court was nonetheless "troubled" that section 1304 allowed some forms of broadcast gambling advertisements while prohibiting others.

E. Supreme Court Opinion (1999)

In 1999, the Supreme Court reversed the Fifth Circuit in *Greater New Orleans Broadcasting*. The Court unanimously ruled unconstitutional the federal ban on broadcast advertisements for private casino gambling as applied to licensees in states like Louisiana with legalized private casino gambling. Justice Stevens, who penned the opinion of the Court, said the audience should be left to judge the value of these advertisements without interference by the government.

The Court used the *Central Hudson* analysis to strike down the ban as applied to broadcast licensees in states with legalized private casino gambling. Under the first factor, the Court found that section 1304 bans protected commercial speech, meaning in this case truthful, commercial speech. See *id.* at 1334-36.

209. See *id.* at 1334-36.

210. See *id.* at 1335-36.

211. See *id.* at 1334 (stating that "common sense suggests that advertising increases participation; indeed were this not so, it is unlikely that casinos would seek to advertise on the Broadcaster's stations"). The court also said the "Supreme Court has expressly recognized the connection between advertising and demand." *Id.* (citing *Posadas*, 478 U.S. at 341-42; *Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n*, 447 U.S. 557 (1980)).


214. See *id.* at 183-87. Thomas agreed with the Court that section 1304 is unconstitutional, but said it was not necessary to apply the *Central Hudson* analysis because it was "illegitimate per se" for the government to regulate commercial speech in this manner. *See id.* at 197 (Thomas, J., concurring) (citing *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in the judgment)).
non-deceptive advertising for legalized casino gambling. Invoking the critical rationale and underpinnings of the Court's landmark Virginia Board case, Stevens stated:

[T]he proposed commercial messages would convey information – whether taken favorably or unfavorably by the audience – about an activity that is the subject of intense public debate in many communities. In addition, [the broadcast advertisements] presumably would disseminate accurate information as to the operation of market competitors, such as pay-out ratios, which can benefit listeners by informing their consumption choices and fostering price competition. Thus, even if the broadcasters' interest in conveying these messages is entirely pecuniary, the interests of, and benefit to, the audience may be broader.

Moving to the second factor, the Court concluded that the federal government had a sufficiently substantial regulatory interest in curbing social costs related to casino gambling by reducing demand and protecting similar state policies. The government had argued that casino gambling contributes to social problems like increased crime, including organized crime. In addition, the government claimed that socially harmful compulsive gambling was on the rise as a result of more legalized gambling in America. The government claimed that compulsive gamblers are especially susceptible to televised gambling advertising.

Under the third Central Hudson factor, the Court concluded that section 1304 was too "pierced by exemptions and inconsistencies" to advance the asserted regulatory interests in a direct and material way. For instance, Stevens noted, the broadcast ban did not apply to casino gambling operated by Native Americans or non-profit organizations. In addition, the Court noted, the Federal Communications Commission – responsible for interpreting and enforcing the ban – had approved broadcast advertisements for private casinos that, while not explicitly mentioning casino gambling,

215. See id. at 184.
217. See id. at 185-87.
218. See id. at 185.
219. See id. at 189.
220. See id. at 190.
221. See id. Stevens said "the Government presents no convincing reason for pegging its speech ban to the identity of the owners or operators of the advertised casinos." Id. at 191. In addition, Stevens said that casinos operated by Native Americans offered the same type of gambling as private casinos and were not so isolated as to distinguish them from private casinos as suggested by the government. See id.
touted such attributes as “Vegas-style excitement.”

Still under the third factor, Stevens said the government also failed to establish a connection between casino gambling – especially compulsive gambling – and advertising. He wrote: “While it is no doubt fair to assume that more advertising would have some impact on overall demand for gambling, it is also reasonable to assume that much of that advertising would merely channel gamblers to one casino rather than another.” Furthermore, the Court refused to take for granted the “causal chain” asserted by the government – that broadcast advertising for casino gambling spurs demand, then increased gambling, and, finally, pernicious social costs. However, the Court said it was unnecessary to decide whether the government’s lack of evidence on this point was fatal under the third Central Hudson factor because the regulatory scheme was already fatally flawed with an irrational array of exemptions and inconsistencies.

Under the fourth Central Hudson factor, the Court concluded that the government’s regulatory scheme was not narrowly tailored because practical and non-speech alternatives could be used to more directly regulate private casino gambling. For example, as Stevens suggested, the government could enact monetary limits on wagering and credit extended to patrons, limit automated cash machines on casino premises, or impose stricter licensing requirements. Failure to even try these or other regulatory means instead of a speech ban undermined the government’s asserted interest, Stevens said, as had been the case in Rubin.

Also under the fourth Central Hudson factor, the Court clearly rejected the “greater-includes-the-lesser” regulatory rationale. Stevens stated: “[T]he power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct.” Stevens cited Rubin and 44 Liquormart and said that in those cases, the Court had “rejected the argument that the power to restrict speech about certain socially harmful

222. See id. at 190.
223. See id. at 189.
224. Id. (emphasis added).
225. See id.
226. See id. at 190.
227. See id. at 192.
228. See id.
229. See id.
230. Id. at 193 (citing 44 Liquormart, 517 U.S. 484, 509-11 (opinion of Stevens, J.) (1996), 531-32 (O'Connor, J., concurring in judgment); Rubin v. Coors Brewing Co., 514 U.S. 476, 483 n.2 (1995)).
activities was as broad as the power to prohibit such conduct. An attorney for the broadcasters said after the decision: "The court is saying that it is not legitimate to let some . . . activity like gambling flourish . . . then treat people like they are too stupid to be told anything about it." 

In a concurring opinion in Greater New Orleans Broadcasting, Thomas agreed with the Court's holding but not its rationale. He restated his position from 44 Liquormart that government may not constitutionally try and manipulate consumer choices in the marketplace by squelching non-deceptive commercial speech about legal products and services. This type of regulatory goal is illegitimate per se, he reiterated. Thus, he concluded, the majority should not have used intermediate scrutiny under the Central Hudson analysis as its constitutional test. 

It should be noted that the Greater New Orleans Broadcasting majority did not pledge unblinking allegiance to the Central Hudson analysis by any means. In the principal opinion Stevens noted that judges and legal scholars had criticized the test as convoluted and less than stringent. He also noted the split among the justices on the application of the analysis in 44 Liquormart the previous term. However, Stevens characterized the Central Hudson analysis as an "established constitutional jurisprudence" and thus an "adequate" basis for deciding the case at hand.

F. Significance of Greater New Orleans Broadcasting

The Supreme Court's opinion in Greater New Orleans Broadcasting is significant in many regards. The opinion finally and

231. Id. at 1929 (citing 44 Liquormart, 517 U.S. 484, 509-11 (opinion of Stevens, J.) (1996), 531-32 (O'Connor, J., concurring in judgment); Rubin v. Coors Brewing Co., 514 U.S. 476, 483 n.2 (1995)).
234. See id.
235. See id.
236. See id. at 184 (citing as examples Justice Thomas's concurring opinion in 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 526-28 (1996) (Thomas, J., concurring in judgement), and a 1990 article, Alex Kozinski and Stuart Banner, Who's Afraid of Commercial Speech, 76 VA. L. REV. 627 (1990)).
237. See id. (stating that "we do not ordinarily reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground").
clearly extinguishes any validity the “greater-includes-the-lesser” rationale might have retained after Rubin and 44 Liquormart. In other words, government power to ban a product or activity does not alone reduce First Amendment protection for truthful, non-deceptive commercial speech about that product or activity. Instead, the government must regulate in a more direct manner that is less intrusive upon the First Amendment rights of commercial speakers and the public.

In similar fashion, the Court clearly refuted the argument that truthful, non-deceptive commercial speech about lawful products and activities merits less First Amendment protection when dealing with “vice” products and activities. It is remarkable that the Greater New Orleans Broadcasting Court analogized casino gambling advertising to the prescription drug price advertising at issue in the Virginia Board case. This strongly supports the proposition that truthful, non-deceptive commercial speech about lawful products and services must be analyzed under the Central Hudson analysis without value judgements being placed on the products or services being promoted. The current Supreme Court clearly intends for these value judgements to be made by the public – especially the targets and recipients of commercial messages – assisted by free-flowing commercial information.

In addition, the Greater New Orleans Broadcasting opinion questions whether a causal connection exists between advertising and overall demand and consumption. As Stevens pointed out in the principal opinion, advertising might instead lead to brand switching among consumers. This statement is evidence of the Court’s retreat from axiomatic assumptions – present in the majority opinions in Central Hudson, Posadas, and Edge Broadcasting – that advertising increases overall demand and consumption. Even in Rubin and 44 Liquormart, the Court did not seem to seriously question such an assumed causal connection. It seems unlikely, after Greater New Orleans Broadcasting, that the Court will accept without evidence causal connection assumptions regarding advertising, demand and consumption, and harmful secondary effects. It is equally unlikely that the Court will accept, without evidence, more convoluted causal connections.

However, the Greater New Orleans Broadcasting case sheds no light on the question of how much evidence is sufficient to prove that a restriction of protected commercial speech directly advances an asserted regulatory interest under the third Central Hudson factor. The Greater New Orleans Broadcasting Court openly avoided this
question because it was not necessary to the holding. Thus, the split among the justices in *Went For It*, the lawyer advertising case, remains unresolved. Still, any concerns about loose evidentiary standards under the third factor seem to be mitigated by the direct means analysis employed by the Court in *Rubin, 44 Liquormart*, and *Greater New Orleans Broadcasting* under the narrowly-tailored requirement (fourth factor) of the *Central Hudson* analysis.

The *Greater New Orleans Broadcasting* opinion is not clear on the continued validity of the Court’s rationale in *Edge Broadcasting*. The opinion does not explicitly address the validity of the federal broadcast ban on casino gambling advertising as to licensees in the some 40 non-casino states at the time of this article. Nonetheless, based on the rationale employed by the *Greater New Orleans Broadcasting* Court, the U.S. Department of Justice officially concluded that the federal broadcast ban could not be constitutionally applied to truthful advertising for legal private casino gambling regardless of whether a licensee is located in a casino or a non-casino state. It seems logical to argue that *Greater New Orleans Broadcasting* strongly suggests the Court will not accept a federal goal of protecting state policies without scrutinizing them under the more stringent version of the *Central Hudson* analysis employed by the Court since *Edge Broadcasting*.

V

Conclusion

This article has demonstrated that the Supreme Court has greatly enhanced commercial speech protection through its recent opinions in *Rubin, 44 Liquormart*, and *Greater New Orleans Broadcasting*. In addition, the Court has changed its approach toward “vice” advertising – which went from being effectively outside commercial

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238. *See supra* note 212 for a list of states allowing private, casino gambling at the time of this article.

239. *See Public Notice, Casino Advertising Enforcement Pending Disposition of Players International Case, DA 99-2034* (Sept. 30, 1999). In addition, the U.S. Department of Justice decided after *Greater New Orleans Broadcasting* not to continue defending the constitutionality of the federal broadcast ban on advertising for private casino gambling in a case pending before the U.S. Court of Appeals, Third Circuit. *See id.* The Federal Communications Commission officially announced it would suspend enforcement of the ban against any licensees pending further court rulings or action by Congress. *See id.* When the *Greater New Orleans Broadcasting* case was decided, there was a pending appeal before the U.S. Circuit Court of Appeals, Third Circuit, in *Players International, Inc. v. United States* in which the federal district court in New Jersey struck down section 1304 as unconstitutional. *See supra* note 206. That case is still pending.
speech protection in *Posadas* and *Edge Broadcasting* to being equally protected alongside other forms of commercial speech. Indeed, based on the Supreme Court’s recent commercial speech jurisprudence, a strong argument exists that the “vice” distinction retains little, if any, legal significance under the current configuration of the commercial speech doctrine.

In addition, the Supreme Court in *Greater New Orleans Broadcasting* has, for the first time, seriously questioned the assumption that advertising is causally connected to increased consumer demand and consumption. This is remarkable since the Court had been assuming this causal connection for almost twenty years – since deciding the *Central Hudson* case. As demonstrated by the preceding cases, government has consistently used the causal connection assumption as a justification when trying to regulate harmful products and activities through advertising restrictions. Clearly, government now has an elevated burden under the third *Central Hudson* factor (direct advancement) to demonstrate with evidence that a legislative goal involving a product or activity can somehow be achieved by restricting protected speech about that product or activity. It is unfortunate that the Court has refused to adequately address the issue of quality and quantity of evidence needed under the third *Central Hudson* factor to prove direct advancement. The third factor remains the murkiest of the four and, consequently, is susceptible to varying interpretations and loose evidentiary standards.

Despite its unwillingness to directly address the evidence issue, the Court has unequivocally rejected the notion that governmental power to regulate and even ban a product or activity includes the “lesser” power to regulate truthful, non-deceptive speech about that product or activity. Simply speaking, the latter invokes grave constitutional concerns, and the former does not. This approach is entirely consistent with the Court’s current more stringent application of the fourth *Central Hudson* factor, which requires government to seek direct means of reaching its asserted regulatory goal instead of restricting protected speech. The opinions in *Rubin*, *44 Liquormart*, and *Greater New Orleans Broadcasting* stand as clear and strong precedents on this point.

Finally, four of the current justices – Stevens, Kennedy, Ginsburg, and Thomas – have expressed their support for abandoning intermediate scrutiny under the *Central Hudson* analysis when government restricts truthful, non-deceptive advertising in order to manipulate lawful consumer choices in the marketplace. It remains to
be seen whether an additional justice will join these four and create a majority on this position in a future commercial speech case. If so, that would mark yet the most dramatic development in the commercial speech doctrine since the Court assimilated pure commercial speech into the First Amendment in *Virginia Board* in 1976.
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