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MUTING THE COMMERCIAL SPEECH DOCTRINE:
*BOARD OF TRUSTEES OF THE STATE
UNIVERSITY OF NEW YORK V. FOX*
109 S. Ct. 3028 (1989)

The commercial speech doctrine provides significant first amendment protection¹ to speech that proposes a commercial transaction.² Before this doctrine's inception, commercial speech enjoyed no refuge from government regulation.³ The commercial speech doctrine provides a mechanism for balancing the public benefit from the free flow of information⁴ with the state's interest in regulating business.⁵ As the doctrine developed, it increasingly curtailed the government's ability to regulate commercial speech.⁶ Restrictions were allowed to extend no

1. Although the doctrine provides significant protection, courts recognize its limited nature. See *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 456 (1978) (characterizing commercial speech's protection as limited, commensurate with its subordinate position in the scale of first amendment values).

2. See *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340 (1986) (defining commercial speech as that which does "no more than propose a commercial transaction").

3. See *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942) (refusing to extend first amendment protection to advertising). But see *Cammarano v. United States*, 358 U.S. 498 (1959). In *Cammarano*, the Court stated: "The [Valentine] ruling was casual, almost off hand. And it has not survived reflection." *Id.* at 514. See generally Comment, *The First Amendment Protection of Commercial Speech and State Regulation of Advertising in the Dental Profession: Parker v. Kentucky Board of Dentistry*, 56 U. CIN. L. REV. 1525 (1988) (overview of commercial speech development).

4. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976) ("It is a matter of public interest that [private economic] decisions, in the aggregate, be intelligent and well informed."). See generally A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT* (1948) (discussing the need for the free flow of information in a representative democracy).

5. See *Virginia State Bd.*, 425 U.S. at 770 (noting that the first amendment controls in balancing the dangers of suppressing information with the dangers of its misuse if freely available). See also D. ROHRER, *MASS MEDIA, FREEDOM OF SPEECH, AND ADVERTISING* 75-80 (1979) (tracing the development of the commercial speech doctrine). See generally J. NOWACK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 923-43 (2d ed. 1983).

6. See *Virginia State Bd.*, 425 U.S. at 774 (noting that a state may not suppress the flow of truthful information out of fear of that information's effect on its recipients).

further than necessary to advance the state's regulatory interests.⁷ In *Board of Trustees of the State University of New York v. Fox*,⁸ however, the Supreme Court retreated from previous formulations of the doctrine by choosing not to impose a least restrictive means requirement on commercial speech regulations.⁹

In *Fox*, the State University of New York (SUNY) prohibited vendors from demonstrating their products in campus dormitory rooms.¹⁰ Several students sued for a declaratory judgment that such action deprived merchants and students of their first amendment rights.¹¹ After granting a preliminary injunction,¹² the district court held for SUNY and declared the speech restrictions reasonable in light of a dormitory's function.¹³ The Second Circuit reversed on appeal¹⁴ and remanded the

7. See *Central Hudson Gas v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (invalidating the state's complete suppression of commercial speech when narrower restrictions on expression would adequately serve the state's interest).

8. 109 S. Ct. 3028 (1989).

9. *Id.* at 3033.

10. *Id.* at 3030. SUNY Resolution 66-156 (1979) states: "No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events." *Id.* A representative of American Future Systems, Inc. (AFS) conducted a demonstration of the company's products in a dorm room at SUNY's Cortland campus. Campus police informed the representative of the resolution and asked her to leave. When she refused, police arrested her. Subsequently, Todd Fox agreed to host an AFS presentation in his dormitory room. The Director of Residential Life at SUNY-Cortland denied Fox permission and stated that the university would take legal action if any demonstrations were held. *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 649 F. Supp. 1393, 1395 (N.D.N.Y. 1986).

11. *Fox*, 649 F. Supp. at 1395. AFS, its representative Kathy Rapp and Todd Fox filed suit December 2, 1982. *Id.* Several other students joined as plaintiffs later. *Id.* at 1397.

12. *American Future Sys., Inc. v. State Univ. of N.Y.*, 565 F. Supp. 754, 770 (N.D.N.Y. 1983). The district court enjoined the prohibition of AFS from demonstrating its products in the dormitory rooms of SUNY-Cortland students. The court refused, however, to enjoin SUNY from prohibiting the actual sale of AFS products, reasoning that the claim of a constitutional right to consummate transactions did not demonstrate a likelihood of success on the merits. *Id.* In addition, the court stated that nothing in its injunction order restrained SUNY from promulgating and enforcing reasonable regulations governing the time, place and manner of such demonstrations. *Id.* at 771.

13. *Fox*, 649 F. Supp. at 1399. The district court recognized that SUNY's interest in protecting students from commercial exploitation was not the motivation for the regulations. Accordingly, the court's ruling rested on the public forum doctrine. The court upheld the resolution on public forum grounds, citing strong support. *Id.* See also *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 808 (1985) (holding

case for determination as to whether SUNY could impose less restrictive means to advance its interest.¹⁵ The Supreme Court reversed the Second Circuit, holding that commercial speech regulations may extend beyond the least restrictive means necessary to advance the government's interest.¹⁶

The Supreme Court first brought commercial speech within the bounds of the first amendment¹⁷ in *Bigelow v. Virginia*.¹⁸ In *Bigelow*, the Court invalidated a state statute prohibiting abortion advertising.¹⁹ The Court renounced the view that the first amendment does not afford constitutional protection to commercial speech²⁰ but did not determine

that a decision to restrict access of a nonpublic forum need only be reasonable); *Glover v. Cole*, 762 F.2d 1197 (4th Cir. 1985) (upholding a university prohibition of on-campus sales and fund raising activities by groups not sponsored by students or the college); *Chapman v. Thomas*, 743 F.2d 1056 (4th Cir. 1984) (upholding a university prohibition on door-to-door solicitation in dormitories).

14. *Fox v. Board of Trustees of the State Univ. of N.Y.*, 841 F.2d 1207 (2d Cir. 1988). Before the district court's ruling, Kathy Rapp dropped out of the suit. AFS dropped out prior to the appeal. Accordingly, the court focused only on the students' first amendment claim of the right to receive information. *Id.* at 1208.

15. *Id.* at 1214. *See Central Hudson Gas v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (striking down a commercial speech regulation because a more limited restriction would adequately serve the government's interest). *But see American Future Sys., Inc. v. Pennsylvania State Univ.*, 752 F.2d 854, 866 (3d Cir. 1984) (concluding that a court may not substitute its own judgment for the University's decision as to the best means to carry out its legitimate ends).

16. *Board of Trustees of State Univ. of N.Y. v. Fox*, 109 S. Ct. 3028, 3033 (1989).

17. *See Comment, supra* note 3, at 1527 (discussing the development of the commercial speech doctrine in relation to the regulation of professional advertising).

18. 421 U.S. 809 (1975).

19. *Id.* at 829. The Virginia statute provided:

If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage[s] or prompt[s] the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor.

VA. CODE ANN. § 18.1-63 (1960). *Bigelow*, the managing editor of a Charlottesville, Virginia newspaper, published an ad for a New York City organization announcing that it would arrange low cost abortions for women in accredited New York hospitals. *Bigelow*, 421 U.S. at 811-12. The trial court found *Bigelow* in violation of the statute. *Id.* at 812-13. The Supreme Court of Virginia affirmed, rejecting *Bigelow's* first amendment claim, holding that the state may constitutionally prohibit commercial advertising. *Id.* at 814. The United States Supreme Court reversed. *Id.* at 829.

20. *See Comment, supra* note 3, at 1527. The Court distinguished a prior holding as limited to its particular facts. The Court stated that the ordinance upheld in that case regulated the manner in which commercial advertising could be distributed. The Court renounced the view that the case supports a sweeping proposition that advertising receives no constitutional protection. *Bigelow*, 421 U.S. at 819-20. *See also New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (concluding that speech does not lose

the extent of its constitutional protection.²¹

The Court made that determination one year later²² in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.²³ In *Virginia State Board*, a consumer group successfully challenged a state law prohibiting pharmacists from advertising prescription drug prices.²⁴ The Court criticized the state's paternalistic method of protecting its citizens by keeping them ignorant.²⁵ Noting that well-informed decisions require open channels of communication,²⁶ the Court concluded that the public's right to the free flow of information outweighed the state's regulatory interests.²⁷

The Supreme Court expanded upon this balancing of interests in *Central Hudson Gas & Electric v. Public Service Commission of New York*,²⁸ when it established a four-part constitutional test for commer-

first amendment protection merely because it appears as a commercial advertisement); *Ginzburg v. United States*, 383 U.S. 463, 474 (1966) (noting that the existence of commercial activity, in itself, does not justify narrowing the protection of expression secured by the first amendment).

21. *Bigelow*, 421 U.S. at 825. The Court limited its holding to the determination that the Virginia courts erred in their assumption that advertising deserves no first amendment protection. *Id.* The Court withheld comment on previous decisions concerning the regulation of advertising in readily distinguishable fact situations. *Id.* at 825 n.10.

22. See Fisher, *The Constitutionality of the Food and Drug Administration's Regulation of Over-the-Counter Drug Labeling under the Commercial Free Speech Doctrine*, 40 FOOD DRUG COSM. L.J. 188, 201 (1985) (discussing the commercial speech doctrine's impact on the marketing of pharmaceuticals).

23. 425 U.S. 748 (1976).

24. *Id.* at 770. The Virginia statute provided that charges of unprofessional conduct may be brought against a licensed pharmacist who publishes, advertises or promotes any amount, price, fee, premium or discount for any drugs which may be dispensed only by prescription. VA. CODE ANN. § 54-524.35 (1974). Two nonprofit organizations challenged the statute, claiming that the public would benefit if the prohibition were lifted and advertising allowed. They argued that the first amendment entitles prescription drug users to receive information concerning the price of drugs. *Virginia State Bd.*, 425 U.S. at 753-54.

25. *Virginia State Bd.*, 425 U.S. at 770.

26. *Id.* at 765. The Court stated that the allocation of resources in a free enterprise economy comes largely through private economic decisions. The public interest in those decisions being intelligent and well informed commands the free flow of commercial information. *Id.* See *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (extending first amendment protection to purely factual matters of public interest).

27. *Virginia State Bd.*, 425 U.S. at 770.

28. 447 U.S. 557 (1980). The Court stated that the protection available for a particular commercial expression turns on the nature of both the expression and the governmental interests served by its regulation. *Id.* at 563. See Comment, *supra* note 3, at

cial speech regulations. First, to warrant first amendment protection under the *Central Hudson* test, commercial speech must concern lawful activity and must not mislead the public.²⁹ Second, the government must assert a substantial public interest in order to regulate commercial speech.³⁰ Third, the regulation must directly advance that interest.³¹ Finally, the regulation must not extend further than necessary to serve that interest.³² Relying on this test, the Court lifted a restraint on an electric utility's ability to advertise the use of electricity because the prohibition was an overly broad attempt to promote conservation.³³ The Court held that unless a more limited regulation proved insufficient, the state could not suppress the utility's advertising.³⁴

The *Central Hudson* test became the Supreme Court's standard for examining commercial speech regulations. As such, two distinct methods of applying the test arose.³⁵ The Court applied the test strictly in cases where the government's interest concerned ensuring equitable business transactions.³⁶ Conversely, when the state's interest did not

1528 (discussing the *Central Hudson* test as a means of balancing the competing interests of state regulation and first amendment rights).

29. *Central Hudson*, 447 U.S. at 563. The Court reasoned that the informational function of advertising forms the basis of the first amendment's concern for commercial speech. Accordingly, the Constitution permits the suppression of commercial messages which do not accurately inform the public about lawful activity. *Id.*

30. *Id.* at 564.

31. *Id.* See *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 95-96 (1977) (striking down a ban on "For Sale" signs in front of houses for lack of a direct connection between the regulation and the city's goal of integrating housing).

32. *Central Hudson*, 447 U.S. at 565. The Court declared that the state cannot regulate speech which poses no danger to the asserted state interest, nor can it completely suppress information when narrower restrictions on expression would suffice. *Id.* See *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 795 (1978) (invalidating a statute that prohibited speech in a manner unjustified by a compelling state interest).

33. *Central Hudson*, 447 U.S. at 572. The regulation at issue in *Central Hudson* completely banned the utility from advertising to promote the use of electricity. *Id.* at 558. The Court found a direct connection between the regulation and the state's interest in energy conservation. *Id.* at 569. Upon appellant's insistence that, but for the ban, it would advertise products and services which use energy efficiently, the Court concluded that the energy conservation rationale did not justify suppressing information about electrical devices or services which do not cause an increase in energy use. *Id.* at 570.

34. *Id.* at 571.

35. See Comment, *Posadas de Puerto Rico v. Tourism Company: Rolling the Dice with Central Hudson*, 40 RUTGERS L. REV. 241, 253 (1987) (discussing the Supreme Court's inconsistent application of the *Central Hudson* test).

36. See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (struck

relate to supervising commerce, the Court deferred to legislative determination of the regulation's proper scope.³⁷

In *In re R.M.J.*,³⁸ an example of the former type of regulation, the Court required a state to show that the restriction on speech was no broader than reasonably necessary to prevent deception. *In re R.M.J.* involved an attorney who faced disbarment because his advertising deviated from the specific wording required by the state of Missouri.³⁹ The Supreme Court struck down the regulation under the *Central Hudson* test.⁴⁰ The Court found that the state made no effort to advance its interests through a less restrictive means.⁴¹ The Court concluded that restrictions should apply in a manner no more extensive than reasonably necessary to further substantial interests.⁴²

Similarly, in *Zauderer v. Office of Disciplinary Counsel*,⁴³ the Supreme Court invalidated a prohibition on the use of illustrations in attorney advertising.⁴⁴ The Court declared that the state bears the burden of showing that its regulation facilitates a substantial state interest

down ban on illustrations in attorney advertising after Court determined that the regulation extended further than necessary to accomplish the state's objective). See also *infra* notes 39-50 and accompanying text.

37. See, e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (plurality opinion) (deference given to legislature's determination that prohibiting billboards would eliminate traffic problems and improve city's appearance). See also *infra* notes 51-60 and accompanying text.

38. 455 U.S. 191 (1982).

39. *Id.* at 197-98. An addendum to Missouri Supreme Court Rule 4 specified twenty-three areas of practice which attorneys may list in advertisements. An attorney could not deviate from the precise wording stated in the rule to describe these areas. *Id.* at 195. The appellant deviated from the prescribed language in his advertisement, listing his areas of practice as "personal injury" and "real estate," rather than "tort law" and "property law." He also included several areas of law without analogue in the list. The Advisory Committee of the Missouri Supreme Court charged the appellant with unprofessional conduct and subjected him to disbarment proceedings. *Id.* at 197.

40. *Id.* at 206-07.

41. *Id.* at 206. See Respondent's Brief in Opposition to Petition for a Writ of Certiorari at 16, *Board of Trustees of State Univ. of N.Y. v. Fox* (No. 87-2013), cert. granted, 109 S. Ct. 52 (1988). The Court doubted that the regulation provided the only manner of advancing the state's interest in supervising attorney advertising. The Court suggested that requiring attorneys to file a copy of advertisements with the Advisory Committee would accomplish the state's objective without unreasonably restricting commercial expression. 455 U.S. at 206.

42. *R.M.J.*, 455 U.S. at 207.

43. 471 U.S. 626 (1985).

44. *Id.* at 647. Zauderer placed an advertisement in 36 Ohio newspapers, targeting women who had been injured. *Id.* at 630. The Disciplinary Counsel charged Zauderer

through the least restrictive means.⁴⁵ Furthermore, the Court noted that deferring to the state would defeat the purpose of extending first amendment protection to commercial speech.⁴⁶

In contrast, when the government's regulatory interest does not concern the integrity of a business transaction, the Supreme Court has yielded to legislative determination. In *Metromedia, Inc. v. City of San Diego*,⁴⁷ for example, the City of San Diego prohibited outdoor advertising displays in order to eliminate traffic hazards and improve the city's appearance.⁴⁸ A plurality of the Supreme Court accepted the regulation as reaching no further than necessary to promote the city's interests.⁴⁹ After acknowledging the *Central Hudson* test as its guiding principle, the plurality upheld the prohibition without inquiring whether less restrictive means would have accomplished the city's objective.⁵⁰

with violating DR 2-101(B) of the Ohio Disciplinary Rules, which prohibits the use of illustrations in attorney advertisements. *Id.* at 632.

45. *Id.* at 647. The Court stated that because the appellant's illustration contained no features likely to deceive, mislead, or confuse the reader, the state must present a substantial governmental interest to justify the restriction and to demonstrate that the restriction advances that interest through the least restrictive available means. *Id.* See Respondent's Brief in Opposition to Petition for a Writ of Certiorari at 17, Board of Trustees of State Univ. of N.Y. v. Fox (No. 87-2013), *cert. granted*, 109 S. Ct. 52 (1988).

46. *Zauderer*, 471 U.S. at 646. The Court stated that commercial speech's first amendment protection would mean little if courts did not require the state to justify their regulations. *Id.*

In *Shapiro v. Kentucky Bar Association*, 108 S. Ct. 1916 (1988), the Supreme Court struck down a ban on targeted solicitation of legal business. *Id.* at 1925. A Kentucky Supreme Court Rule prohibited mailing or delivering written advertisements "precipitated by a specific event or occurrence involving or related to the addressee or addressees as distinct from the general public." *Id.* at 1919-20 n.2. The Court concluded that the state failed to meet the *Central Hudson* criteria because the regulation did not employ the least restrictive means to achieve its end. *Id.* at 1923. The Court declared that merely because targeted, direct mail solicitation presents lawyers with opportunities for abuses, that does not justify a ban on protected commercial speech. *Id.*

47. 453 U.S. 490 (1981) (plurality opinion).

48. *Id.* at 493. The California Supreme Court defined the term "advertising display sign" as a rigidly assembled sign, display, or device permanently affixed to the ground or permanently attached to a building or other permanent structure used for the display of a commercial or other advertisement to the public. *Id.* The city permitted a few exceptions, including allowing companies to advertise with signs on their own site. *Id.* at 508.

49. *Id.*

50. *Id.* The plurality declared that if the city has a sufficient basis for believing that billboards constitute traffic hazards, their prohibition may be the most direct, and perhaps the only effective approach to solving the problems they create. The plurality did

The Supreme Court applied the *Central Hudson* test deferentially again in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*.⁵¹ In *Posadas*, the Court upheld a statute regulating the advertisement of casino gambling.⁵² The law sought to prevent Puerto Rican citizens from gambling by prohibiting casinos from advertising their facilities to local residents.⁵³ The Court did not question whether the government could better accomplish its goal by broadly discouraging gambling, rather than suppressing speech which might encourage it.⁵⁴ Accordingly, the Court deferred to the legislature to determine the scope of its regulation.⁵⁵ The Court's deference to such audience-specific restrictions formed the basis for the Court's later rejection of a least restrictive means analysis.⁵⁶

*Board of Trustees of the State University of New York v. Fox*⁵⁷ presented the Supreme Court with an opportunity to clarify its application of the *Central Hudson* test. The Court held that the first amendment does not require commercial speech regulations to satisfy a least restrictive means test.⁵⁸ As such, the Court's ruling precludes first amendment challenges based solely upon claims that less restrictive

not discuss any less restrictive alternatives which could have advanced the city's objective, such as size or place limitations for billboards. *Id.* The separate concurrence would have decided the case without regard to the commercial/noncommercial speech dichotomy in first amendment analysis. *Id.* at 522.

51. 478 U.S. 328 (1986).

52. *Id.* at 344.

53. *Id.* at 333.

54. *Id.* at 344.

55. *Id.* The Court stated that the legislature could conclude that residents of Puerto Rico already know the risks of gambling. Nevertheless, widespread advertising might induce them to engage in potentially harmful conduct. *Id.* See *Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983). In *Dunagin*, the court upheld a restriction on alcohol advertising. The state acknowledged the public's awareness of the dangers of alcohol. The state's regulatory concern was that advertising would promote alcohol consumption despite its known dangers. 718 F.2d at 751.

56. See *infra* notes 64-69 and accompanying text (Justice Scalia's support for the *Fox* rationale).

Justice Stevens, in dissent, found the *Posadas* Court's deference shocking, and argued that the first amendment clearly forbids the regulation. 478 U.S. at 358.

At least one commentator finds the *Posadas* Court's justification for such audience-specific regulation unsettling, arguing that little separates audience-specific regulation from content-specific bans. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 903-04 (2d ed. 1988).

57. 109 S. Ct. 3028 (1989).

58. *Id.* at 3033.

means could equally advance the government's interest.⁵⁹

The Court argued that support for a least restrictive means requirement in prior cases was dicta.⁶⁰ Based on such a characterization of prior cases as merely dicta, the Court stated that it confronted the specific issue for the first time.⁶¹ The Court then criticized least restrictive means analysis on two grounds. First, the Court recognized that commercial speech receives less first amendment protection than noncommercial speech.⁶² Thus, the Court considered a least restrictive means requirement to be incompatible with the subordinate position of commercial speech in the scale of first amendment protection.⁶³

Second, the Court could not reconcile a least restrictive means analysis with prior decisions upholding commercial speech regulation, such as *Posadas*.⁶⁴ The Court stated that its prior decisions required only a reasonable "fit" between the governmental concern and the means chosen to advance that interest.⁶⁵ The Court concluded that governmental bodies have inside powers and need not create a perfect "fit" as long as the regulation is "narrowly tailored."⁶⁶

The dissent criticized the Court's passing treatment of formulations in prior cases which support a least restrictive means requirement.⁶⁷ The dissent considered a least restrictive means analysis integral to previous decisions invalidating restraints on commercial speech.⁶⁸

59. *Id.* at 3035. The Court emphasized the difficulty of establishing the precise point at which restrictions become more extensive than necessary. Rejecting a least restrictive means standard, it held, provides legislatures with needed leeway in designing regulations. *Id.*

60. *Id.* at 3032-33.

61. *Id.* at 3033.

62. *Id.*

63. *Id.* at 3034.

64. *Id.* See *supra* notes 51-60 and accompanying text. See also *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987) (upholding statute prohibiting the use of the word "Olympic" to promote activities unrelated to the U.S. Olympic Committee).

65. 109 S. Ct. at 3035.

66. *Id.* Additionally, the Court noted that its reasonable fit of means to ends analysis is distinct from "rational basis" analysis under the fourteenth amendment. *Id.*

67. *Id.* at 3038 (Blackmun, J. dissenting). The dissent considered it unnecessary to discuss the commercial speech issue in this case. The dissent argued that the case should have been disposed of on a narrower alternate theory based on overbreadth analysis. *Id.*

68. *Id.* at 3038 n.1. The dissent strongly disagreed with the majority's characterization of the language in prior cases as dicta. *Id.* See *Zauderer v. Office of Disciplinary*

Because it failed to impose a least restrictive means requirement on any commercial speech regulations,⁶⁹ the *Fox* decision seriously undermines the commercial speech doctrine.⁷⁰ The Court correctly noted that commercial speech receives more limited first amendment protection than political speech.⁷¹ The Court erred, however, in failing to acknowledge that the government's regulatory interest should be the determinative factor in the *Central Hudson* test.⁷²

The Court ignored differences in the motivation behind commercial speech regulations.⁷³ In *Fox*, SUNY's interest was in maintaining dormitories for their intended purpose rather than regulating business transactions.⁷⁴ Permitting SUNY to balance that interest against the students' desire to receive information did not contravene the fundamental spirit of the commercial speech doctrine.⁷⁵ By failing to acknowledge the importance of SUNY's motive, however, the Supreme Court left its decision open to broad application and thereby implicitly granted approval for paternalistic business regulations.⁷⁶

The Supreme Court's *Central Hudson* test established a realistic method for balancing advertisers' free speech interests against the government's concern with regulating business.⁷⁷ Unless courts specifically examine a challenged regulation, however, the *Central Hudson*

Counsel, 471 U.S. 626, 647 (1985) (concluding that the state must advance its interest through the least restrictive available means).

69. 109 S. Ct. at 3030-36.

70. See Wall St. J., June 30, 1989, at B6, col. 2. (decrying the *Fox* decision's limitation of first amendment protection for advertising).

71. 109 S. Ct. at 3033.

72. See *supra* notes 39-58 and accompanying text (discussing commercial speech review based on regulatory motive).

73. See *Fox*, 109 S. Ct. at 3030-35.

74. Board of Trustees of State Univ. of N.Y. v. Fox, 649 F. Supp. 1393, 1399 (N.D.N.Y. 1986).

75. The Supreme Court viewed the commercial speech doctrine as a way to liberate information and to promote public self-determination. Fisher, *supra* note 24, at 202. "The doctrine values personal decision making over paternalism, and public disclosure over government enforced ignorance." *Id.*

76. Opening the channels of communication presents a better alternative to paternalism. Given the free flow of information, people will perceive their own best interests. The first amendment dictates that the state may not suppress information, for fear of its danger. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976).

77. Comment, *supra* note 3, at 1536.

test has no impact.⁷⁸ If courts defer to the judgment of local lawmakers without scrutinizing the justifications for a particular regulation, the state may satisfy the test any time it claims a substantial interest.⁷⁹ As noted in *Zauderer v. Office of Disciplinary Counsel*,⁸⁰ such a policy contradicts the purpose of the commercial speech doctrine.⁸¹

The *Fox* decision disadvantages both advertisers and the public. Free speech values encourage the exchange of information, which allows better informed individual choice.⁸² The Supreme Court based the commercial speech doctrine on the benefits of increased public information in the marketplace.⁸³ The government's regulatory interest should not infringe needlessly upon the public's access to information.⁸⁴ The Supreme Court should impose a least restrictive means requirement on paternalistic commercial speech regulations designed to supervise the exchange of information.⁸⁵

By refusing to impose a least restrictive means requirement on any commercial speech regulations, the Supreme Court hinders constitutional challenges against restrictions which go beyond their objective. The Court's decision represents a step backwards from the earlier development of the commercial speech doctrine and will undoubtedly hinder the free flow of important consumer information.

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78. Curtis, *Advertising Regulated Products*, 2 ANN. SURV. AM. L. 621, 636-37 (1985).

79. *Id.* at 637.

80. 471 U.S. 626 (1985).

81. *Id.* at 647.

82. L. TRIBE, *supra* note 60, at 894. "Commercial speech is not political speech, and cannot claim the same historical or philosophic purposes; but it is speech. Its censorship has political as well as economic costs." *Id.*

83. *See supra* note 4 for two illustrative Supreme Court cases.

84. *See supra* notes 33-34 and accompanying text.

85. *Id.*

* J.D. 1991, Washington University

