44 LIQUORMART: UNANIMITY WITHOUT CONSENSUS

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On May 13, 1996 the Supreme Court handed down a unanimous ruling on commercial speech in *44 Liquormart, Inc. and Peoples Super Liquor Stores, Inc. Petitioners v. Rhode Island and Rhode Island Liquor Stores Association*. The decision reinforced a ruling from the previous term in which the Court struck down a ban on the publishing of alcohol content in a legal product. Reflecting on that decision, Justice Stevens wrote in *44 Liquormart*:

> *"The mere fact that messages propose a commercial transaction does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them."*

While the Court achieved majorities on the issue of commercial speech earlier, it reversed them on occasion depending on the specific case at hand. For example, in the *Central Hudson* case (see below) in 1980, the Court protected commercial speech but in the *Posadas* case six years later, it upheld government restrictions on advertising for a legal product. Thus, when the Court reached a unanimous decision in *44 Liquormart*, it came as a surprise.

Rhetorical analysis reveals that the apparent unanimity masks deep divisions among the Justices as to which rationale they embraced to defend their opinions. The Court is far from united on the status of commercial speech, and has crafted a tenuous compromise which asserts that commercial speech does not enjoy the same protection as non-commercial speech. However, to impose restrictions on commercial speech, governments must meet the rigorous tests developed in the *Central Hudson* case as refined in several cases that followed.

This study demonstrates that in the process of cobbling this decision together, the Court failed to provide a coherent framework for deciding commercial speech cases. One week after the decision, the Supreme Court vacated the judgment in *Pennsylvania State Police v. Hospitality Investments of Philadelphia, Inc*. which had upheld a state's right to ban alcohol beverage price advertising using the Twenty-First Amendment as a rationale. On the same day, May 20, 1996, the Court remanded *Anheuser-Busch, Inc. v. Schmoke* which had upheld a ban on outdoor advertising of liquor in Baltimore. In each case, the Supreme Court asked the lower court to re-examine its ruling in light of *44 Liquormart*. However, in a stunning reversal, when both cases were returned to the Court without a change in the prior ruling, the Supreme Court denied certiorari, sowing seeds of confusion about its intent in *44 Liquormart*.

This analysis attempts to untangle the tale by revealing the different rhetorical perspectives of the nine Justices. Some Justices delighted in repudiating the *Posadas* case, which had reversed a trend that began in 1975 giving commercial speech parity with other forms of protected speech. Some Justices embraced the precept of original intent, which many advocates of First Amendment rights for commercial speakers had invoked in briefs, amicus and otherwise, and in scholarly research. Some Justices accepted the empirical argument that advertising does not increase the size of a market for a product; rather, it redistributes those already in a product market among the various brand names. Thus, limiting advertising does not necessarily limit product use.

The case is significant not only because of its apparent unanimity or lack thereof, but because it concerns the advertising of alcohol, which has come under fire lately because certain liquor manufacturers have decided to abandon their self-imposed ban on advertising of distilled spirits on broadcast media. The ban was established in 1936 for radio and in 1948 for television. On June 13, 1996 Representative Joseph Kennedy (D-Mass.), a longtime foe of beer and wine advertising on broadcast media, introduced legislation to codify the ban on advertising of distilled spirits. Two days later the President endorsed the ban in his weekly radio address. By 1997 ten states had petitioned the Federal Communications Commission to impose a ban on the advertising of distilled liquor.

This study examines the *44 Liquormart* case by first briefly reviewing the history of significant Court rulings on commercial speech. Second, it analyzes the various configurations of Justices in the case. Third, it concludes by suggesting that since no clear consensus has emerged, confusion will continue to reign unless a framework, such as the one suggested by Justice Brennan in *Central Hudson*, can be put in place.

HISTORY OF COMMERCIAL SPEECH CASES

Corporate speech concerning matters of public importance is protected in the same way that political, non-commercial speech is. To restrict corporate speech the government must demonstrate that the restriction advances an overriding government interest. For example, editorial advertisements concerning public issues are protected by the First Amendment regardless of whether the comments promote the economic interest of the corporate speaker. *Pacific Gas and Electric v. Public Utility Commission of California* considered whether a state regulatory agency could require a privately owned utility to include the speech of third parties, with which it disagreed, in the utility's monthly billing

envelopes. Pacific Gas and Electric (PG&E) distributed a newsletter to its customers in its billing envelopes. The newsletter included political editorials, feature articles, tips on energy conservation, and information on rates and services. In 1980, a group petitioned the State Public Utility Commission arguing that PG&E should not be allowed to distribute political editorials at the ratepayer's expense. The California PUC ruled that any "extra" envelope space was ratepayer property, and it required PG&E to allow outside groups to use the extra space to raise funds and disseminate counter editorials. PG&E believed that its First Amendment rights had been violated and appealed to the U.S. Supreme Court. The Court held that speech does not lose its protection because of the corporate identity of the speaker. PG&E had "the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents."

Furthermore, states and the federal government are not allowed to suppress commercial speech in invidious ways. For example, *City of Los Angeles v. Taxpayers for Vincent* (1984) states that attempts to suppress speech because of its content—in this case the mentioning of a tobacco product—are unconstitutional. The government may not regulate speech in a way that is prejudicial to some ideas at the expense of others; regulations must be content neutral. Since the 1973 decision in *Committee for Public Education & Religious Liberty v. Nyquist*, the Court has held that it does not matter whether the financial burden imposed on the targeted speech is direct or indirect. The most recent re-affirmation of this position came in *R.A.V. v. St. Paul* (1992) which ruled that a law is unconstitutional on its face if it prohibits otherwise permitted speech solely on the basis of the content of that speech.

Unprotected Commercial Speech

The Supreme Court has been less clear when it comes to the issue restricting purely commercial speech, which is sometimes subject to government restrictions that would be unconstitutional if applied to most non-commercial speech. In 1932 in *Packer Corp. v. State of Utah*, the Supreme Court ruled that the state of Utah could restrict billboard advertisements for Chesterfield cigarettes. More importantly, in 1942, the Supreme Court gave commercial speech second class status under the First Amendment in *Valentine v. Chrestensen*. New York City's Sanitary Code explicitly provided dichotomous treatment for commercial and non-commercial speech by forbidding the distribution of commercial and business advertising material and yet permitting the distribution of handbills devoted to "information or public protest." Chrestensen's two-sided handbill consisted of both a commercial solicitation and a protest against the City Dock Department for refusing to provide wharfage facilities for his exhibit. The Court held that the purpose for affixing the protest to the handbill was to evade the prohibition of the ordinance and that "[i]f that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command." *Chrestensen* gave rise to the commercial speech doctrine, which Supreme Court retained until 1975.

In 1975 the Court departed from this bipolar approach by acknowledging that commercial speech should be accorded significantly more First Amendment protection. In *Bigelow v. Virginia*, the Supreme Court overturned the conviction of a Virginia newspaper editor who was found guilty of running advertisements for a New York abortion referral service at a time when abortions were illegal in Virginia. The Court ruled that Virginians had a right to receive the information and rejected the contention that an advertisement for abortion services was unprotected because it was commercial: "Our cases ... clearly establish that speech is not stripped of First Amendment protection merely because it appears in [commercial] form."

By rejecting the "rigid two-tier typology" of *Chrestensen*, the Court in *Bigelow* made clear that simply labeling expression as "commercial" did not end the matter. Instead, it began an inquiry into how much protection such speech is entitled, or how much regulation could be imposed by government. That inquiry is essentially a balancing test, which the Court described as "the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation."

If there were any doubts as to the viability of *Chrestensen*, they were put to rest the following year in the landmark case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*. As in *44 Liquormart*, petitioners argued that the First Amendment prohibited the State from banning advertisements of prices of legal products. The State claimed that this regulation of commercial speech was necessary to maintain high professional standards for pharmacists. The Court rejected the notion that commercial speech "is wholly outside the protection of the First Amendment..." and repudiated "the highly paternalistic view that government has complete power to suppress or regulate commercial speech." Even though the advertiser's interest is purely "economic," the Court wrote, "that hardly disqualifies him from protection under the First Amendment." The Court again recognized in *Virginia Pharmacy* that consumers had a right to receive commercial information: "[T]he particular consumer's interest in the free flow of consumer information ... may be as keen, if not keener by far, than his interest in the day's most urgent political debate."

Four years later in *Central Hudson Gas v. Public Service Commission*, the Court articulated a test for evaluating the constitutionality of restrictions on commercial speech. The first part established criteria for determining whether commercial speech was protected at all. To be entitled to protection, such speech "must concern lawful activity and not be misleading." The next three parts set standards for determining the degree of regulation permissible: First, "whether the asserted governmental interest is substantial;" second, "whether the regulation directly advances the governmental interest asserted;" and third, "whether it is not more extensive than is necessary to serve that interest."

In this case a State Public Service Commission regulation prohibited all public utility advertising that promoted the use of electricity. The state argued that this ban on commercial advertising supported the national policy favoring conservation of energy resources. In applying their test, the Supreme Court held that total suppression of public utility advertising was a restriction that was more than was necessary to promote energy conservation. In other words, commercial speech enjoys protection but a degree of regulation which is proportional to the governmental interest it promotes may be allowed if it is no more than is necessary to accomplish the task.

Given this elevation of commercial speech, the Supreme Court's decision in *Posadas v. Tourism Company of Puerto Rico* (1986) caught many constitutional scholars off guard. *Posadas* involved a challenge to the constitutionality of a statute that restricted advertising of casino gambling in the local media. In an effort to deter gambling by residents

while encouraging gambling by tourists, Puerto Rico authorized casinos to advertise their "games of chance ... through newspapers, magazines, radio, television and other publicity media outside Puerto Rico." Thus, casinos in Puerto Rico were free to advertise in outside media such as the *New York Times* or network television, but not to local inhabitants, who were by law permitted to gamble in local casinos.

After noting that the particular kind of commercial speech at issue in the case concerned a lawful activity and was neither misleading nor fraudulent, the Supreme Court applied the test it had established in *Central Hudson*. The Court found that the government of Puerto Rico had a substantial interest in reducing the demand for casino gambling by local residents because gambling tended to disrupt family units, foster prostitution, and increase local and organized crime. Writing for four other Justices, Chief Justice Rehnquist held that the restrictions on advertising directly advanced the government's interest because advertising served "to increase the demand for the product advertised." Though he claimed he was applying *Central Hudson*, he narrowed the extent of the constitutional protection accorded commercial solicitations by allowing a government to prohibit the advertising of any lawful activity as long as that government held the greater power to ban the underlying activity promoted in the advertising.

Justice Stevens, the main author of the *44 Liquormart* decision ten years later, wrote a strong dissent in *Posadas*. He found that "Puerto Rico blatantly discriminates in its punishment of speech depending on the publication, audience, and words employed." Stevens noted the irony of the Puerto Rican law which authorized the promotion of casino gambling to tourists and simultaneously prohibited advertising aimed at the local population. In Stevens' view, that "discrimination among publications, audiences, and words" violates the First Amendment.

Stevens notwithstanding, *Posadas* opened the door to a confusing set of rulings over the next decade. The major decisions to which *44 Liquormart* refers are summarized here. In *Board of Trustees of the State of New York v. Fox* (1989), the Court held for the state, reversing the appeals court in a six-to-three decision which prohibited the selling of kitchen products in a dormitory.

Although *Central Hudson* ... contained statements suggesting that government restrictions on commercial speech must constitute the least restrictive means of achieving the governmental interests asserted, those decisions have never required that the restriction be absolutely the least severe that will achieve the desired end. Rather, the decisions require only a reasonable 'fit' between the government's end and the means chosen to accomplish those ends.

This shift from "least restrictive" to "reasonable fit" leaned toward the *Posadas* standards; however, the majority added that the restrictions must be "narrowly tailored to achieve the desired objective."

In *Peel v. Attorney Registration and Disciplinary Commission of Illinois* (1990), the Court examined an Illinois commission prohibition on advertising by lawyers. Peel violated the rule by stating on his letterhead that he was a certified civil trial specialist. In a five-to-four decision, the Court held for Peel saying he could not be censured for truthful advertising: "[T]ruthful advertising related to lawful activities is entitled to First Amendment protection."

In a similar case in April of 1993, the Supreme Court ruled eight-to-one *Endenfield v. Fane* that accountants have a constitutional right to convey "truthful, non-deceptive information" about their services. Arguing that "the general rule is that the speaker and the audience, not the government, assess the value of the information presented," the Court struck down the legislation using the third part of the *Central Hudson* test, that the law must advance the government interest to a significant, material degree.

Nonetheless, in *Florida Bar v. Went For It* (1995), the Court once again shifted course by ruling that solicitation by lawyers of accident victims within thirty days of the accident was not protected speech because so many alternate ways of communicating were available. Justice O'Connor, writing for herself and Justices Scalia, Thomas, Rehnquist, and Breyer, argued that the Florida bar was empowered to protect grieving persons from "conduct that is universally regarded as deplorable and beneath common decency.... First Amendment protection, of course, is not absolute [when it comes to] pure commercial advertising..." This last sentence was clear throw back to the *Chrestensen* decision of 1942.

Dissenting, Justice Kennedy, joined by Justices Souter, Ginsberg, and Stevens, called the bar's rule "censorship pure and simple.... Under the First Amendment the public, not the state, has the right and the power to decide what ideas and information are deserving of their adherence."

On another issue relevant to commercial speech, the Court held six-to-three in *City of Cincinnati v. Discovery Network* (1993) that the city could not restrict the space available for newsracks. Distinction in time, place, and manner cannot be made on the basis of content unless that content is illegal, obscene, fighting words, or a clear and present danger. Writing for the majority, Justice Stevens issued an argument he would repeat in *44 Liquormart*:

> *[T]he city's argument attaches more importance to the distinction between commercial and non-commercial speech than our cases warrant and seriously underestimates the value of commercial speech.... In sum, the city's news rack policy is neither content-neutral nor ... 'narrowly tailored.' Thus, regardless of whether or not it leaves open ample alternative channels of communication, it cannot be justified as a legitimate time, place, or manner restriction on protected speech.*

Concurring, Justice Blackmun sought to restore the thinking of the Court from the mid-1970s: "[T]here is no reason to treat truthful commercial speech as a class that is less 'valuable' than noncommercial speech. [T]he Court should ... hold that truthful, non-coercive commercial speech concerning lawful activities is entitled to full First Amendment protection."

A related case, *City of Ladue v. Gilleo* (1994), examined a statute that was struck down by the Eighth Circuit Court of Appeals for discriminating in favor of certain messages. The ordinance in question allowed posting of some signs, but prohibited others based on the size of the sign. For example, "for sale" and "for lease" signs of any size could be posted on residential property; however, political speech was prohibited under the law if the sign exceeded a certain size. Margaret Gilleo's front window sign opposing the Gulf War violated the law. The Court ruled unanimously that a law

which was not content neutral: "It is common ground that governments may regulate the physical characteristics of signs, within reasonable bounds and absent censorial purpose.... We are confident that more temperate measures could in large part satisfy Ladue's state regulatory needs without harm to the First Amendment rights of its citizens."

Just when the Court seemed to have strung together a series of consistent decisions, the Court voted seven-to-two in *U.S. v. Edge* (1993) to uphold a law which prohibits broadcast stations in states without lotteries from broadcasting commercials for lotteries into neighboring states. Ninety percent of the listeners of WMYK (FM) in Moycock, North Carolina live in Virginia. Virginia has a lottery and WMYK accepted advertising for it. But North Carolina has no lottery and ordered the station to stop the advertising. In upholding the North Carolina law, Justice Byron White wrote, "The government has a substantial interest in supporting the policy of non-lottery states as well as not interfering with the policy of states that permit lotteries. The activity underlying the relevant advertising—gambling—implicates no constitutionally protected right; rather, it falls into a category of 'vice' activity that could be, and frequently has been, banned altogether." As in *Posadas*, the Court demonstrated a bias against gambling; as in *Red Lion* (1969), it demonstrated a bias against broadcasters. The former argument, as we shall see, was singled out by Justice Stevens in *44 Liquormart*.

44 Liquormart v. Rhode Island

This case involved two Rhode Island regulations established in 1956 which allowed the banning of advertising of beer, wine, and liquor prices and had been upheld by the State's Supreme Court in 1985. In this instance, however, they were struck down by the Federal District Court and then reinstated by the Court of Appeals. Writing for the unanimous Court, Stevens reversed the lower court, thereby striking down the Rhode Island statutes and those of ten other states. He concluded "that a state legislature does not have the broad discretion to suppress truthful, non-misleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate." Despite what the Court implied in *U.S. v Edge*, according to Stevens, there should be no vice exception to the First Amendment's protections.

The unanimity of decision, however, papers over the divisions among members of the Court on the proper rationale for their decision. Seven Justices wrote opinions which grouped together in odd ways. For example, Stevens provides an eight part opinion in which various Justices join him on various parts. Scalia, Kennedy, Souter, Thomas and Ginsburg join Parts I, II, and VII. Kennedy, Souter and Ginsburg join Part III; Kennedy and Ginsburg join Part IV. Kennedy, Souter and Ginsburg join Part V; Kennedy, Thomas and Ginsburg join Part VI. Scalia writes alone, as does Thomas; O'Connor is joined by Rehnquist, Souter, and Breyer for her opinion. Thus, there was no commanding majority of Justices in agreement on any of the concurring opinions, though there were agreements on some significant arguments. These areas' agreement will undoubtedly provide common ground for future appeals by advocates of parity for commercial speech.

For example, five Justices joined Justices Stevens in Part VII of his decision which analyzed the Twenty-First Amendment and the power it gave to the states to regulate the sale of alcohol. Though the states had the right to regulate the sale of alcohol, they did not have the right to regulate its advertising once it was made available through commercial sales. "Accordingly," Stevens concluded Part VII, "we now hold that the Twenty-First Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment. The Twenty-First Amendment, therefore, cannot save Rhode Island's ban on liquor price advertising." This agreement specifically reversed the precedent established in *California v. La Rue*.

In another instance of apparent consensus, the Justices endorsed past cases on commercial speech to buttress their opinions. A count of citations reveals that *Central Hudson* was the most popular with Virginia Pharmacy, Edenfield, SUNY, Discovery, and Bigelow following in descending order. That makes an important rhetorical statement for those who will argue cases before the Court in the future.

At the other end of the scale, the Justices put a stake in the heart of *Posadas*; the seven Justices who wrote opinions all commented on the wrong-headedness of that decision. Relishing his vindication and taking dead aim at Rehnquist's majority decision a decade earlier, Stevens wrote:

> *[W]e are now persuaded that* Posadas *erroneously performed the First Amendment analysis.*... Posadas *clearly erred in concluding that it was 'up to the legislature' to chose suppression over a less speech-restrictive policy. The* Posadas *majority's conclusion can not be reconciled with the unbroken line of prior cases striking down similarly broad regulations on truthful, non-misleading advertising when non-speech-related alternatives were available.... [W]e reject the assumption that words are necessarily less vital to freedom than actions, or that logic somehow proves that the power to prohibit an activity is necessarily 'greater' than the power to suppress speech about it.*

This last sentence is direct rewording of Rehnquist's most tortured argument in the *Posadas* decision: that those empowered to ban the greater activity of conduct were also empowered to ban the lesser activity of advertising such conduct. Stevens argued that "banning speech may" be more intrusive "than banning conduct."

In her opinion, Justice O'Connor was gentler but still firm in the position that the Court erred in *Posadas*. She claimed that since *Posadas*, the Court is much less likely to accept the State's asserted claim that the regulation will advance the interest of the State. Objective proof will be needed to demonstrate claims of causality.

In their repudiation of *Posadas*, the Justices seem to concur that adult consumers are not to be considered gullible fools in need of government protection. Justice Stevens traces this theme back to the *Virginia Pharmacy* case and then reiterates that "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." Justices Thomas and Scalia also attack paternalistic government schemes which prevent consumers from receiving information. Thus, the argument from paternalism becomes a topoi for many justices in this case and should prove useful to advocates of commercial speech in the future.

Justice Stevens was joined by Justices Kennedy, Souter, and Ginsburg when he argued that the *Rhode Island*

restriction was unconstitutional because "alternative forms of regulation that would not involve any restriction on speech" were available. This argument was supported in the concurring opinion written by O'Connor and joined by Rehnquist, and in part by Souter and Breyer, and in the separate opinion of Thomas. Thus, those who would restrict advertising will have to demonstrate in the future that alternative forms of regulation are not available.

These areas of agreement should not blind us to the significant differences that were manifest in the seven opinions written in this case. For example, while a majority of the Justices supported some sort of return to the *Central Hudson* standard, Justice Thomas did not believe the *Central Hudson* test was relevant. Even though both sides in the case stipulated that they wanted to be assessed in terms of *Central Hudson*, he wrote:

> *In cases ... in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test in* Central Hudson, *should not be applied.... Rather, such an 'interest' is per se illegitimate and can no more justify regulation of 'commercial' speech than it can justify regulation of 'non-commercial' speech.*

Justice Thomas would retrieve *Virginia Pharmacy*, from which he quoted at length. Of all the Justices, he was the strongest advocate of First Amendment parity for legal, non-misleading commercial speech: "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'non-commercial' speech.... I would adhere to the doctrine adopted in *Virginia Pharmacy* ... that all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible." Justice Scalia, writing alone, "share[d] Justice Thomas's discomfort with the *Central Hudson* test."

Reflecting a centrist position, Justice O'Connor returned to the *Central Hudson* test with Stevens, Souter and Breyer in concurrence. After stating that both sides had agreed that the first two prongs of the *Central Hudson* test had been met, she argued that even if Rhode Island met the third prong of the test, it failed the fourth because the ban "is more extensive than necessary to serve the State's interest." She examined the "availability of less burdensome alternatives to reach the stated goal" and decided that these alternatives "signal that the fit between the legislature's ends the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny." While this opinion differs from Scalia's and Thomas', and while it supports the "less burdensome alternatives" approach, it also endorsed the *SUNY v. Fox* modification of the *Central Hudson* test which replaced the "least restrictive" means with "reasonable fit." That move is also embraced in the Part V of Justice Stevens' opinion, which has the concurrences of Kennedy, Souter and Ginsburg. Thus, while the majority of the Court supported a return to *Central Hudson*, some wanted it modified by *SUNY*.

The issue of advertising so-called vices provides another area where consensus was difficult to achieve. Stevens' clearly disagreed with those who believe that advertising for so-called "vices" deserves less protection than others kinds of speech. Reacting to the prejudice against gambling which underlie the *Posadas* and *Edge* decisions, he rejected Rhode Island's use of these cases in its defense of its restriction on liquor price advertising: "[T]he scope of any 'vice' exception to the protection afforded by the First Amendment would be difficult, if not impossible to define. Almost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to 'vice activity.'" Only Kennedy, Thomas and Ginsburg, however, joined Stevens in this part of his decision indicating that a majority may still bear a prejudice against vices, legal and victimless though they may be.

Another point of contention arises from analysis of the influence of *amici* on the Court. Justice Thomas specifically cites the brief of the American Advertising Federation on original intent. Justice Stevens provided several other instances of amici having their positions heard by the court when he accepted the counter-intuitive position that advertising does not increase the size of the market; rather, it increases a brand share within the market. Advocates of First Amendment rights of advertisers have long supported this contention. For example, the following argument is made in First Amendment Rights of Commercial Speakers, a handbook for defenders of commercial speech, and repeated in several amicus briefs:

> *[T]the Department of Health and Human services said, "research has yet to document a strong relationship between alcohol advertising and alcohol consumption." The Federal Trade Commission found "no reliable basis on which to conclude that alcohol advertising significantly affects alcohol abuse." While advertising expenditures indexed to 1971 have increased more than 100%, per capita consumption has remained at basically the same level. A Senate investigation and the Assistant Director of the Social Science Institute at Washington University, among others, came to the same conclusion. Advertising leads to shifts in the choices of those already in the market.*

In his opinion, Stevens referred to this evidence and then applied it to the instance before the Court:

> *Rhode Island ranks in the upper 30% of States in per capita consumption of alcoholic beverages; alcohol consumption is lower in other States that allow price advertising.... Rhode Island's off-premises liquor advertising ban has no significant impact on levels of alcohol consumption in Rhode Island.*

For this reason, Stevens concluded that the Rhode Island law not only failed to advance the stated government interest, it was "more extensive than necessary to serve that interest." Yet only Kennedy, Souter and Ginsburg join Stevens on this point. Thus, while amici proved influential, they did not achieve a majority following on this point.

Perhaps the most significant argument to win majority support was the argument from original intent. If the Court accepts this precept in other cases the way it did in *44 Liquormart*, then many of the more liberal, activist rulings of the past could be trimmed, even though original intent is not supported by *stare decisis*. This argument has been advanced in various forms over the years but basically supports the position that the intent of the framers should be used as a guide in interpreting the Constitution. The hermeneutics of original intent requires the recreation of the environment at the time of adoption of the First Amendment. Thus, advocates of parity for commercial speech defend their position by pointing out that the newspapers extant at the time the First Amendment was adopted were filled with advertisements for all sorts of products.

The Founders deduced their theory of original intent in from Blackstone's Commentaries, which advised interpreters

to look at the "cause" of the law "which moved the legislator to enact it." "Publius", a.k.a Alexander Hamilton, consistently argues for such an interpretation in the *Federalist Papers*. His advice is taken in 1803 by Chief Justice John Marshall in the landmark *Marbury v. Madison* decision. In 1821 James Madison, the acknowledged author of the First Amendment, wrote that the Constitution must be interpreted according to "its true meaning as understood by the nation at the time of its ratification." On June 12, 1823, fourteen years after his presidency, Thomas Jefferson wrote that we ought to return "to the time when the constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed."

This data, contained in many amicus briefs, made a clear impression on the members of the Court. Justice Stevens begins Part III of his decision by stating:

> *Even in colonial days, the public relied on 'commercial speech' for vital information about the market. Early newspapers displayed advertisements for goods and services on their front pages, and town criers called out prices in public squares. Indeed, commercial messages played such a central role in public life prior to the Founding that Benjamin Franklin authored his early defense of free press in support of his decision to print, of all things, an advertisement for voyages to Barbados.*

Justices Scalia and Thomas, not unexpectedly, took up the same theme, citing historical interpretations of the original understanding of the First Amendment. But Scalia added an unusual twist in his brief opinion when he argued that, when examining original intent, we should examine exactly which liberties state legislatures endorsed at the time they ratified the First and Fourteenth Amendments. Using the anti-paternalistic sentiment of the Court as a jumping off point, Scalia asserted that "it would also be paternalistic for us to prevent the people of the States from enacting laws that we consider paternalistic, unless we have good reason to believe that the Constitution itself forbids them." Scalia contended that at the times the First and Fourteenth Amendments were adopted, it was "improbable that that adoption was meant to overturn any existing national consensus regarding free speech." The Supreme Court may be overreaching the original intent of the authors of the First and Fourteenth Amendment by imposing their will on the states. Scalia implied that the Fourteenth Amendment does not necessarily incorporate all of the bill of rights against the states to in its equal protection and due process clauses. Instead he would go back to the time of adoption to determine what rights the Congress and the state legislatures had in mind immediately following the Civil War. Given the controversial way in which the Fourteenth Amendment was finally adopted, that is, as a condition of re-admission to the Union in some cases, that determination would be difficult to make and might reverse *Gitlow v. New York*, the precedent setting ruling in 1925 that applied First Amendment standards to state governments.

Conclusion With Justice Brennan in the majority, the commercial speech doctrine was undermined in *Bigelow*, *Virginia Pharmacy*, *Central Hudson* and their progeny. Those cases demonstrated that government regulation of commercial speech can be detrimental to consumers. Those cases protected businesses' rights to convey information to consumers regarding lawful products and services unless a narrowly drawn regulation of commercial speech advanced a significant government interest.

Most of the Justices in *44 Liquormart* returned to the *Central Hudson* test with slight modifications and with a nod toward using original intent to interpret the Constitution. The Court adapted the *Central Hudson* test by substituting "reasonable fit" for "least restrictive means" and then strengthened the fourth prong of the test to limit states' abilities to restrict commercial speech. Justice Thomas was quite overt about the agreement when he wrote of the two other primary opinions:

> *Both Justice Stevens and Justice O'Connor appear to adopt a stricter, more categorical interpretation of the fourth prong of* Central Hudson *than that suggested in some of our other opinions.... [T]he Court's holding will in fact be quite sweeping if applied consistently in future cases.*

In reaching this agreement, the Justices repudiated the syllogistic deviation of Justice Rehnquist's *Posadas* decision. In fact, Justice O'Connor used her repudiation of *Posadas* to endorse the *Central Hudson* compromise: "The closer look that we have required since *Posadas* comports better with the purpose of the analysis set out in Central Hudson, by requiring the State to show that the speech restriction definitely advances its interest and is narrowly tailored." This delicate compromise allowed each of the Justices to project his or her own interpretation of commercial speech cases whether it be the argument from original intent, as articulated by Justice Thomas, or the common sense approach of Justice Stevens.

If this consensus had been authentic, the decision would have had at least three major implications. First, *44 Liquormart* could have been read to prevent national legislation banning the advertising of alcohol on broadcast channels. If, as most Justices agreed, the consumer's right to receive information is paramount under First Amendment law, then legislation banning advertising that would provide information about prices and alcohol content might have a very difficult time passing constitutional muster. Second, the decision could have been read as supporting commercial speech rights as on equal footing with non-commercial speech at the time of the adoption of the First Amendment, and hence, deserving of parity now. Third, the decision could have been interpreted as a rough compromise to provide guidance for the lower courts through maze of phrases they had embraced before, including "restrictions no more extensive than necessary," "the least restrictive means," and "less [but not "least"] burdensome alternatives."

However, the present analysis indicates that lower courts, legal advocates, advertisers and consumers must cope with the opinions of nine Justices which are grounded on very different premises. Appealing to certain arguments will offend some Justices and resonate with others. Perhaps that is why within a year of the *44 Liquormart* decision, the Court was sending contrary signals again. In May of 1997, the Court left an opening for state legislators to restrict legal commercial speech when it refused to revisit the Penn Advertising case even though the lower court refused to alter its decision in light of *44 Liquormart*. Despite the defiant stance of the Fourth Circuit U.S. Court of Appeals, the Supreme Court let the lower court decision stand without comment. That decision upheld a Baltimore law that banned billboard advertising of alcohol and tobacco products in certain locations because the law "directly and materially advances a substantial governmental interest in promoting the welfare and temperance of minors who are

involuntarily and unavoidably exposed to such advertisement." However, in *44 Liquormart*, Justice Stevens wrote: "[W]ithout findings of fact ... we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance." In other words, the Supreme Court supported a decision which is based on the premise that in the City of Baltimore billboard advertising results in children smoking and drinking even though no hard evidence was presented to support the asserted correlation and even though in *44 Liquormart* the majority held that mere speculation was impermissible in justifying a regulation.

Later, in a five-to-four decision, the Court also upheld a law in California which compelled fruit growers to participate in a generic advertising program which the Ninth Circuit had ruled was a clear example of compelled speech and a violation of the *Central Hudson* test. Once again the Court has refused to give commercial speech equal status with other forms of expression.

In his dissent in *Posadas*, Justice Brennan provided a way out of this quagmire when he wrote, "I see no reason why commercial speech should be accorded less protection than other types of speech where, as here, the government seeks to suppress commercial speech in order to deprive consumers of accurate information concerning lawful activity." In endorsing the *Central Hudson* standard, Brennan recommended that courts apply the strictest judicial scrutiny to government actions seeking to suppress the dissemination of non-misleading commercial speech for fear that recipients will act on the information provided. Vindicating Brennan by returning to the *Central Hudson* standard might, as has been indicated elsewhere, end the confusion in the commercial marketplace of ideas, while undoubtedly contributing to a more robust debate over the merits of different products for consumers.

Endnotes

- Hereafter *44 Liquormart*, U.S. 94-1140. Text from 1996 U.S. Lexis, 3020.
- See *Rubin v. Coors*, 115 S. Ct. 1585 (1995) which rules that unless commercial speech regulations target false, misleading, or coercive advertising, or require disclosure of information designed to prevent such advertising, strict First Amendment scrutiny should apply. See also, K. M. Sullivan," Cheap Spirits, Cigarettes, and Free Speech: The Implications of *44 Liquormart*," 1996 *Supreme Court Review*, (1996): 123-61.
- 1996 Lexis 3020, 30. Justice O'Connor also refers to *Coors* in her decision.
- 100 S. Ct. 2343. In *Austin v. Michigan Chamber of Commerce* (1990) the Court upheld a Michigan law that prohibits the state Chamber of Commerce from buying a newspaper advertisement on behalf of a political candidate.
- See K. M. Sullivan," Cheap Spirits, Cigarettes, and Free Speech: The Implications of *44 Liquormart*, Inc. v. Rhode Island ," 1996 *Supreme Court Review* (1996): 123-61.
- 650 A.2d 854 (Pa. 1994), U.S. 94-1247.
- 63 F.3d 1305 (4th Cir. 1995), U.S. 95-685.
- See *Anheuser-Busch, Inc. v. Mayor and City Council*, 63 F3d 1305 (4th Cir.1995), vacated and remanded sub nom. *Anheuser-Busch, Inc. v. Schmoke*, 116 S. Ct 1821 (1996), reaff'd 101 F3d 325 (4th Cir 1996), cert. denied, 1997 U.S., and *Penn Advertising of Baltimore, Inc. v. Mayor and City Council*, 63 F.3d 1318 (4th Cir. 1995), vacated and remanded sub nom. *Penn Advertising of Baltimore, Inc. v. Schmoke*, 116 S. Ct. 2575 (1996), reaff'd 101 F.3d 332 (4th Cir. 1996), cert. denied, 1997.
- Seagrams initially broke the ban by advertising Crown Royal whiskey on a Corpus Christi television station. Seagrams has long argued that one drink is equal to a glass of wine or a can of beer in alcohol content overall.
- The organization that imposed the ban is the Distilled Spirits Council of the United States.
- Alaska, Hawaii, Iowa, Kansas, Maryland, Minnesota, Michigan, North Dakota, Rhode Island, and Vermont.
- *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 562 n.5 (1980).
- See, for example, *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 (1983); B*igelow v. Virginia*, 421 U.S. 809, 818 (1975); *Ginzburg v. United States*, 338 U.S. 463, 474 (1966); *Thornhill v. Alabama*, 310 U.S. 88 (1940).
- 106 S. Ct. 903 (1986).
- *Pacific Gas* at 911 and 912. 112 S. Ct. 2538. 316 U.S. 52 (1942).
- *Chrestensen* at 53.
- *Chrestensen* at 55.
- *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 391 (1973). See S. M. Simpson, "The Commercial Speech Doctrine: An Analysis of the Consequences of Basing First Amendment Protections on the 'Public Interest'" New York Law School Law Review, 39 (1994): 575-606.
- 421 U.S. 809, 822 (1975) at 818.
- Bigelow at 826.
- 425 U.S. 748 (1976) at 761.
- *Virginia Pharmacy* at 762.
- *Virginia Pharmacy* at 763.
- 447 U.S. 557 (1980) at 571.

- *Central Hudson* at 571.
- 54 U.S.L.W. 4956 (U.S. July 1, 1986) at 4958.
- *Posadas* at 4960.
- *Posadas* at 4961.
- *Posadas* at 4965.
- *Posadas* at 4965, n.1.
- *Posadas* at 4966.
- 492 U.S. 469, 480.
- 496 U.S. 91. This decision re-affirmed a series of earlier decisions protecting professionals who wish to advertise their services. For example, in *Bates v. State Bar of Arizona* (433 U.S. 350, 1977), the Supreme Court overturned a ban on price advertising by lawyers: "[Commercial] speech serves individual and social interests in assuring informed and reliable decision making..." More importantly, in *Zauderer v. Office of Disciplinary Counsel* (471 U.S. 626, 1985), the Court struck down bans on the content of lawyer's commercials with these words: "[T]here is no longer any room to doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment. [Legal advertising] tend[s] to acquaint persons with their legal rights who might otherwise be shut off from effective access. [It is] undoubtedly more valuable than many other forms of advertising." In *Shapero v. Kentucky Bar Association* (108 S. Ct. 1916, 1988) the Court expanded the constitutional prohibition against regulation of problem-specific advertising by holding that "targeted" direct-mail solicitation was constitutionally protected. See J. S. Kinsler, "Targeted Direct-Mail Solicitation: Shapero v. Kentucky Bar Association," *Loyola University Chicago Law Journal*, 25 (Fall, 1993): 1-30
- 113 S. Ct. 1792. D. W. Bishop, "Building the House on a Weak Foundation: Edenfield v. Fane and the Current State of the Commercial Speech Doctrine," *Pepperdine Law Review*, 22 (April, 1995): 1143-74. See also *Ibanez v. Florida Department of Business & Professional Regulation Board of Accountancy*, 114 S. Ct. 2084 (1994). This case also reported the high value of commercial speech to the consumer.
- Justice Blackmun in concurring argued that the Court should go further and give commercial speech the same protection as speech about public affairs.
- 113 S. Ct. at 1798.
- J. C. Coots, "A Missed Opportunity to Definitively Apply the Central Hudson Test," C*reighton Law Review*, (June, 1993): 1155-91.
- See J. Vanderwater, "Florida Bar v. Went For It, Inc.: Restricting Attorney Advertising to Preserve the Image of the Legal Profession," *Loyola University of Chicago Law Journal*, 27 (Spring, 1996): 765-802; T. L. Lattomus, "Offensiveness, the New Standard for First Amendment Legal Advertising Cases: Florida Bar v. Went For It, Inc.," *Villanova Law Review*, 40 (1995): 1209-56; S. A. Moore, "Florida Bar v. Went For It, Inc.," *Catholic University Law Review*, 45 (Summer, 1996): 1351-403; X. M. Larsen, "Florida Bar v. Went For It, Inc.: Supreme Court Upholds Thirty-Day Ban on Lawyer Advertising to Accident and Disaster Victims," *Journal of Contemporary Law*, 22 (1996): 207-20.
- 115 S. Ct. 2371.
- 113 S. Ct. 1505. See also *Lakewood v. Plain Dealer Publishing* (1988). This evolution of this policy is discussed by George E. Stevens in "Newsracks and the First Amendment," *Journalism Quarterly*, 66 (1990): 930-933. See also, R. T. Cahill, Jr., "City of Cincinnati v. Discovery Network, Inc.: Towards Heightened Scrutiny for Truthful Commercial Speech," *University of Richmond Law Review*, 28 (March, 1994): 225-54; E. J. McAndrew, "City of Cincinnati v. Discovery Network, Inc.: Elevating the Value of Commercial Speech?" *Catholic University Law Review*, 43 (Summer, 1994): 1247-87.
- 507 U.S. at 428.
- 113 S. Ct. at 1518, 1520.
- This case revisited portions of *Linmark Associates v. Willingboro*, 431 U.S. 85 (1977) which struck down a New Jersey ordinance forbidding the posting of "for sale" signs.
- The decision is very consistent with Linmark which allowed the posting of "for sale" signs.
- 113 S. Ct. 2696. See T. L. Lavery, "Commercial Speech Suffers a First Amendment Blow in United States v. Edge Broadcasting, Co." *Northern Illinois University Law Review*, 14 (Spring, 1994):549-84.
- 509 U.S. 418, 125.
- In *Valley Broadcasting Co. v. United States*, the Ninth Circuit affirmed a lower court ruling that the federal ban was unconstitutional as applied to legal casino advertising in Nevada. The Supreme Court denied certiorari without comment. This ruling is a major breakthrough for broadcasters because it overturns a provision of the 1934 Communications Act which prohibited the advertising of gambling.
- 1996 Lexis 3020, 45.
- 1996 U.S. Lexis 3020, 52-53.
- 1996 Lexis 3020, 56. Justice O'Connor uses nearly identical language on this point. "The Twenty-First Amendment cannot save an otherwise invalid restriction on speech." 1996 Lexis 3020, 83.

409 U.S. 109. "We are now persuaded," wrote Justice Stevens in Part VII of his decision, "that the Court's analysis in *LaRue* would have led to precisely the same result if had placed no reliance on the Twenty-First Amendment." 1996 U.S. Lexis 3020, 54.

- 1996 Lexis 3020, 45, 48. Later in the decision, Stevens again ridiculed the "Posadas syllogism." 1996 Lexis 3020, 49.
- 1996 Lexis 3020, 48.
- 1996 Lexis 3020, 81-82.
- 1996 U.S. Lexis 3020, 34. He also made the point about commercial messages being an important provider of consumer information at 1996 U.S. Lexis 3020, 22.
- In this instance, Thomas expanded his position from the Rubin case.
- 116 S.Ct. at 1510.
- 116 S. Ct. at 1515-1516.
- See *Virginia Pharmacy* 425 U.S. at 780.
- See conclusion of Part II of his opinion.
- 115 S. Ct. at 1515.
- at 1521.
- 1996 Lexis 3020, 76.
- Id.
- 1996 Lexis 3020, 42.
- 1996 Lexis 3020, 52-53.
- 1996 Lexis 3020, 66.
- (Long Beach, CA: Freedom of Expression Foundation, 1995), p. 28.
- 1996 Lexis 3020, 18.
- 1996 Lexis 3020, 39.
- See William Blackstone, *Comments on the Laws of England* (1765; Chicago: University of Chicago Press, 1979), n.8, pages 59-61.
- See particularly essay 81.
- Letter to John G. Jackson as cited in Craig R. Smith and Scott Lybarger, *The Ratification of the Bill of Rights, 1789-91* (Washington, D.C.: Freedom of Expression of Foundation, 1991), p. ix.
- June 12, 1823, as cited in Craig R. Smith, *To Form a More Perfect Union* (Lanham, Maryland: University Press of America, 1993), p. xi.
- In fact, Justice Scalia writing alone cites the analysis of history contained in the amicus brief of the American Advertising Federation et. al. 1996 U.S. Lexis 3020, 58.
- 1996 U.S. Lexis 3020, 58.
- 1996 U.S. Lexis 3020, 60.
- See M. J. Schramm, "Constitutional Protection of Commercial Speech under the Central Hudson test as Applied to Health Claims," *Food & Drug Law Review*, 51 (1996): 323-9.
- Citing *SUNY v. Fox*, 492 U.S. 469, 480.
- 1996 Lexis 3020, 68.
- 1996 Lexis 3020, 81.
- The Federal Communications Commission's jurisdiction over broadcast stations pre-empts state and local control. See *Oklahoma Telecasters Assn. v. Crisp*, 699 F.2d 490, 495-497 (1983) and *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697, 81 L. Ed. 2d 580, 104 S. Ct. 2694 (1984).
- 63 F. 3d 1318 (4th Cir. 1995). See M. J. Johnson, "Taking Advantage of Joe Camel's and Marlboro Man's Rights is UnKool and Merits Constitutional Protection: Penn Advertising, Inc. v. Mayor of Baltimore," *University of Dayton Law School* 21 (Winter, 1996): 489-511.
- 63 F. 3d 1318 (4th Cir. 1995). For analysis of how the FDA regulations compromise affected the advertising of rights of tobacco companies see, G. D. Bassuk, "Advertising Rights and Industry Fights: A Constitutional Analysis of Tobacco Advertising Restrictions in a Federal Legislative Settlement of Tobacco Industry Litigation," *Georgetown Law Journal*, 85 (Fall, 1997): 715-49.
- 1996 Lexis 3020, 37.
- See *Glickman v. Wileman Bros. & Elliott, Inc.*, 58 f. ed 1397 (9th Cir. 1995), —U.S.—, SC 1997. Justice Stevens was joined by Breyer, Ginsberg, Kennedy and O'Connor in this ruling.
- 54 U.S.L.W. at 4962.

- Craig R. Smith, "Ending the Confusion over Commercial Speech," *Free Speech Yearbook*, 33 (1995)

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