BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK v. FOX — THE DAWN OF A NEW AGE OF COMMERCIAL SPEECH REGULATION OF TOBACCO AND ALCOHOL

MARK A. CONRAD*

I. INTRODUCTION

Four decades ago, the late Supreme Court Justice Hugo Black observed that a door-to-door seller of pots or other gadgets has no constitutional right to hawk his wares.[1] Justice Black's dicta, reflecting a prevailing legal truism even to this first amendment absolutist, echoed a long-standing belief that commercial speech was not protected under the first amendment[2]—a credo lasting almost 185 years after the enactment of the Bill of Rights. However, in the last decade and a half, merchants, salespersons, hawkers and their advertisers have become members of the first amendment club, being recognized as engaging in a fundamental right of expression.[3]

The constitutionalization of commercial speech clouded, rather than settled, the issue of first amendment protection. The courts have been locked in a legal and public policy tug of war to determine how much protection commercial speech should be granted, and how much power the state and federal governments have to regulate it. The questions have been many: Should commercial speech have the same rights as non-commercial speech? Should the government have the right to limit or even ban some kinds of speech on public health and safety grounds? And if so, what standards should be imposed to achieve the appropriate balance between the rights of advertisers and the protection of the public?

---

* Assistant Professor of Law, Graduate School of Business Administration, Fordham University; B.A., 1978, City College of New York; J.D., 1981, New York Law School; M.S., 1982, Graduate School of Journalism, Columbia University.

[1] Breard v. Alexandria, 341 U.S. 622, 650 (1951) (Black, J., dissenting).

[2] *See* Valentine v. Chrestensen, 316 U.S. 52 (1942); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973); *infra* notes 7-24 and accompanying text. The first amendment states: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

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

Recently, the Supreme Court took a giant step toward resolving these questions in *Board of Trustees of the State University of New York v. Fox*.[4] The Court upheld a state university regulation prohibiting "private commercial enterprises" from operating on its campuses and thus barred a "tupperware party" from being held in a student's dormitory.[5] Despite the trivial factual background in *Fox*, this Supreme Court decision will have significant implications for the regulation of commercial speech by permitting more governmental regulation of certain kinds of advertising.

Fox is the latest in a string of cases that have plagued the Supreme Court and the lower federal courts throughout the 1980s on the issue of commercial speech. Due in part to its recent first amendment vintage, commercial speech had yet to find an exact niche in the constitutional scheme. With its opinion in *Fox*, the Court may have found a standard applicable to such cases—one signaling a more flexible approach towards balancing regulation and constitutional protection. If this standard ultimately becomes the rule, it will put a troublesome area of first amendment jurisprudence to rest. In addition, it will serve to balance the constitutional rights of advertisers with the compelling social need to regulate areas of commercial speech—such as the promotion of tobacco and alcohol products—that have raised considerable public safety concerns. At a time of hardening public attitudes against tobacco and liquor consumption,[6] the Court's practical and moderate approach in *Fox* may be just the stimulus that Congress needs to enact meaningful regulations limiting these advertisements, and finally clarifying the appropriate standard of protection for such expression.

Part II of this Article traces the history of commercial speech, the constitutionalization of the doctrine, and the more recent attempts by the government to further justify its regulation. Part III analyzes the Supreme Court's decision in *Board of*

---

4 109 S. Ct. 3028 (1989).

5 *Id.*

6 Domestic sales of cigarettes have dropped from a high of $636.5 billion in 1981 to $575.4 billion in 1987. Per capita consumption of cigarettes for all U.S. residents over 18 years of age has declined from a high of 4,112 in 1973 to 3,227 in 1987. *See* FEDERAL TRADE COMM'N REP. TO CONG. FOR 1987 PURSUANT TO THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT, at 14-15 (1989) [hereinafter 1987 FTC Report]. Yearly domestic consumption of liquor has also dropped from a per capita consumption of 2.0 gallons in 1981 to 1.6 gallons in 1988. Cases of liquor shipped to wholesalers also decreased from 199 million in 1971 to 161 million in 1988, due in large part to more public concern about the dangers of alcohol and driving. *See* Winters, *A Struggle to Compete in a Shrinking Market*, N.Y. Times, July 9, 1989, § 3 (Business), at 13, col. 2.

Trustees of The State University of New York v. Fox. Part IV discusses limits on tobacco advertisements and the impact of *Fox* on these restrictions. Part V similarly considers alcoholic beverage advertising and the application of the *Fox* doctrine.

II. The History of Commercial Speech

A. *The Ghost of* Valentine v. Chrestensen

The complex and confusing history of commercial speech protection is marked by a pendulum effect: swinging from too little to too much. For over thirty years, the unanimous and surprisingly short 1942 Supreme Court decision in *Valentine v. Chrestensen*,[7] was the final word on the law of commercial speech. *Chrestensen* upheld a New York regulation forbidding the dissemination of "advertising matter."[8] Once the Court held that there was no constitutional protection for such advertising, there was no restraint on governmental powers to limit such conduct.[9]

Despite judicial attempts to narrow its scope, *Chrestensen* stood as a bar to any protection for purely commercial speech.[10] Although later cases specifically exempted paid advertisements espousing social and political grievances from the notion of commercial speech and accorded them constitutional protection,[11] the vitality of *Chrestensen* for "purely commercial speech" continued.[12]

---

7 316 U.S. 52 (1942).

8 The regulation, § 318 of the Sanitary Code, stated:

> *Handbills, cards and circulars* — No person shall throw, cast or distribute, or cause to permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever in or upon any street or public place, or in a front yard or court yard, or on any stoop, or in the vestibule or any hall of any building, or in a letterbox therein . . . . This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter.

City Admin. Code & Charter §§ 16-18(5), *cited in Chrestensen*, 316 U.S. at 53 n.1.

9 *Chrestensen*, 316 U.S. at 54.

10 *See* Breard v. Alexandria, 341 U.S. 622 (1951) (upholding an ordinance prohibiting the door-to-door solicitation of secular, as opposed to religious magazines). *But see* Jamison v. Texas, 318 U.S. 413 (1943) (refusing to apply a local ordinance prohibiting the distribution of handbills to a distributor of religious handbills).

11 *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *Sullivan* involved a libel action for a paid advertisement by a number of civil rights leaders denouncing repressive police conduct against blacks in Alabama. *Id.* at 256-57. As for the commercial speech issue, the Court held that a communication which conveyed "information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern" is not deemed to be commercial in nature. *Id.* at 266. The Court ultimately concluded that defamation involving public officials was privileged, unless the plaintiff shows actual malice and reckless disregard for the truth on the part of the defendant. *Id.* at 280.

12 *See* Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424 (1963)

No court explicitly articulated a definition of commercial speech until 1973. In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,[13] the Court defined commercial speech as speech that does "no more than propose a commercial transaction."[14] The Court ruled that a city ordinance forbidding newspapers from running classified advertisements under gender captions was not protected speech, but rather activity that promoted sex discrimination.[15]

Although an increasing number of lower courts began to question the view that commercial speech does not merit constitutional protection,[16] the Supreme Court did not formally consider this question until *Bigelow v. Virginia*.[17] *Bigelow* challenged a Virginia statute making it a misdemeanor to encourage abortions.[18] The advertisement at issue provided an address and

---

(affirming an injunction against newspapers and radio stations carrying optometrists' advertising in violation of a state statute prohibiting such action); Devore & Sack, *Advertising Commercial Speech*, in COMMUNICATIONS LAW 1989, at 12-13 (PLI); *see also* SEC v. Wall St. Transcript Corp., 422 F.2d 1371 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970) (application of first amendment to Investment Advisers Act of 1940, ch. 686, 54 Stat. 847).

[13] 413 U.S. 376 (1973).

[14] *Id.* at 385.

[15] *Id.* at 391. But the Court indicated that the advertisements would have received some first amendment protection if the activity (sex discrimination) were legal. *Id.* at 389.

[16] *See, e.g.*, Barrick Realty, Inc. v. City of Gary, 491 F.2d 161 (7th Cir. 1974); *see also*, Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971). The latter two cases involved the regulation of cigarette advertising on radio and television. The court in *Banzhaf* ruled that anti-smoking messages must be broadcast by those who carry smoking advertisements, citing the Fairness Doctrine obligations of broadcasters. *Banzhaf*, 405 F.2d at 1097-99, 1102-03. For a discussion of the Fairness Doctrine, see *infra* note 180 and accompanying text. The court in *Capital Broadcasting* upheld Congress' ban on cigarette advertising on radio and television. *Capital Broadcasting*, 333 F. Supp. at 586. Courts have been able to regulate broadcast content with less difficulty than print media, due to broadcasting's "unique characteristics" and the scarcity of the broadcast spectrum. *See* Red Lion Broadcasting v. FCC, 395 U.S. 367, 394 (1969).

[17] 421 U.S. 809 (1975).

[18] The statute read: "If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor." VA. CODE ANN. § 18.1-63 (1960) (repealed in 1975). *See Bigelow*, 421 U.S. at 809 n.2 (the Court notes that the statute dates back to 1878 and that Bigelow was probably the only individual to be prosecuted under this statute).

Bigelow, the managing editor of a weekly newspaper permitted the publication of an advertisement for legal abortions in New York (abortions were illegal in Virginia at the time) and was charged and convicted for violating the state statute. The advertisement read:

UNWANTED PREGNANCY
LET US HELP YOU
Abortions are now legal in New York.
There are no residency requirements.
FOR IMMEDIATE PLACEMENT IN ACCREDITED
HOSPITALS AND CLINICS AT LOW COST

phone number for women to call for help in placement at accredited hospitals and clinics that performed abortions. In a 7-2 decision, the Court ruled that the "commerical aspects" of the advertisement promoting abortions did not negate its first amendment protection[19] since it did more than propose a commercial transaction, and that the Virginia court therefore erred in failing to balance the constitutional interests with the state's interest in regulating such speech.[20]

The *Bigelow* decision radically limited the holding of *Chrestensen*, concluding that it simply upheld "a reasonable regulation [regarding] the manner in which commercial advertising could be distributed. The fact that it had the effect of banning a particular handbill does not mean that *Chrestensen* is authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge."[21] However, the court in *Bigelow* stated that it "need not decide here the extent to which constitutional protection is afforded commercial advertising under all circumstances."[22] The majority noted that the advertisement "contained factual material of clear 'public interest' . . . involv[ing] the exercise of the freedom of communicating information and disseminating opinion [which, when v]iewed in its entirety, . . . conveyed information of potential interest and value to a diverse audience."[23] Further, since the charges were brought against the newspaper's publisher rather than the advertiser, "[t]he prosecution thus incurred more serious First Amendment overtones."[24] The Court did not explicitly overrule *Chrestensen*; it still remained—barely—good law. It would take one more year and one more case to formally lay *Chrestensen* to rest.

Contact
WOMEN'S PAVILION
515 Madison Avenue
New York, N.Y. 10022
or call any time
(212) 371-6670 or (212) 371-6650
AVAILABLE 7 DAYS A WEEK
STRICTLY CONFIDENTIAL. We will make
all arrangements for you and help you
with information and counseling.

Id. at 812.

19 *Bigelow*, 421 U.S. at 822, 825.

20 *Id.* at 826.

21 *Id.* at 819-20.

22 *Id.* at 826.

23 *Id.* at 822.

24 *Id.* at 828.

B. Virginia Pharmacy

The Court finally got the opportunity to constitutionalize all truthful commercial speech in its seminal 1976 opinion, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[25] which held unconstitutional a Virginia statute prohibiting the publication or advertising of prices for prescription drugs by licensed pharmacists.[26] In a 7-1 opinion, the Court adopted the position of two consumer groups that the advertising ban violated their right to receive important information regarding the pricing of prescription drugs.[27]

In sweeping language, Justice Blackmun's majority opinion brushed aside the remnants of prior law and explicitly concluded that "purely" commercial speech is not wholly outside the protection of the first amendment.[28] Thus, the Court held that "speech does not lose its First Amendment protection because money is spent to project it."[29] Furthermore, commercial speech is not "so removed from any 'exposition of ideas' . . . that it lacks all protection."[30] In supporting its conclusion, the Court relied heavily on public policy arguments. According to the majority, the consumer's interest in the "free flow" of pricing information was a "convincing one."[31]

> Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent.[32]

Since the "free flow of commercial information is indispensable" to the formation of intelligent opinions, "[a]dvertising, however tasteless and excessive it sometimes may seem," serves as an important medium to disseminate information of public interest and

---

25 425 U.S. 748 (1976).

26 The Virginia statute provided in part :

> Any pharmacist shall be considered guilty of unprofessional conduct who . . . (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription.

VA. CODE ANN. § 54-524.35 (1974), *quoted in Virginia Pharmacy*, 425 U.S. at 750 n.2.

27 *Virginia Pharmacy*, 425 U.S. at 754.

28 *Id.* at 762.

29 *Id.* at 761.

30 *Id.* at 762 (citations omitted).

31 *Id.* at 763.

32 *Id.*

aids consumers in making informed economic decisions.[33] In view of this strong public interest in the free flow of pricing information, the Court rejected the state's interest in maintaining the "professionalism" of pharmacists,[34] stating that the ban in question "does not directly affect professional standards one way or the other."[35]

The Court in *Virginia Pharmacy* noted that false, deceptive and misleading speech was not constitutionally protected.[36] Still, the Court failed to come up with any standards or limits for governmental regulation of truthful speech, stating that "[w]hatever may be the proper bounds of . . . restrictions on commercial speech, they are plainly exceeded by this Virginia statute."[37] Two concurring opinions,[38] while agreeing with the majority's conclusion, attempted to limit the scope of the majority's broad holding.[39]

In his dissenting opinion, Justice Rehnquist attacked the majority's arguments on several grounds. Citing prior cases giving considerable (even excessive) deference to the will of the state legislatures in regulating advertising,[40] Justice Rehnquist stated that the majority disregarded prior doctrine, and noted the broad applicability of *Virginia Pharmacy* to other advertising concepts.[41] Clearly

---

[33] *Id.* at 765.

[34] *See id.* at 766-70. The Court added that:

> The only effect the advertising ban has on [the pharmacist] is to insulate him from price competition and to open the way for him to make a substantial, and perhaps even excessive, profit in addition to providing an inferior service. The more painstaking pharmacist is also protected but, again, it is a protection based in large part on public ignorance. . . . [T]he justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is.

Id. at 769-70.

[35] *Id.* at 769.

[36] *Id.* at 771.

[37] *Id.*

[38] *See id.* at 773 (Burger, C.J., concurring), 775 (Stewart, J., concurring).

[39] In his concurrence, Chief Justice Burger stated that the majority's approach is appropriate when dealing with the pricing of "*prepackaged drugs*," but felt that different factors would govern the regulation of professional service advertisements, such as those rendered by attorneys and physicians. *Id.* at 774 (emphasis in original). Justice Stewart's concurrence also offered a less conclusive protection of commercial speech than that to which the majority alluded. *Id.* at 766. He noted that "[c]ommercial price and product advertising differs markedly from ideological expression" and that the state is justified in regulating and even eliminating "false and deceptive claims" regarding commercial speech. *Id.* at 780-81.

[40] *Id.* at 784 (Rehnquist, J., dissenting). *See* Williamson v. Lee Optical Co., 348 U.S. 483 (1955), where the Court, in upholding a state prohibition against the advertisement of eyeglass frames, stated: "We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers." *Id.* at 490.

[41] Justice Rehnquist stated:

> [I]f the sole limitation on permissible state proscription of advertising is that it may not be false or misleading, surely the difference between pharmacists' advertising and lawyers' and doctors' advertising can be only one of degree

troubled by the lack of power to regulate truthful speech, Justice Rehnquist felt that the majority failed to appreciate the "very real dangers that general advertising for . . . drugs might create"[42] and that the first amendment should not "mandate[] the . . . 'open door policy' toward such commercial advertising."[43]

Couched in ringing consumer protection and public policy terms, *Virginia Pharmacy* gave broad constitutional imprimatur without giving much thought to the power and potential of the advertising industry. Arguably, the *Virginia Pharmacy* Court was justified in bringing commercial speech into the realm of protected rights, particularly in light of the almost half-century expansion of first amendment rights in other spheres.[44] However, Justice Rehnquist's doubts, expressed in his dissent, materialized in future cases. While many commentators welcomed the constitutionalization of commer-

---

> and not of kind. I cannot distinguish between the public's right to know the price of drugs and its right to know the price of title searches or physical examinations or other professional services for which standardized fees are charged.

Virginia Pharmacy, 425 U.S. at 785.

[42] *Id.* at 788-89.

[43] *Id.* at 790.

[44] *See* Schenck v. United States, 249 U.S. 47, 52 (1919), which first articulated what eventually became known as the "clear and present danger" doctrine, when Justice Holmes stated for the Court, "The question in every [free speech] case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id. See also* Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting) (involving the unlawful utterance, printing, writing, and publishing of materials denigrating the United States during World War I); Gitlow v. New York, 268 U.S. 652 (1925) (Holmes, J., dissenting) (upholding a statute penalizing utterances which advocated the overthow of the government by means of force and violence); Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring) (Brandeis employed the "clear and present danger" test to assess the validity of a state law that directly punished the advocacy of revolutionary violence). *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 845 (2d ed. 1988) [hereinafter TRIBE]. Justice Brandeis' eloquent concurrence in *Whitney* became a benchmark for the future expansion of first amendment protection of unpopular political opinion:

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

Whitney, 274 U.S. at 377 (1926). See Brandenburg v. Ohio, 395 U.S. 444 (1969), which reversed *Whitney* and articulated the Court's present standard that speech can be suppressed when it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. *See also* Cohen v. California, 403 U.S. 15, *reh'g denied*, 404 U.S. 876 (1971) (upholding the protected use of the expression "fuck the draft" painted on an article of clothing and refusing to classify it as "fighting words"); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (granting a qualified privilege to defamatory statements made about public figures).

cial speech,[45] others questioned whether a notion that is irrelevant to preserving representative democracy and to political decision making should be deemed a fundamental right.[46]

A short period of almost *carte blanche* protection for truthful commercial speech immediately followed the *Virginia Pharmacy* decision. An ordinance prohibiting "for sale" or "sold" signs to prevent the flight of white residents was struck down by the Court, despite the "laudable purpose" of the prohibition.[47] The Court also rendered unconstitutional a statute which prohibited any advertising of contraceptives.[48]

The most celebrated cases following *Virginia Pharmacy* involved professional advertising by attorneys—a perilous area that even the majority in *Virginia Pharmacy* warned would be far more subjective than a simple product restriction.[49] One year after this prediction,

---

[45] *See, e.g.*, Comment, *Prior Restraints and Restrictions on Advertising After* Virginia Pharmacy Board: *The Commercial Speech Doctrine Reformulated*, 43 Mo. L. REV. 64, 74-87 (1978). For a more recent justification of *Virginia Pharmacy*, see Kozinski & Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990), where the authors strongly—and entertainingly—argue that any distinction between first amendment protections of commercial and noncommercial speech makes no sense. *Id.* at 628. They conclude by stating that "[t]he commercial speech doctrine is the stepchild of first amendment jurisprudence: Liberals don't much like commercial speech because it's commercial; conservatives mistrust it because it's speech. Yet, in a free market economy, the ability to give and receive information about commercial matters may be as important, sometimes more important, than expression of a political, artistic, or religious nature." *Id.* at 652.

[46] *See* Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979). The authors argue that applying first amendment principles to commercial speech is irrelevant to any political decision making, but rather serves as a vehicle to permit greater economic benefits for merchants, advertisers and consumers. *Id.* at 25. This form of "Re-Lochnerization" contradicts the "settled idea that the Constitution tolerates extensive regulation of the economy." *Id.* at 32. For a discussion of Lochner v. New York, 198 U.S. 45 (1905), see *infra* note 68 and accompanying text.

See also Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976). In castigating *Viriginia v. Bigelow*, 421 U.S. 809 (1975), and *Virginia Pharmacy*, the author states that "a complete denial of first amendment protection for commercial speech is not only consistent with, but is required by, first amendment theory." *Id.* at 3. Furthermore,

> [C]ommercial speech is not a manifestation of individual freedom or choice; unlike the broad categories of protected speech, commercial speech does not represent an attempt to create or affect the world in a way which can be expected to represent anyone's private or personal wishes. Therefore, profit-motivated or commercial speech lacks the crucial connections with individual liberty and self-realization which exist for speech generally, and which are central to justifications for the constitutional protection of speech . . . ."

Id. (citation omitted).

[47] *See* Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977). The Court ruled that the first amendment precluded the township from achieving its goal of a racially integrated community by restricting the free flow of commercial information. *Id.* at 97.

[48] *See* Carey v. Population Serv. Int'l, 431 U.S. 678 (1977). The Court concluded that a statute barring advertisements for contraceptives was unconstitutional. The Court also rejected any justification for suppressing contraceptive advertising on the ground that the advertising "would be offensive" to those exposed to it. *Id.* at 701.

[49] *See Virginia Pharmacy*, 425 U.S. at 773 n.25.

the Court prohibited a state from banning attorney advertising, stating that such a ban failed to achieve the prohibition's stated purposes of maintaining "professionalism" and "deterring shoddy work."[50] It therefore concluded that two attorneys, who operated a "legal clinic" and placed "truthful advertisement[s] concerning the availability and terms of routine legal services" in several newspapers could not be censured for violating the state bar association's code of ethics.[51]

The following year, however, the Court began to limit some of the sweeping language of *Virginia Pharmacy* when it unanimously upheld an attorney's suspension for improper client solicitation in *Ohralik v. Ohio State Bar Association*.[52] The Court in *Ohralik* specifically espoused a lower level of constitutional protection for commercial speech, the first post-*Virginia Pharmacy* case to do so. The Court stated that "commercial speech [has] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values," and that "modes of regulation that might be impermissible in the realm of noncommercial expression" are al-

---

> We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. *Physicians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.*

Id. (emphasis added).

50 Bates v. State Bar of Arizona, 433 U.S. 350, 368-72, 378 (1977).

51 *Id.* at 384. The advertisement in question consisted of the headline: "DO YOU NEED A LAWYER? — Legal Services at Very Reasonable Fees." *Id.* at 385 (app. to opinion of the Court.) It then proceeded to list fees for uncontested divorces, adoptions, bankruptcies, and name changes. *Id.*

52 436 U.S. 447 (1978). Justice Brennan took no part in the decision. *Ohralik* involved a challenge to a prohibition against in-person solicitation, an area specifically not considered in *Bates* but which was specifically banned by state law. The Ohio statute, DR 2-103(A) (1970), modeled after the American Bar Association's Code of Professional Responsibility, provided that "[a] lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer." *Id.* at 453 n.9. Unlike the relatively benign and informational advertisements in *Bates*, Ohralik's conduct involved "ambulance chasing," conduct which no doubt influenced the Court to uphold the regulation against constitutional attack. *Id.* at 469-70 (Marshall, J., concurring). "[Ohralik] approached two young accident victims at a time when they were especially incapable of making informed judgments or of assessing and protecting their own interests." *Id.* at 467. The lawyer also surreptitiously recorded conversations with the two victims. *Id.* He was suspended indefinitely from the practice of law by the Ohio Supreme Court for his solicitations. *Id.* at 453-4. Ohralik also violated Ohio Code DR 2-104(A) (1970), which states that "[a] lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice." *Id.* at 453 n.9. In relying on the state's substantial interest in protecting consumers relying on licensed attorneys from the "potential harm . . . of overreaching, overcharging, underrepresentation, and misrepresentation," the Court justified the restrictions on solicitation. *Id.* at 461.

lowed because the commercial nature of the speech "lowers the level of appropriate judicial scrutiny."[53] Furthermore, "[w]hile entitled to some constitutional protection, appellant's conduct is subject to regulation in furtherance of important state interests."[54]

Further limitation of *Virginia Pharmacy* occurred in decisions upholding a state ban on "the practice of optometry under an assumed name, trade name, or corporate name"[55] and a real estate regulation preventing brokers from using a franchisor's service mark unless the broker's own name occupied not less than fifty percent of the combined surface area of the advertisement.[56]

After a short period of accepting a right to broad commercial speech, some courts began to accept the idea of a lower standard of constitutional review for commercial speech cases. These courts adopted the new "substantial state interest" standard, a middle level of review between "mere rationality" and "strict scrutiny."[57] If such a standard is utilized by future courts, it would give commercial speech a fair level of protection, without subjecting it to the very exacting standards of political speech.[58] Yet, despite these develop-

---

[53] *Id.* at 456-57.

[54] *Id.* at 459.

[55] Friedman v. Rogers, 440 U.S. 1, 5 (1979). The Court, in an opinion by Justice Powell, noted that "there is a significant possibility that trade names will be used to mislead the public" and that the Texas Legislature was responding to such abuse when it enacted the statute. *Id.* at 13 & n.12. In an interesting footnote, the majority signaled a greater deference to state interests when it proclaimed:

> Because of the special character of commercial speech and the relative novelty of First Amendment protection for such speech, we act with caution in confronting First Amendment challenges to economic legislation that serves legitimate regulatory interests. Our decisions dealing with more traditional First Amendment problems do not extend automatically to this as yet uncharted area.

Id. at 10 n.9.

[56] *See* Century 21 Real Estate Corp. v. Nevada Real Estate Advisory Comm'n, 448 F. Supp. 1237 (D. Nev. 1978), *aff'd*, 440 U.S. 941 (1979). The Supreme Court summarily affirmed the district court's ruling which upheld a regulation "ensuring that the public realizes it is doing business with an independent broker and not [with] a national firm." *Id.* at 1240.

[57] *See Ohralik*, 436 U.S. 447; *Friedman*, 440 U.S. 1. See also United States v. Carolene Prods., 304 U.S. 144 (1938), which articulated specific standards for measuring the constitutionality of legislation. Legislation, other than that which appears to be violative of a specific prohibition in the Constitution, is generally subject to a "rational basis" test; if the state can demonstrate a rational basis for the legislation, it will survive constitutional attack. However, legislation that seems to violate the first ten amendments and the fourteenth amendment is subject to a more exacting standard that has come to be known as a "strict scrutiny" standard. This requires the state to show a far more compelling reason for the restrictions, especially when an action by the government "is tainted by 'prejudice against discrete and insular minorities,' the sort of prejudice 'which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities' in our society." TRIBE, *supra* note 44, at 1465 (quoting *Carolene Prods.*, 304 U.S. at 152 n.4); G. GUNTHER, CONSTITUTIONAL LAW—CASES AND MATERIALS 974 (11th ed. 1985) [hereinafter GUNTHER].

[58] *See Carolene Prods.*, 304 U.S. at 152 n.4; GUNTHER, *supra* note 57, at 974. In the area

ments, the broad language of *Virginia Pharmacy* remained good law and a specific uniform standard remained elusive.

C. Central Hudson—*A Confusing Standard Developing*

In 1980, the Supreme Court finally "rationalized" its decision in *Virginia Pharmacy*, and set out a supposedly precise balancing test in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[59] In striking down a New York regulation banning promotional advertising by electric utilities, the Court rejected the state's claim that a utility's "monopoly" status permits a ban on advertising. More importantly, the Court adopted a four-part test[60] to determine whether a regulation restricting commercial speech passes constitutional muster:

1. The commercial speech "must concern lawful activity and not be misleading" to be entitled to any first amendment protection[61] (if it is false, it can be regulated or banned and the rest of the test is not applicable);[62]

2. The government's interest in regulating the commercial speech must be "substantial;"

3. The regulation must "directly advance[] the governmental interest asserted;" and

4. The regulation "is not more extensive than is necessary to serve that interest."[63]

Under this fairly rigorous test, the Court found New York's regulation defective because the regulation was more extensive than necessary for the stated purpose of decreasing energy use.[64]

---

of first amendment cases, the Supreme Court has evolved two distinct approaches to resolve such claims. If the regulation is aimed at the communicative impact of an action, the regulation is unconstitutional unless the government can show that

> the message being suppressed poses a "clear and present danger," constitutes a defamatory falsehood, or otherwise falls on the unprotected side of one of the lines the Court has drawn to distinguish those expressive acts privileged by the first amendment from those open to government regulation with only minimal due process scrutiny.

TRIBE, *supra* note 44, at 791-92. If the regulation is a so-called "time, place and manner" restriction, the standard is less onerous. The regulation is considered constitutional, "even as applied to expressive conduct, so long as it does not unduly constrict the flow of information and ideas." *Id.* at 792. In such a case, the court is called upon to "balance" the competing interests on a case-by-case basis. *Id.*

59 447 U.S. 557 (1980).

60 *Id.* at 566.

61 *Id.*

62 *Id.* at 563-64.

63 *Id.* at 566.

64 *Id.* at 570. The Court stated,

> [T]he energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use. In addition, no showing has been made that

Justices Blackmun and Brennan concurred in the judgment, but criticized the four-part test as "not adequate," and not consistent with the mandate of *Virginia Pharmacy* to safeguard the first amendment interests of commercial speech.[65] Justice Stevens concurred, but argued that this was not a "commercial speech" case.[66]

As in *Virginia Pharmacy*, Justice Rehnquist dissented in *Central Hudson*. Castigating the majority for unduly impairing the ability of the legislature to adopt regulations that would advance important state interests,[67] Justice Rehnquist criticized the majority's approach as stifling state economic regulation, and "return[ing] to the bygone era of *Lochner v. New York*."[68] Rehnquist further noted that a state has the right to enact legislation to economically regulate "a business in any of its aspects."[69]

Justice Rehnquist's lone dissent encapsulated the main problem with the four-part *Central Hudson* test by stating that it "elevates the protection accorded commercial speech that falls within the scope of the First Amendment to a level that is virtually indistinguishable from that of noncommercial speech."[70] In a parting shot at the majority, he noted "that the Court unlocked a Pandora's Box when it 'elevated' commercial speech to the level of traditional political speech."[71]

Justice Rehnquist may have been right. Although *Central*

> a more limited restriction on the content of promotional advertising would not serve adequately the State's interests.

Id.

65 *Id.* at 573 (Blackmun, J., concurring). Justice Blackmun noted, "If the First Amendment guarantee means anything, it means that, absent clear and present danger, government has no power to restrict expression because of the effect its message is likely to have on the public." *Id.* at 575. The Court also stated that any differences in the level of protection afforded commercial speech are "for the purpose of protecting consumers from deception or coercion," not from "truthful" commercial speech. *Id.* at 578.

66 *Id.* at 579 (Stevens, J., concurring). Justice Stevens stated, "Whatever the precise contours of [commercial speech] . . . I am persuaded that it should not include the entire range of communication that is embraced within the term 'promotional advertising.' " *Id.* at 580.

67 *Id.* at 585 (Rehnquist, J., concurring).

68 *Id.* at 589. In *Lochner*, 198 U.S. 45 (1905), the Court struck down economic regulations regarding the maximum number of hours that bakery employees could work as violating the contractual relationship between employer and employee, infringing on their rights of "liberty" and "due process." *See* GUNTHER, *supra* note 57, at 565. For a discussion of the demise of the *Lochner* doctrine, see Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363, 1364-67 (1990).

69 *Central Hudson*, 447 U.S. at 589 (quoting Nebbia v. New York, 291 U.S. 502, 537 (1934)).

70 *Id.*, at 591.

71 *Id.* at 598. He added:

> What time, legal decisions, and common sense have so widely severed, I declined to join in *Virginia Pharmacy Board* and regret now to see the Court reaping the seeds that it there sowed. For in a democracy, the economic is

Hudson should have ended the debate over the level of protection to be afforded commercial speech, it left subsequent courts groping for the exact meaning of the elements of the four part test. The fourth requirement that the regulation not be "more extensive than necessary" proved to be especially troublesome. Some courts interpreted "not more extensive than necessary" as the "least restrictive measure" the state can enact to protect its interests,[72] while others found it to mean "narrowly drawn" and "no further than necessary in seeking to meet" those interests.[73] Although this distinction appears to be subtle, it can mean the difference between a statute's invalidity and its constitutionality. This question regarding the permissible extent of the regulation was not definitively answered until *Board of Trustees of The State University of New York v. Fox*.[74]

D. *Post*-Central Hudson *Cases*

Major commercial speech decisions in the post-*Central Hudson* era frequently displayed inconsistent decisions characterized by bitterly divided courts. In *Metromedia, Inc. v. San Diego*,[75] the Surpreme Court declared unconstitutional a city ordinance forbidding most billboard advertisements because the ordinance regulated noncommercial messages.[76] This ordinance allowed some commercial messages but prohibited others. Although the Court believed that treating commercial speech differently was

---

> subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to relearn many years hence.

Id. at 599.

[72] *See id.* at 564 ("[I]f the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."). *See also* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 n.14 (1985) (where the Court found that a disclosure requirement was found to be an acceptable less restrictive alternative to suppression of speech.); *infra* notes 81-85 and accompanying text.

[73] Metromedia, Inc. v. San Diego, 453 U.S. 490, 508 (1981) (plurality opinion) (the Court noted that the broad restriction on billboards was not "broader than necessary" to meet the city's goals); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (holding that the State of Kentucky could not prohibit solicitation by attorneys who sent truthful and nondescriptive letters to potential clients facing particular legal problems); San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 537 n.16 (1987) (holding that the application of the *Central Hudson* test was "substantially similar" to the application of the test for validity of time, place, and manner restrictions upon protected speech which does not require least restrictive means).

[74] 109 S. Ct. 3028 (1989).

[75] 453 U.S. 490 (1981).

[76] The ordinance specifically exempted on-premises signs (those "designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed"), specific categories of off-premises signs, such as those at bus stops, historical plaques, religious symbols and signs displaying time, temperature or news. *Id.* at 494-95.

valid, it found the statute unconstitutional because it prohibited *all noncommercial* speech. Because noncommercial speech is given stronger protection than commercial speech and weighs more heavily against the government's interests of safety and aesthetics in the *Central Hudson* balancing test, if some commercial speech is allowed to go unregulated, *all noncommercial* speech must be free of regulation. By *regulating* all noncommercial speech, the statute was overbroad and therefore *prima facie* unconstitutional. The city government had misinterpreted the Court's prior decisions allowing regulation of commercial speech without regulation of noncommercial speech, to mean that the government can regulate *one* type of speech without regulating the other. In reality, those decisions held that the government could regulate commercial speech without regulating noncommercial speech, but not necessarily vice-versa. Therefore, the plurality in *Metromedia* felt that if the city was allowing *some* billboard advertisements, it could not be achieving its intended purposes of protecting the safety of the people and beauty of the city.[77]

Attorney advertising cases, an important area of commercial speech jurisprudence before *Central Hudson*, continued to plague the Court in the post-*Central Hudson* period, and resulted in disparate rules regarding commercial speech protection. In *In re R.M.J.*,[78] the Court expanded the constitutional protection of professional advertising to include even "potentially" misleading statements,[79] thereby stretching the first prong of *Central Hudson*. In doing so, the Court ultimately invalidated Missouri's limitations on attorneys' advertisements regarding the jurisdictions in which they can practice, the mailing of announcement cards, and

---

[77] *Id.* at 512-13. The plurality opinion, written by Justice White, was joined by Justices Stewart, Marshall and Powell; Justice Brennan wrote a concurring opinion which was joined by Justice Blackmun; Chief Justice Burger, together with Justices Rehnquist and Stevens, dissented. Ultimately, the plurality held the ordinance unconstitutional, not on commercial speech grounds, but on an equal protection theory. Because it permitted on-site signs in the manner that it did, the ordinance favored commercial speech over noncommercial speech. *Id.* at 521. Three years later, the Court, in another sign ordinance case, City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984), ruled 6-3 that a sufficient state interest exists to justify a prohibition against posting signs on utility poles. The majority ruled that "[b]y banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy," noting the district court's finding that the prohibited signs constituted a "visual clutter and blight." *Id.* at 808 (footnote omitted). The three dissenters criticized the majority, stating that the City's interest in eliminating such signs did not justify such a broad prohibition. *Id.* at 818, 827.

[78] 455 U.S. 191 (1982).

[79] The Court stated, "Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of *potentially* misleading information . . . ." *Id.* at 203 (emphasis added).

the terms used in the advertisements.[80]

However, three years later, in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*,[81] the Court seemed to backtrack. A 5-3 majority struck down a ban on illustrations used in attorney advertising and a prohibition against an attorney recommending employment of himself or others in his firm.[82] A 6-2 majority, however, upheld a State requirement that advertisements mentioning contingent fee rates must delineate how those rates are computed and explain that the client is liable for court costs if the litigation is unsuccessful.[83] The Court's ruling in

---

80 The Court ultimately found three sections of Missouri's limitations unconstitutional: (1) the restrictions on the terms used to describe an attorney's practice; (2) the restrictions on advertising the jurisdictions in which an attorney is licensed to practice; and (3) the limits on attorneys' mailing announcement cards. *Id.* at 205-06. In extending commercial speech to potentially misleading information, the opinion stated that "[a]lthough the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception." *Id.* at 203.

81 471 U.S. 626 (1985). Justice Powell took no part in the decision. *Id.* at 628.

82 Zauderer placed advertisements in 36 Ohio newspapers, seeking clients who suffered injuries from their use of the Dalkon Shield, an intrauterine device (IUD). The ad stated: "If you or a friend have had [serious injuries from use of the Dalkon Shield] do not assume it is too late to take legal action . . . . The cases are handled on a contingent fee basis . . . . If there is no recovery, no legal fees are owed by our clients." *Id.* at 631. The Office of Disciplinary Counsel charged Zauderer with violating the following rules:

> DR2-101(B), which prohibits the use of illustrations in advertisements run by attorneys [,and] requires that ads by attorneys be "dignified" . . .; DR2-103(A), which prohibits an attorney from "recommend[ing] employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer"; . . . DR 2-104(A), which provides . . . "[a] lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice"[;]. . . DR 2-101(B)(15), which provides that any advertisement that mentions contingent-fee rates must "disclos[e] whether percentages are computed before or after deduction of court costs and expenses;"

and DR2-101(A) which forbids a lawyer from participating in public communication containing false or deceptive statements. *Id.* at 632-33, 651. The Court recognized that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech," but held that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the state's interest." *Id.* at 651. Justices White, Blackmun, Stevens, Brennan and Marshall concluded that even if the ad was "in poor taste" it did not justify reprimand on the grounds that it violated the ban on recommending employment through unsolicited legal advice. *See id.* at 642. Distinguishing an advertisement from the kind of in-person solicitation used in Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), the majority noted that "a printed advertisement is a means of conveying information about legal services that is more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney." *Id.* at 642. Also, the majority struck down the ban on illustrations as the state lacked a "substantial interest" in declaring such a restriction. *Id.* at 648-49.

83 Justices White, Blackmun, Stevens, Burger, O'Connor, and Rehnquist concluded that as long as it is "reasonably related to the State's interest in preventing deception of consumers," the State's "requirement that an attorney advertising his availability on a contingent-fee basis disclose that clients will have to pay costs even if their lawsuits are unsuccessful . . . easily passes muster." *Id.* at 651-52. The Court specifically noted that

Zauderer was applied to help strike down a ban on targeted mail solicitations by lawyers to potential clients with specific legal problems,[84] and used to find unconstitutional a prohibition on using the term "Certified Civil Trial Specialist" on an attorney's letterhead.[85]

An important exception to the Supreme Court's post-*Central Hudson* inconsistencies was its unanimous opinion in *Bolger v. Youngs Drug Products Corp.*[86] In *Bolger*, the Court struck down a prohibition against the mailing of "[a]ny unsolicited advertisement" of contraceptives.[87] Youngs Drug Products, a maker and seller of condoms, sought to send informational pamphlets and flyers promoting its products, thereby challenging the statutory ban.[88] The district court concluded that the ban was "more extensive than is necessary" to support the government's interests,[89] and the Supreme Court affirmed that determination.[90]

In his opinion, Justice Marshall applied the *Central Hudson* test, ruling that the informational pamphlets constituted commercial speech despite the fact that they contained information on "important public issues such as venereal disease and family planning."[91] Marshall found that the two interests asserted by

---

disclosure requirements were subject to a less stringent standard of review than the "least restrictive means" test of *Central Hudson* "[b]ecause the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed." *Id.* at 651-52 n.14.

84 *See* Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988). In a 6-3 ruling, the Court distinguished direct-mail advertising from in-person solicitations, which are more subject to abuse and likely to invade privacy than mailings, and concluded that a ban on direct mailings was overbroad and unjustified. *See id.* at 475-76. In a biting dissent, Justice O'Connor castigated the entire string of lawyer advertising cases beginning with Bates v. State Bar Ass'n of Arizona, 433 U.S. 350 (1977), as creating a considerable potential for abuse and misrepresentation to the public. *Shapero*, 486 U.S. at 485-86.

85 *See* Peel v. Attorney Registration and Disciplinary Comm'n of Illinois, 110 S. Ct. 2281 (1990). The majority ruled that a truthful statement on an attorney's letterhead stating that he had been certified as a "trial specialist" by the National Board of Trial Advocacy could not be prohibited by the state. The Court further held that while the state may prohibit misleading advertising entirely, the state's interest in avoiding any potential confusion by the public was not a justification for a complete ban. *Id.* at 2287, 2288-90.

86 463 U.S. 60 (1983). Justice Brennan took no part in the decision.

87 *Id.* at 61. The appellee, Youngs Drug Products, a manufacturer and seller of condoms, challenged a postal service ban which stated that "[a]ny unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs." 39 U.S.C. § 3001(e)(2) (1988).

88 *Youngs Drug*, 463 U.S. at 62.

89 *See* Youngs Drug Prod. Corp. v. Bolger, 526 F. Supp. 823, 829 (D.D.C. 1981) (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 572 (1980)).

90 *Youngs Drug*, 463 U.S. at 63.

91 *Id.* at 68 (footnote omitted). The Court stated, "We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the con-

the government—to "shield[] recipients of mail from materials that they are likely to find offensive and . . . [to aid] parents' efforts to control the manner in which their children become informed about sensitive and important subjects such as birth control"[92]—were lacking in the statute.[93]

As to the first interest, the Court went beyond the confines of *Central Hudson* and concluded that "[t]he First Amendment 'does not permit the government to prohibit speech as intrusive unless the "captive" audience cannot avoid [the] objectionable speech.' "[94] Since the recipients could "effectively avoid further bombardment of their sensibilities simply by averting their eyes"[95] or discarding the matter, the government's rationale could not be supported.[96]

The Court found the second government interest of aiding parental efforts to control the manner in which their children obtain information regarding birth control to be "undoubtedly substantial."[97] However, the Court went on to say that the statutory restriction imposed upon unsolicited advertisements that are carried or delivered by mail is "more extensive than the Constitution permits"[98] and "fails to withstand scrutiny."[99]

---

stitutional protection afforded noncommercial speech." *Id.* at 68 (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 563 n.5 (1980)). Although the informational pamphlets could conceivably be accorded noncommercial speech status, the decision noted that taken together, the fact that the literature was intended as an advertisement—it referred to specific products and was economically motivated—tipped the balance in favor of giving them commercial speech status. *Id.* at 66-67.

92 *Id.* at 71.

93 *Id.* at 71-74.

94 *Id.* at 72 (quoting Consolidated Edison v. Public Serv. Comm'n of New York, 447 U.S. 530, 542 (1980)).

95 *Id.* at 72 (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).

96 *Id.*

97 *Id.* at 73.

98 *Id.*

99 *Id.* See 39 U.S.C. § 3001(e)(2) which states:

> Any unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs unless the advertisment-
>
> (A) is mailed to a manufacturer of such matter, a dealer therein, a licensed physician or surgeon, or a nurse, pharmacist, druggist, hospital, or clinic; or
>
> (B) accompanies in the same parcel any unsolicited sample excepted by paragraph (1) of this subsection.
>
> An advertisement shall not be deemed to be unsolicited for the purposes of this paragraph if it is contained in a publication for which the addressee has paid or promised to pay a consideration or which he has otherwise indicated he desires to receive.

E. Posadas—*Banning Commercial Speech for a Legal Enterprise*

A significant 1986 decision gave new impetus to the scope of governmental regulation of commercial speech and resulted in the Supreme Court giving greater deference to the states in formulating commercial speech limitations. In a 5-4 ruling, the Court in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*[100] upheld a Puerto Rican statute prohibiting gambling casino advertisements aimed at residents of Puerto Rico,[101] despite the fact that gambling has been legal on the island since 1948.

In affirming a ruling by the Supreme Court of Puerto Rico, which upheld the constitutionality of the restrictions,[102] Justice Rehnquist's majority opinion accorded great weight to the Commonwealth's justifications: that gambling by residents "would produce serious harmful effects on the health, safety and welfare" of the citizenry including "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."[103] Applying the *Central Hudson* standards in a less rigid manner than in the past, and after noting that the ads in question were truthful and not deceptive, Justice Rehnquist ruled, with little discussion or analysis, that he had "no difficulty in concluding that the [governmental interests at stake are] 'substantial.' "[104]

---

100 478 U.S. 328 (1986).

101 The statute in question stated that: "[n]o gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico." The Games of Chance Act of 1948, § 8 (codified as amended at P.R. LAWS ANN. tit. 15, § 77 (1972)). "The Act authorized the Economic Development Administration of Puerto Rico to issue and enforce regulations implementing the various provisions of the Act." *Posadas*, 478 U.S. at 332. *See also* The Games of Chance Act of 1948, § 7(a) (codified as amended at P.R. LAWS ANN. tit. 15, § 76(a) (1972)). Regulation 76a-1(7), provided that:

> No concessionaire, nor his agent or employee is authorized to advertise the gambling parlors to the public in Puerto Rico. 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 Tourism Development Company . . . .

P.R. R. & Regs. tit. 15, § 76a-1(7) (1972), *quoted in Posadas*, 478 U.S. at 332-33. The Tourism Company interpreted these restrictions as prohibiting the use of the word "casino" in any manner that might be accessible to the public in Puerto Rico. *Posadas*, 478 U.S. at 333 (citing Brief for Appellants at 7a). However, the Superior Court of Puerto Rico restricted this interpretation of the Act, stating that "the only advertisement prohibited by the law originally is that which is contracted with an advertising agency, for consideration, to attract the resident to bet at the dice, card, roulette and bingo tables." *Id.* at 334-35 (quoting the decision of the Superior Court of Puerto Rico). *See* Recent Development, *Trends in First Amendment Protection of Commercial Speech*, 41 VAND. L. REV. 173, 197 (1988).

102 *Posadas*, 478 U.S. at 337.

103 *Id.* at 341 (quoting Brief for Appellees at 37).

104 *Id.*

The majority noted that the law "directly advanced" the government's interest in reducing gambling among residents, and rejected the argument that it was "underinclusive" because other types of gambling, such as horse racing, cockfighting, and the lottery, could legally be advertised in the commonwealth. Distinguishing the latter activities from casino gambling, the majority granted deference to the legislature's view that the "risks associated with casino gambling were significantly greater than those associated with the more traditional kinds of gambling in Puerto Rico."[105] The Court also stated that the legislature's interest was only to reduce demand for casino gambling, and not the "small games of chance . . . [that] 'have been traditionally part of the Puerto Rican's roots.' "[106]

Finally, the Court stated that the restriction was "no more extensive than necessary" since it was only aimed at residents of the island.[107] It rejected the appellant's contention that the first amendment requires a counter speech policy, which would allow additional speech to specifically discourage casino gambling in response to advertisements. The Court stated that the legislature would have passed a counter speech rule if it had believed that it would be an effective method of discouraging gambling.[108]

The *Posadas* majority heavily deferred to the legislature's regulatory discretion and held that advertising of a legal product could be barred. This was the first time that such types of advertising had been barred since commercial speech was constitutionalized. Ironically, Justice Rehnquist, the sole dissenter in *Virginia Pharmacy*, persuaded four of his colleagues to support his view.

Justice Brennan, joined by Justices Marshall and Blackmun, dissented,[109] stating that "I do not believe that Puerto Rico constitutionally may suppress truthful commercial speech in order to discourage its residents from engaging in lawful activity."[110] Applying a more rigorous standard of constitutional protection than the majority, Brennan saw "no reason why commercial speech should be afforded less protection than other types of speech where . . . the government seeks to suppress commercial speech

---

105 *Id.* at 343 (footnote omitted).
106 *Id.* at 342-43.
107 *Id.* at 343.
108 *Id.* at 344.
109 *Id.* at 348 (Brennan, J., dissenting). In a separate dissent, Justice Stevens, joined by Justices Marshall and Blackmun, noted that Puerto Rico's "rather bizarre restraints [on advertising are discriminatory because of] . . . its punishment of speech depending on the publication, audience, and words employed." *Id.* at 359.
110 *Id.* at 349.

in order to deprive consumers of accurate information concerning lawful activity."[111]

Applying a *Central Hudson* analysis,[112] the dissent concluded that the ban did not pass constitutional muster. Justice Brennan, rejecting the majority's heavy deference to the will of the Puerto Rican legislature, stated that the commonwealth's interests were not sufficient to uphold the ban. "Neither the statute on its face nor the legislative history indicates that the Puerto Rico Legislature thought that serious harm would result if residents were allowed to engage in casino gambling . . . ."[113] Because the legislature legalized gambling, Puerto Rico's interest in discouraging its residents from engaging in casino gambling could not be characterized as "substantial."[114] Also, the ban failed to "directly advance" Puerto Rico's interests in controlling crime, corruption and prostitution and was more extensive than necessary to combat these alleged problems.[115] "[N]othing suggests that the Puerto Rico Legislature ever considered the efficacy of measures other than suppressing protected expression."[116]

Posadas was justifiably criticized by many for its excessive deference to the legislature and effective retreat to the "mere rationality" test used by Justice Rehnquist in *Virginia Pharmacy*.[117] It marked the first time since *Virginia Pharmacy* that a ban on the advertising of a legal product was upheld, and the Court did so

---

111 *Id.* at 350.

112 *Id.* Although the majority opinion applied the more relaxed *Central Hudson* standards, Justice Brennan, in his dissent, claimed that a regulation which suppresses the dissemination of nonmisleading commercial speech regarding legal activities should be subject to the even more rigorous "strict scrutiny" test. *Id.* at 351.

113 *Id.* at 352-53.

114 *Id.* at 354. Justice Brennan's dissent also rejected the majority's claim that casino gambling risks are "significantly greater than those associated with the more traditional kinds of gambling in Puerto Rico." Brennan concluded that the selective advertising ban violated the equal protection clause. *Id.* at 353 n.3.

115 *Id.* at 356.

116 *Id.* at 357.

117 *See* DeVore, Posadas de Puerto Rico v. Tourism Co. of Puerto Rico: *The End of the Beginning*, 10 HASTINGS COMM/ENT. L.J. 579 (1988) (*Posadas* may signal troubled times ahead for commercial speech); *see also* Kurland, *Posadas de Puerto Rico v. Tourism Co.: " 'Twas Strange, 'Twas Passing Strange, 'Twas Pitiful, 'Twas Wonderous Pitiful"*, 1986 SUP. CT. REV. 1. The author, in an often biting and satirical commentary, stated:

> [I]t may be that this opinion is just another facet of the new federalism, freeing the states from the rigidities of the Bill of Rights, whether on the grounds of 'original intent' or based on the notion that government is best for the people that is closest to the people. Or can it be a return to substantive due process. . . . Or is it Rehnquist's movement back to his original position that 'commercial speech' is not protected speech at all. Suppose the censorship was imposed on advertising cereals with high sugar contents or advertising automobiles with high fuel consumption or advertising inexpensive air flights to Las Vegas or Atlantic City?

Id. at 15 (footnotes omitted).

by framing the issue in terms of limiting the demand for the product.[118] Relying on governmental power to ban harmful products by restricting advertising,[119] Justice Rehnquist's majority opinion profoundly effected the future of advertising for harmful products, such as tobacco and liquor.[120]

III. *Board of Trustees of The State University of New York v. Fox*

A. *The Holdings of the Lower Courts*

The facts leading to the Supreme Court's decision in *Board of Trustees of The State University of New York v. Fox*[121] could be called mundane. *Fox* challenged a State University of New York ("SUNY") resolution that provided:

> No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events.[122]

In October 1982, a representative of a firm that marketed housewares for college students demonstrated those products in a

---

118 *Posadas*, 478 U.S. at 342.

119 *Id.* at 346-47. The Court stated:

> Legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, has varied from outright prohibition . . . to legalization of the product or activity with restrictions on stimulation of its demand . . . . To rule out the latter, intermediate kind of response would require more than we find in the First Amendment.

120 During this time, several courts considered laws restricting advertising for alcoholic beverages. *See, e.g.*, Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) (questioning the constitutionality of Oklahoma's ban on cablecasters from re-transmitting out-of-state liquor advertising); Queensgate Inv. Co. v. Liquor Control Comm'n, 69 Ohio St. 2d 361, 433 N.E.2d 138, *appeal dismissed*, 459 U.S. 807 (1982) (challenge to regulation prohibiting advertising of retail prices of alcoholic beverages); Michigan Beer & Wine Wholesalers Ass'n v. Attorney Gen. of Michigan, 142 Mich. App. 294, 370 N.W.2d 328 (Mich. Ct. App. 1985), *cert. denied*, 479 U.S. 939 (1986) (questioning constitutionality of a Michigan regulation limiting liquor advertisements); Dunagin v. City of Oxford, 718 F.2d 73 (5th Cir. 1982) (challenging constitutionality of Mississippi ban on liquor advertising). These cases are discussed *infra* notes 237-61 and accompanying text.

In the area of tobacco advertising restrictions, there has been a paucity of cases. *See* Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd*, 405 U.S. 1000 (1972). For a discussion of *Capital Broadcasting*, see notes 185-90 and accompanying text.

121 American Future Sys., Inc. v. State Univ. of New York College at Cortland, 565 F. Supp. 754 (N.D.N.Y. 1983), *later proceeding*, Fox v. Board of Trustees of The State Univ. of New York, 649 F. Supp. 1393 (N.D.N.Y. 1986), *rev'd*, 841 F.2d 1207 (2d Cir.), *on remand*, 695 F. Supp. 1409 (N.D.N.Y. 1988), *rev'd*, 109 S. Ct. 3028 (1989).

122 *See* SUNY Resolution 66-156 (1979), *cited in* Board of Trustees of The State of New York v. Fox, 109 S. Ct. 3028, 3030 (1989).

student dormitory room at the Cortland campus for a small group of students in a setting popularly known as a "Tupperware party."[123] Because the SUNY resolution prohibited this activity, campus police asked the representative to leave. When she refused, they arrested her and charged her with loitering, soliciting without a permit, and trespassing.[124]

The representative's firm and a student sued SUNY, claiming that the regulation "prevent[ed] discussions with . . . 'commercial invitees' " in the dorm rooms, thereby violating the students' first amendment rights.[125] The district court granted a preliminary injunction preventing SUNY from prohibiting the demonstration of the products and the dissemination of commercial information.[126] However, SUNY was still allowed to "enforc[e] reasonable restrictions governing the time, place, and manner of . . . [the] demonstrations."[127] At the completion of the trial, the same judge found for the University on the ground that its restrictions were reasonable in light of the finding that the University dormitories were "limited public forums."[128]

Interestingly, although the district court rejected the claim that the speech was "pure,"[129] it dispensed with the *Central Hudson* standard[130] and applied the "public forum" test, which the courts more frequently apply to restrictions of speech on government property.[131] The court based its conclusion that college dormitories constitute, at most, limited public forums on the fact that the dormi-

---

123 American Future Sys., Inc. ("AFS"), the corporation which sold cookware, china, crystal, and silverware to the SUNY students, arranged group demonstrations to market their goods. A representative of the firm obtained names and telephone numbers of students who were interested in hosting these demonstrations, and informed them that they could obtain a free vacation in return. *See Fox*, 649 F. Supp. at 1395.

124 *Id.* The AFS representative refused to leave the dormitory after a request by the dormitory director. She "replied that she had a constitutional right to stay." *Id.* She remained in the room after campus police entered and was arrested.

125 *Fox*, 109 S. Ct. at 3030.

126 American Future Sys., Inc. v. State Univ. of New York College at Cortland, 565 F. Supp. 754 (N.D.N.Y. 1983). After applying the *Central Hudson* test, the district court concluded that the plaintiffs showed a likelihood of success on the merits regarding their claim of a right to disseminate and receive commercial information through group product demonstrations conducted in the dormitory rooms, but "failed to [show] a likelihood of success on the merits with respect to their claim of a Constitutional right to consummate transactions in dormitory rooms." *Id.* at 770.

127 *Id.* at 771.

128 *See Fox*, 649 F. Supp. at 1400-01.

129 *Id.* at 1398. The court stated, "While it may be true that some of the students may receive pure speech information from AFS demonstrations, it cannot be reasonably controverted that the bulk of such a demonstration concerns speech directed toward a commercial transaction . . . . [T]he speech . . . is properly characterized as commercial speech." *Id.*

130 *Id.* at 1399.

131 *Id.* at 1398, 1400-02.

tories are used for a "variety of social, cultural and educational activities" but are not primarily used for assembly and debate.[132] Consquently, the court upheld the ban as reasonable and viewpoint-neutral in light of the dormitory's purpose of fostering an educational climate.[133] The opinion noted that the purpose of the restrictions was to: "(1) preserve the educational environment of the dormitories, (2) assure student safety, (3) prevent commercial exploitation of students, (4) avoid the use of tax supported facilities for private commercial gain, and (5) prevent overcrowding in the dormitories," all of which reasonably supported a total ban on commercial solicitation.[134]

The Second Circuit, applying *Central Hudson* rather than public forum theory, reversed and remanded on the issue of whether the restriction was constitutional.[135] The 2-1 majority opinion concluded that the product demonstrations constituted lawful activities that were not misleading, and that SUNY's interests in prevention of crime, protection against consumer exploitation and preservation of residential tranquility were substantial and justified the ban.[136] However, due to the paucity of evidence cited, the court did not determine whether the regulation directly advanced the state's interest,[137] but did conclude that the lower court misapplied the "more extensive than necessary" prong of the *Central Hudson* test.[138]

The court stated, "*Central Hudson* makes clear that 'if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.' "[139] The appellate court found support for the plaintiff's position that "a less restrictive measure might better balance the respective interests of the parties."[140] The court concluded that the

---

132 *Id.* at 1401.

133 *Id.* at 1401.

134 *Id.* at 1402.

135 Fox v. Board of Trustees of The State Univ. of New York, 841 F.2d at 1212-13. On appeal, the housewares company dropped out as a party, so the focus of the case concerned the constitutional rights of the students in their dormitory rooms. *Id.* at 1208.

136 *Id.* at 1213.

137 *Id.*

138 *Id.* at 1214.

139 *Id.*

140 *Id.* (citing 649 F. Supp. at 1402). The dissenting opinion by Judge Mahoney essentially applied the lower court's public forum theory, but did state that *Central Hudson* should not be read as imposing a "least restrictive alternative" requirement for commercial speech regulations. *Id.* at 1214-15. A Third Circuit case, American Future Sys., Inc. v. Penn. State Univ., 752 F.2d 854 (3d Cir. 1984), *cert. denied*, 473 U.S. 911 (1985), which applied the *Central Hudson* test to limit such activity on a college campus, was cited. *Fox*, 841 F.2d at 1214. Judge Mahoney also noted that "[w]ith all due respect, I do not believe that the First Amendment's protection of a free and robust marketplace of ideas requires that a university dormitory be turned into a marketplace for a private corpora-

restriction was not the "least restrictive means" to regulate the activity, and was therefore constitutionally defective.[141] Although the district court struck down the resolution on remand,[142] its determination was stayed pending the Supreme Court's decision.[143]

B. *The Supreme Court Opinion*

The Supreme Court granted *certiorari*,[144] and reversed the court of appeals ruling.[145] Justice Scalia, writing for Justices Rehnquist, White, Stevens, O'Connor and Kennedy, in a forthright and strongly-worded majority opinion, squarely confronted the issue of "whether governmental restrictions upon commercial speech are invalid if they go beyond the least restrictive means to achieve the desired end."[146] By answering affirmatively,[147] the Court carried the *Posadas* rationale of greater governmental deference in commercial speech regulation one step further and may have settled the exact meaning of the fourth element of the *Central Hudson* test.

After determining that there was "no doubt that the . . . 'Tupperware' parties [constituted]. . . commercial speech,"[148] despite the appellants' futile and unconvincing argument that such activity had "inextricably intertwined" noncommercial features such as teaching home economics and budgeting,[149] Justice Scalia addressed the issue of the exact meaning of the "not more extensive than is necessary" standard.[150] Scalia noted that the activity was not misleading and that the governmental interest in supporting the regulation—preserving an educational environ-

---

tion's sale of kitchenware." *Id.* at 1216 (quoting *American Future Sys.*, 752 F.2d at 871 (3d Cir. 1984) (Adams, J., concurring)).

141 *Fox*, 841 F.2d at 1216..

142 Fox v. Board of Trustees of The State Univ. of New York, 695 F.Supp. 1400 (N.D.N.Y. 1988).

143 Board of Trustees of The State Univ. of New York v. Fox, 109 S. Ct. 3028, 3031 n.1 (1989).

144 Board of Trustees of The State Univ. of New York v. Fox, 488 U.S. 815 (1988).

145 *Fox*, 841 F.2d 1207 (2d Cir. 1988), *rev'd*, 109 S. Ct. 3028 (1989).

146 *Fox*, 109 S. Ct. at 3030.

147 *Id.* at 3033-35.

148 *Id.* at 3031 (citation omitted).

149 The majority stated:

> [T]here is nothing whatever 'inextricable' about the noncommercial aspects of these presentations. No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. . . . Including these home economics elements no more converted AFS's presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech.

Id. at 3031-32.

150 *Id.* at 3032-33.

ment at a public university—was "substantial."[151] The majority then tackled the last requirement of the *Central Hudson* test: whether the SUNY Resolution is " 'not more extensive than is necessary' [and] . . . if it is the 'least restrictive measure' that could effectively protect the State's interests."[152] The Court did not address the issue of whether the regulation directly advanced these interests because that was a factual matter for the district court to determine.[153]

Rejecting the dictum of *Zauderer* linking "not more extensive than is necessary" to "least restrictive means,"[154] Justice Scalia defined a "not more extensive than is necessary" standard as something short of a least restrictive means standard.[155] Justice Scalia stated that "our jurisprudence has emphasized that 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.' "[156] His opinion noted that such a "least restrictive means test" is not used even in assessing the validity of *noncommercial* speech "time, place and manner restrictions,"[157] inferring that "it would be incompatible with the asserted 'subordinate position . . . of First Amendment values' to apply a more rigid standard in the present context."[158]

Relying on *Posadas*, *Metromedia* and other cases upholding commercial speech restrictions as supporting the relaxed standard now being adopted, the Court concluded:

> In sum, while we have insisted that " 'the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful,' " we have not gone so far as to impose upon [the regulators] the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a " 'fit' between the legislature's ends and the means chosen to accomplish those

---

151 *Id.* at 3032.

152 *Id.*

153 *Id.*

154 *Id.* at 3033. "Whatever the conflicting tenor of our prior dicta may be, we now focus upon this specific issue for the first time . . . ." *Id.*

155 *Id.*

156 *Id.* (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).

157 *Id.* at 3034.

158 *Id.* at 3034. Such "time, place, and manner restrictions [are upheld] so long as they are 'narrowly tailored' to serve a significant governmental interest, a standard . . . not interpreted to require elimination of all less restrictive alternatives." *Id.* at 3033 (citations omitted). *See* United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

> 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" that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective.[159]

In other words, the restriction does not have to be the most limited possible, but rather has to be sufficiently "narrow" in scope so as to serve as a direct nexus between the restriction and the goals it purports to serve. The majority went to some pains to distinguish its revised "least restrictive means" standard from the "mere rationality test" used in fourteenth amendment cases. The Court held that "the government['s] goal [must be] substantial, and the cost . . . carefully calculated."[160]

The Court also addressed the claim that the University resolution was "overbroad" since it prohibited "fully protected" noncommercial speech, such as for-profit job counseling in the dormitories, tutoring, legal advice, and medical consultations provided for a fee.[161] The majority determined that the restriction was not ripe for resolution because the lower courts failed to separately consider this claim[162] and remanded the case for further consideration under the Supreme Court's interpretation of the *Central Hudson* standards.

Justice Blackmun, joined by Justices Brennan and Marshall, dissented[163] not on commercial speech theory grounds, but because the statute was overbroad in its potential application to noncommercial speech. Stating that the question of interpreting the "least restrictive means" analysis should be addressed in another case,[164] Blackmun noted that the regulation prohibits "a wide range of speech that receives the fullest protection of the First Amendment,"[165] such as "meeting with [a] physician or lawyer in [the] dorm room, if the doctor or lawyer is paid for the visit" or taking a paid music lesson in the dorm.[166]

Troubled by the University's interpretation of the resolution's ban on "private commercial enterprise,"[167] Blackmun concluded

---

159 *Fox*, 109 S. Ct. at 3034-35 (citations omitted).
160 *Id.* at 3035.
161 *Id.* at 3036.
162 *Id.* at 3037-38.
163 *Id.* at 3038 (Blackmun, J., dissenting).
164 *Id.*
165 *Id.* at 3039.
166 *Id.*
167 *Id.* Justice Blackmun stated in his dissent:
> The dorm room is the student's residence for the academic term, and a student surely has a right to use this residence for expressive activities that are

that the regulation made no effort to distinguish between commercial and noncommercial speech. He considered the regulation to be constitutionally defective, since "[b]y prohibiting *all* speech in a dorm room if the speaker receives a fee, . . . [it] indiscriminately proscribes an entire array of wholly innocuous expressive activity."[168]

Fox's weakening of the constitutional protection accorded commercial speech is unmistakable. Not only did Justice Rehnquist (whose antagonism to commercial speech made him the lone dissenter in *Virginia Pharmacy*) gain adherents to his position allowing greater governmental deference in the regulation of such communication, but he also found a particularly eloquent champion of his cause: Justice Scalia. Scalia's powerful, even polemical opinion, coupled with his writings in previous constitutional cases,[169] will make him an influential member of the Court for years to come.

More directly, *Fox*'s diminishing of the fourth requirement of *Central Hudson* to that of a precise, yet "reasonable" fit between ends and means, will indeed allow many governmental regulations of commercial speech to withstand constitutional scrutiny, particularly those regulations based on health and safety considerations. Tobacco and alcohol advertising will be particularly affected.

Many members of Congress and various groups have sought to limit advertising for such products as tobacco and alcoholic beverages.[170] The *Fox* decision has prompted a number of proposals to regulate advertising of cigarettes and alcohol.[171] Prior regulations and these current proposals show that the likelihood of judicial acceptance of tobacco and alcohol advertising restrictions is probably greater now than at any time in the recent past.

> not inconsistent with the educational mission of the university . . . . It cannot plausibly be asserted that music, art, speech, writing, or other kinds of lessons are inconsistent with the educational mission of the University, or that a categorical prohibition of these activities is the "least-restrictive means". . . to protect the interests of other dorm residents.

Id.

168 *Id.* (emphasis in original).

169 See Webster v. Reproductive Health Servs., 109 S. Ct. 2969 (1989) (Scalia, J., concurring), where he castigated the majority opinion for not explicitly overruling Roe v. Wade, 410 U.S. 113 (1973) when evaluating a Missouri statute restricting abortions. See also Stanford v. Kentucky, 109 S. Ct. 3040, 3064 (1989) where Justice Scalia, writing the majority opinion, upheld a state statute instituting capital punishment for juveniles convicted of murder.

170 *See* Boffey, *A.M.A. Votes to Seek Total Ban on Advertising Tobacco Products*, N.Y. Times, Dec. 11, 1985, at A1, col. 4 [hereinafter *A.M.A. Votes To Seek Total Ban*]. (The American Medical Association voted to press for new federal laws that would make it illegal to advertise or promote any kind of tobacco product in "any form of media.").

171 For a discussion of the proposals related to the regulation of cigarette advertising, see *infra* notes 203-16 and accompanying text. For a discussion of possible regulatory proposals related to alcohol advertising, see *infra* notes 274-79 and accompanying text.

IV. The Legal Basis for Limiting Tobacco Advertising

A. *History of Tobacco Advertising*

Since the tobacco industry became an oligopoly early in this century,[172] advertising has played an important role in its marketing plans, ensuring continued public consumption and preventing upstart firms from gaining a market share.[173] Indeed, advertising—as well as glamorized portrayals of smoking in motion pictures—have shaped public attitudes and brand loyalties.[174] By the 1950s, health concerns about smoking became increasingly prevalent. In 1964 the Surgeon General issued a report linking smoking with lung cancer and other deadly diseases.[175] Thereafter, Congress enacted legislation requiring that warning labels be placed on packaging and advertising;[176] more stringent proposals however, failed to become law.[177]

B. *The Broadcast Ban*

A considerable portion of cigarette advertising occurs on tel-

---

172 In 1907, the government instituted antitrust proceedings against what was known as the "tobacco trust," which was formed when James B. Duke, through his firm W. Duke Sons & Co., forced four other principal manufacturers to form the American Tobacco Company in 1890. By 1910, this combination was able to control the vast majority of the nation's cigarette production. In United States v. American Tobacco Co., 221 U.S. 106 (1911), the Court concluded that American Tobacco violated §§ 1 and 2 of the Sherman Antitrust Act and ordered the lower court to dissolve the trust. In doing so, the district court in United States v. American Tobacco Co., 191 F. 371 (S.D.N.Y. 1911), essentially divided the trust into four entities: Liggett & Myers Tobacco Co., Lorillard Company, American Tobacco, and R.J. Reynolds. *See* R. Tennant, The American Cigarette Industry 19-39, 59-73 (1950) [hereinafter Tennant].

173 *See* Tennant, *supra* note 172, at 70-72, 170. In the 1930s, two newer firms entered the market, Brown & Williamson and Phillip Morris. Since then, despite antitrust violations for price fixing by Liggett & Meyers, American Tobacco, and R.J. Reynolds, sustained by the Supreme Court in American Tobacco Co. v. United States, 328 U.S. 781 (1946), the structure of the industry has not changed appreciably.

174 Since there was effectively no price competition in the industry, even after the antitrust actions, the industry used advertising to demonstrate product quality and differentiation. In 1954, Phillip Morris changed the image of the Marlboro brand, from that of a woman's cigarette to that of a macho "cowboy" image. The campaign was successful, with the "new" Marlboro grabbing a significant share of the market. *See* Garrison, *Should All Cigarette Advertising Be Banned? A First Amendment And Public Policy Issue*, 25 Am. Bus. L.J. 169, 183 (1987) [hereinafter Garrison].

175 *See* G. Thain, *Prohibition on Advertising for Products It is Legal to Sell: A Constitutionally Valid Option*, 3 J. Prod. L. 83, 89 (1984) [hereinafter Thain].

176 See Cigarette Labeling and Advertising Act, 15 U.S.C. § 1333 (1988), which prior to 1970 required the following warning: "Caution: Cigarette Smoking May Be Hazardous to Your Health." Subsequently, the warning became "is dangerous." *See* 15 U.S.C. § 1333 (as amended) 1984, 1985. In 1972, the Federal Trade Commission ("FTC") obtained consent orders from the major cigarette firms requiring the disclosure of the health hazards of cigarette smoking in their advertisements. Brown & Williamson Tobacco Corp. v. Engman, 1975-2 Trade Cas. (CCH) ¶ 60,607.

177 *See* Thain, *supra* note 175, at 91.

evision,[178] causing the Federal Communications Commission ("FCC") to become concerned about the effects of these advertisements on the health and well-being of young people. In a rare display of public activism, the FCC declared that the Fairness Doctrine should be applied to smoking advertisements.[179] The Fairness Doctrine is a now-abandoned rule that required that opposing viewpoints of controversial issues of public importance be broadcast.[180] In upholding the FCC's determination, the District of Columbia Circuit, in *Banzhaf v. FCC*,[181] ordered that "reply time" must be given to broadcast "counter-ads" outlining the dangers of smoking, since smoking was a "controversial issue" greatly affecting the health and safety of the public.[182] In the period after *Banzhaf*, a ratio of one anti-cigarette commercial was aired for each six cigarette commercials broadcast.[183]

The application of counter speech to neutralize the affect of television advertisements proved to be short-lived. In 1969, Congress banned the advertising of cigarettes from radio and television.[184] The ban was, in part, a response to pressure from the cigarette industry which felt that a total ban would be less detrimental than anti-smoking ads. A first amendment challenge to the ban by broadcasters was rejected by a three-judge district court in *Capital Broadcasting Co. v. Mitchell*.[185] The majority, in a 2-1 decision, noted that there were no first amendment rights at issue, but rather the loss of an ability to collect revenue.[186] The majority, four years before the *Virginia Pharmacy* decision, noted that product advertising has very limited constitutional protec-

---

178 The Cigarette Labelling and Advertising Act required the FTC to issue reports concerning the number of smoking advertisements on the airwaves. 15 U.S.C. § 1337 (1988). The 1968 report noted that each child saw 44.5 cigarette commercials, while each teenager saw 60.88 in the month of January, 1968. *See* S. REP. No. 566, 91st Cong., 2d Sess. 3, 5, 19 (1969), *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 2652, 2656, *cited in* Welkowitz, *Smoke in the Air: Commercial Speech and Broadcasting*, 7 CARDOZO L. REV. 47, 49 (1985).

179 *See In re* WCBS-TV, 8 F.C.C.2d 381 (1967).

180 *See* 47 C.F.R. § 73.1910 (1987). The Fairness Doctrine was abolished by the FCC in 2 FCC Rcd. 5043, 63 Rad. Reg. 2d (P & F) 541 (1987), *aff'd sub nom.* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 717 (1990). For more background on the Fairness Doctrine, see Conrad, *The Demise of the Fairness Doctrine: A Blow for Citizen Access*, 41 FED. COMM. L.J. 161 (1989).

181 405 F.2d 1082 (D.C. Cir. 1968).

182 *Id.* at 1097-99.

183 *See* Thain, *supra* note 175, at 91. During the period of 1968-1970, the tobacco industry spent approximately $200 million per year in television advertising. *See* 1987 FTC Report, *supra* note 6, at 27.

184 *See* Federal Cigarette Labeling And Advertsing Act, 15 U.S.C. § 1335 (1988) (effective January 1, 1971).

185 333 F. Supp. 582 (D.D.C. 1971), *aff'd mem. sub nom.* Capital Broadcasting Co. v. Acting Attorney-Gen., 405 U.S. 1000 (1972).

186 *Id.* at 584.

tion and that the public health dangers of cigarettes, especially to young people, justified the broadcast ban.[187]

In his fascinating dissent based on public policy concerns, Judge Skelly Wright argued that the ban was unconstitutional because it infringed on the public's right to receive information about the *negative* effects of smoking under the *Banzhaf* ruling by reducing the number of anti-smoking commercials on the air.[188] Wright stated that "[t]he legislative history . . . shows that the effect of this legislation was to cut off debate on the value of cigarettes just when *Banzhaf* had made such a debate a real possibility."[189] Furthermore, with regard to commercial speech and the first amendment, he noted that "when commercial speech has involved matters of public controversy, or artistic expression, or deeply held personal beliefs, the courts have not hesitated to accord it full First Amendment protection."[190]

Even after *Virginia Pharmacy*, the broadcast ban was never judicially reexamined. A number of commentators, however, criticized Congress' method, preferring a continuation of the *Banzaf* counter speech approach as being more effective in disseminating anti-smoking information.[191] There was some merit to this argument. Following the broadcast ban, the tobacco industry was able to shift its media focus and increase its print exposure without facing a corresponding Fairness Doctrine counter speech threat.[192] This was coupled with a significant decrease in the number of anti-smoking advertisements in the broadcast media.[193]

However, subsequent events negated this argument. In 1974, the FCC explicitly rejected any prior determination applying the Fairness Doctrine to commercial advertising, unless some "meaningful" or "substantive" discussion of public issues was

---

187 *Id.* at 585-86.

188 *Id.* at 589-90.

189 *Id.* at 590 (emphasis in orginial).

190 *Id.* at 592 (footnotes omitted).

191 *See* Hamilton, *The Demand for Cigarettes: Advertising, The Health Scare, and the Cigarette Advertising Ban*, 54 REV. ECON. & STAT. 401 (1974); Schneider, Klein & Murphy, *Governmental Regulation of Cigarette Health Information*, 24 J.L. & ECON. 575 (1981). In 1970, 1560 anti-smoking messages were broadcast. *See* Lewit, Coate & Grossman, *The Effects of Government Regulation on Teenage Smoking*, 24 J.L. & ECON. 545, 546 (1981).

192 In 1970, the tobacco industry spent $217.4 million on broadcast advertising ($205 million of which was on television) and $64.2 million on newspaper and magazine advertisements. In 1987, the latter amount increased to $412 million. Outdoor advertisements, such as billboards, increased from $7.3 million in 1970 to almost $270 million in 1987. *See* 1987 FTC Report, *supra* note 6, at 19, 26-27.

193 *See* Garrison, *supra* note 174, at 180.

present.[194] In 1987, the FCC abandoned the Fairness Doctrine, concluding that it no longer served the public interest and violated broadcasters' first amendment rights.[195] If cigarette advertising had not been banned, it would now be broadcast with no obligation to run anti-smoking advertisements. Since there have been no restrictions on tobacco advertisements in the print media, no cases of first amendment limitations on the subject have been reported.

C. *New Opportunities for Regulation*

In the last decade, public attitudes regarding the social acceptability of smoking have changed, and many jurisdictions have passed laws banning or limiting smoking in public places.[196] However, the tobacco industry continues to spend billions of dollars on print media advertisements. Federal Trade Commission figures show that $2.58 billion was spent in 1987 for tobacco advertising and promotions,[197] as compared to $1.24 billion in 1980[198] and $314.7 million in 1970,[199] despite (or more likely due to) a decline in domestic sales since 1981.[200] Newspaper and magazine advertisements account for about one-sixth of the 1987 total, or about $412 million.[201] as compared to $64.2 million in 1970.[202]

As a response to *Fox*, which no longer requires the courts to apply the "least restrictive means" test when regulating commercial speech, a number of limitations on tobacco advertisements in the print media have been proposed in Congress and should pass constitutional muster. The most promising bills would specifically prohibit the use of advertisements for tobacco products using "human likenesses, models, slogans, scenes or colors;" instead requiring "tombstone" advertisements essentially limited

---

194 *See In re* Fairness Doctrine, 48 F.C.C.2d 1, 26, 30 Rad. Reg. 2d (P & F) 1261, 1295 (1974).

195 *In re* Complaint of Syracuse Peace Council, 2 FCC Rcd. 5043, 63 Rad. Reg. 2d (P & F) 541 (1987), *aff'd sub nom.* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 717 (1990).

196 *See* MASS. ANN. LAWS ch. 111, § 72 (Law. Co-op. 1990); MICH. COMP. LAWS § 333.12603 (1990); N.Y. PUB. HEALTH LAW § 1399 (Consol. 1990); CONN. GEN. STAT. § 1-216 (1989); FLA. STAT. § 386.204 (1989); N.H. REV. STAT. ANN. § 155.46 (1989); N.J. STAT. ANN. § 26.30-40 (West 1989); TEX. PENAL CODE ANN. § 48.01 (Vernon 1989).

197 *See* 1987 FTC Report, *supra* note 6, at 26.

198 *Id.* at 27.

199 *Id.*

200 *Id.* at 26-27.

201 *Id.* at 26.

202 *Id.* at 27.

to identifying the brand.[203] The goals of the legislation are to "restrict tobacco manufacturers efforts to influence teenagers with images that link smoking with a successful, healthy, and active lifestyle . . . . [By not] placing new restrictions on what a manufacturer can say in ads,. . . [t]his kind of limited ad ban addresses the constitutional concerns raised by critics. . . ."[204]

Because the tobacco industry often skirts the broadcast ban by posting billboards or signs in sports stadiums throughout the country, the proposed legislation would also prohibit tobacco product advertising and sponsorship in any location where sporting events occur.[205] In addition, the proposed legislation would bar the distribution of free samples or discount coupons and prohibit tobacco manufacturers from placing, for a fee, a tobacco product in movies, television shows, or other forms of entertainment. The legislation would also prohibit placement of brand name logos or symbols on any toys used by children under the age of eighteen.[206]

Although the bills would not restrict the textual content, they would greatly reduce the allure of many of these ads, which frequently feature attractive men and women in seductive or athletic poses. The key to these proposals is the "tombstone" requirement which would prohibit the use of human models or their likenesses in any tobacco advertisement or on any product package, and which would require that only a neutral white background and black lettering be used.[207] If enacted, such commu-

---

[203] *See* H.R. 1493, 101st Cong., 1st Sess. (1989) ("The Children's Health Protection Act" sponsored by Rep. Mike Synar) [hereinafter H.R. 1493]; *see also* H.R. 1250, 101st Cong., 1st Sess. [hereinafter H.R. 1250] (sponsored by Rep. Thomas Luken).

[204] Synar Takes Aim At Tobacco Ads Aimed At Kids, News Release of Rep. Michael Synar, March 16, 1989, at 1-2 [hereinafter News Release] (describing H.R. 1493).

[205] Twenty-two of the 24 major league baseball parks display cigarette advertisements—signs that often become part of the television transmission of a game. *See* J. DeParle, *Warning: Sports Stars May be Hazardous to Your Health*, WASH. MONTHLY, Sept. 1989, at 36. For example, "[t]he camera near the visiting team dugout at Shea Stadium . . . [in New York], which is used to capture men leading off first base, frames the player with the Marlboro sign in left-center." *Id. See also* Conrad, *Sending the Wrong Signal at Shea Stadium*, Letters to the Editor, N.Y. Times, July 22, 1990, § 3 (Business), at 13, col. 3; Conrad, *Ban on Cigarette Ads Protects the Young*, Letters to the Editor, N.Y. Times, Nov. 8, 1990, at A34, col. 4. Sponsorship of sporting events, such as the Virginia Slims tennis tournament or the Marlboro Cup horse race, gives these companies added exposure without spending a cent for television advertising. *Id.* If the new brand is also the name of a corporation in existence, it is permissible to use it in the sponsorship of an event. *See* H.R. 1250, *supra* note 203, at § 3(b)(2)(D).

[206] *See* H.R. 1493, *supra* note 203, at 6-8.

[207] *See id.* at 6; H.R. 1250, *supra* note 203, at 6. *See also* H.R. 5041, 101st Cong., 2d Sess. [hereinafter H.R. 5041] (sponsored by Rep. Henry A. Waxman).

In 1985, the U.S. health care system spent an estimated $22 billion to treat smoking-related diseases, while lost productivity costs due to smoking-related illnesses and premature deaths were $43 billion. H.R. 1493, *supra* note 203, at 3; *see* H.R. 5041, *supra*.

nications would look more like the "tombstones" that one finds on advertisements for securities—enough to give the reader basic information about the product, but not so much as to entice younger members of the audience to utilize it. Instead of the "Marlboro Man" and the svelte Virginia Slims models, all that would grace the print pages would be a stark illustration of a cigarette package and the brand name.

Under the revised *Central Hudson* test enunciated in *Fox*, such legislation would survive a constitutional challenge. There is no question that the state has a substantial interest in curbing smoking, given the significant health risks and medical costs associated with the habit.[208] Such a regulation would directly advance the state's interests by counteracting the allure of smoking that is fostered by advertisements geared toward young people and sports fans who frequently see cigarette logos on stadium billboards. It is argued that the "suggestive images in tobacco ads linking smoking to a successful, healthy, and active lifestyle have the most influence on children, . . . [since] one-half of all high school seniors who have ever smoked did so by the eighth grade."[209]

Finally, the restriction would pass the *Fox* interpretation of the fourth element of the *Central Hudson* test by being "not more extensive than is necessary"[210] to accomplish the law's stated purpose. Unlike the complete ban on gambling advertising allowed in *Posadas*,[211] this type of restriction would not ban tobacco advertising, but would rather limit the types of images it can convey. While it is possible to come up with even more limiting restrictions—such as limiting tobacco product ads in college newspapers or college editions of magazines—under *Fox*'s less onerous standards,[212] the "tombstone" proposal would be upheld as more effective.

Of course, media interests are not happy with these proposed restrictions.[213] But the proposals benefit the American

---

208 *See supra* notes 175, 207 and accompanying text. It is estimated that every year one million people die from cigarette-related diseases worldwide, of which 350,000 die in the United States. Cigarette-associated diseases drastically shorten the normal life span and costs the United States $65 billion in medical care and lost productivity costs. Blasi & Monaghan, *The First Amendment and Cigarette Advertising*, 256 J. A.M.A. 502, 502 (1986) [hereinafter Blasi & Monaghan].

209 *See* News Release, *supra* note 204, at 1.

210 Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y., 447 U.S. 557, 566 (1980).

211 *See supra* notes 100-120 and accompanying text.

212 "[T]he reason of the matter requires something short of a least-restrictive-means standard." Board of Trustees of The State Univ. of New York v. Fox, 109 S. Ct. 3028, 3033 (1989).

213 *See generally* Rasky, *For Tobacco's Lobbyists, No Nice Days at the Office*, N.Y. Times, Feb.

public, who continue to pay enormous physical and monetary costs for tobacco consumption, resulting in thousands of deaths and the loss of billions of dollars each year.

The question remains whether these limitations go far enough to attain former Surgeon General C. Everett Koop's goal of a smoke-free society.[214] A complete ban was advocated by the American Medical Association and some members of Congress.[215] Scholarly research has suggested that a ban would be constitutional.[216] In addition, *Posadas* and *Fox* have made governmental regulation of commercial speech more likely to withstand constitutional attack, making it possible for a complete ban to fulfill the *Central Hudson* requirements.

Prior to these cases, the strongest constitutional argument for the ban was that commercial advertising was outside the realm of "speech" protected by the first amendment, due to its false and deceptive nature.[217] While superficially appealing, this argument is legally problematic. There is no statutory definition of "false" or "deceptive" in the Federal Trade Commission Act or in its legislative history.[218] The present "working definition" promulgated by the Federal Trade Commission ("FTC") in the early 1980s does little to clarify matters, since it requires that the deceptive advertisements be "likely" to mislead and is material only when the advertisements actually cause injury.[219]

25, 1990, § 4 (Week In Review), at 4, col. 3; Miller & Levin, *Smoking Critics Seek Sweeping Restrictions on Ads for Cigarettes; Tobacco*, L.A. Times, June 15, 1990, at D1 (Business), col. 6; Miller, *White House Backs Plan to Curb Cigarette Marketing*, L.A. Times, July 13, 1990, at A39, col. 1.

214 *See* Koop, *A Parting Shot at Tobacco Ads*, 262 J. A.M.A. 2894 (1989).

215 *See A.M.A. Votes to Seek Total Ban, supra* note 170, at A1, col. 4. The A.M.A. proposal would ban the promotion and advertising of all tobacco products. In Congress, Rep. Synar proposed a bill to ban the promotion of such products in 1986. H.R. 4972, 99th Cong., 2d Sess., 132 CONG. REC. H3481 (daily ed. June 10, 1986). Although he stated that the goal of a total ad ban "has not changed," Rep. Synar chose not to re-introduce this bill in subsequent congressional sessions and instead introduced the "tombstone" advertisement bill. *See supra* notes 203-07 and accompanying text; News Release, *supra* note 204, at 3.

216 *See* Blasi & Monaghan, *supra* note 208.

217 *Id.* at 504.

> Indeed there is a kind of fraud, as courts of equity have long perceived, in clinging to a benefit which is the product of misrepresentation, however innocently made. That is the respondents' plight today, no matter what their motives may have been when they began. They must extricate themselves from it by purging their business methods of a capacity to deceive.

FTC v. Algoma Lumber Co., 291 U.S. 67, 81 (1933) (citations omitted).

218 *See* 15 U.S.C. §§ 45, 52 (1988). *See also* D. GILMOR & J. BARRON, MASS COMMUNICATION LAW 617 (4th ed. 1984).

219 The test specifically requires that the advertisement should be "likely" to mislead the "reasonable" consumer and the deceptiveness should be held "material" only when actual consumer injury occurs, as opposed to when an advertising claim merely can "af-

It can be argued that the depiction of healthy young people in sporting activities creates a less than truthful image about the adverse health consequences of tobacco products. It would be difficult, however, to show that *all* such advertisements would fit into this definition. What about a picture of the cigarette package, with the words "Smoke Kool Cigarettes"? Such a statement could be false and deceptive to the average consumer, since there is a government-mandated warning on the package, but it would not be practical for an individual smoker to have to prove specific injury, since illnesses related to smoking can take years to develop.[220]

In light of *Fox*, it is better to approach the ban under the revised *Central Hudson* test. Enough data exists to establish the link between advertising and smoking, making the government's interest in preventing the devastating health consequences of tobacco usage unquestionable. A ban on tobacco advertising could "directly advance" the government's interests by preventing young people from being tempted by alluring advertisements to start smoking.[221]

The primary issue is whether a ban would be more restrictive than necessary to fulfill the legislature's goals. Arguably, the insidious dangers of smoking, the tremendous volume of print advertising over the last two decades,[222] and the failure to significantly decrease the numbers of young people who start smoking,[223] mandate the conclusion that a complete ban is the only effective way to achieve the government's goal of eliminating tobacco smoking.

Another factor justifying a finding that a ban is not over-

---

fect detrimentally" the consumer's purchase decision. *See* Preston, *A Review of the Literature on Advertising Regulation*, CURRENT ISSUES & RES. IN ADVERTISING 298 (1988).

220 *See* Altman, *Higher Risk is Found Among Children of Smokers*, N.Y. Times, Sept. 6, 1990, at B12, col. 4.

221 *See* Blasi & Monaghan, *supra* note 208, at 508. The authors noted that studies showing a correlation between advertising expenditures and smoking are enough to demonstrate that a ban would "directly advance" the state's interests, even though these studies do not "absolutely" prove a direct link between advertising and consumption. "To demand [absolute] proof of legislative facts would render government unworkable. 'From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions.' " *Id.* (quoting Paris Adult Theater I v. Slaton, 413 U.S. 49, 61 (1973)). Professors Blasi and Monaghan anticipated the *Posadas* decision where the Court upheld a ban on the advertising of casino gambling in Puerto Rico in an analogous manner. There, the Court deferred to the reasoning of the legislature "that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised." Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 342 (1986).

222 *See supra* notes 197-202 and accompanying text.

223 *See Cigarettes and Schooling*, N.Y. Times, Dec. 26, 1989, at C11, col. 2 (new educational efforts are needed to stem flow of young people starting to smoke).

broad- and is therefore constitutional- is that it would primarily benefit teenagers. This is especially true in light of the fact that most smokers become addicted during the teenage years.[224] A truism in our legal system has been that people under a certain age are presumed to lack the capacity to engage in certain kinds of conduct, such as entering into contracts.[225] In fact, the Supreme Court long ago gave deference to regulations designed to protect young people from commercial advertising.[226] In view of the number of advertisements in the print media and the age and susceptibility of those who begin smoking, a ban could effectively limit the enticement for youngsters to start smoking.

Could a counter speech requirement applied to the print media, requiring a certain number of anti-smoking messages for every tobacco advertisement, be used instead of an outright ban? Although counter speech is an appealing concept, which could theoretically serve as an alternative to a ban, such a proposal would prove not only unworkable, but illegal. Despite the fact that such a measure was tried in the broadcast media,[227] the Supreme Court specifically rejected its application to the print media,[228] and it would seem highly unlikely that the print media industry would voluntarily agree to run such counter-advertisements.

The argument that banning the manufacture, sale, and production of tobacco products would be a more direct solution (and pose fewer constitutional problems) is similarly impractical. Although definitively declared constitutional as part of the Commerce Power,[229] a ban on cigarette and cigar manufacturing

---

224 *See supra* note 204 and accompanying text. Also, about 60% of those addicted began smoking at the age of 13 or 14. Blasi & Monaghan, *supra* note 208, at 503.

225 *See* CALAMARI & PERILLO, CONTRACTS § 8.1 (3rd ed. 1987) (asserting that while contracts of infants were once held void per se, Henry v. Root, 33 N.Y. 526, 537 (1865), they are now more often held voidable, Casey v. Kastel, 237 N.Y. 305, 311, 142 N.E. 671, 673 (1924)). *See also* Southern California Edison Co. v. Hurley, 202 F.2d 257, 265 (9th Cir. 1953) (continuing trend holding infants' contracts voidable).

226 FTC v. R.F. Keppel & Bros., 291 U.S. 304, 313 (1934).

227 *See supra* notes 180-83 and accompanying text.

228 *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). The *Tornillo* Court held unconstitutional a Florida statute that provided a right of reply, free of cost, to any candidate for public office. The Court stated that while the goals were laudable, the statute served as an impermissible limitation on the editorial discretion of the print media. *Id.* at 258. In the context of the present Article, the right of reply might be afforded anti-smoking activists in response to smoking advertisements.

229 The Commerce Power is derived from the Constitution which states: "The Congress shall have Power to . . . regulate Commerce with foreign Nations, and among the several States. . . ." U.S. CONST. art. I, § 8. Although at one time due process challenges to commerce regulation were often successful, the notion that substantive due process applies to economic legislation has been totally discredited. *See* Day Bright Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) (Missouri statute which provides that any employee

would cause tremendous enforcement problems due to the estimated fifty million Americans who would still crave a tobacco product.[230] Prohibition of alcohol, a failed social experiment in the 1920s, and the current difficulties of enforcing anti-narcotics laws,[231] illustrate the inherent problems associated with such a ban. Ironically, despite the greater constitutional protection afforded speech, a ban on production might involve more of a loss of personal liberty than a ban on advertising.[232]

Fox gives the legal imprimatur to curtail tobacco advertising. Hopefully, it will spur the government to limit advertising of such a deadly product. The stakes are high for the future health of American society. As the U.S. Surgeon General stated in the foreword to his *1979 Report on the Health Consequences of Smoking*, it "is nothing short of a national tragedy that so much death and disease are wrought by a powerful habit often taken up by unsuspecting children, lured by seductive multimillion dollar cigarette advertising campaigns."[233] To which, there is nothing else that can be added.

V. Liquor Regulations

A. *Judicial Opinion*

Alcohol restrictions have an additional legal advantage that tobacco restrictions do not: the twenty-first amendment to the Constitution permits a state to broadly regulate the delivery and use of alcoholic beverages.[234] Although courts have noted that enforcement of this amendment does not grant states the authority to abrogate individual constitutional rights, many have granted states broad authority to heavily regulate alcohol sales and advertisements.[235]

---

entitled to vote may absent himself from his employment for four hours on election days and that any employer who deducts wages for that absence is guilty of a misdemeanor, does not violate the Due Process or Equal Protection Clause of the fourteenth amendment or the Contract Clause of Article I, clause 10); Williamson v. Lee Optical, 348 U.S. 483, 488 (1955) (explicitly rejecting challenges to legislation involving health concerns).

230 *See* Blasi & Monaghan, *supra* note 208, at 504.

231 *See* Shenon, *Bush Officials Say War on Drugs in the Nation's Capital is a Failure*, N.Y. Times, April 5, 1990, at A1, col. 3.

232 *See* Blasi & Monaghan, *supra* note 208, at 504.

233 *Id.* at 509.

234 "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2. For a discussion of the scope of the twenty-first amendment's grant of state police power, see California v. LaRue, 409 U.S. 109, 114 (1972).

235 *See* Craig v. Boren, 429 U.S. 190, 206-09 (1976); Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971).

The tensions between the state's powers to regulate liquor and first amendment commercial speech rights have never been directly addressed by the Supreme Court,[236] but have been discussed by a number of lower federal courts and some state courts. Those courts have generally upheld state powers to limit advertisements. Although *Fox* would not greatly change the thrust of these decisions, it would make broader, interstate restrictions more easily justifiable in light of its reinterpretation of the fourth prong of *Central Hudson*.

The first of these cases, *Queensgate Investment Co. v. Liquor Control Commission*,[237] upheld an Ohio statute which restricted retail liquor permit holders from advertising "a price advantage for alcoholic beverage in a circular off of permit premises."[238] The court rejected the argument that the purpose of regulating the advertising in question was directed toward protecting speech, noting that, under the twenty-first amendment, the historical interest in regulating the intoxicants themselves was strong.[239] The court also held that the regulations were not "more extensive than necessary" to accomplish the goal of minimizing excessive alcohol consumption.[240] The Supreme Court refused to hear an appeal "for want of a substantial federal question."[241]

The *Queensgate* rationale strongly influenced a Tenth Circuit ruling rejecting a challenge to Oklahoma's prohibition on broad-

---

236 The Supreme Court's reversal of the Tenth Circuit's decision in Oklahoma Telecaster Ass'n v. Crisp, 699 F.2d 490, 498 (10th Cir. 1983), *rev'd sub nom.* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984), was not reversed on commercial speech grounds.

237 69 Ohio St. 2d 361, 433 N.E.2d 138, *appeal dismissed*, 459 U.S. 807 (1982).

238 *Id.* at 361, 433 N.E.2d at 139. The Ohio Administrative Code § 4301:1-1-44, at the time *Queensgate* was decided, provided in pertinent part:

> (A) As to advertising on the premises, holders of Class C, D, and G permits shall not advertise the price per bottle or drink of any alcoholic beverage, or in any manner refer to price or price advantage except within their premises and in a manner not visible from the outside of said premises.
>
> (B) Manufacturers and distributors of alcoholic beverages are permitted to advertise their products in Ohio.
>
> Holders of Class C, D, and G permits shall be authorized to advertise in newspapers of general circulation, radio and television, on billboards, calendars, in or on public conveyances and in regularly published magazines. Advertising may include the retail price of the original container or packages, but such advertising may not in any manner refer to price advantage.

69 Ohio St. 2d at 361 n.1, 433 N.E.2d at 139 n.1 (quoting OHIO ADMIN. CODE § 4301:1-1-44 (1977)). The Code has since been revised to permit exterior sign advertising visible from the outside. Advertising may include the retail price and the price advantage of alcoholic beverages, except for beer and malt beverages which are regulated separately. OHIO REV. CODE ANN. § 4301.21.1 (Page 1989).

239 *Queensgate*, 69 Ohio St. 2d at 366, 433 N.E.2d. at 142.

240 *Id.*

241 *Queensgate*, 459 U.S. 807 (1982).

casting advertisements for alcoholic beverages. The court in *Oklahoma Telecasters Association v. Crisp*[242] upheld the broadcast ban incorporated in the Oklahoma Constitution[243] by relying on the Supreme Court's dismissal in *Queensgate* as a "decision on the merits."[244] The court ruled that the constitutional questions regarding the power of states, acting pursuant to the twenty-first amendment, to regulate "some . . . forms of liquor advertising with the goal of decreasing the consumption and abuse of alcoholic beverages,"[245] were the same in both cases. The *Crisp* court balanced the first amendment interests of the broadcasters against the state's regulatory powers under the twenty-first amendment.[246]

The Tenth Circuit sided with the state of Oklahoma. Noting that the "broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals,"[247] the court concluded that the goals of the state regulations must be taken into account when analyzing commercial speech protection.[248]

In its analysis, the *Crisp* court applied the four-prong *Central Hudson* test to the state's regulatory power granted by the twenty-first amendment. The state easily satisfied the first prong requiring legality, and the second requiring that commercial speech not be misleading. Regarding the third prong, the court noted the "exceptionally strong" state interests and concluded that they were "directly advanced" by the ban, adding that it need not have been the "best means" the state could have used.[249] Applying the fourth prong of the *Central Hudson* test, the court relied on *Metromedia* to determine that the ban was not more extensive than necessary to achieve the state's goal.[250] The opinion added that although cable operators "are placed in a difficult position . . . ,

---

242 699 F.2d 490 (10th Cir. 1983), *rev'd sub nom.* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984).

243 The Oklahoma Constitution states, "It shall be unlawful for any person, firm, or corporation to advertise the sale of alcoholic beverages within the State of Oklahoma, except by a sign at retail package stores bearing the words 'Retail Alcoholic Liquor Store.'" OKLA. CONST. art. XXVIII, § 5 (1989).

244 *Crisp*, 699 F.2d at 495. "[T]he Supreme Court has consistently stated that summary dispositions . . . for want of a substantial federal question are decisions on the merits and are binding on the lower federal courts." *Id.*

245 *Id.* at 497.

246 *Id.* at 498.

247 *Id.* (quoting California v. LaRue, 409 U.S. 109, 114 (1972)).

248 *Crisp*, 699 F.2d at 498.

249 *Id.* at 500.

250 *Id* at 501-02. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); *supra* notes 75-77 and accompanying text.

nothing in the First Amendment prohibits this result."[251]

Although the United States Supreme Court reversed the Tenth Circuit's opinion on other grounds,[252] subsequent lower courts have relied on the holdings of *Queensgate* and *Crisp* to uphold bans on price and sign advertising. A Mississippi ban on liquor advertisements was upheld by the Fifth Circuit in *Dunagin v. City of Oxford, Mississippi*.[253] The court relied on the *Crisp* court's strong construction of the twenty-first amendment state regulatory powers, and upheld the effective ban on hard liquor or wine advertising on billboards and local newspapers.[254] Applying *Central Hudson*, the *Dunagin* court concluded that the ban satisfied the four standards, despite the testimony of experts in the lower court to the contrary.[255] This approach, which gives deference to the legislature rather than to experts in making findings of "direct advancement," was similarly used by the majority to uphold the gambling ban in *Posadas*.[256]

Recent decisions have upheld bans on price advertising,[257]

---

[251] *Crisp*, 699 F.2d at 502.

[252] Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984). The Supreme Court concluded that the Oklahoma statute was pre-empted by the FCC's "distant signal" rules which require rebroadcast of the advertisements as part of the programs containing them. The Court limited the twenty-first amendment's power to impose restrictions on interstate commerce that, without the amendment, would have the effect of violating the Commerce Clause. *Id.* at 711-13.

[253] 718 F.2d 738 (5th Cir. 1983). *Dunagin* also involved an appeal of a companion case, Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Comm'n, 539 F. Supp. 817 (S.D. Miss. 1982) in which the district court invalidated a state regulation banning liquor advertisements which originate within the state. The lower court in *Dunagin* found the regulation constitutional. Dunagin v. City of Oxford, 489 F. Supp. 763 (N.D. Miss. 1980).

[254] *Dunagin*, 718 F.2d at 753.

[255] Interestingly, the majority was skeptical regarding the degree to which an appellate court should defer to a trial court's findings as to the "latest truths" in the social sciences. "There are limits to which important constitutional questions should hinge on the views of social scientists who testify as experts at trial. . . . The social sciences play an important role in many fields, . . . but other unscientific values, interests and beliefs are transcendent." *Id.* at 748 n.8. The court then noted that the Supreme Court's decisions in recent commercial speech cases did not "rely heavily on fact findings of the trial court." *Id.* at 749 n.8.

[256] Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 344 (1986) ("We think it is up to the legislature to decide whether or not such a 'counter-speech' policy would be as effective in reducing the demand for casino gambling as a restriction on advertising."). *See also* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 509 (1981) ("We likewise hesitate to disagree with the accumulated, commonsense judgments of local lawmakers . . . that billboards are real and substantial hazards to traffic safety.").

[257] *See* S & S Liquor Mart, Inc. v. Pastore, 497 A.2d 729 (R.I. 1985) (prohibition on price advertising by liquor stores upheld on the ground that the prohibition directly advanced the state's interests in reducing alcohol consumption); Rhode Island Liquor Stores Ass'n v. Evening Call Pub. Co., 497 A.2d 331 (R.I. 1985) (prohibition against local media advertising alcohol prices upheld on the ground that the prohibition directly advanced the state's interest in reducing alcohol consumption and in deference to the judgment of the legislature).

with one notable exception. *Michigan Beer & Wine Wholesalers Association v. Attorney General*[258] rejected prohibitions on "truthful"[259] price advertising for beer as "impermissible restraints on the freedom of commercial speech in violation of the First and Fourteenth Amendments of the United States Constitution."[260] The court was not convinced that the ban directly advanced the interests of temperance, and distinguished its decision from that in *Queensgate*, which involved "less restrictive" regulations.[261]

B. *The Possibility of Greater Regulation*

As stated earlier, *Fox*'s easing of the fourth prong of *Central Hudson* would not appreciably change the power of states to enforce restrictions on liquor advertising, because states already have wide latitude in restricting such advertising. However, *Fox* may have an effect on federal legislation restricting advertisements either in packaging or in the broadcast media.

As in the case of tobacco products, alcohol use can have adverse health consequences, including deaths from certain types of cancers and cirrhosis of the liver. It also causes automobile accidents resulting in injuries and deaths.[262] On a national level, in 1989, approximately $685 million was spent on alcohol advertising in the broadcast media, and $302 million in the print media.[263]

Federal regulation of liquor advertising is rather limited, and unlike cigarette advertising, alcohol advertising is not barred from the airways. The Bureau of Alcohol, Tobacco and Firearms ("BATF") has overlapping jurisdiction with the FTC over alcohol advertising. The BATF's responsibilities include regulating "health warning statements [and] the prevention of commercial

---

258 142 Mich. App. 294, 370 N.W.2d 328 (Mich. Ct. App. 1985), *cert. denied*, 479 U.S. 939 (1986).

259 *Id.* at 302, 370 N.W.2d at 332.

260 *Id.* at 312, 370 N.W.2d at 337. The Michigan Court of Appeals reversed the lower court's grant of summary judgment, and held that the state Attorney General was qualified and correct in rendering his opinion that regulations restricting the advertising of liquor prices were unconstitutional. *Id.* at 298, 370 N.W.2d at 330.

261 *Id.* at 305-06, 370 N.W.2d at 333-34.

262 *See Alcohol Tied to the Deaths of 105,095 in U.S. in '87*, N.Y. Times, March 27, 1990, at C10, col. 4. The National Center for Disease Control ("CDC") reported that unintentional injuries related to alcohol killed 30,205 Americans, accounting for 29% of all alcohol-related deaths. Alcoholic cirrhosis of the liver and other digestive diseases killed an additional 19,556 people. It is further estimated that about 25,000 Americans die on the road each year due to drunk driving-related accidents. The chief researcher of the CDC report stated that 300 people a day die from alcohol-related deaths. *See also* Comment, *Alcoholic Beverage Advertising on the Airwaves: Alternatives to a Ban or Counteradvertising*, 34 UCLA L. REV. 1139, 1142 n.6 (1987) [hereinafter *Advertising on the Airwaves*].

263 LEADING NATIONAL ADVERTISERS, INC., 1989 AD $ SUMMARY § IV (1989).

bribery [and] consumer deception . . . in the beverage alcohol industry."[264] The FTC has the authority to sanction any alcoholic beverage company engaged in deceptive and unfair presentations.[265] Only the FTC has jurisdiction over broadcast advertising.[266] Industry codes, which generally bar hard liquor from being advertised on radio and television[267] and prohibit beer advertisements from stressing "overindulgence," also serve to "regulate" such commercial speech.[268] Additionally, the code of the National Association of Broadcasters ("NAB") prohibits hard liquor advertisements by its members and prohibits on-camera drinking in commercials.[269]

Past attempts to label alcohol advertisements as "false and deceptive" because they encourage alcohol abuse have been denied.[270] Additionally, claims that the Fairness Doctrine would apply to those ads over the broadcast media similarly have been rejected.[271] However, in recent years, many people in and out of government have begun to advocate more restrictions on liquor commercials. In 1985, a bill to require equal time for health and safety messages about health risks associated with drinking was introduced unsuccessfully.[272] More recently, legislation was in-

---

264 OFFICE OF THE FEDERAL REGISTER, THE UNITED STATES GOVERNMENT MANUAL 1990/91, at 485.

265 *See* 15 U.S.C. §§ 45-58 (1988).

266 For a more thorough explanation of the confusing and overlapping jurisdictions of the BATF and the FTC, see Note, *We Can Share the Women, We Can Share the Wine: The Regulation of Alcohol Advertising on Television*, 58 S. CAL. L. REV. 1107, 1110-1113 (1985).

267 *Media Images of Alcohol: The Effects of Advertising and Other Media on Alcohol Abuse, 1976: Hearings Before the Subcomm. on Alcoholism and Narcotics of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess., 210, 214-15 (1976) (statement of Sam D. Chilcote, Jr., Executive Vice President, Distilled Spirits Council of the United States, Inc.).

268 *Advertising on the Airwaves, supra* note 262, at 1146 n.30. The United States Brewing Association Basic Guidelines for Beer Advertising also prohibits advertisements from portraying "sexual passion, promiscuity, or any other amorous activity as a consequence of drinking beer." *Beer and Wine Advertising: Impact of the Electronic Media: Hearing Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 443-48 (1985) [hereinafter *Hearing*]. Whether beer ads presently lack sexual passion is a matter of great debate.

269 *See Excerpts from the Television Code National Association of Broadcasters Twenty-First Edition, January 1980*, 49 ANTITRUST L.J. 811, 813 (1980).

270 In 1985, the FTC denied a petition seeking restrictions on alcohol advertisements for lack of evidence proving that alcohol advertising was likely to lead to abuse. *Hearing, supra* note 268, at 604-05 (statement of Maryland-District of Columbia-Delaware Broadcasters Association, Inc.).

271 *See* 1974 Fairness Report, 48 F.C.C.2d 1, 26; *see also supra* notes 180-183 and accompanying text.

272 H.R. 2526, 99th Cong., 1st Sess., 131 CONG. REC. H3264 (1985) (introduced by Rep. John Sieberling). The bill did not seek a ban on alcohol advertising, but sought "[t]o amend the Communications Act of 1934 to require that . . . equivalent time . . . be provided for public service . . . [advertising] regarding alcohol consumption and misuse." *Id.* The bill never got out of the committee. 2 Cong. Index (CCH) 28,292 (1985).

troduced to mandate rotating health warning labels on all beer, wine, and liquor advertising.[273]

Former Surgeon General Koop advocated greater restrictions to combat the effects of drunk driving. His proposals included: counter-advertising of public service anti-drinking messages; the elimination of tax deductions for alcohol advertisements and promotions; the elimination of the use of celebrities who appeal to young people; warnings on all broadcast and print advertisements; and the banning of sponsorship of athletic events by beer and wine companies.[274] Similar concerns about the effect of commercials and drunk driving have been echoed by the present Secretary of the Department of Health and Human Services.[275]

Even on the industry level, the increasing concern about the health risks associated with alcohol consumption prompted the National Collegiate Athletic Association ("NCAA") to limit the time permitted for beer commercials to 60 seconds per hour, coupled with an increase in the number of "moderation" messages.[276]

Unless a particular advertisement violates industry code or is blatantly untrue, it is protected commercial speech subject to the *Central Hudson* standards. But all these proposals, if enacted into law, would stand a very good chance of passing constitutional scrutiny. As with tobacco products, the state interest for restrictions is strong. The regulations would directly advance the state's interests in preventing alcohol abuse and drunk driving, despite the lack of conclusive studies and the FTC opinion that there is no connection between alcohol advertising and the incidence of alcohol abuse,[277] a point noted by the courts in both *Dunagin* and *Posadas*.[278] Finally, with the aid of *Fox*, none of these

---

See Advertising on the Airwaves, *supra* note 262, at 1178 n.215; *see also Historical Overview of Activity on Alcohol Advertising*, News Release of Center for Science in the Public Interest, Dec. 1989 [hereinafter *Historical Overview*].

273 Gatty, *College Alchohol Ads Draw Congressional Fire*, BEVERAGE INDUSTRY, January 1990. *See* Kent, *Whither the Supreme Court on Commercial Speech?*, 204 N.Y.L.J. 3, col. 1 (Aug. 24, 1990).

274 *See Koop Urges Ad Restrictions, More Taxes to Cut Drinking*, N.Y. Times, June 1, 1989, at A20, col. 1.

275 *See Historical Overview*, *supra* note 272, at 1.

276 *See Billion-Dollar Basketball for CBS*, Broadcasting, Nov. 27, 1989, at 36-37.

277 *See* Kohn & Smart, *The Impact of Television Advertising on Alcohol Consumption: An Experiment*, 4 J. STUD. ALCOHOL 295, 299 (1984) (authors claimed no scientific evidence to link advertising with the rate of alcohol abuse); C. ATKIN & M. BLOCK, CONTENT AND EFFECTS OF ALCOHOL ADVERTISING REPORT OF MICHIGAN STATE UNIVERSITY STUDY (1981) (prepared for Bureau of Alcohol, Tobacco and Firearms) (study established a causal connection between advertising and abuse).

278 *See supra* notes 253-56 and accompanying text.

proposals are more extensive than necessary to achieve the desired ends, especially due to the history of state regulation of both liquor and liquor advertising under the twenty-first amendment.

The most interesting idea is the counter speech requirement mandating a required number of anti-drinking messages as a response to liquor advertisements. Because the FCC decided the Fairness Doctrine would not apply to commercial advertisements, Congress would have to enact legislation to implement such a requirement. If it should decide to do so, which is not likely any time soon due to the opposition of broadcasters and advertisers,[279] such legislation would not be considered overbroad under *Fox* due to the serious and legitimate health concerns related to alcohol consumption.[280] Even if a total ban on alcohol advertising were enacted, it conceivably could withstand constitutional scrutiny under *Fox*'s easing of the fourth prong of *Central Hudson* for the same reasons.

Although alcohol restrictions are more prevalent on the state level, Congress has been far slower in proposing national restrictions on the alcohol industry than on the tobacco industry. As of this date, no serious restrictions have been proposed. Such proposals may have to wait until tobacco restrictions are enacted and upheld by the courts.

VI. CONCLUSION

After a period of vague and inconsistent interpretation of a newly-established constitutional right, *Board of Trustees of The State University of New York v. Fox* has created a reasonable and practical standard by which to evaluate commercial speech. First amendment protection still remains, but commercial speech cannot, and should not, be equated with that of political or artistic speech and should therefore not receive the same degree of protection. Advertisements that are truthful and accurate have some protection, but the states achieved a reinvigorated power to regulate those kinds of truthful commercial speech that can adversely affect the health, safety, and well-being of the American public. At a time of increasing health awareness, concerns about the effects of tobacco and liquor advertising on the young, and the multi-billion dollar toll that tobacco products and alcoholic beverages impose upon American society, it becomes not only desirable, but imper-

---

279 *See supra* note 213 and accompanying text.
280 *See supra* note 262 and accompanying text.

ative that the government secure the right to limit the damage caused by these products.

With its easing of the burden of proof, *Fox* gives the legislature the right to take action. If Congress and the President accept the challenge to stop or limit Madison Avenue from hustling such harmful wares, *Fox* will help safeguard these measures from constitutional attack.