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Butt In: 44 Liquormart, Inc. v. Rhode Island and Its Implications on the Future of Cigarette Advertising and Commercial Speech - 44 Liquormart, Inc. v. Rhode Island

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BUTT IN: *44 Liquormart, Inc. v. Rhode Island* AND ITS IMPLICATIONS ON THE FUTURE OF CIGARETTE ADVERTISING AND COMMERCIAL SPEECH[1]

44 Liquormart, Inc. v. Rhode Island

116 S. Ct. 1495 (1996)

Brenda Currie[2]

I. INTRODUCTION

The United States Supreme Court's decision in *44 Liquormart, Inc. v. Rhode Island*, handed down on May 13, 1996, settled many questions concerning the standard of First Amendment protection given commercial speech.[3] At the same time, the decision created concerns that the Supreme Court's increased willingness to provide First Amendment protections to commercial speech would apply across the board—even to cigarette advertisements.

The First Amendment vigorously protects "pure speech," but the degree to which the First Amendment protects "commercial speech" has fluctuated. In the early part of this century, speech that contained any "commercial" undertones was denied First Amendment protection.[4] Since that time, the standard of protection has evolved to the point where "pure commercial speech" is allowed some protection under the First Amendment.[5] Indeed, while truthful, nonmisleading, commercial speech has not yet been given absolute protection by the First Amendment, *44 Liquormart, Inc.* can be read to suggest that the Supreme Court is moving in that direction.

Over the last few decades, commercial speech has been given "mid-level" First Amendment review.[6] Until *44 Liquormart, Inc.*, the Court has seemingly allowed this "mid-level" review to be somewhat flexible—to be used with varying levels of specificity dependent upon the outcome sought to be achieved.[7] The leeway in the standard of protection afforded commercial speech led to its abuse. Commercial speech has been the target of regulations seeking to reach paternalistic goals.

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1. Daniel Helberg wrote an article entitled *Butt Out: An Analysis of the FDA's Proposed Restrictions on Cigarette Advertising under the Commercial-Speech Doctrine*, 29 LOY. L.A. L. REV. 1219 (1996). His article discusses recent proposals that he felt would eventually completely ban tobacco advertising. This Casenote, on the other hand, demonstrates that *44 Liquormart, Inc. v. Rhode Island* may have "saved" these advertisments from such fate—hence the title "Butt In."

2. I would like to thank Professor Matthew Steffey for his patience, supervision, and advice throughout the development of this Casenote. I would also like to thank Professor Angela Kupenda for her excellent instruction in her First Amendment class.

3. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996).

4. *See* Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747 (1993); Stromberg v. California, 283 U.S. 359, 368 (1931); Fiske v. Kansas, 274 U.S. 380, 382 (1927); Whitney v. California, 274 U.S. 357, 371 (1927), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

5. *See generally 44 Liquormart, Inc.*, 116 S. Ct. at 1495.

6. *See generally* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

7. *See generally id*; Posadas De P.R. Assoc. v. Tourism Co. of P.R., 478 U.S. 328 (1986).

The Supreme Court "tightened-up" the test to be used for commercial speech protection in *44 Liquormart, Inc.*[8] The Court left no room for purely paternalistic restrictions on commercial speech.[9] This leaves us to wonder if the Supreme Court will continue to apply stricter standards or create some exceptions when it is confronted with the constitutionality of the abundant bans on cigarette advertising.

II. FACTS

In 1991, a Rhode Island corporation, 44 Liquormart, Inc., ran what turned out to be a controversial advertisement in a Rhode Island daily newspaper.[10] The advertisement was headed "Thanksgiving Harvest" and displayed bottles of brand named liquors.[11] It advertised the price of snack foods, cigarettes, and mixers. The advertisement noted that advertising the price of liquor violated state law and, instead of prices, placed "WOW" next to pictures of vodka and rum bottles.[12]

At the time the advertisement was published, the state of Rhode Island had two statutes prohibiting the advertising of the retail price of alcoholic beverages. Rhode Island General Laws section 3-8-7 prohibited the "'advertising in any manner whatsoever' the price of any alcoholic beverage offered for sale in the State; the only exception is for price tags or signs displayed with the merchandise within licensed premises and not visible from the street."[13] The other statute, Rhode Island General Laws section 3-8-8.1, prohibited the "publication or broadcast of any advertisements—even those referring to sales in other States—that 'make reference to the price of any alcoholic beverages.'"[14]

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8. *44 Liquormart, Inc.*, 116 S. Ct. at 1495.
9. *Id.*
10. 44 Liquor Mart, Inc. v. Racine, 829 F. Supp. 543, 545 (D.R.I. 1993).
11. *Id.*
12. *44 Liquormart, Inc.*, 116 S. Ct. at 1503.
13. *Id.* at 1501. Rhode Island General Laws section 3-8-7 (1987) states:
    Advertising price of malt beverages, cordials, wine or distilled liquor—No manufacturer, wholesaler, or shipper from without this state and no holder of license issued under the provisions of this title and chapter shall cause or permit the advertising in any manner whatsoever of the price of any malt beverage, cordials, wine or distilled liquor offered for sale in this state; provided, however, that the provisions of this section shall not apply to price signs or tags attached to or placed on merchandise for sale within the licensed premises in accordance with rules and regulations of the department. Regulation 32 of the Rules and Regulations of the Liquor Control Administrator provides that no placard or sign that is visible from the exterior of a package store may make any reference to the price of any alcoholic beverage.

Id. at n.2 (citing App. 2 to Brief for Petitioners).

14. *Id.* at 1501. Rhode Island General Laws section 3-8-8.1 (1987) states:
    Price advertising by media or advertising companies unlawful—No newspaper, periodical, radio or television broadcaster or broadcasting company or any other person, firm or corporation with a principal place of business in the state of Rhode Island which is engaged in the business of advertising or selling advertising time or space shall accept, publish, or broadcast any advertisement in this state of the price or make reference to the price of any alcoholic beverages. Any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor. . . . The statute authorizes the liquor control administrator to exempt trade journals from its coverage.

Id. at n.3 (citing App. 2 to Brief for Petitioners).

Soon after 44 Liquormart, Inc. ran their advertisement, competitors complained to the Rhode Island Liquor Control Administrator.[15] These complaints led to an enforcement hearing that took place in December of 1991. The Liquor Control Administrator for Rhode Island concluded that 44 Liquormart, Inc. violated Rhode Island General Laws section 3-8-7 and Liquor Control Administration Regulation 32, fined them $400, and ordered that the advertisement cease.[16] 44 Liquormart, Inc. paid their fine and did not appeal the administrator's decision.[17]

People's Super Liquor Stores, Inc. is a licensed retailer of alcoholic beverages who extensively used price advertising in Massachusetts.[18] On several occasions, they had attempted to place advertisements including information about prices in Rhode Island newspapers, but they were consistently refused due to Rhode Island General Laws section 3-8-8.1.[19] 44 Liquormart, Inc. and People's joined as plaintiffs to challenge the constitutionality of Rhode Island's two prohibitions against advertising the price of alcoholic beverages; they asserted that the two statutes violated the First Amendment.[20]

III. HISTORY OF APPLICABLE LAW

A. The First Amendment and Commercial Speech

The First Amendment was adopted in 1791 as part of the Bill of Rights.[21] It states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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."[22] It was not until the late 1920's or the early 1930's that the Supreme Court expressly recognized that the First Amendment applied not only to the federal government, but also to state and local governments.[23] Since incorporation, commercial speech has sparked great dispute. Is advertising speech? Is commercial speech given any protection by the First Amendment? What level of scrutiny will apply to commercial speech? Should truthful, non-deceptive commercial speech be treated differently from other speech?

Protection afforded commercial speech by the First Amendment was quite hazy during the early part of this century.[24] Advertising was not viewed as a form of

15. *Id.* at 1503.
16. 44 Liquor Mart, Inc. v. Racine, 829 F. Supp. 543, 545 (D.R.I. 1993).
17. *Id.*
18. *44 Liquormart, Inc.*, 116 S. Ct. at 1503.
19. *44 Liquor Mart*, 829 F. Supp. at 545.
20. *Id.* at 544-45.
21. U.S. CONST. amend. I.
22. *Id.*
23. *See* Kozinski & Banner, *supra* note 4. *See also* Stromberg v. California, 283 U.S. 359, 368 (1931); Fiske v. Kansas, 274 U.S. 380, 382 (1927); Whitney v. California, 274 U.S. 357, 371 (1927), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969).
24. *See generally* Kozinski & Banner, *supra* note 4.

expression or speech—but as business.[25] Indeed, the Court's 1942 decision in *Valentine v. Chrestensen* seemed to make commercial advertising an exception to the protections given speech by the First Amendment.[26] In this case and cases that followed, restrictions were allowed to stand on all speech that was in some respect "commercial"—even if "advertising" was not the entire or even dominant theme. In *Valentine*, a New York statute prohibited the distribution of any "handbill . . . or other advertising matter whatsoever in or upon any street."[27] The Court upheld the statute and explained that the First Amendment did not allow the banning of all handbill communication, but it did allow the banning of handbills that contained aspects of "commercial advertising."[28]

Likewise, in *Breard v. Alexandria*, decided in 1951, commercial speech was not given First Amendment protection.[29] The defendant was convicted for the violation of an ordinance that prohibited door-to-door solicitation of magazine subscriptions.[30] The Court upheld the conviction due to the "commercial feature" of the transaction.[31] *Breard* is, however, the last case in which the Court denied protection under the First Amendment without finding that the speech was "purely commercial."

Following *Breard*, the Court began to take steps in the direction of recognizing First Amendment protections for speech, even if the speech had "commercial" aspects. However, the Court did not yet acknowledge protections for "pure commercial speech." In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, the Court upheld an ordinance which restricted the advertising of "sex-designated columns of advertisements for non-exempt job opportunities."[32] The Court emphasized that their decision hinged on the fact that the activity was illegal; otherwise the advertisements would have received some degree of First Amendment protection.[33] Following *Pittsburgh Press Co.*, the Court actually gave First Amendment protection to an advertisement in *Bigelow v. Virginia*, but it made clear that there was an element of public concern involved and not just "pure commercial speech."[34] At the time *Bigelow* was decided, abortion was the subject of increasing debate.[35] A Virginia statute made an advertisement that "encourage[d] or prompt[ed] the procuring of abortion or miscarriage" a misde-

25. *See* Packer Corp. v. Utah, 285 U.S. 105 (1932); Fifth Ave. Coach Co. v. City of New York, 221 U.S. 467 (1911). There are cases as early as 1877 that recognized advertising to be speech and entitled to at least some First Amendment protections. *See Ex parte* Jackson, 96 U.S. 727 (1877). But, there are still other cases decided during that time that suggest advertising was beyond First Amendment protection. *See* Lewis Pub. Co. v. Morgan, 229 U.S. 288 (1913). *See generally* Kozinski & Banner, *supra* note 4, at 765-66.

26. Valentine v. Chrestensen, 316 U.S. 52 (1942).

27. *Id.* at 53.

28. *Id.* at 54.

29. Breard v. Alexandria, 341 U.S. 622 (1951).

30. *Id.* at 622-23.

31. *Id.* at 642.

32. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1973).

33. *Id.* at 388-89.

34. Bigelow v. Virginia, 421 U.S. 809, 822 (1975).

35. *Id. See generally* Daniel Helberg, *Butt Out: An Analysis of the FDA's Proposed Restrictions on Cigarette Advertising under the Commercial-Speech Doctrine*, 29 Loy. L.A. L. Rev. 1219, 1244 (1996).

meanor.[36] An advertisement was published in the *Virginia Weekly* which informed readers that abortions were legal in New York, explained that residency was not a requirement, and instructed interested readers to contact a particular clinic.[37] While finding the statute in violation of the First Amendment, the Court held that the advertisement "contained factual material of clear 'public interest'" and not just pure commercial speech.[38]

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Court finally recognized that even "pure commercial speech" should be given some First Amendment protection.[39] The Court held invalid a Virginia statute which made "publish[ing], advertis[ing], or promot[ing], directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription" a violation of professional conduct.[40] The Court refused to require the pharmacist to add a "public interest element" so that their advertisements would not be "pure commercial speech"—therefore eligible for First Amendment protection.[41] The Court instead revealed that the Board's justifications for this requirement were based on the State's attempt to protect its citizens by keeping them ignorant.[42] The Court said that the statute "affects [citizens] only through the reactions it is assumed [they] will have to the free flow of drug price information."[43] The Court held that there was

> an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.[44]

In that same opinion, the Court clarified it was not holding that commercial speech could never be regulated and noted that untruthful commercial speech had never been protected.[45] Further, the Court justified its finding by recognizing that commercial speech is more "verifiable than . . . news reporting or political commentary."[46] The Court determined that "the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements."[47]

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Court continued to define the protections given commercial speech and set out a four-part test to determine if regulations on commercial speech violate

36. *Bigelow*, 421 U.S. at 812-13.
37. *Id.* at 812.
38. *Id.* at 822.
39. Virginia State Bd. of Pharm. v. Virginia Citizen Consumer Council, 425 U.S. 748 (1976).
40. *Id.* at 750.
41. *Id.* at 764-65.
42. *Id.* at 768-69.
43. *Id.* at 769.
44. *Id.* at 770.
45. *Id.* at 771.
46. *Id.* at 772, n.24.
47. *Id.*

the First Amendment.[48] The test required: (1) the speech "concern lawful activity and not be misleading"; (2) the government assert a "substantial interest" in restricting the speech; (3) the government must demonstrate that its regulation "directly advances" the interest it asserts; and (4) the regulation must not be "more extensive than is necessary to serve that interest."[49]

Due to lack of energy supply, the state of New York banned all advertising that promoted the use of electricity.[50] Central Hudson Gas & Electric Corporation challenged the ban on First Amendment grounds.[51] Applying this new test, the Court found: (1) the speech concerned lawful activity and was not deceptive or misleading; (2) the State had substantial interests in conserving energy and in making sure rates were fair and efficient; (3) "the link between the advertising prohibition and [interest in assuring fair rates was], at most, tenuous," but a direct link existed between the prohibition and the State's interest in conservation; and (4) the statute was more extensive than necessary in that it "reach[ed] all promotional advertising, regardless of the impact of the touted service on overall energy use."[52] Though the statute passed prongs one, two, and three, the Court said that "[i]n the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising."

The Court, however, in *Posadas De Puerto Rico Associates v. Tourism Company of Puerto Rico*, weakened prong four of the *Central Hudson* test by allowing more deference to legislatures in deciding which types of regulations could be used to further the State's interest.[54] Justice Rehnquist delivered the opinion for the Court.[55] A Puerto Rico regulation prohibited advertisements of casino gambling addressed to the residents of Puerto Rico but allowed advertisements directed toward tourists.[56] The Court applied the test set out in *Central Hudson*.[57] After finding the speech concerned lawful activity and was not misleading or fraudulent, the Court found that Puerto Rico's legislature had a "substantial interest" in protecting their citizens from the evils of gambling.[58] The Court also found that the regulation "directly advanced" this interest.[59] Further, the Court held that even though there might be other ways to satisfy Puerto Rico's interest which would not suppress commercial speech, "it [was] up to the legislature to decide whether or not such a 'counterspeech' policy would be as effective in reducing the demand for casino gambling as a restriction on advertising."[60] In applying the fourth prong, the Court diverged from the stricter stan-

48. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).
49. *Id.*
50. *Id.* at 558-59.
51. *Id.*
52. *Id.* at 566-70.
53. *Id.* at 571.
54. Posadas De P.R. Assoc. v. Tourism Co. of P.R., 478 U.S. 328 (1986).
55. *Id.*
56. *Id.* at 335-36.
57. *Id.* at 340-44.
58. *Id.* at 341.
59. *Id.* at 341-42.
60. *Id.* at 344.

dard of *Central Hudson* which required proof that a lesser restriction would not be effective. The Court instead allowed greater deference to the legislature.[61]

In *Rubin v. Coors Brewing Co.*, the Court applied the *Central Hudson* test more rigorously than it had in *Pasodas*.[62] It found that section 5(e)(2) of the Federal Alcohol Administration Act of 1935 failed *Central Hudson*'s standards.[63] The statute prohibited the displaying of alcohol content on beer labels.[64] Both the parties and the Court agreed that the speech was "truthful, verifiable and nonmisleading" information concerning beer's alcohol content—satisfying prong one of the test set out in *Central Hudson*.[65] The government asserted that its "substantial interest" was to "advance Congress' goal of curbing 'strength wars' by beer brewers who might seek to compete for customers on the basis of alcohol content."[66] The Court found that "the goal of suppressing strength wars constituted a substantial interest," therefore, the second prong of *Central Hudson* was satisfied.[67] The Court then moved into its analysis of the last two prongs of *Central Hudson*.

In analyzing whether the stated governmental interest was "directly advanced" by the restrictions and whether they were "no more extensive than necessary," the Court recalled its analysis two terms prior in *Edenfield v. Fane*.[68]

> In *Edenfield*, we decided that the Government carries the burden of showing that the challenged regulation advances the Government's interest "in a direct and material way." That burden "is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree."[69]

The Court found that the statute did not "directly" or "materially" advance the Government's interest.[70] It found that alcohol content was prohibited on labels but was not prohibited in advertising to the same degree.[71] It also found that alcohol content was actually required on "malt liquors."[72] The Court said, "The failure to prohibit the disclosure of alcohol content in advertising, which would seem to constitute a more influential weapon in any strength war than labels, makes no rational sense if the government's true aim is to suppress strength wars."[73] The Court found convincing the respondent's argument that the regula-

61. *Id.*
62. Rubin v. Coors Brewing Co., 514 U.S. 476 (1995). *See Posadas*, 478 U.S. 328 (1986); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980).
63. *Rubin*, 514 U.S. at 476.
64. *Id.* at 476-477.
65. *Id.* at 483.
66. *Id.*
67. *Id.* at 485.
68. *Id.* at 485-486; Edenfield v. Fane, 507 U.S. 761 (1993).
69. *Rubin*, 514 U.S. at 486 (citations omitted).
70. *Id.* at 487-488.
71. *Id.*
72. *Id.*
73. *Id.* at 488.

tion was "more extensive than necessary" in satisfying its goal.[74] They suggested "directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high alcohol strength, . . . or limiting the labeling ban only to malt liquors, which is the segment of the market that allegedly is threatened with a strength war" as alternative means to satisfy the government's interest.[75] The Court accordingly found that the statute failed to meet *Central Hudson* and thus violated the First Amendment.[76]

B. Twenty-first Amendment and Commercial Speech

At times, the type of product or activity that is being advertised generates an assortment of arguments which attempt to justify the states' power to restrict commercial speech. Two common positions asserted are the "vice" argument and the "greater includes the lesser" argument. The "vice" argument has been asserted when products such as alcoholic beverages or conduct such as gambling are being advertised. The argument is that these things are "inherently bad;" therefore, the government should have broader regulatory power—even if it includes restricting speech. The similar "greater includes the lesser" rationale was first expressed as early as 1939 in *Ziffrin v. Reeves*.[77] The Court held that the "greater power" to prohibit includes the "lesser power" to extensively regulate.[78]

When regulations are directed at speech that relates to alcoholic beverages, another argument is sometimes asserted. It is argued that the Twenty-first Amendment should justify such restraints. The Eighteenth Amendment, which was adopted in 1919, prohibited the manufacture, sale, or transportation of liquor.[79] The Twenty-first Amendment, adopted in 1933, in Section 1 repealed the Eighteenth Amendment and in Section 2 expressly granted regulatory power over intoxicating liquors to the states.[80] Because the Twenty-first Amendment is the only express grant of power given to the states, there has been some argument as to its role in conjunction with other amendments—in particular, the First Amendment.[81] The "vice" argument, the "greater includes the lesser" rationale,

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74. *Id.* at 489-90.

75. *Id.* at 489.

76. *Id.* at 490.

77. Ziffrin v. Reeves, 308 U.S. 132 (1939).

78. Queensgate Inv. Co. v. Liquor Control Comm'n, 433 N.E.2d 138, 141(Ohio 1982) (citing *Ziffrin*, 308 U.S. at 138-39); *see also* Posadas De P.R. Assoc. v. Tourism Co. of P.R., 478 U.S. 328, 345-46 (1986).

79. The Eighteenth Amendment states:

> Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited. Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

U.S. CONST. amend. XVIII, §§ 1-2 (repealed 1933).

80. The Twenty-first Amendment states: "Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed. Section 2. 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, §§ 1-2.

81. S & S Liquor Mart, Inc. v. Pastore, 497 A.2d 729, 732 (R.I. 1985) (citations omitted).

and issues involving the Twenty-first Amendment all intertwine and appear throughout commercial speech history.

California v. LaRue is often-cited authority for the argument that the powers granted through the Twenty-first Amendment sometimes override protections granted by the First Amendment.[82] Justice Rehnquist wrote the opinion for the Court in which he refers to the Twenty-first Amendment as a "broad sweep" of power which gives "something more than the normal state authority over public health, welfare, and morals."[83] Though addressing expressive speech rather than commercial speech, the Court upheld a California regulation that prohibited bars or nightclubs licensed to distribute liquor "from displaying either in the form of movies or live entertainment, 'performances' that partake more of gross sexuality than of communication."[84] Holders of California liquor licenses brought an action arguing that the regulation violated their First Amendment rights.[85] The Court held that the Twenty-first Amendment gave the State "broad authority" to regulate the manner and places in which liquor was sold.[86] Justice Rehnquist justified his holding by explaining that this regulation did not completely ban this type of expressive conduct, but "[i]t . . . merely proscribed such performances in establishments that it license[d] to sell liquor by the drink."[87]

Queensgate Investment Co. v. Liquor Control Commission, though summarily dismissed by the Supreme Court, is also often cited as authority for the argument that the Twenty-first Amendment's broad powers sometimes override First Amendment protections.[88] The petitioner violated three Ohio regulations when it advertised the retail price and price advantage of alcoholic beverages in a circular that was not on the permitted premises.[89] The regulations were upheld against petitioner's assertion that they violated the First Amendment.[90] The court explained the broad powers of the Twenty-first Amendment and said, "[t]he regulation is directed toward regulation of the intoxicants themselves, rather than speech. This is unlike the case, *e.g.*, in *Virginia Pharmacy* . . . where the speech was the actual focus of the regulation, since the aim of the restriction was the prevention of competition in pharmaceutical sales, not the discouragement of pharmaceutical purchases."[91]

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82. California v. LaRue, 409 U.S. 109 (1972).
83. *Id.* at 114.
84. *Id.* at 117-18.
85. *Id.* at 110.
86. *Id.* at 118.
87. *Id.*
88. Queensgate Inv. Co. v. Liquor Control Comm'n, 433 N.E.2d 138 (Ohio 1982). In particular, the First Circuit, in *44 Liquormart, Inc.*, relied on this case arguing that "it is settled that such action [summary dismissals] has precedential effect, although not necessarily on the identical reasoning of the court." 44 Liquormart, Inc. v. Rhode Island, 39 F.3d 5, 8 (1994) (citing Mandel v. Bradley, 432 U.S. 173, 176 (1977)).
89. *Queensgate*, 433 N.E.2d at 139. *See* OHIO ADM. CODE § 4301:1-1-44 (1982).
90. *Queensgate*, 433 N.E.2d at 141-42.
91. *Id. See* Virginia State Bd. of Pharm., Inc. v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

Though not in relation to alcoholic beverages, the Supreme Court in *Posadas* again addressed the "greater includes the lesser" rationale.[92] The Court, after declaring that the regulation passed the test set out in *Central Hudson*, said

> it is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising. . . . Legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, has varied from outright prohibition on the one hand, to legalization of the product or activity with restrictions on stimulation of its demand on the other hand.[93]

In *Rubin v. Coors Brewing Co.*, the Court finally rejected the application of the "greater includes the lesser" argument.[94] Coors brought action against the Federal Alcohol Administration seeking judgment on the grounds that prohibiting brewers from displaying alcohol content on beer labels violated the First Amendment.[95] When the Government, relying on *Posadas*, set forth an argument that alcoholic beverages were "vice" products and that the greater power to prohibit includes the lesser power to restrict their advertising, the Court rejected their rationale.[96] The Court held that *Posadas* did not compel the Court to craft an exception to the *Central Hudson* standard. The Court explained that though it concluded that the government could ban "advertising of casino gambling because it could have prohibited gambling altogether," it did so only after "it already had found that the state regulation survived the *Central Hudson* test."[97]

IV. PROCEDURAL HISTORY

A. District Court

44 Liquormart, Inc. and People's Super Liquor Stores brought their First Amendment argument before the United States District Court of Rhode Island.[98] The district court recognized that the constitutionality of these same statutes was addressed in two previous cases decided by the Rhode Island Supreme Court.[99] The court pointed out that in both cases the Supreme Court of Rhode Island held

92. Posadas De P.R. Assoc. v. Tourism Co. of P.R., 478 U.S. 328, 345-46 (1986).
93. *Id.* at 346 (citations omitted).
94. Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).
95. *Id.*
96. *Id.* at 481, n.2. The government also relied on *United States v. Edge Broadcasting Co.* In *Edge Broadcasting Co.*, petitioners sought judgment that regulations banning the advertising of gambling on radio stations licensed in non-lottery states violated the First Amendment. The government asserted that gambling was a "vice" activity and "that the greater power to prohibit gambling necessarily includes the lesser power to ban its advertisement." The Court in *Edge Broadcasting* refused to address the argument because the statues were not unconstitutional under *Central Hudson*. United States v. Edge Broad. Co., 509 U.S. 418, 425 (1993). Responding to the government's reliance on *Edge Broadcasting*, the Court, in *Rubin*, said, "[i]ndeed, *Edge Broadcasting* specifically avoided reaching the argument the government makes here because the Court found that the regulation in question passed muster under *Central Hudson*." *Rubin*, 514 U.S. at 482, n.2.
97. *Rubin*, 514 U.S. at 482, n.2.
98. 44 Liquor Mart, Inc. v. Racine, 829 F. Supp. 543 (D.R.I. 1993).
99. *Id.* at 549. *See* S & S Liquor Mart, Inc. v. Pastore, 497 A.2d 729 (R.I. 1985); Rhode Island Liquor Stores Ass'n v. Evening Call Pub. Co., 497 A.2d 331 (R.I. 1985).

that the advertising ban on prices was a "valid exercise of the State's powers under the Twenty-first Amendment" and not in violation of the retailers' First Amendment rights but noted that the holdings were merely persuasive authority and not binding upon it.[100]

The district court accepted the parties' agreement to stipulate that "Rhode Island has a substantial interest in fostering temperance and that under the Twenty-first Amendment the State has the right to regulate 'the sale, and the incidents thereof, of alcoholic beverages, and to protect its citizens from the evils incident to alcohol.'"[101] But, Rhode Island contended that the legislature's means need only be "reasonably related to" rather than "directly advance" its substantial interest in order to withstand constitutional scrutiny.[102] Rhode Island further contended that "because of the Twenty-first Amendment, the price advertising regulation is entitled to an 'added presumption' in favor of its validity."[103] Rhode Island argued "that this 'added presumption' works to shift the burden of proof to the plaintiffs to show that 'these statutes are unconstitutional beyond a reasonable doubt.'"[104]

The district court found that Rhode Island's argument gave too much weight to the Twenty-first Amendment.[105] It held, "The Twenty-first Amendment is an exception to the Commerce Clause and gives the states broad regulatory authority over interstate commerce of liquor."[106] But, the court further held that the regulatory power was not absolute and did not necessarily override other constitutional guaranties including those prescribed in the First Amendment.[107] The district court did not find the cases Rhode Island relied on applicable and binding in this case.[108] Accordingly the court found "the Twenty-first Amendment does not

100. *44 Liquor Mart*, 829 F. Supp. at 543. *See* Grantham v. Avondale Indus., 964 F.2d 471 (5th Cir. 1992).

101. *44 Liquor Mart*, 829 F. Supp at 551 (quoting Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490, 500 (10th Cir. 1983), *rev'd* by Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984)).

102. *Id.*

103. *Id.* (citing New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 718 (1981) (quoting California v. LaRue, 409 U.S. 109, 118 (1972)).

104. *Id.* (quoting Defendant's Post-Trial Memorandum at 7). *See S & S Liquor Mart, Inc.*, 497 A.2d at 729; *See also Evening Call*, 497 A.2d at 331.

105. *44 Liquor Mart*, 829 F. Supp. at 551.

106. *Id.* at 552.

107. *Id. See* Craig v. Boren, 429 U.S. 190 (1976). The majority per Justice Brennan said: "Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. As one commentator has remarked: 'Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned.'" *Id.* at 206 (quoting P. BREST, PROCESSES OF CONSTITUTIONAL DECISION-MAKING, CASES AND MATERIALS 258 (1975)).

108. Defendants based their argument on *S & S Liquor Mart, Inc.*, 497 A.2d at 729 and *Evening Call Publishing Co.*, 497 A.2d at 331, which primarily relied on two U.S. Supreme Court decisions, *LaRue*, 409 U.S. at 109, and *Bellanca*, 452 U.S. at 714. The district court said: "I do not find these cases persuasive in the present context . . . . These cases concerned total bans on liquor and advertising. They simply do not deal with price advertising in the present factual setting." *44 Liquor Mart, Inc.*, 829 F. Supp. at 553. The district court also did not find the summary dismissal in *Queensgate Inv. Co. v. Liquor Control Comm'n*, 459 U.S. 807 (1983) strongly authoritative because of its different factual predicate and its lack of a reasoned opinion. *Id.*

require a modification of either the level or allocation of the burden of proof in commercial speech cases involving the regulation of the sale of alcoholic beverages."[109]

After refusing to base its judgment on the Twenty-first Amendment argument, the district court applied the test set out in *Central Hudson*. The court accepted the parties' agreement that the activity was lawful and not misleading and that the State had a substantial interest in promoting temperance therefore satisfying the first two prongs of *Central Hudson*.[110] The court then focused on the last two prongs of the test.[111]

To determine the relationship between the prohibition and the asserted end of promoting temperance, the court extensively reviewed the evidence concerning the effects of alcohol advertising on alcohol consumption.[112] It found a "pronounced lack of unanimity among researches."[113] The court concluded that the State had failed to meet its burden of proof. It stated, "The State has simply not shown an 'immediate connection' between the price advertising ban and reduced consumption."[114] Therefore, the third prong of *Central Hudson* was not met.

The court also held that the statutes failed to meet the fourth prong of *Central Hudson*. It found "that the price advertising ban [was] more extensive than necessary to serve the State's asserted interest."[115] The Court set out alternative ways to accomplish its goal without restricting speech. The court said

> [C]ommon sense tells us that a lifting of the ban on price advertising will lead to a more competitive market. But any concern that such competition will result in unacceptably low liquor price levels can be controlled by the imposition of higher sales taxes or minimum consumer prices. Such measures would directly serve the State's asserted ends without burdening commercial speech.[116]

Finding that prongs three and four of the *Central Hudson* test were not met, the United States District Court for the District of Rhode Island entered judgment for the plaintiffs.[117] It concluded that Rhode Island's two statutes "impermissibly restricte[d] commercial speech" and were therefore unconstitutional.[118]

B. Court of Appeals

Following declaratory judgment for the liquor retailers, the defendants appealed to the United States Court of Appeals for the First Circuit. The court of

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109. *44 Liquor Mart, Inc.*, 829 F. Supp. at 553 (citing Michigan Beer & Wine Wholesalers Ass'n v. Attorney General, 370 N.W.2d 328, 335 (Mich. Ct. App. 1985), *cert. denied*, 479 U.S. 939 (1986) (Twenty-first Amendment does not require court to treat restraints on speech any differently than if alcoholic beverages were not involved)).

110. *Id.* at 554. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

111. *44 Liquor Mart, Inc.*, 829 F. Supp. at 554.

112. *Id.* at 546-49.

113. *Id.* at 546.

114. *Id.* at 554.

115. *Id.*

116. *Id.*

117. *Id.* at 555.

118. *Id.*

appeals recognized that the retailers had sufficient standing to attack these statutes.[119] Rhode Island argued that

> [t]he advertising ban directly advanced the governmental interest by increasing the cost of alcoholic beverages, thereby lowering the amount of alcohol consumption by residents of the State of Rhode Island. . . . [T]he State's power to totally ban any advertising about alcoholic beverages necessarily included the lesser power to restrict price advertising. Further, the State contended that plaintiffs, in order to rely on the First Amendment, must "prove that the four part *Central Hudson* test could not be met."[120]

The court began its analysis by applying the *Central Hudson* test.[121] As did the district court, the court of appeals accepted the parties' agreement that prongs one and two raised no question and moved forward to an analysis of the last two prongs.[122] In its determination as to whether the advertising restriction "directly advanced" the State's interest in promoting temperance, the court first dealt with the burden of proof.[123] The court of appeals, agreeing with the lower court, held that the burden is on the party seeking suppression, in this case the State, but it did not agree with the level of proof required by the lower court.[124] The court of appeals pointed out that the lower court demanded the State persuade the court they were "correct."[125] The court of appeals, however, believed the burden to be mere "reasonableness."[126]

The court of appeals held that the third prong of "directly advancing temperance" was met.[127] It relied on *Posadas*'s lower standard — "[w]arrantable inferences, however, may be sufficient."[128] Further, relying on *LaRue*, the court relieved the State of some burden of proof by emphasizing an "added presumption in favor of the validity of the [S]tate regulation in this area that the Twenty-First Amendment requires."[129]

The court of appeals also did not agree with the lower court's analysis of the fourth prong of the *Central Hudson* test. It held that the State was entitled to a reasonable choice of methods to accomplish its goals and was not required to use one of the means suggested by the lower court.[130] The court of appeals did not believe the district court could find the State's means were unreasonable without affirmative contradictions to rely on—especially with the added presumption

119. 44 Liquormart, Inc. v. Rhode Island, 39 F.3d 5, 6 (1st Cir. 1994). The court said, "[t]he State of Rhode Island . . . did not ratify the Eighteenth Amendment, and was among the earliest to ratify the Twenty-[f]irst that repealed it, in 1956." *Id.*
120. *Id.* at 6.
121. *Id.* at 6-8.
122. *Id.* at 6-7.
123. *Id.* at 7.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* Posadas De P.R. Assoc. v. Tourism Co. of P.R., 478 U.S. 328, 341-42 (1986).
129. 44 Liquormart, Inc. v. Rhode Island, 39 F.3d 5, 7 (1st Cir. 1994) (quoting California v. LaRue, 409 U.S. 109, 118-19 (1972).
130. *Id.*

granted by the Twenty-first Amendment.[131] Noting that the plaintiffs did not attempt to rebut the statute's declared purpose, the United States Court of Appeals for the First Circuit reversed the district court's decision and entered judgment for Rhode Island.[132] 44 Liquormart, Inc., and People's appealed their constitutional question to the United States Supreme Court and certiorari was granted.

V. INSTANT CASE

In May of 1996, the Court unanimously held that Rhode Island's statutes prohibiting the advertisement of alcohol prices violated the First Amendment and were therefore unconstitutional.[133] Though all of the Justices concurred in the judgment, there was far less unanimity in reasoning. Justice Stevens announced the judgment of the Court and announced an opinion which was joined in parts by various Justices.[134] Both Justices Scalia and Thomas wrote individual opinions concurring in parts and concurring in the judgment.[135] Justice O'Connor also wrote a separate opinion concurring in the judgment; Chief Justice Rehnquist, Justice Souter, and Justice Breyer joined her opinion.[136]

In parts one, two, and three, Justice Stevens discussed the procedural history, facts, and the history of the applicable law. The rest of the opinion basically addressed four areas: (1) Is *Central Hudson* still the appropriate test? (2) If the *Central Hudson* test is used, how strict is its application? (3) Where does the Court stand on various other arguments that have been introduced in prior commercial speech cases and that were asserted by Rhode Island in this case? (4) How does the Twenty-first Amendment affect the First Amendment?

A. Is Central Hudson *the Appropriate Test?*

1. Justices Stevens, Kennedy, and Ginsburg

Justices Stevens, Thomas, Kennedy, and Ginsburg all seem to concur that the *Central Hudson* test should not have been used in the present case and should possibly be abandoned. The remaining Justices refused to decide this case so broadly. Part four of Justice Stevens' opinion, which Justice Kennedy and Justice Ginsburg joined, rejected Rhode Island's conclusion that the level of scrutiny used during constitutional review should be the same for all commercial speech.[137] Justice Stevens suggested that commercial speech, which is not deceptive or misleading, should receive the same level of scrutiny (strict scrutiny) as

131. *Id.* at 7-8.
132. *Id.* at 8-9.
133. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1515 (1996).
134. *Id.* at 1501-15.
135. *Id.* at 1515-20.
136. *Id.* at 1520-23.
137. *Id.* at 1507. *See also* Rubin v. Coors Brewing Co., 514 U.S. 476, 482 (1995) (Stevens, J., concurring in judgment).

non-commercial speech and not be subjected to the mid-level scrutiny set out in *Central Hudson*.[138] Justice Stevens agreed that regulations directed at protecting the consumer from misleading and deceptive advertisements deserve less than strict review, but he did not agree that a lower level of scrutiny should be used for commercial speech that is not deceptive or misleading.[139] He wrote: "[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands."[140]

Justice Stevens noted that a lesser level of scrutiny for truthful and non-misleading commercial speech is even more unjustified and in danger of violating the First Amendment when the regulation amounts to a complete ban.[141] This is because, unlike content neutral time, place, and manner restrictions, complete bans deny alternative means for the message to be portrayed.[142] Justice Stevens contended that the dangers involved when regulations amount to "complete bans on truthful, nonmisleading commercial speech cannot be explained away by appeals to the 'commonsense distinctions' that exist between commercial and noncommercial speech. . . . [N]either the 'greater objectivity' nor the 'greater hardiness' of truthful, nonmisleading commercial speech justifies reviewing its complete suppression with added deference."[143]

Justice Stevens pointed out that the reason commercial speech has obtained a lesser level of scrutiny than non-commercial speech is to protect consumers from "commercial harms."[144] He explained that regulations amounting to complete bans on truthful and nonmisleading commercial speech are rarely directed at protecting consumers from such harms but "rest solely on the offensive assumption that the public will respond 'irrationally' to the truth."[145] Justice Stevens' established belief is that, as a general rule, the speaker and the audience should determine the value that should be given to speech, not the government.[146] He maintained that truthful and non-misleading information should not lose its First Amendment protections simply because it proposes a commercial transaction.[147]

2. Justice Scalia

Justice Scalia, in his separate opinion, sympathized with Justice Stevens' concerns about "paternalistic governmental polices that prevent men and women from hearing facts that might not be good for them."[148] But, he said, "On the other hand, it would also be paternalism for [the Court] to prevent the people of

138. *44 Liquormart, Inc.*, 116 S. Ct. at 1507.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 1507-08 (citation omitted).
144. *Id.* at 1508 (citing Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426 (1993)).
145. *Id.* at 1508 (citing Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85, 96 (1977)).
146. *Id. See* Rubin v. Coors Brewing Co., 514 U.S. 476, 491 (1995) (Stevens, J., concurring in judgment).
147. *44 Liquormart, Inc.* 116 S. Ct. at 1507.
148. *Id.* at 1515.

the States from enacting laws that we consider paternalistic, unless we have good reason to believe that the Constitution itself forbids them."[149] Justice Scalia agreed with Justice Stevens that these statutes did not pass the test set out in *Central Hudson*, but he did not agree that the Court had the authority at this time to overrule *Central Hudson*.[150] Justice Scalia believed that the Court should look to the "state legislative practices at the time the Fourteenth Amendment was adopted" for guidance on how commercial speech should be treated under the First Amendment.[151]

3. Justices O'Connor, Souter, Breyer, and Chief Justice Rehnquist

Justice O'Connor, joined by Chief Justice Rehnquist, and Justices Souter and Breyer, expressed some of the same concerns as Justice Scalia. Justice O'Connor said she would have "resolved this case more narrowly."[152] Because Rhode Island's statutes would not pass *Central Hudson*, Justice O'Connor did not see the need at this time to adopt a new analysis for commercial speech evaluation.[153]

4. Justice Thomas

Though Justice Thomas did not join in part four of Justice Stevens' opinion, he too did not believe that the test set out in *Central Hudson* should be applied.[154] He pointed out what he saw as inconsistencies in the Court's decisions. Justice Thomas said that after *Virginia Pharmacy*, some members of the Court "continued to stress the importance of free dissemination of information about commercial choices in a market economy; [and] the antipaternalistic premises of the First Amendment," but at other times the Court "appeared to accept the legitimacy of laws that suppress information in order to manipulate the choices of consumers—so long as the government could show that the manipulation was in fact successful."[155] Justice Thomas, apparently in agreement with Justice Stevens, further asserted that commercial speech should not receive a lesser level of scrutiny than noncommercial speech and that reasons given in past cases for treating them differently were unjustified.[156]

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149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 1521.
153. *Id.* at 1520-22.
154. *Id.* at 1515-16.
155. *Id.* at 1517.
156. *Id.* at 1518. Thomas recalled the interests set out in *Central Hudson*. He said, "The asserted rationales for differentiating 'commercial' speech from other speech are (1) that the truth of 'commercial' speech is supposedly more verifiable, and (2) that 'commercial speech, the offspring of economic self-interest' is supposedly a 'hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulations.'" *Id.* at 1518 n.4 (quoting Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980)) (internal quotation marks omitted).

B. Application of Central Hudson

1. Justices Stevens, Kennedy, Souter, and Ginsburg

Though Justice Stevens suggested in part four that truthful and nonmisleading, commercial speech should receive ordinary, noncommercial speech First Amendment scrutiny and protection, he nevertheless proceeded in part five of his opinion to apply the test set out in *Central Hudson*.[157] Justices Kennedy, Souter, and Ginsburg joined this part of his opinion. Justice Stevens found that the statutes, in compliance with prong one of the *Central Hudson* test, constituted a ban against "truthful, nonmisleading speech about a lawful product," and he then applied the remaining three prongs.[158]

Rhode Island argued that the statutes pass prongs two and four of the *Central Hudson* test because they serve a "substantial interest in promoting temperance, and because it is no more extensive than necessary" to serve this interest.[159] Justice Stevens maintained that the ban "may not be sustained if it provides only ineffective or remote support for the government's purpose."[160] He further contended that "the State bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so 'to a material degree.'"[161] Justice Stevens held that without evidentiary proof we could assume (1) the prohibition tends to alleviate competition, therefore keeping prices higher; and (2) consumption is lower when prices are higher; but he held that without such proof we could not conclude that the regulation will advance its interest to a "material degree."[162] Such a conclusion, he suggests, would require "speculation" and "conjecture" on the part of the Court.[163] So, while Justice Stevens did not declare Rhode Island had no "substantial interest" in promoting temperance in compliance with the second prong of *Central Hudson*, he refused to find that the statutes "directly advanced" (third prong) the interest without a finding that such advancement was of a "material degree."[164]

Justice Stevens also determined that the State did not meet the forth prong requirement that its advertisement prohibition be "no more extensive than necessary" to reach its goal.[165] Justice Stevens said the State "failed to establish a 'reasonable fit' between its abridgment of speech and its temperance goal."[166] Justice Stevens concluded this section by pointing out that the prohibitions cannot survive even under *Central Hudson*'s "less than strict standard that generally applies in commercial speech cases."[167]

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157. *Id.* at 1508-10. *See Central Hudson*, 447 U.S. at 570.
158. *44 Liquormart, Inc.* 116 S. Ct. at 1508. *See Central Hudson,* 447 U.S. at 566.
159. *44 Liquormart, Inc.*, 116 S. Ct. at 1508-09.
160. *Id.* at 1509.
161. *Id.* (citing Edenfield v. Fane, 507 U.S. 761, 771 (1993); *See also* Rubin v. Coors Brewing Co., 514 U.S. 476, 485 (1995).
162. *44 Liquormart, Inc.*, 116 S. Ct. at 1509-10.
163. *Id.*
164. *Id.*
165. *Id.* at 1510.
166. *Id.*
167. *Id.*

2. Justices Scalia and Thomas

In a separate opinion, Justice Scalia agreed that the statutes did not pass the *Central Hudson* test and did not provide any analysis for this conclusion. Justice Thomas, also in a separate opinion, concurred with this "stricter" application of *Central Hudson*. In particular, Justice Thomas commented on the Court's application of the fourth prong of *Central Hudson* and Justice Stevens' application of it in this case. He said, "[F]aulting the State for failing to show that its price advertising ban decreases alcohol consumption 'significantly,' . . . seems to imply that if the State had been *more successful* at keeping consumers ignorant and thereby decreasing their consumption, then the restriction might have been upheld."[168] He said that this strict application of prong four commits the Court to strike down all regulations that effect speech when other regulations would be at least as effective.[169] Justice Thomas asserted that he did not mind this application so much because he believes that it inevitably leads the Court back to the doctrine of *Virginia Pharmacy*— which is exactly the direction he would like to see the Court turn.

3. Justices O'Connor, Souter, Breyer, and Chief Justice Rehnquist

Justice O'Connor, with Chief Justice Rehnquist and Justices Souter and Breyer joining, also accepted that the statutes did not pass the First Amendment analysis of *Central Hudson*. Justice O'Connor focused her opinion on the fourth prong.[170] She said that even if we assume that all of the prongs except the fourth were met, the regulations could not pass prong four.[171] She said, "The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny."[172] She recognized a looser application of prong four was applied in *Posadas*, but she pointed out that, after *Posadas*, the Court has required a "closer look" at "the State's professed goal."[173]

C. "Legislative Deference," "Lesser Includes the Greater," and "Vice Products"

In part six, Justice Stevens, joined by Justices Kennedy, Thomas, and Ginsburg, responded to three arguments asserted by Rhode Island.[174] The Court had been confronted with these arguments in prior cases and again attempted to put them to rest. Rhode Island first argued, "because expert opinions as to the effectiveness of the price advertising ban 'go both ways,' the Court of Appeals correctly concluded that the ban constituted a 'reasonable choice' by the legislature."[175] Justice Stevens rejected the State's first argument.[176] He found that the

168. *Id.* at 1518.
169. *Id.* at 1519.
170. *Id.* at 1521-22.
171. *Id.*
172. *Id.* at 1521.
173. *Id.* at 1522.
174. *Id.* at 1510-14.
175. *Id.* at 1511(citing 44 Liquormart, Inc. v. Rhode Island, 39 F.3d 5, 7 (1994)); *Cf.* Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 478 (1989) ("reasonable fit").
176. *44 Liquormart, Inc.* 116 S. Ct. at 1511.

State's reliance on the Supreme Court's holding in *United States v. Edge Broadcasting Co.* was erroneous.[177] Justice Stevens pointed out how that decision was directed at a statute that regulated advertising of illegal activity where this advertising ban is directed at information pertaining to lawful activity.[178]

Justice Stevens found Rhode Island's reliance on *Posadas*, which held that it was left to the legislature to decide on the proper means to reach their goals, more persuasive;[179] however, he did not agree with Rhode Island. Instead, he held that *Posadas* had "erroneously performed the First Amendment analysis."[180] Justice Stevens concluded by saying, "[A] state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate."[181]

Second, Rhode Island argued that "precedent requires [the Court] to give particular deference to that legislative choice because the State could, if it chose, ban the sale of alcoholic beverages outright."[182] Justice Stevens also refused to accept this argument.[183] He noted that again Rhode Island relied on the Court's findings in *Posadas* where the majority held that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."[184] Based on this statement, Rhode Island concluded that "its undisputed authority to ban alcoholic beverages must include the power to restrict advertisements offering them for sale."[185] Justice Stevens rejected this syllogism as applied to complete bans on truthful, nonmisleading commercial speech. Justice Stevens said, "Contrary to the assumption made in *Posadas*, we think it quite clear that banning speech may sometimes prove far more intrusive than banning conduct."[186]

Third, Rhode Island argued, "Deference is appropriate because alcoholic beverages are so-called 'vice' products."[187] Justice Stevens also rejected this argument.[188] He found that the State erroneously relied on *Edge*.[189] He recalled that

177. *Id.* United States v. Edge Broad. Co., 509 U.S. 418 (1993).

178. *44 Liquormart, Inc.*, 116 S. Ct. at 1511; *Edge*, 509 U.S. at 433-35.

179. *44 Liquormart, Inc.*, 116 S. Ct. at 1511. *See* Posadas De P.R. Assoc. v. Tourism Co. of P.R., 478 U.S. 328, 344 (1986).

180. *44 Liquormart, Inc.*, 116 S. Ct. at 1511. *See Posadas*, 478 U.S. at 351 (Brennan, J., dissenting).

181. *44 Liquormart, Inc.*, 116 S. Ct. at 1511.

182. *Id. See Posadas*, 478 U.S. at 345-46.

183. *44 Liquormart, Inc.*, 116 S. Ct. at 1512-13.

184. *Id.* at 1512; *Posadas*, 478 U.S. at 345-46.

185. *44 Liquormart, Inc.*, 116 S. Ct. at 1512.

186. *Id.* Stevens footnoted the proverb: "Give a man a fish, and you feed him for a day. Teach a man to fish, and you feed him for a lifetime." *Id.* at 1512, n.19 (quoting THE INTERNATIONAL THESAURUS OF QUOTATIONS 646 (compiled by R. Tripp 1970)). He said, "[i]t may prove more injurious to prevent people from teaching others how to fish than to prevent fish from being sold. Similarly, a local ordinance banning bicycle lessons may curtail freedom far more than one that prohibits bicycles riding within city limits. In short we 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." *Id.* at 1512.

187. *Id.* at 1511. *See* United States v. Edge Broad. Co., 509 U.S. 418 (1993).

188. *44 Liquormart, Inc.*, 116 S. Ct. at 1513-14.

189. *Id.* at 1513. *See Edge*, 509 U.S. at 418.

in *Rubin* the Court struck down this very argument.[190] Rejecting this argument, Justice Stevens said that "recognition of such an exception would also have the unfortunate consequence of either allowing state legislatures to justify censorship by the simple expedient of placing the 'vice' label on selected lawful activities, or requiring the federal courts to establish a federal common law of vice."[191]

D. The Twenty-first Amendment and its Relation to the First Amendment

In part seven of Justice Stevens' opinion, he wrote for the entire Court and held that Rhode Island's liquor price advertising ban could not be saved by the Twenty-first Amendment.[192] He acknowledged that both the State[193] and the court of appeals relied on the Court's statement in *LaRue* that "the Twenty-first Amendment required that the prohibition be given an added presumption in favor of its validity."[194] However, as the Court established more recently in *Rubin*, "*LaRue* did not involve commercial speech about alcohol, but instead concerned the regulation of nude dancing in places where alcohol was served."[195] Accordingly, the Court put this argument to rest and held, "[T]he Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment."[196] Agreeing with Justice Stevens' analysis in that regard, Justice O'Connor wrote: "The Twenty-first Amendment does not trump First Amendment rights or add a presumption of validity to a regulation that cannot otherwise satisfy First Amendment requirements."[197]

VI. ANALYSIS

Though the Supreme Court's judgment in *44 Liquormart, Inc.* was unanimous, the majority did not concur in a single line of reasoning. The Court left important questions to be answered. The uncertainty that remains creates fear in many about the status of the increasingly popular bans on cigarette advertising.

The use of cigarettes and other tobacco products by minors and the health risks related to such use have led state legislatures, Congress, the Food and Drug Administration, and the President in search for means to discourage the use of tobacco products. Restricting the advertising of such products has been a pre-

190. *44 Liquormart, Inc.*, 116 S. Ct. at 1513. *See* Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).
191. *44 Liquormart, Inc.*, 116 S. Ct. at 1513.
192. *Id.* at 1515.
193. Stevens wrote in a footnote, "The State also relies on two *per curia* opinions that followed the 21st Amendment analysis set forth in *LaRue*." *Id.* at 1514 (citing New York State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981), and Newport v. Iacobucci, 479 U.S. 92 (1986)).
194. *Id.* California v. LaRue, 409 U.S. 109, 118-19 (1973).
195. *Id. See Rubin*, 514 U.S. at 483, n.2.
196. *44 Liquormart, Inc.*, 116 S. Ct. at 1515.
197. *Id.* at 1523.

dominant route to accomplishing their goal.[198] The Supreme Court has not addressed these bans under its current commercial speech analysis.[199] Perhaps the Supreme Court will have the opportunity to further stabilize commercial speech law through an analysis of these growing bans on cigarette advertising.

After the Supreme Court's opinion in *44 Liquormart, Inc.*,[200] what is most uncertain is whether the entire Court will return to the basic analysis of *Virginia Pharmacy*.[201] Will the Court conclude that once it has determined that the commercial speech in question is truthful, nonmisleading, and concerns lawful activity that the speech will receive full First Amendment protection—the regulation must pass strict scrutiny to survive?[202] It appears that Justices Stevens, Thomas, Kennedy, and Ginsburg are ready to embrace this analysis.[203] And, while the remaining five Justices did not find it necessary to adopt that standard in this case, they did not rule out the possibility of its adoption in future cases. If the Court was to adopt this standard, all bans on truthful, nonmisleading commercial speech that concerned lawful activity would have to pass strict scrutiny in order to be upheld; theoretically, even bans on certain cigarette advertising.

Though the Court left undecided if a majority will eventually overturn *Central Hudson*[204] and return to the standards of *Virginia Pharmacy*,[205] the Supreme Court's *44 Liquormart, Inc.* opinion does provide some firm guidance in other areas.[206] For instance, it is clear that the Court is no longer going to accept the "vice" products or conduct argument, the "greater includes the lesser" rationale, or the assertion that a state has "broad discretion to suppress truthful, non-misleading information for paternalistic purposes."[207] Furthermore, though a majority was not willing to overturn *Central Hudson* on the facts of *44 Liquormart, Inc.*, it appears a unanimous Court will apply a "stricter" application of *Central Hudson*, rather than the deferential analysis employed by the Court in *Posadas*.[208]

Prongs one and two of *Central Hudson*'s test have been applied fairly consistently throughout commercial speech cases. There has been some variation on

198. *See* Public Health Cigarette Smoking Act, Pub. L . No. 91-222, 84 Stat. 87 (1970) (codified as amended at 15 U.S.C. §§ 1331-1340 (1994)) (making it unlawful to "advertise cigarettes . . . on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission); Baltimore City Code, Art. 30 (zoning),§ 10.0-1(I)(1994); 60 Fed. Reg. 41,314 (1995) (to be codified at 21 C.F.R. pts. 801, 803, 804, 897) (proposed Aug. 11, 1995) (restricting the sale and distribution of cigarettes and smokeless tobacco products to protect children and adolescents); Tobacco Products Control Act of 1995, S. 1262, 104th Cong., 1st Sess. (1995) (attempting to restrict advertising on all billboards in close proximity to elementary and secondary schools, print ads in publications where subscribers under the age of 18 make up more than 15% of the total subscribers, and in family amusement centers). *See also* Youth Smoking Prevention Act of 1995, H.R. 2414, 104th Cong., 1st Sess. (1995); Freedom From Nicotine Addiction Act of 1995, H.R. 1853, 104th Cong., 1st Sess. (1995). *See generally* Daniel Helberg, *supra* note 35.

199. The Supreme Court upheld the ban of cigarette advertising on radio and television in *Capital Broadcasting Co. v. Mitchell*, but this decision was made before *Central Hudson* was decided. Capital Broad. Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd*, 405 U.S. 1000 (1972); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

200. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996).

201. Virginia State Bd. of Pharm. v. Virginia Citizen Consumer Council, 425 U.S. 748 (1976).

202. *Id.*

203. *44 Liquormart, Inc.*, 116 S. Ct. 1495.

204. *Central Hudson*, 447 U.S. 557.

205. *Virginia Pharm.*, 425 U.S. 748.

206. *44 Liquormart, Inc.*, 116 S. Ct. 1495.

207. *Id.* at 1511.

208. *Id.*

the application of prong three, but most of the discrepancies in applying *Central Hudson* appear in prong four. The prong three standard started off in *Central Hudson* to be that the regulation was required to "directly advance" the state's asserted "substantial interest."[209] Though the Court in *Posadas* used this same terminology, its application was less stringent. It did not focus on evidence for proof that the prong was satisfied, but rather found it sufficient that the legislatures believed the regulation would advance their interest.[210] This is the same reasoning used by the First Circuit in *44 Liquormart, Inc.*[211] The court refused to follow the logic of the lower court who analyzed statistical evidence concerning the effect of the regulation on the governmental interest and instead concluded that "warrantable inferences" were sufficient to determine that the interest was advanced.[212] The Supreme Court rejected this application of the third prong and added that the regulation must not merely "directly advance" the government's interest but must do so in a "material way."[213]

The fourth prong of *Central Hudson* has fluctuated more dramatically than any of the other prongs and was given the most attention by the Justices in the Supreme Court's *44 Liquormart, Inc.* opinion. *Central Hudson*'s fourth prong originally required that the regulation be "no more extensive than necessary" to accomplish its goal.[214] Justice Rehnquist, in *Posadas*, weakened this prong by allowing legislatures to have a choice between means to accomplish their goal, regardless of the effects on speech.[215] Again, the First Circuit in *44 Liquormart, Inc.* followed the reasoning of the Court in *Posadas* and allowed legislatures a "reasonable choice" of methods to satisfy their interests.[216] The Supreme Court once more rejected the reasoning used in *Posadas* and by the First Circuit. It again required a showing that the regulation was "no more extensive than necessary" to accomplish its goal.[217]

So, while it is unclear if the *Central Hudson* test will be the commercial speech standard in cases to come, it is at least certain that a majority will require the rigorous application used in *44 Liquormart, Inc.* Such a strict application should prove to strike down many bans on commercial speech. States must meet high standards before any ban on truthful, nonmisleading commercial speech will be upheld—especially when it amounts to a "complete ban." With such a high burden, it seems a loophole or an exception will have to be created in order for some of the present cigarette advertising bans to pass First Amendment scrutiny—unless the standard is ignored.

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209. *Central Hudson*, 447 U.S. at 566.
210. Posadas De P.R. Assoc. v. Tourism Co. of P.R., 478 U.S. 328, 335-36 (1986).
211. 44 Liquormart, Inc. v. Rhode Island, 39 F.3d 5 (1st Cir. 1994).
212. *Id.*
213. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1508-09 (1996).
214. *Central Hudson*, 447 U.S. at 566.
215. Posadas De P.R. Assoc. v. Tourism Co. of P.R., 478 U.S. 328, 341-44 (1986).
216. *44 Liquormart, Inc.*, 39 F.3d at 7.
217. *44 Liquormart, Inc.*, 116 S. Ct. at 1509.

Recently, the Fourth Circuit had the opportunity to strike down a ban on cigarette advertising but declined.[218] In refusing to do so, the Fourth Circuit did not create a loophole nor an exception but, instead, seemingly ignored issues decided in *44 Liquormart, Inc.* involving the standards required by the *Central Hudson* test.[219]

The Fourth Circuit delivered its opinion in *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore*, on August 31, 1995, more than eight months before the Supreme Court decided *44 Liquormart, Inc. v. Rhode Island.*[220] It was faced with the decision of whether Baltimore, Maryland Ordinance 307 violated the First Amendment.[221] The ordinance prohibited "the placement of any sign that 'advertise[d] cigarettes in a publicly visible location,' *i.e.*, on 'outdoor billboards, sides of building[s], and freestanding signboards.'"[222] To arrive at its decision, the Fourth Circuit applied the test set out in *Central Hudson.*[223]

In its application, the court skipped over the first prong and went right into its discussion of the second prong of "substantial government interest."[224] The government's asserted interest was "to promote compliance with the state prohibition of the sale of cigarettes to minors."[225] The court also recognized that the district court found that "the ordinance also furthers the obvious public policy underlying such a prohibition, 'which is to prevent the purchase, and thus the consumption, of cigarettes by minors.'"[226] The court found that this was a substantial public interest and moved on to its analysis under the third and fourth prongs of *Central Hudson.*[227]

The court did not do an independent analysis of the last two prongs.[228] Instead, it referred to its analysis in *Anheuser-Busch, Inc. v. Schmoke.*[229] The ordinance in

218. Penn Adver. of Baltimore, Inc. v. Mayor of Baltimore, 101 F.3d 332 (4th Cir. 1996).

219. *44 Liquormart, Inc.*, 116 S. Ct. 1495.

220. Penn Adver. of Baltimore, Inc. v. Mayor of Baltimore, 63 F.3d 1318 (4th Cir. 1995); *44 Liquormart, Inc.*, 116 S. Ct. 1495.

221. *Penn Adver.*, 63 F.3d at1320-21; Baltimore City Code, Art. 30 (zoning), § 10.0-1(I). The court was also faced with the issue of whether Ordinance 307 was "preempted by the Federal Cigarette Labeling and Advertising Act or by Maryland statutes prohibiting the sale of cigarettes to minors or the possession of cigarettes by minors." *Id.* Ultimately, the court found that the Ordinance was not preempted by either. *Id.* at 1324.

222. *Penn Adver.*, 63 F.3d at 1321 (alterations in original). The ordinance in question, Ordinance 307, in relevant part provides: "No person may place any sign, poster, placard, device, graphic display, or other form of advertising that advertises cigarettes in a publicly visible location. In this section 'publicly visible location' includes outdoor billboards, sides of building[s], and free standing signboards." *Id.* at 1321, n.1 (alterations in original) (citing Baltimore City Code, Art. 30 (zoning), § 10.0-1(I)).

223. *Id.* at 1325-26; Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n N.Y., 447 U.S. 557, 566 (1980).

224. *Penn Adver.*, 63 F.3d at 1325. The Fourth Circuit does address prong one in its opinion of *Anheuser-Busch* after remand from the Supreme Court with direction to be decided in compliance with *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996). Anheuser-Busch, Inc. v. Schmoke, 101 F.3d 325, 329 (4th Cir. 1996). It said, "Baltimore's ordinance expressly targets persons who cannot be legal users of alcoholic beverages, not legal users as in Rhode Island." *Id.*

225. *Penn Adver.*, 63 F.3d at 1325.

226. *Id.* (quoting Penn Advert. of Baltimore, Inc. v. Mayor of Baltimore, 862 F. Supp. 1402, 1406 (D. Md. 1994)).

227. *Id.*

228. *See Id.* at 1325-26.

229. *Id.* at 1325; Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305 (4th Cir. 1995).

Anheuser-Busch similarly prohibited "the placement of stationary, outdoor 'advertising that advertises alcoholic beverages' in certain areas of [Baltimore] City."[230] In analyzing prong three of *Central Hudson*, the court found:

> There is a *logical nexus* between the City's objective and the means it selected for achieving that objective, and it is not necessary, in satisfying *Central Hudson*'s third prong, to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem. . . . The proper standard for approval must involve an assessment of the reasonableness of the legislature's belief that the means it selected will advance its ends.[231]

So the Fourth Circuit, loosely applying *Central Hudson*, found that the third prong was satisfied. Referring to its *Anheuser-Busch* analysis to determine the fourth prong—is the regulation "more extensive than is necessary to serve that interest,"[232]—the court concluded that when faced with a "problem as significant as that which the City seeks to address, the City must be given some reasonable latitude,"—satisfying prong four.[233]

Upon appeal of the Fourth Circuit's holding, the Supreme Court of the United States vacated the decision and remanded both *Penn Advertising*[234] and *Anheuser-Bush*[235] to be reconsidered in light of its opinion in *44 Liquormart, Inc.*[236] On remand of *Penn Advertising*,[237] the Fourth Circuit affirmed its prior holding without a full opinion but referred to modifications in its opinion of *Anheuser-Bush*[238] on remand.

In an attempt to justify its decision to uphold the advertising regulation, the Fourth Circuit did not change its application of *Central Hudson* but rather pointed out what it recognized as differences between Baltimore's restrictions and the restrictions in *44 Liquormart, Inc.*[239] The first difference the Fourth Circuit found was that Rhode Island's regulation constituted a "blanket ban" on price advertising while Baltimore's regulation was not a "ban," but "zoning."[240] The second difference between the two cases the court focused on was that Rhode Island's regulation sought "to enforce adult temperance through an artificial budgetary constraint, [while] Baltimore's interest is to protect children who are not yet independently able to assess the value of the message presented."[241]

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230. *Anheuser-Busch*, 63 F.3d at 1308.
231. Penn Adver. of Baltimore, Inc. v. Mayor of Baltimore, 63 F.3d 1318, 1325 (quoting *Anheuser-Busch*, 63 F.3d at 1314)(emphasis added).
232. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).
233. *Penn Adver.*, 63 F.3d at 1326 (quoting *Anheuser-Busch*, 63 F.3d at 1316)(emphasis added).
234. *Id.*
235. *Anheuser-Busch*, 63 F.3d 1305.
236. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996).
237. Penn Adver. of Baltimore, Inc. v. Mayor of Baltimore, 101 F.3d 332 (4th Cir. 1996).
238. Anheuser-Busch, Inc. v. Schmoke, 101 F.3d 325 (4th Cir. 1996).
239. *Id.*
240. *Id.*
241. *Id.* at 329. The court then discussed how the Supreme Court has observed special protections under the First Amendment where children are involved and cites a string of cases. *Id.* What the Fourth Circuit fails to realize is that these cases address either unprotected speech (obscenity and child pornography) or speech that has been given a different level of review (broadcast media) and not restrictions on truthful, non-misleading commercial speech. *Id. e.g.*

Clearly an advertising ban like the one in *Penn Advertising* would not pass First Amendment scrutiny if the Supreme Court were to return to the rigorous standards of *Virginia Pharmacy*.[242] All that would have to be determined under such standards is that the advertisement was truthful, nonmisleading, and concerned lawful activity.[243] While use of cigarettes and smokeless tobacco by minors is unlawful, there is no indication that only advertisements portraying minors using such products were prohibited; but, rather, lawful portrayals were prohibited because they were displayed in areas in plain view of children.[244] Unless the standard was changed to include lawful activity "appropriate" for view by children, such a restriction would be struck down. Consequently, such a change in this standard would bring back in the voice of paternalism and the "vice" argument which the Court explicitly attempted to get away from in *44 Liquormart, Inc.*[245]

While cigarette advertisements like the ones in *Penn Advertising* do not portray the use of tobacco by minors which is unlawful, there is an argument that these truthful advertisements could be misleading as to children. Since child consumption is illegal, it might be that stricter standards are applied to the advertisement of products and activities in which legality depends upon age so as to avoid misleading children. Such an argument might have the affect of altering the types of advertisements portrayed but should not rise to the level of banning all advertisements of such products and activities. This is one direction the Court could turn if it were to rely on the rigorous standards of *Virginia Pharmacy*,[246] but it still appears the advertising bans would not pass.

Even if the Court retains its renewed *Central Hudson* analysis,[247] it is likely advertising restrictions such as the one in *Penn Advertising*[248] would not be upheld by the Supreme Court. Though the Fourth Circuit claimed to use the *Central Hudson* test in compliance with its application in *44 Liquormart, Inc.*, it differed dramatically in its standards.[249] First, in its application of the third prong of *Central Hudson*, the Supreme Court required a finding that the means employed by the legislatures "directly advanced" the state's asserted interest to a "material degree";[250] the Fourth Circuit held that a "logical nexus" between the legislature's means and its asserted interest was sufficient.[251] Secondly, in its application of the fourth prong of *Central Hudson*, the Supreme Court required a finding that the regulation be "no more extensive than necessary" to serve the asserted substantial interest.[252] The Fourth Circuit held that the legislature had "reasonable latitude" to choose the manner in which to accomplish its goal.[253]

242. Virginia State Bd. of Pharm. v. Virginia Citizen Consumer Council, 425 U.S. 748 (1976).
243. *Id.*
244. Penn Adver. of Baltimore, Inc. v. Mayor of Baltimore, 101 F.3d 332 (4th Cir. 1996).
245. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996).
246. *Virginia State Bd. of Pharm.*, 425 U.S. 748 (1976).
247. *Id.*
248. *Penn Adver.*, 101 F.3d at 332.
249. *Id.*
250. *44 Liquormart, Inc.*, 116 S. Ct. at 1509.
251. Penn Adver. of Baltimore, Inc. v. Mayor of Baltimore, 63 F.3d 1318, 1325 (4th Cir. 1995) (quoting Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305, 1314 (4th Cir. 1995)).
252. *44 Liquormart, Inc.*, 116 S. Ct. at 1509.
253. *Penn Adver.*, 63 F.3d at 1325-26 (quoting *Anheuser-Busch*, 63 F.3d at 1316).

The application used by the Fourth Circuit directly ignored the Supreme Court's standards for First Amendment scrutiny and corrections to the First Circuit's reasoning in *44 Liquormart, Inc.*[254]

The Fourth Circuit's variation from the Supreme Court's holding in *44 Liquormart, Inc.*, may merely show their reluctance to strike down these increasingly popular cigarette advertising bans.[255] Unable to uphold these bans under the Court's strict analysis, the Fourth Circuit was forced to loosen the requirements or allow the advertising.[256] What the Fourth Circuit has demonstrated is that if the Supreme Court wants to comply with the efforts of state legislatures, Congress, the Food and Drug Administration, and the President by using bans on advertising to deter the use of tobacco products by minors, it is going to have to find a new route. The Supreme Court is not going to be able to make these bans "fit" within its strict commercial speech guidelines. The Supreme Court will have to find an exception for cigarettes and other tobacco products if it seeks to use advertising to deter their use.

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254. *44 Liquormart, Inc.* 116 S. Ct. 1495.
255. *Id.*
256. *Id.*