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Regulation of Environmental Marketing: Reassessing the Supreme Court's Protection of Commercial Speech

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I. INTRODUCTION

"Millions have come to Yellowstone," the voice-over says, 'and for over seventy-five years when they arrived, they filled up with a gasoline developed by Conoco, a company committed to protecting the environment. Maybe that's why Conoco has always been the hottest brand going, and the only gasoline sold in National Yellowstone Park." America has discovered the environment, and companies hope to profit. Claims like the one above have sparked calls for government action to protect consumers from fraudulent claims and to encourage businesses to make real changes in their products to benefit the environment. However, amidst state and federal efforts to achieve these goals, the First Amendment seems to have been forgotten.

But in 1993, the Supreme Court decided three cases involving commercial speech: Cincinnati v. Discovery Network;2 United States v. Edge Broadcasting;3 and Edenfield v. Fane.4 Characteristically, the decisions have left much uncertainty concerning First Amendment protection of commercial speech. Discovery Network and Edenfield purportedly raised the level of protection accorded commercial speech; later, however, Edge Broadcasting apparently withdrew this protection. This incongruity reflects the checkered history of the Court's commercial speech jurisprudence. Commercial speech encompasses all types of advertising, some of which have received special treatment by the Court. Therefore, attempts to reconcile conflicting results often prove futile. Nevertheless, the 1993 Court

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1 Bob Garfield, If this is the Revolution, Bring Back the Old Guard, ADVERTISING AGE, June 28, 1993, at 53.
This Note will review the modern commercial speech doctrine, analyze the Court's recent decisions, and determine whether state environmental statutes which regulate the use of common environmental terms pass constitutional scrutiny. The issue will likely see more litigation. Six states have passed such laws and California's is currently on appeal in the Ninth Circuit. Part II of this Note reviews federal and state efforts to remedy the problems caused by increased environmental claims. Part III studies the founding and development of the modern commercial speech doctrine. Drawing common principles from such a divergent array of case law can often hide important nuances in the Court's analysis. However, the cases are categorized to demonstrate both key variables in this analysis, and highlight trends in the Court's treatment of commercial speech. Both are essential to understand the significance of the Court's 1993 opinions, which are analyzed in Part IV. Finally, Part V applies these new developments to the contested California statute. This Note argues that the 1993 Court raised commercial speech to a level of protection that would likely require courts to strike down many state environmental statutes.

II. FEDERAL AND STATE EFFORTS TO REGULATE ENVIRONMENTAL MARKETING

Responding to greater consumer awareness of the impact products and services have on the environment, companies have increasingly made environmental claims about their products in recent years to boost sales. Federal and state governments have responded to remedy two problems created by this type of advertising. First, businesses often make false or misleading environmental claims. Second, governments hope to improve the environment by giving incentives to businesses to meet consumer demand for environmentally friendly products. Thus far, federal and state governments have utilized two methods to achieve these goals: (1) prosecuting individual cases of misleading advertisements and

6 See Jennifer Lawrence, Green Products Sprouting Again; More Focused Efforts Avoid Controversy, ADVERTISING AGE, May 10, 1993, at 12.
7 See, e.g., Lungren, 809 F. Supp. at 756 (citing California's asserted interests in "ensuring truthful environmental advertising and encouraging recycling and environmentally sound packaging" as substantial).
using these case precedents to set standards, and (2) regulating
the use of environmental terms. The second method presents First
Amendment concerns.

A. Case-by-Case Enforcement Against Misleading Claims

The federal government preferred to combat false environ-
mental claims by prosecuting cases to set standards. But in 1992,
the Federal Trade Commission (FTC) passed non-binding
guidelines at the request of states and companies. The guidelines
provide general principles for businesses to follow and give specific
examples of marketing claims that would be considered suspect.
Corporations are not bound by the guidelines. The FTC promul-
gated them only in response to the demands of many corporations
frustrated by state suits for misleading environmental claims they
thought legitimate. Under the Bush administration, the FTC
and the EPA largely rejected the pleas of environmental advocates
and some state attorney generals to adopt binding regulations un-
der which companies could be held liable. However, these par-

8 See, e.g., FTC Rules and Guides—Enforcement Activities: Prepared Remarks of The Honorable Deborah K. Owen, Commissioner, FTC, FTC TODAY, Sept. 21, 1993 (highlighting the FTC's recent prosecution of companies allegedly using terms such as "environmentally friendly" unfairly); FTC Seeks Early Role in EPA Environmental Advertisement Claims Regula-

9 16 C.F.R. § 260 (1992). These guidelines were made pursuant to 15 U.S.C. § 45 (§ 5 of the FTC Act), which prohibits unfair methods of competition. The guidelines are
to be applied specifically to environmental claims made in connection with sales or mar-
keting of a product. They do not preempt state or federal law and do not have the
force of administrative regulations.

10 See, e.g., Jennifer Lawrence, Mobil; With the Introduction of the Degradable Hefty Trash
Bag In June 1989, Mobil Thought It Had Addressed a Growing Retail Complaint, ADVERTISING
AGE, Jan. 29, 1991, at 12. This case study of Mobil Chemical Company's degradable plas-
tic garbage bag litigation highlights this frustration. See infra note 181.

The FTC was accused of being too lethargic in not acting sooner to promulgate
regulations or take some action. The guidelines were made only after corporations facing
various state suits were frustrated that no national standard existed upon which they
could rely. See Edward B. Cohen & William I. Rothbard, Reauthorizing the FTC Back into

11 See FTC Still Paralyzed Over Guidelines for 'Green' Advertisement Claims, FTC: WATCH
(Wash. Regulatory Reporting Assoc., Washington, D.C.), July 6, 1992, available in LEXIS,
Trade Library, FTCWAT File. See also Environmental Advertisement Claims, FTC: WATCH
ties gained some success in lobbying Congress, where such statutory definitions have been proposed. There is still substantial evidence of support for such legislation and criticism of the case-by-case enforcement approach.

B. Regulation of Environmental Terms

In response to perceived federal inaction, states began to act. First, ten states wrote and endorsed The Green Report, which sought to assess the environmental marketing problem and recommend solutions. The Green Report recognized that the increase in environmental claims was causing consumer confusion because common terms like "biodegradable" and "recyclable" have no clear, uniform meaning. Moreover, "the science involved in understanding the environmental issues underlying these claims is complicated and the related technologies associated with environ-

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12 See H.R. 3865, 102d Congress, 2d Sess. (1991). The National Waste Reduction, Recycling, and Management Act was proposed by Senator Lautenberg but failed to pass. The Act required the EPA to promulgate regulations for marketing claims in order to "reduce negative environmental impacts and improve environmental attributes." Id. at 50. It also delineated specific requirements that these regulations must have regarding certain terms. Under this Act, the FTC's only role was to enforce the regulations once enacted by the EPA. See also HOWARD BEALES & TIMOTHY J. MURIS, STATE AND FEDERAL REGULATION OF NATIONAL ADVERTISING 97 (1993) [hereinafter NATIONAL ADVERTISING].


14 They are California, Florida, Massachusetts, Minnesota, Missouri, New York, Texas, Utah, Washington, and Wisconsin. In May, 1991, the GREEN REPORT II was published which made some changes to the original recommendations of the Task Force in light of some criticisms that the original recommendations were "untenable, unfair, or ill-advised." NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, AD HOC TASK FORCE ON ENVIRONMENTAL ADVERTISING, THE GREEN REPORT II: RECOMMENDATIONS FOR RESPONSIBLE ENVIRONMENTAL ADVERTISING, at vi [hereinafter GREEN REPORT II]. Tennessee joined the original ten states in the GREEN REPORT II.

15 NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, AD HOC TASK FORCE ON ENVIRONMENTAL ADVERTISING, THE GREEN REPORT: FINDINGS AND PRELIMINARY RECOMMENDATIONS FOR RESPONSIBLE ENVIRONMENTAL ADVERTISING, at 2-3 [hereinafter GREEN REPORT]. This report may be obtained by contacting the Offices of the Attorney General of the participating states.

16 Id. at 13.
mental management are undergoing rapid change." The participating states recommended some form of government action to prevent a number of harms. For example, consumers may become disillusioned by misleading claims and stop taking environmental considerations into account when making purchasing decisions; incentives for businesses to make substantial investments in more environmentally sound manufacturing processes and new products would be lost if trivial or exaggerated claims are permitted by competing companies; finally, the improvement in environmental quality that might accrue from the manufacture and use of environmentally safe products would be lost.

The Green Report reviewed a number of possible approaches to prevent such problems, but ultimately recommended that "the federal government adopt a national regulatory scheme establishing definitions for environmental marketing claims to be used in the labeling, packaging and promotion of products on the basis of environmental attributes." The Task Force proceeded to make preliminary recommendations on which businesses could rely in crafting environmental claims until binding national standards were enacted. Briefly, the states recommended that environmental claims be specific, that they should reflect current disposal options, and that they should be substantive and supported by evidence of veracity. Within these recommendations, the Task Force made efforts to define when terms such as "recyclable" should be used.

The Green Report was a concerted attempt to

17 Id.
18 Id. at 14.
19 Id.
20 Id. at 20. The Green Report specifically notes, however, that "by recommending a national regulatory scheme for environmental claims, the Task Force is not recommending that states be preempted from regulating the area. Indeed, the states would vigorously oppose any federal statute or regulation that would preempt states' rights in the area." Id. at 20 n.11. This opposition to preemption is odd in that it conflicts with one of the stated reasons for enacting national legislation in the first place: preventing national retailers from having to comply with varying standards. Id. at 15-16. See also Environmental Advertisement Enforcement, FTC: WATCH (Wash. Regulatory Reporting Assoc., Washington, D.C.), July 29, 1991.

There is recognition in the Green Report that the industry participants in the Task Force were less than enamored with this endorsement of a federal regulatory scheme. See the Green Report, supra note 15, at 29-24.

21 Green Report, supra note 15, at 29-46. For example, terms such as "environmentally friendly" are too vague because they incorporate value judgements on what helps the environment. Id. at 32. Also, claims of "disposability" should not be made unless that option is currently available in the area in which the product is sold. Id. at 38.

22 This term would be prohibited "unless the particular item is currently recycled in
standardize claims and prompt federal action. However, some states soon became unsatisfied with the less aggressive federal response.

Six states enacted their own statutes regulating the use of environmental terms. California's law is considered the most stringent in the country because it establishes uniform definitions for environmental terms and requires that parties who make broad environmental claims maintain records which substantiate these claims. Other states, such as New York and New Jersey, have enacted emblem programs whereby a state bureau sets standards for use of environmental terms and allows manufacturers who meet these standards to use the state emblem on their products. These states believed that by standardizing the meaning of given terms, they would eliminate consumer confusion and any resulting deception by businesses. Moreover, by setting an appropriate level for an environmental term, the state could encourage conservation efforts by businesses hoping to increase sales through the use of environmental labels. However, these laws present First Amendment problems because they regulate the use of words irrespective of the context in which they are used.

a significant amount in the states in which the advertisement is made.” Id. at 40. Other terms such as “compostable,” “biodegradable,” and “photodegradable” are constrained by similar language. Id. at 40-42.


24 See Rathe, supra note 15, at 441-42.

25 Id. at 443-45.

26 See GREEN REPORT, supra note 15, at 19; Association of Nat’l Advertisers v. Lungren, 809 F. Supp. 747, 756 (N.D. Cal. 1992) (“The statute is premised on the belief that consumers have difficulty determining the veracity of the environmental claims advertisers make concerning consumer products. Given the confusion over what advertisers mean when they state, for example, that a product is recyclable or biodegradable, the legislature sought to level the playing field for all advertisers by requiring that they mean the same thing when using the terms set forth in the statute.”)

III. COMMERCIAL SPEECH BEFORE 1993: THE DEVELOPMENT OF THE CENTRAL HUDSON TEST

A. Extending Protection to Commercial Speech in Virginia Pharmacy

The Supreme Court explicitly extended First Amendment protection to commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* The Court decided whether a Virginia statute could prohibit pharmacists from advertising prescription drug prices. Writing for the Court, Justice Blackmun noted that Virginia considered pharmacists to be professionals who affected the public health; therefore, heavy regulation was a justified effort to preserve high professional standards. Plaintiffs argued that the First Amendment entitled them "to receive information that pharmacists wish to communicate to them through advertising and other promotional means ...." Departing from its decision in *Valentine v. Christensen,* the Court decided to grant commercial speech First Amendment protection. Four principles emerged from the Court's analysis.

First, the Court found that the First Amendment protects both the interests of the listener and the speaker in the information communicated: "If there is a right to advertise, there is a reciprocal right to receive the advertising ...." Second, Justice Blackmun found that commercial information may hold value for the consumer. Therefore, it should receive First Amendment protection like other valuable speech, unless it is demonstrated to

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28 The Court first implied that commercial speech fell within the scope of First Amendment protection in *Bigelow v. Virginia,* 421 U.S. 809 (1975). In that case, a newspaper editor published an advertisement of an organization located in New York which offered services related to obtaining legal abortions in New York. Although the Court did not "decide ... the extent to which constitutional protection is afforded commercial speech under all circumstances and in the face of all kinds of regulation," Justice Blackmun stated that "the relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas." *Id.* at 826. Therefore, regardless of the commercial or noncommercial label attached, the Court found that First Amendment interests must be considered when a regulation is challenged. *Id.*

30 *Id.* at 750.
31 *Id.* at 750-51.
32 *Id.* at 754.
33 316 U.S. 52, 54 (1942) ("We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.")
34 *Virginia Pharmacy,* 425 U.S. at 757.
have no value.\textsuperscript{35} The prescription drug prices at issue in \textit{Virginia Pharmacy} do not lose their informational value to the consumer simply because money is spent to project them.\textsuperscript{36} Consequently, states seeking to limit commercial speech must distinguish it "by its content."\textsuperscript{37} It cannot "simply be speech on a commercial subject."\textsuperscript{38} Commercial speech does not necessarily fall beyond the "exposition of ideas"\textsuperscript{39} on "truth" or "science,"\textsuperscript{40} so it too must be protected because the consumer's interest in that message "may be as keen, if not keener by far, than his interest in the day's most urgent political debate."\textsuperscript{41}

Third, the Court held that information is not harmful; people's use, or misuse, causes the harm.\textsuperscript{42} Because "the allocation of our resources in large measure will be made through numerous private economic decisions, [i]t is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of information is indispensable."\textsuperscript{43} The Court here rejected paternalistic measures which seek to protect the public through the suppression of information. Recognizing a legislature's concern that information, however valuable, can be 'misused by an advertiser, the Court held that "it is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."\textsuperscript{44} Therefore, the

\begin{thebibliography}{99}
\item \textsuperscript{35} Id. at 771.
\item \textsuperscript{36} Id. at 761.
\item \textsuperscript{37} Id. (emphasis added).
\item \textsuperscript{38} Id.
\item \textsuperscript{39} Id. at 762 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).
\item \textsuperscript{40} Id. (quoting Roth v. United States, 354 U.S. 476 (1957)).
\item \textsuperscript{41} \textit{Virginia Pharmacy}, 425 U.S. at 763. One example of valuable commercial information cited by Justice Blackmun was "a manufacturer of artificial furs promot[ing] his product as an alternative to the extinction by his competitors of fur-bearing mammals." \textit{See} Fur Info. & Fashion Council, Inc. v. E.F. Timme & Son, 364 F. Supp. 16 (S.D.N.Y. 1975). Justice Blackmun states that while not all commercial messages hold great public interest, "there are few to which such an element . . . could not be added. Our pharmacist, for example, could cast himself as a commentator on store-to-store disparities in drug prices, giving his own and those of a competitor as proof." \textit{Id.} at 764-65.

Justice Blackmun's discussion implicates a difficult, yet unresolved, issue: defining commercial speech and distinguishing it from noncommercial speech. \textit{See infra} Part IV.A.1.
\item \textsuperscript{42} \textit{Virginia Pharmacy}, 425 U.S. at 770.
\item \textsuperscript{43} Id. at 765. \textit{Compare infra} notes 186-88, where public decisionmaking drives state environmental regulations. There, resources are being allocated according to legislative prerogatives, not necessarily the people's.
\item \textsuperscript{44} Id. at 770.
\end{thebibliography}
First Amendment prefers that legislatures open channels of information to curb these misuses rather than close them.\textsuperscript{45}

Justice Blackmun concluded by caveating his support for commercial speech. Commercial and noncommercial speech differ in two respects: (1) commercial speech is more easily verifiable than noncommercial speech; and (2) commercial speech is more durable and less likely of being chilled by government regulation.\textsuperscript{46} These distinctions “may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.”\textsuperscript{47} Therefore, regulations of commercial speech may receive some form of lower scrutiny. Justice Blackmun did not elaborate on how much deference should be given the legislature, except to suggest that “[t]hey may also make it appropriate to require that a commercial mes-

\textsuperscript{45} Id. “There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.” \textit{Id}.

\textsuperscript{46} Id. at 771 n.24. \textit{But see} Alex Kozinski and Stuart Banner, \textit{Who's Afraid of Commercial Speech?}, 76 Va. L. Rev. 627 (1990). The authors contest both alleged differences. First, they argue that “the objectivity [and verifiability] of commercial speech fades even more when we get beyond old-fashioned 'We make a good product' advertising and consider the way advertising is actually practiced today. What about a television commercial that shows a man using a particular brand of deodorant and, as an apparent result, leading a much more vigorous social life? How could we ascertain the truth of that commercial? . . . [Also,] there are many varieties of noncommercial speech that are just as objective as paradigmatic commercial speech . . . Scientific speech is the most obvious; much scientific expression can easily be labeled true of false, but we would be shocked at the suggestion that it is therefore entitled to a lesser degree of protection.” \textit{Id}. at 635.

The comment is especially applicable to environmental advertising. \textit{See infra} Part IV.A.1. The authors further argue that even if commercial speech were more objectively verifiable, it should not therefore receive lesser protection: “To the extent that commercial speech is easily susceptible to debunking by counterspeech, there seems to be less, not more, justification for governmental interference.” \textit{Id}. at 636.

Regarding the durability of commercial speech, “this justification is even shakier than the first. Much expression is engaged in for profit but nevertheless receives full first amendment protection . . . . Film producers, book publishers, record producers—all who engage in their chosen profession for profit—are fully protected . . . . Moreover, the durability of speech is not purely a function of the economic interest behind it; other interests can be just as strong as economics, sometimes stronger. History teaches that speech backed by religious feeling can persist in extraordinarily hostile climates . . . . Artistic impulses can also cause expression to persist . . . .” \textit{Id}. at 637.

sage appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." In short, the Court contemplated that legislatures provide more information rather than less when regulating perceived harms under the modern commercial speech doctrine.

Since Virginia Pharmacy, the Court has addressed a wide variety of commercial speech cases including attorney advertising, gambling advertising, and billboard regulations. An equally diverse array of tests and factors have played a part in the development of the modern commercial speech doctrine. The Court's 1993 decisions also studied three different factual scenarios, but applied the Central Hudson test in each case. A brief review of these areas will highlight principles that still inform the Court's commercial speech analysis. For a coherent review, the cases have been placed into three categories. First, the Court has addressed cases concerning legal advertising. Second, the Court studied advertising on "vice activities," such as gambling. Finally, the remaining cases can broadly be grouped under the heading of regulations made pursuant to the general welfare.

B. Legal Advertising

Probably the most litigated area of commercial speech is attorney advertising and solicitations. The Court has heard so many cases on the subject that it has been said "that [the category] has

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48 Id. (emphasis added).
49 See infra note 85 and accompanying text.
50 These categories are primarily functional—i.e. a way of organizing the case law. In some instances, the Court has made analytic distinctions between categories which have later been deemphasized by the Court. See, e.g., infra Part III.B. Yet some factors still seem to play a part in outcomes. See, e.g., infra Part III.C.
51 See infra Part III.B.
52 See infra Part III.C.
53 See infra Part III.D. One final category could be added: speech which is false or made on an illegal activity. This Note only addresses speech which is about legal activity or speech which is only potentially deceptive.
been able to seal itself off from its roots in first amendment theory."

However, the cases indicate that, at least since 1982, the Central Hudson test has been applied to legal advertising as well. Yet, the cases also recognize the existence of unique conditions by noting: "the Central Hudson formulation must be applied to advertising for professional services with the understanding that the special characteristics of such services afford opportunities to mislead and confuse that are not present when standardized products or services are offered to the public." Therefore, while attorney advertising has received greater scrutiny by the Court, the principles emphasized throughout these cases can inform our understanding of the analysis the Court will apply to contested environmental statutes because they too are preventative bans on potentially deceptive speech.

Unlike other areas of commercial speech, these cases challenged "prophylactic" regulations of advertising deemed potentially deceptive by the regulating body. Prophylactic regulations "censor[] all speech on a topic regardless of the potential benefit

55 See Kozinski, supra note 46, at 630. Some support for this can be found in Justice O'Connor's lone dissent in Edenfield v. Fang, where she argues professional services should be treated differently. See Edenfield, 113 S. Ct. at 1804. Moreover, Edenfield never cited Discovery Network while nevertheless affirming many of the same principles. See infra Part IV.B.

56 In re R.M.J., 455 U.S. at 203 n.15. See also Poel, 496 U.S. at 106 (utilizing the Central Hudson test); Zauderer, 471 U.S. at 638 (invoking Central Hudson's factors).

57 See infra Part V.

58 The legal advertising cases have concerned blanket prohibitions on specified activities. However, it is not the complete prohibition that makes them "prophylactic." Rather, prophylactic means "preventing or contributing to the prevention of disease" or "tending to prevent or ward off: preventative, cautionary." See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1818 (1986). That is, the term prophylactic seeks to describe the rule's method, not its scope. The legal advertising regulations have been labeled as prophylactic because the regulating bodies intended to prevent abusive practices in a setting difficult to police retrospectively. Prior restraints were considered the only effective remedy. Therefore, any rule that effects a precautionary silencing of parties to achieve a goal would be considered "prophylactic" as the Court has used the term. This distinction between prohibition of all activity or speech and the prescriptive method of the ban is further emphasized in Edenfield. See infra note 145.

59 The parties challenging the particular bans did not advertise clearly false or misleading information. Rather, the State argued that the bans should be upheld because appellants' speech was potentially misleading. See, e.g., Poel, 496 U.S. at 96 (Petitioner indicated on his letterhead that he had a "Certified Civil Trial Specialist" from the National Board of Trial Advocacy); Zauderer, 471 U.S. at 629 (Appellant's advertisements soliciting business contained nondeceptive illustrations); In re R.M.J., 455 U.S. at 197 (Appellant listed courts in which he was admitted to practice in violation of a State Supreme Court rule).
or harmful effect of the speech." That is, they prevent speech or conduct irrespective of the context in which the words are spoken or the actions performed. The Court finds two principles dispositive when evaluating such rules.

First, states cannot assume that the potential to mislead permits them to regulate as if the advertisement in fact misleads. Over the years, the Court has required states to distinguish between potentially and clearly deceptive speech: The First Amendment "imposes on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." Excusing states from this admittedly difficult task would deprive the Court of any ability to prevent the government "from suppressing other forms of truthful and nondeceptive advertising."

Second, prophylactic bans on potentially misleading speech must be the least restrictive means of achieving the state's objective. Speech with the potential to mislead can be banned only when the state overcomes the strong presumption in favor of

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60 See Howell A. Burkhalter, Comment, Advertorial Advertising and the Commercial Speech Doctrine, 25 WAKE FOREST L. REV. 861, 882. The Court has recently spoken to the issue of prophylactic rules and their treatment under the commercial speech doctrine in Edenfield. See infra note 145.

61 Zauderer, 471 U.S. at 646. See also Peel, 496 U.S. at 110 ("A State may not, however, completely ban statements that are not actually or inherently misleading . . . .") (emphasis added); In re R.M.J., 455 U.S. at 203 ("[W]hen the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way which is not deceptive.") (emphasis added)

It is also important to note that the Court has considered "[t]he experience of the FTC . . . instructive. Although that agency has not found the elimination of deceptive uses of visual media in advertising to be a simple task, neither has it found the task an impossible one: in many instances, the agency has succeeded in identifying and suppressing visually deceptive advertising. Given the possibility of policing the use of illustrations in advertisements on a case-by-case basis, the prophylactic approach taken by Ohio cannot stand." Zauderer, 471 U.S. at 649 (citing as one example FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965)). Perhaps this experience is what prompted the FTC to resist instituting guidelines and instead prefer the case enforcement method. See supra notes 8-11 and accompanying text.

62 Zauderer, 471 U.S. at 646. "Thus, acceptance of the State's argument would be tantamount to adoption of the principle that a State may prohibit the use of pictures or illustrations in connection with advertising of any product or service simply on the strength of the general argument that the visual content of advertisements may, under some circumstances, be deceptive or manipulative. But . . . broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force." Id. at 649.
disclosure rather than concealment of information. If the state can eliminate the possibility of consumer confusion by requiring more information, then it must do so. Essentially, this is a least restrictive means test.

The potential for coercion of the consumer by an advertisement is another factor emphasized by the Court when evaluating the constitutionality of preventative regulations. For example, in *Ohralik v. Ohio State Bar Association*, the Court upheld a ban on in-person solicitation by lawyers largely because of the potential for lawyers to "exert pressure and often demand[] an immediate response, without providing the [possible client] an opportunity for comparison or reflection." In contrast, print advertisements, such as those at issue in *Zauderer*, do not present similar coercive circumstances. Therefore, states will be given less latitude in regulating them.

This line of cases provides three principles particularly relevant to an analysis of laws regulating the use of environmental terms. First, states cannot ignore the difficult task of distinguishing potentially misleading speech from clearly deceptive advertisements. So, although corporations can easily manipulate environmental information, state laws must attempt to identify this misuse. Second, prophylactic rules which constrain speech will face tough judicial scrutiny; preference will be given to disclosure rather than censorship. Environmental regulations take the opposite tack. Finally, advertisements made under non-coercive circumstances

63 *See Peel*, 496 U.S. at 109-11; *Zauderer*, 471 U.S. at 651 ("because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, 'warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.'”) (quoting *In re R.M.J.*, 455 U.S. at 201).

64 An advertisement which has the potential to mislead "does not satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public." *Pee*, 496 U.S. at 109.

65 *See infra* notes 85-87.


67 Id. at 457.

68 "A printed advertisement is a means of conveying information about legal services that is more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney. Accordingly, the substantial interests that justified the ban on in-person solicitation upheld in *Ohralik* cannot justify the discipline imposed on appellant for the content of his advertisement." *Zauderer*, 471 U.S. at 642. *See also infra* notes 208-209 and accompanying text.

69 *See infra* notes 188-91.
probably will not merit preventative bans. Likewise, reading a product label, environmental or otherwise, is hardly coercive.

C. Regulating “Vice Activities”

Regulations on advertising of “vice activities” such as gambling, alcoholic beverages, tobacco and prostitution have been relatively common. Only one case has recently addressed this type of commercial speech: *Posadas de Puerto Rico v. Tourism Company.* In that case, Puerto Rico placed restrictions on advertising of legal casino gambling aimed at residents of the island. Chief Justice Rehnquist, writing for the Court, upheld the law as a reasonable constraint on commercial speech under the *Central Hudson* test. A long opponent of any First Amendment protection for commercial speech, Chief Justice Rehnquist’s opinion substantially reduced the protection accorded commercial speech.

First, Chief Justice Rehnquist stated that the last two steps of the *Central Hudson* test “basically involve a consideration of the ‘fit’ between the legislature’s ends and the means chosen to accomplish those ends.” The Court then applied the test with unconditional deference to the legislature’s policy. Appellant had argued that Puerto Rico should have required additional information about the evils of gambling rather than suppress information about gambling. The Chief Justice rejected this because “it is up to the legislature to decide whether or not such a ‘counterspeech’ policy would be as effective in reducing the demand for casino gambling as a restriction on advertising.” Finally, Chief Justice Rehnquist asserted that because a State has the power to ban gambling, they also have the ability to constrain advertising on gambling.

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70 478 U.S. 328 (1986).
71 Id. at 330.
72 Id. at 341.
73 Id. at 344.
74 Id. *But compare* Virginia Pharmacy, 425 U.S. at 771 n.24; *supra* note 48.
75 Posadas, 478 U.S. at 345. (“In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling . . . .”). In making this finding, Rehnquist juxtaposed cases considering advertising on activity independently protected as a constitutional right. For example, in Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), the Court held that a state could not prohibit the mailing of unsolicited advertisments for contraceptives. Applying the four prong test developed by the Court in *Central Hudson*, the Court found not only that this commercial speech was neither illegal nor deceptive, “but also [that it] relates to activity which is protected from unwarranted state interference.” That is, because the right to
These assertions solidified a departure from the principles found in *Virginia Pharmacy* that began in the early 1980s.\(^{76}\) Extensive judicial deference and a "reasonable fit" test constitute no more than rational basis review\(^ {77}\)—precisely what Rehnquist had always argued the standard should be for commercial speech.\(^ {78}\) However, Rehnquist's final argument that the greater includes the lesser has been soundly criticized.\(^ {79}\) The extent to which it still holds sway over the Court's analysis is unclear.\(^ {80}\) Regardless, vice activities still receive separate treatment by the Court.\(^ {81}\) Although environmental labeling is not a vice activity, *Posadas* is relevant because its deferential application of the final parts of *Central Hudson* finds life beyond cases dealing with vice activities.

### D. Regulations Pursuant to the General Welfare

Four Supreme Court cases concerned regulations made by the state for the general welfare of the public. Although these cases contain many characteristics of the other categories, they have

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76 See *infra* Part IV.D.

77 Rational basis review is partially characterized by the Court's search for a legitimate legislative purpose where the legislature's intent was less than apparent. See, e.g., *Edenfield*, 113 S. Ct. at 1798 ("Unlike rational basis review, the *Central Hudson* standard does not permit us to supplant the precise interest put forward by the State with other suppositions."). However, Rehnquist appears to do precisely this. See *Posadas*, 478 U.S. at 343-44. See also Albert P. Mauro, Jr., Comment, *Commercial Speech after Posadas and Fox: A Rational Basis Wolf in Intermediate Sheep's Clothing*, 66 TUL. L. REV. 1931 (1992) (arguing that the *Central Hudson* test as modified by *Fox* and *Posadas* is nothing more than rational basis).

78 See *Virginia Pharmacy*, 425 U.S. at 781 (Rehnquist, J., dissenting); see also *Central Hudson*, 447 U.S. at 589 (Rehnquist, J., dissenting) ("The Court's decision today fails to give due deference to this subordinate position of commercial speech. The Court in so doing returns to the bygone era of Lochner v. New York, 198 U.S. 45. (1905)).


80 See *infra* Part IV.C.

81 This special treatment is of particular importance to regulations on liquor or tobacco advertising, both considered vice activities by the Court. See, e.g., M. David LeBrun, Annotation, *Validity, Construction, and Effect of Statutes, Ordinances, or Regulations Prohibiting or Regulating Advertising of Intoxicating Liquors*, 20 A.L.R. 4th 600 (1983); David D. Vestal, *The Tobacco Advertising Debate: A First Amendment Perspective*, 11 COMM. & L. 53 (1989). However, some district courts appear to have placed less emphasis on this factor in light of the Supreme Court's 1993 cases. See, e.g., *infra* note 184.
been placed here because, viewed together, they demonstrate the historical development of the modern commercial speech doctrine. *Virginia Pharmacy* found restrictions on drug price advertising unconstitutional; *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* invalidated a ban on promotional advertising by an electric utility; *Metromedia v. City of San Diego*[^82] struck down a municipal ordinance imposing substantial prohibitions on billboard advertisements within San Diego; finally, *Board of Trustees of State University of New York v. Fox*[^83] evaluated a state's prohibition on company presentations in student dorm rooms[^84]. These cases reflect the fluctuating protection accorded commercial speech by the Court over the years.

In *Central Hudson*, the Court laid out a four prong test to determine whether New York's ban on promotional advertising by a utility violated the First Amendment. First, the commercial speech must concern a lawful activity and not be misleading. Second, the regulation must be supported by a substantial government interest. Third, the law must directly advance the government interest asserted. Finally, the regulation must be no more extensive than necessary to accomplish the substantial state interest[^85]. Although the Court found that New York's interest in conserving energy was directly advanced by limiting promotional advertising[^86], this interest did not justify a blanket prohibition on all promotional advertising because "no showing had been made that a more limited restriction on the content of promotional advertising would not serve adequately the state's interests."[^87] Thus, under *Central Hudson*, commercial speech was protected by a least restrictive means test.

However, in *Metromedia, Inc. v. City of San Diego*[^88], the Court began a subtle departure from this protection. In that case, the Court evaluated a city ordinance which sought to improve traffic safety and city appearance by regulating billboard use in three ways: (1) the ordinance permitted signs advertising goods or services available on-site; (2) it prohibited signs advertising goods or services produced or offered elsewhere; and (3) it prohibited non-

[^84]: One final case can be added: *Discovery Network*. See infra Part IV.A.
[^85]: *Central Hudson*, 447 U.S. at 566.
[^86]: Id. at 569.
[^87]: Id. at 570.
commercial advertising unless the advertisement fell within an articulated exception. The Court applied the *Central Hudson* test and upheld the ordinance's distinction between on-site and off-site commercial messages. However, the prohibition of noncommercial messages was ruled facially unconstitutional. Underlying this decision was a shift in principles relied on by the Court: A 'hierarchy' of First Amendment values replaced *Virginia Pharmacy*'s respect for commercial information.

The *Metromedia* Court emphasized that *Virginia Pharmacy* did not equate commercial and noncommercial speech. Citing *Ohralik*, the Court noted that "we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." Moreover, the Court stated that "other [lower] courts ... have failed to give adequate weight to the distinction between commercial and noncommercial speech and to the higher level of protection to be afforded to the latter." This holding shifted the Court's focus from Justice Blackmun's *Virginia Pharmacy* opinion, which emphasized the informational value and similarities between commercial and noncommercial speech for First Amendment purposes. Because San Diego inverted the Court's hierarchy of values—giving commercial speech greater protection than noncommercial speech—that part of the ordinance was invalid.

In contrast, municipalities were free to distinguish between types of commercial speech (and between commercial and noncommercial speech) because this speech fell on a "lower rung" of constitutional protection. Therefore, while the *Central Hudson* test was still

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89 Id. at 503.
90 Id. at 508-12.
91 Id. at 513-15.
92 There is confusion over what the Court did in *Metromedia*. In the Sixth Circuit opinion in *Discovery Network*, Judge Boggs stated that only a plurality found that the San Diego ordinance regulated commercial speech. *Metromedia* rested on the ground that this ordinance was a content-based restriction on noncommercial speech. See *Discovery Network*, Inc. v. City of Cincinnati, 946 F.2d 464, 470 n.9 (6th Cir. 1991). Chief Justice Rehnquist disagreed with this interpretation in his dissent in *Discovery Network*. See supra note 129 and accompanying text.
94 Id. at 513 n.18.
95 See supra notes 35-43 and accompanying text.
97 See id. ("[O]ur recent commercial cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech . . . . Although the city may distinguish between the relative value of different categories of commercial speech,
applied in its original form, the principles protecting commercial speech began to disappear.

Building on Metromedia, Board of Trustees v. Fox watered down the test itself. In Fox, the Court was faced with a challenge to a State University of New York regulation prohibiting commercial solicitation in student dorms. In remanding the case for further proceedings, Justice Scalia found that previous decisions of the Court interpreted the fourth prong of Central Hudson to require only a reasonable fit between the legislative means and ends, not the least restrictive means. In so doing, he provided greater leeway for legislatures to make policy decisions on how to accomplish their stated objectives. Justice Scalia also dismissed arguments that this essentially made the Central Hudson test one of rational basis review. Against this background of diluted principles and a watered down test, the Court addressed commercial speech in 1993.

IV. REASSESSING COMMERCIAL SPEECH: A RETURN TO FIRST PRINCIPLES

A. Cincinnati v. Discovery Network: Requiring a Commercial Harm

"Motivated by its interest in the safety and attractive appearance of its streets and sidewalks, the city of Cincinnati has refused to allow respondents to distribute their commercial publications

the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests.")

98 In deciding whether the speech at issue was in fact "commercial" speech, Justice Scalia briefly discussed the problem of when noncommercial and commercial messages become "inextricably intertwined." He argued that communications can "constitute commercial speech notwithstanding the fact that they contain discussions of important public issues . . . . We have made clear that advertising which "links a product to a current political debate" is not thereby entitled to the constitutional protection afforded noncommercial speech." Fox, 492 U.S. at 475 (citing Bolger, 463 U.S. 67-68). But see supra note 46. Justice Scalia's approach threatens to ensnare fully protected speech in a lesser standard of review. See infra Part IV.A.1.

99 Fox, 492 U.S. at 476. In this case, the Court of Appeals did not decide whether the SUNY regulation directly advanced the State interests as required by the Central Hudson test. Instead, they chose to remand the case for further factual findings. The Supreme Court upheld this remand, but did resolve a legal issue with respect to the terms of this remand—i.e. whether a least restrictive means test was required by the fourth prong of Central Hudson.

100 Fox, 492 U.S. at 480 (citing Posadas, 478 U.S. at 341).

101 Id. at 480.

102 Id.
through freestanding newsracks located on public property."\(^{103}\)

Respondents were Discovery Network and Harmon Publishing Company, Inc. Discovery Network advertised its educational and social programming in a free magazine published nine times a year; Harmon Publishing distributed a free magazine advertising real estate for sale at various locations throughout the United States.\(^{104}\) The Court found that Cincinnati's actions violated the First Amendment because they "attache[d] more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimate[d] the value of commercial speech . . . ."\(^{105}\) Thus, Cincinnati v. Discovery Network asserted that commercial and noncommercial speech held equal value unless articulable harms could be derived from commercial messages. In so doing, the Supreme Court came full circle from substantial protection (Virginia Pharmacy), to nearly rational basis review (Fox), and back to clear protection.

Two issues indicate a return to the principles articulated in Virginia Pharmacy. First, the Court analyzed, but did not rectify, the distinction between commercial and noncommercial speech. Second, the Court rejected the proposition that commercial speech has lesser value, but instead held that commercial speech may be subjected to heavier regulation only when it poses a unique commercial harm. Based on these principles, the Court applied the Central Hudson prongs with renewed vigor, stating clearly that intermediate scrutiny differs from rational review abdication.\(^{106}\)

1. Defining Commercial Speech

The Court began its analysis of whether the Discovery Network's publications were "commercial handbills" or newspapers by recognizing the "difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category."\(^{107}\) Academic commentary clearly agrees.\(^{108}\) Therefore, the Court began by stating what does not distinguish commercial speech from non-commercial speech: (1) whether money is spent to project it, (2) whether the speech is carried in a publication sold for a profit,

\(^{103}\) Discovery Network, 113 S. Ct. at 1505.
\(^{104}\) Id. at 1508.
\(^{105}\) Id. at 1511.
\(^{106}\) See also infra notes 196-99.
\(^{107}\) Discovery Network, 113 S. Ct. at 1511.
\(^{108}\) See supra note 46.
(3) whether the speech solicits money, or (4) whether the speech is on a commercial subject. Two definitions competed for the Court's attention. *Virginia Pharmacy*’s “core notion of commercial speech”—that which does no more than propose a commercial transaction—was compared to the broader definition used in *Central Hudson*: “expression related solely to the economic interests of the speaker and its audience.”

The Court opted for the narrower *Virginia Pharmacy* approach, but recognized that this definition did not resolve the following dilemma: The editorial content in Discovery Network’s publications is clearly not commercial speech under such a definition; however, ordinary newspapers routinely carry advertisements which propose commercial transactions. Ultimately, the Court relied on what they called a “common sense” difference between commercial and noncommercial speech, but admitted that this difference was only a “matter of degree.” Clearly, the Court was concerned with the suppression of noncommercial speech under the guise of the commercial speech doctrine. Such concern is warranted, because both definitions focus on the intent of the speaker rather than the nature of the speech. For example, had Discovery Network advertised programming encouraging people to vote for the Democratic party, the Court would likely have found that this was not commercial speech, even though a profit could be realized through increased viewers. Examples of the problems with the commercial speech definition abound. Nevertheless, the facts


110 Id. at 1513 (quoting *Central Hudson*, 447 U.S. at 561). The Court notes that this broader definition was not used in *Bolger or Fox*; instead, the speech was closely scrutinized to “ensure that speech deserving of greater constitutional protection is not inadvertently suppressed.” Id.; see also supra notes 46, 98.

111 *Discovery Network*, 113 S. Ct. at 1513.

112 Id.

113 See Kozinski, supra note 46, at 640-44. One lower court case highlights the problem. In *Bloom v. O’Brien*, No. 4-93-1202, 1993 U.S. Dist. LEXIS 18560 (D. Minn. Dec. 30, 1993), a group of doctors sought a preliminary injunction from Minnesota’s law placing a two percent tax on the gross revenues of health care providers and restricting their ability to itemize this expense when billing patients. Recognizing *Discovery Network*’s definition of commercial speech, the court had to admit that

[this] common sense distinction between commercial and political speech breaks down in this case . . . . The speech involved concerns, but does not propose, a transaction. The proscribed speech will indicate that, in conjunction with the charges normally associated with a particular medical transaction, the consumer must also pay a specific amount of money which will help to compensate the health care provider for the cost the provider incurs because of the gross reve-
before the Court were sufficient for it to assume that respondents' publications were commercial speech for purposes of the case. The issue, however, has serious implications in the environmental field, especially in light of the scientific uncertainty surrounding any environmental claim. One Seventh Circuit case presents a good example.

In *National Commission on Egg Nutrition v. FTC*, an egg industry organization produced advertisements claiming that no scientific evidence linked eating eggs to heart disease. The FTC ordered the advertisements stopped, claiming they were misleading. The Seventh Circuit found the advertisement to be com-

**NOTE-REASSESSING COMMERCIAL SPEECH**

114 Discovery Network, 113 S. Ct. at 1514. The Court's wavering on this issue has provided little guidance to lower courts, leaving some to ponder whether the commercial-noncommercial distinction still survives. For example, in *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604 (9th Cir. 1993), billboard owners challenged city sign codes on First Amendment grounds. While recognizing the differentiation between commercial and non-commercial speech, the Ninth Circuit was "somewhat uneasy because of a recent footnote comment by the Court [in *Discovery Network*]. [But] [a]s the comment is not a holding, gives us no specific direction, and is apparently of insufficient importance to be in the text of the opinion, we have no choice but to conclude that this commercial-noncommercial analytical distinction still exists." *Id.* at 610.

The Ninth Circuit was not misreading *Discovery Network*. Footnote 11 hints that "if commercial speech is entitled to 'lesser protection' only when the regulation is aimed at either the content of the speech or the particular adverse effects stemming from that content, it would seem to follow that a regulation that is not so directed should be evaluated under the standards applicable to regulations on fully protected speech, not the more lenient standards by which we judge regulations on commercial speech." *Discovery Network*, 113 S. Ct. at 1510 n.11. So, speech that is false or on an illegal activity falls beyond the First Amendment and gets no protection because of its content; also, speech which has adverse effects, like gambling advertising, gets lower scrutiny. *See Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 470 & nn.10-11 (6th Cir. 1991). This analysis likens the commercial speech doctrine to the regulation of adverse secondary effects of speech. *See City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). The commercial-noncommercial distinction would thereby be rendered useless, as this is essentially a content-neutral analysis under *United States v. O'Brien*, 391 U.S. 367 (1968). Many have argued that this approach would more effectively protect the consumer's interest in truthful information and the State's interest in regulating adverse effects of some commercial speech, without ensnaring fully protected speech in an intermediate standard of review. *See, e.g., Kozinski, supra note 46, at 651.*

116 *Id.* at 159-60.
mmercial speech. Therefore, a company’s differing version of scientific facts was easily silenced because of the commercial context in which it was conveyed. Similarly, companies which advertise the beneficial environmental effects of their products could be constrained from doing so simply because they fail to meet a state requirement which may or may not consider all necessary variables. Yet “[f]ew free speech observers would find constitutionally tolerable a widespread system of governmental suppression of scientific opinion, even when that opinion differed dramatically from the prevailing scientific consensus.” The proliferation of these ‘advertorials’ is well-documented: “Cigarette companies advertise that no scientifically credible evidence links smoking to cancer. Oil companies advertise, often on the editorial page, the dangers of particular alternative sources of energy.” It is all valuable speech, but arguably commercial in nature. Therefore, the Court’s reluctant reaffirmation of the commercial-noncommercial distinction could be used to censor scientific evidence regarding the environment.

2. The Need for a Commercial Harm

In applying the Central Hudson test, the Court first recognized that the city’s argument rested heavily on “the proposition that commercial speech has only a low value.” This proposition was soundly rejected by reliance on Virginia Pharmacy. The Court noted Justice Blackmun’s original reasons for extending protection and recognized that commercial speech may receive differential

117 Id. at 163.
118 See Kozinski, supra note 46, at 642 (discussing Egg Nutrition).
119 See infra notes 174-81 and accompanying text.
120 Redish, supra note 79, at 1443 (footnote omitted).
122 Kozinski, supra note 46, at 649.
123 There are ways of avoiding the commercial speech characterization. For example, Phillip Morris celebrated the two hundredth anniversary of the Bill of Rights by running television spots with prominent public figures advertising a brochure on the history of the Bill of Rights. Although cigarette advertising is banned from television, Phillip Morris utilized an increasingly popular advertorial approach to gain access to the television market. See Burkhalter, supra note 60, at 872. However, the Court has said that attaching a political message to commercial speech will not necessarily heighten the scrutiny. See supra note 98.
124 Discovery Network, 113 S. Ct. at 1511.
125 Id. at 1512 n.17; see also supra Part III.A.
treatment only when it presents a definable social harm, which Cincinnati failed to do:

The city's primary concern, as argued to us, is with the aggregate number of newsracks on its streets. On that score, however, all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at fault . . . . Cincinnati has not asserted an interest in preventing commercial harms by regulating the information distributed by respondent publishers' newsracks, which is, of course, the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.126

Because no harm could be tied to the commercial nature of the publications, Cincinnati had no right to distinguish between commercial and noncommercial speech.127

Therefore, commercial speech appears to be accorded equal weight with noncommercial speech unless it is shown to inflict a discernable harm. This principle overrules one which had gained prominence in the Court's jurisprudence—i.e. that commercial speech fell on a lower rung of a First Amendment hierarchy of values. Chief Justice Rehnquist noticed the shift.128 Relying on Metromedia, the Chief Justice argued that "seven Justices were of

126 Id. at 1515 (emphasis added).
127 However, the Court notes that their decision does not preclude a state or city from demonstrating such a difference: "Our holding, however, is narrow . . . . [W]e do not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks." Id. at 1516. That is, if a state can show that their regulation is directed at a harm which happens to be presented uniquely by commercial speech as opposed to similarly situated noncommercial speech, then the Court might be compelled to permit such regulation. But those facts suggest that the state is not making a content-based distinction slighting commercial speech, but rather a content-neutral determination on how to prevent a particular harm. See infra note 130.

One lower court has already recognized that Discovery Network's requirement of a commercial harm means that commercial speech cannot be placed on a 'lower rung.' See Lysaght v. New Jersey, 837 F. Supp. 646 (D.N.J. 1993). In that case, a preliminary injunction was granted on an Act prohibiting delivery of a prerecorded commercial advertisement, unless a live operator obtains the consent of the called party. The Act did not require consent for delivery of noncommercial messages. Judge Ackerman found the case analogous to Discovery Network, claiming that the "distinction between commercial and noncommercial prerecorded messages bears no relation to the interest of protecting residents from unwarranted intrusions at home. The only arguable basis for such a distinction is the perceived 'low value' of commercial speech. However, under Discovery Network, this is an impermissible justification for banning commercial messages." Id. at *16.

128 See Discovery Network, 113 S. Ct. at 1522 (Rehnquist, C.J., dissenting) (citing Ohralik, 436 U.S. at 456).
the view that San Diego's safety and esthetics interests were sufficient to justify its ban of off-site billboard advertising, even though the city's reason for regulating these billboards had nothing to do with the content of the advertisements they displayed."

However, the majority in *Discovery Network* reconciled *Metromedia* by claiming that there the Court was endorsing a content-neutral distinction between on-site and off-site commercial advertising, not a content-based differentiation between commercial and noncommercial speech.

Some have argued that *Discovery Network*’s impact may be overstated: “The force of this holding, however, hinges on the strength of the required relationship” between the regulation and some definable commercial harm. By refusing to delineate how strong this relationship needs to be, “*Discovery Network* ultimately may not change the actual substance of commercial speech so much as the interests the government advances to support its regulations.” This analysis loses the forest in the trees. *Discovery Network* is significant for the principles it asserts, not its application of the *Central Hudson* test. *Central Hudson* has always been the subject of judicial manipulations. But *Discovery Network* indicates that at least five members of the Court view this test through a different lens than previous Courts. Now, states should assume that commercial speech holds equal weight with other protected speech.

Therefore, environmental regulations will be studied in

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129 *Id.* at 1524-25 (citing *Metromedia*, 453 U.S. at 507-10).
130 *Id.* at 1514 n.20. The difference between content-based and content-neutral regulations on speech is a crucial one. If the off-site advertisements create a significant harm, as distinguished from on-site advertisements, then a state may remedy the situation because the regulator does not discriminate against speakers based on what they are saying. However, the Court is suspicious of efforts to prevent harms to the consumer by making content-based distinctions between types of speech, like commercial versus noncommercial. See also *id.* at 1510 n.11, discussed supra note 114. There, the Court suggests that lower protection may only apply when commercial speech falls beyond the First Amendment by virtue of its content (e.g. illegal or false claims) or when adverse effects flow from that content (e.g. gambling advertisements).
132 *Id.* at 231.
133 See, e.g., Floyd Abrams, *Treading on Trade Talk*, THE RECORDER, August 25, 1993, at 8 (“Finally, *Discovery Network* is as noteworthy for its celebratory tone as it is for the substance of its analysis. Any decision that quotes from historian Daniel Boorstein’s *The Americans: The Colonial Experiment* to demonstrate that commercial speech is a historically important means of "[enlarging] and [enlightening] the public mind" can only be described as a paean to commercial speech. *Discovery Network* may well be the single most important decision in this area of First Amendment law since the landmark [Virginia Pharmacy].”); David O. Stewart, *Commercial Break: Supreme Court Bolsters Constitutional*
light of this value. Moreover, the impact of *Discovery Network* is also evidenced by the further endorsement of its core principles in *Edenfield v. Fane*.

**B. Edenfield v. Fane: Prophylactic Rules and the Potential to Mislead**

One month after *Discovery Network* was decided, the Court handed commercial speech a second victory in *Edenfield v. Fane*. The case concerned Florida's ban on in-person solicitation by certified public accountants. Florida attempted to justify the ban as a prophylactic rule designed to maintain the accounting profession’s independence, and to protect consumers from fraud and CPA overreaching. However, eight members of the Court ruled that these interests, although substantial, were not advanced by this regulation. The third prong of *Central Hudson* requires the government to show that "its restriction will in fact alleviate [the harm] to a material degree." No empirical evidence was offered to support the Board’s contention that accountant solicitations presented problems of abuse or overreaching. Unlike solicitations by lawyers, CPA solicitations are "conducive to rational and considered decisionmaking by the prospective client, in sharp contrast to the 'uninformed acquiescence' to which the accident victims in *Ohralik* were prone." By striking the regulation, *Edenfield* reaffirmed the principles articulated in *Discovery Network* and those reflected in the Court's jurisprudence addressing prophylactic rules on potentially deceptive speech.

*Protections for Commercial Speech*, 79 A.B.A. J. 42, 45 (June 1993) (According to Mark Yurick, the assistant city solicitor who represented Cincinnati before the Supreme Court, "the Court's ruling creates a strict scrutiny test. He stresses (as did the dissenting justices) that a critical holding in the majority opinion is buttressed by citations to First Amendment cases that involved no commercial speech.") Note that the Court also cited noncommercial cases in *Edenfield*. See infra notes 144-45.

135 Id. at 1797, 1802.
136 Id. at 1796.
137 Id. at 1800.
138 Id. at 1800-01.
139 Id. at 1803 (quoting *Ohralik*, 436 U.S. at 465). Thus, the Court reaffirms that the environment in which the commercial speech occurs—*i.e.* whether it is potentially coercive—is a factor in analyzing commercial speech restrictions. See supra notes 66-68 and accompanying text.
First, *Edenfield* explained that commercial speech received intermediate review not because it held a 'lower' value, but because “[it] is ‘linked inextricably’ with the commercial arrangement that it proposes . . . . [T]he State’s interest in regulating the underlying transaction may give it a concomitant interest in the expression itself.”\(^{140}\) That is, an underlying commercial harm justifies greater government regulation, not the nature or value of the speech. Therefore, because the commercial marketplace is “a forum where ideas and information flourish, . . . the general rule is that the speaker and the audience, not the government, assess the value of the information presented.”\(^{141}\)

Second, states may not justify bans on potentially deceptive (but truthful) speech by asserting interests in protecting against fraud. When a law prohibits truthful speech in an effort to eliminate deception, it must be reasonably tailored to its objective under the *Central Hudson* test.\(^ {142}\) In short, states bear the burden of distinguishing between potentially and actually deceptive speech; they may not constrain the former under the guise of the latter.\(^ {143}\)

Finally, the Court addressed the application of prophylactic rules to commercial speech. Prophylactic rules are not simply blanket bans. Rather, rules are prophylactic when they prohibit conduct or speech “at the outset, rather than punishing the misconduct after it occurred.”\(^ {144}\) Reiterating its prior case law, the Court quoted a case involving noncommercial speech, *NAACP v. Button*, for the proposition that: “Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.”\(^ {145}\) *Button* concerned solicitations that were

\(^{140}\) Id. at 1798 (quoting Friedman v. Rogers, 440 U.S. 1, 10 & n.9 (1979); and *Ohralik*, 436 U.S. at 457). Reference to the underlying transaction again invokes notions of O'Brien's content-neutral analysis hinted at in *Discovery Network*. See supra notes 114, 130.

\(^{141}\) *Edenfield*, 113 S. Ct. at 1798.

\(^{142}\) Id. at 1799 (“But where, as with the blanket ban involved here, truthful and nonmisleading expression will be snared along with fraudulent or deceptive commercial speech, the State must satisfy the remainder of the *Central Hudson* test by demonstrating that its restriction serves a substantial state interest and is designed in a reasonable way to accomplish that end.”)

\(^{143}\) See supra notes 61-62 and accompanying text.

\(^{144}\) *Edenfield*, 113 S. Ct. at 1803 (citing *Ohralik* facts). One justification advanced by the Board for the solicitation ban was that it acted as a prophylactic rule. *Edenfield*, 113 S. Ct. at 1802. The separate assertion by the Board further indicates that not all bans are prophylactic; only those having the purpose of preventing conduct are prophylactic. See supra note 58.

\(^{145}\) Id. at 1803-04 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). In finding
deemed political speech by the Court. Citation to this case further evidences the Court's conviction that commercial speech holds equal weight with fully protected speech and deserves strong protection, especially against prior restraints on that speech.

C. United States v. Edge Broadcasting: Attempting to Reestablish Rational Basis Review

Commercial speech suffered a surprising defeat in June, 1993, when the Court handed down United States v. Edge Broadcasting. In that case, the Court was confronted with a federal statute which sought to discourage gambling by limiting advertising of state lotteries by radio or television stations located in states which had no lottery. Edge Broadcasting owned a radio station in North Carolina, a non-lottery state, but had an audience consisting primarily of Virginians. Edge argued that its First Amendment rights were violated by the federal prohibition against advertising the Virginia lottery over their station. Applying the Central Hudson factors, the Court upheld the federal statute as a legitimate restraint on commercial speech. Writing for the Court, Justice White relied heavily on Posadas and Fox to revive something akin to rational basis review. However, several factors suggest that Edge Broadcasting may be limited to its facts.

Prophylactic rules suspect, it is uncertain whether the Court finds blanket prohibitions on all activity or speech problematic, or whether it finds the prior restraint, or prophylactic nature of these regulations suspect. The Court is likely voicing its traditional concern over the prior restraint of any speech. See 16A AM. JUR 2D, Constitutional Law, § 498 (1979) ("It is well established that freedom of speech . . . means principally . . . immunity from previous restraints or censorship . . . ."); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1951) (constitutionality of laws imposing prior restraints is more suspect than that of laws providing for subsequent punishment).

The above quote in Edenfield is explained by the court as the "general approach to the use of preventative rules in the First Amendment context." Id. at 1803. In short, prior restraint on speech, not the scope or completeness of a prohibition on any category of speech, is suspect.

146 Button, 371 U.S. at 429.
149 Edge Broadcasting, 113 S. Ct. at 2702. 92.2% of its listeners are Virginians, as the station is located three miles from the state boarder. 95% of the station's revenue derives from Virginia sources. Id.
150 Id.
151 Id. at 2704-06.
1. Jumpstarting Rational Basis Review

Justice White's opinion focused on whether the final two Central Hudson factors must directly advance the government interest as applied in a particular case, or whether the regulation need only remedy the general problem the government sought to address. According to Justice White, the third factor should not analyze "whether the government interest is directly advanced as applied to a single person or entity."152 The fourth factor—whether a reasonable fit exists—is the proper place for this consideration. However, after finding the regulation valid under the third factor, Justice White reused the same language in his factor four analysis: "[T]he fit in this case was a reasonable one . . . [A]pplying the restriction to a broadcaster such as Edge directly advances the governmental interest . . . ."153 Justice White further supported his conclusion by analogizing to time, place and manner restrictions, which he stated were "very similar to those applicable in the commercial speech context."154 Under time, place and manner analysis:

'[T]he validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in a particular case' . . . . [T]hus . . . we judge the validity of the restriction in this case by the relation it bears to the general problem of accommodating the policies of both lottery and nonlottery States, not the extent to which it furthers the government's interest in an individual case.155

Therefore, in Justice White's mind, the statute need only bear a relation to the overall problem, rather than concretely achieve the end sought by the government. By interpreting the fourth prong as an 'overall' analysis of the regulation, Justice White reapplied

152 Id. at 2704.
153 Id. at 2705 (emphasis added).
154 Id. Specifically, time, place and manner restrictions must (1) be within the power of the government, (2) further an important or substantial government interest, (3) the government interest must be unrelated to the suppression of free expression, and (4) the restriction is no greater than is essential to the furtherance of that interest. See United States v. O'Brien, 391 U.S. 367, 377 (1968). The Court addressed themselves to this content-neutral test in Discovery Network, refusing to apply it because the contested regulation was content-based. See Discovery Network, 113 S. Ct. at 1516 ("It is the absence of a neutral justification for its selective ban on newsracks that prevents the city from defending its newsrack policy as content-neutral.")
155 Edge Broadcasting, 113 S. Ct. at 2705.
the third factor's "directly advancing" test, but failed to subject the statute to the further scrutiny traditionally required by the fourth prong.\textsuperscript{156} This deferential test is not uncharacteristic of Justice White, a long-time opponent of commercial speech protection, which is once again evidenced in this opinion.\textsuperscript{157}

2. Indications of Low Precedential Value

Two facts in \textit{Edge Broadcasting} suggest the case holds limited precedential value. First, this case presents a clear commercial harm: advertisements on lottery gambling. As stated above, vice activities still receive some special treatment by the Court.\textsuperscript{158} But the Court does not depart from its finding in \textit{Discovery Network} that commercial harm distinguishes commercial speech, not its commercial character.\textsuperscript{159} Second, the opinion suggests that the government interest involved in \textit{Edge Broadcasting}—respect for differing state policies on lotteries—drove the Court's analysis and ultimate conclusion.\textsuperscript{160}

Justice White's opinion differentiates between the perceived government interest and that which Congress seeks to protect: "the[se] statutes were not 'adopted . . . to keep North Carolina residents ignorant of the Virginia lottery for ignorance's sake,' but to accommodate non-lottery states' interest in discouraging public participation in lotteries, even as they accommodate the countervailing interests of lottery states."\textsuperscript{161} Federalism—respect for competing state policies—is the substantial interest.\textsuperscript{162} Requiring stations to respect their local state policies on lottery gambling directly advances and reasonably fits this federalism interest.\textsuperscript{163}

\textsuperscript{156} The fourth prong actually states that the government regulation be "no greater than necessary." \textit{See supra} note 84 and accompanying text.

\textsuperscript{157} \textit{See}, e.g., \textit{Edge Broadcasting}, 113 S. Ct. at 2703 ("lesser protection to commercial speech"), 2705 ("subordinate position of commercial speech") (citing \textit{Fox}, 492 U.S. at 477). Justice White's disdain for commercial speech is evidenced by his joining in the majority opinions in \textit{Fox} and \textit{Posadas}, as well as his dissent with Rehnquist in \textit{Discovery Network}.

\textsuperscript{158} \textit{Edge Broadcasting}, 113 S. Ct. at 2703. \textit{See supra} note 81 and accompanying text. \textit{But see infra} note 184 for some lower court indications that this factor may be receding.

\textsuperscript{159} \textit{See supra} Part IV.A.2.

\textsuperscript{160} Interview with Douglas Kmiec, Professor of Law, Notre Dame Law School, in Notre Dame, IN (Nov. 15, 1993) (discussing federalism issue intertwined with commercial speech).

\textsuperscript{161} \textit{Edge Broadcasting}, 113 S. Ct. at 2707 (quoting Reply Brief for Petitioners 11).

\textsuperscript{162} This statute "was enacted 'to accommodate the operation of legally authorized State-run lotteries consistent with continued Federal protection to the policies of non-lottery states.'" \textit{Id.} at 2701 (quoting S. REP. NO. 1404, 93d Cong., 2d Sess. 2 (1974)).

\textsuperscript{163} \textit{Id.} at 2704 ("This congressional policy of balancing the interests of lottery and
When viewed in this light, it is difficult to imagine an alternative congressional statute which could more effectively advance that policy.\(^{164}\)

The dissenting opinion of Justices Stevens and Blackmun also indicated that the Court’s debate turned not on the protection to be accorded commercial speech, but the weight and character of congressional interest in discouraging lottery gambling. Justice Stevens argued that this regulation is primarily a “ban on speech imposed for the purpose of manipulating public behavior,”\(^{165}\) not a benign congressional effort to respect federalism. The dissent believed the government has the “purpose of manipulating, through ignorance, the consumer choices of some of its citizens.”\(^{166}\) Because these interests are not substantial, the law fails constitutional scrutiny.\(^{167}\)

Therefore, although Edge Broadcasting reflects much of the rhetoric of Fox and Posadas, the above factors suggest that only the ardent supporters and opponents of commercial speech protection differed here.\(^{168}\) It is more likely that members of the Court saw few alternatives for Congress should they invalidate the statute.

V. STATE STATUTES UNDER THE COMMERCIAL SPEECH DOCTRINE: A VIOLATION OF FREE SPEECH

This section will analyze the California statute under the Court’s 1993 cases.\(^{169}\) As discussed above, states assert two inter-

\(^{164}\) Nevertheless, the outcome is troubling because it seems to suggest that the “greater” power of States to limit gambling will permit Congress to exercise the “lesser” power of limiting advertising on gambling. See supra note 75.

\(^{165}\) Edge Broadcasting, 113 S. Ct. at 2708.

\(^{166}\) Id. at 2710.

\(^{167}\) Id. (“While a State may indeed have an interest in discouraging its citizens from participating in state-run lotteries, it does not necessarily follow that its interest is ‘substantial’ enough to justify an infringement on constitutionally protected speech, especially one as draconian as the regulation at issue in this case.”) (footnotes omitted).

\(^{168}\) Justices Blackmun and Stevens are the strongest supporters of commercial speech, as evidenced by Stevens’ majority opinion in Discovery Network and their joint dissent here.

\(^{169}\) CAL. BUS. & PROF. CODE § 17508.5 (West Supp. 1994) provides:

It is unlawful for any person to represent that any consumer good which it manufactures or distributes is “ozone friendly,” or any like term which connotes that stratospheric ozone is not being depleted, “biodegradable,” “photodegradable,” “recyclable,” or “recycled” unless that consumer good meets the definitions contained in this section, or meets definitions established in trade
ests in enacting such legislation: prevention of misleading advertisements and improvement of the environment. There is little doubt that most courts would find both interests substantial.\textsuperscript{170} However, the Court's recent cases suggest that the statute may not survive the final two prongs of the \textit{Central Hudson} test.\textsuperscript{171} First, the statute's efforts to improve the environment are suspect under \textit{Central Hudson}'s third and fourth prongs. Second, the

rules adopted by the Federal Trade Commission. For purposes of this section, the following words have the following meanings:

(a) "Ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, means that any chemical or material released into the environment as a result of the use or production of a product will not migrate to the stratosphere and cause unnatural and accelerated deterioration of ozone.

(b) "Biodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through natural biological processes into nontoxic carbonaceous soil, water, or carbon dioxide.

(c) "Photodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through physical processes, such as exposure to heat and light, into nontoxic carbonaceous soil, water, or carbon dioxide.

(d) "Recyclable" means that an article can be conveniently recycled, as defined in Section 40180 of the Public Resources Code, in every county in California with a population over 300,000 persons. For the purposes of this subdivision, "conveniently recycled" shall not mean that a consumer good may be recycled in a convenience zone as defined in Section 1409.4 of the Public Resources Code.

(e) "Recycled" means that an article's contents contain at least 10 percent, by weight, postconsumer material, as defined in subdivision (b) of Section 12200 of the Public Contract Code.

(f) "Consumer good" means any article which is used or bought primarily for personal, family, or household purposes.

(g) For the purposes of this section, a wholesaler or retailer who does not initiate a representation by advertising or by placing the representation on a package shall not be deemed to have made the representation.

\textsuperscript{170} See, e.g., Association of Nat'l Advertisers v. Lungren, 809 F. Supp. 747, 756 (applying the second prong of \textit{Central Hudson}).

\textsuperscript{171} Claims of unconstitutional vagueness or overbreadth may also be brought. The doctrines are closely related. "An overbroad statute . . . is one that is designed to burden or punish activities that are not constitutionally protected, but the statute also includes within its scope activities protected by the First Amendment." \textsc{John E. Nowak \\& Ronald D. Rotunda, Constitutional Law} § 16.8 (4th ed. 1991).

In \textit{Lungren}, the court responded to this challenge by upholding the California statute under a relaxed vagueness standard in light of the lower scrutiny accorded commercial speech. \textit{See Lungren}, 809 F. Supp. at 761-62. Similarly, the court also refused to apply the doctrine of overbreadth because of commercial speech's lesser protection. \textit{Id.} at 759. However, in light of the Court's recent elevation of commercial speech, both challenges could be applied to commercial speech by arguing that it too deserves protection from the chilling effects of overbroad or vague regulations.
government’s interest in preventing deceptive advertising fails to satisfy the fourth prong’s reasonableness requirement.172

A. Applying Central Hudson to the Government’s Interest in Helping the Environment

1. Third Prong Analysis

Central Hudson requires a court to determine whether the challenged regulation “directly advances” in a “material way” the government’s asserted objectives.173 Because rapid changes in environmental science cause even experts to disagree over what practices harm or help the environment, it is unclear whether regulating environmental terms will encourage consumers and businesses to be environmentally conscious. Examples of confusion in environmental policy abound. Analyzing these statutes will demonstrate that they are premised on policy decisions which cannot guarantee results. Regulations which cannot show results fail Central Hudson’s third prong.

When the government decides to regulate the use of an environmental term, it must make an initial policy decision on what is best for the environment. For example, California allows “recycled” to be used only on products which contain ten percent, by weight, post-consumer material.174 However, proposed federal legislation required twenty-five percent post-consumer waste,175 and New

172 Before proceeding to this analysis, it is important to note one threshold issue studied by the Lungren court to which the Supreme Court’s 1993 cases have briefly spoken: the requirement that States must distinguish between potentially deceptive and actually deceptive advertising. In Lungren, defendant-intervenor argued that the commercial speech in question was inherently misleading and therefore not protected by the First Amendment at all. See Lungren, 809 F. Supp. at 755 n.7 (citing Def. Int. Opp. at 26-29). The court rejected this argument, finding that “a legislative body cannot justify its restrictions on commercial speech simply by declaring that marketing claims are misleading.” Id. at 756. Edenfield, relying on precedent, found similarly that “where . . . truthful and nonmisleading expression will be snared along with fraudulent or deceptive commercial speech, the State must satisfy the remainder of the Central Hudson test . . . .” Edenfield, 113 S. Ct. at 1799. See also supra notes 61-62. Of course, the California statute would encompass truthful claims as well as misleading ones. Therefore, further application of the Central Hudson test is required.

173 Edenfield, 113 S. Ct. at 1800.

174 CAL. BUS. & PROF. CODE § 17508.5(e) (West Supp. 1994). Post-consumer waste is that which has been used by the consumer. This is to be distinguished from pre-consumer waste—i.e. that derived from commercial uses.

175 H.R. 3865, 102nd Congress, 2d Sess. 50 (1991). The Act also provided for the level to be raised to 50 percent by the year 2000.
Hampshire requires fifty percent post-consumer waste.176 Others argue that the distinction between pre- and post-consumer waste should not be made at all.177 Therefore, determining the appropriate level requires a body of scientific knowledge on what is best for the environment. However, clear scientific proof that something helps the environment is rare.

Recently, environmental experts have focused on "life-cycle" analysis as a method for determining what practices aid the environment. This is best summarized as follows:

This type of analysis might be called a "cradle to grave" life cycle analysis for a product. Our society is concerned about the "cradle" of lost natural resources spent on overpackaging, as it is with the "grave," i.e. the landfill or incineration cite where disposal occurs. In a hypothetical example, the making of the widget consumes trees, electric power, and petroleum, and generates waste solvent; the widget is inserted into a container made for petroleum-based laminated paper and plastic; and residue from the widget's production is consigned to a landfill or incinerator. Life cycle analysis measures the environmental effects at each stage.178

Because innumerable variables are implicated in life-cycle analysis, experts rarely agree on what course of action effectively protects the environment. For example, the Reason Foundation, a public policy think tank, argued that the FTC should not define the term "recyclable" because this might imply to consumers that the FTC encourages recycling of all products labeled in conformity with that definition.179 According to them, recycling all products is poor environmental policy because, based on life-cycle analysis, some recyclable products do less harm to the environment when

177 One example is a proposed Ohio statute. See Ohio H.B. 202, 120th General Assembly, Reg. Sess. (1993). See also NATIONAL ADVERTISING, supra note 12, at 97-102. The authors explain that this distinction presumes that consumers interpret "recycled" to mean that a consumer had previously used the material and separated it out for reuse. They find no empirical support for this presumption. The authors argue that consumers are probably concerned about reducing consumption of natural resources (whether to lessen the solid-waste disposal problem or for some other reason). However, reducing consumption does not require states to distinguish between consumer and commercial waste, but should only ascertain whether that material would have been waste but for the recycling effort. Id. at 98-99.
they are not recycled. Mobil Chemical Company's experiment with degradable garbage bags highlights the policy debate and problems underlying any environmental claim. The uncertain results derived from these policy choices present problems under the commercial speech doctrine as informed by Edenfield.

In Edenfield, the Court required the government regulator to bear its burden of proof under the third prong of Central Hudson. This burden "is not satisfied by mere speculation or conjecture." In California's case, the Court would likely require some empirical evidence demonstrating that requiring ten percent post-consumer waste in any product labeled as "recycled" actually increased recycling efforts (or decreased the level of solid waste disposal) "to a material degree." Unsupported claims that a

180 Id.

181 See generally Lawrence, supra note 10. Mobil had responded to consumer demand for degradable plastic bags even though they had concluded that biodegradable plastics would not help solve the solid waste disposal problem. Mobil's conclusion conflicted with the popular opinion at the time among environmental groups that degradability was the best policy to remedy solid waste disposal problems. Mobil's "degradable" plastic bag had qualifying language stating that the bag was degradable only when exposed to the elements. The back of the box carried a further explanation of the new feature. A year later, the Environmental Defense Fund called for a boycott of many degradable products because people began to realize that most garbage is sent to covered landfills where degradability is unlikely, if not impossible. Mobil soon faced six separate state lawsuits for misleading claims. Officials in New York and Minnesota stated that Mobil was targeted because of its public opposition to degradability benefits.

182 Edenfield, 113 S. Ct. at 1800.

183 Id.

184 Id. Lower court interpretations of Edenfield support this argument. See Adolph Coors Co. v. Bentsen, 2 F.3d 355 (10th Cir. 1993). In that case, Coors challenged provisions of the Federal Alcohol Administration Act (27 U.S.C. §§ 201-211, 205(e)(2), (f)(2)) which prohibited statements of alcohol content on malt beverage labels. The Government argued the regulation was designed to prevent strength wars from starting among manufacturers. After citing Edenfield's requirement that the government meet its burden of proof in a material way, the Tenth Circuit found that

[the Government] primarily on anecdotal evidence that malt beverage manufacturers already are competing and advertising on the basis of alcohol strength in the malt liquor sector of the market . . . . [But] [t]he critical question is whether the evidence shows the required relationship between the labeling prohibition that Coors is challenging and the threat of strength wars . . . . The Government simply has not shown a relationship between the publication of such factual information and strength wars.

Id. at 358 (footnotes omitted). Similarly, governments defending environmental regulations would have to show a relationship between limits on the use of environmental terms and reduction in solid waste amounts or increases in recycling efforts.

See also 44 Liquor Mart, Inc. v. Racine, 829 F. Supp. 543 (D.R.I. 1993). Liquor retailers challenged state statutes prohibiting off-premises advertising of prices at which liquor stores sold alcoholic beverages. Judge Pettine applied Edenfield's holding to strike
higher requirement of post-consumer waste necessarily reduces solid waste volume may not satisfy this test. Even if the state can offer empirical support, opponents of the law could utilize life-cycle analysis to demonstrate that the statute encouraged recycling which in fact damaged the environment. Courts will be placed in the position of evaluating scientific information on environmental effects: a role which the First Amendment contemplated for consumers, not judges or legislatures.

Policy decisions are always made by governments. But when environmental policy decisions are incorporated into state statutes, there is no certainty that the environment or consumers will benefit. Under Edenfield, a state's inability to muster empirical evidence to support its substantial interests could prove fatal to environmental marketing regulations.

2. Fourth Prong Analysis

The above discussion shows that state laws regulating environmental terms necessarily operate from imperfect scientific information which continually undergoes new developments. The Green down the statutes because "the link between alcohol price advertising and increased per-capita consumption is not self-evident." Id. at 554. Refusing to defer to legislative judgments, Judge Pettine found that the State failed to show a "direct correlation between the price advertising ban and reduce consumption of alcohol . . . . [T]he plaintiffs' expert testimony demonstrates that the alcohol price advertising ban has no appreciable impact on the levels of consumption in Rhode Island. At best, price advertising is one factor among many that influence consumption patterns." Id. Therefore, California has a substantial burden to fill. They must demonstrate that defining environmental terms is not merely a factor affecting the environment, but instead is clearly connected to environmental improvement.

Note that both cases concern a typical vice activity heavily regulated by states. Nevertheless, neither court declined to apply the principles reflected in Edenfield, regardless of the fact that it did not concern a vice activity. In light of the compartmentalized approach the Supreme Court has historically taken towards commercial speech, these cases suggest that commercial speech case law may be unifying behind particular principles.

Note, however, that California would not have to justify its 10 percent level vis-a-vis the higher or lower levels of other states or the federal government. It need only demonstrate that such a floor on post-consumer waste actually improved landfill problems or increased recycling. Of course, there is no clear evidence that this is the case; rather, the opposite may in fact be true. See infra note 195. However, the disparity in levels of postconsumer waste required by governments (from no requirement to a 50% by weight requirement) is further evidence of the uncertainty as to methods and results in the field.

185 See supra notes 178-81
186 See supra note 141.
Report has acknowledged this much. States adopting broad statutes regulating environmental terms have responded to this lack of knowledge by limiting the amount of information available to the consumer. Rather than allow corporations to make environmental claims about their products (subject to case-by-case prosecution when those claims mislead consumers), a blanket regulation instead prohibits environmental claims failing to comport with the state's policy decision on what benefits the environment. The government-endorsed scientific theory will predominate, silencing other (equally legitimate) theories which could be advocated by private corporations. Thus, these states use the lack of scientific certainty to regulate information and prohibit advertisements which are not misleading. California's law is a prime example of this approach.

In contrast, the Supreme Court views information as valuable, tainted only by how people use it. California must therefore demonstrate that consumer knowledge about a product's impact on the environment makes improving the environment more difficult. An example used by the Lungren court illustrates the argument:

> the claim that a product is 'biodegradable, if composted' might be truthful, but if the product is only disposed in landfills, the alleged environmental attribute actually produces no benefit.

188 See supra note 17.
189 See NATIONAL ADVERTISING, supra note 12, at 93-94 ("By this view, truth is irrelevant. Instead, to promote the choice the regulator believes desirable, information is suppressed concerning the issue most consumers confront regularly . . . . Until scientific issues are definitively resolved, consumers are not to be trusted with the information.").
190 This is an outcome facilitated by the Court's questionable distinction between commercial and noncommercial speech. However, it is one widely disfavored by most scholars of free speech. See supra notes 115-23 and accompanying text.
191 See, e.g., GREEN REPORT II, supra note 14, at 11. The Task Force would prohibit any claims based on life-cycle analysis in light of the uncertainty inherent in such analyses until "a general consensus is reached among government, business, environmental, and consumer groups on how this type of environmental comparison can be advertised non-deceptively." Id. It is unlikely such a consensus could ever develop.
192 For example, Edenfield stated that even solicitation, traditionally suspect and open to abuse, may have considerable value. Edenfield, 113 S. Ct. at 1797. See also supra notes 42-43.
But limiting the use of terms through definitions or certification programs\textsuperscript{194} arguably makes active environmental consumers passive observers:

The consequences of simple yes/no purchase symbols [or definitional constraints on the use of words] will be a net loss for the environment. The effectiveness of these [programs] in modifying consumer behavior is unclear, but they could prevent beneficial actions by easing consumer guilt instead of helping to change consumer habits. [For example], many people seem unwilling to commit to long-term, community-wide participation in the labor-intensive process of separating recyclables and diverting organic waste to composting . . . . Environmental 'involvement,' then, is the goal of those working to reach consumers with positive messages about source reduction, recycling, and composting. If the consumer merely thinks, 'I did my job at the grocery store,' or 'my purchase of appropriately [defined] products fulfills my obligation to the environment,' the consumer has been induced to ignore the real actions which most benefit the environment.\textsuperscript{195}

The point is not merely to critique California's policy as failing to achieve environmental improvement. Rather, it demonstrates that censorship of information is not the least restrictive way California can improve its environment. *Discovery Network* demands such precise regulation when states attempt to limit commercial speech.

In *Discovery Network*, Cincinnati failed to satisfy the final two prongs of the *Central Hudson* test because no commercial harm existed.\textsuperscript{196} In applying this test, the Court suggested alternative methods Cincinnati could have used to achieve its objective.\textsuperscript{197} Although the Court refused to acknowledge that it was reinstituting a least restrictive means test, it held that obvious alternatives to the chosen policy are "relevant consideration[s] in determining" whether a reasonable fit exists.\textsuperscript{198} Consistent with

\textsuperscript{194} See, e.g., Rathe, *supra* note 13, at 443-45 (discussing New Jersey and New York emblem statutes). Although utilizing a different method, these programs arguably have the same effect on consumer behavior as the California law.

\textsuperscript{195} O'Reilly, *supra* note 178, at 209-11.

\textsuperscript{196} *Discovery Network*, 113 S. Ct. at 1514-15. Rehnquist correctly notes in dissent, however, that the majority does not discuss the third prong of the test. *Id.* at 1522. Instead, the majority speaks of the law bearing "no relationship whatsoever" to its objective and the failure to establish a "'fit' between means and ends." *See* *id.* at 1514, 1516.

\textsuperscript{197} *Id.* at 1510.

\textsuperscript{198} *Id.* at 1510 n.18. Rehnquist disagreed: "[T]his argument rests on the discredited notion that the availability of 'least restrictive means' to accomplish the city's objectives
the Court's reassertion of commercial speech value is a more aggressive application of the *Central Hudson* test—an application difficult to distinguish from *Central Hudson*’s original requirement that regulations be “not more extensive than . . . necessary.” California’s statute runs afoul of this mandate.

For example, California’s decision to prohibit a company from informing a buyer that its product is ‘biodegradable if composted’ restricts valuable information when it is not necessary. A less restrictive manner of accomplishing the same result would require companies to inform consumers that their product is usually disposed of in landfills. This provides the consumer an incentive which censorship denies: It encourages composting, or other pro-environmental activities. The same analysis applies to terms like “recyclable”:

[B]ecause the claim that a product is ‘recyclable’ is a claim about capability rather than likelihood or actuality, such claims should be permissible in some instances even when facilities are not widely available . . . . [A]ctual recycling requires both collection points and the consumer’s ability to identify recyclable products for separation and collection. Claims of recyclability are likely to precede wide availability of facilities, because little incentive exists to develop facilities in the absence of information in the hands of the consumers.  

*Discovery Network* and *Edenfield* suggest that this is the approach contemplated by the First Amendment. Again, information is not renders its regulation of commercial speech unconstitutional.” *Id.* at 1523 (citing *Fox*, 492 U.S. at 479).

199  *Central Hudson*, 447 U.S. at 566. Thus, the Court has appeared to implicitly return to a test akin to the least restrictive means test. Lower courts have recognized this shift and acted accordingly. *See*, e.g., 44 Liquor Mart, Inc. v. Racine, 829 F. Supp. 543, 555 (D.R.I. 1993). Citing *Discovery Network*, the court stated that “[w]hile it may have been ‘reasonable’ or ‘rational’ . . . for the legislature to assume a correlation between the price advertising ban and reduced consumption, the Supreme Court has recently explained that such ‘rational basis’ scrutiny is not to be applied when deciding the constitutionality of restrictions on commercial speech . . . .” The court in fact describes the fourth prong of *Central Hudson* as being satisfied when the contested regulation is “no more extensive than necessary to serve that interest.” *Id.*

*See also* Kentuck Div., Horsemen’s Benevolent & Protective Ass’n v. Turfway Park Racing, 832 F. Supp. 1097 (E.D. Ky. 1993). In that case, a horsemen’s organization challenged the Interstate Horseracing Act (15 U.S.C. §§ 3001-3007 (1988)), which required consent from horsemen’s organizations and state agencies for interstate simulcasts of horse races. The court struck down the Act as a violation of the commercial speech doctrine. Relying on both *Edenfield* and *Discovery Network*, the court understood that commercial speech “receives substantial protection . . . .” *Id.* at 1101 & nn.6-7.

200 NATIONAL ADVERTISING, supra note 12, at 109 (emphasis added).
harmful, so companies should provide more, not less. California may prefer to evaluate what environmental facts are valuable, but the First Amendment’s general rule “is that the speaker and the audience, not the government, assess the value of the information presented.” Therefore, a state cannot justify environmental regulations by arguing that they improve the environment.

B. Applying Central Hudson to the Government’s Interest in Preventing Deceptive Advertising

Unlike its interest in improving the environment, a state may satisfy the third prong of Central Hudson by arguing that environmental regulations level the playing field for businesses and consumers, thereby reducing consumer deception. However, such statutes are not sufficiently tailored to achieve this goal under Central Hudson’s fourth prong. It is clear that environmental advertisements are at least potentially misleading, presenting a commercial harm that may be regulated. However, this statute seeks to prevent deceptive claims by prohibiting the use of words before they can be misused. It assumes first that consumers have difficulty determining the truth of a claim; that by prohibiting the use of a term except under specific conditions, consumers cannot misunderstand how the term is used. Therefore, California’s statute is prophylactic: It prescribes the use of a word like “biodegradable” regardless of whether that word misleads anyone

201 Edenfield, 113 S. Ct. at 1798 (emphasis added). See also supra note 141. The point is further buttressed by Virginia Pharmacy’s preference that private decisions should allocate resources, not public ones. See supra note 43.

202 But even the GREEN REPORT admits that “[f]or definitions and standards to be truly effective in fostering truthful environmental advertising, they must be based on a thorough understanding of the scientific and technical issues underlying existing and emerging products as well as changes taking place in waste management.” GREEN REPORT, supra note 15, at 30. In light of Edenfield’s requirement that States give empirical evidence to satisfy the third prong of Central Hudson, litigants would be well advised to argue, utilizing current scientific evidence, that the State’s statutory definitions misinterpret the necessary scientific background and in fact do not promote truthful advertisements “to a material degree.”

203 See GREEN REPORT, supra note 15, at 15. See also Discovery Network, 113 S. Ct. at 1515.
in a given context.\textsuperscript{204} So, for example, California would prohibit the following label:

\begin{quote}
The body of this can is steel. This material is recyclable where steel recycling facilities exist. Support recycling in your community.\textsuperscript{205}
\end{quote}

This label does not present the harm California is trying to remedy: It does not deceive. Instead, it bans truthful speech in an effort to protect consumers from fraud yet to occur.

The principles established by \textit{Edenfield} and thirteen years of legal advertising cases discourage this approach. First, these cases inform legislatures that prophylactic rules are subject to one test: can the state achieve truthful advertising through less drastic measures?\textsuperscript{206} This preference for disclosure would require a law mandating that businesses provide additional information to cure any possibility of deception.\textsuperscript{207} Second, \textit{Edenfield} also focused on the coercive potential or context of the advertisement.\textsuperscript{208} Similarly, the legal advertising cases emphasize the unique context and circumstances of lawyer solicitations, distinguishing them from product labeling.\textsuperscript{209} If prophylactic rules were disfavored by the Court in professional solicitations, an area where abuse is difficult to uncover, bans on publicly displayed products will certainly be suspect.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{204} California's statute does allow the use of these words under specified conditions. However, because the statute seeks to prevent harms before they occur, the rule is prophylactic. \textit{See supra} note 68. This prior restraint on speech is disfavored, regardless of whether some speech is allowed. \textit{See supra} note 145. Of course, complete bans on the use of terms in any circumstance would also be suspect, but the Court's scrutiny does not diminish simply because a prescription on the use of words does not entirely prevent their use. Therefore, the principles derived from the Court's opinions on legal advertising are not inapposite because they concerned complete bans. Instead, they speak directly to environmental advertising because they were prior restraints on speech in a context more amendable to abuse than is product labeling. \textit{See supra} notes 66-68.
\item \textsuperscript{205} \textit{See NATIONAL ADVERTISING, supra} note 12, at 110 (citing Complaint at 22, Association of Nat'l Advertisers v. Lungren, 809 F. Supp. 747 (N.D. Cal. Feb. 5, 1992)). This would be prohibited by the statute because it requires that the product be recyclable in every county of California with a population of 300,000 or more. \textit{See CAL. BUS. & PROF. CODE} § 17508.5(d) (West Supp. 1994).
\item \textsuperscript{206} \textit{See supra} notes 63-65 and accompanying text. \textit{But see the Lungren} decision's deference to the legislature: "The California legislature decided that allowing manufacturers and distributors to evade the dictates of [the law] by defining terms themselves would not promote the state's consumer and environmental protection goals ... [S]uch a policy determination is reasonable in light of Fox . . . ." Lungren, 809 F. Supp. at 758. The Court's 1993 opinions would not accord regulators this level of deference.
\item \textsuperscript{207} \textit{See supra} notes 48, 63-65.
\item \textsuperscript{208} \textit{See supra} note 139.
\item \textsuperscript{209} \textit{See supra} notes 66-68.
\end{itemize}
\end{footnotesize}
While Edenfield and the legal advertising cases are directly analogous to environmental labeling and their potential to deceive, Discovery Network must also inform a court's analysis. Commercial information can always be misused by businesses, and environmental information is no exception, especially in light of the scientific debates surrounding the field.210 The crucial issue is how courts should handle the misuse of information under the First Amendment. Discovery Network reformulates First Amendment analysis by shifting the focus from the nature of the speech (commercial v. noncommercial) to the harms resulting therefrom.211 When these harms arise, the First Amendment's preferred remedy is more information.212 Therefore, apart from the application of the Central Hudson factors, states regulating environmental terms have an uphill climb if Discovery Network is to be given any precedential force. While states seek to constrain knowledge, Discovery Network hopes to free information. Under these principles, the potential for deception in environmental advertisements cannot justify such regulations under the fourth prong of Central Hudson.

VI. CONCLUSION

Historically, the Supreme Court's commercial speech jurisprudence is best described as a minefield where unsuspecting litigants attempting to apply the Court's precedents find themselves victimized by a newly discovered factor or condition unique to "this kind" of advertising. Discrepancies still exist, perhaps due to the Court's decision to retain the commercial speech definition as an analytical tool under the First Amendment. Indeed, it has been argued that "[a]s long as the commercial speech doctrine includes such a strong subjective component, judicial rulings may often turn on judicial views of the value of different types of commercial speech."213 The advent of Justice Ginsburg's tenure on the Court adds yet another variable to this complex equation.214 Further-

210 See supra notes 113-21, 175-78 and accompanying text.
211 See supra Part IV.A.1.
212 See supra notes 45-48.
214 Justice Ginsburg has made no prominent commercial speech rulings. However, some see her as an ardent First Amendment supporter and a strong ally of commercial speech protection. See Steven W. Colford, High Court Hopeful Seen as Advertisement Ally, ADVERTISING AGE, June 21, 1993, at 48.
more, environmental advertising regulations present a new array of facts, and nothing prevents the Court from reformulating its analysis again in light of "the differing natures, values, abuses and dangers of [this method of advertising]."\textsuperscript{215}

However, the 1993 Court has made some sense of this difficult area. Operating against three factual backgrounds, a majority of the Court emphasized principles of First Amendment law that are not confined to particular types of advertising: Information is valuable to free people; harmful speech should be remedied by more speech, not less; and individuals, not governments, should be permitted to make these informed decisions. Ultimately, states regulating the ability to speak about true environmental attributes of their products or services find themselves at war with these undergirding principles. And "a law repugnant to the Constitution is void."\textsuperscript{216}

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215 \textit{Metromedia}, 453 U.S. at 501 (quoting Kovacs v. Cooper, 336 U.S. 77, 97 (1949)). Thus, the Ninth Circuit, in Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604 (9th Cir. 1993), evaluated billboard regulations under the commercial speech doctrine by choosing to "pay particular attention to the body of case law involving billboard regulations. For as the Supreme Court has often recognized, 'each method of communicating ideas is a 'law unto itself . . . ."' Id. at 610.

So, for instance, the Court could conceivably find that environmental attributes are so inherently misleading as to be beyond the purview of First Amendment protection.

216 \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 179 (1803).

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