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Restraints on Alcoholic Beverage Advertising: A Constitutional Analysis

The role which advertising plays in the consumption and abuse of alcohol has received considerable attention in recent years.1 A coalition of public health, religious, and educational organizations, concerned with drunk driving and alcoholism, currently advocates a congressional ban on the advertising of alcoholic beverages on radio and television.2 In addition, several states, acting pursuant to their powers to control alcoholic beverage traffic under the twenty-first amendment,3 have adopted broad restrictions on liquor advertising.4 Recent changes in the constitutional status of commercial speech,5 however, indicate that the first amendment6 may limit government efforts to protect the public from the hazards of alcohol abuse through the suppression of advertising.

This note addresses the degree to which the first amendment protects alcohol advertising. Part I examines the development of the Supreme Court's commercial speech doctrine. Part II analyzes two recent federal court decisions which upheld the constitutionality of state bans on liquor advertising, and concludes that the courts improperly applied the constitutional standard for commercial


3 The twenty-first amendment provides in part: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.


5 See notes 8-20 infra and accompanying text.

6 U.S. Const. amend. I. Restraints on alcohol advertising also have been challenged on equal protection grounds. See Dunagin v. City of Oxford, 718 F.2d 738, 752-53 (5th Cir. 1983) (en banc), cert. denied, 104 S. Ct. 3553 (1984).
speech. Part III applies the Supreme Court’s test for evaluating the constitutionality of a restriction on commercial speech and determines that a prohibition of alcohol advertising violates the first amendment. Finally, Part IV considers the unique characteristics of the electronic media which traditionally have justified diminished first amendment protection for broadcasters and maintains that these characteristics do not support a prohibition of alcohol advertising on television and radio.

I. The First Amendment and Commercial Speech

The Supreme Court has only recently afforded commercial speech any protection under the first amendment. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court first adopted the position that the truthful advertising of a lawful product may not be completely suppressed. The opinion rested on the Court's belief that the free flow of commercial information is necessary for intelligent and well informed consumer decision-making. The Court thus recognized the public's right to receive, as well as the seller's right to disseminate, commercial information. Yet the Court also emphasized the "common sense" distinctions between commercial speech and other forms of protected speech.

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7 Until the mid-1970's, the Court's view was represented by Valentine v. Chrestensen, 316 U.S. 52 (1942), which held that purely commercial advertising falls outside the protection of the first amendment. The Court retreated somewhat from this position in Bigelow v. Virginia, 421 U.S. 809 (1975). In Bigelow, the Court rejected the argument that an advertisement for abortion referral services was unprotected because it was commercial in nature. The Court distinguished Chrestensen as a mere regulation of the manner in which commercial advertising could be distributed. Id. at 818-20. Yet the Court noted that the abortion advertisement "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.'" Id. at 822. Given this "public interest" element, the Court did not squarely address the constitutional status of purely commercial speech.

8 425 U.S. 748 (1976). In *Virginia Pharmacy*, the Court struck down a statute which prohibited the advertising of prescription drug prices by pharmacists. Id. at 750 n.2.

9 Id. at 773.

10 Id. at 765. In fact, the Court pointed out that the "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." Id. at 763.

11 Id. at 756-57. A consumer group therefore had standing to challenge the restriction. Id.

12 Id. at 771 n.24. The Court reasoned that governmental regulation is less likely to chill commercial speech since "advertising is the *sine qua non* of commercial profits." Id. Moreover, because an advertiser may easily ascertain the truth about the information which he disseminates, there is less reason to tolerate misleading commercial speech than political or other protected speech. Id.

Legal commentators differ greatly in their views regarding the appropriate constitutional protection for commercial speech. See, e.g., Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 Iowa L. Rev. 1 (1976) (first amendment theory requires a complete denial of first amendment protection for commercial speech); Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U.L. Rev. 372 (1979) (regulations aimed directly at restrict-
indicating that commercial speech merits only qualified first amendment protection.

The Court refined its commercial speech doctrine in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, involving the New York Public Service Commission’s prohibition of all utility advertising which promoted the use of electricity. In striking down the ban, the Court set forth a formal four part test for determining the constitutionality of governmental regulation of commercial speech: (1) In order to constitute protected commercial speech, the advertising must concern a lawful activity and must not be misleading; if the advertising satisfies the first prong, it may be regulated only if (2) the state asserts a substantial interest, (3) the regulation directly advances the asserted state interest, and (4) the regulation is no more extensive than necessary to serve

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14 447 U.S. at 559. The Commission believed that an advertising ban would dampen unnecessary growth in energy consumption, a goal in accord with the national policy of conservation of energy. *Id.* at 559-60.

15 The Court stated the test as follows:
At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

*Id.* at 566.

16 *Id.* The Court reasoned that, because commercial speech protection is based upon the informational value of advertising, commercial messages which misinform or inform about illegal activity may be completely suppressed. *Id.* at 563-64.

In *In re R.M.J.*, 455 U.S. 191 (1982), the Court later set forth the general standards for regulation of misleading advertising. While advertising which is “actually” or “inherently” misleading may be completely prohibited, advertising which is merely “potentially” misleading must be regulated in the least intrusive way possible. *Id.* at 203. Thus, if the subject matter is capable of being presented in a nonmisleading manner, a complete ban is impermissible.

17 447 U.S. at 566.

18 *Id.* The Court explained that “ineffective” or “remote” support is insufficient. *Id.* at 564.
the state interest.\textsuperscript{19} The Court explained that compliance with the third and fourth criteria is necessary to assure that the limitation on expression will be in proportion to the state goal and will be "designed carefully" to achieve that goal.\textsuperscript{20}

The Court seemingly diluted the \textit{Central Hudson} test in a subsequent commercial speech case, \textit{Metromedia, Inc. v. City of San Diego},\textsuperscript{21} by giving little effect to the third and fourth prongs. In a plurality opinion written by Justice White, the Court struck down an ordinance which prohibited most commercial and noncommercial billboard advertising, but only because of the ordinance's effect on noncommercial speech.\textsuperscript{22} The Court considered the commercial speech aspects of the case in dicta, and concluded that the ban satisfied the \textit{Central Hudson} test.\textsuperscript{23} After finding that the advertising was lawful and not misleading, the Court readily conceded that the municipality's goals of traffic safety and city aesthetics were substantial and that the ordinance was no broader than necessary.\textsuperscript{24} In addressing the "more serious question" of direct advancement of the governmental interest in traffic safety, the Court acknowledged the "meager record," but stated: "We . . . hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest

\begin{itemize}
\item \textsuperscript{19} Id. at 566.
\item \textsuperscript{20} Id. at 564. Applying its four part test, the Court first determined that utility advertising was protected commercial speech. Id. at 566-68. It rejected the argument that the first amendment does not protect a monopolist's speech, noting that since an electric utility faces competition from alternative energy sources, even advertising by a monopoly contains valuable consumer information. Next, the Court found that the state's asserted interest, conservation of energy, was substantial. Id. at 568. Without empirical evidence, the Court also concluded that there is an "immediate connection" between advertising and demand for electricity. The Court inferred this connection from the fact that Central Hudson chose to contest the advertising ban. Id. at 569. With respect to the fourth part of the test, however, the Court held that the ban was more extensive than necessary to further energy conservation, because it prohibited promotional advertising regardless of the impact of the service or product in question on overall energy use. The Court also noted that the state's interest could have been achieved by requiring that the advertisements include information about the efficiency and expense of the offered service or product. Id. at 569-71. The Court therefore held the ban unconstitutional. Id. at 571.
\item \textsuperscript{21} 453 U.S. 490 (1981) (plurality opinion).
\item \textsuperscript{22} Id. at 512-17. The ordinance prohibited all billboards except for on-site commercial advertising and 12 specified categories of signs. Id. at 493-95 & nn.1, 3. The Court struck down the ordinance because it distinguished between noncommercial signs on the basis of content, and because the ordinance treated commercial speech more favorably than noncommercial speech. Id. at 513-15.
\item \textsuperscript{23} Id. at 507-12. Justice Stevens joined the commercial speech analysis of the plurality. Id. at 541.
\item \textsuperscript{24} Id. at 507-08. With respect to the extensiveness of the ordinance, Justice White stated: "If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them." Id. at 508.
\end{itemize}
that these judgments are unreasonable."25 In effect, this waiver of proof reduced Central Hudson's commercial speech test to a rational basis standard of review.

Though Metromedia seems to suggest that a mere reasonable relation between the state interest and the commercial speech restriction will support even an extensive ban, it is significant that the San Diego ban was directed only at the form of the advertising, not its content. Metromedia did not necessarily alter Central Hudson's intermediate standard of review for content based regulations designed to suppress information about a particular product.26 Moreover, in its most recent commercial speech cases, the Court has been quite willing "to disagree with the accumulated, commonsense" legislative judgment when examining a regulation under the third and fourth criteria of Central Hudson.27 In fact, few commercial speech bans have survived Supreme Court scrutiny since Virginia Pharmacy.28 Though the Court's commercial speech doctrine has not yet fully evolved,29 these results indicate that the government

25 Id. at 508-09. The Court likewise concluded that the regulation advanced the city's aesthetic interests. Id. at 510.

26 Accord Comment, Standard of Review for Regulations of Commercial Speech: Metromedia, Inc. v. City of San Diego, 66 MINN. L. REv. 903, 914-17 (1982); Comment, Tension Between the First and Twenty-first Amendments in State Regulation of Alcohol Advertising, 37 VAND. L. REv. 1421, 1439-43 (1984). Under well-established first amendment analysis, a government regulation aimed at the content of the communication itself, as opposed to a regulation which is content neutral, is presumptively unconstitutional unless the expression falls within several unprotected categories of speech. See L. Tribe, AMERICAN CONSTITUTIONAL LAW §§ 12-2, -8 (1978). Arguably, a similar distinction may be made in the commercial speech area. Thus, while a content neutral advertising regulation need only satisfy a rational basis test, a restriction directed at a particular product still should be subject to Central Hudson's intermediate level of review.

27 In In re R.M.J., 455 U.S. 191 (1982), the Court held that the attorney advertising in question was not inherently or actually misleading. Id. at 206-07. Because the state failed to assert that the advertising restrictions at issue advanced a substantial interest, or were no more extensive than necessary, the Court held the attorney advertising restrictions unconstitutional. Id. at 205-07.

In Bolger v. Youngs Drug Prods. Corp., 103 S. Ct. 2875 (1983), the Court once again held a commercial speech ban unconstitutional under Central Hudson. Bolger involved a federal statute which prohibited the unsolicited mailing of contraceptive advertisements. Id. at 2877-78. Though the Court conceded that the government had a substantial interest in assisting parents' efforts to control the manner in which their children learn about birth control, it found that the statute provided "only the most limited incremental support for the interest asserted." Id. at 2883-84. According to the Court, parents can screen mail and "must already cope with the multitude of external stimuli that color their children's perception of sensitive subjects." Id. at 2884. The ban also was declared more extensive than necessary because it reduced the adult population to reading "that which would be suitable for a sandbox." Id.

28 See notes 13, 27 supra.

29 The Court will consider two additional commercial speech cases in 1985. See SEC v. Lowe, 725 F.2d 892 (2d Cir. 1984), cert. granted, 105 S. Ct. 81 (Oct. 1, 1984) (No. 83-1911) (an investment adviser was barred from publishing his newsletters after the SEC revoked his registration); Office of Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d 44, 461 N.E.2d 883 (1984), prob. juris. noted, 105 S. Ct. 76 (Oct. 1, 1984) (No. 83-2166) (Ohio Disciplinary
II. Challenges to State Restrictions on Alcoholic Beverage Advertising

A. Recent Cases

The Supreme Court has yet to fully examine restrictions on alcoholic beverage advertising under the Central Hudson test. However, three lower courts which have considered the issue have sustained state regulations against first amendment attack. In Queensgate Investment Co. v. Liquor Control Commission, the Ohio Supreme Court upheld an Ohio statute which restricted the ability of certain liquor permit holders to advertise alcohol prices on their licensed premises. These permit holders were still permitted to advertise through other means, and manufacturers and distributors of alcohol were not affected by the regulation. Though the Ohio Supreme Court purported to apply the Central Hudson test, it characterized the statute as a regulation of the alcoholic beverages themselves, thereby minimizing the first amendment implications.

Rules prohibited an attorney from advertising his availability for representation of women injured through use of the Dalkon Shield.


32 69 Ohio St. 2d 361, 433 N.E.2d 138 (per curiam), appeal dismissed, 459 U.S. 807 (1982).

33 The Ohio statute provided in part:

No alcoholic beverages shall be advertised in Ohio except in the manner set forth in 4301:1-1-03 and as hereinafter provided.

(A) As to advertising on the premises, holders of Class C, D, and G permits shall not advertise the price per bottle or drink of any alcoholic beverage, or in any manner refer to price or price advantage except within their premises and in a manner not visible from the outside of said premises.

(B) Manufacturers and distributors of alcoholic beverages are permitted to advertise their products in Ohio.

Holders of Class C, D, and G permits shall be authorized to advertise in newspapers of general circulation, radio and television, on bill boards, calendars, in or on public conveyances and in regularly published magazines. Advertising may include the retail price of the original container or packages, but such advertising may not in any manner refer to price advantage.

of the statute. The United States Supreme Court later summarily dismissed the appeal for lack of a substantial federal question, which constituted an affirmance of the judgment below. Thereafter, in *Oklahoma Telecasters Association v. Crisp,* the United States Court of Appeals for the Tenth Circuit viewed *Queensgate*’s summary dismissal as binding when it examined two Oklahoma laws which prohibited virtually all liquor advertising originating from within the state. Although the court ultimately proceeded to examine the merits of the plaintiffs’ challenges, it determined that *Queensgate* “cautioned” against finding the Oklahoma prohibition unconstitutional. Addressing the merits of the case, the court emphasized that, in light of state power to control liquor traffic under the twenty-first amendment, the Oklahoma advertising laws were entitled to a

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34 69 Ohio St. 2d at 366, 433 N.E.2d at 142.
35 459 U.S. 807 (1982); see Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam) (a summary dismissal is binding in cases where substantially similar issues are presented); Hicks v. Miranda, 422 U.S. 332, 344 (1975) (a summary dismissal of an appeal for lack of a substantial federal question is a decision on the merits). *See also* notes 54-58 infra and accompanying text.
36 699 F.2d 490 (10th Cir. 1983), rev’d on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 2694 (1984). On certiorari, the Supreme Court held that the Oklahoma regulations were preempted by FCC rules which required cable operators to carry signals in full. 104 S. Ct. at 2709. The Court therefore struck down the restrictions without reaching the first amendment issue.
37 In determining the precedential weight of *Queensgate,* the court followed the rule set forth in Hicks v. Miranda, 422 U.S. 332 (1975). *See note* 35 *supra.* Emphasizing the similarities between the Ohio and Oklahoma regulations, the court stated:

The crucial similarity between the cases . . . is this: in both cases, the state, acting under its powers granted by the Twenty-first Amendment, has chosen to prohibit some, but not all, forms of liquor advertising with the goal of decreasing the consumption and abuse of alcoholic beverages. We are confident that the constitutional question presented in *Queensgate* and in the present appeals is substantially the same.

699 F.2d at 497. At the same time, the court recognized that the Oklahoma laws were “indeed broader” than the regulation in * Queensgate.* *Id.*
38 In *Crisp,* a group of broadcasters and cable operators challenged provisions of the Oklahoma Constitution and Oklahoma Alcoholic Beverage Control Act which completely prohibited the advertising of alcoholic beverages except by strictly regulated on-premise signs. 699 F.2d at 492. The Oklahoma Constitution provided: “It shall be unlawful for any person, firm or corporation to advertise the sale of alcoholic beverage within the State of Oklahoma, except one sign at the retail outlet bearing the words ‘Retail Alcoholic Liquor Store.’” *Okla. Const. art. XXVII, § 5* (repealed 1984). *See also* Okla. Stat. Ann. tit. 37, § 516 (West Supp. 1984) (only on-premise signs are permitted). However, because the definition of “beer” included only beverages containing more than 3.2% alcohol, the advertising of all beer was generally allowed. 699 F.2d at 492. In addition, advertising in out-of-state printed publications distributed within the state was permitted. *Id.* at 502.
39 The court noted the Supreme Court’s admonition that courts should not become so preoccupied with the effect of a summary dismissal that they fail to address the merits of the case. 699 F.2d at 497 (quoting Mandel v. Bradley, 432 U.S. 173, 177 (1977)).
40 *Id.*
41 *See note* 3 *supra.*
presumption of validity. The court perceived this power as “permitting regulation of commercial speech that might not otherwise be permissible.” Proceeding with a Central Hudson analysis, the court found that the restrictions easily passed the first two criteria of the test. Regarding the third and fourth prongs, the court relied on the rational basis approach of the Metromedia plurality, as well as the deference to the legislature it believed the twenty-first amendment dictated. Thus, though the record failed to establish that the Oklahoma laws had any direct effect on alcohol consumption, the court concluded that the restrictions were “reasonably related” to the state’s interest in promoting temperance. The court also determined that the prohibition was no more extensive than necessary, noting that the ordinance in Metromedia had banned virtually all billboards but had nevertheless satisfied the fourth prong under Central Hudson. The court therefore upheld the advertising ban, utilizing Queensgate, Metromedia and the twenty-first amendment to alter the Central Hudson test.

The United States Court of Appeals for the Fifth Circuit has also upheld a similar liquor advertising ban, using a comparable formulation of the Central Hudson test. In Dunagin v. City of Oxford,


Id. at 502.

Id. at 500. The court rejected the argument that alcohol advertising is misleading because it associates drinking with only positive images and fails to disclose the dangers of the product, because the same might be said of almost all advertising. Id. at 500 n.9. The second prong was easily met; the court found that controlling alcohol abuse, which affects highway safety and family stability, is undoubtedly a substantial state interest. Id. at 500.

Referring to Metromedia, the court stated:

In that case, the appellants argued that there was nothing in the record to show any connection between billboards, which San Diego had essentially prohibited, and traffic safety, one of the asserted governmental interests. The California Supreme Court had held, nevertheless, that as a matter of law the ordinance eliminating billboards was reasonably related to traffic safety. The plurality agreed with that holding.

Id. at 501 (citations omitted).

Id. The court was particularly influenced by New York State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981) (per curiam), in which the Supreme Court permitted the state to regulate nude dancing in licensed liquor establishments pursuant to its powers under the twenty-first amendment. But see note 70 infra.

699 F.2d at 501. The court stated that, because the entire economy of the broadcast and cable industries is based on the belief that advertising increases sales, it was not “constitutionally unreasonable” for the state of Oklahoma to believe that advertising not only affects market share but also increases alcohol consumption generally. Id. Both the broadcast and alcohol industries disagree with this view of the effects of advertising. See note 75 infra and accompanying text.

699 F.2d at 501. The court also observed that the statute did not completely prohibit advertising in the state; advertising in publications printed out-of-state but distributed within the state was permitted, and the rebroadcasting of beer commercials was not prohibited. Id. at 502.
Mississippi, the Fifth Circuit, like the Tenth Circuit, decided that while Queensgate "cautioned" against invalidating Mississippi's regulation, it should nevertheless examine the merits of the case under the Central Hudson test. Concentrating on the Metromedia Court's reluctance to disagree with the common-sense judgments of local lawmakers and noting that the regulation of liquor is a matter of "peculiar importance" to the state in light of the twenty-first amendment, the court found that there was "sufficient reason" to believe that advertising and alcohol consumption are linked, whether or not there was scientific proof. Addressing the extensiveness of Mississippi's ban, the court relied on the Metromedia Court's conclusion that the only effective way of solving the problems posed by billboards is simply to prohibit them. Similarly, the Dunagin court reasoned that the only effective means of eliminating the problems of liquor advertising is to ban the advertising.

49 718 F.2d 738 (5th Cir. 1983) (en banc), cert. denied, 104 S. Ct. 3553 (1984). Dunagin was a consolidated rehearing of the appeals in Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Comm'n, 701 F.2d 314 (5th Cir. 1983) and Dunagin v. City of Oxford, 701 F.2d 335 (5th Cir. 1983). The court in Lamar had struck down Mississippi's ban on liquor advertising under the Central Hudson test. 701 F.2d at 331-33. In light of the Tenth Circuit's decision in Crisp, however, the Fifth Circuit voted to rehear the appeals en banc. 718 F.2d at 740 n.2.

The Mississippi regulation at issue prohibited virtually all liquor advertisements originating from within the state. The regulation provided in part:

No person, firm or corporation shall originate advertisement in this State, dealing with alcoholic beverages by any means whatsoever, including but not limited to newspapers, radio, television, circular, dodger, word of mouth, signs, billboards, displays or any other advertising media, except as follows:

(1) On the front of any licensed retail package store building, and no higher than the top of the roof of the permitted place of business at its highest point, there may be printed without illumination, in letters not more than eight (8) inches high, the name of the business, the permit number thereof, which may be preceded by the words "A.B.C. Permit No. —,” and the words “Package Liquor Sold Here.” Where the package retail store is located in a building of more than one story in height, the top of such sign shall not be higher than the top of the first story.

Id. at 740 n.3 (quoting Regulation No. 6, promulgated by Mississippi State Tax Comm'n pursuant to Miss. Code Ann. § 67-1-37(e) (Supp. 1983)). In addition to on-premise signs, beer advertising and advertisements originating out-of-state, including those in television, radio, and print, were permitted, however. Id. at 741. The plaintiffs also challenged a statute which prohibited most forms of sign advertising, Miss. Ann. Code § 67-1-85 (1972) (amended 1982).

50 718 F.2d at 746.
51 Id. at 750.
52 Id. The court also relied upon the approach taken by the Supreme Court in Central Hudson, where the Court found an "immediate connection" between advertising and demand for electricity. Id. at 749. See note 20 supra.
53 See note 24 supra. The Dunagin court stated:

We do not believe that a less restrictive time, place and manner restriction, such as a disclaimer warning of the dangers of alcohol, would be effective. The state's concern is not that the public is unaware of the dangers of alcohol. . . .
B. Analysis of Crisp and Dunagin

The Fifth and Tenth Circuits employed similar reasoning in upholding extensive advertising bans. The Crisp and Dunagin decisions, however, are flawed for several reasons. First, both courts, the Crisp court in particular, gave undue weight to the Supreme Court’s summary dismissal of Queensgate. Though a summary dismissal of an appeal for lack of a substantial federal question constitutes a decision on the merits, it is binding on lower courts only with respect to the precise constitutional issues necessarily decided. Other courts are not bound by the affirmed court’s reasoning. Under commercial speech analysis, a minimal restraint on advertising does not raise the same first amendment concerns as a complete ban. Because the statute in Queensgate restricted only a very limited form of advertising and applied only to licensees of a state agency, Queensgate should not be viewed as binding in cases involving far more extensive bans such as those adopted in Oklahoma and Mississippi.

Second, both courts attributed unwarranted emphasis to the deferential approach used in Metromedia. In Metromedia, the problem facing the City of San Diego was the form of certain commercial advertisements, not the content of the message conveyed. In contrast, alcohol advertising restrictions are aimed at the actual content of the communication. Though the Metromedia plurality did not require evidence that billboards in fact affect traffic safety, a waiver of proof may be inappropriate for a content based regulation. In addition, because the billboards, as structures, interfered with San Diego’s interests, removal of the billboards was probably the only solution. Unlike the potential hazards created by billboards, the dangers posed by alcohol advertisements may be alleviated without complete prohibition. Where the actual content of the advertising presents a hazard, the Supreme Court has consistently preferred

The concern instead is that advertising will unduly promote alcohol consumption despite known dangers.

718 F.2d at 751.

55 Mandel, 432 U.S. at 176.
56 Id.
57 See note 33 supra and accompanying text.
59 See note 26 supra and accompanying text. The application of Central Hudson’s intermediate standard of review, as opposed to Metromedia’s rational basis standard, most significantly affects the fourth prong of the Central Hudson test because, even in Central Hudson, the Court did not require empirical evidence to prove direct advancement of the state interest. See note 20 supra. For a discussion of the use of empirical evidence under the third prong of Central Hudson, see notes 78-82 infra and accompanying text.
remedies which increase the flow of information rather than those which diminish it and thereby keep the public in ignorance. Thus, to the extent that the Fifth and Tenth Circuits utilized *Metromedia* to analyze the means employed by Mississippi and Oklahoma to reduce alcohol abuse, their conclusions are questionable.

Finally, both courts improperly incorporated the twenty-first amendment into the *Central Hudson* test. The history of the amendment indicates that it was designed to create an exception to the normal operation of the commerce clause, permitting states to impose burdens on interstate commerce which otherwise would be invalid. As one commentator notes, however, the twenty-first amendment does not license the states to override other constitutional provisions: "Neither the text nor the history of the Twenty-first amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned." In practice, the Supreme Court consistently has endorsed this principle in cases involving interplay between the twenty-first amendment and the equal protection clause, the establishment clause, and the due process clause.

The Court recently examined the relationship between liquor advertising and the twenty-first amendment in *Capital Cities Cable, Inc. v. Crisp*, in which it considered the Oklahoma advertising laws upheld by the Tenth Circuit in *Crisp*. Though the Court did not

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60 See *Virginia Pharmacy*, 425 U.S. at 770.
61 The twenty-first amendment, which repealed prohibition, recognizes the states' right to continue to regulate the transportation or importation of intoxicating liquors within their borders. See note 3 supra. Twenty-first amendment power has not been limited by a literal reading of the amendment. In addition to deciding whether to permit the importation or sale of alcohol within its borders, a state may choose how to structure its entire liquor distribution system. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980).
62 See *Craig v. Boren*, 429 U.S. 190, 205-06 (1976). The twenty-first amendment, however, does not completely exempt states from the federal commerce power whenever alcoholic beverages are the subject of regulation. See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (price-setting by wine producers); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) (sale of liquor to consumers in foreign countries where the sales are supervised by the Federal Bureau of Customs).
64 See *Craig v. Boren*, 429 U.S. 190, 204-09 (1976) (statute which prohibited the sale of beer to men under twenty-one and women under eighteen violated equal protection).
65 See *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982) (the twenty-first amendment may not impinge upon the establishment clause by permitting a church to veto the issuance of a liquor license to businesses within a radius of five hundred feet).
66 See *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (a statute which permitted the posting of names of excessive drinkers in retail liquor outlets violated due process).
reach the commercial speech issue, invalidating Oklahoma's advertising prohibitions on federal preemption grounds instead, its analysis of the twenty-first amendment is instructive:

In contrast to state regulations governing the conditions under which liquor may be imported or sold within the state, the application of Oklahoma's advertising ban to the importation of distant signals by cable television operators engages only indirectly the central power reserved by § 2 of the Twenty-first Amendment—that of exercising "control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."

Given this precedent, as well as the Court's refusal to permit the twenty-first amendment to diminish individual rights, it seems unlikely that the Court would permit a state, through an "indirect" exercise of the twenty-first amendment, to infringe upon otherwise protected first amendment rights.

In relying on the twenty-first amendment, the Crisp and Dunagin courts apparently presumed that a state's power to completely prohibit the sale and consumption of alcohol includes the lesser power to indirectly regulate consumption through the suppression of advertising. Yet the courts failed to follow the established principle that the twenty-first amendment does not permit the states to abridge individual rights. Once a state has chosen to permit the sale and consumption of alcohol within its borders, it

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68 The Oklahoma regulations were preempted by FCC rules requiring cable operators to carry signals in full. 104 S. Ct. at 2703-04, 2709.

69 Id. at 2709.

70 Only two Supreme Court cases even arguably support the contrary position of the Fifth and Tenth Circuits. In California v. LaRue, 409 U.S. 109 (1972), the Court upheld a regulation which prohibited explicit sexual entertainment in licensed liquor establishments. The Court viewed the regulation primarily as a restriction on the sale of liquor under the twenty-first amendment, though it admitted that some forms of the incidentally suppressed expression were ordinarily protected by the first amendment. Id. at 118. In New York State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981) (per curiam), the Court similarly upheld a New York statute which prohibited nude dancing on the premises of liquor license holders. Id. at 717-18. Neither case, however, holds that regulations enacted pursuant to the twenty-first amendment may abridge otherwise constitutionally protected speech. Instead, LaRue and Bellanca simply establish a state's power to regulate the conditions under which liquor is sold. The entertainment involved was only incidentally burdened, and was prohibited only in establishments licensed to sell liquor. Moreover, the expression consisted of conduct with only minimal communicative aspects. In fact, the Court characterized the entertainment in LaRue as consisting "more of gross sexuality than of communication." 409 U.S. at 118. In contrast, a restriction on advertising is not incidental to communication but is a direct regulation of speech. LaRue and Bellanca therefore do not support a different application of the Central Hudson test whenever alcoholic beverages are the subject of regulation.

should not attempt to restrict such activity through the suppression of constitutionally protected speech. Because the courts also erred in utilizing Queensgate and Metromedia to dilute the commercial speech standard of review, it is necessary to examine the proper application of the Central Hudson test to restrictions on alcohol advertising.

III. Application of Central Hudson to Restrictions on Alcoholic Beverage Advertising

The first two prongs of the Central Hudson test pose little difficulty. First, because alcohol advertising relates to a lawful activity and is not inherently misleading, such advertising constitutes protected commercial speech. Central Hudson's second prong is also easily satisfied—the government undoubtedly has a substantial interest in controlling alcohol abuse, which affects the safety of highways, the stability of families, and the health of the public. The critical inquiry under commercial speech analysis, however, is whether the advertising restriction is designed carefully to achieve the government goal. Together the third and fourth prongs of the

71 See note 15 supra and accompanying text.

72 In some states, such as Mississippi, alcohol may be legally sold only in certain counties. The Fifth Circuit, however, dismissed the argument that liquor advertising promotes an illegal activity in states with dry counties and is therefore unprotected commercial speech. Dunagin v. City of Oxford, 718 F.2d 738, 742-43 (5th Cir. 1983) (en banc), cert. denied, 104 S. Ct. 3553 (1984).

Critics of alcohol advertising have argued that alcohol advertising is misleading in two ways. First, advertising allegedly creates the impression that drinking is linked with sexual, business, and social success. See Mosher & Wallack, Proposed Reforms in the Regulation of Alcoholic Beverage Advertising, 8 CONTEMP. DRUG PROBS. 87, 89 (1979). It is not surprising, however, that advertisers seek to associate their products with positive images. Moreover, alcohol advertising accurately reflects certain aspects of our society, as drinking does play a prominent role in some business and social situations. Second, alcohol advertisements are said to be misleading because they fail to include information about the hazards of alcohol use. Id. at 103. But, as the Supreme Court has stated, in the case of omissions in advertising, "the preferred remedy is more disclosure, rather than less." Bates v. State Bar, 433 U.S. 350, 375 (1977); see note 16 supra. Thus, though a balance of information regarding the product's dangers may be lacking, the solution is warnings or counter-advertising. Absent compliance with the remaining portions of the Central Hudson test, a ban which suppresses existing truthful information about legal activity is impermissible.

Both the Crisp and Dunagin courts rejected the contention that alcohol advertising is misleading. In Crisp, the court noted: "[T]he qualities [which allegedly] make these commercials 'inherently misleading'—the commercials tend to project an image of wine drinkers as successful, fun-loving people, without warning of the dangers of alcohol—are present in the advertising of almost any product from automobiles to snack foods." 699 F.2d at 500 n.9. Similarly, the Dunagin court found that "[n]early all advertising associates the promoted product with a positive or alluring lifestyle or famous or beautiful people. Our policy is to leave it to the public to cope for themselves with Madison Avenue panache and hard sells." 718 F.2d at 743.

73 Crisp, 699 F.2d at 500.

74 Dunagin, 718 F.2d at 747 (citing expert testimony from trial).
Central Hudson test assure the requisite relationship between the legislative means and ends.

The third prong, which addresses whether advertising restrictions directly advance the government interest in reducing alcohol abuse, is troublesome because of uncertainty about the effects of alcohol advertising. Opponents of advertising restrictions maintain that alcohol advertising merely causes existing consumers to shift from one brand to another.75 Proponents of such restrictions claim that advertisers in fact target new markets, such as women and young people, thereby bringing new consumers into the market as well as increasing the consumption levels of existing drinkers.76 Because the scientific community continues to debate the actual impact of advertising upon excessive alcohol consumption,77 satisfaction of the third prong depends upon whether the Court requires conclusive empirical evidence.

While "direct advancement" should require more than a rational basis standard of review, a review of the Court's past commercial speech cases suggests that empirical evidence is not always critical.78 In Central Hudson, for example, the Court inferred "an

75 See, e.g., 1985 Hearings, supra note 1 (statement of Donald Shea, President, United States Brewers Ass'n) (on file with the Notre Dame Law Review); id. (statement of Edward Fritts, Nat'l Ass'n of Broadcasters) (on file with the Notre Dame Law Review); 1976 Hearings, supra note 1, at 345 (statement of United States Brewers Ass'n).


77 See Strickland, Content and Effects of Alcohol Advertising: Comment on NTIS Pub. No. PB82-123142, 45 J. Stud. Alcohol 87 (1984) (the author critiques the methodology employed in a recent study on the effects of alcohol advertising); Atkin & Block, A Reply to Strickland, 45 J. Stud. Alcohol 93 (1984) (the researchers who conducted the study, which suggested that alcohol advertising affects consumption, respond to Strickland's criticisms). Compare Atkin & Block, Effectiveness of Celebrity Endorsers, J. Advertising Research, Feb./Mar. 1983, at 57 (research showed that celebrity endorsers of alcoholic beverages significantly influence adolescents) with Strickland, Alcohol Advertising: Orientations and Influence, 1 J. Advertising 307 (1982) (research indicated that overall televised alcohol advertising had virtually no effect on teenagers).

Similar debate continues over the effect, if any, which Congress' 1969 cigarette advertising ban has had on cigarette consumption, with little consensus among the experts. See Mosher & Wallack, supra note 72, at 93.

78 The Court sometimes evaluates the relationship between the commercial speech regulation and the government interest on the basis of intuition rather than reliance on statistical data. See, e.g., Bolger v. Youngs Drug Prods. Corp., 103 S. Ct. 2875, 2884 (1983) (a statute prohibiting the unsolicited mailing of contraceptive advertisements did not directly aid parents in controlling their children's access to birth control information, because parents presumably can screen mail); Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557, 569 (1980) (there is an "immediate connection" between advertising and energy consumption); Bates v. State Bar, 433 U.S. 350, 378 (1977) (restraints on attorney advertising are an ineffective way of deterring unprofessional work); Carey v. Population Servs. Int'l, 431 U.S. 678, 701 (1977) (the contraceptive advertisements in question
immediate connection" between advertising and demand for electricity from the fact that Central Hudson chose to contest the ban. Although Central Hudson arguably supports finding a similar connection between advertising and alcohol consumption, the two situations are not completely analogous. Alcohol use is affected by a complex interaction of factors such as cultural, family and peer group influences. Advertising therefore may play only a minimal role in excessive alcohol consumption, making an "immediate connection" less obvious. Moreover, the contention that advertising increases only market share may be raised more convincingly by the alcohol industry than by a utility monopoly. In order to avoid speculation, alcohol advertising should not be regulated without at least some empirical basis. Yet, because the precise role which advertising plays in behavior as complex as alcohol abuse is not capable of being proven with absolute certainty, the Court is not likely to question sound empirical research which links advertising to alcohol consumption simply because scientists have been unable to reach a complete consensus. Thus, as long as the government is

79 447 U.S. at 569; see note 20 supra.


81 The Central Hudson Court acknowledged that even a utility monopoly competes with alternative energy sources. 447 U.S. at 567. The Court, however, made this observation only to establish that utility advertising has informational value for consumers considering other energy sources. The Public Service Commission had argued that advertising by a monopoly is not important for consumer decision-making, precluding any first amendment protection. Id. at 566-68. Though the existence of alternative energy sources may make utility advertising valuable from the consumer's standpoint, it does not necessarily follow that the monopolist's primary reason for advertising is merely to compete with the other energy sources for its share of a fixed market.

82 Cf. Note, Liquor Advertising: Resolving the Clash Between the First and Twenty-first Amendments, 59 N.Y.U. L. REV. 157, 182-83 (1984) (as in Central Hudson, the connection between alcohol advertising and excessive consumption may be inferred from the fact that advertisers have chosen to contest advertising bans).
able to produce such evidence, the Court would probably find that the third prong of the *Central Hudson* test is satisfied despite continuing scientific debate.

Nevertheless, even if a ban on advertising would directly serve the asserted government interest, under the fourth prong "[t]he State cannot regulate speech that poses no danger to the asserted state interest . . . nor can it completely suppress information when narrower restrictions on expression would serve its interest as well." In *Central Hudson*, the Court suggested that the state could have promoted conservation by supplementing advertising with information about energy efficiency, rather than prohibiting all advertising. Viable alternatives to a complete ban also exist in the area of alcohol advertising. For instance, alcohol advertising could be countered by messages which inform the public of the hazards associated with alcohol abuse. Furthermore, regulations could restrict only alcohol advertising which promotes underage or excessive drinking, or which associates drinking with driving.

Because less extensive alternatives exist, sweeping advertising prohibitions such as those adopted in Oklahoma and Mississippi fail to pass constitutional muster under the *Central Hudson* test. The question remains, however, whether the *Central Hudson* test applies with equal force to all types of media, including radio and television.

IV. The First Amendment and Broadcasting Advertising

The broadcast media traditionally have received special treatment under the first amendment. The Court has not yet fully examined the status of the broadcast media in the commercial speech context. Nevertheless, when it first brought commercial speech within the protection of the first amendment in *Virginia Pharmacy*, the Court cautioned that "the special problems of the electronic

83 *Central Hudson*, 447 U.S. at 565.
84 Id. at 570-71; see note 20 supra.
85 Any regulation of alcohol advertising, including less intrusive versions, must comply with the *Central Hudson* test, requiring that an immediate connection between the advertising and alcohol consumption be established. Once such a connection is demonstrated, however, past experience with counter-advertising suggests that this alternative to a complete ban would be an effective way of educating the public in order to reduce alcohol abuse. See note 106 infra and accompanying text.
86 See 1976 Hearings, supra note 1, at 204-06 (examples of ads which are geared to the youth market, invite excessive drinking, or suggest drinking as a coping mechanism). To the alcohol industry's credit, substantial self-regulation already encourages responsible advertising. See id. at 214-15 (self-imposed code for distilled spirits industry); id. at 348-61 (guidelines for beer advertising).
broadcast media are . . . not in this case." Moreover, in subsequent commercial speech cases, the Court has noted that advertising on the broadcast media "will warrant special consideration." These comments suggest that broadcast advertising enjoys a different degree of protection. Determining the appropriate constitutional standard for this variety of commercial speech is especially important in light of the current movement to ban alcoholic beverage commercials on radio and television. The "special problems" of the broadcast media therefore must be identified in order to assess their role, if any, in the area of alcohol advertising.

One of the Court's long-standing justifications for special treatment of the broadcast media has been the scarcity of broadcast frequencies and public ownership of the airwaves. In Red Lion Broadcasting Co. v. FCC, for example, the Court utilized the scarcity

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88 425 U.S. at 773. The Court then referred to Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), aff'd mem. sub nom. Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972), in which the constitutionality of the 1969 congressional ban on cigarette advertising over the electronic media had been upheld. 333 F. Supp. at 583. The reference to Capital Broadcasting as an example of the "special problems" of the broadcast media seems inappropriate inasmuch as the decision, which antedated the emergence of the Supreme Court's present commercial speech doctrine, was based in part upon the former first amendment status of commercial speech. Id. at 584. The continuing validity of Capital Broadcasting, and thus the cigarette advertising ban's constitutionality, is questionable in light of the subsequent development of commercial speech protection. See NOWAK, ROTTUNDA & YOUNG, CONSTITUTIONAL LAW 933-34 (2d ed. 1983). See also Wuliger, The Constitutional Rights of Puffery: Commercial Speech and the Cigarette Broadcast Advertising Ban, 36 Fed. Com. L.J. 1 (1984) (the cigarette advertising ban fails to conform to the Central Hudson test). Moreover, it is doubtful that Capital Broadcasting could be sustained solely on the basis of the unique characteristics of the broadcast media. See notes 92-108 infra and accompanying text. The rationales traditionally used to support special treatment of broadcasters would not ordinarily justify a complete ban on product advertising, though it is arguable that cigarette advertising should receive special treatment because cigarettes, unlike other products, cannot be consumed safely in any quantity.


90 See note 2 supra and accompanying text. A self-imposed code generally has prevented the hard liquor industry from advertising on radio and television. See 1976 Hearings, supra note 1, at 214-15 (self-imposed code for distilled spirits industry). As a practical matter, a broadcast ban therefore would affect only beer and wine commercials.


rationale to uphold the fairness doctrine, which required broadcasters to present fair coverage of both sides of public issues, thus assuring the public a diversity of views. The Court reasoned that, because only a limited number of broadcast frequencies are available for allocation, those who receive licenses must serve the public interest by permitting the presentation of opposing viewpoints. However, this justification generally has been employed to secure a balanced presentation of views on issues of public concern in order to increase the flow of information to the public. In contrast, advertising bans seek to suppress speech and diminish the flow of information. The scarcity of broadcast frequencies therefore does not constitute a "special problem" of the electronic broadcast media which would justify a complete ban on broadcast alcohol advertising.

The Court cited additional justifications for granting broadcasters only limited first amendment protection in *FCC v. Pacifica Foundation*. In *Pacifica* the FCC issued an order banning the radio broadcast of an "indecent but not obscene" George Carlin monologue at times when children were likely to be a part of the audience. The Court upheld the otherwise constitutionally impermissible ban on two grounds. First, the Court noted that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," so that offensive material broadcast over the airwaves often assaults the individual in the privacy of his own home. Because prior warnings are ineffective for the listener who tunes in to the middle of a broadcast, it is often

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94 395 U.S. at 388-89, 400-01.

95 In *FCC v. League of Women Voters*, 104 S. Ct. 3106 (1984), the Court contrasted earlier regulations it had upheld under the scarcity doctrine with a regulation which silenced editorializing on matters of public interest. *Id.* at 3127. *See also* Krattenmaker & Powe, *supra* note 91, at 1227-28; Shinners, *supra* note 91, at 87-88.

Though *Red Lion* upheld the fairness doctrine on the basis of the public's right to balanced information, this right is not unconditional. *See, e.g.*, Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (broadcasters are not required to accept editorial advertisements from everyone willing to pay for them). Moreover, the fairness doctrine does not apply to standard product advertising. *See note 106 infra.*

96 The scarcity doctrine may completely lose its viability in years to come. The Court suggested in *FCC v. League of Women Voters*, 104 S. Ct. 3106 (1984), that, if properly signalled by Congress or the FCC, it may be willing to reconsider the scarcity doctrine in light of developing cable and satellite technology. *Id.* at 3116 n.11.


98 *Id.* at 729-33.

99 Suppression of nonobscene material ordinarily raises serious constitutional problems. *Id.* at 741 n.17.

100 *Id.* at 748.
impossible to avoid objectionable material. In addition to this intrusiveness rationale, the Court relied on broadcasting's unique accessibility to children. Since the government has an interest in the "well-being of its youth," the Court concluded that the FCC could regulate indecent broadcasts, at least during certain hours of the day.

The characteristics of broadcasting which the Court focused upon in Pacifica arguably support similar timing regulations of broadcast alcohol advertising. Television and radio commercials are undoubtedly a "uniquely pervasive presence in the lives of all Americans," and also easily accessible to children. The broadcast industry's powerful impact on children and adolescents has caused concern over the influence which alcohol advertising may have in shaping attitudes toward this frequently abused product.

Yet the monologue at issue in Pacifica can be distinguished from product advertising in two ways. First, any adverse effects which alcohol advertising may have on viewers generally may be countered with messages advocating responsible use of alcohol and disclosing the risks of excessive consumption. Hence, even a time-of-day ban on alcohol advertising is more extensive than necessary. In fact, past experience with cigarette advertising suggests that counter-advertising may have more effect than a ban, because it stimulates public debate and assures a balanced flow of information. Second, the Pacifica Court was unquestionably affected by

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101 *Id.* Compare Cohen v. California, 403 U.S. 15 (1971), which involved a man who strolled through a courthouse while wearing a jacket which bore the slogan "Fuck the Draft." The Court noted that observers could simply look the other direction. *Id.* at 21.

102 438 U.S. at 749-50.

103 *Id.* at 749 (quoting Ginsberg v. New York, 390 U.S. 629 (1968)).

104 *Id.* at 750-51. The Court characterized the FCC's decision as resting entirely on a nuisance theory. Since a nuisance may be "a right thing in the wrong place," the context in which the Carlin material was broadcast determined the outcome. *Id.*


106 Before Congress banned cigarette broadcast advertising in 1969, anti-smoking messages were carried to counter the advertisements. Following this period, cigarette consumption declined. After the commercials and counter-commercials were taken off the air, consumption began to rise again. *See* Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 587-89 (D.D.C. 1971) (Wright, J., dissenting), *aff'd mem. sub nom.* Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972). For a discussion of the constitutionality of the cigarette advertising ban, see note 88 *supra*.

Prior to the advertising ban, the FCC had required broadcasters to provide reasonable time for anti-smoking messages pursuant to the fairness doctrine. *See* Television Station WCBS-TV, 8 F.C.C.2d 381 (1967), *aff'd sub nom.* Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir.)
the nature of the language in Carlin's monologue.\textsuperscript{107} As intrusive as broadcast advertising may be, beer and wine commercials simply do not offend in the way that "indecent" language does. In fact, the \textit{Pacifica} court itself emphasized the narrowness of its holding,\textsuperscript{108} indicating that the decision should be read only as an approval of restrictions on indecent language broadcast during times when children are likely to comprise the audience. \textit{Pacifica}, therefore, does not necessarily support even a time-of-day restraint on inoffensive broadcast advertising.

None of the Supreme Court's traditional justifications for special treatment of broadcasters supports a complete ban on broadcast alcohol advertising. The scarcity rationale has been utilized only to sustain regulations which promote diversity by preventing broadcasters from monopolizing the airwaves. The intrusiveness rationale and the Court's concerns about broadcasting's accessibility to children have been limited to a partial ban on indecent speech. Absent any additional "special problems" of the broadcast media which the Court has not yet specified, a ban on television and radio alcohol advertising should be no more permissible than a ban applied to other forms of communication.

\textsuperscript{107} The Court characterized the language as "vulgar," "offensive," 438 U.S. at 747, "verbal shock treatment," and "potentially degrading and harmful to children," \textit{id.} at 757-58 (Powell, J., concurring).

\textsuperscript{108} \textit{Id.} at 750.
V. Conclusion

The Supreme Court has recognized that society benefits from the free flow of commercial information. Accordingly, the Court has granted commercial speech qualified first amendment protection which precludes government suppression absent a substantial interest which is directly served by narrow regulation. Under the Central Hudson test, a complete alcohol advertising ban is more extensive than is necessary to reduce excessive alcohol consumption and therefore should be found unconstitutional. Rather than promoting a paternalistic approach designed to suppress information, those concerned with alcohol abuse should seek to counter such advertising with additional information.

Contrary to the holdings of two federal courts, the power of the states to regulate liquor traffic under the twenty-first amendment should not alter commercial speech analysis under Central Hudson. The twenty-first amendment was designed to prevent the normal operation of the commerce clause; it does not permit the states to abridge otherwise protected individual rights. Thus, if a state chooses to permit the sale and consumption of alcoholic beverages within its borders, it should not indirectly attempt to manipulate its residents' consumption of alcohol through the suppression of constitutionally protected speech.

Furthermore, the special characteristics of the broadcast media do not justify diminished commercial speech protection for alcoholic beverage advertising on radio and television. Broadcasting's unique impact on children and adolescents should be utilized to educate viewers about the hazards of excessive alcohol consumption, not to justify a ban on the advertising of a lawful product. As the Supreme Court has stated, "People will perceive their own best interests if only they are well enough informed, and... the best means to that end is to open the channels of communication rather than to close them."\(^{109}\)

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