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**Constitutional Law—Freedom of Speech. No Longer That Crazy Aunt in the Basement, Commercial Speech Joins the Family. 44 *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996).**

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CONSTITUTIONAL LAW—FREEDOM OF SPEECH. NO LONGER THAT  
CRAZY AUNT IN THE BASEMENT, COMMERCIAL SPEECH JOINS THE FAMILY.  
*44 LIQUORMART, INC. v. RHODE ISLAND*, 116 S. Ct. 1495 (1996).

I. INTRODUCTION

*“Make no law abridging the freedom of speech,” our preeminent guarantee,  
Alive and well in the home of the brave, the strong, the fearless, the free.  
Tune out the political clamor; you hear its pulse steady and strong,  
Its promise has not been forsaken. Its beat goes steadfastly on.*

Does the First Amendment<sup>1</sup> permit the government to censor truthful informational advertisements in order to affect our economic and lifestyle choices? In *44 Liquormart, Inc. v. Rhode Island*, the United States Supreme Court answered: No.<sup>2</sup> The Court thus ended a sixteen-year hiatus from the ideas that the First Amendment prohibits the government from silencing truthful speech and that in America, citizens may consider all information and make decisions for themselves. Since 1980, the *Central Hudson* balancing test had dominated the Court’s commercial speech doctrine and allowed the government to block the flow of truthful commercial information to consumers.<sup>3</sup> Aided by the *Central Hudson* mechanism, our government could make laws that suppressed commercial speech in order to influence prices and consumer choice.<sup>4</sup> But in *44 Liquormart*, the Court relied on the First Amendment to point the way in determining whether government can suppress truthful speech, and the *Central Hudson* test took a back seat.<sup>5</sup> Never again will truthful commercial speech be subjected to arbitrary balancing tests; no longer may the government suppress commercial speech without consulting the First Amendment.

This note will first set out the facts of *44 Liquormart*, a case that marked the beginning of true First Amendment protection for commercial speech. Second, the note will outline the circuitous development of commercial speech law, revealing that the freedom of commercial speech has often depended on

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1. The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I.

2. 116 S. Ct. 1495, 1499 (1996).

3. For a discussion of the *Central Hudson* test and its effects, see *infra* section III.A.4-5.

4. For a discussion of the *Central Hudson* test and its effects, see *infra* section III.A.4-5.

5. Justices Stevens, Kennedy, Ginsburg and Souter advocated a “special care” review for laws that suppress truthful commercial speech for reasons other than truth-in-advertising. *44 Liquormart*, 116 S. Ct. at 1507. Justice Thomas called for strict review when speech restrictions silence truthful commercial speech. See *id.* at 1515, 1516 (Thomas, J., concurring).

considerations other than the First Amendment. Next, the note will summarize the reasoning of the Court in *44 Liquormart*, explaining how four separate opinions resulted in a unanimous judgment. Finally, the note will explore the significance of the Court's decision in *44 Liquormart* and predict a bleak future for the Federal Drug Administration's plans to send the Marlboro Man riding off into the sunset.

## II. FACTS

In 1956, in the interest of promoting temperance,<sup>6</sup> Rhode Island enacted two statutes that prohibited advertising the retail prices of alcoholic beverages within the state's borders.<sup>7</sup> For the next forty years, a consumer could peruse the price of spirits in one place, and one place only: on tags or signs in liquor stores.<sup>8</sup> The Rhode Island Liquor Control Board strictly enforced the State's ban on price advertisements,<sup>9</sup> and Rhode Island's supreme court officially upheld it.<sup>10</sup> But the beginning of the end for Rhode Island's advertising ban came when *44 Liquormart, Inc. (Liquormart)*, a Rhode Island liquor store, placed an advertisement in a 1991 edition of the *Providence Journal-Bulletin*.<sup>11</sup>

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6. See *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1502 (1996). In a post-trial interview, Evan T. Lawson, counsel for *44 Liquormart* stated: "I think the law was passed to protect package stores from competition. . . . What I have observed is that you can look at the regulatory scheme; find what are regarded as anomalies and trace them back to whichever segment of the industry had the most influence on the Legislature at any given time." *Evan T. Lawson*, MASS. LAW. WKLY., Aug. 5, 1996, at B2.

How would the statutes effectively promote temperance? Rhode Island's theory was as follows: (1) If liquor retailers did not advertise prices, there would be less price competition; (2) If there were less price competition, prices would be higher; and (3) If prices were higher, drinkers would not drink as much as they would if prices were lower. See *44 Liquormart*, 116 S.Ct. at 1509.

7. The twin statutes collectively stamped out price advertisements from all possible sources. One statute governed liquor manufacturers, wholesalers, shippers, and retailers. These entities were forbidden to: "Advertis[e] in any manner whatsoever . . . the price of any malt beverage, cordials, wine [,] or distilled liquor offered for sale in this state; provided, however, . . . this section shall not apply to price signs or tags attached to or placed on merchandise for sale within the licensed premises . . . ." *Id.* at 1501 n.2 (quoting R.I. GEN. LAWS § 3-8-7 (1987)). The second statute controlled the media and advertising firms. These entities were forbidden to "accept, publish, or broadcast any advertisement . . . of the price or make reference to the price of any alcoholic beverages." *Id.* at 1501 n.3 (quoting R.I. GEN. LAWS § 3.8-8.1 (1987)).

8. The Liquor Control Administrator promulgated a regulation that provided "no placard or sign that is visible from the exterior of a package store may make any reference to the price of any alcoholic beverage." *Id.* at 1501 n.2. (quoting Regulation 32 of the Rules and Regulations of the Liquor Control Administrator of Rhode Island).

9. See *id.* at 1503.

10. See *id.* at 1502.

11. See *44 Liquormart, Inc. v. Racine*, 829 F. Supp. 543, 545 (D.R.I. 1993). The

The advertisement quoted low prices for Schweppes mixers, peanuts, and potato chips and accented the bargains with the word "WOW."<sup>12</sup> The "WOW" exclamation, without mention of price, also appeared alongside pictures of brand-name liquor bottles.<sup>13</sup> Liquormart's advertisement grabbed the attention of local competitors, who in turn reported their discovery to Rhode Island's Liquor Control Administrator, Kate Racine.<sup>14</sup> Without delay, Racine held a hearing to determine whether Liquormart's ad violated the State's statutory prohibition on price advertising.<sup>15</sup> She concluded that the veiled reference, WOW, to low liquor prices violated the ban, ordered that the ad cease to run, and fined Liquormart \$400.<sup>16</sup>

Liquormart paid the fine, bypassed the state's appeal process, and filed suit against Racine in the Federal District Court for Rhode Island.<sup>17</sup> Liquormart charged that Rhode Island's interdiction of price advertising violated the First Amendment by denying retailers their right to freedom of speech and consumers their right to obtain factual information about a legal product.<sup>18</sup>

People's Super Liquor Stores, Inc., a Massachusetts liquor retailer, who wanted to advertise prices in Rhode Island newspapers, joined as plaintiff.<sup>19</sup> Additionally, the Rhode Island Liquor Store Association, who wanted to protect small liquor retailers, intervened as defendant.<sup>20</sup>

Racine asserted that the Twenty-first Amendment<sup>21</sup> bolstered the validity of the statutes in question and operated to shift the burden to Liquormart to prove the statutes were unconstitutional.<sup>22</sup> However, the district judge held that

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Providence Journal-Bulletin is a daily newspaper in Rhode Island. *See id.*

12. *See 44 Liquormart*, 116 S. Ct. at 1503.

13. *See id.*

14. *See id.*

15. *See id.* Liquormart's advertisement appeared in a December 1991 issue of the Journal, and Racine held a hearing on December 11, 1991. *44 Liquormart*, 829 F. Supp. 543, 545 (D.R.I. 1993).

16. *See 44 Liquormart*, 116 S. Ct. at 1503.

17. *See id.* Later in the litigation, the State of Rhode Island took Racine's place as defendant. *See id.*

18. *See* Brief for Petitioner at 3, *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996) (No. 94-1140).

19. *See 44 Liquormart*, 116 S. Ct. at 1503.

20. *See 44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5, 6 (1st Cir. 1994). The Association intervened because "if advertising of prices were to be allowed, its members 'would be obliged to participate in the advertising arena and would be at a definite disadvantage when matched up against retailers who hold multiple licenses.'" *Id.* (quoting the alleged grounds for Association's intervention). *See supra* note 6 (discussing the possibility that small liquor retailers influenced the legislature to enact the advertising ban).

21. The Twenty-first Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI.

22. *See 44 Liquormart*, 829 F. Supp. at 551.

the State could not use the Twenty-first Amendment as leverage to tilt First Amendment review in its favor.<sup>23</sup> As a result, Rhode Island shouldered the burden of proving that its ban on commercial speech passed First Amendment scrutiny under *Central Hudson*.<sup>24</sup> After considering the evidence, the district judge held that the advertisement ban did not directly advance the State's interest, that the State could further its interest in temperance without burdening commercial speech, and that the ban unconstitutionally abridged the freedom of speech.<sup>25</sup> Rhode Island appealed.<sup>26</sup>

The Court of Appeals for the First Circuit reversed the district court's decision.<sup>27</sup> The circuit court ruled that the Twenty-first Amendment gave the statutes at issue a "presumption of validity"<sup>28</sup> and noted that evidence of whether the advertisement ban directly advanced the State's interest went "both ways."<sup>29</sup> The court reasoned that because evidence of the statutes' effectiveness was inconclusive, Rhode Island was entitled to a "reasonable choice" in selecting a method that would serve the State's interest<sup>30</sup> and concluded that the advertising ban was a permissible restriction of commercial speech.<sup>31</sup>

Liquormart petitioned the United States Supreme Court for certiorari. The Court granted Liquormart's petition and framed the question it would resolve as follows: under the First Amendment, may Rhode Island ban factual, non-deceptive advertisement of liquor prices?<sup>32</sup>

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23. *See id.* at 553.

24. *See id.* For an explanation of the *Central Hudson* test, see *infra* text accompanying note 94.

25. *See 44 Liquormart*, 829 F. Supp. at 554-55.

26. *See 44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994).

27. *See id.* at 9.

28. "[T]he presumption based on the Twenty-First Amendment . . . seems precisely in order." *Id.* at 8.

29. *See id.* at 7. The circuit judge noted that there was no empirical evidence that Rhode Island's statutes would be an effective way to promote temperance and that the expert testimony offered in district court was inconclusive. *See id.* In district court, Liquormart presented two expert witnesses who testified that studies did not show advertising liquor prices had a significant influence on alcohol consumption. *44 Liquormart*, 829 F. Supp. 543, 546 (D.R.I. 1993). Rhode Island presented a study that indicated alcohol prices influenced alcohol consumption and that without a price advertisement ban, prices would decrease and consumption would rise. *Id.* at 547-48. However, the district judge rejected the study because it did not consider all pertinent factors in reaching its conclusion. *Id.* at 548. Additionally, the State's expert witness agreed that banning liquor price advertisements would not insure liquor prices would fall to the point that would decrease alcohol consumption. *Id.* at 549.

30. *44 Liquormart*, 39 F.3d. at 7.

31. *Id.* at 8.

32. *44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994), *cert. granted* 115 S. Ct. 1821 (1995) (No. 94-1140).

### III. BACKGROUND

In ten words, the First Amendment prohibits Congress from establishing *any* law that curtails freedom of speech.<sup>33</sup> Despite this straightforward command,<sup>34</sup> the framers did not clarify how to fulfill the promise of free speech in America,<sup>35</sup> and people disagree about the types of speech the First Amendment protects<sup>36</sup> and the forms of government action it prohibits.<sup>37</sup> As a result, the guarantee of free speech has not received a literal reading in American jurisprudence,<sup>38</sup> and the United States Supreme Court has produced a catalogue

33. See *supra* note 1 for text of the First Amendment.

34. The First Amendment provides a more categorical proscription against government action than other provisions in the Bill of Rights. Other guarantees are qualified: The Fourth Amendment guarantees against "unreasonable" searches and seizures; the Fifth Amendment guarantees "due" process; and the Eighth Amendment prohibits "excessive" bail. WILLIAM W. VAN ALSTYNE, *INTERPRETATIONS OF THE FIRST AMENDMENT* 22 (1984).

35. The intent of the framers offers little guidance for adapting the words of the First Amendment to present day claims to freedom of speech. See MARTIN REDISH, *FREEDOM OF EXPRESSION A CRITICAL ANALYSIS* 13 n.27 (1984). Furthermore, legal scholars who base their First Amendment interpretation solely on the intent of the framers tend to change their minds over time. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-1, at 785 n.3 (2d. ed. 1988). See also RODNEY A. SMOLLA, *SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT* § 1.04[2] (1994) (explaining that Justice Oliver Wendell Holmes initially interpreted the First Amendment on narrow, historical grounds but later became one of the Court's major advocates for the freedom of speech). As a result, jurists often devise their prescription for First Amendment jurisprudence based on their understanding of the purpose or value of the freedom of speech. See *id.* at § 2.01[2]. For example, Judge Bork asserts the value of free speech is limited to its role in the democratic process; he would grant First Amendment protection to political speech only. See REDISH, *supra* at 15. On the other hand, Professor Tribe believes that the value of the freedom of speech is multifaceted and includes, but is not limited to, personal liberty; he would protect "a rich variety of expressional modes." TRIBE, *supra* at § 12-1.

36. On the question of whether commercial speech should receive the same First Amendment protection as political speech, Justice Rehnquist asserted the First Amendment was not intended to protect "intercourse between a seller hawking his wares and a buyer seeking to strike a bargain." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 781 (1976) (Rehnquist, J., dissenting). On the other hand, Justice Blackmun stated that "even if the First Amendment were thought to be primarily an instrument to enlighten public decision making in a democracy, we could not say that the free flow of [commercial] information does not serve that goal." *Id.* at 765.

37. Most jurists agree that the First Amendment forbids prior restraints—laws that require speech to be approved by the government before publication. See Steven A. Childress, *The Empty Concept of Self-Censorship*, 70 TUL. L. REV. 1969, 1972 (1996). Additionally, the Supreme Court has held that prior restraints are highly disfavored under the First Amendment. See *id.* Professor Childress proposes that "abridging speech" means "censoring speech" and that laws penalizing speech after its dissemination are no less censorial than laws that stop speech before its dissemination. See *id.* at 1969, 1975.

38. Though his First Amendment views never ruled a majority of the court, Justice Black believed in an absolutist approach to First Amendment interpretation and was opposed to balancing First Amendment rights with governmental interests. See TINSLEY E. YARBROUGH,

of balancing tests<sup>39</sup> and speech categories<sup>40</sup> that determines the boundaries of our right to freedom of speech. The Court has singled out commercial speech as a category that receives less-than-full<sup>41</sup> First Amendment protection.<sup>42</sup> Is minimizing the freedom of commercial speech a judicious application of the First Amendment, or an expedient method for balancing freedom of speech

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MR. JUSTICE BLACK AND HIS CRITICS 131-32 (1988). He said, "[t]he First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech' . . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Id.* at 126 (quoting *Bridges v. California*, 314 U.S. 252, 263 (1941)). Critics of the absolutist interpretation of the First Amendment contend that balancing First Amendment rights with societal interests is necessary to protect against harms such as solicitation for murder, perjury, and false advertising. See VAN ALSTYNE, *supra* note 34, at 24-25.

39. The Court has endorsed a "content-neutral" First Amendment principle, which forbids the government to abridge speech based on the content, message, or viewpoint communicated. See Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 374 (1979). As a result, the Court ordinarily applies a demanding "strict-scrutiny" review to content-based speech restrictions and will strike a law aimed at speech content unless it is narrowly tailored to further a compelling government interest. Laws rarely survive strict-scrutiny review. See SMOLLA, *supra* note 35, at § 12.01[3]. However, the Court has not adhered consistently to the principle of content neutrality. For example, if a law curtails the content of speech deemed to be of "low value," the Court will apply reduced scrutiny or "categorical balancing" to determine whether the speech restriction passes constitutional muster. See Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 47-48 (1987). Additionally, when speech restrictions suppress speech for reasons not related to the content of speech—for example, a law that prohibits loud speech beside a school zone—the Court uses one of several standards of review ranging from rational review, which usually results in the Court upholding the restriction, to strict scrutiny. See *id.* at 48-54. This is so even though a content-neutral restriction can suppress the content of speech as effectively as a content-based restriction. See *id.* at 54.

40. The Court has held that the low value of commercial speech, fighting words, pornography, and false statements justify that these speech forms receive less First Amendment protection than political speech. See Alex Kozinski & Stuart Banner, *The Anti History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 774, n.25 (1993) (citations omitted). Depending on the category of speech at issue, different rules apply: "Each method of communicating ideas is a 'law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method. We deal here with the law of billboards." VAN ALSTYNE, *supra* note 34, at 21 (quoting *Metromedia, Inc. v. City of San Diego*, 435 U.S. 490, 501 (1981)).

41. "Less-than-full" or "second-class" First Amendment protection results when the Court applies a reduced level of scrutiny to a speech restriction and gives the restriction a better chance of surviving First Amendment review. See *supra* note 39 for a discussion of strict and reduced scrutiny.

42. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978) ("We have not discarded the 'common-sense' distinction between proposing a commercial transaction . . . and other varieties of speech . . . . [C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.").

with present day public policy?<sup>43</sup> To answer this question it is necessary to understand *why* the Court ousted commercial speech from the core protection of the First Amendment. An inquiry into the history of commercial speech jurisprudence is in order.

#### A. How Commercial Speech Inherited a Second-Class Form of First Amendment Protection

During the glory days of substantive due process,<sup>44</sup> plaintiffs did not employ the First Amendment when they brought suit against a State who had suppressed their attempts to advertise.<sup>45</sup> Instead, these plaintiffs charged that under the Due Process Clause, the State had impermissibly interfered with their right to carry on a business.<sup>46</sup> It simply did not occur to late nineteenth and early twentieth century litigants to characterize their advertisements as “commercial speech” because advertising was thought of as an occupation, not a form of expression.<sup>47</sup> In fact, the first Supreme Court case that referred to “commercial speech” was decided in 1973.<sup>48</sup> Early decisions used the terms “commercial activity,” “commercial advertising,” or “soliciting and

43. As previously mentioned, the Court has disfavored prior restraints and supported content neutrality. *See supra* notes 37, 39. Additionally, most jurists agree that the First Amendment stands for the principle that it is impermissible to suppress speech because a majority of people think certain speech is inferior. *See Kozinski, supra* note 40, at 751-72. However, the commercial speech doctrine permits prior restraints, *see infra* note 75, and content-based restrictions. *See supra* note 42. Therefore, in order for the commercial speech doctrine to agree with fundamental First Amendment principles, there must be a provident reason, unrelated to majority bias, why commercial speech receives inferior First Amendment protection. *See Farber, supra* note 39, at 373 n.7.

44. From 1890 to 1937, regulation of industry grew in response to the industrial revolution. *See TRIBE, supra* note 35, at § 7-3. During this time, the Supreme Court reviewed regulations with an expansive view of the Due Process Clause and interpreted it to include a substantive right to carry on legal business without undue interference from the government. *See TRIBE, supra* note 35, at § 7-3.

45. *See Kozinski, supra* note 40, at 760-61.

46. For example, in 1907, Nebraska prohibited a beer bottler from labeling his bottles with the American flag and the bottler brought his claim under the Due Process Clause. *See Kozinski, supra* note 40, at 763 (citing *Halter v. Nebraska*, 205 U.S. 34 (1907)). In contrast, a present day beer bottler—Coors Brewing Company—claimed that the government violated the First Amendment when it prohibited the alcohol content of beer to appear on its labels. *See Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585, 1588 (1995).

47. *See Kozinski, supra* note 40, at 756-57.

48. *See Kozinski, supra* note 40, at 756 (noting that the Court first used the term “commercial speech” in *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 384 (1973)). *See also* David F. McGowan, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359, 364 (1990) (stating that the Court did not characterize advertisements as commercial speech until its opinion in *Bigelow v. Virginia*, 421 U.S. 809 (1975)).



canvassing”—terms that define conduct, not speech.<sup>49</sup> Early plaintiffs did not use the First Amendment in their advertising suppression claims for another reason; the First Amendment was not definitively applied to the states until 1931.<sup>50</sup> The concept of commercial speech would take time to evolve, and the Court would decide whether commercial speech received First Amendment protection within the context of a future setting.

1. *The Paradoxical Origin of the Commercial Speech Doctrine: Valentine v. Chrestensen*<sup>51</sup>

New Deal legislation and deference to legislatures pervaded the era in which the Court ostensibly decided whether the First Amendment protected commercial speech.<sup>52</sup> In 1942, the Court decided *Valentine v. Chrestensen* and held that the Constitution did not prohibit restrictions of “commercial advertising.”<sup>53</sup> Mr. Chrestensen, a New York resident, owned a scrapped navy submarine, which he displayed to the public for a fee.<sup>54</sup> He wanted to advertise his operation by distributing handbills in the streets, but a New York Sanitary Code regulation deterred his advertising efforts.<sup>55</sup> Chrestensen knew, despite the sanitary code, protest material could be publicly distributed, so he printed a protest on one side of his handbill and attempted to circulate his advertisements.<sup>56</sup> Despite Chrestensen’s efforts to comply with the law, the New York police put a stop to his promotional efforts. In response, Chrestensen filed suit against the police commissioner charging that the sanitary regulation violated the Due Process Clause.<sup>57</sup> The United States Supreme Court found that the

49. See Kozinski, *supra* note 40, at 757.

50. The Court incorporated the First Amendment to the states in *Stromberg v. California* and stated that “[i]t has been determined . . . that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech.” Kozinski, *supra* note 40, at 760-61 (quoting *Stromberg v. California*, 283 U.S. 359, 368 (1931)).

51. 316 U.S. 52 (1942).

52. “The commercial-speech doctrine is traceable to the brief opinion in *Valentine v. Chrestensen*.” *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 384 (1973). Five years before *Valentine* was decided, President Roosevelt introduced a bill that would have increased the number of Supreme Court Justices; he planned to fill the Court vacancies with Justices who would uphold his New Deal legislation. Roosevelt’s bill did not pass, but it did cause the Supreme Court to support legislation aimed at the regulation of commerce. See TRIBE, *supra* note 35, at § 8-6.

53. “We are equally clear that the Constitution imposes no such restraint on commercial advertising as respects purely commercial advertising.” *Valentine*, 316 U.S. at 54.

54. See *id.* at 52.

55. See *id.* at 53.

56. See *id.* Chrestensen protested the city’s refusal to allow him the privilege of docking his submarine at the city pier. See *id.*

57. See *id.* at 54. “[Chrestensen’s] argument . . . wasn’t one thought of as resting on the First Amendment; Mr. Chrestensen was before the Court claiming a freedom of speech

substance of Chrestensen's printed protest amounted to an attempt to dodge the sanitary code, and upheld the prohibition of Chrestensen's "activity in the streets."<sup>58</sup>

In a six-paragraph opinion, the Court did not discuss commercial speech or the First Amendment but concentrated on the commercial activity involved and the legitimate power of the government to regulate commerce.<sup>59</sup> Therefore, *Valentine* was not a case that decided whether commercial *speech* should receive First Amendment protection but did concern a pertinent issue of the day: whether commercial *conduct* could be regulated by legislatures.

Even though the Court's decision in *Valentine* had nothing to do with the freedom of commercial speech, its holding—that commercial advertising receives no Constitutional protection—engendered the distinction between commercial and noncommercial speech and affected the Court's treatment of commercial speech in the years that followed.<sup>60</sup>

## 2. *The Demise of Valentine and the Dawn of First Amendment Protection for Commercial Speech: Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>61</sup>

After its decision in *Valentine*, the Court began to chisel away at the idea that commercial advertising received no constitutional protection,<sup>62</sup> and in 1976, the Court explicitly denounced the ouster of commercial speech from First Amendment protection.<sup>63</sup> In *Virginia State Board of Pharmacy v.*

guaranteed by substantive due process, the same doctrine that had just undergone radical transformation." Kozinski, *supra* note 40, at 762.

58. *Valentine*, 316 U.S. at 55.

59. "Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, . . . are matters for legislative judgment." *Id.* at 54.

60. Since *Valentine*, "the concept of a commercial/noncommercial distinction has remained in the law. By now it has become such a well-established part of our jurisprudence that it is accepted almost without question." Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 628 (1990).

61. 425 U.S. 748 (1976).

62. See McGowan, *supra* note 48, at 364-66. In *Cammarano v. United States*, Justice Douglas commented that *Valentine* was "casual, almost offhand. And it has not survived reflection." *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring). Justice Stewart in *Pittsburgh Press* stated: "Whatever validity the *Chrestensen* case may still retain when limited to its own facts, it certainly does not stand for the proposition that the advertising pages . . . are outside the protection given . . . by the First and Fourteenth Amendments." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 401 (1973) (Stewart, J., dissenting). In *Bigelow v. Virginia*, the Court explained that the ordinance in *Valentine* was upheld not as a regulation of speech but as a "reasonable regulation of the manner in which commercial advertising could be distributed." *Bigelow v. Virginia*, 421 U.S. 809, 819 (1975).

63. See *Virginia Bd.*, 425 U.S. at 762 ("Our question is whether speech [that] does 'no

*Virginia Citizens Consumer Council*, the Court was faced, for the first time, with whether an advertisement, unadorned by editorial comment or political protest, receives protection under the First Amendment.<sup>64</sup> The Court answered: yes.<sup>65</sup> In *Virginia Board*, a State regulation prohibited pharmacists from advertising the prices of drugs.<sup>66</sup> Consumers of prescription drugs brought suit against the State, charging that the advertising ban violated the First Amendment and denied them the benefit of learning the prices of drugs from advertisements.<sup>67</sup> Virginia asserted that the regulation furthered the State's interest in the professional conduct of pharmacists and theorized that if pharmacists advertised the prices of drugs, price wars would ensue and pharmacists would keep prices low by cutting corners.<sup>68</sup> The Court reasoned the State had ample power to regulate its pharmacists' conduct through direct means, and the advertising ban would not necessarily modify a pharmacist's conduct but would work to influence consumers' decisions by keeping them unaware of competitive drug prices.<sup>69</sup> The Court advised that the State could combat the ill effects of drug price advertising by providing consumers with *more* information about prescription drugs.<sup>70</sup> Thus, the State's choice—to curtail speech instead of directly controlling conduct or providing counter speech—violated the First Amendment's guarantee to the freedom of speech.

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more that propose a commercial transaction,' is so removed from any 'exposition of ideas,' . . . that it lacks all protection. Our answer is that it is not.") (citations omitted).

64. "Our pharmacist does not wish to editorialize on any subject . . . . The 'idea' he wishes to communicate is simply this: 'I will sell you the X prescription drug at the Y price.' Our question, then, is whether this communication is wholly outside the protection of the First Amendment." *Id.* at 761.

65. *See id.* at 770.

66. *See id.* at 749-50.

67. *See id.* at 753 ("The plaintiffs are an individual Virginia resident who suffers from diseases that require her to take prescription drugs on a daily basis, and two nonprofit organizations."). On the issue of whether the plaintiffs had standing, the Court held that "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees." *Id.* at 757.

68. *See id.* at 767-68. In the alternative, the state argued that advertising would inflate the prices of prescription drugs. *See id.* at 768. Additionally, the state argued that advertising would cause consumers to "shop around" and destroy the pharmacist/customer relationship. *See id.*

69. "The only effect the advertising ban has on [a pharmacist likely to cut corners] is to insulate him from price competition and to open the way for him to make a . . . profit in addition to providing an inferior service." *Virginia Bd.*, 425 U.S. at 769. "Virginia is free to require whatever professional standards it wishes from its pharmacists . . . . But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering." *Id.* at 770.

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

Justice Blackmun, writing for the Court, articulated principles on which he based granting First Amendment protection to commercial speech. First, he noted that the profit motivation of a speaker did not remove speech from the protection of the First Amendment.<sup>71</sup> Second, he explained that the public needed commercial information as much as, if not more than, it needed political information.<sup>72</sup> Third, Justice Blackmun posited that the success of a democracy and a free economy required that commercial information be freely disseminated and readily available.<sup>73</sup> And finally, he asserted that the First Amendment prohibited the government from preventing the flow of commercial information in order to affect the public's decisions.<sup>74</sup>

After granting commercial speech First Amendment protection, the Court left a loophole for its suppression. In footnote twenty-four, the Court noted that "commonsense differences" between commercial and noncommercial speech made commercial speech more regulable.<sup>75</sup> Although the Court acknowledged that commercial speech may allow more regulation than other speech, it did so on the premise that regulation would further the interest of truthful commercial information.<sup>76</sup> Indeed, the Court noted that the law provides no protection for *any* form of false speech.<sup>77</sup>

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71. *See id.* at 762.

72. *See id.* at 763.

73. *See id.* at 765.

74. *See id.* at 770.

75. *See Virginia Bd.*, 425 U.S. at 771-72 n.24. The Court reasoned that the "greater objectivity" and "greater hardiness" of commercial speech provided "commonsense distinctions" that "may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker." *Id.* The Court concluded that commercial speech had greater objectivity because "the truth of commercial speech . . . may be more easily verifiable by its disseminator than . . . news reporting or political commentary . . ." *Id.* And greater hardiness "since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely." *Id.* Additionally, the Court posited that the commonsense differences justified requiring commercial speech to "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." *Id.* The Court also noted that the commonsense differences "may also make inapplicable the prohibition against prior restraints." *Id.*

76. "[A] different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired." *Id.*

77. "Untruthful speech, commercial or otherwise, has never been protected for its own sake." *Id.* at 771 (citing *Gertz v. Robert Welch, Inc.* 418 U.S. 340 (1974)).

3. *The Wearing Away of Virginia Board: Subsequent Cases Give Truthful Commercial Speech Less-Than-Full First Amendment Protection*

The Court's decision in *Virginia Board* gave commercial speech First Amendment protection and, arguably, gave *truthful* commercial speech full First Amendment protection.<sup>78</sup> However, in cases that followed *Virginia Board*, the Court drew on the "commonsense differences" set out in footnote twenty-four to defend affording commercial speech second-class First Amendment protection.

In *Bates v. State Bar of Arizona*,<sup>79</sup> the Court rejected the application of the overbreadth doctrine<sup>80</sup> to commercial speech restrictions and used the commonsense differences for support.<sup>81</sup> Bates, an attorney, advertised his legal services in violation of the State's complete ban on attorney advertising.<sup>82</sup> The Court noted that if the ban had restricted non-commercial speech, the overbreadth doctrine would apply and the Court would declare the ban unconstitutional on its face.<sup>83</sup> But because the speech in question was commercial, the Court narrowed its inquiry to whether the advertising ban unconstitutionally abridged Bates's specific speech.<sup>84</sup> The Court held that the State's suppression of Bates's commercial speech violated the First Amendment.<sup>85</sup>

In *Ohralik v. Ohio State Bar Association*,<sup>86</sup> the Court held that commercial speech received less-than-full First Amendment protection and fortified its holding with the commonsense differences rationale.<sup>87</sup> Additionally, the *Ohralik* Court warned that if commercial speech were granted full First Amendment protection, the protection granted to other forms of speech would

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78. See McGowan, *supra* note 48, at 368.

79. 433 U.S. 350 (1977).

80. Ordinarily, a plaintiff cannot attack the constitutionality of a law unless that law directly violates the constitutional rights of the plaintiff bringing suit. See *id.* at 380. However, the overbreadth doctrine, as it applies to freedom of speech cases, allows a plaintiff to challenge a speech restriction without showing that the restriction directly violates the rights of the particular plaintiff before the court. See *id.* The overbreadth doctrine operates when a law has the potential of causing non-litigants to avoid engaging in protected speech for fear that their speech would be punished under an overbroad statute. See *id.*

81. The Court did not question the logic behind the "commonsense differences" but simply stated that "it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation." *Id.* at 381.

82. See *id.* at 354-55.

83. See *id.* at 379-80.

84. See *id.* at 381.

85. See *Bates*, 433 U.S. at 382.

86. 436 U.S. 447 (1978).

87. See *supra* note 42.

be diluted and the First Amendment would be “devitalized.”<sup>88</sup> *Ohralik* involved the aggressive solicitation tactics of an attorney who visited a potential client while she was hospitalized.<sup>89</sup> Arguably, it was unnecessary for the Court to decide the case by limiting the protection of commercial speech; the Court could have decided the case by limiting its holding to the fact that the State had ample authority to discipline an attorney for overreaching *conduct*, not speech.<sup>90</sup>

4. *Protection for Commercial Speech Articulated in a Balancing Test: Central Hudson Gas & Electric Corporation v. Public Service Commission*<sup>91</sup>

In *Central Hudson Gas & Electric Corp. v. Public Service Commission* the Court held that a New York regulation that banned public utility advertising violated the freedom of speech.<sup>92</sup> The government argued that its regulation served the interest of energy conservation because the utility’s advertisements would increase the demand for electricity and lead to more consumption.<sup>93</sup> In order to make its decision, the Court devised a four-prong test to determine whether the regulation could be upheld under the First Amendment. The *Central Hudson* test is as follows: first, commercial speech receives no protection if it is false, misleading, or concerns an illegal activity; second, the government must assert a substantial interest in order to restrict speech; third, the speech restriction must directly advance the government’s interest; and fourth, the speech restriction must be no more extensive than necessary.<sup>94</sup>

In applying the test to New York’s advertising ban, the Court accepted, without requiring empirical proof, that the advertising ban would lower consumption and, therefore, directly advance the State’s interest.<sup>95</sup> However,

88. See *Ohralik*, 436 U.S. at 456. In reaction to the Court’s proposition that protecting commercial speech would decrease protection for other forms of speech, Judge Kozinski asserted, “[T]he opposite is true. Protecting commercial speech less than noncommercial speech leads exactly to what you would think—not enough protection for speech implicating economic concerns.” Kozinski, *supra* note 40, at 648.

89. See *Ohralik*, 436 U.S. at 449.

90. See McGowan, *supra* note 48, at 370. In his concurring opinion, Justice Marshall noted that “[w]hat is objectionable about *Ohralik*’s behavior here is not so much that he solicited business for himself, but rather the circumstances in which he *performed* that solicitation and the *means* by which he accomplished it.” *Id.* at 370 (emphasis added).

91. 447 U.S. 557 (1980).

92. See *id.* at 572.

93. See *id.* at 568. The government also argued that increasing the demand for electricity would increase the cost of supplying electricity and result in higher rates to consumers. See *id.* 568-69.

94. See *id.* at 566.

95. See *id.* at 569.

the Court found that the ban failed the fourth requirement because the State could achieve its goal by requiring that the utility include in its advertisements information regarding energy conservation.<sup>96</sup> Therefore, New York's advertisement ban failed the *Central Hudson* test.<sup>97</sup>

In devising the *Central Hudson* test, the Court called upon the common-sense differences<sup>98</sup> to support giving commercial speech restrictions an intermediate level of judicial review.<sup>99</sup> On the other hand, the Court professed disapproval of paternalistic speech bans that advance a governmental interest by keeping information from the public.<sup>100</sup> Could the Court's new balancing test give commercial speech reduced protection *and* guard against paternalistic speech regulations? *Central Hudson's* criteria would be put to the test in the years that followed.

### 5. *The Application and Manipulation of Central Hudson*

Six years after constructing the *Central Hudson* test, the Court applied it to a Puerto Rico statute that forbade the island's casinos from advertising to Puerto Rican residents; the casinos *were* permitted to advertise to tourists.<sup>101</sup> Puerto Rico asserted that it enacted the statute in the interest of reducing the gambling activities of the Puerto Rican public.<sup>102</sup> The Commonwealth maintained that if casino advertisements were kept from the public, the demand for gambling would fall.<sup>103</sup>

In applying the *Central Hudson* test to Puerto Rico's statute, the Court readily accepted the theory that an advertisement ban would directly advance the legislature's interest in reducing gambling.<sup>104</sup> Additionally, the Court held

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96. *See id.* at 571. Additionally, the Court noted that the first and second prongs of its test were satisfied because the utility's advertisements did not concern illegal activity or deceptive advertising, and the State's interest in energy conservation was substantial. *See id.* at 566, 568.

97. *See Central Hudson*, 447 U.S. at 566, 568.

98. *See id.* at 562.

99. "The *Central Hudson* commercial speech test is less rigorous than the "strict scrutiny" level of judicial review normally applied in content-based regulation of speech." SMOLLA, *supra* note 35, at § 12.01[3]. "The test for commercial speech differs from strict scrutiny in two ways. First, the regulation need not be justified by a 'compelling' governmental interest; a 'substantial' interest will suffice. Second, . . . the means employed by the government need not be the 'least restrictive' method of achieving its objective." SMOLLA, *supra* note 35, at § 12.01[3].

100. *See Central Hudson*, 447 U.S. at 562.

101. *See Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 340-41 (1986).

102. *See id.* at 341.

103. *See id.* at 342.

104. *See id.* Justice Rehnquist, writing for the Court, did not require the state to submit empirical evidence that the advertising ban would be effective. He commented, "[w]e think the legislature's belief is a reasonable one, and the fact that the appellant has chosen to litigate this

that the statute passed the fourth prong of *Central Hudson*,<sup>105</sup> because the legislature had latitude in choosing between a restriction of commercial speech or more direct means of furthering its interest.<sup>106</sup>

Although the Court determined that Puerto Rico's statute passed the *Central Hudson* test, it went on to reinforce its holding under alternative theories. First, the Court asserted that the *greater* power to forbid gambling encompassed the *lesser* power to forbid the advertising of gambling.<sup>107</sup> Additionally, the Court implied that the legislature had enhanced power to suppress commercial speech when the speech concerned "vice" products or activities.<sup>108</sup>

Nine years after deciding *Posadas*, the Court relaxed the fourth prong of the *Central Hudson* test in *Board of Trustees v. Fox*.<sup>109</sup> The *Fox* Court held that a commercial speech restriction would pass the fourth prong as long as the governmental interest at stake counterbalanced the imposition on commercial speech. Even if the government could achieve its goals without suppressing speech, a reasonable burden on commercial speech would pass First Amendment review.<sup>110</sup>

#### B. *Central Hudson* Strengthened: *Virginia Board* Principles Reappear

In *Edenfield v. Fane*,<sup>111</sup> the Court invalidated a Florida statute that prohibited certified public accountants from soliciting new clients in person.<sup>112</sup> Florida asserted the statute protected consumers from fraud and helped to

case . . . indicates that the appellant shares the legislature's view." *Id.*

105. See *supra* text accompanying note 94 for a discussion of the *Central Hudson* test.

106. See *Posadas*, 478 U.S. at 344. Justice Rehnquist opined that the legislature could reason that even if the residents of Puerto Rico were told that gambling was bad for them, they would do it anyway. See *id.*

107. See *id.* at 345-46.

108. See *id.* at 346.

109. 492 U.S. 469 (1989). In *Fox*, students of the State University of New York held a Tupperware party in violation of a school resolution that forbade commercial enterprises to operate on campus. See *id.* at 471-72. The government asserted the resolution furthered its interest in "promoting an educational rather than commercial atmosphere on . . . campuses." *Id.* at 475. The students claimed that the resolution violated their right to free speech and that the Tupperware party involved both commercial and "pure speech" about fiscal responsibility and operating an efficient household. See *id.* at 474. The Court rejected the theory that the speech at issue was partially pure speech and decided the case under *Central Hudson* standards. See *id.* at 474-75.

110. See *id.* at 480 ("What our decisions require is a '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' . . .") (citations omitted).

111. 507 U.S. 761 (1993).

112. See *id.* at 763.



maintain the certified public accountants' independence in auditing the financial records of their clients.<sup>113</sup>

The *Edenfield* Court changed the third prong of the *Central Hudson* test, which resulted in a more stringent review for Florida's solicitation restrictions. Specifically, the Court required the State to *prove* that the commercial speech restriction would remedy an "actual" harm to a "material" degree.<sup>114</sup> Thus, the Court refashioned the third prong of the *Central Hudson* test to serve as a check on the second prong.<sup>115</sup> The Court explained that the proof it required was necessary to prevent a State from claiming that a speech restriction served a legitimate end, while covertly serving an end that would never pass First Amendment review.<sup>116</sup>

In *Rubin v. Coors Brewing Co.*,<sup>117</sup> the Court strengthened the fourth prong of the *Central Hudson* test and struck down a federal law that forbade the printing of alcohol content on beer labels.<sup>118</sup> The government claimed that the speech restriction advanced its interest in preventing "strength wars" between brewers who would otherwise increase the alcohol content of beer in order to attract more customers.<sup>119</sup> In applying the *Central Hudson* test, the Court used its "new and improved" version of the third prong as set out in *Edenfield*.<sup>120</sup> The Court found that the government's speech restriction did not materially advance its interest in preventing strength wars because the regulation allowed alcohol content to be advertised through media other than labels.<sup>121</sup> Additionally, the Court held that the regulation failed the fourth prong of *Central Hudson* because the State could have used means less burdensome to commercial speech.<sup>122</sup> Thus, the *Rubin* Court's version of the fourth prong of *Central Hudson* was stronger than what the Court had prescribed in *Fox*—that the speech restriction need be only reasonable and that the legislature's choice would receive deference.<sup>123</sup>

113. *See id.* at 768.

114. "[The third prong of *Central Hudson*] 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." *Id.* at 770-71.

115. The second prong of *Central Hudson*, as originally written, required the government assert a substantial interest, and the third prong required the government's speech restriction directly advance the asserted interest. *See text accompanying note 97.*

116. *See Edenfield*, 507 U.S. at 771.

117. 115 S. Ct. 1585 (1995).

118. *See id.* at 1594.

119. *See id.* at 1588.

120. *See id.* at 1591-93.

121. *See id.* at 1592.

122. *See id.* at 1593-94.

123. For a discussion of *Fox*, see *supra* notes 109-10 and accompanying text.

In *Edenfield* and *Rubin*, the Court used the *Central Hudson* test in name only. In substance, the Court altered the test to the extent of providing truthful commercial speech the protection called for in *Virginia Board*. However, in order for strong protection for commercial speech to endure, the Court would have to ground its commercial speech doctrine in solid First Amendment principles, rather than the happenstance of the *Central Hudson* test.

#### IV. REASONING OF THE COURT

In a unanimous judgment, the United States Supreme Court held that Rhode Island's advertising ban silenced commercial speech in violation of the First Amendment.<sup>124</sup> Additionally, the Court held that the Twenty-first Amendment did not enable Rhode Island to make laws restricting freedom of speech protected under the First Amendment.<sup>125</sup> While the Court was united in its judgment, it was divided in its reasoning. The Court's analysis of First Amendment review, as it applies to commercial speech, was a tangled array of plurality opinions and partial concurrences.<sup>126</sup>

##### A. The Principal Plurality Opinion

Justice Stevens began his substantive discussion in part three of the principal eight-part plurality opinion.<sup>127</sup> First, he reviewed the history of American advertising<sup>128</sup> and summarized the evolution of commercial speech jurisprudence.<sup>129</sup> Through his historical review, Justice Stevens developed a principle that guided the remainder of the opinion. That principle was as

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124. See *44 Liquormart*, 116 S. Ct. at 1515.

125. See *id.* at 1514-15.

126. Justice Stevens wrote the eight-part principal, plurality opinion. See *id.* at 1501-15. Justices Scalia, Kennedy, Souter, Thomas, and Ginsburg joined Justice Stevens in parts one, two, and seven of the principal opinion. See *id.* at 1501-04, 1514-15. Justices Scalia, Kennedy, Souter, and Ginsburg joined Justice Stevens in part eight of the principal opinion. See *id.* at 1515. Justices Kennedy, Souter, and Ginsburg joined Justice Stevens in parts three and five of the principal opinion. See *id.* at 1504-07, 1508-10. Justices Kennedy, Thomas, and Ginsburg joined Justice Stevens in part six of the principal opinion. See *id.* at 1510-14. Justices Kennedy and Ginsburg joined Justice Stevens in part four of the principal opinion. See *id.* at 1507-08. Justice Scalia wrote an opinion concurring in part and concurring in the judgment. See *id.* at 1515 (Scalia, J., concurring). Justice Thomas wrote an opinion concurring in part and concurring in the judgment. See *id.* at 1515-20 (Thomas, J., concurring). Justice O'Connor, joined by Chief Justice Rehnquist, Justice Souter, and Justice Breyer, wrote an opinion concurring in the judgment. See *id.* at 1520-23 (O'Connor, J., concurring).

127. See *id.* at 1501-15.

128. Justice Stevens noted: "Even in colonial days, the public relied on 'commercial speech' for vital information about the market." *Id.* at 1504.

129. See *id.* at 1504-07.

follows: The objective of commercial speech jurisprudence is to advance the consumers' interest in receiving factual, undistorted information so that they may make well-informed economic decisions.<sup>130</sup> This principle, he emphasized, is the primary reason states have latitude in enacting commercial speech regulations that protect consumers from false advertising.<sup>131</sup> This principle, he noted, is the reason a state cannot justify censoring truthful commercial speech in order to protect its citizenry from making decisions the state fears will be unwise.<sup>132</sup> This principle, he made clear, is the reason the First Amendment protects truthful commercial speech.<sup>133</sup>

After establishing consumer advocacy as the core objective of commercial speech jurisprudence, Justice Stevens addressed the issue of constitutional review.<sup>134</sup> He asserted that when a commercial speech regulation blocks all avenues for imparting truthful information and promotes an interest separate from fair dealing in the marketplace, "special care" should be taken when reviewing the regulation.<sup>135</sup>

In part four, Justice Stevens advanced the rationale for reviewing commercial speech bans with special care.<sup>136</sup> A complete ban of truthful

130. See 44 *Liquormart*, 116 S. Ct. at 1504-07. Justice Stevens noted: "In accord with the role that commercial messages have long played, the law has developed to ensure that advertising provides consumers with accurate information about the availability of goods and services." *Id.* at 1504.

131. See *id.* at 1505-07. Justice Stevens recognized that some types of commercial speech may be regulated more freely than other forms of commercial speech. See *id.* at 1505. "Specifically, . . . the State may require commercial messages to 'appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.'" *Id.* at 1505-06 (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 772, n.24 (1976)).

132. See *id.* at 1505 ("There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume . . . people will perceive their own best interests if only they are well enough informed. . . .") (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976)).

133. See *id.* at 1505 ("[T]he public's interest in receiving accurate commercial information also supports an interpretation of the First Amendment that provides constitutional protection for the dissemination of accurate and nonmisleading commercial messages.").

134. See *id.* at 1507.

135. See *id.* The source for Justice Stevens's special care review is found in *Central Hudson* which states: "We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. . . . Indeed, in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself is flawed in some way . . ." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 n.9 (1980). In *Central Hudson*, the special care language may have referred to the test set out and applied in the Court's decision. However, Justice Stevens implied that special care review is stricter than the *Central Hudson* test itself. See *infra* note 139.

136. See 44 *Liquormart*, 116 S. Ct. at 1507-08. Justice Stevens began part four by proposing that there is more than one way to review a commercial speech regulation. See *id.* Because the *Central Hudson* test had governed review of commercial speech regulations from 1980 up to the time of his opinion in 44 *Liquormart*, Justice Stevens proposed applying a

commercial speech, he warned, with a goal unrelated to consumer advocacy, could serve as a subterfuge to hide the government's primary goal and prevent enlightened public debate.<sup>137</sup> Additionally, Justice Stevens noted that the factual speech censored by Rhode Island's ban on price advertisement lacked the qualities of commercial speech that, in some instances, justify reviewing commercial speech regulations with added deference.<sup>138</sup>

In attempting to fix the limits of special care review, Justice Stevens indicated that it should be more demanding than the *Central Hudson* test, and hinted that it should be equivalent to full-strength First Amendment review.<sup>139</sup> However, he stopped short of declaring that truthful commercial speech is entitled to full First Amendment protection.

In part five of the opinion, the Justice Stevens applied a "special care" version of the *Central Hudson* test to Rhode Island's advertisement ban.<sup>140</sup> First, he addressed the third prong of *Central Hudson*: does the regulation directly advance the State's interest?<sup>141</sup> Justice Stevens noted that under the general test set out in *Central Hudson*, a State must show that its regulation advances the asserted interest to a "material" degree.<sup>142</sup> However, in this case, where the regulation muzzled factual information, he required that Rhode Island prove its ban advanced the State's interest in temperance to a "significant" degree.<sup>143</sup> Justice Stevens found no evidence to support a conclusion that the advertising ban would decrease alcohol consumption to an extent that would significantly advance the State's interest in promoting temperance.<sup>144</sup>

stricter review than set out in *Central Hudson*. *See id.*

137. *See id.* at 1508 ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.").

138. *See id.* at 1507-08. Justice Stevens explained that the "commonsense distinctions" between commercial and noncommercial speech, set out in *Virginia Pharmacy*, do not justify a complete ban on truthful information. *See id.* For a discussion of the commonsense distinctions see *supra* note 75 and accompanying text.

139. Justice Stevens explained:

"When a State regulates commercial messages to protect consumers . . . the purpose of its regulation . . . justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful . . . commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands."

44 *Liquormart*, 116 S. Ct. at 1507.

140. *See id.* at 1508-10.

141. *See id.* at 1509-10.

142. *See id.* at 1509.

143. *Id.* (quoting *Edenfield*, 507 U.S. at 771).

144. *See id.* at 1509. Justice Stevens accepted Rhode Island's theory that dampening price competition would tend to keep prices higher and compared the State's scheme to a "collusive agreement among competitors" to keep prices high. *See id.* Justice Stevens concluded,

Furthermore, he found that marginally higher prices would probably have no effect on the level of alcohol consumption among certain groups of consumers.<sup>145</sup>

Next, Justice Stevens addressed the fourth prong of *Central Hudson*: is the regulation more extensive than necessary to serve the asserted state interest?<sup>146</sup> While he did not articulate the standard to be applied to the fourth prong of the *Central Hudson* test in cases that merit special care review, Justice Stevens concluded that Rhode Island's advertising ban fell short of passing the "reasonable fit" standard generally required under *Central Hudson*.<sup>147</sup> He asserted that Rhode Island could use more direct means to achieve temperance that would not suppress commercial speech.<sup>148</sup> Specifically, he suggested, the State could increase taxes on liquor, limit purchases of liquor, or implement educational campaigns.<sup>149</sup>

In part six of the principal opinion, Justice Stevens addressed arguments asserted by Rhode Island, which were based in large part on the Court's decision in *Posadas*.<sup>150</sup> First, Rhode Island argued that, in keeping with *Posadas*, the State's legislature was entitled to promote temperance by choosing an advertisement ban over alternative methods, especially when evidence of whether the ban would be effective was inconclusive.<sup>151</sup> Justice Stevens criticized *Posadas* as an anomaly<sup>152</sup> and asserted that when suppression of truthful commercial speech indirectly promotes public policy, the policy is hidden from the public eye and is removed from public debate.<sup>153</sup> In conclusion, he maintained that the First Amendment, *not* Rhode Island's legislature, was the authority to be consulted when deciding whether to suppress speech.<sup>154</sup>

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however, that "without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance." *Id.*

145. See 44 *Liquormart*, 116 S. Ct. at 1509. In its brief to the Court, the State defined its interest in promoting temperance as "an interest in reducing alcohol consumption among all drinkers." *Id.* n.14 (emphasis added). Justice Stevens noted that "evidence suggests that the abusive drinker will probably not be deterred by a marginal price increase . . ." *Id.* at 1510.

146. See *id.* at 1510.

147. See *id.*

148. See *id.*

149. See *id.*

150. See *id.* at 1510-14. The arguments asserted were based in large part on the Court's decision in *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986). For a discussion of *Posadas*, see *supra* notes 101-08 and accompanying text.

151. See 44 *Liquormart*, 116 S. Ct. at 1511-12.

152. See *id.* at 1511 ("Because the [five]-to-[four] decision in *Posadas* marked such a sharp break from our prior precedent, . . . we decline to give force to its highly deferential approach.").

153. See *id.*

154. See *id.* at 1511 ("[W]e conclude that a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the

Next, Justice Stevens addressed Rhode Island's claim that the State's "greater" authority to ban the sale of liquor encompassed the State's "lesser" authority to ban the advertisement of liquor prices.<sup>155</sup> He contended that the opposite is true—that the State's power to suppress speech is far more onerous than the its power to regulate conduct by banning the sale of liquor.<sup>156</sup> The thrust of Justice Steven's response was that, under the First Amendment, preventing citizens from learning and communicating about an activity abridges freedom more than preventing citizenry from participating in that activity. Furthermore, citizens should not be made to forgo a constitutional right in order to receive a service or benefit from their government.<sup>157</sup> Justice Stevens concluded that because Rhode Island had the power to ban liquor sales, it did not follow that Rhode Island had an incidental power to ban the advertisement of liquor prices.<sup>158</sup>

Finally, Justice Stevens addressed Rhode Island's argument that the Court should uphold the State's advertising ban because the ban regulates a "vice" activity.<sup>159</sup> He made short work rejecting the "vice" argument by pointing out the practical problems it would create.<sup>160</sup> Who would be the arbiter to decide what constitutes a purported vice?<sup>161</sup> Would legislatures simply censor commercial speech according to their own subjective definition of vice?<sup>162</sup> Would the federal courts develop a common law of vice?<sup>163</sup> Would eating too much red meat constitute a vice?<sup>164</sup>

*Posadas* majority was willing to tolerate.").

155. *See id.* at 1512. This "greater-includes-the-lesser" reasoning was embraced in *Posadas*. *See supra* notes 101-08 and accompanying text. Justice Rehnquist, writing for the Court, distinguished constitutionally protected conduct (abortions) from conduct that could be prohibited by the states (gambling). He reasoned that if a state could completely ban conduct, it could likewise ban advertising concerning the conduct. *See Posadas*, 478 U.S. at 345-55.

156. *See 44 Liquormart*, 116 S. Ct. at 1512 ("[W]e fail to see how . . . the State's power to regulate commercial activity is 'greater' than its power to ban truthful, nonmisleading commercial speech.").

157. *See id.* at 1513.

158. *See id.*

159. *See id.* at 1513. Rhode Island based its "vice" distinction argument on the Court's opinion in *Posadas* and *Edge*, which both dealt with commercial speech regulations affecting gambling. *See id.* at 1513. However, in *Rubin v. Coors*, the Court stated that the holdings in *Posadas* and *Edge* depended on application of *Central Hudson* test, not a "vice" distinction. *See Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1589 n.2 (1995).

160. *See 44 Liquormart*, 116 S. Ct. at 1513-14.

161. *See id.* at 1513.

162. *See id.*

163. *See id.*

164. *See id.* Justice Stevens cautioned: "Almost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to a 'vice activity.'" *Id.* at 1513.

In part seven of the principal opinion, six members of the Court held that the Twenty-first Amendment did not bolster Rhode Island's ban on commercial speech.<sup>165</sup> The Court recognized that the Twenty-first Amendment gives the States ample commerce power over alcoholic beverages<sup>166</sup> but concluded that such power must be exercised in compliance with other constitutional provisions.<sup>167</sup>

#### B. Justice Scalia's Concurrence

Justice Scalia, writing individually, disclosed a lack of fondness for the *Central Hudson* test<sup>168</sup> and paternalistic state laws that keep information from the public.<sup>169</sup> However, he contended that the *Court* would be paternalistic if it prohibited states from enacting laws unless the Constitution directed the Court to do so.<sup>170</sup> According to Justice Scalia, evidence of what the First Amendment mandates regarding commercial speech is supplied by America's past.<sup>171</sup> Consequently, he would not replace the *Central Hudson* test for a stricter review unless historical evidence showed that the First Amendment was intended to protect commercial speech.<sup>172</sup> Specifically, he required evidence that the American people long have held freedom of commercial speech to be a fundamental liberty.<sup>173</sup> More specifically, he required evidence that state legislatures have long recognized freedom of commercial speech as a fundamental liberty.<sup>174</sup> In *44 Liquormart*, the parties before the Court did not

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165. *See id.* at 1514-15.

166. *See 44 Liquormart*, 116 U.S. at 1514. "As is clear, the text of the Twenty-first Amendment supports the view that, while it grants the States authority over commerce that might otherwise be reserved to the Federal Government, it places no limit whatsoever on other constitutional provisions." *Id.*

167. *See id.* at 1514-15. The Court reviewed its prior holdings that the Twenty-first Amendment did not diminish the force of the Supremacy Clause, the Establishment Clause, or the Equal Protection Clause. *See id.*

168. *See id.* at 1515 (Scalia, J., concurring) ("I share Justice Thomas's discomfort with the *Central Hudson* test, which seems to me to have nothing more than policy intuition to support it.").

169. *See id.* at 1515 (Scalia, J., concurring) ("I also share Justice Stevens's aversion towards paternalistic governmental policies that prevent men and women from hearing facts that might not be good for them.").

170. *See id.* at 1515 (Scalia, J., concurring) ("[I]t would also be paternalism for us to prevent the people of the States from enacting laws that we consider paternalistic, unless we have good reason to believe that the Constitution itself forbids them.").

171. *See id.* (Scalia, J., concurring).

172. *See 44 Liquormart*, 116 S. Ct. at 1515 (Scalia, J., concurring).

173. *See id.* (Scalia, J., concurring) ("I will take my guidance as to what the Constitution forbids . . . from the long accepted practices of the American People.").

174. *See id.* at 1515 (Scalia, J., concurring). Justice Scalia noted that state legislative practices *before* adoption of the First Amendment and *after* the adoption of the Fourteenth

provide Justice Scalia with the evidence he required; therefore, he declined joining Justice Stevens in his pursuit of a new special care review.<sup>175</sup>

### C. Justice Thomas's Concurrence

Justice Thomas, writing individually, argued that when a government regulation works to keep information from the public in order to control the public's choices, the *Central Hudson* test is inapplicable.<sup>176</sup> Instead, he insisted, regulations that keep citizens ignorant in order to control their behavior, should categorically be deemed illegitimate.<sup>177</sup>

Throughout his concurrence, Justice Thomas adhered to the principles of *Virginia Pharmacy*<sup>178</sup> which determined that a democracy and a free enterprise economy require well-informed citizens free to make independent decisions,<sup>179</sup> and that the First Amendment protects the circulation of commercial speech.<sup>180</sup> He rejected the aftermath of *Central Hudson*—that regulations which suppress information are permissible as long as they pass a balancing test,<sup>181</sup> and that commercial speech receives a second-class form of First Amendment protection.<sup>182</sup>

Amendment would be most relevant because "it is most improbable" that the First and Fourteenth Amendments were "meant to overturn any existing national consensus regarding free speech." *Id.* at 1515 (Scalia, J., concurring).

175. *See id.* at 1515 (Scalia, J., concurring).

176. *See id.* at 1515-16 (Thomas, J. concurring). By definition, Justice Thomas asserted that the *Central Hudson* test was an inappropriate review for Rhode Island's regulation and the regulation reviewed in *Central Hudson* itself. This is because the regulation at issue in *Central Hudson* prohibited electric utilities from advertising in order to keep low the demand for electricity, i.e., the regulation worked to keep information from people in order to affect their conduct. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 558-61 (1980).

177. *See 44 Liquormart*, 116 S. Ct. at 1515-16 (Thomas, J. concurring).

178. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

179. *See 44 Liquormart*, 116 S. Ct. at 1516 (Thomas, J. concurring).

180. *See id.* (Thomas, J. concurring).

181. *See id.* at 1517 (Thomas, J. concurring) ("[T]he Court has appeared to accept the legitimacy of laws that suppress information in order to manipulate the choices of consumers—so long as the government could show that the manipulation was successful. *Central Hudson* (citation omitted) was the first decision to clearly embrace this position . . .").

182. *See id.* at 1517 (Thomas, J. concurring). Justice Thomas noted that the *Central Hudson* opinion assumed that commercial speech was of "less constitutional moment" than other forms of protected speech. *Id.* at 1517-18 (Thomas, J. concurring) (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562-63 n.5 (1980)).



#### D. Justice Thomas's Prediction: Return to *Virginia Board*

Additionally, Justice Thomas observed that the Court's present version of the fourth prong<sup>183</sup> of *Central Hudson*, if faithfully applied to future cases, would dramatically affect commercial speech jurisprudence.<sup>184</sup> The effect, he predicted, would be that restrictions on commercial speech would rarely, if ever, pass constitutional scrutiny.<sup>185</sup> He explained that, in the present case, Rhode Island's ban failed the fourth prong because the Court found more direct ways to promote temperance which did not infringe on commercial speech.<sup>186</sup> He reasoned that in future cases, there would almost always be a speech-neutral alternative available to advance a state's interest.<sup>187</sup>

Therefore, Justice Thomas concluded that the Court's application of *Central Hudson*'s fourth prong swallowed the *Central Hudson* test.<sup>188</sup> In his view, the Court's application of the *Central Hudson* test in *44 Liquormart* amounted to following the principle in *Virginia Board*; attempts to manipulate consumer's choices by keeping them ignorant are impermissible under the First Amendment.<sup>189</sup>

#### E. Justice O'Connor's Concurrence

Justice O'Connor relied on the fourth prong of the traditional *Central Hudson* analysis to conclude that Rhode Island's ban violated the First Amendment.<sup>190</sup> According to Justice O'Connor, it was clear that the State could easily keep liquor prices higher without trespassing on the freedom of

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183. The fourth prong of *Central Hudson* inquires whether the government regulation is more extensive than necessary to achieve the asserted governmental interest. *See id.* at 1510.

184. *See id.* at 1518-20 (Thomas, J., concurring). The Stevens plurality found that under the fourth prong of *Central Hudson*, Rhode Island's ban was more extensive than necessary because the State could have advanced temperance more directly without suppressing speech. *See id.* at 1510. Similarly, the O'Connor plurality found "the regulation imposes too great . . . a prohibition on speech . . . . The State has other methods at its disposal . . . methods that would more directly accomplish this stated goal . . . ." *Id.* at 1521 (O'Connor, J., concurring).

185. *See 44 Liquormart*, 116 S. Ct. at 1518-20 (Thomas, J., concurring).

186. *See id.* (Thomas, J., concurring).

187. *See id.* (Thomas, J., concurring).

188. *See id.* (Thomas, J., concurring).

189. *See id.* (Thomas, J., concurring).

190. *See id.* at 1520-23 (O'Connor, J. concurring).

commercial speech.<sup>191</sup> As a result, she did not think it was necessary to discard or alter the *Central Hudson* test.<sup>192</sup>

Justice O'Connor agreed with Justice Stevens's view that *Posadas* was overly deferential to Puerto Rico's legislature.<sup>193</sup> She noted that, since *Posadas*, the Court has scrutinized more closely the State's proffer that commercial speech restrictions directly advance the State's asserted interest.<sup>194</sup> Additionally, Justice O'Connor concluded that the Twenty-first Amendment had no role to play in First Amendment review of commercial speech restrictions.<sup>195</sup>

## V. SIGNIFICANCE

Before the Court's decision in *44 Liquormart*, the *Central Hudson* test sanctioned the suppression of truthful commercial speech.<sup>196</sup> After the Court's decision, government may no longer manipulate the marketplace by suppressing truthful speech about a legal product when speech-neutral alternatives can further the government's goals.<sup>197</sup> If government wants to influence citizens' choices, it must do so openly and honestly. Only then will the people know the policy behind government action; only *then* can the people hold their government politically accountable for what it does.<sup>198</sup>

191. See *44 Liquormart*, 116 S. Ct. at 1521-22 (O'Connor, J. concurring). Justice O'Connor, like Justice Stevens, proposed that a liquor tax, purchase limit, or educational campaigns would serve the State's interest without burdening commercial speech. See *id.* at 1522 (O'Connor, J. concurring).

192. See *id.* at 1522 (O'Connor, J. concurring).

193. See *id.* (O'Connor, J. concurring) (citing *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986)).

194. See *id.* at 1522 (O'Connor, J. concurring)

Since *Posadas*, however, this Court has examined more searchingly the State's professed goal, and the speech restriction put into place to further it, before accepting a State's claim that the speech restriction satisfies First Amendment scrutiny . . . we declined to accept at face value the proffered justification . . . but examined carefully the relationship between the asserted goal and the speech restriction used to reach that goal.

*Id.* (citations omitted).

195. *Id.* at 1523 (O'Connor, J. concurring).

196. See *supra* section III.A.4-5.

197. Both the Stevens and O'Connor pluralities found that Rhode Island's advertisement ban violated the First Amendment because the State's interest in temperance could have been achieved by more direct control over conduct or educational campaigns. See *supra* sections IV.A. & D.

198. The Stevens plurality, Justice Scalia, and Justice Thomas denounced paternalistic speech restrictions that hide public policy from citizenry. See *supra* section IV.A-D.

The Justices disagreed about the type of constitutional review to apply to commercial speech restrictions.<sup>199</sup> However, as Justice Thomas noted, no matter what the label, the First Amendment review applied in *44 Liquormart* will always result in invalidating a law that curtails truthful commercial speech unless the government cannot further its goals through non-speech restrictive means.<sup>200</sup>

While the Court took a big step toward strengthening the freedom of commercial speech in *44 Liquormart*, the speech at issue contained verifiable information; but not all commercial speech can be proven true or false.<sup>201</sup> Some advertisements simply assert the opinion that product A is superior to product B. Others, without saying a word, engage the consumer's desire to possess a particular image or lifestyle.<sup>202</sup> For example, a tee shirt emblazoned with Joe Camel does not provide us with facts, but suggests, "Smoking Camels will give you a cool persona." Does this type of commercial speech receive First Amendment protection? We may condemn the ideas Joe Camel conveys; but we cannot prove them to be false statements, and the First Amendment protects ideas even when the majority finds them reprehensible.<sup>203</sup>

The Food and Drug Administration has issued regulations that severely limit public appearances of Joe Camel and company hoping to reduce smoking among children and adolescents.<sup>204</sup> The regulations limit cigarette advertisements viewable by children to black and white text with no pictures or logos.<sup>205</sup> Additionally, the FDA prohibits the sale of caps and tee shirts that identify a

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199. Five Justices advocated "special care" or strict review. See *supra* notes 140-45 and accompanying text. Justice Scalia and the O'Connor plurality used the *Central Hudson* test. See *supra* text accompanying notes 175, 192.

200. See *44 Liquormart*, 116 S. Ct. at 1519 (Thomas, J., concurring).

201. See McGowan, *supra* note 48, at 416-21 (distinguishing between informational and persuasive commercial speech).

202. See McGowan, *supra* note 48 at 411-12.

203. See Kozinski, *supra* note 40, at 751-72.

204. See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 21 CFR pts. 801-04, 807, 820, 897 (1996).

On June 25, 1997, attention turned from the FDA regulations to a proposed settlement between tobacco companies and the attorneys general of forty states, which would severely restrict cigarette advertisements. Richard Sloane, *Details of the Tobacco Industry's Settlement*, N.Y.L.J., Aug. 19, 1997, at 4. Congress must implement the settlement through legislation before it can become law. *Id.* Professor Laurence Tribe "questioned any attempt to write the ad restrictions in the agreement into law, and said they are less likely to withstand judicial scrutiny than the Internet decency law already overturned by the U.S. Supreme Court." Ira Teinowitz, *Tobacco Settlement Seen Headed Into Next Year: Slow Going in Congress Turns Spotlight Back to Court Battle Over FDA Regs*, ADVERTISING AGE, July 21, 1997, at 34.

205. See *id.*

cigarette brand.<sup>206</sup> Thus, the regulations curtail both informational and Joe Camel-like cigarette advertisements.

It is unlikely the FDA's speech regulations will pass First Amendment review for the following reasons. First, cigarette advertisements concern a legal activity—selling cigarettes to adults.<sup>207</sup> Therefore, under *44 Liquormart*, the FDA may not curtail truthful, informative cigarette advertisements when it can further its goals through control of cigarette sales and educational anti-smoking campaigns. Second, the well-established maxim that the First Amendment protects ideas and opinions requires that cigarette advertisements that are non-informative but represent ideas or opinions receive First Amendment protection.<sup>208</sup> Third, the FDA's regulations present a classic example of paternalistic speech restrictions, which were condemned in *44 Liquormart*. And finally, *44 Liquormart* rejected the "vice" distinction, which at one time may have bolstered the constitutionality of the FDA's regulations.<sup>209</sup>

Another question regarding commercial speech remains unresolved—how do we distinguish commercial speech from other speech forms when they are mixed? The New York State Liquor Authority banned the sale of "Bad Frog" beer within its borders because it found the beer's label offensive and ungrammatical.<sup>210</sup> Bad Frog's label displays a frog shamelessly extending its middle finger to the viewer with a slogan that reads, "He just don't care; the beer so good . . . it's bad."<sup>211</sup> The manufacturer of Bad Frog filed suit in

206. *See id.*

207. Cigarette advertisements reach adults and children, and because selling cigarettes to children is illegal, the FDA may argue that its regulations address an illegal activity that is unprotected by the First Amendment. Presumably, cigarette advertisements concern an illegal activity only if the advertisements are directed toward selling cigarettes to children, and the FDA would have difficulty proving that cigarette companies intentionally reach out to children and adolescents through advertisements. Additionally, the Court has held that it will not reduce the freedom of speech to that which is suitable for children. *See Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73 (1983) (striking down a ban on direct mailings that advertised contraceptives). On June 26, 1997, the Court invalidated the Communications Decency Act and restated that the interest in protecting children "does not justify an unnecessarily broad suppression of speech addressed to adults. *Reno v. ACLU*, 117 S. Ct. 2329, 2346 (1997).

208. "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

209. "[A] 'vice' label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled justification for the regulation of commercial speech about that activity." *44 Liquormart*, 116 S. Ct. at 1513-14.

210. The liquor authority claimed the label "'expresses a disrespect and flippant attitude, rejecting propriety and proper English.'" Jay Gallagher, *Bad Frog Brewery Suing to Overturn New York Ban*, Gannett News Service, October 22, 1996 (quoting the New York Liquor Authority). "New York isn't alone in trying to keep Bad Frog beer . . . off store shelves. Ohio, New Jersey, and Pennsylvania also turned thumbs down." *Id.*

211. *Id.*

federal court, charging that the ban violated the First Amendment.<sup>212</sup> Is Bad Frog's speech commercial, profane, or both? The answer could determine the outcome of the case.<sup>213</sup>

Undoubtedly, the lines between speech categories are sometimes hard to see, and as long as different classes of speech receive varying levels of protection, First Amendment jurisprudence will continue to be a puzzling and unpredictable area of constitutional law.<sup>214</sup> But the Court's decision in *44 Liquormart* cleared away some of the confusion and brought to our attention that when the freedom of speech is devalued, an opportunity exists for our government to do much more than abridge speech. If lawmakers were perfect, we would not need the Constitution or its First Amendment.<sup>215</sup>

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212. See *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, No. 96-CV-1668(FJS), 1996 U.S. Dist. LEXIS 18068, at \*1 (N.D.N.Y. 1996) (denying Bad Frog Brewery a preliminary injunction that would have allowed the sale of Bad Frog beer before final resolution of the case).

213. The Court has upheld the restriction of profane or indecent speech in limited circumstances. See *Federal Communications Commission v. Pacifica Foundations*, 438 U.S. 726 (1978). However, even the current doctrines governing obscenity are highly speech protective, and can validly be called part of the 'heightened scrutiny' methodology. SMOLLA, *supra* note 35, at § 2.01[3].

214.

We have a distinction, then, with no basis in the Constitution, with no justification in the real world, and . . . that must often be applied arbitrarily in any but the easiest cases. Still, we could live with the distinction if it led to the same degree of protection speech would receive without it. Unfortunately, such is not the case. Kozinski, *supra* note 40, at 648.

215. "If angels were to govern men, neither external nor internal controls on government would be necessary." THE FEDERALIST NO. 51 (James Madison).