PERPETUATING CONFUSION IN THE COMMERCIAL SPEECH AREA: ADOLPH COORS CO. V. BRADY

INTRODUCTION

The United States Supreme Court is currently redefining the status of commercial speech under the First Amendment. In 1942, the Supreme Court held that commercial speech fell outside the scope of First Amendment protection. In 1976, the Supreme Court began reforming the scope of First Amendment protection to gradually bring commercial speech under the protection of the First Amendment. This reformation culminated in 1980 when the Supreme Court, in Central Hudson Gas & Electric Corp. v. Public Service Commission, articulated a test to be used in determining whether a state may regulate commercial advertising. The United States Supreme Court modified the commercial speech doctrine in 1989 in Board of Trustees v. Fox, when it relaxed the requirements of its previous test and granted governments greater leeway in controlling commercial speech.

In Adolph Coors Co. v. Brady, the United States Court of Appeals for the Tenth Circuit decided a case concerning the commercial advertisement of a regulated substance utilizing the less restrictive test set forth in Fox. However, the court did not eliminate the wording of the Central Hudson test from its analysis.

This Note reviews the changes that have evolved in the commercial speech area since the inception of commercial speech protection under the First Amendment. This Note also analyzes the inconsistencies between the wording of the commercial speech test and the actual application of the test in recent cases. This Note then discusses the confusion and lack of certainty in the commercial speech
Finally, this Note examines how the court in *Coors* could have remedied the problem, but instead followed the inconsistent approach of prior decisions.  

**FACTS AND HOLDING**

In 1987, in hopes of eliminating its image as a producer of a weak beer, Adolph Coors Company ("Coors") applied to the Bureau of Alcohol, Tobacco, and Firearms ("BATF") for approval of new advertisements and labels which would disclose the alcohol content of Coors and Coors Light beers. The BATF refused Coors's request, citing 27 U.S.C. § 205(e)(2) and (f)(2) as authority for their denial. The relevant statutory sections prohibited advertisements or labels that reveal the alcohol content of malt liquor beverages, unless such disclosure was mandated by state law. The statute was created to discourage labels displaying alcohol content which were thought to result in "strength wars" wherein producers competed for a market.

13. *See infra* notes 223-72 and accompanying text.
16. *Id.* at 1545. The relevant parts of title 27, § 205 provide:

It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate:

13. *See infra* notes 223-72 and accompanying text.
16. *Id.* at 1545. The relevant parts of title 27, § 205 provide:

(e) To sell or ship or deliver for sale or shipment, or otherwise introduce in interstate or foreign commerce, or to receive therein, or to remove from customs custody for consumption, any distilled spirits, wine, or malt beverages in bottles, unless such products are bottled, packaged, and labeled in conformity with such regulations, to be prescribed by the Administrator, with respect to packaging, marking, branding, and labeling and size and fill of container . . . (2) as will provide the consumer with adequate information as to the identity and quality of the products, the alcoholic content thereof (except that statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages are hereby prohibited unless required by State law and except that, in case of wines, statements of alcoholic content shall be required only for wines containing no more than 14 per centum of alcohol by volume) . . .

(f) To publish or disseminate or cause to be published or disseminated by radio broadcast, or in any newspaper, periodical or other publication or by any sign or outdoor advertisement or any other printed or graphic matter, any advertisement of distilled spirits, wine, or malt beverages, if such advertisement is in, or is calculated to induce sales in, interstate or foreign commerce, or is disseminated by mail, unless such advertisement is in conformity with such regulations, to be prescribed by the Administrator . . . (2) as will provide the consumer with adequate information as to the identity and quality of the products advertised, the alcoholic content thereof (except the statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages and wines are prohibited).

17. *Id.*
Coors filed a complaint in the United States District Court for the District of Colorado against the Director of the BATF and the Secretary of the Treasury, alleging a violation of the Free Speech Clause of the First Amendment. Coors asserted that the relevant portions of section 205 prevented it from revealing truthful information concerning the amount of alcohol in its malt beverages. Coors urged the district court to invalidate the statutory sections and to set aside the BATF's refusal of Coors's application.

The United States Justice Department, on behalf of the BATF and the Secretary of the Treasury, admitted that the restrictions on labeling and advertising were unconstitutional. However, the United States House of Representatives intervened to defend the constitutionality of the statute. The district court held that section 205(e)(2) and (f)(2) created an unconstitutional suppression of speech under the First Amendment and thus granted a summary judgment for Coors. The Secretary of the Treasury, now defending the statutory sections, together with the House of Representatives, appealed to the United States Court of Appeals for the Tenth Circuit.

On appeal, the Tenth Circuit reversed and remanded the case. The court used the four-part test set forth by the United States Supreme Court in Central Hudson Gas & Electric Corp. v. Public Service Commission to analyze the validity of the statutory sections. The Central Hudson test set up the following requirements for First Amendment protection of commercial expression: (1) the expression must not be misleading and must concern a lawful activity ("protected speech test"), (2) the governmental interest must be substantial ("substantial interest test"), (3) the regulation must directly advance the governmental interest ("directly advance test"), and (4) the regulation must be no more extensive than necessary to serve the

18. Coors, 944 F.2d at 1548.
19. Id. at 1546. The Free Speech Clause of the First Amendment to the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.
20. Coors, 944 F.2d at 1546.
21. Id.
22. Id. The Justice Department also was speaking on behalf of the Executive branch. Id.
23. Id.
24. Id. at 1545. The district court's summary judgment enjoined the government's enforcement of the statute. Id.
25. Id. at 1546.
26. Id. at 1545. The case was remanded with instructions to determine whether the regulation directly advanced the government's interest and whether there was a reasonable connection between the Congress's means and ends. Id. at 1554.
28. Coors, 944 F.2d at 1546-47.
interest ("least restrictive means test"). The first part of the test determines whether the speech is protected by the First Amendment and the last three parts determine whether the regulation is constitutional. The Tenth Circuit began by recognizing that the disclosure of alcohol content was neither unlawful nor misleading. Therefore, the commercial advertising involved in Coors fell within the protection afforded by the First Amendment.

Next, the court determined that this interest in the prevention of strength wars was substantial and fell within Congress's power to regulate the marketing and sale of beer in interstate commerce. The court stated that the federal government had a legitimate interest in promoting fair competition among brewers, and assuring moderate levels of alcohol for the protection of purchasers.

Under the third part of the Central Hudson test, the court questioned whether the restrictions directly advanced the asserted governmental interest. The court cited Central Hudson as requiring an "immediate connection" between the restrictions on labeling and the governmental goal. Under the "immediate connection" analysis, a means-end connection that is "highly speculative" or "tenuous" will not survive constitutional scrutiny.

The court stated that unlike other commercial speech cases, the link between strength wars and advertising was not self-evident. Although the party imposing the restriction on speech generally has the burden of justifying it, the court stated that requiring the government to affirmatively illustrate a nexus between the means and the end would be an intrusion into the legislative function. Nevertheless, the court stated that it could not assume that certain means would accomplish particular ends simply because the legislature presumed they would and enacted them into law. Thus, the court placed the burden of justifying the restriction on the government.

29. Id. (quoting Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980)).
30. See id.
31. Id. at 1547. The U.S. House of Representatives argued below that the disclosure of alcohol content was inherently misleading. The district court disagreed with this contention. Id. at 1547 n.2.
32. Id. at 1547.
33. Id. at 1548-49. Congress thought that § 205 regulations would produce a lower alcohol beer to benefit both consumers and the alcohol industry. Id. at 1548.
34. Id. at 1548-49.
35. Id. at 1549; see Central Hudson, 447 U.S. at 566.
36. Coors, 944 F.2d at 1549.
37. Id. (citing Central Hudson, 447 U.S. at 569).
38. Id. at 1550.
39. Id. at 1550-51.
40. Id. at 1551.
41. Id. at 1550.
The court remanded the question of whether the third part was satisfied because the district court had not separately considered whether the facts presented by both sides presented a genuine issue of material fact.42

Under the fourth part of the Central Hudson test, the court assessed whether the regulation was more expansive than necessary to promote the interest of the government.43 Under this part of the test, the court abandoned the "least restrictive means" language of the Central Hudson test and instead stated that the governmental goal "must be 'substantial' and the cost 'carefully calculated.'"44 The court borrowed this language from the United States Supreme Court decision in Board of Trustees v. Fox,45 which was decided after the district court's decision in Coors.46 The Fox analysis did not require a perfect fit between the governmental ends and means, but merely required a reasonable fit that was proportionate to the interest served.47

In Coors, the Tenth Circuit examined the language of the Fox decision in allowing the legislature to determine what "reasonable" means would best expedite the governmental end.48 The question of whether there was a sufficiently reasonable fit between Congress's means and the end then became a question of fact to be resolved by the district court on remand.49

BACKGROUND

The First Amendment to the United States Constitution protects an individual's right to self-expression.50 The purpose of this protection is to promote the discovery of truth and to permit the free and open exchange of ideas.51 The First Amendment grants special protection to ideas related to political issues and matters of public con-

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42. Id. at 1551.
43. Id. The court relied on the new interpretation of the least restrictive means test as set forth in Board of Trustees v. Fox, 492 U.S. 469, 480 (1989), which was handed down subsequent to the district court decision. Coors, 944 F.2d at 1551-52.
44. Id. at 1552. (quoting Fox, 492 U.S. at 480).
46. Coors, 944 F.2d at 1552.
47. Id. (citing Fox, 492 U.S. at 480).
48. Id. (quoting Fox, 492 U.S. at 480).
49. Id. at 1554. The court also evaluated Coors's assertion that the federal government did not have sufficient power to regulate the marketplace for the benefit of producers and consumers under the Commerce Clause. Id. The court upheld the congressional power to regulate alcohol under the Commerce Clause. Id.
cern.\textsuperscript{52} These matters of public importance are at the core of the First Amendment and, therefore, warrant strict scrutiny by the courts.\textsuperscript{53}

Unlike core First Amendment speech, commercial speech has only recently been given constitutional protection.\textsuperscript{54} The United States Supreme Court has defined commercial speech as speech that does “no more than propose a commercial transaction,” or speech that relates solely to the economic interests of the speaker and its audience.\textsuperscript{55}

For many years, the United States Supreme Court’s treatment of commercial speech followed its 1942 decision in Valentine v. Chrestensen,\textsuperscript{56} in which the Court held that “purely commercial advertising” was not worthy of any First Amendment protection.\textsuperscript{57} In Valentine, an individual attempted to distribute handbills promoting tours of a United States Navy submarine for a fee.\textsuperscript{58} After being told by the New York Police Commissioner that he was violating the New York Sanitary Code, a legal battle ensued.\textsuperscript{59} Ultimately, the Supreme Court in Valentine determined that purely commercial speech was outside the protection of the First Amendment.\textsuperscript{60} In the Court’s view, the entrepreneur was attempting to “pursue a gainful occupation in the streets” by distributing his leaflets, and his right to do so was purely a matter for legislative judgment.\textsuperscript{61} According to the Court, because the primary purpose of the handbill was commercial, it was undeserving of First Amendment protection.\textsuperscript{62}

\begin{footnotesize}
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\item \textsuperscript{56} 316 U.S. 52 (1942).
\item \textsuperscript{57} Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).
\item \textsuperscript{58} Id. at 53.
\item \textsuperscript{59} Id. at 53-54. The solicitor was informed by the Police Commissioner that his solicitation would be in violation of the sanitary code, but if the purpose was for “information or a public protest,” the activity would be allowed. Id. The statute provided in relevant part:

\begin{quote}
No person shall throw, cast or distribute or cause or permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever, in or upon any street or public place. . . . This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter.
\end{quote}

Id. at 53 (citing N.Y. SANITARY CODE § 318).
\item \textsuperscript{60} Id. at 54.
\item \textsuperscript{61} Id.
\item \textsuperscript{62} Id. at 54-55.
\end{itemize}
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In 1976, the Supreme Court modified its position taken in Valentine. In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., the United States Supreme Court invalidated a statute that provided that the advertising of prescription drug prices by pharmacists was unprofessional conduct. The Court acknowledged that price advertising was purely commercial speech, but found that its status as commercial speech was insufficient to place price advertisements entirely outside the protection of the First Amendment. The Court observed that to maintain an efficient free enterprise system, information must flow freely so that consumers are educated and informed as to how to spend their money. The Court, therefore, rejected the contention that because advertisers have economic motives, they should be disqualified from the protection offered by the First Amendment.

The Court's reasoning in Virginia State Board of Pharmacy was premised on the theory that the free flow of commercial information served the public interest. The Court held that the consuming public had a protected First Amendment interest in the free flow of truthful information concerning lawful activities. The Court did not establish a test by which to measure the validity of commercial speech regulations, but rather it simply considered the individual and societal interests in product information as compared to the state interest in maintaining professionalism in the pharmacy trade.

63. See Virginia State Bd. of Pharmacy, 425 U.S. at 762.
64. 425 U.S. 748 (1976).
65. Virginia State Bd. of Pharmacy, 425 U.S. at 749-50, 773. The statute provided in relevant part:

Any pharmacist shall be considered guilty of unprofessional conduct who (1) is found guilty of any crime involving grave moral turpitude, or is guilty of fraud or deceit in obtaining a certificate of registration; or (2) issues, publishes, broadcasts by radio, or otherwise, or distributes or uses in any way whatsoever advertising matter in which statements are made about his professional service which have a tendency to deceive or defraud the public, contrary to the public health and welfare; or (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription.

VA. CODE ANN. § 54-524.35 (Michie 1974).
67. Id. at 765. The Court viewed the First Amendment as an instrument to help inform and enlighten public decisionmaking. Id.
68. Id. at 762.
69. Id. at 765. In striking down the Virginia statute, Justice Blackmun wrote, "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." Id. at 770.
70. Id.
71. Id. at 766.
cause the interest in product information outweighed the State's interest in professionalism in the pharmacy trade, the Court upheld the district court's ruling that the statute was unconstitutional.72

Later decisions continued to develop the distinction between commercial and noncommercial speech, characterizing *Virginia State Board of Pharmacy* as having "afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression."73

**THE FOUR-PART CENTRAL HUDSON TEST AND ITS MODIFICATIONS**

Four years after the Supreme Court's decision in *Virginia State Board of Pharmacy*, the United States Supreme Court clarified its position on commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.74 In *Central Hudson*, the Public Service Commission for the State of New York proposed to continue a ban on the advertising of electricity usage which it had imposed during a time of fuel shortage.75 The Central Hudson Gas & Electric Corporation claimed that the ban infringed on its First Amendment rights.76 The New York Court of Appeals upheld the prohibition, recognizing the State's interest in conserving energy and ensuring low rates for electricity.77 The court found that the governmental interest in conserving electricity outweighed society's interest in reliable and informed economic decisions, especially because the consumers had no choice in the source of their electric supplier.78 For this reason, the court concluded that the speech was of little worth and upheld the restriction.79 Central Hudson Gas & Electric Corporation appealed to the United States Supreme Court, and the

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72. Id. at 770, 772. The State's complete suppression of the dissemination of lawful and concededly truthful information was held to be unconstitutional. Id. at 773. The dissent advocated a balancing test in which the interest in free speech would be weighed against the interest in public welfare as detailed in a legislative enactment. Id. at 789 (Rehnquist, J., dissenting). The dissent viewed the interest in free speech in this case to be at best marginal and criticized the Court's new "open door policy" toward commercial advertising. Id. at 790 (Rehnquist, J., dissenting).


74. 447 U.S. 557, 566 (1980). The Court did this by stating a four-part test to be met in commercial speech cases. *Central Hudson*, 447 U.S. at 566.

75. Id. at 558-59. The Commission felt that advertising of electricity would present "misleading signals" to consumers by appearing to support greater energy consumption during a time of shortages. Id. at 560.

76. Id.

77. Id. at 560-61, 568.

78. Id. at 561.

79. Id. at 566-67.
Supreme Court reversed the decision.\textsuperscript{80} The Supreme Court proposed the following four-part test for commercial speech cases:

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 is necessary to serve that interest.\textsuperscript{81}

Under the first part of the test, the Public Service Commission admitted that the expression was neither unlawful nor inaccurate.\textsuperscript{82} In its analysis of whether this was protected speech, the Supreme Court rejected the state court's reasoning that because the gas market was noncompetitive, the speech was of no real worth.\textsuperscript{83} Because there was still competition from suppliers of other types of fuels, the Court determined that the advertising was valuable.\textsuperscript{84} Therefore, the Court noted that the advertising warranted protection under the First Amendment, even though the advertising occurred in a monopolistic electricity market.\textsuperscript{85} In summary, the Court determined that because the advertisement of electric rates was legal, the commercial speech was entitled to constitutional protection.\textsuperscript{86}

Regarding the substantiality of the governmental interest under the second part, the Court stated that the State's interest in the conservation of energy and the concern for efficient and fair rates represented clear and substantial governmental interests.\textsuperscript{87} The regulation, therefore, satisfied the second part of the test.\textsuperscript{88}

Focusing on the third part of the test, the Court stated that the nexus between the government's means and its end in creating fair and efficient electricity rates was, at most, tenuous.\textsuperscript{89} The Court stated that the impact of the advertisements on electricity rates was

\textsuperscript{80} Id. at 572.
\textsuperscript{81} Id. at 567.
\textsuperscript{82} Id. The New York Court of Appeals questioned whether the advertising was protected commercial speech. Id.
\textsuperscript{83} Id. at 567.
\textsuperscript{84} Id. The Court stated that even in monopolistic markets, the limitation of advertising reduces the amount of information available to consumers and thereby defeated the goals of the First Amendment. Id.
\textsuperscript{85} Id. at 568.
\textsuperscript{86} Id. at 566-67.
\textsuperscript{87} Id. at 568-69.
\textsuperscript{88} Id. at 569.
\textsuperscript{89} Id.
speculative and, therefore, was insufficient to justify prohibiting the advertisements. In contrast, the State's interest in energy conservation was directly aided by the regulation. The Court concluded that a direct link between the regulation and the State's interest in conservation existed because of the immediate relationship between the advertisement and the demand for electricity. Therefore, the third part was satisfied.

The Court stated that the fourth part, whether the regulation was the least restrictive means, was the critical issue in the case. Because the regulation reached all advertising, regardless of the effect on energy use, the Court viewed the regulation as more restrictive than necessary. In addition, the Public Service Commission failed to show that a less restrictive regulation would not have adequately served the State's interests. For these two reasons, the regulation failed the fourth part of the test and was invalidated by the Court.

In Metromedia, Inc. v. City of San Diego, the United States Supreme Court slightly modified the four-part Central Hudson test. The Court in Metromedia evaluated the validity of a municipal ordinance that prohibited outdoor advertising signs, except for those in twelve exempted categories. The stated purpose of the law "was 'to eliminate hazards to pedestrians and motorists brought about by distracting sign displays' and 'to preserve and improve the appearance of the City.'" Although they were unable to agree on a majority opinion, six members of the Court agreed that the ordinance

90. Id.
91. Id.
92. Id. The Court thought that the Central Hudson Corporation would not have protested the ban unless it thought that the advertisements would increase its sales. Id.
93. Id.
94. Id. at 569-70.
95. Id. at 570. The Commission's order was held to violate both the First and Fourteenth Amendments. Id.
96. Id.
97. Id. at 570-71.
99. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 508-09 (1981). The Court gave greater deference to the judgment of lawmakers than it had in the past. Id. at 509.
100. Id. at 493-94. The specific categories exempted included: government signs; signs located at public bus stops; signs manufactured, transported, or stored within the city, if not used for advertising purposes; commemorative historical plaques; religious symbols; signs within shopping malls; for sale and for lease signs; signs on public and commercial vehicles; signs depicting time, temperature, and news; approved temporary, off-premises, subdivision directional signs; and temporary political signs.
101. Id. at 493 (quoting SAN DIEGO, CAL., ORDINANCE 10,795 (Mar. 14, 1972)). On-site commercial advertising was still permitted under the scheme. Id. at 496.
was invalid under the First Amendment.102 The plurality found that the ordinance satisfied the commercial speech requirements of Central Hudson, but was invalid under the Fourteenth Amendment because it did not provide exemptions for noncommercial speech.103 In effect, the ordinance gave less protection to noncommercial speech than to commercial speech, according to the Court.104

In evaluating the commercial speech aspects of Metromedia, the plurality indicated that the law satisfied the first, second, and fourth parts of the Central Hudson test.105 Under the first part, the Court noted that there was no suggestion that the advertising involved an unlawful activity or was misleading.106 Under the second part, the Court stated that the goals of traffic safety and keeping a pleasant appearance of the City were substantial governmental interests.107 Under the fourth part of the test, the Court found that the ordinance was not unnecessarily broad; in fact, the regulation stopped short of accomplishing its ends because it could have prohibited all billboards but instead chose to allow onsite advertisements which fit into one of the twelve exempt categories.108

The more complicated question concerned whether, under the third part of the Central Hudson test, the ordinance directly advanced the governmental interests in the appearance and traffic safety of the City.109 Evaluating the ordinance, the Court used a more deferential version of the third part of the test than was used in Central Hudson.110 Although the Court recognized that only meager support existed for the connection between billboards and traffic safety, the Court deferred to the legislative judgment used in enacting the ordinance, stating that it was not manifestly unreasonable.111 The Court stated that absent an effort to suppress speech, the ability of the San Diego City Council to determine that banning outdoor advertising signs advanced the cause of urban aesthetics was enough to satisfy the directly advance test.112 Although the court did not rede-
fine the third part of the test, it did stress granting greater leeway to local lawmakers in deciding whether the ordinance directly advanced their interests.  

In **Zauderer v. Office of Disciplinary Counsel**, the United States Supreme Court further altered the **Central Hudson** test. In **Zauderer**, the Court considered whether advertisements of an Ohio attorney violated disciplinary rules of the Ohio Office of Disciplinary Counsel because of their alleged false and misleading character. The disciplinary rule in question prohibited attorneys from using any form of public communication containing false or deceptive claims. Philip Zauderer, the attorney, asserted in his advertisement that he was willing to represent women who had been injured by use of the Dalkon Shield intrauterine device. The advertisement also represented to women that their claims might not be time-barred.

Zauderer argued that the rules restricting the content of advertising were unconstitutional under the First Amendment. The Court applied the **Central Hudson** test to the facts of Zauderer and concluded that blanket prohibitions on attorney price advertising were impermissible. The Court stated that because the attorney's statements concerning the contraceptive device were not deceptive or false, the speech was entitled to constitutional protection. The Court then considered the second part of the test and examined whether the asserted governmental interest was substantial.

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113. Id. at 509.
115. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 n.14 (1985). The Court changed the inquiry under the fourth part of **Central Hudson** from one of the least restrictive means to one which required only a reasonable relationship between the means and the ends. Id. See P. Cameron DeVore & Robert D. Sack, Advertising and Commercial Speech, in FALSE ADVERTISING AND COMMERCIAL SPEECH 7, 63 (1992).
117. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A) (1980). Disciplinary Rule 2-101(A) provides in pertinent part:

A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

**Id.**

118. Zauderer, 471 U.S. at 630-31. The advertisement was placed in 36 Ohio newspapers and featured a drawing of the Dalkon Shield. Id. at 630. It then asked women whether they had used the device and encouraged them to seek legal representation if they had. Id. at 631.
119. Id.
120. Id. at 634.
121. Id. at 638.
122. Id. at 641.
123. Id.
neys did not use misleading or false advertising to create meritless litigation failed the substantial interest test. The State’s argument that it was difficult for consumers to distinguish false or deceptive legal advice from that which was truthful was unpersuasive to the Court, and therefore was not a substantial state interest.

Regarding the third part of the Central Hudson test, the Court summarily stated that it found that it was difficult to understand how the rule would directly advance the State’s interest in preventing the deception of consumers. The regulation in question therefore failed the third part of the Central Hudson test.

Under the fourth part of the test, the Court held that the disclosure requirements did not have to be the least restrictive means of advancing the government’s interest. Instead, the Court stated that the advertiser’s rights were adequately protected if disclosure requirements were “reasonably related to the State’s interest in preventing deception of consumers.” The Court thereby rejected the appellant’s contention that the disclosure requirements be subjected to a strict “least restrictive means” test, under which the requirements would be invalid if the State could have achieved its goals in less restrictive ways. Although the regulation passed the fourth part of the test, because the restriction did not advance a substantial state interest, the prohibitions were unconstitutional.

In Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, the United States Supreme Court decided the constitutionality of a statute that regulated commercial speech involving casino gambling. In a five to four ruling, the Court in Posadas upheld a Puerto Rican statute that encouraged gambling among tourists but prohibited casino advertisements aimed at Puerto Rican citizens, despite the fact that gambling was legal on the island.

The court used Central Hudson to guide its analysis of the regu-

124. Id. at 644.
125. Id. at 644-45. The Court stated that assessing the validity of legal advertisements was not a complex matter. Id. at 645-46.
126. Id. at 647.
127. Id. at 641-44.
128. Id. at 651 n.14.
129. Id. at 651.
130. Id. at 651 n.14.
131. Id. at 638, 651.
134. Id. at 330-31, 348. The statute provided in relevant part: “No gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico.” P.R. LAWS ANN. tit. 15, § 77 (1972).
lation’s validity.\textsuperscript{135} Under the first part, the advertising of casino gambling concerned a lawful activity and was not fraudulent or misleading.\textsuperscript{136} Therefore, the communication was entitled to constitutional protection.\textsuperscript{137}

In assessing the strength of the government’s interest under the second part of the test, the Court looked at whether reducing the demand for casino gambling among the Puerto Rican citizens qualified as a substantial interest.\textsuperscript{138} The Legislature thought that profuse gambling among residents would produce harmful effects such as fostering prostitution, corruption, and organized crime.\textsuperscript{139} These would in turn be harmful to the safety, welfare, and health of Puerto Rican citizens.\textsuperscript{140} The Court determined that these interests were substantial.\textsuperscript{141}

Examining the last two parts of the \textit{Central Hudson} test, the Court concluded that these parts required a “fit” between the Legislature’s means and ends.\textsuperscript{142} The fit did not necessarily have to be “perfect,” but rather “reasonable” and “in proportion to the interest served.”\textsuperscript{143} The Court then stated that under the third part, the restrictions directly advanced the government’s interest.\textsuperscript{144} The Court, as in prior decisions, gave deference to the decisions of local lawmakers.\textsuperscript{145} The fact that the Legislature chose to regulate casino gambling and not other types of gambling such as horse-racing or the lottery did not invalidate the regulations.\textsuperscript{146} The Court acknowledged the Legislature’s view that the risks inherent to casino gambling were greater than those associated with other types of gambling and that the restrictions on the advertising of casino gambling to the citizens of Puerto Rico were justified.\textsuperscript{147} The Court, therefore, viewed the ban of casino advertisements as directly advancing the government’s interest.\textsuperscript{148}

The regulations also satisfied the fourth part of the \textit{Central Hud-
son test. The Court found that the statute was no more extensive than necessary because it only affected Puerto Rican citizens and did not affect tourists. The Court granted leeway to the Legislature and stated that the Legislature's conclusion that the widespread advertisement of casino gambling would induce the citizens to gamble was enough to uphold the statute. The Court, therefore, held that the advertising ban was constitutional under the Central Hudson test.

THE FIRST AMENDMENT AND CONTROLLED ACTIVITIES

Some circuit courts of appeals have evaluated situations involving alcohol advertisements in association with the First Amendment. In Oklahoma Telecasters Ass'n v. Crisp, the United States Court of Appeals for the Tenth Circuit upheld an Oklahoma prohibition on liquor advertising. The Oklahoma Constitution and the Oklahoma Alcoholic Beverage Control Act forbade the advertising of alcoholic beverages within the State except for one sign on the premises of retail stores. The members of the Oklahoma Telecasters Association, who were engaged in the business of television broadcasting in the state of Oklahoma, filed suit against Richard A. Crisp in his official capacity as director of the Oklahoma Alcoholic Beverage Control Board. The broadcasters requested the United States District Court for the Western District of Oklahoma to render a declaratory judgment that the law violated their rights to free speech guaranteed under the First Amendment. The district court granted the broadcasters' motion for summary judgment, and Crisp
The Tenth Circuit rejected the broadcasters' assertion that the restrictions violated their First Amendment rights. Applying the Central Hudson test, the Tenth Circuit found that the first two parts were easily satisfied. First, the speech, in all relevant aspects, concerned a heavily regulated, yet lawful, activity. Second, the reduction of problems related to alcohol was undoubtedly a substantial interest. Considering the third part and whether the law directly advanced the government's interests, the Tenth Circuit granted deference to local lawmakers, as had been done in Metromedia. The court interpreted the third part of the Central Hudson test as requiring that the "means chosen by the legislature, however objectionable any court may find them, directly advance the asserted state interest." The court did not interpret the third part to require that the means be the best available to advance the government's interest. Therefore, the regulations did not need to have a direct effect on alcohol consumption, so long as they were reasonably related to reducing the attendant problems of alcohol consumption. For this reason, the court viewed the choice of the Oklahoma Legislature as reasonable and found that the law directly advanced a substantial interest — thereby satisfying the third part of the test.

Under the fourth part of the Central Hudson test, the Tenth Circuit held that the Oklahoma laws were no more extensive than necessary to serve the government's interest. Again, the court looked to the Metromedia decision for its analysis of the regulation. Although the statute prohibited the broadcasters from broadcasting all alcoholic beverage advertisements, the broadcasters were free to carry other forms of advertising. In addition, because Oklahoma

159. Id. at 493.
160. Id. at 502.
161. Id. at 500.
162. Id. at 499-500.
163. Id. at 500. The State of Oklahoma was found to have a substantial and legitimate interest in highway safety, family stability, citizen health and welfare, and the productivity of the work force. Id.
164. Id. at 500-01. See Metromedia, 453 U.S. at 509.
165. Crisp, 699 F.2d at 500.
166. Id.
167. Id. at 501.
168. Id. The court stated that it was not unreasonable for the Oklahoma Legislature to think that advertising would increase the sale of alcoholic beverages. Id.
169. Id. at 502.
170. Id. at 501.
171. Id. at 502. Although the broadcasters carried a disproportionate amount of the regulation's burdens, the dissemination of information on alcoholic beverages was not totally eliminated. Id.
had not prohibited all forms of alcohol advertising, the court stated that the statute was not overbroad and that the statute satisfied the fourth part of the test.\textsuperscript{172}

In \textit{Dunagin v. City of Oxford},\textsuperscript{173} the United States Court of Appeals for the Fifth Circuit upheld a Mississippi ban on liquor advertisements.\textsuperscript{174} The regulation in question prohibited all billboards and newspapers from advertising wine or hard liquor.\textsuperscript{175} Radio and television stations operating within the State also were prohibited from carrying wine commercials.\textsuperscript{176} Several outdoor advertising, television, newspaper, and radio businesses that operated in Mississippi brought suit in the United States District Courts for the Northern and Southern Districts of Mississippi seeking declaratory judgments that the bans violated their commercial speech rights.\textsuperscript{177} The two district courts reached opposite judgments, and the cases were consolidated on appeal to the Fifth Circuit.\textsuperscript{178}

The court began its analysis under the \textit{Central Hudson} test by summarily stating that liquor advertising was protected commercial speech.\textsuperscript{179} Under the second part, the court found that the State had a substantial interest in safeguarding the safety, health, and welfare of citizens by controlling the stimulation of alcohol sales and consumption.\textsuperscript{180}

However, the court more carefully analyzed the validity of the statute under the third part of the test.\textsuperscript{181} The court relied on the decisions in \textit{Queensgate Investment Co. v. Liquor Control Commision} and \textit{Crisp} to establish that the restriction directly advanced the State's interest.\textsuperscript{182} Because the courts in these earlier decisions had found alcohol advertising and consumption to be directly linked, the court in \textit{Dunagin} established the same connection in its opin-
The court also relied on the reasoning from *Central Hudson*, which stated that advertisers would not expend money on promotions unless the promotions increased sales, to establish a link between advertising and consumption. The court in *Dunagin* used this connection between advertising and sales, together with the deference allowed to local decisionmakers as established in *Metromedia*, to determine that the restrictions satisfied the third part of the test.

Finally, under the fourth part of the *Central Hudson* test, the court in *Dunagin* found that the restrictions were no more extensive than necessary. Again the court relied on *Metromedia* in reasoning that because not all alcohol advertising was restricted, the regulation was not overly extensive.

**THE NEW STANDARD UNDER FOX**

In *Board of Trustees v. Fox*, the United States Supreme Court gave even greater deference to the government in restricting commercial speech. In *Fox*, the Supreme Court considered a State University of New York resolution that forbade certain private commercial enterprises from operating on campus. A representative of a houseware company refused to leave a dormitory and was arrested for loitering, trespassing, and soliciting without a permit. Several students and the houseware company sued the University, claiming a violation of their First Amendment rights.

In upholding the restriction, the United States District Court for the Northern District of New York dispensed with the *Central Hudson* test and applied the "public forum" test, which is frequently used in evaluating the protection afforded to speech occurring on government property. The district court found for the University,
stating that the restrictions were reasonable in light of the dormitories' purpose, and the students appealed. Reversing the district court decision, the United States Court of Appeals for the Second Circuit determined that the speech in question constituted commercial speech and applied the *Central Hudson* test. The court found that the first three parts of the test were satisfied. The Second Circuit stated that the restriction did not meet the "least restrictive means" requirement under the fourth part of the test and, therefore, was unconstitutional. The University Board of Trustees petitioned the Supreme Court for certiorari.

On certiorari, the Supreme Court reversed the Second Circuit ruling. The Court applied the *Central Hudson* test in upholding the University resolution. The Court agreed with the Second Circuit that the speech was not misleading and that it did not propose an unlawful transaction. Therefore, it was entitled to protection under the First Amendment. The Court also agreed with the Second Circuit that, under the second part of the *Central Hudson* test, the governmental interests were substantial. The promotion of an educational, as opposed to commercial, atmosphere on campuses, along with the promotion of the security and safety of students and the prevention of student exploitation, were all seen as substantial governmental interests.

The Court did not address the University regulation under the third part of the *Central Hudson* test, other than to say that the restrictions satisfied the test. However, the Court discussed the fourth part of the *Central Hudson* test in great depth.

The Court began its analysis of the "not more extensive than is necessary" test by defining the word "necessary" within the meaning of the test. The Court stated that some of its prior decisions, including *Central Hudson*, had used the language "no more expansive

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195. *Id.*
196. *Id.* at 473.
197. *Id.*
198. *Id.*
201. *Id.* at 475.
202. *Id.* The parties did not contest the validity of the regulation under the first part of the test. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at 475-81.
207. *Id.*
208. *Id.* at 476-77.
than ‘necessary.’”209 The Court then noted that the word “necessary” had been interpreted loosely in prior decisions.210 The Court stated that “[w]hatever the conflicting tenor of our prior dicta may be, we now focus upon this specific issue for the first time, and conclude that the reason of the matter requires something short of a least-restrictive-means standard.”211 The Court stated that in some of its prior decisions, such as Zauderer, Metromedia, and Posadas, the Court apparently had invalidated only those restrictions that were “substantially excessive” and had upheld those that lawmakers could have considered to be reasonable restrictions.212

To clarify its interpretation of the fourth part, the Court articulated a less restrictive standard than the standard provided under the language of Central Hudson.213 The Court used the language of Posadas, which stated that the regulations require a “fit” between the legislative means and ends which is “not necessarily perfect, but reasonable,” and “one whose scope is ‘in proportion to the interest served.’”214 The Court therefore interpreted the fourth part as requiring not the least restrictive alternative, but one that was reasonable.215

The Court denied that the test as applied in Fox was overly permissive and distinguished it from the “rational basis” test used in Fourteenth Amendment Equal Protection cases.216 The Court reasoned that in Equal Protection cases, it was sufficient if the regulation could be thought to advance a legitimate legislative goal, without inquiring into the cost.217 In commercial speech cases, however, the Court required “the government goal to be substantial, and the cost to be carefully calculated.”218 By using this test, the Court allowed the legislatures to perform the difficult task of establishing the point at which the restrictions become too extensive.219 The Court thereby gave the legislative branch leeway in an area “traditionally subject to governmental regulation,” and left it to governmental deci-

209. Id. at 476.
210. Id. at 476-77 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)).
211. Id.
212. Id. at 479-80 (citing Posadas, 478 U.S. at 344; Zauderer, 471 U.S. at 651; Metromedia, 453 U.S. at 508).
213. Id. at 480. The fourth part was now interpreted to require not the single best disposition but one which was reasonable. Id.
214. Id.
215. Id.
216. Id.
217. Id.
218. Id. States must affirmatively establish a reasonable fit under the fourth part. Id.
219. Id. at 480-81.
sionmakers to decide what manner of regulation to employ. The Court summed up its modifications to the Central Hudson test by stating that its decision strengthened rather than weakened the essential protections under the First Amendment. By avoiding "parity of constitutional protection for commercial and noncommercial speech," the Court stated that it had protected noncommercial speech from a dilution of protection under the Constitution.

ANALYSIS

For a doctrine that is still in its infancy, the "commercial speech" doctrine has demonstrated remarkable vigor and flexibility. In recent years, courts have regularly considered commercial speech controversies, but they have not settled the exact degree of protection owed to that form of expression. Indeed, the courts have sent conflicting signals on the fundamental question of the appropriate degree of protection to be afforded to commercial speech ever since the United States Supreme Court announced in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. that commercial speech warrants a "different degree of protection." The Constitution affords "commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values," but the actual application of this intermediate level of protection has produced something less than a seamless web of precedent.

In Adolph Coors Co. v. Brady, the United States Court of Appeals for the Tenth Circuit merely followed the changes that had been evolving from the Supreme Court decisions in Central Hudson Gas & Electric Corp. v. Public Service Commission and Board of Trustees v. Fox. These changes have primarily affected the fourth part of the Central Hudson test. The analysis in Coors reflects the

220. Id. (citing Ohralik, 436 U.S. at 455-56).
221. Id. at 481.
222. Id.
223. See supra notes 64-222 and accompanying text.
224. See supra notes 64-222 and accompanying text.
228. 944 F.2d 1543 (10th Cir. 1991).
230. 492 U.S. 469 (1989); Adolph Coors Co. v. Brady, 944 F.2d 1543, 1551-53 (10th Cir. 1991); see supra notes 74-223 and accompanying text.
231. See supra notes 43-49, 94-97, 128-31, 149-52, 169-72, 208-22 and accompanying text.
confusion in the commercial speech area.\textsuperscript{232}

The confusion in the commercial speech area did not begin in the cases after \textit{Central Hudson}; the problems actually began with the language of \textit{Central Hudson} itself.\textsuperscript{233} In \textit{Central Hudson}, the Supreme Court stated that the fourth part of the test was whether the regulation was more extensive than necessary to serve the government's interest.\textsuperscript{234} This language is similar to the language of the "least restrictive means" test used in cases concerning noncommercial or "core" First Amendment speech.\textsuperscript{235} Although the Court stated that the Constitution accords commercial speech less protection than other forms of expression, the Court phrased the test in a manner that indicated that attempts at suppression would be looked at with strict scrutiny.\textsuperscript{236} However, applying this test to the facts, the Court did not require the least restrictive means, but instead required only a "more limited regulation."\textsuperscript{237}

Although the Court in \textit{Central Hudson} may have incorrectly articulated the standard to be applied to commercial speech cases through the use of loose language, the courts in subsequent cases soon began to recognize these mistakes.\textsuperscript{238} The courts did not specifically change the language of the test, but the courts did apply the correct analysis in assessing the validity of the government regulation on commercial speech.\textsuperscript{239}

Although the first two parts of the \textit{Central Hudson} test remained substantially the same, changes soon began to appear in the analysis of the third part of the test.\textsuperscript{240} For instance, in \textit{Metromedia, Inc. v. City of San Diego},\textsuperscript{241} the United States Supreme Court, by allowing great deference to lawmakers, loosened the third part of the \textit{Central Hudson} test without specifically stating that it was doing

\begin{itemize}
  \item \textsuperscript{232} See supra notes 31-49 and accompanying text.
  \item \textsuperscript{234} Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980).
  \item \textsuperscript{236} \textit{Central Hudson}, 447 U.S. at 566.
  \item \textsuperscript{237} Id. at 570.
  \item \textsuperscript{238} See supra notes 43-47, 109-13, 115, 128-31, 142-52, 165-67, 208-22 and accompanying text.
  \item \textsuperscript{239} See supra notes 43-47, 109-13, 115, 128-31, 142-52, 165-67, 208-22 and accompanying text.
  \item \textsuperscript{240} See supra notes 109-13, 142-48, 165-68, 181-86 and accompanying text.
  \item \textsuperscript{241} 453 U.S. 490 (1981).
\end{itemize}
Likewise, the United States Court of Appeals for the Tenth Circuit, in *Oklahoma Telecasters Ass'n v. Crisp*, held that so long as the legislative decisions were reasonable, they satisfied the third part of the *Central Hudson* test and "directly advanced" the governmental interest.

The fourth part of the *Central Hudson* test underwent even more expansive change than that which occurred under the third part of the test. In *Dunagin v. City of Oxford*, the United States Court of Appeals for the Fifth Circuit criticized the discrepancy between the language and application of the fourth part of the *Central Hudson* test. Although the wording of the fourth part — "least restrictive means" — indicates a strict scrutiny standard of review, the court reiterated that commercial speech was entitled to a different standard of review.

In *Zauderer v. Office of Disciplinary Counsel*, the United States Supreme Court changed the interpretation of the fourth part of the *Central Hudson* test from a least restrictive means requirement to a reasonable relationship between the legislative means and ends requirement. Then, in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, the United States Supreme Court once again changed the interpretation of the fourth part of the *Central Hudson* test by focusing on the "fit" between the legislative means and ends. The fact that the Legislature could conclude that gambling was harmful to residents of Puerto Rico was sufficient to satisfy the necessary "fit" under the last two parts of the *Central Hudson* test.

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243. 699 F.2d 490 (10th Cir. 1983).


246. 718 F.2d 738 (5th Cir. 1983).

247. Dunagin v. City of Oxford, 718 F.2d 738, 752 (5th Cir. 1983). The court, in analyzing the case under the Equal Protection Clause of the United States Constitution, stated:

Strict scrutiny is clearly inappropriate. In this case we have held the Mississippi law entirely legal under the First Amendment, and parties cannot insist on strict scrutiny merely by asserting a First Amendment right that the court ultimately finds not to be violated.

Id.

248. Id.


253. Id. at 341-44.
In Fox, the Supreme Court acknowledged that its prior decisions had been inconsistent. The Court specifically stated a requirement which entailed "something short of a least restrictive means standard;" however, the Court still used the language of Central Hudson, that the restrictions be "not more extensive than is necessary," as the test to be applied under the fourth part. Even though the Court again changed the interpretation of the fourth part of the Central Hudson test by requiring "the government goal to be substantial, and the cost to be carefully calculated," the Court in Fox did not change the language of the fourth part as stated in Central Hudson.

In Coors, the Tenth Circuit applied the interpretation of the fourth part of the Central Hudson test as set forth in Fox. However, the Tenth Circuit in Coors, like the Supreme Court in Fox, still enunciated the fourth part of the test for commercial speech by using the language used in Central Hudson. The courts in Coors and Fox applied the test using language that indicated a test of intermediate scrutiny; however, they did not modify the "strict scrutiny" wording of the Central Hudson test.

By failing to modify the Central Hudson language, the courts continued to complicate an otherwise simple test. By stating the Central Hudson test in a manner different from how it is applied, the courts have set the stage for confusion in the commercial speech area. Fortunately, the courts in cases after Central Hudson have been able to see beyond the words of the Central Hudson test to the actual application of the lesser standard. Unfortunately, the courts, including the Supreme Court, have refused to abandon the wording of the fourth part of the Central Hudson test. In essence, the courts have been saying one thing and doing another. The proper test for commercial speech is one of intermediate scrutiny, but the loose use of language by the Supreme Court has complicated an otherwise clear test.

254. Fox, 492 U.S. at 477.
255. Id. at 476-77.
256. Id. at 475, 480.
257. Coors, 944 F.2d at 1551-53.
258. Id. at 1546-47.
259. See supra notes 43-47, 208-22 and accompanying text.
260. Central Hudson, 477 U.S. at 566.
263. See supra notes 43-47, 94-97, 128-31, 149-52, 169-72, 208-22 and accompanying text.
264. See supra notes 98-222 and accompanying text.
265. Central Hudson, 447 U.S. at 573. Justice Blackmun agreed with the majority
To avoid applying the actual language of the fourth part of the Central
Hudson test, the courts have continually changed their interpre-
tation of the language. The fourth part has gone from a test of
"not more extensive than is necessary," to a test of a "reasonable rel-
ationship," to a test of requiring the "cost to be carefully calcu-
lated." By rarely interpreting the Central Hudson language in the
same way, the courts have created uncertainty in the commercial
speech area. The courts have not indicated what the proper stan-
dard is, nor whether the most recent interpretation as set down in
Fox will continue to be applied to future cases.

Because the courts have been saying one thing and doing an-
other, no one can be sure which standard will be applied, except
that it will not be what is implied by the language of the Central
Hudson test. Until the Central Hudson test is either applied as stated,
modified, or disposed of entirely, parties will continue to be subjected
to differing interpretations. Given the history of the courts in this
area, commercial speech could even receive a strict scrutiny an-
alysis.

It is difficult to understand why the Supreme Court has not re-
solved this tangled area by clarifying the language of the fourth part
of the Central Hudson test. The Court should state the test and
apply it to cases in a manner consistent with its actual wording.

If the United States Supreme Court chooses to restate the com-
mercial speech test, the new language should reflect the current

opinion that an intermediate level of scrutiny was appropriate. See Gary B. Wilcox et al., Alcoholic Beverage Advertising and the Electronic Media, in ADVERTISING AND COMMERCIAL SPEECH 77, 94-95 (Hon. Theodore R. Kupferman ed., 1990) [hereinafter Wilcox].


267. Central Hudson, 477 U.S. at 566; Zauderer, 471 U.S. at 651; Fox, 492 U.S. at 480.

268. See supra notes 104-226 and accompanying text. See Wilcox, supra note 265, at

77, 95.

269. Wilcox, supra note 265, at 77, 94-95 (noting the inconsistency of commercial
speech decisions).

270. See supra notes 43-49, 109-13, 128-31, 142-52, 165-68, 208-22 and accompanying
text.

271. See supra notes 114-52, 189-222 and accompanying text.

thought that the wording of the Central Hudson test had effectively elevated commer-
cial speech to the same level as core, noncommercial speech which receives virtually
complete protection. Id.

273. See supra notes 43-49, 94-97, 128-31, 149-52, 169-72, 208-22 and accompanying
text.

274. See supra notes 43-47, 99, 109-13, 128-31, 142-52, 165-68, 208-22 and accompany-
ing text.
thoughts on commercial speech. The Supreme Court has moved from a position in which regulations on commercial speech were looked on with disfavor to one in which they are generally upheld. Unfortunately, the language of Central Hudson has become outdated and no longer reflects the Supreme Court's thinking on commercial speech issues. Therefore, it is time to change the test to allow certainty and consistency in the commercial speech area.

In Coors, the Tenth Circuit Court simply followed the ruling set down in Fox, and interpreted the Central Hudson test as applied at that time. However, this analysis could change at any time. The Tenth Circuit could have assured certainty in the commercial speech area by stating the test in the same way that it was applied. Because the Court in Fox had spelled out the standard using words such as "reasonable fit" and "substantial governmental goal" with "costs carefully calculated," the Tenth Circuit should have set up a four-part test similar to the Central Hudson test, but with the wording of the fourth part expressed in the language of Fox rather than in the language of Central Hudson. By doing so, courts in subsequent cases would have a standard that says the same thing as it means.

By using new, more accurate language in accordance with the language of Fox, the Tenth Circuit would not have violated precedent because the test would have been consistent with the Supreme Court's actual interpretation of Central Hudson. For this reason, use of new language to describe the fourth part of the test by the court in Coors would have been unlikely to have been overruled. It is possible that the Supreme Court in subsequent decisions might have adopted the new language of the test, thus ending the inconsistency in this area.

Instead, the Tenth Circuit chose to follow the winding trail of prior decisions by stating the test in one way and by applying it in another. Rather than a precedential case, the decision in Coors is
just another link in a weak chain of commercial speech decisions.\textsuperscript{288}

CONCLUSION

In \textit{Adolph Coors Co. v. Brady},\textsuperscript{289} the United States Court of Appeals for the Tenth Circuit was faced with a muddled history of inconsistent application of the commercial speech test. Rather than settle the confusion by restating the test in a manner which would be consistent with recent interpretations, the court chose to follow the lead of the United States Supreme Court and apply the \textit{Central Hudson} test in a manner inconsistent with its language.

It is now time to end the confusion in the commercial speech area. The Supreme Court needs to revamp the test under which it measures the validity of regulations on commercial speech. By stating a test that is compatible with its application, the Supreme Court could turn commercial speech from an area of bewilderment and inconsistency to one of a simple four-part test. The Court’s commercial speech doctrine seems set on an unsteady course for the future. Clearer language would lay a better foundation upon which to build a steady and consistent commercial speech doctrine.

\textit{Denise D. Trumler—’94}

\textsuperscript{288} See \textit{supra} notes 98-222 and accompanying text.

\textsuperscript{289} 944 F.2d 1543 (10th Cir. 1991).