

*CITIZENS UNITED V. CENTRAL HUDSON:*  
A RATIONALE FOR SIMPLIFYING AND CLARIFYING  
THE FIRST AMENDMENT'S PROTECTIONS FOR  
NONPOLITICAL ADVERTISEMENTS

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INTRODUCTION

A popular Pennsylvania bar advertises its “beer night” in its local university’s newspaper; another bar in Virginia does the same in its own city. Both universities are public, and most of both schools’ students are of legal drinking age. Students at the two schools are exposed to radio, television, and Internet advertising. Both states, wishing to curb illegal, underage drinking, pass laws that forbid these advertisements, and the college newspapers lose lucrative advertising revenue. The newspapers challenge the laws on First Amendment grounds, urging that the statutes address only one type of advertisement and cannot hope to have any appreciable effect on the underage-drinking problem. Although the reviewing courts apply the same test, one newspaper prevails, but the other does not.<sup>1</sup>

The four-pronged test for permissible restrictions of commercial speech set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*<sup>2</sup> has endured for thirty years, despite harsh criticism.<sup>3</sup> Courts use the *Central Hudson* test to decide whether a proposed governmental regulation of non-misleading advertisements for lawful activities violates

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<sup>1</sup> See *Educ. Media Co. at Va. Tech, Inc. v. Swecker*, 602 F.3d 583, 587, 589-91 (4th Cir.) (upholding a ban on advertising as directly advancing government interest and narrowly tailored), *cert. denied*, 131 S. Ct. 646 (2010); *id.* at 591, 595 (Moon, J., dissenting) (observing that a majority of the readership is over twenty-one); *Pitt News v. Pappert*, 379 F.3d 96, 101-03, 106-08 (3d Cir. 2004) (finding that the Commonwealth had not shown that the law against alcohol advertisements satisfied the third and fourth prongs of the *Central Hudson* test); see also *infra* Part IV.A (discussing the split between *Education Media* and *Pitt News*).

<sup>2</sup> 447 U.S. 557 (1980).

<sup>3</sup> See, e.g., Brian J. Waters, Comment, *A Doctrine in Disarray: Why the First Amendment Demands the Abandonment of the Central Hudson Test for Commercial Speech*, 27 *SETON HALL L. REV.* 1626, 1627-28 (1997); see also *infra* note 78.

the First Amendment.<sup>4</sup> To survive *Central Hudson*'s intermediate-scrutiny test, the government must have substantial interest in regulating the advertisements.<sup>5</sup> Furthermore, the statute must directly address the government's goals, and the statute must be no broader than necessary to achieve those ends.<sup>6</sup> The Supreme Court has insisted that advertisements are not entitled to the benefit of strict scrutiny's least-restrictive-means test.<sup>7</sup> Despite its urgings that applying such a high standard is inappropriate, the Court has frequently engaged in least-restrictive-means analyses when evaluating the constitutionality of statutes that restrict advertisements.<sup>8</sup> The *Central Hudson* Court relied, in part, on such an analysis when it observed that the government had not shown that its interest "[could not] be protected adequately by more limited regulation of appellant's commercial expression."<sup>9</sup> Perhaps, because of this conflict within the seminal decision, courts have not reached a consensus on the proper application of the third and fourth prongs of the *Central Hudson* test.<sup>10</sup>

The Supreme Court's recent decision in *Citizens United v. Federal Election Commission*<sup>11</sup> provides useful insights that resolve the longstanding disagreement about the "more extensive than necessary" aspect of the *Central Hudson* test. In *Citizens United*, filmmakers sought to advertise their political documentary in advance of the 2008 presidential primary election, but a statute prohibiting corporations from using general treasury monies to fund certain "electioneering communications"<sup>12</sup> forbade such action because the election was less than thirty days away.<sup>13</sup> The *Citizens United* Court examined the regulation of political speech and invalidated the statute,<sup>14</sup> holding that corporations may not be barred from political

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<sup>4</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980) ("For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading.").

<sup>5</sup> *See id.* ("Next, we ask whether the asserted governmental interest is substantial.").

<sup>6</sup> *See id.* ("If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.").

<sup>7</sup> *See Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634-35 (1995); *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

<sup>8</sup> *See, e.g., Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371-73 (2002); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 531-32 (1996) (O'Connor, J., concurring); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995); *Central Hudson*, 447 U.S. at 570-71; *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 95 (1977).

<sup>9</sup> *Central Hudson*, 447 U.S. at 570-71.

<sup>10</sup> *See infra* Part I.C.

<sup>11</sup> 130 S. Ct. 876 (2010) (5-4 decision).

<sup>12</sup> Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 434(f)(3)(A) (2006) (internal quotation marks omitted), *invalidated in part by Citizens United*, 130 S. Ct. 876.

<sup>13</sup> *Citizens United*, 130 S. Ct. at 887-88.

<sup>14</sup> *Id.* at 894-99.

speech simply because they are corporations.<sup>15</sup> The Court applied a least-restrictive-means analysis, rejecting corporations' option to form political action committees ("PACs") as a viable solution to the statute's First Amendment problems.<sup>16</sup> The Court characterized PACs as expensive and governed by onerous regulations, finding that they were not reasonable alternatives to unregulated corporate political speech.<sup>17</sup>

The sum of Supreme Court jurisprudence strongly supports replacing the "more extensive than necessary" element of the *Central Hudson* test with a least-restrictive-means analysis. The Court has frequently declined to rigorously apply the *Central Hudson* test,<sup>18</sup> probably because it is difficult to do so. This test yields unpredictable results.<sup>19</sup> It relies on an artificial distinction between commercial and noncommercial speech,<sup>20</sup> and prevents valuable information from reaching the marketplace.<sup>21</sup> The Court should overrule *Central Hudson* and replace it with the same strict scrutiny standard that applies to individuals' speech. Doing so would properly acknowledge the importance of commercial speech in the modern marketplace in accord with the approach in *Citizens United*, and it would provide more consistent outcomes overall.

Part I of this Comment describes the rationale for affording commercial speech First Amendment protection and sets forth the elements of the *Central Hudson* test. Part II addresses the holding in *Citizens United* and its impact on nonpolitical commercial speech. Part III assesses the current state of *Central Hudson* in view of *Citizens United*, examines the practical application of the test, and urges that the Supreme Court replace the "more extensive than necessary" element with a strict scrutiny test. Part IV applies the improved test to a recent unresolved circuit split over alcohol advertisements in college newspapers.

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<sup>15</sup> See *id.* at 917.

<sup>16</sup> See *id.* at 897.

<sup>17</sup> See *id.* at 897-98 ("PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations.").

<sup>18</sup> See *infra* text accompanying notes 68-76, 135-42; *cf.* *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561-66 (2001) (conducting a rigorous application of the fourth prong of the *Central Hudson* test); *Edenfield v. Fane*, 507 U.S. 761, 770-73 (1993) (requiring evidence that commercial speech prohibitions "serve [the state's] purposes in a direct and material manner" under the third prong of the *Central Hudson* test).

<sup>19</sup> See *infra* Part IV.A. *Compare* *Educ. Media Co. at Va. Tech, Inc. v. Swecker*, 602 F.3d 583, 591 (4th Cir.) (holding an advertisement regulation constitutional), *cert. denied*, 131 S. Ct. 646 (2010), *with* *Pitt News v. Pappert*, 379 F.3d 96, 113 (3d Cir. 2004) (holding the opposite on nearly identical facts).

<sup>20</sup> See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring).

<sup>21</sup> See *Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898, 905 (1971) (Douglas, J., dissenting from denial of cert.).

## I. FIRST AMENDMENT PROTECTION FOR ADVERTISEMENTS

The Supreme Court did not consider any advertisement regulation cases until after the Civil War.<sup>22</sup> Since that time, however, the Court's opinion on the amount of freedom such commercial speech deserves has been in a constant state of flux.<sup>23</sup> This Part briefly outlines the development of commercial speech jurisprudence, reviews the generation of the intermediate-scrutiny standard, and describes two distinct—and incompatible—ways in which the Supreme Court has interpreted that standard.

### A. *Evolution of Constitutional Rights for Commercial Speech*

For much of its history, the Supreme Court gave no First Amendment protection to advertisements.<sup>24</sup> In *Valentine v. Chrestensen*,<sup>25</sup> the Court held that permitting business owners to freely distribute advertisements without restriction would interfere with the public's right to use streets and sidewalks as thoroughfares.<sup>26</sup> In *Breard v. Alexandria*,<sup>27</sup> the Court permitted communities to curtail the activities of "obnoxious" salespersons and considered the notion of extending First Amendment protections to such individuals "a misuse of the great guarantee[] of free speech."<sup>28</sup> Under these early rules, the Court afforded no First Amendment protection to speech and publications that were commercial in any respect.<sup>29</sup>

The Court revisited this rule in 1964, holding in *New York Times Co. v. Sullivan*<sup>30</sup> that First Amendment protection extended to a paid advertisement containing opinions as well as information of public interest.<sup>31</sup> The Court concluded that stifling editorial advertisements would prevent the free dissemination of information from diverse sources, an outcome that

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<sup>22</sup> Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 YALE J. ON REG. 85, 113 (1999); see also Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 754-72 (1993) (tracing the early development of First Amendment commercial speech jurisprudence).

<sup>23</sup> See Waters, *supra* note 3, at 1637-41.

<sup>24</sup> See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (holding that while the First Amendment prevents the government from regulating private speech in public places, "[w]e are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising").

<sup>25</sup> 316 U.S. 52 (1942).

<sup>26</sup> *Id.* at 54-55.

<sup>27</sup> 341 U.S. 622 (1951).

<sup>28</sup> *Id.* at 644-45; see also *id.* at 641 (noting that freedom of speech is "not open to the solicitors for gadgets or brushes").

<sup>29</sup> See, e.g., *id.* at 642, 645 (noting that selling has "a commercial feature" and proceeding to place the importance of freedom from unwanted solicitation above the salesperson's freedom to advertise).

<sup>30</sup> 376 U.S. 254 (1964).

<sup>31</sup> *Id.* at 266.

would directly collide with the purpose of constitutional free speech.<sup>32</sup> In the 1975 case *Bigelow v. Virginia*,<sup>33</sup> the Court considered an advertisement detailing the availability of abortion services.<sup>34</sup> The *Bigelow* Court rejected the proposition that when profit motivates a speaker, the resulting speech escapes the First Amendment's umbrella.<sup>35</sup> The Court distinguished the *Bigelow* and *Sullivan* advertisements from those in *Chrestensen* by noting that the latter proposed a purely commercial transaction, while the others provided information of public interest.<sup>36</sup>

Possibly because *Bigelow*'s "purely commercial" standard was inherently problematic for most cases,<sup>37</sup> the Court moved still further toward granting free speech for advertisements in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>38</sup> In *Virginia Board*, the Court considered the constitutionality of a state law that forbade pharmacists from advertising the prices of medications.<sup>39</sup> The Court rejected the argument that providing price information would compromise pharmacists' professionalism<sup>40</sup> and turn them into mere peddlers of wares.<sup>41</sup> The Court

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<sup>32</sup> *Id.*

<sup>33</sup> 421 U.S. 809 (1975).

<sup>34</sup> *Id.* at 811-12.

<sup>35</sup> *Id.* at 818.

<sup>36</sup> *Id.* at 820-22.

<sup>37</sup> *See id.* at 830, 832 (Rehnquist, J., dissenting) (concluding that the advertisement at issue was "purely commercial," despite an earlier acknowledgement that the advertisement contained two lines of arguably informational text). In fact, the Court's reasoning in *Chrestensen* suffered from the same inconsistency as Justice Rehnquist's *Bigelow* dissent, since the handbills the defendant sought to distribute in that case contained an advertisement on one side and a protest against the city's discriminatory pier-access regulations on the other. *Valentine v. Chrestensen*, 316 U.S. 52, 53 (1942). Despite the handbills including the defendant's political views, the *Chrestensen* Court categorized it as "purely commercial advertising." *Id.* at 54.

<sup>38</sup> 425 U.S. 748 (1976).

<sup>39</sup> *Id.* at 749-50.

<sup>40</sup> *Id.* at 768-70. The Court continued to disagree about the erosion of professionalism. *Compare Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995) (permitting a state bar association to restrict attorneys from soliciting clients by direct mail), and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 468 (1978) (permitting a state bar association to prohibit attorneys from soliciting clients in person), with *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 642-49 (1985) (rejecting the argument that attorney advertisements degrade the profession and "stir up" litigation while striking down a blanket ban on illustrations in attorney advertising), and *Bates v. State Bar of Ariz.*, 433 U.S. 350, 369-70 (1977) (finding a similar statute unconstitutional and speculating that lawyers actually improve the public's opinion of the profession when they advertise openly).

<sup>41</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 766-68 (1976). A few later courts revived this concern; for example, in *Ohralik*, the Court upheld a state regulation forbidding attorneys from advertising their services, relying on the strong state interest in upholding the reputation of the state bar. *Ohralik*, 436 U.S. at 460-62. *Ohralik*'s holding has since been limited to its facts. *See Edenfield v. Fane*, 507 U.S. 761, 774 (1993). The *Edenfield* Court distinguished between *Ohralik*'s emotionally vulnerable prospective clients—accident victims—and the average consumer capable of making rational decisions about his or her professional accountant, concluding that for the latter, the danger of fraudulent solicitations is insignificant. *Id.* at 775-76.

held that strictly excepting advertisements from First Amendment protection would be improper in view of prior holdings that expenditures of money did not automatically strip expression of its status as speech.<sup>42</sup> The Court concluded that accurate information of public interest is entitled to protection.<sup>43</sup> It recognized that permitting facts to flow freely would facilitate intelligent economic decisionmaking.<sup>44</sup> The Court even noted that the public likely has a greater interest in price information than in “urgent political debate”<sup>45</sup> and should be entitled to hear purely commercial information.<sup>46</sup> Under *Virginia Board*, unless advertisements are false or misleading,<sup>47</sup> or propose illegal commercial transactions,<sup>48</sup> the First Amendment protects them.<sup>49</sup>

B. *A New Test: Balancing the Right to Free Speech with the Ability to Legislate*

In *Central Hudson*, the Court evaluated the constitutionality of a state ban on a power company’s advertisements that, like the one in *Bigelow*, could be construed as containing both information and a sales pitch.<sup>50</sup> The *Central Hudson* Court recognized society’s interests in allowing free expression and permitting helpful government action.<sup>51</sup> Despite the fact that the proposed advertisement conflicted with serious policy concerns by promoting increased energy consumption,<sup>52</sup> the Court held that completely stifling the power company’s right to speak was too drastic a measure.<sup>53</sup> In so deciding, the Court devised “intermediate scrutiny,” a four-part test for identifying unconstitutional restrictions on commercial speech.<sup>54</sup>

Under *Central Hudson*, a court analyzing the constitutionality of a statutory prohibition on advertising first asks whether the commercial speech

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<sup>42</sup> *Virginia Board*, 425 U.S. at 761 (citing, among other cases, *Buckley v. Valeo*, 424 U.S. 1, 35-59 (1976)).

<sup>43</sup> *Id.* at 762.

<sup>44</sup> *Id.* at 765; *see also* *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978) (noting a societal interest in wide availability of commercial information).

<sup>45</sup> *Virginia Board*, 425 U.S. at 763.

<sup>46</sup> *Id.* at 756-57.

<sup>47</sup> *Id.* at 771-72.

<sup>48</sup> *See id.* at 772-73.

<sup>49</sup> *See id.* at 770.

<sup>50</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 559-60 (1980). The advertisements could have contained information about low energy-consumption periods and an urging to use power during those times. *Id.* at 559.

<sup>51</sup> *Id.* at 563.

<sup>52</sup> *Id.* at 568.

<sup>53</sup> *Id.* at 571.

<sup>54</sup> *See id.* at 563-64.

is truthful and does not advocate an illegal activity.<sup>55</sup> Second, the court evaluates whether the statute addresses a substantial interest that is not merely a pretext.<sup>56</sup> If both of these requirements are met, the court moves on to the question of proportionality.<sup>57</sup> If the court finds that the law directly promotes the government's interest (the third part of the test) with no greater speech restriction than necessary to achieve that interest (the fourth part), the statute passes the test.<sup>58</sup> *Central Hudson's* intermediate scrutiny is more forgiving than strict scrutiny, the standard that courts use to evaluate government restriction on the content of individuals' speech;<sup>59</sup> under strict scrutiny, a statute only survives if it is the least restrictive conceivable means of achieving the state's goals.<sup>60</sup> *Central Hudson's* intermediate scrutiny attempts to provide some basis for blocking fraudulent commercial speech. This concern is more urgent than silencing a single speaker's inaccuracies because advertisements reach many listeners and can have a sizeable effect in the aggregate.<sup>61</sup> *Central Hudson* also attempted to give states the ability to exercise their police power to discourage their citizens from engaging in undesirable activity.<sup>62</sup>

Subsequent decisions have attempted to refine the *Central Hudson* test.<sup>63</sup> The government must prove the direct-regulation requirement (the third prong of the test) through evidence, not just the government's speculation as to the statute's effectiveness.<sup>64</sup> Without the third prong's requirement that the regulation directly relate to a particular purpose, the govern-

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<sup>55</sup> *Central Hudson*, 447 U.S. at 566.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 564.

<sup>58</sup> *See id.* at 564-65.

<sup>59</sup> *See, e.g., Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

<sup>60</sup> *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (holding that a statute is unconstitutional if a less restrictive—but equally effective—option is available). A statute violates the First Amendment under this standard if either the parties or the court identifies at least one alternative; once such an option is proposed, the burden shifts to the government to show that the suggested alternative would not be as effective as the statute in question. *Id.* at 879. A plausible suggestion is sufficient to shift the burden; no evidence is required. *See id.* Likely because of the high evidentiary burden placed on the government, statutes rarely survive challenges under strict scrutiny. *See Burson v. Freeman*, 504 U.S. 191, 199-200 (1992) (plurality opinion).

<sup>61</sup> *See Central Hudson*, 447 U.S. at 561-62 (“Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.”).

<sup>62</sup> Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 35-36 (2000) (“Within the area of public discourse, the Court has been clear that ‘there is no such thing as a false idea.’ But . . . ‘[t]he First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely.’” (second, third, and fourth alterations in original) (footnote omitted) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974), and *Edenfield v. Fane*, 507 U.S. 761, 768 (1993))).

<sup>63</sup> *See supra* note 8.

<sup>64</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001); *Edenfield*, 507 U.S. at 770-71; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n.20 (1983).

ment could simply ban commercial speech whenever there was any rationale for doing so, no matter how unrelated to the speech.<sup>65</sup> Courts agree that the third prong is the most important of the four,<sup>66</sup> and yet it is typically the hardest to prove.<sup>67</sup>

In theory, at least, the mere fact that the government supplies information in support of a statute is inadequate to survive the *Central Hudson* test; the evidence must directly link a statute with its goal.<sup>68</sup> For example, in *Edenfield v. Fane*,<sup>69</sup> the Court conceded that a state had a legitimate interest in maintaining professional standards for licensed professionals, protecting citizens' privacy, and preventing the spread of fraudulent information.<sup>70</sup> Despite these undeniably important governmental aims, the *Edenfield* Court struck down as unduly restrictive the state accountancy board's blanket prohibition against accountants personally soliciting new clients.<sup>71</sup> The Court held that the Board had not provided sufficient evidence to establish that the ban directly addressed its professionalism concerns.<sup>72</sup> The only evidence the Board presented to justify those worries was the opinion of one of its own former chairmen, which did not impress the Court.<sup>73</sup> The Board also relied on a survey of state officials' opinions about the impact of direct solicitation on the accounting field,<sup>74</sup> but the Court concluded that the study

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<sup>65</sup> *Edenfield*, 507 U.S. at 771.

<sup>66</sup> *E.g.*, *Pitt News v. Pappert*, 379 F.3d 96, 107 (3d Cir. 2004) (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995)).

<sup>67</sup> *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 143 (1994) ("The State's burden is not slight; the 'free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.' '[M]ere speculation or conjecture' will not suffice; rather the State 'must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" (alteration in original) (citation omitted) (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 646 (1985), and *Edenfield*, 507 U.S. at 770-71)).

<sup>68</sup> *See Edenfield*, 507 U.S. at 773.

<sup>69</sup> 507 U.S. 761 (1993).

<sup>70</sup> *Id.* at 768-70.

<sup>71</sup> *Id.* at 763-64.

<sup>72</sup> *Id.* at 771; *see also id.* at 776 ("Ohralik in no way relieves the State of the obligation to demonstrate that it is regulating speech in order to address what is in fact a serious problem and that the preventative measure it proposes will contribute in a material way to solving that problem."). The required evidence is "some showing beyond plausibility." *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 504 (1997) (Souter, J., dissenting).

<sup>73</sup> *See Edenfield*, 507 U.S. at 764, 771 ("The only suggestion that a ban on solicitation might help prevent fraud and overreaching or preserve CPA independence is the affidavit of [the former chairman], which contains nothing more than a series of conclusory statements that add little if anything to the Board's original statement of its justifications.").

<sup>74</sup> *Id.* at 771-72. In this study, the American Institute of Certified Public Accountants ("AICPA") requested its members' opinions on the effects of accountants' directly soliciting new clients. Joint Appendix at 48-49, *Edenfield v. Fane*, 507 U.S. 761 (1993) (No. 91-1594). A "substantial majority" of respondents believed that "direct uninvited solicitation does not lower the quality of services performed by [accountants]" and that "direct uninvited solicitation does not impair independence in fact." *Id.* at 49.

actually demonstrated that the statute played no role in accomplishing the state's goals.<sup>75</sup> The *Edenfield* Court interpreted *Central Hudson* as stringently requiring a clear nexus between the submitted evidence and the government's goal.<sup>76</sup>

### C. Implementation of the Central Hudson Test

*Central Hudson* attempts to balance two of society's clashing interests: the free flow of economic information and the prevention of fraudulent advertising. Determining which governmental interests are "substantial" and whether the statute at issue "directly advances" government aims, however, is extremely subjective.<sup>77</sup> Criticism of the unpredictability of the *Central Hudson* test's results began shortly after the Court's ruling.<sup>78</sup> As the

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The study's primary recommendation was that the AICPA's professional code should not include "a general prohibition of direct uninvited solicitation of potential clients or a narrower prohibition of oral direct uninvited solicitation of potential clients." *Id.* at 34 (emphasis omitted).

<sup>75</sup> *Edenfield*, 507 U.S. at 772 ("The [AICPA's] Report contradicts, rather than strengthens, the Board's submissions."). The Court also noted that the published professional literature "suggests that the main dangers of compromised independence occur when a CPA firm is too dependent upon, or involved with, a long-standing client," not when accountants make direct solicitations for new clients. *Id.*

<sup>76</sup> *Id.* at 770-73.

<sup>77</sup> See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 574 (2001) (Thomas, J., concurring in part) ("Since [*Virginia Board*], the Court has followed an uncertain course—much of the uncertainty being generated by the malleability of the four-part balancing test of *Central Hudson*."); Post, *supra* note 62, at 42 ("The bland, generic quality of [the *Central Hudson* test elements] is unconnected to any particular First Amendment theory, which is no doubt why they have proved susceptible to such wide swings of application.").

<sup>78</sup> See, e.g., *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 168 (1980) ("[T]he Court's four-part analysis [in *Central Hudson*] provides inadequate protection for the values underlying the first amendment. Moreover, the Court's failure to provide a clear definition of commercial speech leaves unaltered the possibility of unprincipled adjudication."); Jonathan Weinberg, Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720, 720-21 (1982) ("[T]he [*Central Hudson*] Court neglected to supply any rationale at all to buttress its holding—a factor that makes the durability of that holding questionable and that has contributed to a wide divergence of opinion among commentators as to the degree of constitutional protection that commercial speech should receive." (footnote omitted)). Jurists and commentators have continued to decry *Central Hudson*. See, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 438 (1993) (Blackmun, J., concurring) ("I hope the Court ultimately will come to abandon *Central Hudson*'s analysis entirely in favor of one that affords full protection for truthful, noncoercive commercial speech about lawful activities."); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 630-31 (1990) ("[J]udges and Justices have filled quite a bit of space in the case reporters trying to figure out precisely what forms of regulation the [*Central Hudson*] test permits. . . . [T]he cases have been able to shed little light on *Central Hudson*, aside from standing as ad hoc subject-specific examples of what is permissible and what is not."); Matthew L. Miller, Note, *The First Amendment and Legislative Bans of Liquor and Cigarette Advertisements*, 85 COLUM. L. REV. 632, 636-40 (1985) (noting that the "direct advancement" element undesirably requires judges to second-guess legislators, and discussing the divergent approaches various courts have employed in applying the third prong of the *Central Hudson* test). *But see* Note, *Making*

*Edenfield* Court's exhaustive analysis illustrates,<sup>79</sup> the third prong requires judges to rule on hotly disputed issues of fact, a task that is inherently difficult for courts.<sup>80</sup> Because the third prong is so fact dependent, and judges are given such broad discretion to assess the evidence presented by the government, the outcome of the test in any given case is highly unpredictable.<sup>81</sup> Two primary lines of jurisprudence have arisen dealing with *Central Hudson*'s third and fourth prongs—one willing to rely on intuition and common sense,<sup>82</sup> and one demanding strong evidence about the legislation's goals and effects, in essence, carrying out a least-restrictive-means analysis.<sup>83</sup>

This Section first outlines the decisions in which the Court was willing to rely, at least in part, on common sense and intuition, and then this Section discusses those in which the Court applied a rigorous evidentiary standard. The Section concludes by demonstrating that the United States Courts of Appeals applying *Central Hudson* have not reached consensus about which approach to take.

### 1. Decisions Based on Intuition and Common Sense

An extremely permissive view of the evidence required to establish effective, direct advancement in the third and fourth prongs of the test unifies the first line of cases.<sup>84</sup> In these cases, the Court failed to enforce the strin-

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*Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118 HARV. L. REV. 2836, 2853 (2005) [hereinafter *Hybrid Speech*] (concluding that *Central Hudson* is still good law because the Court continues to apply it). Indeed, criticism of the *Central Hudson* test persists. See, e.g., Kristie LaSalle, Note, *A Prescription for Change: Citizens United's Implications for Regulation of Off-Label Promotion of Prescription Pharmaceuticals*, 19 J.L. & POL'Y 867, 899, 907-09 (2011) (criticizing a federal district court's application of the test to a Food and Drug Administration restriction on off-label promotions of pharmaceuticals, then suggesting that *Citizens United* supports adding a disclosure requirement to the FDA's rules); Recent Cases, *First Amendment—Commercial Speech—Fourth Circuit Holds That a Regulation Largely Prohibiting Alcohol Advertisements in College Newspapers is Constitutional—Educational Media Co. at Virginia Tech v. Swecker*, 602 F.3d 583 (4th Cir. 2010), 124 HARV. L. REV. 843, 850 (2011) (“[T]he *Central Hudson* ‘test’ is susceptible to manipulation. Thus, the Court should set forth a more definitive test to guide lower courts when they are faced with the competing policy arguments in future vice advertising cases.”).

<sup>79</sup> *Edenfield*, 507 U.S. at 771-73 (analyzing, one by one, the validity and persuasiveness of each piece of evidence submitted by the government); see *supra* notes 68-76.

<sup>80</sup> Miller, *supra* note 78, at 640.

<sup>81</sup> See *Lorillard Tobacco*, 533 U.S. at 574 (Thomas, J., concurring in part); Kozinski & Banner, *supra* note 78, at 631.

<sup>82</sup> See, e.g., *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 334-36, 341-44 (1986) (5-4 decision).

<sup>83</sup> See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (plurality opinion).

<sup>84</sup> See *United States v. Edge Broad. Co.*, 509 U.S. 418, 428-29 (1993) (finding “only marginal advancement” of the government’s interest sufficient to uphold its commercial speech restriction). *But see id.* at 440 n.6 (Stevens, J., dissenting) (noting that commercial speech restrictions are subject to greater scrutiny than mere rational basis review).

gent evidentiary standard required in *Edenfield*,<sup>85</sup> instead permitting anecdotal evidence and intuition to weigh in favor of upholding the regulations at hand.

In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,<sup>86</sup> the Court considered a statute that legalized casino gambling in Puerto Rico but forbade casino owners from advertising to Puerto Rican citizens.<sup>87</sup> The *Posadas* Court concluded that the power to prohibit gambling “necessarily includes the lesser power to ban advertising of casino gambling.”<sup>88</sup> For the *Posadas* Court, the judiciary could only enjoin the government from banning advertising if the advertised object or activity was itself constitutionally protected.<sup>89</sup> Examples of such activities include the abortion services in *Bigelow*.<sup>90</sup> Other than legislative history, the casino owner provided no evidence that gambling had any negative effects on Puerto Rico’s residents.<sup>91</sup> Thus, the Court seems to have relied largely on its intuition about permissible government action.<sup>92</sup>

The Court applied a similar rationale in *United States v. Edge Broadcasting Co.*<sup>93</sup> when it upheld a federal statute restricting advertisements for

<sup>85</sup> Cf. *Edenfield v. Fane*, 507 U.S. 761, 771-73 (1993) (finding insufficient anecdotal evidence and an affidavit making conclusory statements about the relationship between a ban on CPA advertising and CPAs’ ability to carry out their jobs with honesty).

<sup>86</sup> 478 U.S. 328 (1986).

<sup>87</sup> *Id.* at 332-36. The casino owner argued that the government could not ban advertisements for activities that were lawful. *Id.* at 345-46.

<sup>88</sup> *Id.* at 345-46.

<sup>89</sup> *Id.* at 345.

<sup>90</sup> *Id.* This holding has been harshly criticized for producing absurd results. See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 509-11 (1996) (plurality opinion); Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at “The Greater Includes the Lesser”*, 55 *VAND. L. REV.* 693, 696-97 & n.22 (2002) (describing opinions of over twenty commentators who questioned the majority’s decision). *But see id.* at 703 (suggesting that *Posadas* actually clarifies the longstanding conflict over the definition and regulation of commercial speech).

<sup>91</sup> *Posadas*, 478 U.S. at 343 & n.8.

<sup>92</sup> Perhaps because of its social implications, the Court has considered numerous restrictions on advertisements regarding gambling, for example in *Greater New Orleans Broadcasting Ass’n, Inc. v. United States*, 527 U.S. 173, 176-77 (1999). In *Greater New Orleans Broadcasting*, the Court reluctantly accepted the government’s argument that discouraging gambling was a substantial interest, pointing out that casino gambling confers economic benefits on the state but deferring to the legislature’s judgment. *Id.* at 185-86. “[I]t is not our function to weigh the policy arguments on either side of the nationwide debate over whether and to what extent casino and other forms of gambling should be legalized.” *Id.* at 187. The *Greater New Orleans Broadcasting* Court discussed the *Central Hudson* test and the evidentiary standards it requires, *id.* at 188-89, but as in *Posadas*, it based its conclusion on an intuitive determination that the statute would not accomplish the government’s goals, rather than on statistics and information. *Id.* at 190 (“We need not [address the lack of evidence], however, because the flaw in the Government’s case is more fundamental: [The regulatory scheme] is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it.”).

<sup>93</sup> 509 U.S. 418 (1993).

state lotteries in non-lottery states.<sup>94</sup> In applying the third prong of the *Central Hudson* test, the *Edge Broadcasting* Court relied on the “commonsense judgment” of Congress in deciding not to favor either lottery states’ interests or non-lottery states’ interests over each other.<sup>95</sup> The only evidence submitted in *Edge Broadcasting* demonstrated that permitting the radio station to carry lottery advertising would subject listeners (including those in non-lottery states) to 11 percent more lottery advertisements.<sup>96</sup> The *Edge Broadcasting* Court concluded that this increase alone was dispositive;<sup>97</sup> the Court did not require evidence directly correlating increased exposure to lottery ads with a deterioration of the government’s interest in supporting non-lottery states’ policies.<sup>98</sup>

In *Florida Bar v. Went For It, Inc.*,<sup>99</sup> the Court upheld a state law forbidding lawyers from using direct-mail advertising to solicit clients from amongst people who had experienced “accident or disaster” within thirty days of the mailing.<sup>100</sup> Florida’s legislature designed the statute to preserve the reputation of the legal profession and to protect accident victims and their families from unwanted intrusions of their privacy during a difficult time.<sup>101</sup> The government’s evidence was a two-year study chronicling many Floridians’ negative opinions about attorneys who advertise in the mail.<sup>102</sup> The Court held that the evidence was sufficient to demonstrate a “reasonable fit” between the law and its goal.<sup>103</sup>

The opinions in these cases each claim to consider the proffered evidence, but their analysis is more superficial than *Edenfield* would require.<sup>104</sup> The *Florida Bar* Court considered the study presented sufficiently rigorous to meet *Edenfield*’s evidentiary requirement for the *Central Hudson* test,

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<sup>94</sup> *Id.* at 422-23, 436. The law prohibited radio stations licensed in states that did not sponsor a lottery from advertising for state lotteries, even when the station’s signal reached a state that did have a lottery. *Id.* at 422-23.

<sup>95</sup> *See id.* at 428.

<sup>96</sup> *Id.* at 432. Specifically, the study addressed the number of North Carolina (a non-lottery state) residents subjected to advertisements for the Virginia lottery. *Id.*

<sup>97</sup> *Edge Broadcasting*, 509 U.S. at 432.

<sup>98</sup> *See id.* at 426; *see also id.* at 440 & n.6 (Souter, J., dissenting) (questioning whether the asserted interest was sufficiently substantial to warrant regulation and accusing the majority of merely accepting as fact both the presence and importance of the interest).

<sup>99</sup> 515 U.S. 618 (1995) (5-4 decision).

<sup>100</sup> *Id.* at 634.

<sup>101</sup> *Id.* at 624-25.

<sup>102</sup> *Id.* at 626-27. The study included anecdotes on the subject from Florida citizens. *Id.* at 627.

<sup>103</sup> *Id.* at 632-33 (“The Bar’s rule is reasonably well tailored to its stated objective of eliminating targeted mailings whose type and timing are a source of distress to Floridians, distress that has caused many of them to lose respect for the legal profession.”).

<sup>104</sup> *See Florida Bar*, 515 U.S. at 628. *But see id.* at 640-41 (Kennedy, J., dissenting) (questioning the relevance of the vast majority of the proffered evidence, pointing out the conclusory nature of the evidence, and criticizing the lack of evidence supporting the statute’s ability to protect victims’ privacy, since all of the evidence regarded the public’s opinion of attorneys).

urging that courts have upheld “restrictions based solely on history, consensus, and ‘simple common sense.’”<sup>105</sup>

But common sense and intuition are sufficient to defeat a law only under strict scrutiny, a standard that presumes a given speech restriction is invalid and requires the government to demonstrate that there is no less restrictive means available to accomplish its goal.<sup>106</sup> By contrast, common sense on its own is inadequate to demonstrate that a law regulating commercial speech does not perform its purpose; under *Edenfield*, a law survives *Central Hudson*’s intermediate scrutiny only when supported by actual data and evidence tending to show a lack of correlation between the law and its ends.<sup>107</sup> The government faces a heavy evidentiary burden to maintain a regulation under strict scrutiny, while the party seeking to invalidate a law has, in theory, the higher evidentiary burden under intermediate scrutiny.<sup>108</sup>

*Posadas*, *Edge Broadcasting*, and *Florida Bar* conflict with other commercial speech jurisprudence, especially *Edenfield*’s stringent evidentiary standard. If the facts in *Posadas* were held to the *Edenfield* standard, a different result would almost certainly arise because the *Posadas* Court based its decision entirely on intuition and common sense.<sup>109</sup> The government in *Posadas* did not supply any extrinsic evidence that the law had any effect on Puerto Rican citizens’ casino gambling, information that *Edenfield* would have required.<sup>110</sup> The *Edge Broadcasting* Court was well aware of

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<sup>105</sup> *Id.* at 628 (majority opinion) (quoting *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (applying strict scrutiny to a law forbidding campaign speech on a public sidewalk and concluding that requiring campaign workers to stay at least one hundred feet from polling places was necessary to maintain peace and order)).

<sup>106</sup> *Burson*, 504 U.S. at 199 (plurality opinion) (“To survive strict scrutiny . . . a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest.”). In practice, it is frequently the party seeking to invalidate a content-restriction law who proves the negative by suggesting an alternative that would work as well as the challenged law but would have a less chilling effect on speech. *See, e.g.*, *Ashcroft v. ACLU*, 542 U.S. 656, 661-62, 666-67 (2004) (accepting the lower court’s conclusion that filtering software would be less restrictive—and more effective—than a federal law seeking to protect minors by banning certain commercial Internet postings with sexual content).

<sup>107</sup> *See Edenfield v. Fane*, 507 U.S. 761, 771-73 (1993).

<sup>108</sup> *Florida Bar*, 515 U.S. at 623.

<sup>109</sup> The Court instead applied a rational basis test. “The Puerto Rico Legislature obviously believed . . . that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature’s belief is a reasonable one . . .” *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341-42 (1986).

<sup>110</sup> *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (holding that “mere speculation or conjecture” will not suffice). *But see Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487-88 (1995) (using logical reasoning to conclude that the government’s proffered reasoning behind a regulatory scheme “ma[de] no rational sense”). Likewise, the Court in *Greater New Orleans Broadcasting* cited *Edenfield*, but did not even consider the proffered evidence, having already decided that the law at issue was fatally flawed. *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 188, 190 (1999).

the *Edenfield* holding<sup>111</sup> but did not address the case within the third-prong analysis. Rather than evidence showing a correlation, the *Edge Broadcasting* Court relied on logical reasoning and speculation to conclude that the statute at issue directly advanced the federal government's interest. The *Florida Bar* holding is even more puzzling. The Court insisted on subjecting direct-mail solicitations to *Central Hudson*'s intermediate scrutiny<sup>112</sup> but then permitted anecdotal and common-sense reasoning to determine its holding on the basis of their applicability in a previous strict scrutiny analysis.<sup>113</sup> Indeed, *Florida Bar* seems to conflict with *Central Hudson* itself. All of these decisions referred in passing to the importance of evidence, but in practice, they required no hard facts to reach their conclusions.

## 2. Decisions Based on Evidentiary Showings

Another line of cases has advocated a return to the *Virginia Board* Court's listeners' rights rationale for protecting commercial speech.<sup>114</sup> These decisions emphasize that the founders did not put any limits in the First Amendment about preferred types of speech.<sup>115</sup> In practice, these decisions level the playing field by requiring strong and convincing evidence, essentially carrying out a least-restrictive-means analysis.<sup>116</sup>

In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*,<sup>117</sup> the Court evaluated a state law restricting advertising by attorneys.<sup>118</sup> The *Zauderer* Court referenced the elements of the *Central Hudson*

<sup>111</sup> *United States v. Edge Broad. Co.*, 509 U.S. 418, 431 (1993) (citing and distinguishing *Edenfield*).

<sup>112</sup> *Florida Bar*, 515 U.S. at 623; see also *Greater New Orleans Broadcasting*, 527 U.S. at 188 (holding that commercial speech is not entitled to the "least restrictive means" test that personal speech enjoys under strict scrutiny).

<sup>113</sup> *Florida Bar*, 515 U.S. at 628.

<sup>114</sup> See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496-97 (1996) (plurality opinion) (citing *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976)) (acknowledging "the public's interest in receiving accurate commercial information").

<sup>115</sup> See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231-32 (1977) ("Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to those beliefs the critical constitutional inquiry."); *Kozinski & Banner*, *supra* note 78, at 631 ("At the risk of sounding unsophisticated, we point out that nothing in the text of the first amendment creates a distinction between commercial and noncommercial speech."); see also *Kozinski & Banner*, *supra* note 22, at 756-57 (noting that the term "commercial speech" was not used in an opinion until 1971 (internal quotation marks omitted)). But see *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 948-49 (2010) (Stevens, J., concurring in part and dissenting in part) (pointing out that when the First Amendment was written, corporations existed at the pleasure of state governments, which required them to obtain a burdensome corporate charter).

<sup>116</sup> See *infra* notes 117-43 and accompanying text.

<sup>117</sup> 471 U.S. 626 (1985).

<sup>118</sup> *Id.* at 632-33.

test in holding the statute unconstitutional<sup>119</sup> but based its opinion largely on its conclusion that compelled-disclosure requirements would be just as effective as the ban without stifling speech.<sup>120</sup> The *Zauderer* Court criticized the state bar association for providing no evidence that its goals “cannot be combated by *any means short of* a blanket ban.”<sup>121</sup> With this statement, the Court called on the government to prove that the ban was the least restrictive conceivable means of achieving its goal; finding no evidence to that end, the Court invalidated the statute.<sup>122</sup>

In *Rubin v. Coors Brewing Co.*,<sup>123</sup> the Court evaluated a federal statute prohibiting beer manufacturers from displaying their beers’ alcohol content anywhere on labels or packaging.<sup>124</sup> The government argued that it had enacted the law to aid states in regulating alcohol and to prevent brewers from competing for customers by producing beers with high alcohol content.<sup>125</sup> The Court noted that “strength wars” could be avoided by any of several alternative means put forth by the respondent, including direct limitations on the permissible amount of alcohol in beers.<sup>126</sup>

At issue in the sharply divided case *44 Liquormart, Inc. v. Rhode Island*<sup>127</sup> was a categorical ban on any express or implied price information in advertisements for alcoholic beverages.<sup>128</sup> The *44 Liquormart* plurality suggested that commercial speech should be silenced only if it is of a sort that is particularly dangerous if deceptive or it can manipulate vulnerable consumers.<sup>129</sup> According to the *44 Liquormart* plurality, “[t]he 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.”<sup>130</sup> The *44 Liquormart* plurality conceded that common sense supported the advertising ban but based its decision on the lack of evidence correlating reduced market-wide consumption with the silencing of price information.<sup>131</sup> The *44 Liquormart* plurality concluded by pointing out that

<sup>119</sup> *Id.* at 638.

<sup>120</sup> *See id.* at 650-51.

<sup>121</sup> *Id.* at 648 (emphasis added).

<sup>122</sup> *See id.* at 649.

<sup>123</sup> 514 U.S. 476 (1995).

<sup>124</sup> *Id.* at 480-81.

<sup>125</sup> *Id.* at 483-86.

<sup>126</sup> *Id.* at 490-91. The Court also criticized the fact that the government could not logically square the law with the government’s purpose because consumers could not choose beers on the basis of alcohol content without knowing which beers contain the most alcohol. *See id.* at 488.

<sup>127</sup> 517 U.S. 484 (1996). All nine Justices concurred in the judgment, but only Justices Kennedy and Ginsburg joined all eight parts of Justice Stevens’s opinion. *Id.* at 488-89. Justice O’Connor’s concurrence, by contrast, garnered the support of Chief Justice Rehnquist as well as Justices Souter and Breyer. *Id.* at 528 (O’Connor, J., concurring).

<sup>128</sup> *Id.* at 492-93 (majority opinion).

<sup>129</sup> *Id.* at 498.

<sup>130</sup> *Id.* at 503 (plurality opinion).

<sup>131</sup> *44 Liquormart*, 517 U.S. at 505-06.

other means of regulation, such as counter-speech, would likely achieve the state's goals.<sup>132</sup> Only four justices joined the portion of the *44 Liquormart* decision calling for the Court to overturn *Posadas*,<sup>133</sup> but four other Justices (including Rehnquist, the author of the majority opinion in *Posadas*, and O'Connor, who joined that opinion) admitted in concurrence that the analysis in *Posadas* was faulty.<sup>134</sup>

Justice O'Connor's majority opinion in *Lorillard Tobacco Co. v. Reilly*<sup>135</sup> contains the Supreme Court's most rigorous application of the *Central Hudson* test.<sup>136</sup> In *Lorillard Tobacco*, the Court faced a challenge to a state law that placed severe restrictions on the placement of advertisements for tobacco products.<sup>137</sup> Justice O'Connor scrutinized each piece of evidence the government submitted to establish that the law directly advanced its aims,<sup>138</sup> concluding that the government had met the third prong of *Central Hudson*.<sup>139</sup> In considering the fourth prong of the *Central Hudson* test, she evaluated each element of the legislation and pointed out its extreme breadth relative to the statute's aims.<sup>140</sup> After an intricate weighing analysis,<sup>141</sup> she concluded that the law's reach far exceeded its goals.<sup>142</sup> It is un-

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<sup>132</sup> *Id.* at 507. A full discussion of counter-speech is beyond the scope of this comment; an article of interest published shortly after *44 Liquormart* is Kathryn Murphy, Note, *Can the Budweiser Frogs Be Forced To Sing a New Tune?: Compelled Commercial Counter-Speech and the First Amendment*, 84 VA. L. REV. 1195 (1998).

<sup>133</sup> *44 Liquormart*, 517 U.S. at 488-89, 510 (plurality opinion) ("Because the 5-to-4 decision in *Posadas* marked such a sharp break from our prior precedent, and because it concerned a constitutional question about which this Court is the final arbiter, we decline to give force to its highly deferential approach."). It is noteworthy that Justices Ginsburg and Kennedy, both of whom joined the *44 Liquormart* plurality, replaced two retired members of the *Posadas* majority, Justices White and Powell. See JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 21-22 (2007).

<sup>134</sup> See *44 Liquormart*, 517 U.S. at 531-32 (O'Connor, J., concurring) ("The closer look that we have required since *Posadas* comports better with the purpose of the analysis set out in *Central Hudson* [by placing the burden on the state]."). Only Justice Scalia declined to specifically address *Posadas* in *44 Liquormart*.

<sup>135</sup> 533 U.S. 525 (2001).

<sup>136</sup> See *id.* at 553-67.

<sup>137</sup> See *id.* at 533-36.

<sup>138</sup> *Id.* at 556-61. O'Connor focused on statistical data provided by the FDA about American children's choices of tobacco products and brands before and after the FDA imposed stringent restrictions on advertisements for cigarettes and smokeless tobacco. *Id.* at 558-61. She considered each type of product with respect only to the FDA regulation specifically affecting it. *Id.*

<sup>139</sup> *Lorillard Tobacco*, 533 U.S. at 561.

<sup>140</sup> *Id.* at 561-66.

<sup>141</sup> *Id.* at 562-66. In considering the fourth prong, O'Connor criticized the Massachusetts Attorney General's decision to prohibit tobacco advertisements within an arbitrarily selected distance of schools. *Id.* at 562-63. Since the government's data only documented problems with highly visible billboards, O'Connor also questioned the Attorney General's choice to ban radio and television ads as well as signs of all sizes. *Id.* at 563. Under the Massachusetts law, in-store tobacco product displays were themselves forbidden "advertisements," since passersby could observe them through a store's windows. See *id.* at 565, 567. O'Connor pointed out that the law's provision forbidding stores from displaying any such

fortunate that other decisions have failed to follow Justice O'Connor's thorough example.<sup>143</sup>

### 3. A Lack of Consensus in Courts of Appeals

The confusion about proper application of *Central Hudson* extends to lower federal courts.<sup>144</sup> The First Circuit has acknowledged objections to *Central Hudson* but appropriately noted that it is bound to follow the precedent until the Supreme Court changes the test.<sup>145</sup> However, the First Circuit did consider anecdotal evidence<sup>146</sup> as well as Surgeon General reports<sup>147</sup> in concluding that a Massachusetts law limiting outdoor and point-of-sale advertising of tobacco products<sup>148</sup> survived intermediate scrutiny.<sup>149</sup>

Other Courts of Appeals appear to have applied strict scrutiny in evaluating the third and fourth prongs of the *Central Hudson* test.<sup>150</sup> Several federal courts of appeals have accepted arguments based on common sense or the proposal of a less restrictive means. In *Bad Frog Brewery, Inc. v. New York State Liquor Authority*,<sup>151</sup> the Second Circuit struck down a state liquor board's decision to ban a brewery's product from New York,<sup>152</sup> accepting the brewery's argument that the liquor board could have employed less restrictive means to protect children from viewing arguably vulgar la-

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tobacco advertisements would force convenience stores wishing to sell tobacco products to cover their windows, causing potential security risks within the stores—a nonsensical result. See *Lorillard Tobacco*, 533 U.S. at 565.

<sup>142</sup> *Id.* at 565-66.

<sup>143</sup> See *supra* Part I.C.1; *infra* Part I.C.3.

<sup>144</sup> See, e.g., *MD II Entm't Inc. v. City of Dall., Tex.*, 28 F.3d 492, 494-95 (5th Cir. 1994) (questioning whether the *Central Hudson* test is appropriate for evaluating commercial speech restrictions). Other courts have considered strict scrutiny as the appropriate standard for commercial speech. See, e.g., *Citizens United for Free Speech II v. Long Beach Twp. Bd. of Comm'rs*, 802 F. Supp. 1223, 1232-33 (D.N.J. 1992) (“It is clear from the Supreme Court’s recent decision in *R.A.V. v. St. Paul* . . . that commercial speech must be protected by the usual strictures against content-based distinctions.”).

<sup>145</sup> *Consol. Cigar Corp. v. Reilly*, 218 F.3d 30, 42-43 (1st Cir. 2000), *aff'd in part, rev'd in part*, *Lorillard Tobacco v. Reilly*, 533 U.S. 525 (2001).

<sup>146</sup> *Id.* at 47.

<sup>147</sup> *Id.* at 48-49.

<sup>148</sup> *Id.* at 37.

<sup>149</sup> *Id.* at 52-53.

<sup>150</sup> See *Pitt News v. Pappert*, 379 F.3d 96, 108 (3d Cir. 2004) (describing a less restrictive way for government to achieve goal); see also *id.* at 111 (alleging that Pennsylvania had not shown that “its worthy objectives cannot be served at least as well by other means”); *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 305 (4th Cir. 2009) (permitting “history, consensus, and simple common sense” to weigh in its decision about restrictions on advertisements for video-lottery machines (internal quotation marks omitted)).

<sup>151</sup> 134 F.3d 87 (2d Cir. 1998).

<sup>152</sup> *Id.* at 90.

bels.<sup>153</sup> Similarly, in evaluating a Mississippi statute that effectively banned outdoor advertisements for alcohol products,<sup>154</sup> the Fifth Circuit relied on its intuitive conclusion that liquor producers' decision to spend money on advertising necessarily implied that the ads achieved their purpose.<sup>155</sup>

Over the years, the Fourth Circuit has also allowed anecdotal evidence and intuition to be dispositive. In 1995, the Fourth Circuit applied a mixed analysis as it considered the constitutionality of a Baltimore statute that limited the placement of billboards advertising alcoholic beverages to certain areas.<sup>156</sup> In upholding the statute, the Fourth Circuit conceded that the statute was broader than necessary to achieve the city's goals but concluded based on the city's diligent efforts that the statute was permissible under *Central Hudson*.<sup>157</sup> At the same time, however, the Fourth Circuit noted, "If there were some less restrictive means of screening outdoor advertising from minors . . . the City would have to consider those alternatives."<sup>158</sup> More recently, the Fourth Circuit confronted another regulation on advertising, this time on video lottery machines.<sup>159</sup> Once again, the Fourth Circuit's opinion expressly relied on "history, consensus, and simple common sense"<sup>160</sup>—evidence that falls short of *Edenfield's* requirements for evidence adequate to support a statute's surviving intermediate scrutiny.<sup>161</sup> In 2010, the Fourth Circuit again ruled "history, consensus, and simple common sense" dispositive in a case regarding the constitutionality of a statute limiting advertisements for alcoholic beverages in college newspapers.<sup>162</sup> The disparate approaches and results in the Courts of Appeals demonstrate that after decades of debate, the commercial speech landscape is still in dire need of a stabilizing influence.

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<sup>153</sup> *Id.* at 101. The beer bottle labels in question displayed a drawing of a frog holding up one of its front feet with its middle toe extended, giving the impression that the frog was making a familiar insulting gesture. *Id.* at 90-91.

<sup>154</sup> *Dunagin v. City of Oxford*, 718 F.2d 738, 740-41 (5th Cir. 1983).

<sup>155</sup> *See id.* at 750 ("Whether we characterize our disposition as following the judicial notice approach taken in *Central Hudson Gas*, or following the 'accumulated, common-sense judgment' approach taken in *Metromedia*, we hold that sufficient reason exists to believe that advertising and consumption are linked to justify the ban . . ."); *see also* *Speaks v. Kruse*, 445 F.3d 396, 400-02 (5th Cir. 2006) (analogizing a chiropractor's solicitations to the attorney solicitations in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), and concluding based on the chiropractor's least-restrictive-means arguments that a statute banning solicitations was overbroad).

<sup>156</sup> *See Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1308 (4th Cir. 1995), *vacated*, 517 U.S. 1206 (1996).

<sup>157</sup> *Id.* at 1317.

<sup>158</sup> *Id.* at 1316.

<sup>159</sup> *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 294 (4th Cir. 2009).

<sup>160</sup> *Id.* at 303 (internal quotation marks omitted).

<sup>161</sup> *Edenfield v. Fane*, 507 U.S. 761, 770-71, 773 (1993).

<sup>162</sup> *See Educ. Media Co. at Va. Tech, Inc. v. Swecker*, 602 F.3d 583, 587, 589-90 (4th Cir.), *cert. denied*, 131 S. Ct. 646 (2010); *see infra* Part IV.

## II. *CITIZENS UNITED*'S EFFECT ON NONPOLITICAL ADVERTISEMENTS

Until recently, the Supreme Court has held the opinion that corporations may not make direct contributions to political campaigns or causes.<sup>163</sup> However, the Court overturned its precedents in *Citizens United* and loosened restraints on such direct contributions.<sup>164</sup> Under *Citizens United*, political speech by corporations is entitled to many of the same protections as private citizens' speech.<sup>165</sup> *Citizens United* illuminates the shadowy depths of nonpolitical commercial speech regulation. This Part outlines the issues and holding in *Citizens United*, then discusses the Court's reliance on decisions from all areas of First Amendment jurisprudence, not just political-speech precedents.

### A. *Reviewing the Standard for Restrictions on Corporate Political Speech*

In *Citizens United*, the Court considered the constitutionality of a portion of the Bipartisan Campaign Reform Act of 2002 ("BCRA")<sup>166</sup> that forbade corporations from paying directly for political advertisements within a set time period preceding an election.<sup>167</sup> The Court considered advertisements for a feature-length documentary about a presidential candidate, which the documentary makers wished to air within the period forbidden by statute.<sup>168</sup> Finding itself unable to resolve the case on its facts,<sup>169</sup> the Court proceeded to overturn precedent that would have forbidden the advertisements.<sup>170</sup>

In holding that the documentary makers could have aired their advertisements,<sup>171</sup> the Court rejected the government's argument that contributions through PACs provided corporations with adequate avenues for election speech.<sup>172</sup> A PAC is an association funded and established by a corporation for the express purpose of political activism, but the association is

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<sup>163</sup> See *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 203 (2003), *overruled by* *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990), *overruled by* *Citizens United*, 130 S. Ct. 876.

<sup>164</sup> *Citizens United*, 130 S. Ct. at 917.

<sup>165</sup> *Id.* at 913.

<sup>166</sup> Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 434(f)(3)(A) (2006), *invalidated in part by* *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

<sup>167</sup> *Citizens United*, 130 S. Ct. at 887.

<sup>168</sup> *Id.* at 887-88.

<sup>169</sup> *Id.* at 892.

<sup>170</sup> *Id.* at 913 (overruling *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), and portions of *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003)).

<sup>171</sup> The Supreme Court did not decide the case until 2010, nearly two years after the presidential primary election at issue. *Id.* at 895.

<sup>172</sup> *Id.* at 897.

administered separately from the corporation.<sup>173</sup> The Court characterized PACs as so cumbersome and expensive as to be an unreasonable option for most corporations.<sup>174</sup> A corporation wishing to comply with the Federal Election Commission's ("FEC's") extensive regulations for establishing a PAC, the Court noted, might simply be unable to prepare the paperwork required in time for the advertisement to be relevant.<sup>175</sup> In particular, the Court criticized the FEC's "two-part, 11-factor balancing test" for evaluating permissible corporate expenditures.<sup>176</sup> The Court carried out a least-restrictive-means analysis, pointing out that requiring electioneering communications to contain donor information<sup>177</sup> was a viable alternative to BCRA's complete ban.<sup>178</sup>

### B. *Distinctions Between Political and Nonpolitical Speech?*

The *Citizens United* majority explicitly held that the Court will review government bans on corporate political speech with strict scrutiny.<sup>179</sup> Eight Justices agreed that the BCRA's direct-funding provisions failed under least-restrictive-means analysis because the law's disclosure requirements could achieve the government's goal without unduly stifling speech.<sup>180</sup> Although Justice Thomas declined to join the majority's conclusion about the disclosure requirement, he did so out of concern that even the disclosure

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<sup>173</sup> See Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b(b)(2) (2006), *invalidated in part by Citizens United*, 130 S. Ct. 876; *Citizens United*, 130 S. Ct. at 897 ("Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak.").

<sup>174</sup> *Citizens United*, 130 S. Ct. at 897-98.

<sup>175</sup> *Id.* Indeed, the plight of the petitioners in this case was itself an extreme example of the Court's "time is of the essence" rationale for permitting political speech by corporations, since the documentary makers did not learn until two years after the election was over—when their opinions were wholly moot—that they could in fact have aired their advertisements. *Id.* at 895.

<sup>176</sup> *Id.* (citing, among other things, Permissible Use of Corporate and Labor Organization Funds for Certain Electioneering Communications, 11 C.F.R. § 114.15 (2009)).

<sup>177</sup> See *id.* at 980 n.1 (Thomas, J., concurring in part and dissenting in part) (noting that BCRA requires that "[e]very person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of \$10,000 during any calendar year" disclose "the names and addresses of all contributors who contributed an aggregate amount of \$1,000 or more to the person making the disbursement" (quoting 2 U.S.C. § 434(f)(2)(F)) (internal quotation marks omitted)).

<sup>178</sup> *Id.* at 915 (majority opinion).

<sup>179</sup> *Citizens United*, 130 S. Ct. at 898.

<sup>180</sup> *Id.* at 915; see also *id.* at 931, 938-42 (Stevens, J., concurring in part and dissenting in part) (disagreeing with the majority's overruling of *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), and *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), but endorsing the majority's least-restrictive-means analysis of the disclosure requirement). Justice Kennedy (author of the Court's majority opinion) and Justice Stevens were each joined by three other justices.

requirement was too restrictive on political speech.<sup>181</sup> Justice Thomas has frequently urged that commercial speech should receive the same constitutional treatment as personal speech;<sup>182</sup> therefore, he would likely agree that strict scrutiny is the proper analysis for evaluating corporate political-speech restrictions other than disclosure requirements.<sup>183</sup>

Although *Citizens United* concerned corporate political speech, the decision supports the notion that all commercial speech is generally protected under the First Amendment. The *Citizens United* Court relied heavily on prior decisions regarding corporate political speech,<sup>184</sup> but the Court also cited nonpolitical commercial speech decisions.<sup>185</sup> In particular, the Court cited *United States v. Playboy Entertainment Group, Inc.*<sup>186</sup> as support for its conclusion that the First Amendment's purpose is preventing the government from permitting only its preferred opinions or subjects.<sup>187</sup> The Court's choice to rely on *Playboy* for such an important proposition is intriguing, considering *Playboy* was a case about content regulation of obscene speech, not corporate political speech or even commercial speech.<sup>188</sup> *Playboy* struck down a statute that gave cable-television operators wishing to air adult programming an unattractive choice: scramble the picture and sound

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<sup>181</sup> *Id.* at 981-82 (Thomas, J., concurring in part and dissenting in part). Justice Thomas opposed the disclosure requirement, reasoning that it may put speakers in physical danger as a result of their unpopular views when their identities are made public. *Id.* at 982.

<sup>182</sup> *See, e.g.,* *Milavetz, Gallop, & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1342-43 (2010) (Thomas, J., concurring in part); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001) (Thomas, J., concurring in part); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-82 (1995).

<sup>183</sup> *See, e.g., Lorillard Tobacco*, 533 U.S. at 572 (Thomas, J., concurring in part) (“I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as ‘commercial.’”).

<sup>184</sup> *Citizens United*, 130 S. Ct. at 898-99 (citing *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784 (1978) (addressing corporate funding of political advertisements)); *see also id.* at 901-02 (citing *Buckley v. Valeo*, 424 U.S. 1, 7 (1976) (per curiam) (discussing the regulation of campaign contributions)).

<sup>185</sup> *Id.* at 898 (citing *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) (dealing with content-based restrictions of adult television programming)); *see also id.* at 899-900 (citing several dozen commercial speech cases, some of which concern nonpolitical speech); *infra* notes 191-94 and accompanying text.

<sup>186</sup> 529 U.S. 803 (2000).

<sup>187</sup> *Citizens United*, 130 S. Ct. at 898.

<sup>188</sup> At issue in *Playboy* was the constitutionality of Section 505 of the Telecommunications Act of 1996, 47 U.S.C. § 561 (1994 & Supp. III 1997), which regulated cable-television broadcasts of sexual content. *Playboy*, 529 U.S. at 806. The Court held that Section 505's content-based restriction, which applied only to certain broadcasters, did not survive strict scrutiny. *See id.* at 826-27. Indeed, the *Playboy* majority did not discuss commercial speech at all, much less carry out the *Central Hudson* test; in dissent, however, Justice Scalia decried the “commercial exploitation” of adult programming that he found obscene. *Id.* at 833-35 & n.2 (Scalia, J., dissenting). The implication of *Playboy* is that the Court does not consider cable-television programming itself to be commercial speech.

on such programming (and incur hefty penalties if the scrambling was inadequate), or air the objectionable shows only after 10 p.m.<sup>189</sup> The *Playboy* Court pointed out that people may choose to avoid speech they find objectionable merely by looking away.<sup>190</sup>

Furthermore, the *Citizens United* Court cited commercial free speech opinions<sup>191</sup> on diverse nonpolitical subjects including restrictions on topless dancing,<sup>192</sup> “dial-a-porn” telephone services,<sup>193</sup> and public exhibition of motion pictures,<sup>194</sup> suggesting that the Court is amenable to applying principles from nonpolitical and noncommercial speech cases in the corporate political speech context. The Court’s broad selection of cited precedent on wildly divergent commercial speech cases supports a conclusion that the Court sees no clear practical difference between corporate political speech and nonpolitical commercial speech.

One might argue that the First Amendment places stronger protection on political speech because political speech has always been valued more highly than advertisements for products and services,<sup>195</sup> but there is ample support to the contrary. Indeed, the *Citizens United* Court wrote that First Amendment protection for corporations “has been *extended* by explicit holdings to the context of political speech,”<sup>196</sup> which logically requires that the protection for nonpolitical corporate speech actually existed first. This conclusion is borne out by history; in *First National Bank v. Bellotti*,<sup>197</sup> the Court fully accepted the principle that corporate speech generally deserved First Amendment protection because it provides information crucial to the free market.<sup>198</sup> The *Bellotti* Court noted, “[O]ur consideration of a corporation’s right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political cam-

<sup>189</sup> See *id.* at 808-09 (majority opinion).

<sup>190</sup> *Id.* at 813.

<sup>191</sup> *Citizens United*, 130 S. Ct. at 899-900.

<sup>192</sup> See *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 933-34 (1975).

<sup>193</sup> *Sable Comm’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

<sup>194</sup> See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952).

<sup>195</sup> *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993) (“Our decisions, however, have recognized the ‘common-sense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.’” (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-56 (1978)) (internal quotation marks omitted)).

<sup>196</sup> *Citizens United*, 130 S. Ct. at 900 (emphasis added); see also *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 788 n.26 (1978) (“[A] corporation’s right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office.”).

<sup>197</sup> 435 U.S. 765 (1978).

<sup>198</sup> See *id.* at 783. But see J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1019 (1976) (“Money may register intensities, in one limited sense of the word, but money by itself communicates no ideas. Money, in other words, may be related to speech, but *money itself is not speech*. Courts ought to judge restrictions on giving and spending accordingly.”).

paign for election to public office.”<sup>199</sup> In fact, the *Bellotti* Court was hesitant to expand the general right to free nonpolitical commercial speech to include the specific arena of politics. Furthermore, in the 1957 case of *Roth v. United States*,<sup>200</sup> the Court considered the constitutionality of a statute prohibiting the sale of pornographic books through the mail.<sup>201</sup> In striking down the law, the *Roth* Court concluded that the First Amendment applied to “[a]ll ideas having even the slightest redeeming social importance,” with certain exceptions.<sup>202</sup> These exceptions included obscenity as well as political activity.<sup>203</sup>

Decisions since *Roth* have reinforced the lack of a meaningful distinction between political and nonpolitical speech. In *Abood v. Detroit Board of Education*,<sup>204</sup> the Court rejected the notion that only political speech deserves constitutional protection, noting that permitting “expression about philosophical, social, artistic, economic, literary, or ethical matters” was a legitimate aim of the First Amendment.<sup>205</sup> In *United States v. United Foods, Inc.*,<sup>206</sup> the Court applied *Abood*’s sentiment to commercial speech.<sup>207</sup> While *Abood* and *United Foods* concerned regulations requiring mandatory contributions to fund activities, not restrictions on advertising, their refusal to apply different levels of First Amendment protection to speech based on its content is illustrative because they support according political and nonpolitical speech the same importance. The teachings of the *Roth*, *Bellotti*, *Abood*, and *United Foods* Courts, taken with *Citizens United*’s statement that general protection for commercial speech has been “extended” to the context of political speech,<sup>208</sup> strongly support the conclusion that the novelty of *Citizens United*’s rule lies in its free commercial *political* speech element, not its free *commercial* speech element.<sup>209</sup>

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<sup>199</sup> *Bellotti*, 435 U.S. at 788 n.26.

<sup>200</sup> 354 U.S. 476 (1957).

<sup>201</sup> *Id.* at 479-80.

<sup>202</sup> *Id.* at 484.

<sup>203</sup> *See id.* at 484 & n.14 (citing, among other cases, *United States v. Harriss*, 347 U.S. 612, 625 (1954) (upholding a law that placed limitations on political lobbyists)).

<sup>204</sup> 431 U.S. 209 (1977).

<sup>205</sup> *Id.* at 231; *see also id.* at 232 (“Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective ‘political’ can properly be attached to those beliefs the critical constitutional inquiry.”).

<sup>206</sup> 533 U.S. 405 (2001).

<sup>207</sup> *Id.* at 413.

<sup>208</sup> *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 900 (2010).

<sup>209</sup> Some commentators have criticized *Citizens United* as representing a completely new principle. *See, e.g.*, Erwin Chemerinsky, *The Most Important Decision of the Term*, TRIAL, May 2010, at 54, 54, 56 (predicting that federal, state, and local elections “will never be the same”). However, this view fails to account for—or underemphasizes—the much older *Bellotti* and *Roth* holdings, as well as the fact that several justices have long disparaged content-based restrictions on corporate expenditures. *See, e.g.*, *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 705 (1990) (Kennedy, J., dissenting) (“That those who can afford to publicize their views may succeed in the political arena as a result does not

Some Courts have referred to a difference between political and non-political speech, suggesting that political speech is more valuable to society and, therefore, more worthy of First Amendment protection.<sup>210</sup> “Our decisions, however, have recognized the ‘common-sense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.’”<sup>211</sup> However, the Supreme Court has not established a clear basis for this position that is not based on mere intuition.<sup>212</sup> Justice Stevens’s *Citizens United* partial concurrence and dissent warned against the “potentially deleterious effects” of political ads funded by corporations, fearing that such speech would “undermine the integrity of elected institutions across the Nation.”<sup>213</sup> But there is no guarantee that political contributions are less harmful—or more valuable—than commercial advertisements.<sup>214</sup> Indeed, even Justice

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detract from the fact that they are exercising a First Amendment right.”), *majority opinion overruled by Citizens United*, 130 S. Ct. 876; *id.* at 695 (Scalia, J., dissenting) (“The premise of our system is that there is no such thing as too much speech—that the people are not foolish but intelligent, and will separate the wheat from the chaff.”); *see also* Robert L. Kerr, *Naturalizing the Artificial Citizen: Repealing Lochner’s Error in Citizens United v. Federal Election Commission*, 15 COMM. L. & POL’Y 311, 348-355 (2010) (arguing that *Bellotti* stands for the proposition that the First Amendment protects corporate political media spending but does not generally extend protections to corporations); David Axelman, Note, *Citizens United: How the New Campaign Finance Jurisprudence Has Been Shaped by Previous Dissents*, 65 U. MIAMI L. REV. 293, 308-18 (2010) (recognizing several justices’ concerns with restricting corporate expenditures on political speech).

<sup>210</sup> *See Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”).

<sup>211</sup> *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993) (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-56 (1978)).

<sup>212</sup> *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring) (referring to the “artificiality of a rigid . . . distinction” and criticizing the majority for not explaining its finding that the terms at issue in the case were commercial speech); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 477 (1996) (“[T]o justify [the reduced protection granted to truthful commercial speech], the audience-based model needs a plausible theory of why learning about commercial matters and making sound commercial decisions has only insubstantial value to the public.”); Waters, *supra* note 3, at 1628 & n.17 (“The pronouncement of some ‘commonsense difference’ between political and [nonpolitical] commercial speech has never been adequately demonstrated.”).

<sup>213</sup> *Citizens United*, 130 S. Ct. at 930-31 (Stevens, J., concurring in part and dissenting in part).

<sup>214</sup> Darrel C. Menthe, *The Marketplace Metaphor and Commercial Speech Doctrine: Or How I Learned to Stop Worrying About and Love Citizens United*, 38 HASTINGS CONST. L.Q. 131, 152 (2010). But Justice Stevens was extremely concerned about corporations participating in political debate:

The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.

*Citizens United*, 130 S. Ct. at 930 (Stevens, J., concurring in part and dissenting in part).

Stevens refused in other cases to relegate commercial speech to a position of lesser importance merely because it is uttered in the interest of profit.<sup>215</sup>

Some commentators agree that nonpolitical commercial speech deserves less protection than political discourse, supporting their position with an intuitive high valuation of the latter over the former<sup>216</sup> and an unwillingness to accept the theory that the inherent informative value of commercial speech is sufficient to warrant protection.<sup>217</sup> Former Chief Justice Rehnquist staunchly opposed giving full protection to commercial speech, frequently expressing concern that placing advertising on the same level as personal speech would erode the values of the First Amendment.<sup>218</sup>

The Court has recognized that while advertisements propose commercial activity, they also necessarily include information about the product or service being offered for sale—at a minimum, they inform the public about the product or service’s availability.<sup>219</sup> Bias against the importance of advertising’s inherent informational value may be a holdover from an understandable mistrust of capitalism after the rise of “robber barons”<sup>220</sup> in the late nineteenth century, wariness that continued through the Great Depression.<sup>221</sup> However, the text of the First Amendment protects “speech” and does not include any distinction between “core political speech made by corporations” and other commercial speech that some consider less socially valuable.<sup>222</sup> The Founders, concerned about the effects of the exclusive licenses the British crown had issued,<sup>223</sup> recognized the desirability of a highly in-

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<sup>215</sup> See *Coors Brewing*, 514 U.S. at 494 (Stevens, J., concurring) (“[E]conomic motivation or impact alone cannot make speech less deserving of constitutional protection, or else all authors and artists who sell their works would be correspondingly disadvantaged.”).

<sup>216</sup> See, e.g., Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1185-86 (1988) (“[There is not] any reason why the first amendment might not be the phrase encompassing several different justifications not reducible to any single principle.”); Troy, *supra* note 22, at 88-89 (discussing views of commentators who believe that “deliberative democracy” is more important than the wide availability of economic information); William Van Alstyne, *Remembering Melville Nimmer: Some Cautionary Notes on Commercial Speech*, 43 UCLA L. REV. 1635, 1640 (1996) (calling the proposition that nonpolitical commercial speech is entitled to as much First Amendment protection as political speech “disconcerting”).

<sup>217</sup> See Schauer, *supra* note 216, at 1193 n.50 (“[A]part from those theories that see information as serving some other value, there has been a paucity of explanation of why the information provided by communication constitutes a sufficient condition for first amendment concern.” (citation omitted)).

<sup>218</sup> *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 439 (1993) (Rehnquist, C.J., dissenting); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 781 (1976) (Rehnquist, J., dissenting); *id.* at 787 (“I had understood [enlightened] public decisionmaking to [refer to] political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo.”).

<sup>219</sup> See *id.* at 765 (majority opinion).

<sup>220</sup> See Hal Bridges, *The Robber Baron Concept in American History*, 32 BUS. HIST. REV. 1, 1 (1958).

<sup>221</sup> Troy, *supra* note 22, at 113-14.

<sup>222</sup> Cf. Kozinski & Banner, *supra* note 78, at 631.

<sup>223</sup> Troy, *supra* note 22, at 96-97.

formed free-market economy.<sup>224</sup> Therefore, there is no clear basis for concluding that the Founders would have considered economic information subordinate to political debate.<sup>225</sup>

Although advertisements may be “tasteless and excessive”<sup>226</sup> or unwelcome,<sup>227</sup> the Supreme Court indicated in *R.A.V. v. City of St. Paul, Minnesota*<sup>228</sup> that it is willing to provide First Amendment protection to speech that is even more unpopular than obnoxious advertisements.<sup>229</sup> The law at issue in *R.A.V.* did not seek to regulate advertising, but rather displays motivated by particular types of discrimination.<sup>230</sup> The Court reasoned that the statute was an unconstitutional viewpoint restriction because it forbade displays based on some forms of discrimination but not others.<sup>231</sup> For example, racially motivated displays were criminalized, but those predicated on hatred for homosexuals were not included in the statute’s scope.<sup>232</sup> In holding that the law was unconstitutional, the *R.A.V.* Court applied strict scrutiny.<sup>233</sup> This case marked the first time the Court employed the highest possible First Amendment standard in an offensive-speech case.<sup>234</sup> *R.A.V.* indicates that the Court is open to applying strict scrutiny to categories of speech that have had less value in the past. Indeed, the *R.A.V.* Court envisioned scenarios in which strict scrutiny might apply to commercial speech.<sup>235</sup> To many commentators, *R.A.V.* signaled a shift in the Supreme Court’s attitude toward commercial speech restrictions.<sup>236</sup> Supreme Court justices have cited *R.A.V.* in commercial speech cases<sup>237</sup> for the proposition that courts may

<sup>224</sup> See *id.* at 100 (noting that the colonial press considered advertisements “to have independent value in educating and informing the reading public”).

<sup>225</sup> The colonial sentiment has pervaded modern commercial speech jurisprudence. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (“So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.”).

<sup>226</sup> *Id.*

<sup>227</sup> See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983).

<sup>228</sup> 505 U.S. 377 (1992).

<sup>229</sup> See *id.* at 379.

<sup>230</sup> *Id.* at 380.

<sup>231</sup> *Id.* at 391-92.

<sup>232</sup> *Id.* at 391.

<sup>233</sup> See *id.* at 395-96.

<sup>234</sup> See *R.A.V.*, 505 U.S. at 400 (White, J., concurring).

<sup>235</sup> See *id.* at 388-89 (“[A] State may choose to regulate price advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there. . . . But a State may not prohibit only that commercial advertising that depicts men [but not women] in a demeaning fashion.”).

<sup>236</sup> See Edward J. Eberle, *Cross Burning, Hate Speech, and Free Speech in America*, 36 ARIZ. ST. L.J. 953, 997-98 (2004); Jonathan M. Holdowsky, Note, *Out of the Ashes of the Cross: The Legacy of R.A.V. v. City of St. Paul*, 30 NEW ENG. L. REV. 1115, 1175 (1996).

<sup>237</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 576 (2001) (Thomas, J., concurring in part); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 437 (1993) (Blackmun, J., concurring). The

apply strict scrutiny's prohibition on content regulation to all types of speech,<sup>238</sup> as have several lower federal courts.<sup>239</sup>

### III. WHAT IS LEFT OF *CENTRAL HUDSON*'S INTERMEDIATE SCRUTINY?

*Citizens United* placed commercial political speech on the same level as individual political speech.<sup>240</sup> The history of commercial speech in American jurisprudence,<sup>241</sup> the application in *R.A.V.* of strict scrutiny to a law restricting hate speech,<sup>242</sup> the broad nature of the decisions relied upon in *Citizens United*,<sup>243</sup> and the Court's conclusion that explicit holdings were required to extend general First Amendment protection for corporations' speech to political expression<sup>244</sup> all suggest that the Court is more amenable than ever to abandoning the different treatment of truthful commercial speech and personal speech. Furthermore, the *Citizens United* Court's harsh criticism of the complicated balancing test used to regulate corporate political speech at the time of that decision indicates a preference for simpler, more predictable analyses.<sup>245</sup>

This Part argues that there is no practical difference between corporate political speech and nonpolitical commercial speech, demonstrating difficulties the Supreme Court has encountered in attempting to delineate them from each other. This Part concludes that the Court has only rarely attempted to draw distinctions between the two.

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Court recently relied on *R.A.V.* for its holding on the presumptive invalidity of content-based regulations. See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011).

<sup>238</sup> See *Lorillard Tobacco*, 533 U.S. at 576-77 (Thomas, J., concurring in part).

<sup>239</sup> See, e.g., *Valley Broad. Co. v. United States*, 107 F.3d 1328, 1331 n.3 (9th Cir. 1997); *MD II Entm't, Inc. v. City of Dall., Tex.*, 28 F.3d 492, 495 (5th Cir. 1994); *Citizens United for Free Speech II v. Long Beach Twp. Bd. of Comm'rs*, 802 F. Supp. 1223, 1232-33 (D.N.J. 1992) (considering political, nonpolitical, and disfavored speech, then concluding on the basis of the *R.A.V.* holding that "even the proscribable forms of expression are certainly protected against wholesale content-based restrictions").

<sup>240</sup> See *supra* Part II.A.

<sup>241</sup> See *supra* Part I.A.

<sup>242</sup> See *supra* text accompanying notes 228-39.

<sup>243</sup> See *supra* Part II.B.

<sup>244</sup> *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 899-900 (2010) ("The Court has recognized that First Amendment protection extends to corporations. This protection has been extended by explicit holdings to the context of political speech." (citations omitted)); see also *supra* notes 196-99 and accompanying text.

<sup>245</sup> See *Citizens United*, 130 S. Ct. at 895-96.

A. *The Court Makes No Clear Distinction Between Political and Nonpolitical Speech*

Since corporations<sup>246</sup> and advertisements<sup>247</sup> existed at the time the First Amendment was drafted, the Founders could have distinguished between advertisements and political speech,<sup>248</sup> but, instead, the First Amendment refers to “speech,” no more, no less.<sup>249</sup> Commentators have noted that besides making a few intuitive, conclusory statements about the inferiority of advertisements,<sup>250</sup> the Court has rarely recognized any practical difference between advertisements and political speech.<sup>251</sup> These sporadic distinctions attempt to marginalize speech that permits people to make wise economic decisions relative to speech that informs political decisions,<sup>252</sup> but the Court has not universally accepted such a position.<sup>253</sup>

The *Citizens United* Court did not clearly limit its holding to political speech,<sup>254</sup> despite being aware of the ongoing conflict over the *Central Hudson* standard.<sup>255</sup> The Court’s failure to mention a distinction, even in passing, between political and nonpolitical commercial speech within over one hundred pages of opinions in *Citizens United* supports a conclusion that

<sup>246</sup> See *id.* at 925-26 (Scalia, J., concurring).

<sup>247</sup> See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495 (1996) (plurality opinion).

<sup>248</sup> See *Citizens United*, 130 S. Ct. at 926-27 (Scalia, J., concurring). *But see* Menthe, *supra* note 214, at 159 (pointing out that when the First Amendment was drafted, every state had anti-blasphe-my laws and none protected pornography).

<sup>249</sup> U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

<sup>250</sup> See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 787 (1976) (Rehnquist, J., dissenting).

<sup>251</sup> Cf. Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 *LOY. L.A. L. REV.* 67, 68 (2007).

<sup>252</sup> See Waters, *supra* note 3, at 1646 (“Many Americans value their ability to obtain commercial information as highly as their right to freely gather political information.”).

<sup>253</sup> See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496-97 (1996) (plurality opinion); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977) (“Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective ‘political’ can properly be attached to those beliefs the critical constitutional inquiry.”); *Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898, 904-06 (1971) (Douglas, J., dissenting from denial of cert.); see also Menthe, *supra* note 214, at 161-62.

<sup>254</sup> See, e.g., *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 890 (2010) (stating, in reference to a cable-television, free-speech case, that “[s]ubstantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored”).

<sup>255</sup> Many of the justices on the *Citizens United* Court have openly criticized the *Central Hudson* test in the past. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571-72 (2001) (Kennedy, J., concurring in part) (reiterating that Justice Kennedy has “continuing concerns that the test gives insufficient protection to truthful, nonmisleading commercial speech”); 44 *Liquormart*, 517 U.S. at 517 (Scalia, J., concurring in part) (noting that *Central Hudson* has “nothing more than policy intuition to support it”); *id.* at 522-23 (Thomas, J., concurring in part) (seeing no basis for bias against commercial speech); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 493 (1995) (Stevens, J., concurring) (calling *Central Hudson* a “misguided approach”).

the Court does not consider the question practically relevant.<sup>256</sup> This position is strengthened by the extensive citation to nonpolitical-speech cases within *Citizens United*.<sup>257</sup> The *Citizens United* majority's overruling of two precedents that advocated severe restrictions on corporate political speech<sup>258</sup> indicates that the Court is more wary than ever of proscribing truthful speech merely because it originates from a corporation. *Citizens United* also signals that the Court is willing to revisit precedents.

B. *The Central Hudson Test Is Problematic Because Distinguishing Commercial Speech From Other Types of Speech Is Itself Difficult*

Defining “commercial speech” is a crucial starting point to any analysis,<sup>259</sup> but the Court has provided a rigorous definition of the term only once.<sup>260</sup> In *Bolger v. Youngs Drug Products Corp.*,<sup>261</sup> the Court defined commercial speech extremely narrowly—that which “propose[s] a commercial transaction” and does no more—but then, later in the same opinion, found flyers advertising contraceptives and discussing public-health issues associated with sexual activity to be commercial speech.<sup>262</sup> Under *Bolger*, the inclusion of an offer of sale in any publication shifts that publication to the category of commercial speech.<sup>263</sup> However, as many have noted, any advertisement is informative about, at a minimum, the availability of a product or service.<sup>264</sup> The Court in *Board of Trustees of the State University of New York v. Fox*<sup>265</sup> acknowledged that some statutes will affect both commercial and noncommercial speech, since “[s]ome of our most valued forms of fully protected speech are uttered for a profit,”<sup>266</sup> but it expressed no concerns about the prospect of silencing socially valuable speech.<sup>267</sup>

Distinguishing between “corporate” speech (such as that addressed in *Citizens United*) and “commercial” speech (the subject of *Central Hudson*)

<sup>256</sup> See generally *Citizens United*, 130 S. Ct. 876.

<sup>257</sup> See *supra* Part II.B.

<sup>258</sup> *Citizens United*, 130 S. Ct. at 913 (overruling *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), and a portion of *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003)).

<sup>259</sup> See Schauer, *supra* note 216, at 1184-85.

<sup>260</sup> See *id.* at 1185 n.17.

<sup>261</sup> 463 U.S. 60 (1983).

<sup>262</sup> *Id.* at 66-68; see also *id.* at 79-80 (Rehnquist, J., concurring) (rejecting the Post Office's suggestions of other less restrictive ways plaintiff could achieve its ends).

<sup>263</sup> See *id.* at 66-68 (majority opinion).

<sup>264</sup> See Menthe, *supra* note 214, at 154-57 (outlining the approaches various courts have used to formulate a useful definition); *Hybrid Speech*, *supra* note 78, at 2838-40 (describing two purposes of commercial speech, informing and selling).

<sup>265</sup> 492 U.S. 469 (1989).

<sup>266</sup> *Id.* at 482 (referring to campaign contributions and advertisements that included political opinion).

<sup>267</sup> See *id.*

and *Virginia Board*) adds another level of complexity.<sup>268</sup> Corporate political spending includes companies' contributions to political campaigns designed to influence private citizens' voting decisions and to increase company profits indirectly,<sup>269</sup> while commercial speech regards specific transactions between a company and private citizens.<sup>270</sup> However, both types of speech represent corporations wishing to influence private decisionmaking—either political<sup>271</sup> or economic.<sup>272</sup> While some argue that speech funded by companies should be marginalized because it does not reflect the opinions of individuals,<sup>273</sup> others have pointed out that corporations are nothing more than groups of people with a common profit goal.<sup>274</sup> Corporations cannot exist without people.<sup>275</sup> For example, no one could reasonably argue that a newspaper abandons its free-speech rights when a company owns it.<sup>276</sup> And individuals' decisions to associate within political parties (which are, in fact, corporations) cannot negate the fact that people—not parties—cast votes.<sup>277</sup>

A company advertising a product speaks expressly to potential consumers, while one supporting a political candidate interacts with consumers

<sup>268</sup> Cf. Tamara R. Piety, *Citizens United and the Threat to the Regulatory State*, 109 MICH. L. REV. FIRST IMPRESSIONS 16, 17-18 (2010), available at <http://www.michiganlawreview.org/assets/fi/109/piety.pdf> (noting that Congress has taken control of both corporate, political spending and commercial speech).

<sup>269</sup> See *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 477-78 (2007) (plurality opinion) (comparing a “corporate ad expressing support for the local football team” with a “corporate speech about an election,” i.e., corporate campaign expenditures); Robert L. Kerr, *Considering the Meaning of Wisconsin Right to Life for the Corporate Free-Speech Movement*, 14 COMM. L. & POL'Y 105, 109 n.19 (2009) (defining corporate political media spending as that which seeks to influence voting).

<sup>270</sup> See *supra* notes 261-67 and accompanying text.

<sup>271</sup> See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776-77 (1978) (calling a bank's views on a proposed state constitutional amendment “the type of speech indispensable to decisionmaking in a democracy”).

<sup>272</sup> See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (noting that “[i]t is a matter of public interest that [private economic] decisions, in the aggregate, be intelligent and well informed” and pointing out that providing consumers with information about economic decisions is compatible with the First Amendment as “primarily an instrument to enlighten public decisionmaking in a democracy”).

<sup>273</sup> Piety, *supra* note 268, at 19 (questioning the wisdom of treating companies as “moral subject[s]” with inherent rights to free speech).

<sup>274</sup> See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 928 (2010) (Scalia, J., concurring) (“Surely the dissent does not believe that speech by the Republican Party or the Democratic Party can be censored because it is not the speech of ‘an individual American.’”); Menthe, *supra* note 214, at 148 (noting that the opinions of corporations are inherently those of its owners).

<sup>275</sup> See *Citizens United*, 130 S. Ct. at 928-29 (2010) (Scalia, J., concurring) (pointing out that corporations are merely “incorporated associations of individuals” and urging that individuals do not lose their right to speak when they form a group or corporation).

<sup>276</sup> See Amanda D. Johnson, Comment, *Originalism and Citizens United: The Struggle of Corporate Personhood*, 7 RUTGERS BUS. L.J. 187, 193 (2010).

<sup>277</sup> See *id.* (citing *Citizens United*, 130 S. Ct. at 928 (Scalia, J., concurring)).

indirectly; however, economic benefit motivates both parties in both relationships.<sup>278</sup> Companies wish to increase their own financial profits by influencing people's spending, and consumers hope to find bargains in which they pay the vendor less than the full value of a product.<sup>279</sup> Companies attempt to affect voting habits by funding candidates who share their own agendas, and voters select candidates who they believe will preserve their economic interests.<sup>280</sup> One type of transaction is more obviously economic than the other, but people often select candidates based on financial and economic concerns.<sup>281</sup> The illusion that voters consider the best interests of the nation, not their own fortunes, in choosing candidates can be the only reason for sustaining the fiction that political speech is superior to commercial speech in the eyes of the First Amendment.<sup>282</sup>

#### IV. ILLUSTRATING THE PROBLEM: ALCOHOL ADVERTISEMENTS IN COLLEGE NEWSPAPERS

Given the Supreme Court's inconsistent interpretation of the *Central Hudson* test,<sup>283</sup> the Courts of Appeals are understandably confused about its

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<sup>278</sup> See GORDON TULLOCK ET AL., *GOVERNMENT FAILURE: A PRIMER IN PUBLIC CHOICE* 6 (2002) (recognizing that persons act in such a way to maximize their well-being in both economic and political spheres).

<sup>279</sup> See Herbert A. Simon, *Rationality in Political Behavior*, 16 *POL. PSYCHOL.* 45, 48 (1995) (explaining that consumer product choice can be explained by rational choice theory).

<sup>280</sup> For example, senior citizens are logically more likely to favor higher congressional expenditures for Medicare and Social Security than are college-age voters, while the latter are more likely to vote for a candidate who promises to use tax revenue to forgive student-loan debt. Some voters object when their tax dollars are spent on gun-control measures and environmental protection, while others avoid candidates who promise to increase defense spending or to support industries historically likely to pollute. Although voters may allege that their votes are cast based on ideology, the American political system operates via legislatures funding, or declining to fund, selected causes. Individuals voting based on ideology, therefore, are actually—at least in part—making economic decisions. See *id.* at 50 (“In public choice analyses of political phenomena, the . . . assumption is that governments maximize political power; elected officials and bureaucrats maximize their chances of survival in office; and voters maximize their economic welfare.”).

<sup>281</sup> Bill Schneider, *Analysis: Could it be “the Economy, stupid” again?*, CNN POLITICS (Nov. 7, 2007), [http://articles.cnn.com/2007-11-07/politics/schneider.economy.poll\\_1\\_top-five-issues-elections-job-growth?\\_s=PM:POLITICS](http://articles.cnn.com/2007-11-07/politics/schneider.economy.poll_1_top-five-issues-elections-job-growth?_s=PM:POLITICS) (discussing issues of concern to voters in the 2008 Presidential election, including that 82% of Americans called the economy “very important” or “extremely important” in shaping their votes, while more voters were concerned about the economy than either terrorism or the ongoing war in Iraq).

<sup>282</sup> This fiction is easily discarded when one considers that Congress exerts nearly much of its power through taxation and spending. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987). A vote for a particular candidate based on his or her campaign platform is, in effect, an endorsement of that candidate's plan for congressional spending.

<sup>283</sup> See *supra* Parts I.C.1-2.

application.<sup>284</sup> In 2010, two circuit splits opened in commercial speech jurisprudence.<sup>285</sup> In the first, two Courts of Appeals disagreed about the standard to which courts should hold evidence in evaluating state laws limiting advertisements for alcohol in college newspapers.<sup>286</sup> In the second, the Courts of Appeals failed to reach consensus on which test should apply to disclosure and disclaimer requirements.<sup>287</sup> The lack of clear guidance from the Supreme Court will likely lead to future splits; thus, the Court should overrule *Central Hudson* and provide substantive, useful guidance for evaluating statutes that seek to regulate commercial speech.

This Part begins by describing the disparate way in which two Courts of Appeals applied First Amendment jurisprudence to advertisements in state-university newspapers, and then it demonstrates that the *Citizens United* Court's rationale supports only one of these viewpoints. The Part describes numerous sitting Justices' dislike for commercial speech doctrine and suggests that the Roberts Court overturn *Central Hudson*. Finally, this Part calls for the Court to apply strict scrutiny to commercial speech, concluding that any potential dangers of that standard are far outweighed by the benefit of providing maximum information to the public.

#### A. *A Recent Circuit Split Highlights the Need for Uniformity*

In *Pitt News v. Pappert*,<sup>288</sup> the Third Circuit (led by then-Circuit Judge Alito) considered a Pennsylvania statute that prevented advertisements for alcoholic beverages from appearing in newspapers published by state universities.<sup>289</sup> The court recognized that university students would see ads for alcoholic beverages in other publications available at the same location as the college newspaper; the court held that the law was not “narrowly tai-

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<sup>284</sup> See *supra* Part I.C.3.

<sup>285</sup> The Court recently resolved a third commercial speech circuit split. See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2662, 2672 (2011) (recognizing a split between the First and Second Circuits, and siding with the First Circuit's rule that would have applied heightened scrutiny to state laws that forbade pharmaceutical companies from using identifying information of prescribers to market their products).

<sup>286</sup> See *Educ. Media Co. at Va. Tech, Inc. v. Swecker*, 602 F.3d 583, 589 (4th Cir.), *cert. denied*, 131 S. Ct. 646 (2010); *Pitt News v. Pappert*, 379 F.3d 96, 106 (3d Cir. 2004).

<sup>287</sup> *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 640-44 (6th Cir. 2010) (applying the test from *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)); *Borgner v. Brooks*, 284 F.3d 1204, 1210-14 (11th Cir. 2002) (applying the test from *Central Hudson*). Recent articles of interest about disclosure requirements include Leslie Gielow Jacobs, *What the Abortion Disclosure Cases Say About the Constitutionality of Persuasive Government Speech on Product Labels*, 87 DENV. U. L. REV. 855 (2010), and Patrick Davis, Comment, *Milavetz v. United States: So Bankruptcy Attorneys are Debt Relief Agencies, Right?*, 7 RUTGERS BUS. L.J. 170 (2010).

<sup>288</sup> 379 F.3d 96 (3d Cir. 2004).

<sup>289</sup> *Id.* at 101; see 47 PA. STAT. ANN. § 4-498(e)(5) (West 2010), *invalidated by Pitt News v. Pappert*, 379 F.3d 96, 109 (3d Cir. 2004).

lored to achieve the desired objective.”<sup>290</sup> The *Pitt News* court purported to carry out the *Central Hudson* intermediate-scrutiny test, but in practice, it employed strict scrutiny.<sup>291</sup> The Third Circuit identified only one less restrictive means by which the government could have met its objectives—increased enforcement of existing alcohol-purchase laws.<sup>292</sup> On that basis, the court found the *Pitt News* statute unconstitutional.<sup>293</sup>

A few years later, in *Educational Media Co. at Virginia Tech, Inc. v. Swecker*,<sup>294</sup> the Fourth Circuit evaluated the constitutionality of Virginia regulations that also limited the types of advertisements for alcoholic beverages that state-university newspapers could publish.<sup>295</sup> The *Educational Media* court held that the Virginia regulation was appropriately narrow because it permitted certain types of advertisements, rather than making a blanket prohibition.<sup>296</sup> However, it relied on common sense and consensus<sup>297</sup> rather than requiring the state to show evidence that the statute accomplished its ends,<sup>298</sup> the latter of which a court applying the Supreme Court’s *Edenfield* standard would have required.<sup>299</sup> The *Educational Media* majority’s primary concern appeared to be shielding college students from an inundation of advertisements for establishments serving alcohol, especially advertisements in a newspaper bearing the name of the university.<sup>300</sup>

The *Educational Media* dissent pointed out that the government had produced no relevant evidence and advocated that the Fourth Circuit should

<sup>290</sup> *Pitt News*, 379 F.3d at 107-08 (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001)) (internal quotation marks omitted).

<sup>291</sup> *See id.* at 108.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 108-09.

<sup>294</sup> 602 F.3d 583 (4th Cir.), *cert. denied*, 131 S. Ct. 646 (2010).

<sup>295</sup> *Id.* at 587; *see* VA. CODE ANN. § 4.1-111 (2010).

<sup>296</sup> *Educational Media*, 602 F.3d at 590-91. The Virginia law limited references to alcohol in such advertisements to five specific words and phrases: “A.B.C. [the Commonwealth’s alcoholic beverage control agency] on premises,” “beer,” “wine,” “mixed beverages,” and “cocktails,” as well as combinations of those words. *Id.* at 587 (quoting VA. ADMIN. CODE ANN. § 5-20-40(B)(3)) (internal quotation marks omitted). Given this somewhat arbitrary choice of permissible words, however, an advertisement for “beer night” would be allowed, while one for “mojito night” would not. *Id.* at 594 (Moon, J., dissenting) (internal quotation marks omitted). The *Educational Media* court considered the law appropriately tailored because it only applied to “campus publications targeted at students under twenty-one,” *id.* at 591 (majority opinion), but the record demonstrated that the majority of the college newspapers’ readerships were actually of legal drinking age, *id.* at 595 (Moon, J., dissenting).

<sup>297</sup> *See id.* at 589-90 (majority opinion).

<sup>298</sup> *See Educational Media*, 602 F.3d at 590 (“[I]t is illogical to think that alcohol ads do not increase demand. . . . It is counterintuitive for alcohol vendors to spend their money on advertisements in newspapers with relatively limited circulation, directed primarily at college students, if they believed that these ads would not increase demand by college students.”).

<sup>299</sup> *See Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).

<sup>300</sup> *See Educational Media*, 602 F.3d at 589-90 (recognizing that “college student publications primarily target college students and play an inimitable role on campus” (internal quotation marks omitted)).

follow the Third Circuit's *Pitt News* rule.<sup>301</sup> The dissent emphasized that the state's own expert admitted that blocking one sort of advertisement generally leads to increased expenditures in others,<sup>302</sup> echoing Judge Alito's point in *Pitt News* that college students are "exposed to a torrent of beer ads" in broadcast and print media and that stemming the tide from one direction would have no meaningful effect.<sup>303</sup> The *Educational Media* majority gave undue weight to the "substantial interest" element of the *Central Hudson* test at the expense of the more important third and fourth prongs of the test, which ask for an analysis of the law's scope and its relationship to the legislature's goal.<sup>304</sup> One might excuse the Fourth Circuit for choosing to give such significant weight to the government's intent because some Supreme Court decisions have done so themselves; the *Educational Media* majority was merely following the Supreme Court's example.<sup>305</sup>

*Citizens United*, taken with much Supreme Court precedent on commercial speech,<sup>306</sup> supports replacing the fourth prong of the *Central Hudson* test with strict scrutiny's least-restrictive-means test and placing a high evidentiary standard on the government when it wishes to silence truthful commercial speech.<sup>307</sup> Under strict scrutiny, the Third Circuit's approach in *Pitt News* would prevail over the Fourth Circuit's in *Educational Media*, since there were also less restrictive means available to the government in *Educational Media*.<sup>308</sup> As in *Pitt News*, Virginia Tech students could easily have learned from other sources about places that serve alcoholic beverages<sup>309</sup>—for example, by word of mouth from other students or on the Internet. The state could have better addressed its statutory purpose (reducing underage drinking and binge drinking) by stiffening enforcement of age-verification laws and providing students with information about the dangers of excessive alcohol consumption.<sup>310</sup>

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<sup>301</sup> *Id.* at 593 (Moon, J., dissenting).

<sup>302</sup> *Id.* at 593 n.5.

<sup>303</sup> *Pitt News v. Pappert*, 379 F.3d 96, 107 (3d Cir. 2004).

<sup>304</sup> *See Educational Media*, 602 F.3d at 589-91 (finding the ban on alcoholic advertisements in college-student publications a "reasonable fit to serve [the State's] interests. . . especially in light of its role in a comprehensive scheme to fight underage and abusive drinking"); *see also* *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (setting out a four-pronged test a law must pass to avoid offending the First Amendment: (1) whether the speech "concern[s] lawful activity and [is not] misleading"; (2) "whether the asserted governmental interest is substantial"; (3) "whether the regulation directly advances the governmental interest asserted"; and (4) "whether it is not more extensive than is necessary to serve that interest").

<sup>305</sup> *See supra* Part I.C.1.

<sup>306</sup> *See supra* Part I.C.2.

<sup>307</sup> *See supra* Part III.

<sup>308</sup> *Educational Media*, 602 F.3d at 595.

<sup>309</sup> *See Pitt News v. Pappert*, 379 F.3d 96, 107-08 (3d Cir. 2004).

<sup>310</sup> *See id.* at 108.

### B. *The Justices Seem Willing to Change the Test*

Years of Supreme Court dicta suggest that the current Justices might support applying strict scrutiny to commercial speech,<sup>311</sup> and *Citizens United* signals that the Roberts Court is willing to overturn longstanding precedent.<sup>312</sup> Many Justices have criticized *Central Hudson*,<sup>313</sup> the staunchest proponent of strict scrutiny for advertisements being Justice Thomas,<sup>314</sup> who has repeatedly reiterated the standard in *Virginia Board* and urged a return to that rationale.<sup>315</sup> Justice Kennedy, the author of the *Citizens United* majority, has also criticized the *Central Hudson* test's inability to protect truthful commercial speech.<sup>316</sup>

Justice Scalia's philosophy regarding commercial speech appears to have changed over the years. In *Fox*, Justice Scalia explicitly rejected replacing the intermediate-scrutiny standard in *Central Hudson* with a least-restrictive-means analysis.<sup>317</sup> He was concerned in *Fox* about the heavy evidentiary burden such a requirement would place on the government agency facing a challenge to a statute.<sup>318</sup> However, three years later, Justice Scalia authored the *R.A.V.* opinion, which applied strict scrutiny for the first time to "fighting words," in effect removing the distinction between traditionally protected speech and that which lies outside the First Amendment's

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<sup>311</sup> See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571-72 (2001) (Kennedy, J., concurring in part) (reiterating his "continuing concerns that the test gives insufficient protection to truthful, nonmisleading commercial speech"); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring in part) (noting that *Central Hudson* has "nothing more than policy intuition to support it"); *id.* at 522 (Thomas, J., concurring in part) (seeing no basis for bias against commercial speech). Retired Justice Stevens also advocated a stricter standard for evaluating restrictions on commercial speech. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 493 (1995) (Stevens, J., concurring) (calling *Central Hudson* a "misguided approach").

<sup>312</sup> See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 920 (2010) (Roberts, C.J., concurring) ("[S]tare decisis is neither an 'inexorable command' nor 'a mechanical formula of adherence to the latest decision.'" (citations omitted)); see also Chemerinsky, *supra* note 209, at 56 (suggesting that the replacement of Justice O'Connor with Justice Alito changed the Court's sentiment about upholding precedent); Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 416 (2010) (explaining that the *Citizens United* Court overruled precedent because it was not well reasoned).

<sup>313</sup> See *supra* note 255.

<sup>314</sup> *44 Liquormart*, 517 U.S. at 522-23 (Thomas, J., concurring in part).

<sup>315</sup> See, e.g., *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1342-43 (2010) (Thomas, J., concurring in part); *Lorillard Tobacco*, 533 U.S. at 572 (Thomas, J., concurring in part); *44 Liquormart*, 517 U.S. at 522-23 (Thomas, J., concurring in part); *Coors Brewing*, 514 U.S. at 481-82.

<sup>316</sup> *Lorillard Tobacco*, 533 U.S. at 571-72 (Kennedy, J., concurring in part) (reiterating his "continuing concerns that the test gives insufficient protection to truthful, nonmisleading commercial speech").

<sup>317</sup> *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989) (finding that *Central Hudson* requires "something short of a least-restrictive-means standard").

<sup>318</sup> See *id.*

shield.<sup>319</sup> Furthermore, in *44 Liquormart* in 1996, Justice Scalia wrote in a concurring opinion that he “share[d] Justice Thomas’s discomfort with the *Central Hudson* test.”<sup>320</sup> Justice Scalia has seemingly joined many of the current justices in questioning the test; furthermore, his willingness in *Citizens United* to overturn precedent in order to restore the Founders’ original intent<sup>321</sup> suggests he may be open to revisiting his position in *Fox*.

Justice Sotomayor joined Justice Stevens’s dissent in *Citizens United*.<sup>322</sup> Because that case was one of the first she faced as a new member of the Court, and because she authored no dissent herself, *Citizens United* may not fully indicate her position on commercial speech. Recently, however, she wrote for the Court in *Milavetz, Gallop & Milavetz, P.A. v. United States*.<sup>323</sup> Justice Sotomayor contrasted the Court’s *In re R. M. J.*<sup>324</sup> decision, in which the Court applied the *Central Hudson* commercial speech test to a state law prohibiting attorneys from advertising,<sup>325</sup> with the statute in *Milavetz*, which for legal purposes required only that attorneys providing bankruptcy assistance clearly disclose in their advertisements that they were debt-relief agencies for legal purposes.<sup>326</sup> Justice Sotomayor, therefore, draws a line between commercial speech regulations and disclosure requirements—her primary concern appears to be the regulation of fraudulent information.<sup>327</sup>

In the short time since the decision in *Citizens United*, the membership of the Court has changed; Justice Stevens retired and was replaced by Jus-

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<sup>319</sup> G. Sidney Buchanan, *The Hate Speech Case: A Pyrrhic Victory for Freedom of Speech?*, 21 HOFSTRA L. REV. 285, 294 (1992) (“Scalia’s opinion not only blurs the distinction between protected and unprotected speech; it obliterates that distinction.”).

<sup>320</sup> *44 Liquormart*, 517 U.S. at 517 (Scalia, J., concurring in part). Justice Scalia went on to comment that *stare decisis* prevented him from agreeing to overturn or to replace *Central Hudson*. *Id.* at 518.

<sup>321</sup> *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 925-27 (2010) (Scalia, J., concurring) (outlining his interpretation of the Founders’ view of commercial speech, describing corporations as groups of individuals, and emphasizing that individuals do not lose their right to speak when they join a group); *id.* at 928 (“Surely the dissent does not believe that speech by the Republican Party or the Democratic Party can be censored because it is not the speech of ‘an individual American.’”); *id.* at 929 (praising the majority opinion for its “conformity . . . with the original meaning of the First Amendment”).

<sup>322</sup> *Id.* at 929 (Stevens, J., concurring in part and dissenting in part).

<sup>323</sup> 130 S. Ct. 1324 (2010).

<sup>324</sup> 455 U.S. 191 (1982).

<sup>325</sup> *Id.* at 197-98.

<sup>326</sup> *Milavetz*, 130 S. Ct. at 1341; *see also* N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health, 556 F.3d 114, 132 (2d Cir. 2009) (joining a majority opinion that granted different protections to affirmative restrictions on speech and compelled disclosure).

<sup>327</sup> *Milavetz*, 130 S. Ct. at 1340 (considering evidence in the Congressional Record about consumers being misled by debt-relief agencies adequate to justify compelling law firms to disclose that they are acting as debt-relief agencies).

tice Kagan,<sup>328</sup> who is likely to support stronger rights for commercial speakers faced with statutory limitations on their speech.<sup>329</sup> Years before her appointment, she questioned the propriety of heightened restrictions on commercial speech, advocating that the Court prohibit the government from deciding which form of speech is more worthy than another.<sup>330</sup> Justice Kagan suggested that she would prefer that the Court limit commercial speech doctrine to shielding the public from fraud.<sup>331</sup> Accordingly, Justice Kagan might join the growing number of Justices who question the *Central Hudson* test.

Considering the lack of consensus on the proper standard for commercial speech,<sup>332</sup> the Court might take a cue from its use of strict scrutiny in *Citizens United* to make the changes in the *Central Hudson* test that many of the sitting Justices have explicitly contemplated<sup>333</sup> and, in the case of Justice Thomas, adamantly demanded.<sup>334</sup> Despite having had numerous opportunities to overturn *Central Hudson*, the Supreme Court has repeatedly declined to do so.<sup>335</sup> However, the most recent Supreme Court commercial speech case to apply the *Central Hudson* test was in 2002, well before *Citizens United*.<sup>336</sup> Given the Court's current willingness to place compa-

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<sup>328</sup> Paul Kane & Robert Barnes, *Senate Confirms Elena Kagan's Nomination to Supreme Court*, WASH. POST (Aug. 6, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/05/AR2010080505247.html>.

<sup>329</sup> See Kagan, *supra* note 212, at 511-12.

<sup>330</sup> See *id.*

<sup>331</sup> See *id.* at 511 (“[T]he government may not signify disrespect for certain ideas and respect for others through burdens on expression. . . . [unless it acts] upon neutral, harm-based reasons.”); see also *Menthe*, *supra* note 214, at 166 (suggesting that commercial speech regulation should be “tied more closely to fraud protection”).

<sup>332</sup> See *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989) (acknowledging the “conflicting tenor” of prior opinions on commercial speech cases).

<sup>333</sup> See *supra* note 255.

<sup>334</sup> 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522-23 (1996) (Thomas, J., concurring in part).

<sup>335</sup> See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554-55 (2001) (rejecting the petitioners’ suggestion that *Central Hudson* should be discarded); *United States v. United Foods, Inc.*, 533 U.S. 405, 409-10 (2001) (acknowledging criticism of the *Central Hudson* test but deciding to sustain precedent anyway); see also Suzanna Sherry, *Hard Cases Make Good Judges*, 99 NW. U. L. REV. 3, 6-11 (2004) (noting that the Rehnquist Court decided six commercial speech cases between 1994 and 2004 and that the justices did not share a common rationale in any of them).

<sup>336</sup> See *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 360, 367-68 (2002). The Court did consider commercial speech in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324 (2010), but in that case, eight justices agreed that the *Central Hudson* test did not apply. *Id.* at 1340-41. Justice Thomas, however, noted in a concurring opinion that he continues to oppose *Central Hudson*. *Id.* at 1342 (Thomas, J., concurring in part). Since *Thompson*, the Court has denied certiorari in three commercial speech cases that might have required application of *Central Hudson*. See *Nike, Inc. v. Kasky*, 539 U.S. 654, 655 (2003) (per curiam) (dismissing a writ of certiorari as “improvidently granted”); *Borgner v. Fla. Bd. of Dentistry*, 537 U.S. 1080 (2002) (denying certiorari); *Educ. Media Co. at Va. Tech, Inc. v. Swecker*, 602 F.3d 583 (4th Cir.), *cert. denied*, 131 S. Ct. 646 (2010). In *Borgner*, Justice

nies' speech on a level close to individuals' speech, the Court might modify or even overturn the long-criticized *Central Hudson* test.<sup>337</sup> Indeed, if faced with a commercial speech case, the Court should embrace the opportunity to clarify the longstanding confusion in this area of the law.

### C. *Strict Scrutiny in Practice*

In *Virginia Board*, the Court's rationale for protecting commercial speech was the importance of giving consumers all possible facts to inform their economic choices.<sup>338</sup> While almost all commercial speech decisions have based their rules on *Virginia Board*, many judges discriminate against purely economic information, which they see as having less intrinsic social value and being less worthy of protection.<sup>339</sup>

Critics of full First Amendment protection for commercial speech have contended that regulations are necessary to keep inaccurate information from reaching the public.<sup>340</sup> However, Justice Stevens, who adamantly opposed the *Citizens United* majority's reasoning,<sup>341</sup> previously observed that most limitations on advertisement content are not enacted to ensure accuracy, but instead to protect the public from activities the legislature considers dangerous or unproductive.<sup>342</sup> Regulation of commercial speech has gone far afield from the purpose identified in *Virginia Board*, especially in light of the *Citizens United* Court's conclusion that people should be exposed to all possible views on political issues and then allowed to decide for themselves which information to discard.<sup>343</sup> Given the Roberts Court's willingness to revisit precedent it considers bad law,<sup>344</sup> the Court seems more likely

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Thomas dissented from the denial of certiorari, and Justice Ginsburg joined his sentiment that the case would have been "an excellent opportunity to clarify some oft-recurring issues in the First Amendment treatment of commercial speech." *Borgner*, 537 U.S. at 1080.

<sup>337</sup> See *Menthe*, *supra* note 214, at 133 ("Although directed at political speech, *Citizens United* has broad implications for commercial speech doctrine.").

<sup>338</sup> See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) ("It is a matter of public interest that [private economic] decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable.").

<sup>339</sup> See, e.g., *id.* at 787 (Rehnquist, J., dissenting) (finding that protection of commercial advertising is not consistent with "the view that the First Amendment is 'primarily an instrument to enlighten public decisionmaking in a democracy.'" (quoting *id.* at 765 (majority opinion))).

<sup>340</sup> See *Kozinski & Banner*, *supra* note 78, at 635-36.

<sup>341</sup> *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 930 (Stevens, J., concurring in part and dissenting in part).

<sup>342</sup> See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring).

<sup>343</sup> See *Citizens United*, 130 S. Ct. at 899 (majority opinion) ("[I]t is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes."); see also *id.* at 929 (Scalia, J., concurring) ("We should celebrate rather than condemn the addition of [corporate] speech to the public debate.").

<sup>344</sup> See *supra* note 312 and accompanying text.

than ever to replace the faulty *Central Hudson* test with a fairer, more predictable one that gives commercial speech the same First Amendment protections granted to individual speech and corporate campaign speech.

The Supreme Court might hesitate to overrule *Central Hudson* out of concern that doing so would radically change commercial speech jurisprudence. In reality, any such shift would likely be minimal, and it would place the responsibility for social policy decisions with the state and federal legislatures.<sup>345</sup> It is extremely rare that a statute seeking to silence commercial speech passes the *Central Hudson* test; in every case in which this has occurred, the speech at issue was objectionable politically.<sup>346</sup> For example, in *Posadas*, the advertisements at issue did not relate to a simple consumer good, but rather to gambling, which many states consider a danger to their citizens.<sup>347</sup> In *Educational Media*, the issue was advertisements targeted to college students for restaurants serving alcohol, and the Fourth Circuit noted that underage drinking and binge drinking among college students is a social problem.<sup>348</sup>

While these issues, as well as politics, may indeed be matters of concern to legislators, *Citizens United* signals that the legal landscape is evolving away from paternalism<sup>349</sup> and returning to allowing individuals to choose which speech to credit.<sup>350</sup> The Court has granted the benefit of strict scrutiny to political speech by corporations<sup>351</sup> and to displays of hate speech,<sup>352</sup> so maintaining an extremely protective position about advertisements for consumer products seems arbitrary.<sup>353</sup> The *Citizens United* Court endorsed the view that the public fares best when all parties are permitted to speak, with individuals deciding for themselves whom to credit.<sup>354</sup> Replac-

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<sup>345</sup> See Miller, *supra* note 78, at 637, 639-40 (finding that the “directly advances” prong of *Central Hudson* requires a court “to duplicate precisely the question that the legislature—by virtue of legislating—has already answered in the affirmative” (first internal quotation marks omitted)).

<sup>346</sup> See *supra* Part I.C.1.

<sup>347</sup> *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986).

<sup>348</sup> See *Educ. Media Co. at Va. Tech, Inc. v. Swecker*, 602 F.3d 583, 587 (4th Cir.), *cert. denied*, 131 S. Ct. 646 (2010).

<sup>349</sup> See C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 CASE W. RES. L. REV. 1161, 1172-78 (2004). *But see* Piety, *supra* note 268, at 21-22 (criticizing the possibility of the government losing its ability to effectively protect people when appropriate if commercial speech were given full First Amendment protection).

<sup>350</sup> See Menthe, *supra* note 214, at 138 (pointing out that the First Amendment, when viewed from the position of public policy, promotes education and information in an effort to better equip the citizenry to make decisions).

<sup>351</sup> See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 899 (2010).

<sup>352</sup> See *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 392 (1992).

<sup>353</sup> See *Kozinski & Banner*, *supra* note 78, at 644 (pointing out the inconsistency in permitting white supremacists to march in parades while silencing advertisements from egg producers).

<sup>354</sup> See *Citizens United*, 130 S. Ct. at 899 (“The Government may not by [establishing a preferred class of speakers] deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas

ing *Central Hudson*'s intermediate scrutiny with strict scrutiny would bring all facets of free-speech doctrine into accord, with the public's right to information presumed to be greater than the government's desire to restrict speech in all instances.

One might argue for a "vice" exception to this Comment's proposed strict-scrutiny rule, one that permits legislatures to protect people from products (such as tobacco) and activities (such as gambling) that are legal but that the state considers dangerous to some or all of its citizens.<sup>355</sup> However, such a policy would likely be both unconstitutional and difficult to administer. While efforts to shield children from dangerous products and activities are laudable, the Court has never approved efforts to sanitize the entire world such that it is child friendly.<sup>356</sup> Under a vice-exception rule, either the legislature or judges would decide which activities and products fall into this category, leading necessarily to unpredictability and unacceptable subjectivity.<sup>357</sup> Further complicating such a rule is the fact that activities found detrimental by one political faction might be of secondary importance to another.<sup>358</sup>

As the *Pitt News* court reasoned, restricting print advertisements in selected newspapers is unlikely to achieve legislatures' goals of protecting students, since information about the availability of alcohol is available from diverse sources.<sup>359</sup> The odds of success of any print-ad regulation are likely to decrease as Internet usage becomes more pervasive in our culture<sup>360</sup> and more people view it as a commercial medium.<sup>361</sup> The Supreme

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that flow from each."); see also Kozinski & Banner, *supra* note 78, at 644 ("[T]he common weal is served by permitting interested parties to speak and letting the public choose whom to believe."); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 156-57 (2010) (describing the *Citizens United* majority as promoting decisionmaking by individuals, unhindered by paternalistic governmental efforts to limit available information).

<sup>355</sup> 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513-14 (1996) (plurality opinion) (internal quotation marks omitted).

<sup>356</sup> See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73-74 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.").

<sup>357</sup> 44 *Liquormart*, 517 U.S. at 514 ("[T]he scope of any 'vice' exception to the protection afforded by the First Amendment would be difficult, if not impossible, to define.").

<sup>358</sup> See Troy, *supra* note 22, at 89-90 ("[A] recent article in the conservative *Weekly Standard* called for a ban on advertising of gambling, and liberals have made a centerpiece of their policy agenda attacks on the advertising of 'unhealthy' products, especially cigarettes." (footnote omitted)).

<sup>359</sup> *Pitt News v. Pappert*, 379 F.3d 96, 107 (3d Cir. 2004).

<sup>360</sup> This outcome seems inevitable. There were as many as 40 million Internet users in 1997, see *Reno v. ACLU*, 521 U.S. 844, 870 (1997), and that number increased by 2008 to more than 1.3 billion users browsing almost 160 million websites. See John L. Sullivan III, Note, *Federal Courts Act as a Toll Booth to the Information Super Highway—Are Internet Restrictions Too High of a Price to Pay?*, 44 NEW ENG. L. REV. 935, 941 (2010).

<sup>361</sup> *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1164 n.15 (9th Cir. 2008) ("[The Internet] has become a dominant—perhaps the preeminent—means through which commerce is conducted.").

Court has held that the Internet warrants strict scrutiny because of its historical non-regulated status<sup>362</sup> and its unlimited, low-cost nature.<sup>363</sup> Applying a relatively low standard to restrictions on print advertisements (e.g., the newspaper ads in *Pitt News*) and the most stringent one possible to those on Internet ads would only serve to punish corporations for choosing print advertisements over virtual ones, thereby shifting the preference for advertisements to those on the Internet and unjustly depriving newspapers of a valuable revenue stream.<sup>364</sup>

Maintaining the artificial distinction between print, television, and radio advertisements and every other sort of speech would unfairly disadvantage these media and make it increasingly difficult for them to compete with the free forum of the Internet. It is also unlikely to discourage vices because information about these activities bombards the public from all sides. For these reasons, the Supreme Court should grant all economic information—political and nonpolitical—equal protection under the First Amendment.

#### CONCLUSION

The *Central Hudson* standard has led to unpredictable and incompatible results.<sup>365</sup> It comes as no surprise that judges and scholars have criticized the standard since its inception.<sup>366</sup> The recent guidance from the Supreme Court in *Citizens United* is instructive in resolving the disagreements, since the Court discarded paternalistic rationales for permitting the government to shield the public from viewpoints and opinions it fears may be damaging.<sup>367</sup> The *Citizens United* Court also advocated equal treatment for corporate and private political speech<sup>368</sup> and employed decisions about nonpolitical speech in reaching its holding.<sup>369</sup>

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<sup>362</sup> See *Reno*, 521 U.S. at 868-69.

<sup>363</sup> See *id.* at 870. The details of the application of the First Amendment to the Internet are beyond the scope of this Comment. Recent articles of relevant interest include John B. Morris, Jr. & Cynthia M. Wong, *Revisiting User Control: The Emergence and Success of a First Amendment Theory for the Internet Age*, 8 FIRST AMEND. L. REV. 109 (2009), and Megan E. Frese, Note, *Rolling the Dice: Are Online Gambling Advertisers "Aiding and Abetting" Criminal Activity or Exercising First Amendment-Protected Commercial Speech?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 547 (2005).

<sup>364</sup> In fact, the bans in both *Pitt News*, 379 F.3d at 103, and *Educational Media Co. at Virginia Tech, Inc. v. Swecker*, 602 F.3d 583, 587 (4th Cir.), *cert. denied*, 131 S. Ct. 646 (2010), led to a substantial loss of capital for the newspapers.

<sup>365</sup> See *supra* Part I.C.

<sup>366</sup> See *supra* note 78.

<sup>367</sup> See *supra* note 349.

<sup>368</sup> See *supra* text accompanying notes 196-209.

<sup>369</sup> See *supra* text accompanying notes 184-94.

Because the Supreme Court has never elaborated a clear rationale for protecting political speech more stringently than nonpolitical speech,<sup>370</sup> it should modify the *Central Hudson* test to require strict scrutiny, not intermediate scrutiny. The Court should also require a correspondingly stringent evidentiary standard,<sup>371</sup> making it harder for the government to silence commercial speech. Such a test would resolve disagreements about permissible restrictions on advertisements<sup>372</sup> and would prevent legislatures from marginalizing speech on the basis of the speaker's profit motive.<sup>373</sup>

The Court should overturn *Central Hudson* and replace it with a test that places meaningful limits on the government's ability to silence economically valuable speech. Requiring the government to meet the highest evidentiary standard before silencing truthful advertising would facilitate the informed economic decisionmaking invaluable to our society. Courts should not permit legislatures to use restrictions on commercial speech as a shortcut to discourage activities they do not see fit to outlaw or for which they cannot garner the support to do so.<sup>374</sup> By requiring the government to demonstrate that a regulation on advertisements is the least restrictive way to accomplish its ends, the Supreme Court would place responsibility for policy choices where it belongs—with the people's elected representatives.

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<sup>370</sup> See *supra* Part II.B.

<sup>371</sup> See *supra* text accompanying notes 64-76.

<sup>372</sup> See *supra* Parts I.C.3, IV.A.

<sup>373</sup> See *supra* Parts III.A-B.

<sup>374</sup> See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 514 (1996) (plurality opinion). *But see* *United States v. United Foods, Inc.*, 533 U.S. 405, 425 (2001) (Breyer, J., dissenting) (questioning the wisdom of employing strict scrutiny for all areas of speech in view of concerns about the survival of "well-established, legislatively created, regulatory programs"); Piety, *supra* note 268, at 21 (expressing concern about children receiving false information from tobacco companies in the absence of regulation).