Fordham Law Review

Volume 80 | Issue 3 Article 13

December 2011

Party Foul: The Fourth Circuit's Improper Application of the Commercial Speech Test inEducational Media Co. at Virginia Tech, Inc. v. Swecker

Michelle Silva Fernandes

NOTES

PARTY FOUL: THE FOURTH CIRCUIT'S IMPROPER APPLICATION OF THE COMMERCIAL SPEECH TEST IN *EDUCATIONAL MEDIA CO. AT VIRGINIA TECH, INC. V. SWECKER*

*Michelle Silva Fernandes**

The pervasive culture of underage and excessive drinking on college campuses has led to numerous federal and state regulatory efforts to reduce drinking rates among college students. One such policy has been to restrict alcohol advertisements in college student publications, which implicates the First Amendment by limiting access to lawful commercial speech. Although the Supreme Court has developed a four-part balancing test to determine the validity of commercial speech restrictions, the Court has not articulated the level of proof required for assessing the validity of restrictions on alcohol advertisements in college student publications.

This Note focuses on the degree of constitutional protection that should be afforded to alcohol advertisements aimed at college students. It begins by exploring the background and development of the commercial speech doctrine and focuses on the vice advertising subset. Next, this Note discusses policies regarding alcohol use on college campuses and current initiatives to reduce both underage and excessive drinking. This Note then presents the split between the Third and Fourth Circuits regarding the proper application of the commercial speech test when evaluating restrictions on alcohol advertising.

Ultimately, this Note concludes that alcohol advertisements in college student newspapers should be analyzed using the same standard as other commercial speech cases. This Note proposes a resolution of the circuit split by articulating a clear application and evidentiary requirement for the commercial speech test regarding alcohol advertisements in college student publications.

* J.D. Candidate, 2012, Fordham University School of Law; B.S., 2006, Cornell University College of Human Ecology. I would like to thank my advisor, Professor Martin S. Flaherty, for his guidance. I would also like to thank my parents, family, and friends for their love, support, and encouragement.

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INTRODUCTION

"Beer is living proof that God loves us and wants us to be happy."[1]

On October 9, 2010, police officers arrived at a Central Washington University (CWU) house party and found nine underage freshmen passed out and highly intoxicated, and dozens of others sick.[2] Given the disturbing scene, police initially suspected a drug overdose, and several students were hospitalized.[3] After a full police investigation, however, officials announced that the students had fallen ill from binge drinking Four Loko, a popular caffeinated alcoholic beverage commonly referred to as "blackout in a can."[4]

Available in eight fruity flavors, Four Loko was marketed heavily to college students from its inception in 2006 through the CWU incident.[5]

1. *See* George F. Will, *Survival of the Sudsiest*, WASH. POST, July 10, 2008, at A15 (attributing the quote to Benjamin Franklin).

2. *See* Shannon Dininny, *Four Loko Sickened Several Central Washington University Students*, HUFFINGTON POST (Oct. 25, 2010, 10:17 PM), http://www.huffingtonpost.com/2010/10/25/four-loko-sickened-centra_n_773597.html.

3. *See Student Released from Hospital After Spiked-Drinks Incident*, CNN (Oct. 11, 2010, 5:53 AM), http://www.cnn.com/2010/CRIME/10/10/washington.students.overdose; *see also* Dininny, *supra* note 2 (discussing how, despite early police suspicions, Four Loko was to blame for the CWU incident).

4. Alan Duke, *'Blackout in a Can' Blamed For Student Party Illnesses*, CNN (Oct. 26, 2010, 8:19 AM), http://www.cnn.com/2010/US/10/25/washington.students.overdose/index.html (identifying Four Loko as the cause of the CWU incident).

5. *See* Abe Sauer, *Four Loko Declines to Own Its Marketing Strategy*, BRANDCHANNEL (Oct. 28, 2010, 11:00 AM), http://www.brandchannel.com/home/post/2010/10/28/Four-Loko-Declines-To-Own-Its-Excellent-Marketing-Strategy.aspx (examining the Four Loko

The drink came in colorful packaging, and the company's advertising focused on the college student market.[6] Students even created, with Four Loko's support, their own videos that they posted online.[7] Four Loko was also inexpensive, and while popular among students, it did not attract regulatory attention until 2010,[8] when it was blamed for several drinking-related deaths and accidents, and was subsequently banned in several states and universities.[9]

The viral Four Loko marketing campaign is an example of alcohol advertising, a form of commercial speech.[10] Although alcohol consumption is lawful, it is classified as a "vice," a socially harmful activity, like gambling or tobacco use.[11] These activities are typically subject to stricter regulation.[12] Along with alcohol's vice status, the culture of binge drinking on college campuses has contributed to particularly strict regulation of the alcohol industry and its advertising component.[13]

Commercial speech doctrine developed from a desire to protect consumers' interest in accurate commercial information.[14] The law did not recognize commercial speech as protected until 1976.[15] Nevertheless,

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viral marketing strategy using social media websites to gain popularity among college students).

6. *See, e.g.*, Abe Sauer, *Four Loko in Danger of Becoming for Loco 'Blackout' Brand*, BRANDCHANNEL (Oct. 27, 2010, 3:00 PM), http://www.brandchannel.com/home/post/2010/10/27/Four-Loko-Delivers-On-Blackout-Brand-Promise.aspx (highlighting the YouTube videos and social media pages dedicated to Four Loko); Willy Staley, *Four Loko Delivered Just What Its Marketing Department Promised*, AWL (Oct. 27, 2010), http://www.theawl.com/2010/10/four-loko-delivered-just-what-its-marketing-department-promised (reviewing the various online rap videos dedicated to Four Loko).

7. *See* Staley, *supra* note 6.

8. *See generally* Meredith Melnick, *'Blackout in a Can': Alcoholic Energy Drinks Keep Wreaking Havoc*, TIME (Oct. 26, 2010), http://healthland.time.com/2010/10/26/blackout-in-a-can-alcoholic-energy-drinks-keep-wreaking-havoc/ (discussing Four Loko's rising popularity and negative effects); Steve Wood, *Four Loko Energy Drink Raises Health Concerns Among Youth*, USA TODAY (Nov. 10, 2010, 4:17 PM), http://www.usatoday.com/yourlife/parenting-family/teen-ya/2010-11-10-alcoholic-energy-drinks_N.htm (noting Four Loko's cheap price and high alcohol content, as well as the FDA's focus on the drink).

9. *See generally* Jenna Johnson & Kevin Sieff, *Four Loko Ban Fuels Buying Binge*, WASH. POST (Nov. 18, 2010, 8:24 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/11/18/AR2010111806114.html (discussing state and university bans of Four Loko).

10. *See infra* Parts I.B–C (discussing commercial speech).

11. *See generally* P. Cameron Devore, *First Amendment Protection of "Vice" Advertising: Current Commercial Speech Hot Buttons*, 15 COMM. LAW. 3, 3 (1997) (discussing how the First Amendment has been applied to vice advertising).

12. *See id.*

13. *See, e.g.*, PHILIP J. COOK, PAYING THE TAB: THE ECONOMICS OF ALCOHOL POLICY 151–52 (2007) (noting that state governments regulate alcohol through the Twenty-first Amendment, with each state free to adopt its own alcohol taxes and regulations).

14. *See* Alex Kozinski & Stuart Banner, *The Anti-history and Pre-history of Commercial Speech*, 71 TEX. L. REV. 747, 754–59 (1993) (giving an overview of commercial speech doctrine development); *see also* M. Neil Browne et al., *Advertising to Children and the Commercial Speech Doctrine: Political and Constitutional Limitations*, 58 DRAKE L. REV. 67, 77–86 (2009) (describing the federal agencies in place to regulate advertising).

15. *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 629–31 (1990) (discussing the evolution of commercial speech starting in 1976).

commercial speech is referred to as "the stepchild of the First Amendment" because it is provided less protection than noncommercial speech.[16]

Within commercial speech jurisprudence, courts have carved out a vice advertising subset, which includes alcohol advertising.[17] Vice advertising refers to advertisements for certain products or activities that the public considers undesirable, such as tobacco and gambling advertisements, and has been the focus of many regulatory efforts.[18] However, such regulatory efforts are limited by constitutional considerations: after all, it is lawful for adults over the age of twenty-one to consume alcohol.[19]

The U.S. Supreme Court has developed a four-part balancing test to determine the validity of restrictions that limit commercial speech.[20] However, the Court has not articulated what type of proof is required when assessing the validity of restrictions on alcohol advertisements in college student publications. Currently, the Third and Fourth Circuits are split regarding what evidentiary showing a party must make in determining whether to uphold governmental restrictions on alcohol advertising in college student publications.[21] The Third Circuit analyzed this issue in *Pitt News v. Pappert*,[22] holding that a prohibition on alcohol advertisements in college student publications unconstitutionally restricted free speech, due to the government's lack of evidence proving that the restriction directly advanced the state's interest and was narrowly drawn.[23] The recent Fourth Circuit decision in *Educational Media Co. at Virginia Tech, Inc. v. Swecker*[24] reached a conflicting conclusion, upholding a similar state law despite a lack of evidence that the restriction directly advanced the state's interest and was narrowly tailored to meet that interest.[25] This Note proposes a resolution to the split, advocating that the Supreme Court adopt the Third Circuit's reasoning and evidentiary requirements.

This Note discusses the background and development of the commercial speech doctrine, with a focus on the vice advertising subset. Part I explores the development and current position of the commercial speech doctrine and discusses the evolution of vice advertising jurisprudence. It analyzes current policies designed to reduce underage and binge drinking. In Part II, this Note presents the split between the Third and Fourth Circuits regarding the proper application of the commercial speech test when evaluating

16. Comment, *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1027–29 (1967) (discussing the constitutional status of commercial speech).

17. *See* Clay Calvert, Wendy Allen-Brunner & Christina M. Locke, *Playing Politics or Protecting Children? Congressional Action & a First Amendment Analysis of the Family Smoking Prevention and Tobacco Control Act*, 36 J. LEGIS. 201, 213–14 (2010) (discussing the vice advertising subset of commercial speech).

18. *See id.* at 214.

19. *See, e.g.*, Browne et al., *supra* note 14, at 104–10 (discussing how vice advertisements can be limited).

20. *See infra* Part I.C.

21. *See infra* Part II.

22. 379 F.3d 96 (3d Cir. 2004).

23. *Id.* at 113; *see also infra* Part II.A.

24. 602 F.3d 583 (4th Cir. 2010), *cert. denied*, 131 S. Ct. 646 (2010).

25. *See infra* Part II.B.

restrictions on alcohol advertising. Additionally, Part II discusses how other circuit courts apply the commercial speech test in vice advertising cases. Part III of this Note proposes a resolution of the circuit split, arguing that alcohol advertisements in college student newspapers should be analyzed under the same standard as other commercial speech cases. Specifically, Part III posits that the Supreme Court resolve the circuit split by *clearly articulating* the proper application and evidentiary standard of the commercial speech test.

I. A LONG TIME IN THE BARREL: THE LONG ROAD TO CONSTITUTIONAL PROTECTION FOR ALCOHOL ADVERTISING

A. A Brief First Amendment Overview

The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech, or of the press."[26] The freedom of expression is a vital, fundamental right.[27] While the drafters did not indicate what speech they intended the First Amendment to protect, historians suggest that the Amendment was a reaction to existing speech and press restrictions on political expression.[28] The First Amendment has been interpreted by the Supreme Court to protect against congressional, presidential, judicial, and state attempts to abridge speech.[29] This section provides background information about the First Amendment and what it protects, including commercial speech.

1. First Amendment Background

The text of the First Amendment created many ambiguities regarding what falls within its scope of protection.[30] While the text of the First Amendment contains absolute language, the Supreme Court has never expressed the view that the First Amendment prohibits all governmental

26. U.S. CONST. amend. I.

27. *See* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 14–17 (1992) (theorizing that multiple justifications underlie freedom of speech); *see also* Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1214–18 (1983) (stating that the multiple theories underlying the First Amendment are all plausible).

28. *See, e.g.*, ZECHARIAH CHAFFEE, JR., FREE SPEECH IN THE UNITED STATES 1–10 (1941) (discussing the drafters' intent behind the First Amendment).

29. *See* DANIEL A. FARBER, THE FIRST AMENDMENT 1–2, 13–16 (2d ed. 2003) (discussing the scope of First Amendment protection); Akhil Reed Amar, *The Document and the Doctrine*, 114 HARV. L. REV. 26, 58–59 (2000) (noting that states have to observe the First Amendment).

30. *See* CHAFFEE, *supra* note 28, at 16 (noting that the drafters did not define the meaning of the First Amendment).

restrictions on expression.[31] Rather, the Supreme Court has held that certain restrictions on expression may be permitted for legitimate reasons.[32]

The Court has established that different categories of speech are entitled to varying degrees of protection.[33] Although there is no textual distinction between commercial and noncommercial speech in the Amendment,[34] the Framers were more concerned with protecting political speech, given its importance to the democratic process.[35]

2. The First Amendment's Stepchild: Commercial Speech

Although the First Amendment does not distinguish between noncommercial and commercial speech in its text, the Supreme Court has recognized such a distinction.[36] The commercial speech doctrine has continuously evolved since its emergence in 1976, due to the Court's changing philosophy about how best to evaluate commercial speech.[37]

Courts have been reluctant to extend full First Amendment protection to commercial speech, partially due to two prevailing ideas regarding commercial speech.[38] First, advertising should not be trusted given its tendency to exaggerate. This was the impetus behind the creation of the Federal Trade Commission (FTC), which enforces advertising laws in an effort to protect American consumers.[39] Second, commercial speech merits

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31. *See generally* GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 3 (3d ed. 2008); *see also* Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874–79 (1960) (urging the Court to take the First Amendment's text literally).

32. *See* Louis J. Virelli, *Permissible Burden or Constitutional Violation? A First Amendment Analysis of Congress' Proposed Removal of Tax Deductibility from Tobacco Advertisements*, 2 U. PA. J. CONST. L. 529, 534 & n.31 (2000) (noting that libel, slander, obscenity, and incitement are not afforded First Amendment protection).

33. *See* Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 273–74 (2009) (stating that despite a few scattered free speech cases, the courts did not seriously interpret the First Amendment until 1919); *see also* David Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1207–09 (1983).

34. *See, e.g.*, MICHAEL G. GARTNER, ADVERTISING AND THE FIRST AMENDMENT 8 (1989) (stating that the Framers understood that it did not matter if information was conveyed through advertisements or as noncommercial speech).

35. *See* EDWIN ROME & WILLIAM H. ROBERTS, CORPORATE AND COMMERCIAL FREE SPEECH 36 (1985) (noting that free speech is integral in a democratic system).

36. *See* Kozinski & Banner, *supra* note 14, at 757–58. *But see* GARTNER, *supra* note 34, at 8–11 (arguing that this distinction was contrived by the Court).

37. *See* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 779 (1999) (noting that commercial speech has no presumption of validity); *see also* Benjamin B. Nelson, *Regulation or Prohibition? The Troubled Legal Status of Internet Gambling Casinos in the United States in the Wake of the Unlawful Internet Gambling Enforcement Act of 2006*, 9 TEX. REV. ENT. & SPORTS L. 39, 53–56 (2007) (discussing the Court's shifting commercial speech framework); Brian J. Waters, Note, *A Doctrine in Disarray: Why the First Amendment Demands the Abandonment of the* Central Hudson *Test for Commercial Speech*, 27 SETON HALL L. REV. 1626, 1627–30 (1997) (advocating that commercial speech be afforded full constitutional protection).

38. *See* THOMAS L. TEDFORD & DALE HARBECK, FREEDOM OF SPEECH IN THE UNITED STATES 192–93 (5th ed. 2005) (noting the reasons behind the anti-advertising attitudes).

39. *See id.* at 192 (discussing the FTC).

less constitutional protection than political speech because it has "less social value," and is not essential to the democratic process.[40] Given these factors, courts treated commercial speech as an element of business and property law, and not as expression, from the establishment of the FTC in 1914 through the emergence of the commercial speech doctrine in 1976.[41]

Proponents of commercial speech protection argue that the First Amendment is not limited to protecting political speech.[42] Commercial speech supporters also assert that because advertising serves an important information purpose, restrictions on advertising should be subject to strict scrutiny.[43]

B. The Evolution of the Commercial Speech Doctrine

The Supreme Court has defined commercial speech as speech that (1) constitutes a type of advertisement; (2) refers to a specific product; and (3) represents an economic motivation by the speech's owner.[44] Initially, the Supreme Court held that the First Amendment did not protect commercial speech.[45] Increased awareness about the social value of certain types of advertisements, however, persuaded the Court to reverse course and begin recognizing advertising as speech.[46] This section discusses the development of the general commercial speech doctrine.

1. The Commercial Speech "Exception"

In 1942, the Supreme Court enunciated the commercial speech exception to free speech law in *Valentine v. Chrestensen*.[47] In *Chrestensen*, the Court adopted a bright-line rule excluding commercial speech from First Amendment protection.[48]

In *Chrestensen*, the Court considered whether a New York City sanitation ordinance prohibiting the distribution of "commercial and

40. *Id. See generally* Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 606 (1996) (arguing that the characteristics of commercial speech do not necessitate that it be afforded the same protection as noncommercial speech).

41. *See* TEDFORD & HARBECK, *supra* note 38, at 192–93.

42. *See* Kozinski & Banner, *supra* note 15, at 652 (noting that in a "free market economy," commercial speech may be as important as noncommercial speech). *But see* Sylvia Law, *Addiction, Autonomy, and Advertising*, 77 IOWA L. REV. 909, 932 (1992) (arguing that commercial speech should not be fully protected).

43. *See generally* R. GEORGE WRIGHT, SELLING WORDS: FREE SPEECH IN A COMMERCIAL CULTURE 16 (1997).

44. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–68 (1983) (concluding that a federal statute prohibiting all unsolicited contraceptive mailings was an unconstitutional restriction on commercial speech under the First Amendment).

45. *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) ("[T]he Constitution imposes no such restraint on government as respects purely commercial advertising").

46. *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 378–79 (1973) (noting that commercial speech has some informational value).

47. 316 U.S. 52 (1942).

48. *See id.* at 54–55; *see also* Kozinski & Banner, *supra* note 14, at 756–59 (discussing *Chrestensen*).

business advertising matter"[49] was unconstitutional as applied to F.J. Chrestensen, who printed handbills that advertised tours on his submarine.[50] After being informed that the handbill was prohibited under the ordinance, Chrestensen revised the handbill to contain a mix of commercial information and political protest language.[51]

After being told that the new handbill was still in violation of the ordinance, Chrestensen filed suit, asserting a violation of his constitutional right to free speech.[52] The Supreme Court held that the application of the ordinance to Chrestensen was not unconstitutional, as the *intent* behind the handbill was commercial, and commercial speech was not protected by the Constitution.[53] Under *Chrestensen*, if the primary purpose behind speech was deemed commercial, that speech would not receive First Amendment protection.[54]

2. Commercial Speech Protection Begins

In the thirty years following *Chrestensen*, the Court repeatedly applied its primary purpose test to evaluate whether speech was commercial or noncommercial.[55] In 1973, the Court shifted its jurisprudence regarding commercial speech in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.[56] *Pittsburgh Press* involved a city ordinance that prohibited newspapers from publishing classified advertisements that discriminated on the basis of sex.[57] Although the Court ultimately upheld the ordinance because gender discrimination was illegal, it indicated that the advertisements would have been entitled to some protection if the advertised activity was not illegal.[58]

The Supreme Court went further to protect commercial speech in *Bigelow v. Virginia*.[59] In *Bigelow*, the Court evaluated whether a Virginia statute prohibiting publications from printing abortion service

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49. *See Chrestensen*, 316 U.S. at 53.

50. *See id.* at 52–54.

51. *See id.* at 53 (noting "that handbills solely devoted to 'information or a public protest'" were allowed).

52. *See id.* at 54.

53. *Id.* at 55.

54. *See* BRADFORD W. SCHARLOTT, THE FIRST AMENDMENT PROTECTION OF ADVERTISING IN THE MASS MEDIA (1980), *reprinted in* ADVERTISING AND COMMERCIAL SPEECH 1, 3 (Theodore R. Kupferman ed., 4th ed. 2004); Kozinski & Banner, *supra* note 14, at 755–58 (discussing the legacy of *Chrestensen*).

55. *See* ROME & ROBERTS, *supra* note 35, at 4 (stating that "purely commercial advertising or commercial speech [was] completely unprotected by the First Amendment" for more than thirty years). *But see* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (holding that paid political advertisements were protected and categorized as political, not commercial speech).

56. 413 U.S. 376 (1973); *see also* Browne et al., *supra* note 14, at 89–91.

57. *See Pittsburgh Press*, 413 U.S. at 378.

58. *See id.* at 388–89; *see, e.g.*, TEDFORD & HARBECK, *supra* note 38, at 200.

59. 421 U.S. 809 (1975); *see also* Browne et al., *supra* note 14, at 91–92 (noting how *Bigelow* clarified commercial speech protection for certain activities).

advertisements was constitutional.[60] Justice Harry Blackmun, writing for the majority, limited the *Chrestensen* holding by stating that *Chrestensen* only determined that regulations regarding the *distribution* of commercial matter were reasonable, not "that all statutes regulating commercial advertising are immune from constitutional challenge."[61] Justice Blackmun went on to state that "speech is not stripped of First Amendment protection merely because it appears [commercially]."[62]

The Court was more explicit about commercial speech protection in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[63] expressly holding that the First Amendment protects truthful speech that "does no more than propose a commercial transaction."[64] The majority stated that advertisements "may be of general public interest"[65] despite their commercial nature and noted that in a "predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions."[66]

The *Virginia Pharmacy* Court stopped short of affording commercial speech equal constitutional protection as noncommercial speech, stating that commercial speech was still protected to a lesser extent.[67] The Court indicated that the difference in protection was warranted by "commonsense" distinctions between advertising and other speech.[68]

In the year following *Virginia Pharmacy*, the Court overturned governmental restrictions on advertising for contraception, legal services, and real estate sales.[69] While reiterating that it did not intend to equalize constitutional protection for commercial and noncommercial speech, the Court did not specify the disparity of protection between noncommercial and commercial speech.[70]

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60. *See Bigelow*, 421 U.S. at 811–15 (noting that a Virginia editor had printed a New York abortion clinic advertisement; abortions were legal in New York at the time).

61. *Id.* at 819–20 (stating that *Chrestensen* should not be understood as disallowing First Amendment protection for advertising).

62. *Id.* at 818.

63. 425 U.S. 748 (1976).

64. *Id.* at 762.

65. *See id.* at 764 ("[S]ociety also may have a strong interest in the free flow of commercial information."); *see also* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 1–4 (2000) (arguing that commercial speech is constitutionally protected because of the informational function that advertising serves).

66. *Va. Pharmacy*, 425 U.S. at 765.

67. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 177 (3d ed. 2007) (noting that cases subsequent to *Virginia Pharmacy* established an intermediate level of scrutiny for commercial speech).

68. *Va. Pharmacy*, 425 U.S. at 771–72 n.24 (noting that there are "commonsense differences" between commercial and noncommercial speech).

69. *See generally* Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (striking down an Arizona law prohibiting legal service advertisements); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (overturning government ban on contraceptive advertising); Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977) (invalidating a law prohibiting the posting of "for sale" signs on real estate property).

70. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456–57 (1978) (noting that the validity of a ban on legal solicitations was subject to a lower level of scrutiny because it was commercial speech).

C. The Standard for General Commercial Speech: Central Hudson

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[71] the Supreme Court established a four-part balancing test for determining when the government may regulate commercial speech.[72] This section discusses the Supreme Court's decision, and explores how the *Central Hudson* commercial speech test has evolved.

1. The *Central Hudson* Balancing Test for Evaluating Commercial Speech Restrictions

Central Hudson involved a New York State Public Service Commission regulation banning electric utility companies from "promot[ing] the use of electricity."[73] The state argued that it could implement the ban because of its interest in limiting electric utility use.[74] The electric company challenged the regulation by alleging that the ban violated the company's First and Fourteenth Amendment rights.[75]

The Supreme Court reaffirmed the constitutional protection of commercial speech.[76] States seeking to uphold restrictions on commercial speech, the Court held, must show that they have a "substantial interest" in regulating the speech, in addition to proving that the restriction was carefully drafted to serve that interest.[77] The Court then set forth the four-part standard for evaluating commercial speech:

> In commercial speech cases, then, a four-part analysis has developed. 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.[78]

In applying this standard, the Court found that the first two prongs were satisfied, thereby establishing a relatively low threshold for meeting those

71. 447 U.S. 557 (1980).

72. *Id.* at 566 (citing *Ohralik*, 436 U.S. at 455–56 (1978)) (differentiating between commercial speech that is regulated by the government and noncommercial speech).

73. *See id.* at 558–60 (noting that the challenged ban prohibited promotional advertising for electrical services and was aimed at encouraging shifts of electric consumption away from peak times and to off-peak periods).

74. *See id.* at 559 (discussing how New York had legitimate fuel shortage concerns, which necessitated the need for energy conservation).

75. *See id.* at 560–61 (internal citations omitted) (remarking how the New York State Court of Appeals upheld the commission's order because they found little social value in promotional electric utility advertising).

76. *See id.* at 564 (stating that government restrictions on lawful commercial speech must be evaluated under the First Amendment to be upheld); *see also* Nelson, *supra* note 37, at 51–52 (discussing the importance of *Central Hudson*).

77. *See Cent. Hudson*, 447 U.S. at 564.

78. *Id.* at 566.

prongs.[79] The Court found the promotional advertising in question was not misleading or related to unlawful activity, and thus entitled to some constitutional protection.[80] The state asserted interests in energy conservation and a fair and efficient rate structure.[81] The Court agreed that both interests were "substantial."[82]

The third prong asks whether the restriction directly and materially advances the government's interest.[83] The Court found that the state's interest in energy conservation satisfied this prong, agreeing with the state's argument that an advertising ban on utility services would lead to less demand for those services.[84] Nevertheless, the Court did not find that the state's interest in a fair and efficient rate structure satisfied the third prong.[85] The Court held that the connection between the ban and the state's interest in a fair and efficient rate structure was indirect at best.[86]

Applying the fourth prong, the Court placed the burden on the state to prove that the prohibition was not "more extensive than necessary to further the State's interest in energy conservation."[87] The Court ultimately found that the state did not meet its burden of proof because it failed to demonstrate that there was no less restrictive means to accomplish its interest in energy conservation.[88] The Court struck down the Commission's order as an unconstitutional infringement on commercial speech.[89]

Although *Central Hudson* established a standard for evaluating governmental restrictions on commercial speech, the Supreme Court did not define commercial speech until *Bolger v. Youngs Drugs Products Corp.*[90] *Bolger* involved a constitutional challenge of a federal statute banning mailings of contraceptive advertisements.[91] The advertisements at issue

79. *See id.* at 566–69; *see also* Browne et al., *supra* note 14, at 105–07 (noting that the low threshold for the government to meet the first two prongs has persisted).

80. *See Cent. Hudson*, 447 U.S. at 566–68.

81. *See id.* at 568–69.

82. *Id.* at 569.

83. *See id.*

84. *Id.* (finding that the direct link between the restriction on advertising and demand for electricity was "immediate"). This reflects a generally accepted view of Supreme Court commercial speech jurisprudence: advertising increases demand, so a ban on that advertising should lessen demand. *See infra* Part I.D.

85. *Cent. Hudson*, 447 U.S. at 569.

86. *See id.* at 569 ("[T]he link between the advertising prohibition and appellant's rate structure is, at most, tenuous.").

87. *See id.* at 569–70 ("[The state] has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression.").

88. *See id.* at 570.

89. *See id.* at 570–72 (implying that the state carried the burden to show that anything less than the total ban on promotional advertising would be ineffective at furthering the state's interest in conservation).

90. 463 U.S. 60 (1983).

91. *See id.* at 61–62.

contained a mix of commercial and noncommercial information.[92] Youngs brought an action for declaratory and injunctive relief claiming that the statute violated its First Amendment rights.[93] The district court held that the advertisements were protected speech despite the mix of commercial and noncommercial information, and found that the statute's absolute ban violated the First Amendment.[94] The Supreme Court agreed with the district court, holding the statute unconstitutional.[95] Additionally, the Supreme Court expanded its definition of what constitutes commercial speech to include speech (1) that is a type of advertisement; (2) that refers to a specific product or service; and (3) where the speech's owner has an economic motivation behind the speech.[96]

Since *Central Hudson*, courts have applied the four-part test to evaluate the validity of governmental restrictions on commercial speech.[97] While the first two prongs of the *Central Hudson* test involve a relatively straightforward analysis and have been consistently applied by lower courts, the third and fourth prongs have created a great deal of confusion.[98] Much of this confusion stems from the fact that the Court in *Central Hudson* did not provide any guidance regarding the burden of proof for each prong or what would constitute sufficient proof to prevail.

2. The Supreme Court Shifts Its Stance on Commercial Speech

The Court's application of the third and fourth prongs has shifted in the years since *Central Hudson*, leaving an ambiguous standard in place.[99] In the decade following *Central Hudson*, the Supreme Court was reluctant to broaden the constitutional protection it had afforded commercial speech by requiring a low evidentiary showing for the government to meet its burden

92. *See id.* at 66–67 (noting that although the mailings contained contraceptive product advertisements and material regarding the importance of contraception generally, the speech was commercial).

93. *See id.* at 63.

94. *See id.* at 63–64.

95. *See id.* at 75.

96. *See id.* at 66–67 (determining that the mailings were commercial speech); *see also* Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55 (1999).

97. *See, e.g.*, Shannon M. Hinegardner, *Abrogating the Supreme Court's De Facto Rational Basis Standard for Commercial Speech: A Survey and Proposed Revision of the Third* Central Hudson *Prong*, 43 NEW ENG. L. REV. 523, 528 (2009) (proposing that a "material evidence" standard should be used in applying *Central Hudson*'s third prong); Nelson, *supra* note 37, at 52–55 (discussing how *Central Hudson* has been applied to commercial speech cases).

98. *See* Krista Hessler Carver, *A Global View of the First Amendment Constraints on FDA*, 63 FOOD & DRUG L.J. 151, 170–75 (2008) (highlighting how the government can typically fulfill the first two prongs, but litigation centers on the third and fourth); *see also* Browne et al., *supra* note 14, at 107 (noting the "ease" with which the government can fulfill the first two prongs of the *Central Hudson* test).

99. *See* Carver, *supra* note 98, at 174–76 (discussing how the Court has shifted the government's burden requirement under the third and fourth prongs since *Central Hudson*).

under the third and fourth prongs.[100] In 1993, however, the Court started to express a willingness to expand constitutional protection of commercial speech, indicated in part by the Court requiring a higher evidentiary standard for the government to meet its burden under the third and fourth prongs.[101]

a. The Evolution of the Central Hudson *Prongs*

The Supreme Court has stated that the third prong of *Central Hudson* requires a speech restriction to "directly and materially advance[] the asserted governmental interest."[102] The Court has described this requirement as "critical."[103] The fourth prong requires that the regulation not be "more extensive than [] necessary," requiring the government to demonstrate a narrow and reasonable fit between the challenged restriction and the stated interest.[104] Given the relationship between the two prongs, the Court often assesses both together.

In *Central Hudson*, the Court did not outline the burden or evidence required in order to satisfy the third and fourth prongs. In *Metromedia, Inc. v. San Diego*,[105] however, the Court appeared to adopt a standard of legislative deference.[106] In this 1981 case, the Court evaluated the constitutionality of a San Diego ordinance restricting outdoor billboards within the city.[107]

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100. *See* Sean P. Costello, *Strange Brew: The State of Commercial Speech Jurisprudence Before and After* 44 Liquormart, Inc. v. Rhode Island, 47 CASE W. RES. L. REV. 681, 748 (1997) (noting the change in the amount of protection that the Court is willing to extend commercial speech).

101. *See* Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 YALE J. ON REG. 85, 140 (1999) (noting that the Justices have been applying stricter, but not strict, scrutiny to the third and fourth prongs in recent commercial speech cases); *see also* Michael Hoefges & Milagros Rivera-Sanchez, *"Vice" Advertising Under the Supreme Court's Commercial Speech Doctrine: The Shifting* Central Hudson *Analysis*, 22 HASTINGS COMM. & ENT. L.J. 345, 372 (2000) (discussing how the Court has increased the government's burden to satisfy the third and fourth *Central Hudson* prongs).

102. Greater New Orleans Broad. Ass'n, Inc., v. United States, 527 U.S. 173, 188 (1999); *see also* Browne et al., *supra* note 14, at 107 (discussing the direct advancement inquiry of the third prong).

103. *See Greater New Orleans*, 527 U.S. at 188.

104. *See* Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993) (stating that the government has the burden to show that it "'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition" (quoting Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989))); *see also* Browne et al., *supra* note 14, at 108 (discussing the requirements of the fourth prong).

105. 453 U.S. 490 (1981).

106. *See* Mark A. Conrad, Board of Trustees of the State University of New York v. Fox*—The Dawn of a New Age of Commercial Speech Regulation of Tobacco and Alcohol*, 9 CARDOZO ARTS & ENT. L.J. 61, 75 (1990) (noting how the Court was deferential to the state in *Metromedia*). *But see* Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 599 (2004) (arguing that the Court in *Metromedia* treated the billboards as regulating the manner of speech and not the speech itself, similar to the Court's reasoning in *Chrestensen*).

107. *See Metromedia*, 453 U.S. at 493–94 (stating that the ordinance allowed for on-site commercial advertising, but forbade most other outdoor advertising signs unless they fell within one of twelve exceptions).

Applying *Central Hudson* to the restrictions on commercial speech, the Court first found that the first two prongs of the test were easily met.[108] In applying the third prong, the Court deferred to the local legislature's "common-sense" judgment, stating that the legislature was in the best position to determine the most appropriate way to achieve its interest in aesthetics and traffic safety.[109] The Court showed similar deference in its application of the fourth prong, agreeing with the state's argument that the billboard ordinance was the most direct approach to addressing the traffic hazard and aesthetic concerns of the municipality.[110] This decision was relatively weak commercial speech protection because it appeared to propose that the third and fourth prongs did not require any evidence and that deference would be given to the state.[111]

Following *Metromedia*, the Supreme Court showed less deference to state legislatures in evaluating the validity of commercial speech restrictions, but was still reluctant to expand constitutional protection for commercial speech.[112] In 1989, the Supreme Court focused on the fourth prong in *Board of Trustees of the State University of New York v. Fox*,[113] stating that commercial speech restrictions must have a reasonable fit between the legislature's means and ends, "not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective."[114] Nevertheless, the Court stated that if a restriction meets this burden, then it would defer to legislative judgment.[115]

This standard was adopted by lower courts as a deferential stance slightly short of the least restrictive means standard, only marginally tougher for states to meet than the deferential standard established in *Metromedia*.[116] *Fox* illustrated the Supreme Court's continued reluctance to expand constitutional protection for commercial speech because the Court did not require the state to show that a challenged regulation was the least restrictive alternative.[117]

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108. *Id.* at 507–08 (finding that the commercial speech was lawful and agreeing that the state had a substantial interest).

109. *Id.* (reflecting the Court's reluctance to expand commercial speech protection further than what *Central Hudson* provided).

110. *Id.*

111. *See* Conrad, *supra* note 106, at 74–75 (highlighting how the Court in *Metromedia* quickly found *Central Hudson*'s test satisfied, but was much more speech-protective while analyzing the billboard's effect on noncommercial speech).

112. See TEDFORD & HARBECK, *supra* note 38, at 208.

113. 492 U.S. 469 (1989).

114. *Id.* at 480.

115. *Id.* (noting that the Court would defer to the government's judgment if the restriction was narrowly tailored).

116. *See* Hinegardner, *supra* note 97, at 529–30.

117. *See* Conrad, *supra* note 106, at 82–85 (discussing how lower courts interpreted *Fox* as shifting the burden from the government to the party challenging the restriction, but how this was subsequently overturned in *Edenfield*).

b. The Court Expands Constitutional Protection for Commercial Speech

In 1993, the Court began to change its stance regarding the constitutional protection afforded to commercial speech in *Edenfield v. Fane*.[118] In *Edenfield*, the Court focused its evaluation of a commercial speech restriction on the third and fourth prongs of *Central Hudson*.[119] *Edenfield* concerned the constitutionality of a Florida Board of Accountancy rule prohibiting licensed certified public accountants from obtaining new clients through "direct, in-person, uninvited solicitation."[120]

Departing from its deferential position in earlier post-*Central Hudson* cases, the Court in *Edenfield* shifted positions and ruled that the government has the burden to provide sound evidence to support its position.[121] The Court held that this restriction was unconstitutional because the government did not meet its third prong evidentiary burden; specifically, the government did not provide any anecdotal evidence to support its contention that there would be harmful consequences without the ban.[122]

Two years later in *Florida Bar v. Went For It, Inc.*,[123] lawyers challenged Florida Bar Association rules imposing a thirty-day waiting period following accidents and disasters before personal injury lawyers could solicit victims and families, claiming the rules were a violation of their commercial speech rights.[124] The district court and the Eleventh Circuit held that the rules violated the First Amendment.[125] The Supreme Court agreed with the lower courts' holdings that the first two prongs of *Central Hudson* were met, but disagreed about the third and fourth prongs.[126]

Finding that the third prong was met, the Court concluded that the restriction directly and materially advanced the state's interest in its residents' well-being.[127] The Florida Bar had submitted statistical evidence highlighting the harmful effect of immediate solicitation on victims, which

118. 507 U.S. 761 (1993).

119. *See id.* at 770 (finding that the first two prongs were satisfied because the state has a substantial interest in regulating CPA solicitations to ensure independence).

120. *See id.* at 764–66 (internal citations omitted) (noting that the CPA challenging the restriction in Florida had previously practiced accountancy in New Jersey, where direct, in-person, uninvited solicitation was permitted).

121. *See id.* at 770–71 ("[This] burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." (internal citations omitted)); *see also* Hinegardner, *supra* note 97, at 536–37 (noting that *Edenfield* tightened the burden required for the third prong).

122. *See Edenfield*, 507 U.S. at 771–73 (discussing how Florida's only supporting evidence was testimony from the Florida Board of Accountancy's chairman, whose testimony was a series of conclusory statements without supporting evidence that did not add to the Board's justifications for the ban).

123. 515 U.S. 618 (1995).

124. *See id.* at 620 (holding that Florida Bar rules prohibiting targeted solicitations by personal injury lawyers for thirty days following an accident or disaster do not violate the Constitution).

125. *See id.* at 621–22.

126. *See id.* at 632–35.

127. *See id.* at 632–34.

the Court noted was important to finding that the state had fulfilled its burden.[128] Finally, the Court found that the fourth prong was met, agreeing with the state's argument that there were no reasonable alternatives to the statute, and that the thirty-day restriction was a reasonable and well-tailored fit given the state's interest.[129] Thus, the Court concluded that the Florida Bar rules were a permissible restriction on commercial speech, and upheld them.[130]

In both of these cases, the inclusion of statistical evidence was critical because the Court displayed a willingness to independently assess the evidentiary support for the restrictions rather than defer to state legislatures.[131] This had the effect of enhancing the protection for commercial speech.

D. The Commercial Speech Standard for Vice Advertising

The Supreme Court and legislatures have considered alcohol, gambling, and tobacco advertising to be vice advertisements because they promote socially harmful activities.[132] Despite the eagerness to regulate vice advertising, the Court's stance affording greater constitutional protection to commercial speech generally has also been reflected in vice advertising cases.[133] This section focuses on the commercial speech doctrine as applied to vice advertising.

1. Gambling and the Rational Relationship Standard

Modern vice advertising doctrine began in 1986 with *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,[134] a case concerning governmental restrictions on gambling advertising.[135] The Supreme Court adopted a paternalistic and deferential approach to local legislative judgment in *Posadas*,[136] reflecting its position along the arc of commercial

128. *See id.* at 627 ("[The] anecdotal record [about the harms caused by immediate solicitation] mustered by the Bar is noteworthy for its breadth and detail.").

129. *See id.* at 632–34.

130. *See id.* at 634–35.

131. *See generally* Virelli, *supra* note 37, at 547–48 (discussing that while the Court upheld the regulation in *Florida Bar*, it indicated that evidence was crucial for the state to meet its evidentiary burden).

132. *See, e.g.*, P. CAMERON DEVORE & ROBERT D. SACK, ADVERTISING AND COMMERCIAL SPEECH: A FIRST AMENDMENT GUIDE 4–22 (1999); Hoefges & Rivera-Sanchez, *supra* note 101, at 361–62.

133. *Compare* Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 346 (1986) (indicating that the Court might be willing to craft a vice advertising exception to the commercial speech doctrine), *with* 44 Liquormart v. Rhode Island, 517 U.S. 484, 514 (1996) (noting that vice status does alone "provide a principled justification for the regulation of commercial speech about that activity").

134. 478 U.S. 328 (1986).

135. *See id.*

136. *See* Nelson, *supra* note 37, at 52 (characterizing *Posadas* as paternalistic); *see also* Daniel Helberg, *Butt Out: An Analysis of the FDA's Proposed Restrictions on Cigarette Advertising Under the Commercial-Speech Doctrine*, 29 LOY. L.A. L. REV. 1219, 1252–54 (1996) (noting that *Posadas* suggested judicial deference would be applied where a vice activity is being regulated).

speech doctrine between *Metromedia*[137] and *Fox*.[138] The *Posadas* Court was reluctant to expand constitutional protection for commercial speech and applied *Central Hudson* to find that the restrictions were constitutional.[139]

Finding that the first two prongs were easily met, the Supreme Court's analysis in *Posadas* turned on its application of the third and fourth prongs.[140] Like its decision in *Central Hudson*, the Court found that the third prong was satisfied by the legislature's reasonable belief that restricting casino gambling advertising would reduce demand; the Court stated that this belief was "reasonable" as evidenced by the casino's desire to appeal the restriction all the way to the Supreme Court. [141] Finally, the Court decided that the fourth prong was met, reasoning that because the Puerto Rico Legislature could ban casino gambling outright, it could ban and regulate casino gambling in whatever manner it saw fit.[142]

The Court followed *Posadas* with *United States v. Edge Broadcasting Co.*,[143] where it upheld regulations prohibiting radio stations from broadcasting lottery advertisements in states that did not operate lotteries.[144] As in *Posadas*, the Supreme Court in *Edge Broadcasting* took a paternalistic approach and upheld the federal law.[145]

However, the Court revisited the gambling issue in *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*.[146] In *Greater New Orleans*, the Court evaluated the constitutionality of section 316 of the Communications Act of 1934, which prohibited the broadcasting of lottery and casino gambling on the radio and television.[147] Even though gambling was legal in Louisiana, the law prohibited broadcasters and television and radio

137. *See supra* notes 105–11 and accompanying text.

138. *See* Conrad, *supra* note 106, at 79–82 (noting that *Posadas* was significant because it resulted in the Court giving more deference to the state when crafting commercial speech restrictions).

139. *See id.* (discussing the Court's reluctance to extend commercial speech protection because of the vice nature of gambling advertising); *see also* Browne et al., *supra* note 14, at 100 (noting that the effect of *Posadas* was to "weaken the commercial speech doctrine by affording deference to the states"); Joshua A. Marcus, Note, *Commercial Speech on the Internet: Spam and the First Amendment*, 16 CARDOZO ARTS & ENT. L.J. 245, 266–67 (1998) (same).

140. *See* Browne et al., *supra* note 14, at 99–100 (discussing how *Posadas* turned on the third and fourth prongs).

141. *See* Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 342 (1986) (reasoning that the appellant's choice "to litigate this case all the way to this Court indicates that appellant shares the legislature's view").

142. *See id.* at 346 ("[P]recisely *because* the government could have enacted a wholesale prohibition . . . it is permissible for the government to [reduce] demand through restrictions on advertising."); *see also* Nelson, *supra* note 37, at 52.

143. 509 U.S. 418 (1993).

144. *See* Laura J. Schiller, *The Lottery in* United States v. Edge Broadcasting Co.*: Vice or Victim of the Commercial Speech Doctrine?*, 2 VILL. SPORTS & ENT. L. FORUM 127, 130–31 (1995).

145. *See Edge Broadcasting*, 509 U.S. at 426 (agreeing that the government's interest in discouraging gambling is substantial); *see also* Schiller, *supra* note 144, at 145–50 (examining the reasoning in *Edge Broadcasting*).

146. 527 U.S. 173 (1999) (holding that the statute banning lottery and gambling advertisements was unconstitutional).

147. *See id.* at 177–78.

station operators from broadcasting lottery and casino gambling advertisements.[148] The broadcasters sued, claiming that the regulation, as applied to them, violated the First Amendment.[149]

Applying the *Central Hudson* test, the Court found that the first two prongs were satisfied.[150] However, the Court did not find that the third and fourth prongs were met.[151] The Court determined that the government's regulatory scheme regarding tribal versus private casino regulations was inconsistent, given its stated interests in reducing gambling and preventing gambling in states that restrict gambling.[152]

Although *Greater New Orleans* did not directly overrule *Posadas* or *Edge Broadcasting*, the Court seemed to require more rigorous proof of a connection between the means and ends of governmental commercial speech restrictions even in vice advertising cases, and not just in general commercial speech cases.[153]

2. Alcohol Advertising

a. Alcohol Consumption in America

After Prohibition ended, alcohol opponents continued to push for increased alcohol regulation, citing the harms of youth drinking.[154] Alcohol lobbyists scored a significant victory during the Vietnam era when several states set the legal drinking age at eighteen or nineteen,[155] but by the mid-1980s, alcohol opponents successfully lobbied for federal legislation that effectively forced states to set their minimum drinking age at twenty-one.[156] Today, all states have a minimum drinking age of twenty-one.[157] Despite these efforts, alcohol remains readily available to those under twenty-one, and underage and abusive drinking by college students is a major concern for states and universities.[158]

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148. *See id.* at 180–81.

149. *See id.* (discussing how the district court upheld the statute as applied to the broadcasters under *Central Hudson*, and the Fifth Circuit affirmed).

150. *See id.* at 184–87.

151. *See id.* at 188–95.

152. *See id.* at 191–92 (finding inconsistency because the government was very supportive of tribal casinos while limiting private casinos).

153. See Nelson, *supra* note 37, at 54–55 (discussing how *Greater New Orleans* halted the Court's paternalist stance towards gambling restrictions).

154. *See* Judith G. McMullen, *Underage Drinking: Does Current Policy Make Sense?*, 10 LEWIS & CLARK L. REV. 333, 338 (2006) (noting how Prohibition left lasting attitudes about the harmful effects of alcohol consumption).

155. *See id.* at 339 (noting that one of the reasons people argued for an eighteen-year-old drinking age during the Vietnam War era was that eighteen-year-olds were eligible for the draft); *see also* HENRY WECHSLER & BERNICE WUETHRICH, DYING TO DRINK: CONFRONTING BINGE DRINKING ON COLLEGE CAMPUSES 30 (2002).

156. *See* McMullen, *supra* note 154, at 339.

157. *See id.* (noting the nationwide drinking age).

158. *See* Elissa R. Weitzman, *Controlling Misuse of Alcohol by College Youth: Paradigms and Paradoxes for Prevention*, *in* SOCIAL AND ECONOMIC CONTROL OF ALCOHOL 159–69 (Carole L. Jurkiewicz & Murphy J. Painter eds., 2008).

The Supreme Court and lower courts generally accept that the individual and societal harms associated with alcohol abuse are so numerous that there is always a substantial government interest in regulating alcohol advertisements.[159] This idea is rooted in the notion that the government can regulate health hazards.[160]

Binge drinking, or heavy episodic drinking, is rampant among these college students aged eighteen to twenty-four.[161] A recent study found that approximately 50 percent of college students aged eighteen to twenty report binge drinking.[162]

b. Alcohol Advertising and the First Amendment

Alcohol advertising is a highly regulated industry, with the FTC and Bureau of Alcohol, Tobacco, Firearms, and Explosives both overseeing alcohol advertising.[163] Despite this dual oversight, alcohol advertising is the most advertised vice activity in the United States.[164]

The Supreme Court first indirectly considered the constitutionality of alcohol advertising restrictions in *Queensgate Investment Co. v. Liquor Control Commission of Ohio*.[165] *Queensgate* involved a prohibition regarding off-premises advertisements of alcoholic beverage prices.[166] The Ohio Supreme Court rejected a First Amendment challenge to the prohibition, stating that the legislature was permitted by its power under the Twenty-first Amendment to promulgate the prohibition. The Supreme Court dismissed the appeal, stating that there was no substantive federal question, which technically was an affirmance of the Ohio court's ruling.[167] This dismissal created confusion among the circuit courts regarding what the relationship is between the First and Twenty-first Amendments in the alcohol advertising arena.[168]

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159. *See* Marc L. Sherman, Note, *We Can Share the Women, We Can Share the Wine: The Regulation of Alcohol Advertising on Television*, 58 S. CAL. L. REV. 1107, 1120–21 (1985) (stating that the substantial government interest in regulating alcohol is not debated).

160. *See* Ferguson v. Skrupa, 372 U.S. 726, 730–31 (1963) (noting that the government can regulate health hazards, but must still respect constitutional limits).

161. The National Institute on Alcohol Abuse and Alcoholism has defined binge drinking as "consuming 5 or more drinks (male), or 4 or more drinks (female), in about 2 hours." *See* NAT'L INSTS. OF HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERVS., *What Colleges Need to Know: An Update on College Drinking Research* (Nov. 2007), *available at* http://www.niaaa.nih.gov/Publications/EducationTrainingMaterials/Documents/1College_Bulletin-508_361C4E.pdf (noting the prevalence and harmful effects of binge drinking).

162. *See* WECHSLER, *supra* note 155, at 10.

163. *See* Sherman, *supra* note 159, at 1110–13.

164. *See* WECHSLER, *supra* note 155, at 10.

165. 459 U.S. 807 (1982).

166. *See* Queensgate Inv. Co. v. Liquor Control Comm'n of Ohio, 433 N.E.2d 138 (Ohio 1982) (the state decision).

167. *See* Mark Steffey, *Tension Between the First and Twenty-First Amendments in State Regulation of Alcohol Advertising*, 37 VAND. L. REV. 1421, 1439–51 (1984).

168. *See id.* at 1434–37 (noting how, in subsequent cases, the Court's dismissal in *Queensgate* caused confusion by implying that states had authority over liquor advertisements through the Twenty-first Amendment, without addressing the relationship between the Twenty-first and First Amendments in the area of alcohol advertising).

The Court clarified its position on the constitutionality of restrictions on alcohol advertising in *Rubin v. Coors Brewing Co.*[169] In *Rubin*, the Supreme Court evaluated the constitutionality of section 205(e)(2) of the Federal Alcohol Administration Act,[170] which banned beer manufacturers from disclosing alcohol content on their labels.[171] Coors Brewing Company filed suit, claiming that the federal statute was a violation of the First Amendment, as an unlawful abridgment of commercial free speech.[172] The government asserted two substantial interests in the regulation: (1) section 205(e)(2) curbs "'strength wars'" between beer manufacturers;[173] and (2) section 205(e)(2) aids state efforts to control alcohol consumption.[174] Applying the *Central Hudson* test, imputed from general commercial speech cases, the Court found that the speech in question was lawful and not misleading, and that the government had a substantial interest in prohibiting alcohol content information on beer labels to prevent "strength wars."[175]

For the third prong, the Court applied the standard set forth in *Edenfield*, and found that the Government did not meet its burden to prove that section 205(e)(2) directly and materially advanced its stated interest in preventing strength wars between beer manufacturers because alcohol content was allowed in beer advertisements but not on labels, and descriptive terms indicating a high alcohol content were allowed but not the content itself. [176] Additionally, the Court did not agree that Coors's pursuit of litigation against section 205(e)(2) evinced a plan to display alcohol content on beer labels to facilitate "strength wars."[177] In its holding, the Court distinguished its reasoning in *Posadas* regarding whether to defer to legislative judgment.[178] In *Rubin*, rather than deferring to the federal agency's judgment, the Court independently assessed whether the ban met the third prong based on the evidence that the government provided to support its position, and concluded that the statute did not directly advance

169. 514 U.S. 476 (1995) (holding that a federal regulation prohibiting beer labels from displaying alcohol content was an unconstitutional abridgement of the First Amendment).

170. 27 U.S.C. § 205 (2006).

171. *See id.* at 478–79 (discussing how the challenged statute prohibited beer labels from including the alcohol content of the beverage on the label).

172. *See id.* (noting how Coors filed suit after unsuccessfully petitioning to print alcohol content on their beer labels).

173. *See id.* at 483–84 (identifying the government's argument that allowing beer manufacturers to display alcohol content on beer labels will lead to the manufacturers competing for customers on the basis of that alcohol content, so that by prohibiting the alcohol content, the government is decreasing the number of consumers who choose a beer based on its alcohol content).

174. *See id.* at 485–86.

175. *See id.* at 483–86 (internal citations omitted).

176. *See id.* at 486–89.

177. "Strength wars" referred to the government's concern that alcohol manufacturers were seeking to display alcohol content on labels solely to compete for market share based on alcohol content. *Id.* at 483.

178. *See id.* at 482 n.2 ("Neither *Edge Broadcasting* nor *Posadas* compels us to craft an exception to the *Central Hudson* standard . . . .").

the government's interest because it was irrational.[179] This displayed how the Court was now willing to use its own judgment to question legislative bans rather than simply deferring to legislative judgment as it did in *Posadas*.[180]

Additionally, the Court held that the statute failed the fourth prong of *Central Hudson*, finding that a number of alternatives to the statute existed that "would prove less intrusive to the First Amendment's protections for commercial speech."[181] This was an indirect repudiation of the Court's reasoning in *Posadas*, because there the Court simply accepted the legislature's ability to impose a ban as evidence that the ban was reasonable.[182] This was also a tightening of the fourth prong standard set forth in *Fox*.[183] The Court thus concluded that Section 205(e)(2) was unconstitutional. The Court's decision in *Rubin* was a setback to those calling for a vice advertising exception in commercial speech cases.[184]

In 1996, the Supreme Court revisited the constitutionality of restrictions on alcohol advertising in *44 Liquormart, Inc., v. Rhode Island*.[185] In *44 Liquormart*, the Court evaluated the constitutionality of two Rhode Island statutes prohibiting liquor advertisements from displaying prices.[186] The petitioners in *44 Liquormart* brought suit in Rhode Island district court, claiming that the two Rhode Island statutes prohibiting price advertising for alcoholic beverages violated the First Amendment.[187]

In its decision, the Court reaffirmed its position that it would not create a vice advertising exception to the commercial speech doctrine.[188] Additionally, the Court noted that absolute bans on certain types of commercial speech, like the one at issue in *44 Liquormart*, should be evaluated more rigorously than a partial ban or less stringent regulation.[189] The Court opined that the state's interest in keeping alcohol prices high to

179. *Id.* at 488 (reiterating that the Government's scheme was irrational).

180. *See supra* note 133 and accompanying text (discussing how the Court deferred to legislative judgment in *Posadas*); *see also* Hinegardner, *supra* note 97, at 539–42 (discussing how *Rubin* was a repudiation of the reasoning in *Posadas*).

181. *See Rubin*, 514 U.S. at 491.

182. *See supra* notes 134–142 and accompanying text (discussing *Posadas*).

183. *Compare* Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989) (explicitly rejecting the least restrictive alternative standard for the fourth prong of the commercial speech test when determining to uphold a governmental regulation), *with Rubin*, 514 U.S. at 491 (applying the least restrictive alternative standard for the fourth prong of the commercial speech test, and ultimately holding that the government restriction was unconstitutional).

184. *See* Devore, *supra* note 11, at 3 (noting that this "delivered the quietus to the so-called vice exception"); *see also Rubin*, 514 U.S. at 481–82.

185. 517 U.S. 484 (1996) (holding that a Rhode Island state ban on advertising alcohol prices was an unconstitutional infringement of the First Amendment).

186. *See id.* at 489–90 (noting that the first Rhode Island statute prohibited alcohol beverage price advertisements in Rhode Island and that the second prohibited media or advertising companies from advertising alcohol prices in all newspapers, periodicals, broadcast advertisements, and other businesses located in Rhode Island).

187. *See id.* at 493–94.

188. *See id.* at 501–05.

189. *See id.* at 501 (stating that the burden on the State is greater when determining the constitutionality of a complete ban).

avoid increased consumption at lower levels was substantial, but warned that for the state to meet the third prong of *Central Hudson*, it would have to present evidence that the ban had a significant impact on reducing alcohol rates.[190] The Court agreed with the state's argument that commonsense judgment supported the claim that prohibiting price advertising would maintain higher prices, but concluded that the lack of evidentiary support prevented the state from satisfying the third prong.[191] Justice John Paul Stevens, writing for the majority, further noted that reliance only on commonsense arguments would amount to engaging in "speculation or conjecture."[192]

The Supreme Court also held that the fourth prong of *Central Hudson* was not met, given the large availability of alternatives that could aid the state's interest in temperance promotion.[193] Rejecting its reasoning in *Posadas*, the Court held that legislative judgment was not enough to satisfy the burden of the fourth *Central Hudson* prong.[194] Finally, the Court rejected Rhode Island's argument that since it has superior authority to completely ban alcohol, it could restrict alcohol advertisements, moving further from the Court's decision in *Posadas*.[195]

3. Tobacco Advertising

The Supreme Court's most recent vice advertising case, *Lorillard Tobacco Co. v. Reilly*,[196] addressed the constitutionality of restrictions on tobacco advertising. The Court reaffirmed and expanded the four-part *Central Hudson* test, rejecting the view that the government can regulate advertising to discourage unhealthy human behaviors.[197] Tobacco advertisements have been the focus of far more litigation than alcohol advertisements.[198]

In *Lorillard*, the Supreme Court evaluated the constitutionality of two Massachusetts regulations.[199] One restricted outdoor tobacco advertisements, prohibiting tobacco advertisements within 1,000 feet of

190. *See id.* at 505.
191. *See id.* at 505–07.
192. *See id.* at 507 & n.18 (noting that in other alcohol-related cases, the Court had not upheld alcohol advertising restrictions where the government relied on speculative evidence to support its claims about a ban's impact on consumption).
193. *See id.* at 507.
194. *See id.* at 509–10 (concluding "that a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes").
195. *Compare id.* at 511 ("Contrary to the assumption made in *Posadas* . . . banning speech may sometimes prove far more intrusive than banning conduct."), *with supra* note 142 and accompanying text (discussing how the *Posadas* Court noted that the power to ban includes the lesser power to heavily regulate).
196. 533 U.S. 525 (2001).
197. *See id.* at 553–55, 561.
198. *See generally* Calvert et al., *supra* note 17. Much of this early litigation did not center on the *Central Hudson* analysis and is beyond the scope of this Note, so it will not be discussed here. *See id.*
199. *See Lorillard*, 533 U.S. at 534–35.

schools or playgrounds.[200] The second regulation sharply restricted on-site tobacco advertisements by requiring that establishments place tobacco advertisements at least five feet above the ground to ensure that children could not see them.[201] Massachusetts claimed that the state's interest in the restriction was to decrease tobacco use by children because tobacco products constitute a health hazard.[202] The majority held that the first two prongs were met because the speech in question was lawful and because the government had a substantial interest in reducing youth demand for tobacco products.[203]

The bulk of the Court's analysis focused on the third and fourth prongs.[204] First, the Court analyzed the constitutionality of the outdoor advertising restrictions and found that the third *Central Hudson* prong was met, because the government provided sufficient anecdotal evidence showing a direct link between advertising and youth demand for tobacco products.[205] However, the Court did not find that the fourth prong was met because the ban was so broad.[206] Despite accepting a broad ban under the fourth prong in *Fox*,[207] the *Lorillard* Court expressed unease with the fact that the regulation on outdoor tobacco advertising effectively constituted a complete ban.[208] The Court noted that adults have an interest in receiving information about cigar and smokeless tobacco products because adult use of these products is lawful, just as manufacturers and retailers have an interest in conveying information.[209] Justice Sandra Day O'Connor, writing for the majority, expressed concern that the regulation restricted speech that adults desired.[210] Finally, the Court identified several alternative means by which the state could advance its interest in reducing youth tobacco product use.[211]

Next, the Court analyzed the constitutionality of the on-site advertising regulations and concluded that the third prong was not met because the regulation's scheme was irrational and inconsistent.[212] The Court also found that the on-site restriction did not meet the fourth prong because it was overbroad and limited adults' access to information.[213]

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200. *See id.* at 553, 556.
201. *See id.* at 566.
202. *See id.*
203. *See id.* at 555.
204. *See id.* at 560–66.
205. *See id.* at 561.
206. *See id.* at 561–63 (holding that the ban was broad because it affected very large portions of metropolitan areas in Massachusetts).
207. *See supra* notes 113–15 and accompanying text.
208. *See Lorillard*, 533 U.S at 561–66 (noting that the ban would prevent cigar and smokeless tobacco advertising in a majority of Massachusetts's metropolitan areas).
209. *See id.* at 564.
210. *See id.* at 528–30 (discussing tobacco restrictions and competing interests).
211. *See id.* at 561.
212. *See id.* at 566 (concluding that the on-site advertisements were irrational because children could look up and still see the advertisements).
213. *See id.* at 564, 567.

Justice Clarence Thomas, concurring in judgment, used *Lorillard* to reiterate his view that commercial speech should be subject to the same protection as noncommercial speech.[214] Justice Thomas stated that advertising restrictions should not be used to promote any interest besides a "fair bargaining process."[215] Additionally, Justice Thomas explicitly rejected suggestions for a "vice" exception to the First Amendment.[216]

II. THE SPLIT BETWEEN THE THIRD AND FOURTH CIRCUITS

Part II examines the circuit split between the Third and Fourth Circuits regarding the proper application of *Central Hudson* to determine the constitutionality of governmental restrictions on alcohol advertisements in college student publications. First, Part II details the Third Circuit's decision in *Pitt News v. Pappert*,[217] which followed Supreme Court precedent on this issue and concluded that a prohibition on alcohol advertisements in college student publications was a violation of the First Amendment. Next, Part II discusses the Fourth Circuit's decision in *Educational Media Co. at Virginia Tech, Inc. v. Swecker*,[218] which departed from the Supreme Court's standard for evaluating vice advertising restrictions. The Fourth Circuit held that a restriction on alcohol advertising in college student publications was not facially unconstitutional.

A. The Third Circuit Holds that Prohibitions on Alcohol Advertisements in College Student Publications Are Not Valid Restrictions on Commercial Speech

In *Pitt News*, the Third Circuit held that a Pennsylvania regulation restricting alcohol advertising in college student publications was an unconstitutional infringement on the freedom of expression as applied to *Pitt News*, a University of Pittsburgh student publication, following the Court's reasoning in *Rubin*,[219] *44 Liquormart*,[220] and *Lorillard*.[221]

1. Act 199: The Challenged Pennsylvania Statute

In 1996, the Pennsylvania Legislature amended Pennsylvania's Liquor Code, enacting what is popularly known as "Act 199."[222] The legislative

214. *See id.* at 577, 588–89 (Thomas, J., concurring) (opining that allowing restrictions on tobacco advertising to protect children was a slippery slope, which could lead to restrictions on fast food advertising to prevent child obesity or restrictions on alcohol advertising to prevent underage drinking).

215. *See id.* at 577, 588–89.

216. *See id.* (calling for strict scrutiny review to evaluate the constitutionality of restrictions on commercial speech).

217. 379 F.3d 96 (3d Cir. 2004).

218. 602 F.3d 583 (4th Cir. 2010), *cert. denied*, 131 S. Ct. 646 (2010).

219. *See supra* notes 169–84 and accompanying text.

220. *See supra* notes 185–95 and accompanying text.

221. *See supra* Part I.D.3.

222. *See* Pitt News v. Pappert (*Pitt News II*), 379 F.3d 96, 102 (3d Cir. 2004). Act 199 states, in relevant part:

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history surrounding the Act does not explain its purpose; however, Pennsylvania asserted in district court proceedings that Act 199 was intended to address underage drinking on college campuses, as well as campus binge drinking by both underage students and adult students.[223]

Act 199 regulated alcohol advertisements in college student publications.[224] Criminal sanctions were imposed on those who violated Act 199.[225] The Bureau of Liquor Control Enforcement (BLCE) was responsible for investigating Act 199 violations and facilitating arrests.[226] The Pennsylvania Liquor Control Board (LCB) was responsible for interpreting Pennsylvania state laws binding on the BLCE, and the LCB interpreted Act 199 as only being enforceable against alcohol advertisers, such as retailers or restaurants advertising alcohol in college student publications, but not the publications in which the advertisements were placed.[227] Additionally, in an informational publication about Act 199, the LCB clarified that advertisements for a licensed alcohol vendor that did not contain any beverage references were permissible.[228] Finally, the LCB stated that Act 199 did not implicate magazines and newspapers circulated on college campuses that had no connection to the campuses.[229]

2. The *Pitt News* Alleges that Act 199 Is a Violation of Its Constitutional Rights

In December 1997, the Fuel & Fuddle restaurant canceled its longstanding contract with the *Pitt News* after being cited for an Act 199 violation.[230] The *News*, in an effort to protect its other advertisers, stopped accepting alcohol advertisements, and tried unsuccessfully to convince liquor retailers to submit advertisements that complied with Act 199.[231] In

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> (e) The following shall apply to all alcoholic beverage . . . advertising:
>
> (4) The use in any advertisement of alcoholic beverages of any subject matter, language or slogan directed to minors to promote consumption of alcoholic beverages is prohibited. Nothing in this section shall be deemed to restrict or prohibit any advertisement of alcoholic beverages to those persons of legal drinking age.
>
> (5) No advertisement shall be permitted, either directly or indirectly, in any booklet, program book, yearbook, magazine, newspaper, periodical, brochure, circular or other similar publication published by, for or in behalf of any educational institution.

47 PA. STAT. ANN. § 4-498(e) (West Supp. 2011).

223. *See* Pitt News v. Fisher (*Pitt News I*), 215 F.3d 354, 358 (3d Cir. 2000). *See generally supra* Part I.D (discussing the prevalence of underage and binge drinking on college campuses).

224. *See Pitt News I*, 215 F.3d at 357.

225. *See id.* at 357–58 (discussing how Act 199 violations were misdemeanors and punishable by a fine of up to $500 or imprisonment); *see also Pitt News II*, 379 F.3d at 102 (same).

226. *See Pitt News I*, 215 F.3d at 358–59.

227. *See id.*

228. *See Pitt News II*, 379 F.3d at 102.

229. *See id.*

230. *See Pitt News I*, 215 F.3d at 359.

231. *See Pitt News II*, 379 F.3d at 103 (noting how other advertisers canceled their advertising contracts with the *Pitt News*).

1998, The *News* suffered a $17,000 advertising revenue loss, which effectively shortened the paper,[232] impeded its ability to make capital expenditures, and had other deleterious effects.[233]

In April 1999, the *Pitt News* sued the Pennsylvania Attorney General, the BCLE Director, and the LCB Chairman in the U.S. District Court for the Western District of Pennsylvania, alleging that the enforcement of Act 199 violated its constitutional rights under 42 U.S.C. § 1983, along with the rights of the paper's readers and advertisers.[234] After a hearing to determine whether to issue a preliminary injunction, the district court denied the *News*'s motion, holding that the paper lacked standing to challenge Act 199's constitutionality on behalf of its readers and advertisers, and had not suffered any personal injury, and therefore could not assert First Amendment claims on its own behalf.[235]

In June 2000, the Third Circuit affirmed the district court's denial of a preliminary injunction on appeal.[236] The Third Circuit agreed that the *News* did not have standing to assert third-party claims; however, the court determined that since the *News* had suffered an advertising loss, it had standing to challenge Act 199.[237] Despite this, the Third Circuit concluded that the preliminary injunction had been properly denied.[238] The *Pitt News* then filed a petition for a writ of certiorari with the Supreme Court, which was denied.[239]

3. Act 199: Unconstitutional as Applied to the *Pitt News*

Following the Supreme Court's denial of certiorari in 2001, the parties cross-motioned for summary judgment.[240] On February 13, 2003, the district court granted summary judgment for the defendants.[241] The *Pitt News* appealed this decision to the Third Circuit, which exercised plenary review of the district court's order.[242]

The Third Circuit panel held that despite Pennsylvania's arguments that the college student publications could still print unpaid alcohol advertisements, "[i]mposing a financial burden on a speaker based on the

232. *See Pitt News I*, 215 F.3d at 359 (noting that because the *Pitt News* was required to run an equal proportion of advertisements and text, the reduction in advertisements forced the paper to limit the amount of space in which it could print articles and photographs).

233. *See Pitt News II*, 379 F.3d at 103.

234. *See id.*; *see also Pitt News I*, 215 F.3d at 359.

235. *See Pitt News II*, 379 F.3d at 103 (stating that the paper did not suffer any injury because it could still publish what it wanted, as long as it did not accept paid advertisements violating the ban, and holding that the paper could not allege First Amendment rights on behalf of its readers and advertisers).

236. *See id.*

237. *See Pitt News I*, 215 F.3d at 362 (noting that the *Pitt News* had standing to bring a claim because its loss of advertising revenue was a redressable injury).

238. *See id.* at 366 (noting that the *Pitt News* did not have a good chance at succeeding on the merits).

239. *See* Pitt News v. Fisher, 531 U.S. 1113 (2001).

240. *See Pitt News II*, 379 F.3d at 104.

241. *See id.*

242. *See id.*

content of the speaker's expression is a content-based restriction of expression and must be analyzed as such."[243] Concluding that Act 199 was a restriction of commercial speech, the Third Circuit panel applied *Central Hudson* to evaluate the constitutionality of the restriction.[244] It noted that the first two prongs of the test were satisfied: (1) the First Amendment protected the commercial speech in question; and (2) the governmental interest was, "at minimum, 'substantial.'"[245]

The court concluded that the third and fourth prongs of the test were not satisfied.[246] According to the Third Circuit, in an opinion written by then-Circuit Judge Samuel Alito, the ban did not directly and materially advance the governmental interest in lowering underage and abusive drinking rates by college students because it only restricted one form of media targeting college students. Nor was the ban narrowly tailored to achieve its stated objective of lowering underage drinking rates because the majority of readers were of legal drinking age.[247] Additionally, the court resolved that the restriction further violated the First Amendment by imposing a financial burden on a distinct part of the media; namely, university media.[248]

In the Third Circuit's analysis of the third prong, it established that the Pennsylvania statute did not directly and materially advance the government's interest.[249] The court stated that Pennsylvania's burden under the third prong would not be "'satisfied by mere speculation or conjecture.'"[250] Additionally, the court resolved that a challenged restriction would not be upheld if it facilitated "ineffective or remote support for the government's purpose,"[251] or has only a small likelihood that it will further the state's interest.[252] This analysis was consistent with the Supreme Court's third prong analysis in the later *Central Hudson* commercial speech cases, decided after the Supreme Court took a less deferential approach, including the recent vice advertising cases.[253]

To meet its third prong burden, Pennsylvania claimed that the "elimination of alcoholic beverage ads from *The Pitt News* and other publications connected with the University will slacken the demand for alcohol by Pitt students."[254] This claim fell short of the state's third prong

243. *Id.* at 106.
244. *See id.*
245. *Id.*
246. *Id.* at 107–09.
247. *See id.*
248. *See id.*
249. *See id.* at 107.
250. *See id.*; *supra* notes 118–22 (discussing the Supreme Court's decision in *Edenfield*; *see also supra* Part I.D.3 (describing the Court's holding in *Lorillard*).
251. *See Pitt News II*, 379 F.3d at 107 (internal citations omitted).
252. *See id.*
253. *See supra* Parts I.C–D.
254. *See Pitt News II*, 379 F.3d at 107 (noting how Pennsylvania argued that, because alcohol advertising encourages consumption, Act 199 discourages underage and abusive drinking by limiting access to alcohol advertisements by underage college students). The Third Circuit did not agree with this assertion because Act 199 only applied to a very narrow sector of the college campus media, and Pennsylvania failed to provide evidence that the restriction had the intended effect of reducing underage and abusive drinking. *See id.*

burden,[255] similar to the result in *Rubin* and *44 Liquormart*.[256] According to Judge Alito, this claim lacked empirical evidence, and relied on "nothing more than 'speculation' and 'conjecture'" to support Pennsylvania's contentions about the effectiveness of Act 199 in reducing underage and abusive drinking.[257]

Additionally, the Third Circuit expressed discomfort with the fact that students were still subject to alcohol advertisements in a variety of media, such as television, radio, and other publications, such that limiting advertisements in newspapers would not significantly reduce exposure.[258] This demonstrated an inconsistency in Pennsylvania's attitude to alcohol laws,[259] similar to that which the Supreme Court highlighted in *Rubin*.[260] In *Rubin*, the restriction prohibiting alcohol content on beer bottles, but not malt liquor bottles, was determined to be an inconsistency in the government's reasoning.[261] Here, the Third Circuit used *Rubin* to discuss how this inconsistency in Pennsylvania's restriction supported the result that the Pennsylvania legislature had not met their burden under *Central Hudson*'s third prong.[262]

Analyzing the fourth prong, the Third Circuit held that Act 199 was "not adequately tailored to achieve [Pennsylvania's] asserted objectives," concluding that the Act was not a reasonable fit between the state's interest and the narrowly tailored means of achieving that interest.[263] The court stated that the Act was both over-inclusive by restricting lawful adults on campus from accessing alcohol advertisements in college publications, as well as under-inclusive by only limiting college publications, without addressing other media on campus through which underage and lawful students were exposed to alcohol advertisements.[264] Additionally, the Third Circuit adopted the Supreme Court's reasoning in *Lorillard*[265] to show that the restriction was not narrowly tailored, pointing out that like the

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Additionally, the Third Circuit decided that it was counterintuitive to believe that Act 199 would reduce college students' demands for alcohol, and that Pennsylvania failed to provide evidence that Act 199 would make it harder for students to find alcohol retailers near campus. *See id.*

255. *See id.* (noting that Pennsylvania used a commonsense argument: because alcohol advertisements generally increased demand for alcohol, restricting advertisements should decrease demands). The Third Circuit did not dispute the assertion that alcohol advertising encourages consumption; however, the court stated that the converse was unsupportable without empirical evidence proving the claim. *See id.*

256. *See supra* Part I.D.2.

257. *See Pitt News II*, 379 F.3d at 107–08.

258. *See id.* at 107.

259. *See id.*

260. *See supra* notes 169–84 and accompanying text.

261. *See supra* notes 169–84 and accompanying text.

262. *See Pitt News II*, 379 F.3d at 107.

263. *See id.* at 108.

264. *See id.* at 108–09.

265. *See id.* at 108 (noting how the Supreme Court in *Lorillard* found that the restriction was not narrowly tailored because it limited access to adults, who could legally buy tobacco products); *see also supra* Part I.D.3 and accompanying text.

advertising restrictions in *Lorillard*, Act 199 prevented adults who could lawfully purchase alcohol from accessing alcohol advertisements.[266]

Finally, the Third Circuit identified several alternatives to the challenged restriction in *Pitt News* that would better serve Pennsylvania's interest.[267] The court stated that the most direct method available to Pennsylvania would be to fully enforce alcohol beverage laws on college campuses.[268]

The Third Circuit concluded that Act 199 violated the First Amendment for a second reason: it imposed a financial burden on a narrow sector of the media, media associated with a college or university.[269] The court decided that Act 199 was presumptively unconstitutional, and required Pennsylvania to show that Act 199 was necessary to further its substantial interest in the regulation, which it did not do.[270] As such, the court determined that this was a second, independent reason for Act 199's unconstitutionality.[271]

B. The Fourth Circuit Holds that Restrictions on Certain Alcohol Advertisements in College Student Publications Are Valid

1. The Challenged Virginia Administrative Code

The Virginia Alcoholic Beverage Control Board, a subsidiary of the Department of Virginia Alcoholic Beverage Control, is responsible for regulating alcohol advertisements throughout Virginia.[272] With this regulatory authority, it enacted an alcohol advertising regulation in the 1970s, updated in the 1990s, which prohibited "various types of advertisements for alcohol in any college student publication."[273] The restriction included "any college or university publication . . . that is: (1) prepared, edited or published primarily by its students; (2) sanctioned as a

266. *See Pitt News II*, 379 F.3d at 108 (finding that the Pennsylvania restriction was too broad because it banned alcohol advertisements in *all* university publications, even those with a substantial majority of readers who were over the age of twenty-one).

267. *See id.*

268. *See id.* (discussing research that showed just how lax enforcement of alcohol beverage control laws were on college campuses, which the Court determined was the most direct way to reduce underage and abusive drinking on college campuses).

269. *See id.* at 109–12.

270. *See id.* at 111.

271. *See id.* at 111–12.

272. 602 F.3d 583 (4th Cir. 2010), *cert. denied*, 131 S. Ct. 646 (2010).

273. *See id.* at 587 (discussing the challenged Virginia statute). Section A(2) of the Virginia statute states the following:

> Advertisements of alcoholic beverages are not allowed in college student publications unless in reference to a dining establishment. . . . A 'college student publication' is defined as any college or university publication that is prepared, edited or published primarily by students at such institution, is sanctioned as a curricular or extra-curricular activity by such institution and which is distributed or intended to be distributed primarily to persons under 21 years of age.

3 VA. ADMIN. CODE § 5-20-40(A)(2) (2008). Section A(3) states:

> Advertisements of alcoholic beverages are prohibited in publications not of general circulation which are distributed or intended to be distributed primarily to persons under 21 years of age, except in reference to a dining establishment . . . .

Id. § 5-20-40(A)(3).

curricular or extracurricular activity; and (3) distributed or intended to be distributed primarily to persons under 21 years of age."[274] Regulated publications could not print any alcohol advertisements, including those for "beer, wine or mixed beverages," unless the advertisement was for a dining institution.[275] Virginia claimed that this regulation sought to further its interest in reducing underage or dangerous consumption of alcohol on college campuses.[276]

2. The Eastern District of Virginia Uses *Pitt News* to Find the Virginia Restriction Invalid

Two Virginia publications affected by this advertising regulation, the *Collegiate Times* and the *Cavalier Daily*, classified as college student publications despite having a majority of readership over twenty-one, challenged the statute as a violation of their First Amendment rights.[277] The U.S. District Court for the Eastern District of Virginia held that the statute was facially unconstitutional as an invalid ban on commercial speech.[278]

In *Educational Media Co.*, the district court relied on the analysis in *Pitt News*.[279] First, the court agreed with the plaintiffs that the first *Central Hudson* prong was met, as the speech in question was both lawful and truthful.[280] The court then agreed with the defendants regarding the second prong, stating that reducing underage and excessive drinking by college students is a substantial government interest.[281]

A significant portion of the district court opinion was dedicated to the third *Central Hudson* prong, the direct advancement requirement.[282] Noting that the government bears the burden to demonstrate this requirement, the district court relied on the post-*Edenfield* line of commercial speech cases to ascertain what evidentiary showing was required.[283] Although the defendants suggested that the district court

274. *Educ. Media Co.*, 602 F.3d at 587 (internal citations omitted).

275. *See id.* (noting that even though dining establishments could submit advertisements, they were restricted to using the following terms to reference alcohol beverages: "A.B.C. on-premises, beer, wine, mixed beverages, cocktails, or any combination of these words.").

276. *See* Educ. Media Co. at Va. Tech, Inc., v. Swecker, No. 3:06CV396, 2008 U.S. Dist. LEXIS 45590, at *33–34 (E.D. Va. Mar. 31, 2008) (internal citations omitted).

277. *See id.* at *29.

278. *See id.* at *57.

279. *See id.* at *32; *see also supra* Part II.A.

280. *See Educ. Media Co.*, 2008 U.S. Dist. LEXIS 45590, at *30–32 (relying on the Third Circuit's reasoning in *Pitt News*, which held that since the activity in question was lawful, and the speech not misleading, it was clearly protected by the First Amendment); *see also supra* Part II.A.

281. *See Educ. Media Co.*, 2008 U.S. Dist. LEXIS 45590, at *33–34; *see also supra* notes 161–62 and accompanying text (detailing problems with underage and binge drinking on college campuses).

282. *See Educ. Media Co.*, 2008 U.S. Dist. LEXIS 45590, at *34–37; *see also supra* notes 71–89 and accompanying text (discussing *Central Hudson*).

283. *See Educ. Media Co.*, 2008 U.S. Dist. LEXIS 45590, at *34–36.

simply determine if the statute was reasonable,[284] the court concluded that this reasonableness standard utilized in *Posadas* was no longer good law,[285] employing *Pitt News* to show how circuit courts read the direct advancement requirement narrowly.[286]

The district court carefully scrutinized Virginia's evidence showing that the ban directly and materially advanced the government's interest in reducing underage and excessive drinking on college campuses.[287] Virginia provided evidence consisting of one expert, several college administrators, and statistics regarding the prevalence and negative effects of underage and excessive drinking on college campuses.[288] The expert, Dr. Henry Saffer, presented his research, which found that limiting alcohol advertisements would reduce alcohol and binge drinking rates in adults aged 18–20.[289] Dr. Saffer believed that college newspapers were a special type of media, with no reasonable substitute;[290] thus, banning advertisements in college publications would reduce alcohol consumption because advertisers could not substitute another medium for college newspapers.[291] The district court did not find this argument persuasive.[292]

The college administrators, citing statistical evidence on underage and binge drinking rates, highlighted the problem that Virginia faced with drinking on college campuses.[293] However, the district court was interested in reviewing evidence showing how the ban itself affected drinking rates from its enactment in the 1970s.[294] The lack of evidence showing the impact of the ban and similar advertising restrictions persuaded the district court that the regulation did not directly advance the government's interest in reducing underage and excessive college drinking rates to a material degree.[295] Therefore, the district court concluded that the third *Central Hudson* prong was not met.[296]

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284. *See id.* at *34–47 (noting how Virginia argued that the district court defer to legislative judgment in crafting the ban, relying on *Posadas*); *see also supra* notes 135–42 and accompanying text (discussing *Posadas*).

285. *See Educ. Media Co.*, 2008 U.S. Dist. LEXIS 45590, at *37–38.

286. *See id.* at *38 (noting how the Fourth Circuit in *Pitt News* expressed that the very fact that college students were still exposed to a torrent of advertisements detracted from the government's direct advancement argument).

287. *See id.* at *40–47.

288. *See id.* at *40–44 (discussing Virginia's evidence).

289. *See id.* at *40–46.

290. *See id.*

291. *See id.* (discussing how Dr. Saffer's conclusions depended on college students not exposed to *any* media containing alcohol advertisements).

292. *See id.* at *46 (noting how Dr. Saffer's testimony ignored the reality that college students now live in a multimedia environment, exposed to television, radio, and other media outlets, all of which include alcohol advertisements).

293. *See id.* at *41–45; *see also supra* notes 161–62 and accompanying text (discussing alcohol abuse among college students).

294. *See Educ. Media Co.*, 2008 U.S. Dist. LEXIS 45590, at *42 (internal citations omitted).

295. *See id.* at *47.

296. *See id.*

Applying the fourth prong of *Central Hudson*, the district court determined that the regulation was not narrowly tailored.[297] The plaintiffs used the Commonwealth's expert to show the availability of alternatives; Dr. Saffer admitted that taxing alcohol and counter-advertising would serve the same state interest.[298] Additionally, Virginia did not use any evidence to show that the restriction was narrowly tailored.[299]

3. The Fourth Circuit Reverses, Directly Contradicting the Third Circuit

The Fourth Circuit distinguished *Educational Media Co.* from *Pitt News*, stating that *Pitt News* was an "as applied challenge."[300] The court stated that unlike an as-applied challenge, in a facial challenge, the burden for the government is lower, because a court must simply determine as a question of law whether the government meets its burden under *Central Hudson*, without considering the statute's "impact on the plaintiff asserting the facial challenge."[301] The court then went on to apply the *Central Hudson* test.[302]

Like the Third Circuit in *Pitt News*, the Fourth Circuit found that the first two prongs were met.[303] The speech in question was lawful and not misleading, and the court agreed that the government's interest in reducing underage and abusive drinking on college campuses was substantial.[304]

The Fourth Circuit, unlike the Third Circuit in *Pitt News*, relied on "history, consensus, and common sense" to find that there was a direct link between advertising bans on college publications and a decreased demand for alcohol among college students.[305] The Fourth Circuit found support for its treatment of "history, consensus, and simple common sense" in *Burson v. Freeman*,[306] a First Amendment case involving non-commercial speech in which the Court upheld a "campaign-free zone" within 100 feet of a polling place.[307]

The Fourth Circuit found that the relationship between alcohol advertising and demand for advertising would not justify an advertising ban in every situation involving a harmful activity, but found that the relationship in *Educational Media Co.* did support the ban.[308] The justification given was that the ban here was justified because "college student publications primarily target college students."[309] As such, the

297. *See id.* at *48.
298. *See id.*
299. *Id.* at *53.
300. *See* Educ. Media Co. at Va. Tech, Inc. v. Swecker, 602 F.3d 583, 588 n.4 (4th Cir. 2010), *cert. denied*, 131 S. Ct. 646 (2010) (noting that the district court used both terms but determining that the district court meant to find the statute facially unconstitutional).
301. *Id.* at 588.
302. *See id.*
303. *Id.* at 589.
304. *Id.*
305. *Id.*
306. 504 U.S. 191, 210 (1992).
307. *See id.* at 211. This argument was similar to an argument *rejected* by the Supreme Court in *44 Liquormart*. *See supra* notes 185–86 and accompanying text.
308. *Educ. Media Co.*, 602 F.3d at 590.
309. *See id.* (internal citations omitted).

Fourth Circuit stated that it was "counterintuitive for alcohol vendors to spend their money on advertisements in newspapers with relatively limited circulation, directed primarily at college students, if they believed that these ads would not increase demands by college students."[310]

Finally, in finding that the third prong of *Central Hudson* was met, the Fourth Circuit stated that the college publications challenging the ban had not presented any evidence to refute Virginia's assertion that alcohol advertisements in college student publications would increase the demand for alcohol among those college students.[311] Thus, in a marked departure from the precedent of the Third Circuit and Supreme Court, the Fourth Circuit shifted the burden of the third prong to those challenging a restriction, stating that it was up to the plaintiffs to dispute the link between the Virginia statute and college student drinking rates.[312] This reasoning departs from most vice advertising cases applying *Central Hudson*.[313]

Additionally, the Fourth Circuit held that the fourth prong of *Central Hudson* was met.[314] The statute was narrowly tailored because it only affected college student publications whose readership is predominantly under twenty-one years of age, and it only banned certain types of alcohol advertisements.[315] Additionally, the Court noted that the ban here was not a complete ban, as it only restricted certain types of alcoholic beverages in certain publications.[316] Accordingly, the Fourth Circuit held that the statute was facially constitutional.[317]

4. The Dissent: *Pitt News* Should Be Followed Here

The dissenting judge in *Educational Media Co.* district judge Norman K. Moon sitting by designation, stated that by applying *Central Hudson* in a manner consistent with *Pitt News*, both the third and fourth prongs were not met.[318] Judge Moon noted that Virginia's interest was reducing underage and abusive drinking on college campuses, not simply reducing general underage college student drinking.[319] He stated that the challenged restriction was incorrectly applied to the two student publications, as both papers showed that the majority of their readers were over the age of twenty-one.[320]

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310. *See id. But see supra* note 195 and accompanying text (noting that the Supreme Court rejected a similar argument in *44 Liquormart*).

311. *See Educ. Media Co.*, 602 F.3d at 590 (noting that the newspapers failed to "provide evidence to *specifically* contradict this link").

312. *Id.*

313. *See supra* notes 169–95 and accompanying text (discussing the Supreme Court's decisions in *Rubin* and *44 Liquormart*).

314. *See Educ. Media Co.*, 602 F.3d at 590.

315. *See id.* at 590–91.

316. *See id.*

317. *Id.* at 591.

318. *See id.* at 592–94 (Moon, J., dissenting).

319. *Id.* at 594.

320. *See id.* at 595 n.7 (arguing that this was unconstitutional as applied because both publications provided evidence showing that the majority of their readers were over the age of twenty-one).

Additionally, Judge Moon conducted his own analysis of the third and fourth prongs of *Central Hudson*.[321] Regarding the third prong, Judge Moon implied that since both publications had a majority of readers over the age of twenty-one, the "common sense" argument relied on by the majority was not applicable.[322] The Fourth Circuit's reasoning regarding advertisers' desire to advertise in college student publications as evidence that the advertising was directly linked to demand was "speculative," and by exempting certain types of alcohol advertisements, the statute displayed an "internal inconsistency."[323]

Furthermore, Judge Moon pointed out that the affidavit that the Fourth Circuit relied on as evidence supporting its application of the third prong made mention of the fact that "there is . . . very little empirical evidence that alcohol advertising has any effect on actual alcohol consumption," and that "a ban on advertising in one medium generally results in greater advertising saturation in other media or forms of marketing."[324] Dr. Saffer, who gave the affidavit, admitted that there were no studies he could point to that showed the effectiveness of an alcohol advertising ban in college student publications at reducing even general drinking rates on campus.[325]

Finally, Judge Moon wrote that he did not believe that the fourth prong was met, because the statute's ban on certain types of alcohol advertisements was not the most effective way to advance the governmental interest, given the existence of other proven and more direct means, such as increasing alcohol taxes, increasing advertising warnings of the dangers of drinking, raising alcohol prices, and simply banning prices on alcohol advertisements.[326] He also noted that the Virginia statute singled out alcohol advertisements in college student publications, without attempting to regulate other alcohol advertisements on campus.[327]

III. THE THIRD CIRCUIT'S STANDARD IS MOST CONGRUENT WITH SUPREME COURT PRECEDENT

As discussed, the *Pitt News* and *Educational Media Co.* courts applied the *Central Hudson* test differently when evaluating governmental restrictions on alcohol advertisements in college student publications. Part III considers each Circuit's application of the third and fourth prongs, and concludes that the Fourth Circuit erred in its Central Hudson application. It first discusses the slight differences between the two cases and why these differences are not significant enough to warrant differing conclusions. Next, Part III examines the differing applications of *Central Hudson* and

321. *See supra* notes 71–89 and accompanying text (discussing the third and fourth *Central Hudson* prongs).

322. *See Educ. Media Co.*, 602 F.3d at 591–93.

323. *Id.* at 593–94 (discussing that the majority did not follow the Court's third prong burden, established in *Edenfield* and all following cases); see also *supra* Part I for a discussion of the Supreme Court's evolving application of the third prong.

324. *Educ. Media Co.*, 602 F.3d at 593 n.5 (internal citations omitted).

325. *See id.*

326. *See id.* at 596 n.8.

327. *See id.*

highlights why the Fourth Circuit's analysis of the third and fourth prongs was incorrect. Finally, Part III concludes by proposing that the Supreme Court resolve the split by adopting the clear Third Circuit standard for evaluating governmental restrictions on alcohol advertisements in college student publications.

A. Minor Differences Between the Two Circuit Cases

1. The Challenged Statutes Are Substantively Similar

The statute that the Third Circuit analyzed, Act 199,[328] was a broad ban, prohibiting all alcohol advertisements in any publications published for or on behalf of any colleges or universities.[329] Act 199 was enforceable against alcohol retailers who published advertisements in applicable publications.[330] Publications that circulated on college campuses but had no connection to those campuses were exempt.[331]

In contrast, the challenged restriction in *Educational Media Co.* prohibited only certain alcohol advertisements in college student publications,[332] allowing restaurants with liquor licenses to publish advertisements including vague references to alcohol sold on premises.[333] Despite the Fourth Circuit's determination that the Virginia restriction was not a broad ban,[334] the restriction broadly restricts commercial speech by effectively disallowing most types of alcohol advertisements in Virginia college student newspapers.[335] Thus, although proponents of the Virginia restriction may argue that it has less of an impact on First Amendment rights, the restriction is still a broad ban limiting commercial speech because it affected all campus-affiliated papers and every alcohol-related advertisement any publication wanted to print.[336]

2. The Type of Challenge Should Not Matter

Unlike the Third Circuit in *Pitt News*, the Fourth Circuit declined to address whether the challenged Virginia statute was unconstitutional as applied to the two student publications bringing the action.[337] The Fourth Circuit simply evaluated whether the challenged Virginia restriction was facially unconstitutional.[338] Unlike an as-applied challenge, a facial

328. *See supra* notes 222–29 and accompanying text (discussing Act 199).
329. *See supra* notes 222–29 and accompanying text.
330. *See supra* notes 227–28 and accompanying text.
331. *See supra* note 229 and accompanying text.
332. *See supra* notes 272–76 and accompanying text (discussing the challenged Virginia statute).
333. *See supra* notes 272–76 and accompanying text.
334. *See supra* notes 314–17 and accompanying text (discussing the Fourth Circuit's reasoning to uphold the ban).
335. *See supra* notes 189, 208–09 and accompanying text.
336. *See supra* notes 208–09 and accompanying text.
337. *See supra* note 300 and accompanying text.
338. *See supra* note 300 and accompanying text (discussing how the Fourth Circuit declined to hear the case as an as-applied challenge because the district court held the statute

challenge to the constitutionality of a commercial speech restriction can be resolved as a question of law when the government meets its *Central Hudson* burden. This is significant because it allows the appellate court to make its own legal determinations without deferring to the district court.[339]

Although the majority opinion in *Educational Media Co.* distinguished *Pitt News* as an as-applied challenge,[340] this distinction is misleading.[341] Facial challenges usually succeed only by showing that the challenged law is unconstitutional in *all applications*.[342] But this is not the standard for First Amendment cases, and does not explain why the Fourth Circuit treated the facial challenge differently than the Third Circuit treated the as-applied challenge.[343]

Furthermore, the *Central Hudson* analysis is the same whether applied in a facial or as-applied challenge.[344] Thus, although there is a difference in the type of challenges at issue here, the circuit split still exists regarding the proper application and evidentiary standard of *Central Hudson* when evaluating governmental restrictions on alcohol advertisements in college student publications.[345]

B. The Supreme Court Should Resolve the Circuit Split by Reversing the Fourth Circuit and Clarifying Its Vice Advertising Stance

1. The Supreme Court's Denial of Certiorari

The Supreme Court denied Educational Media's petition for certiorari.[346] Litigation continues, however, as the two college papers continue to pursue an as-applied challenge in the district court.[347] Additionally, two other states still have laws restricting alcohol advertisements in college student publications, so that the Supreme Court may once again be called on to

facially unconstitutional). *But see supra* notes 318–20 and accompanying text (noting that the dissent in *Educational Media Co.* expressed that this could have been heard as applied in part because the statute was incorrectly applied to the two papers bringing the suit).

339. *See supra* notes 300–02 and accompanying text (discussing standard for facial versus as-applied challenge).

340. *See supra* notes 300–02 and accompanying text.

341. The distinction is misleading because both still require the same *Central Hudson* application. *See supra* notes 300–02 and accompanying text.

342. *See* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1339 (2000) (noting that the distinction between facial and as-applied challenges is not clear enough to warrant an automatic or controlling effect).

343. *See supra* notes 300–02 and accompanying text (noting that the facial challenge burden is lower in First Amendment challenges).

344. *See supra* notes 318–23 and accompanying text.

345. *See supra* Part II.

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

347. *See Educational Media Company at Virginia Tech v. Swecker*, ACLU, http://acluva.org/176/educational-media-company-at-virginia-tech-v-swecker/ (last visited Nov. 16, 2011).

resolve the issue.[348] Therefore, despite the Court's denial of certiorari, the circuit split persists and still requires resolution.[349]

2. The Fourth Circuit Relied on Mere Speculation and Conjecture While Analyzing the Third Prong, Contradicting Supreme Court Precedent

Although there is consensus on the application of the first two prongs of the *Central Hudson* test,[350] the proper evidentiary standard for the third prong continues to plague lower courts, despite the Supreme Court's clarification in *Rubin*, *44 Liquormart*, and *Greater New Orleans*.[351] This Note asserts that the Fourth Circuit erred in applying the third *Central Hudson* prong in three ways.

First, the commonsense link that the Fourth Circuit relied on as evidence is speculative and similar to arguments previously rejected by the Court.[352] Virginia argued that the fact that advertisers were challenging the ban was evidence that the advertisements would increase demand and curtail the government's interest.[353] This same argument was made by the government in *Rubin* and rejected.[354]

The second way in which the Fourth Circuit erred was by accepting Dr. Saffer's testimony without statistical proof of his claims as evidence that the advertising ban on alcohol advertisements in college student publications would curtail underage and excessive drinking on college campuses.[355] Dr. Saffer admittedly lacked empirical evidence to support his claims.[356] Furthermore, as the district court noted, this argument was irrational because Virginia college students were still exposed to alcohol advertisements on campus from a variety of unregulated media outlets, which casts doubt on the effectiveness of this ban.[357] This displayed an

348. There are three states that currently prohibit or restrict alcohol advertisements in college student publications: New Hampshire, Utah, and Virginia. *See* N.H. REV. STAT. ANN. § 179:31 (LexisNexis Supp. 2011); UTAH ADMIN. CODE r. 81-1-17 (2011); 3 VA. ADMIN. CODE § 5-20-40 (2010).

349. *See supra* Part II.

350. *See supra* notes 246–72, 303–17 and accompanying text.

351. *See supra* notes 146–53, 169–95 and accompanying text (discussing the Supreme Court's evidentiary requirements in those cases).

352. *See supra* notes 146–53, 169–95 and accompanying text.

353. *Compare supra* notes 308–10 (discussing Virginia's supporting evidence, claiming that alcohol vendors would not advertise in college student publications if they did not believe that those advertisements would increase demand among college students), *with supra* notes 146–53 (noting that the Court in *Greater New Orleans* rejected the government's argument that allowing advertising would increase demand, finding that the argument was too causal), 169–95 (noting how the Court in *Rubin* rejected similar speculative evidence regarding advertising and demand) and accompanying text.

354. *See supra* notes 177–80 (discussing the Supreme Court's rejection of the government's argument in *Rubin*).

355. *Compare supra* notes 307–09, 324–25 (discussing how the Fourth Circuit accepted Virginia's evidence), *with supra* notes 288–96 (district court rejecting same proof because it found that to accept the proof as evidence would be inconsistent with the Supreme Court's jurisprudence).

356. *See supra* notes 288–96, 323–24 (noting that the restriction had been in place for over thirty years when litigation began).

357. *See supra* notes 290–91 and accompanying text.

inconsistency in Virginia's college alcohol policy, similar to the inconsistency displayed by the government's regulatory scheme in *Rubin*, and should not have been credited.[358]

Finally, and most significantly, the Fourth Circuit's analysis was incorrect because it did not require Virginia to show statistical evidence proving the effectiveness of the ban. The Virginia alcohol restriction had been in place for over thirty years when litigation began.[359] Despite this, Virginia was unable to provide *any* statistical evidence proving the restriction's effectiveness at reducing underage and excessive drinking rates on college campuses during this time.[360] The Fourth Circuit did not address this lack of evidence, displaying a deferential stance towards the legislature. Given the Court's precedent, it is unlikely that this ban would survive scrutiny by the Supreme Court.[361] The Court has emphasized the importance of empirical support since shifting its stance on commercial speech in *Edenfield*.[362] The Fourth Circuit's decision is troubling because it weakens commercial speech by echoing the Court's analysis in *Posadas*, reasoning the Court has long since repudiated.[363]

In contrast to the Fourth Circuit and in line with the Supreme Court, the Third Circuit expressed its understanding of the vice advertising subset as requiring the government to provide evidence to meet its burden under the third *Central Hudson* prong.[364] Pennsylvania made similar arguments when trying to uphold its restriction.[365] However, the Third Circuit found that the lack of evidence supporting the state's claims, along with the anti-paternalist view the Court showed in *Rubin*, *44 Liquormart*, and *Greater New Orleans*, required it to find that the state did not meet its burden.[366]

The Fourth Circuit's reliance on commonsense and testimony lacking evidentiary support was a departure from recent Supreme Court vice advertising cases.[367] Although the state does have a substantial interest in curtailing underage and excessive drinking on college campuses, these restrictions limit adults' access to alcohol advertisements. The Court has

358. *See supra* notes 174–77 and accompanying text.

359. *See supra* notes 272–76 and accompanying text.

360. *See supra* notes 286–96 and accompanying text.

361. *See supra* notes 146–53, 169–95 and accompanying text (discussing the Supreme Court's recent treatment of vice advertising bans).

362. *See supra* note 121 and accompanying text (discussing how the Court changed its stance in *Edenfield* by shifting the burden for the third prong to the government).

363. *Compare supra* note 145 and accompanying text (noting that the Court in *Posadas* accepted paternalistic government reasoning), *with supra* notes 121–22 and accompanying text (noting that the Court required more than paternalistic reasoning in *Edenfield*).

364. *See supra* notes 249–62 and accompanying text (discussing how the Third Circuit interpreted the post-*Edenfield* cases as requiring evidentiary support).

365. *See supra* notes 249–62 and accompanying text (discussing how Pennsylvania made similar commonsense arguments as Virginia, which the Third Circuit did not accept).

366. *See supra* notes 146–53, 169–95, 249–62 and accompanying text (discussing the post-*Edenfield* vice advertising cases).

367. *See supra* notes 122, 196–206 and accompanying text.

indicated concern about such a situation.[368] Proponents of alcohol advertising restrictions argue that the serious problem of underage and excessive binge drinking justifies limits on commercial speech in college publications.[369] However, despite these concerns, restrictions that limit commercial speech should not be upheld in the absence of evidence showing that those restrictions directly advance the state's interest.[370] Thus, the Third Circuit's reasoned application of the third *Central Hudson* prong in college alcohol advertising cases should be applied.[371]

3. The Fourth Circuit Improperly Placed an Evidentiary Burden on Parties Challenging Governmental Restrictions

The Fourth Circuit also erred in its analysis of *Central Hudson*'s third prong by placing an evidentiary burden on the publications challenging governmental restrictions.[372] The Supreme Court has established that government actors seeking to uphold restrictions on commercial speech have the burden of providing evidence to prove that the burden directly and materially advances the government's interest.[373] The Fourth Circuit's apparent burden shift is a direct contradiction of this precedent, and should be reversed.[374]

4. The Fourth Circuit Did Not Consider the Numerous Alternatives Available Under the Fourth *Central Hudson* Prong

Under its analysis of the fourth prong, the Fourth Circuit determined that the restriction was narrowly tailored because it only affected college student publications with a majority of readers under twenty-one, and allowed certain advertisements referencing alcoholic beverages.[375] Additionally, the Fourth Circuit noted that this restriction complemented the state's other efforts at reducing underage and excessive drinking.[376]

The Supreme Court has displayed an increasingly speech-protective stance when analyzing the fourth prong in *Central Hudson* cases, even in vice cases.[377] Although the Virginia restriction was specifically tailored and part of a comprehensive effort, the state did not meet its evidentiary burden to show how the restriction was necessary in light of the

368. *See supra* notes 196–206 and accompanying text (noting how the majority in *Lorillard* was concerned with how the restriction at issue there limited the access that adults had to lawful information about tobacco products).

369. *See supra* Part I.D.2.a and accompanying text (noting the problems with alcohol policy).

370. *See supra* Part I.D.

371. *See supra* Part II.A.3 and accompanying text.

372. *See supra* notes 311–13 and accompanying text (discussing how the Fourth Circuit expressed the view that the two Virginia publications did not present enough evidence showing why the ban did not meet the third and fourth prongs of *Central Hudson*).

373. *See supra* Parts I.C–D.

374. *See supra* notes 311–13 and accompanying text.

375. *See supra* notes 314–17 and accompanying text.

376. *See supra* notes 314–17 and accompanying text.

377. *See supra* Part I.

comprehensive effort.[378] The state mentioned that it aimed at reducing underage and excessive drinking on college campuses includes educational programs and enforcement efforts.[379] These types of programs have proven to be *more* effective at reducing underage and excessive college drinking; thus, the state should have been required to show why the commercial speech restriction was necessary in light of the other two programs.[380] Given the Court's recent protection of commercial speech, the existence of two effective programs that do not restrict speech does not explain why a speech restriction is also necessary, especially since the Virginia restriction solely restricted advertisements in college papers and not in all campus media.[381]

The policies and studies discussed in Part I.D.2 indicate that although alcohol advertising influences demand for alcohol, limiting alcohol advertising is not the most efficient means of curtailing underage and excessive drinking on college campuses.[382] Alternative policies, such as dedicated campus enforcement efforts of drinking laws, increased taxation on alcohol, and multi-pronged education efforts have proven more effective at educating college students about the risks of underage and excessive drinking, and at encouraging changes in these drinking patterns.[383] Given the availability of alternatives, despite the Virginia restriction's "narrow" application, the Fourth Circuit should not have determined that the fourth prong of *Central Hudson* was met.

CONCLUSION

Colleges and universities face a grave problem with underage and excessive drinking on their campuses. While alcohol advertising may generally influence demand, this does not justify unconstitutional restrictions on commercial speech. States interested in curtailing underage and binge drinking should focus their regulatory efforts on enforcing alcohol beverage laws and educating students about the dangers of drinking, rather than adopting paternalistic approaches to the problem like the challenged Virginia statute at issue in *Educational Media Co*. Given the importance of the First Amendment, the Supreme Court should take the next opportunity to reaffirm the constitutional protections afforded to vice advertising.

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378. *See supra* notes 314–17, 326–27 and accompanying text (noting Judge Moon's disagreement with the majority's fourth prong application).

379. *See supra* notes 314–17 and accompanying text.

380. *See supra* notes 263–71 and accompanying text (discussing more effective policies for reducing underage and excessive drinking on college campuses).

381. *See supra* Part I (detailing how the fourth prong has consistently required that the government show why a challenged restriction is necessary to achieve its stated interest).

382. *See supra* Part I.D.2.

383. See supra notes 297–99 and accompanying text (detailing the district court's application of the fourth *Central Hudson* prong in *Educational Media Co.*).