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Something's Brewing within the Commercial Speech Doctrine

Matthew Passalacqua

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SOMETHING’S BREWING WITHIN THE COMMERCIAL SPEECH DOCTRINE

I. INTRODUCTION

Undeniably, each consumer is, to some extent, subconsciously attentive to advertising. Today, one probably cannot open a mailbox, drive down a street, or visit a favorite website without being ambushed by a multitude of different advertisements. The vast majority of signs, flyers, and commercial messages that bombard each person every day are dismissed as no more than a nuisance. Nevertheless, these commercial messages, whether they are realized, have a powerful impact on human behavior and consumption. In fact, many people have come to rely on such advertisements to guide many of their daily decisions. While alcohol, tobacco, and gambling play a role in many individuals’ lives, most do not realize the battle being fought by the government and manufacturers over whether to permit or prohibit the dissemination of commercial information about these goods and activities to the public.

For example, in Pitt News and Swecker, state laws that prohibited advertisements of alcohol in educational publications forced college newspapers to remove these advertisements from their papers. In Pitt

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1 Timothy E. Moore, Subliminal Perception: Facts and Fallacies, SKEPTICAL INQUIRER, Spring 1992, at 273, 276. Moore writes:

Extravagant claims notwithstanding, advertising may affect us in subtle and indirect ways. While there is no scientific evidence for the existence of “embedded” figures or words, let alone effects from them, the images and themes contained in advertisements may well influence viewers’ attitudes and values without their awareness. In other words, the viewer may be well aware of the stimulus, but not necessarily aware of the connection between the stimulus and responses or reactions to it.

Id. at 276.

2 See Terence A. Shimp & Ivan L. Preston, Deceptive and Nondeceptive Consequences of Evaluative Advertising, 45 J. MKTG. 22, 22–23, 30 (1981) (concluding that more advertisers today are relying on deceptive, evaluative advertising by using puffery and ambiguous terms to lure in consumers instead of relying on factual data to support their claims).


5 Compare Educ. Media Co. v. Swecker, 602 F.3d 583, 591 (4th Cir. 2010) (holding that a state statute prohibiting alcohol advertising on collegiate campuses was constitutional).
News v. Pappert, the Third Circuit held that the law banning alcohol advertisements was unconstitutional because there was no material evidence supporting the claim that this action would reduce underage drinking. However, in Educational Media Co. at Virginia Tech. v. Swecker, the Fourth Circuit held that the law banning alcohol advertisements was constitutional because there was a logical connection between alcohol advertising and increased underage drinking. This outcome is problematic because, in federal courts, like cases should yield identical results.

Therefore, to clarify the perimeters of advertising in our society, the U.S. Supreme Court must settle on a concrete First Amendment standard that governs the commercial speech doctrine. To begin, Part II of this Note provides a brief treatment of commercial speech under the First Amendment, followed by an explanation of the test used by the Supreme Court to interpret commercial speech in regard to the First Amendment and two different approaches circuit courts have taken in interpreting this test. Second, Part III discusses the positive and negative aspects of different interpretations of the Central Hudson test. Finally, Part IV explores which interpretations of the Central Hudson test should be followed and proposes a factors test for courts to use as guidance in deciding which restrictions on commercial speech should be permitted.

II. BACKGROUND

For centuries, America has prided itself on protecting individual liberties. A foundation of this core belief is the First Amendment right
The First Amendment was enacted to eliminate all barriers that quieted political speech and to stimulate the unrestricted transfer of ideas throughout society. Nevertheless, the Supreme Court has narrowed the construction of the First Amendment by creating different groups of speech, each of which have their own specific level of protection. However, the Supreme Court has had trouble fitting commercial speech into any existing First Amendment category and, in turn, has created multiple contradictory standards for the commercial speech doctrine.

Part II.A of this Note examines the protection that commercial speech has historically received under the First Amendment, the historians have concluded that the First Amendment gave Americans “remarkable freedom, which ‘spurred an expanding legacy of liberty’” and was regarded “as a prerequisite to the republican government”).

See Erwin Chemerinsky, Constitutional Law: Principles and Policies 922–23 (3d ed. 2006) (articulating that the First Amendment was a reaction to the suppression of speech that existed in England through an elaborate licensing system, seditious libel laws, and criminal sanctions).

But see Paul S. Zimmerman, Hanging Up on Commercial Speech: Moser v. FCC, 71 Wash. L. Rev. 571, 590 (1996) (arguing that some courts have ignored content-based laws when the issue before them has concerned commercial speech and that this “selective basis contains within it a greater possibility for discrimination”).

See, e.g., Pleasant Grove City v. Summum, 555 U.S. 460, 481 (2009) (holding that government speech must only meet rational basis scrutiny to be upheld under the First Amendment); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (finding that the expression derived from nude dancing is at the outer limits of the First Amendment and can be totally banned in public due to its secondary effects); Neb. Press Ass’n v. Stuart, 427 U.S. 539, 558 (1976) (concluding that prior restraints, such as laws restricting publication and licensing systems, carry a “heavy presumption” against constitutional validity); Bradenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that a conviction for incitement of illegal activity is constitutional if there is imminent harm to society, a likelihood that illegal action will imminently occur, and if the defendant had the intent to cause illegality).

See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 572 (2001) (Thomas, J., dissenting) (“I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as ‘commercial.’”); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518 (1996) (Scalia, J., concurring) (“Since I do not believe we have before us the wherewithal to declare Central Hudson wrong—or at least the wherewithal to say what ought to replace it—I must resolve this case in accord with our existing jurisprudence . . . . [However,] I am not disposed to develop new law, or reinforce old, on this issue, and accordingly I merely concur in the judgment of the Court.”); Rubin v. Coors Brewing Co., 514 U.S. 476, 497–98 (1995) (Stevens, J., concurring) (“In my opinion, the Government’s asserted interest, that consumers should be misled or uninformed for their own protection, does not suffice to justify restrictions on protected speech in any context, whether under ‘exacting scrutiny’ or some other standard.”).
subsequent landmark cases that created the commercial speech doctrine, and the construction of the Central Hudson test. Next, Part II.B charts how the Central Hudson test has been applied to diverse classes of advertising and different mediums by which advertising is disseminated. Subsequently, Part II.B.1 and Part II.B.2 inspect how the Court has interpreted the third and fourth prongs of the Central Hudson test, respectively. Part II.C goes on to address the crisis of binge drinking on collegiate campuses, the types of policies that many universities have adopted to combat this trend, and the steps the government has taken to quell this growing societal problem. Finally, Part II.C.1 and Part II.C.2 outline the facts, holdings, and reasonings in the conflicting decisions Pitt News v. Pappert and Educational Media Co. at Virginia Tech v. Swecker.

A. The Evolution of the Commercial Speech Doctrine

The First Amendment expressly states that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” Despite the unambiguous language of the First Amendment, the Supreme Court refused to recognize commercial speech as a protected form of expression before 1976. Subsequently, however, the Court has held

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16 See infra Part II.A (providing a background of the creation and advancement of the commercial speech doctrine).
17 See infra Part II.B (discussing the various ways the commercial speech doctrine has been applied since the Central Hudson test was formed).
18 See infra Part II.B.1 and Part II.B.2 (discussing the interpretations of the third and fourth prongs of the Central Hudson test after 1980).
19 See infra Part II.C (outlining the problems that have occurred as a result of the binge drinking epidemic on American college campuses and the different avenues taken to curb this startling pattern).
20 See infra Part II.C.1 and Part II.C.2 (discussing the background on the Third and Fourth Circuits’ differing opinions on the issue of commercial speech as applied to alcohol advertisements in collegiate newspapers).
21 U.S. CONST. amend. I.
22 See Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (holding that states may constitutionally regulate advertising that is purely commercial); see also Breard v. City of Alexandria, 341 U.S. 622, 642–43 (1951) (finding that state prohibitions on door-to-door solicitation was constitutional); Ad-Express, Inc. v. Kirvin, 516 F.2d 195, 197 (2d Cir. 1975) (holding that a city could ban the distribution of leaflets left on residential doorsteps because “the Constitution imposes no restraint on government with respect to purely commercial advertising in the public streets”); Stevenson v. Bd. of Regents of the Univ. of Tex., 393 F. Supp. 812, 819 (W.D. Tex. 1975) (concluding that a graduate student’s speech in a television commercial was not protected because his representations concerning the device were neither “scientific [nor] educational [in] nature”; Thomas H. Jackson & John Calvin Jeffries, Jr., Commercial Speech: Economic Due Process and the First Amendment, 65 VA. L. REV. 1, 2 (1979) (stating that commercial speech is recognized as less protected under the
that the First Amendment protects not only the right to free expression, but the “right to ‘receive information and ideas.’” In the commercial context, the Court advanced this theory in the landmark case *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* In that case, the Court held that pharmacists could advertise their prescription prices in newspapers, despite the government’s substantial interest in upholding the professional standards and ethics of the pharmaceutical industry. This decision was founded on the right of consumers to receive truthful information about products in the “marketplace of ideas.”

First Amendment because courts have made a “distinction between the market for ideas and the market for goods and services”).

23 See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (holding that pharmacists have the constitutional right to advertise prices in newspapers); *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972) (stating the “First Amendment right to ‘receive information and ideas’”); see also *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (holding that an abortion advertisement published in a newspaper was protected speech under the First Amendment because it did more than propose a commercial transaction, “[i]t contained factual material of clear ‘public interest’” that was of “value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter”). But see Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 VA. U. L. REV. 555, 583 (2006) (arguing that commercial speech is a qualified right because the doctrine was built around the idea that consumers have the right to hear a commercial message and that commercial speakers lack strong independent constitutional interests).

24 425 U.S. at 773. “[A] [s]tate may [not] completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information’s effect upon its disseminators and its recipients.” *Id.*

25 *Id.* at 770. The Court held “that high professional standards . . . are guaranteed by the close regulation to which pharmacists in Virginia are subject. . . . Surely, any pharmacist guilty of professional dereliction that actually endangers his customer will promptly lose his license.” *Id.* at 768–69.

26 *Id.* at 770. The Court explained “that people will perceive their own best interests if only they are well enough informed, and that the best means to [achieving] that end is to open the channels of communication rather than to close them.” *Id.* Further, the Court stated that “[a]dvertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product . . . at what price. . . . It is a matter of public interest that [private economic] decisions . . . be intelligent and well informed.” *Id.* at 765. Therefore, the Court noted that “the free flow of commercial information is indispensable.” *Id.* Some Justices support the protection of commercial speech in the marketplace because “[i]f the individual is to achieve the maximum degree of material satisfaction permitted by his resources, he must be presented with as much information as possible concerning the relative merits of competing products.” Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 433 (1971). This is because “advertising serves a legitimate educational function in that it is ‘an immensely powerful instrument for the elimination of ignorance . . . .’ ” *Id.* Moreover, the marketplace of ideas theory, which holds, “the best test of truth is the power of the thought
Likewise, in Bates v. State Bar of Arizona, the Court held that a blanket suppression of advertisements providing prices for legal services was unconstitutional under the First Amendment. More importantly, the Court carved out three critical exceptions to the dissemination of commercial speech under the First Amendment. First, commercial statements are unprotected if they are false or can be construed to mislead or deceive recipients of the message. Second, legislatures may enact laws that restrict the time, place, and manner of commercial speech. Lastly, commercial speech advertising illegal activity is unprotected.

In Central Hudson Gas & Electric v. Public Service Commission of New York, the Court attempted to deviate from a case-by-case analysis of the newly minted commercial speech doctrine by creating a structured test to examine commercial speech. In Central Hudson, the New York Public Service Commission ordered Central Hudson Gas & Electric Corporation to stop all advertising that promoted the use of electricity. The Public

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27 433 U.S. 350, 384 (1977). “[T]he flow of such information may not be restrained, and . . . the disciplinary rule against appellants [is] violative of the First Amendment.” Id.

28 See id. at 383 (“Advertising that is false, deceptive, or misleading of course is subject to restraint.”); see also Friedman v. Rogers, 440 U.S. 1, 13, 15–16 (1979) (holding that a law restricting optometrists from associating their names with any optometrical office they did not work at was constitutional because there was a significant possibility that names of the optometrists on the offices would be used to mislead the public); Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 464–65 (1978) (holding that attorneys do not have a constitutional right to personally solicit victims of accidents in the hospital because “the very plight of that person not only makes him more vulnerable to influence [like that of a lawyer] but also may make advice all the more intrusive”).

29 See Bates, 433 U.S. at 384 (holding that “reasonable restrictions on the time, place, and manner of [commercial] advertising” are acceptable).

30 See id. (holding that illegal advertisements may be suppressed); see also Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 388 (1973) (concluding that a newspaper could not publish want ads for employers that sexually discriminated in the job description because a city ordinance prohibited any employer from publishing or causing to be published any advertisement indicating sex discrimination).

31 See Shannon M. Hinegardner, Note, 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, 533 (2009) (suggesting that the Court failed to create a concrete test to evaluate commercial speech cases before Central Hudson); see also Alex Kozinski & Stuart Banner, Who’s Afraid of Commercial Speech?, 76 VA. L. REV. 627, 629–30 (1990) (expressing that the Court could not decide what level of scrutiny to apply to cases involving the commercial speech doctrine—let alone the elements for a rigid test—in the interim between Bates and Central Hudson).

Service Commission issued this instruction to protect the best interests of the public by promoting the conservation of energy and to minimize the chances that the public would incur higher rates.33

The Court began its analysis by defining commercial speech as expression that is solely related to the economic interest of the speaker.34 By examining prior case law, the Court created a four-pronged test that could be applied to cases concerning the right to free speech in the commercial context. First, the expression being restricted must be protected by the First Amendment.35 Second, the government’s interest must be substantial.36 Third, the restriction on speech must directly advance the interest that the government asserted.37 Lastly, the restriction on speech must not be more extensive than necessary to serve the government’s substantial interests.38

In applying this test to the Central Hudson Gas & Electric Corporation, the Court held that the first and second prongs were satisfied.39 Furthermore, the government met the third prong because

33 Id. at 559. The Court found that the Public Service Commission of New York “declared all promotional advertising [of energy] contrary to the national policy of conserving energy,” and that the Public Service Commission deemed Central Hudson Gas & Electric Corporation’s advertising scheme to be promotional; which was advertising targeted at stimulating the purchase of utility services. Id. Further, the Public Service Commission of New York argued that the promotional advertising could raise the cost of utilities’ prices because the rates on electricity were not based on marginal costs. Id. at 568–69. Therefore, if electricity consumption increased during peak hours, the rates would not reflect the true costs of expanding production of the electricity. Id. Moreover, these extra costs would be paid by the consumer, not Central Hudson Gas & Electric Corporation. Id. at 569.

34 See id. at 579 (“[C]ommercial speech [is] ‘expression related solely to the economic interests of the speaker and its audience.’”); see also BLACK’S LAW DICTIONARY 1529 (9th ed. 2009) (defining commercial speech as “[c]ommunication (such as advertising and marketing) that involves only the commercial interests of the speaker and the audience, and is therefore afforded lesser First Amendment protection than social, political, or religious speech”). But see Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–67 (1983) (holding that whether or not speech is determined to be commercial is figured by weighing the following factors: (1) whether the speaker proposes a commercial transaction; (2) whether the speaker concedes that the speech is an advertisement; (3) whether the speaker references a specific product; and (4) whether the speaker has an economic motivation).

35 Cent. Hudson, 447 U.S. at 566. The Court stated that, “[f]or commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading.” Id.

36 Id.

37 Id.

38 Id.

39 Id. at 566–69. In regard to the first prong, the Court held that “[i]n the absence of factors that would distort the decision to advertise, [the Court] may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising.” Id. at 567–68. The Court reasoned that, since consumers may need to know information to aid their decision to use a product, or how much of the
energy conservation could be directly advanced by the restriction on advertising. Nevertheless, the Court concluded that the government’s restriction was more extensive than necessary to further the state’s interest in energy conservation, and therefore struck down the Public Service Commission’s order prohibiting promotional advertising. Following the Court’s decision in Central Hudson, the four-pronged test has been adapted to various other instances of commercial speech.

B. The Subsequent Expansion and Interpretation of the Central Hudson Test

In the aftermath of Central Hudson, the Court has since attempted to define the contours of the commercial speech doctrine by applying the four-pronged test to limitations imposed on controversial advertisements of: (1) alcohol products; (2) tobacco products; (3) product, the advertising in this case was constitutionally protected speech. Id. at 567–72. The Court held that the states had two valid interests to protect in this case. Id. First, the state’s goal in conserving energy was substantial because “[i]n view of our country’s dependence on energy resources beyond our control, no one can doubt the importance of energy conservation.” Id. at 568. Further, the state had a second substantial interest in keeping rates fair and efficient. Id. at 569.

40 Id. at 569. The Court held that the state’s interest in conserving energy was directly advanced by the restriction on promotional advertising because the increased advertising for electrical services would presumably lead to increased consumption of electricity. Id. In rejecting the state’s argument, the Court held the assertion that the impact of promotional advertising would unfairly increase public rates was “tenuous” and “highly speculative.” Id.

41 Id. at 570. The Court held that the Commission’s order was overbroad because it prevented utility companies from promoting energy services that would reduce electricity. Id. Further, the Court concluded that the Commission could have alternatively required all utility service advertisements to contain efficiency and expense information within them, instead of totally banning all speech disseminated by utility companies to consumers. Id.

42 See infra Part II.B (detailing the use of the Central Hudson test in various cases concerning other products and services as well as in commercial speech cases pertaining to specific mediums).

43 See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489–90, 516 (1996) (holding that a state may not prohibit manufacturers, wholesalers, shippers, or retailers from advertising the price of alcoholic beverages; or completely disallow any newspaper, periodical, radio or television broadcaster from accepting, publishing, or broadcasting any advertisements for alcoholic beverages); Rubin v. Coors Brewing Co., 514 U.S. 476, 490–91 (1995) (finding that it is unconstitutional for the government to prevent brewers of beer from labeling the alcohol content on their product’s packaging, even though states have substantial interests in reducing alcohol consumption).

44 See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 534–35, 571 (2001) (holding that a state regulation prohibiting all outdoor tobacco advertising within 1,000 feet of any public playground, playground area in a public park, elementary school, or secondary school, and all point-of-sale advertising lower than five feet from the floor was unconstitutional because it prohibited protected speech from being heard by adults, even though the state had a substantial interest in preventing minors from using tobacco products).
Moreover, the Court has decided cases concerning the limitations on commercial advertisement delivered through mediums such as: (1) signs; (2) billboards; (3) books; (4) magazines; (5) newspapers; and (6) professional services.

45 See Greater New Orleans Broad. Ass’n v. United States, 527 U.S. 173, 195–96 (1999) (concluding that a federal statute was unconstitutional as applied when it prohibited commercial advertising for private casinos in states where gambling was legalized); United States v. Edge Broad. Co., 509 U.S. 418, 435–36 (1993) (finding that Congress may constitutionally prohibit radio stations in non-gambling states from broadcasting lottery advertisements even if most of their listeners reside in pro-gambling states).

46 See Fla. Bar v. Went For It, Inc., 515 U.S. 618, 635 (1995) (holding that a state’s thirty-day ban on legal direct-mail solicitations to accident victims was constitutional because this policy limited the intrusion into the victims’ privacy and allowed the state to craft the standards of state-licensed lawyers); Ibanez v. Fla. Dep’t of Bus. & Prof’l. Regulation, Bd. of Accountancy, 512 U.S. 136, 149 (1994) (finding that a state unconstitutionally imposed sanctions on an attorney for advertising as a certified public accountant, when the attorney was licensed under state law as an accountant); Edenfield v. Fane, 507 U.S. 761, 777 (1993) (concluding that a state’s ban on direct, in-person, uninvited solicitations by certified public accountants was unconstitutional); Peel v. Attorney Registration & Disciplinary Comm’n of Ill., 496 U.S. 91, 110–11 (1990) (holding that an attorney who advertised that his services were certified by the National Board of Trial Advocacy was protected by the First Amendment); In re R. M. J., 455 U.S. 191, 207 (1982) (finding that the provisions of a state supreme court rule regulating lawyer advertising that prohibited lawyers from identifying the jurisdictions in which the lawyer was licensed to practice violated the First Amendment).

47 See Thompson v. W. States Med. Ctr., 535 U.S. 357, 377 (2002) (finding that a federal regulation prohibiting advertising and promotion of particular compounded drugs was unconstitutional); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 80 (1983) (holding that a law that prohibited sending unsolicited information concerning contraceptives through the mail was unconstitutional under the First Amendment); see also Carey v. Population Servs., Int’l, 431 U.S. 678, 678–82, 700–01 (1977) (concluding that a state law that banned the advertising and display of contraceptives was unconstitutional under the First Amendment when applied to a direct-mail, non-medical contraceptive devices company); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771–73 (1976) (finding that a state law restricting pharmacists from advertising prices of pharmaceutical medication was unconstitutional).

48 See Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 86, 97 (1977) (holding that a township ordinance banning “For Sale” or “Sold” signs was unconstitutional).

49 See Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 502 (1981) (concluding that the First Amendment protects the communicative and expressive aspects of billboards, just like any other medium of communication that combines communicative and non-communicative features).

50 See City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429–31 (1993) (holding that a city’s revocation of a permit to place newsracks dispensing the plaintiff’s free magazines, which consisted primarily of advertisements for services, was unconstitutional because the city did not have a reasonable fit between its interests of improving aesthetics and safety and the restriction of commercial handbills); Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 647 (1985) (concluding that commercial illustrations in newspapers are entitled to the same First Amendment protections given to verbal speech).
mail;\(^{51}\) (7) radio and oral communications;\(^{52}\) and (8) television broadcasting.\(^{53}\) However, while expanding this doctrine, the Court has employed numerous standards to interpret the Central Hudson test, and, in turn, this approach has created uncertainty over how the First Amendment should be applied to commercial speech cases.\(^{54}\)

1. The Court’s Interpretation of Central Hudson’s Third Prong

The third prong of the Central Hudson test requires that a restriction on commercial speech must directly advance the substantial interest the government asserts.\(^{55}\) To directly advance the government’s substantial interest, the government has the burden of proving that the law restricting speech materially mitigates a cited injury to the public.\(^{56}\) Although the government can use broad evidentiary sources to prove its interest is advanced, the government may not satisfy this prong by

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\(^{51}\) See Fla. Bar, 515 U.S. at 635 (holding that a state’s thirty-day ban on legal direct-mail solicitations to accident victims was constitutional because this policy limited the intrusion into victims’ privacy and allowed the state to craft the standards of state-licensed lawyers); Bolger, 463 U.S. at 79–80 (holding that a law that prohibited sending unsolicited information concerning contraceptives through the mail was unconstitutional under the First Amendment); Carey, 431 U.S. at 678, 700 (holding that a state law that banned the advertising and display of contraceptives was unconstitutional under the First Amendment when applied to a direct-mail, non-medical contraceptive devices company).

\(^{52}\) See United States v. Kokinda, 497 U.S. 720, 720, 732–33 (1990) (holding that it was reasonable to restrict the access to postal premises for purposes of solicitation when an organization asked for contributions, sold books and subscriptions to the organization’s newspaper, and distributed literature on a variety of political issues because the solicitation was inherently disruptive of the postal service’s business); Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 469, 485–86 (1989) (reversing and remanding an appellate court decision upholding a state school rule prohibiting private commercial enterprises from operating in public university facilities).

\(^{53}\) See Greater New Orleans Broad. Ass’n v. United States, 527 U.S. 173, 173, 195–96 (1999) (holding that a federal statute was unconstitutional as applied when it prohibited radio and television commercial advertising for private casinos in states where gambling was legalized). But see United States v. Edge Broad. Co., 509 U.S. 418, 435–36 (1993) (finding that Congress may constitutionally prohibit radio stations in a non-gambling state from broadcasting lottery advertisements, even if most of their listeners reside in a pro-gambling state).

\(^{54}\) See infra Part II.B.1 and II.B.2 (describing the use of the material degree and common sense standards for the third prong of the Central Hudson test and the establishment of the least restrictive means and reasonable fit standards in regard to the fourth prong).


\(^{56}\) See Fla. Bar, 515 U.S. at 626 (holding that the state has the burden of proof to show that commercial speech is actually harmfully; see also Cent. Hudson, 447 U.S. at 569 (suggesting that speculative evidence is not enough to satisfy the third prong of the Central Hudson test).
relying on mere speculation or conjecture. Further, the law will not be upheld if it provides insufficient support for the government’s purpose, or if there is little chance that the law can advance the government’s interest.

In attempting to define the evidentiary threshold necessary to comply with Central Hudson’s third prong, the Court held in Lorillard Tobacco Co. v. Reilly that the government may authorize speech restrictions based solely on history, consensus, and simple common sense. Additionally, in Florida Bar v. Went For It, Inc., the Court stated

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57 See Fla. Bar, 515 U.S. at 626, 628 (holding that the government did not satisfy its evidentiary burden because it “[d]id not disclose any anecdotal evidence . . . that validated the [government’s] suppositions” and that the Court would not read prior “case law to require that empirical data come to [the Court] accompanied by [excessive] background information” (alterations in original)); Clay Calvert & Matthew D. Bunker, Free Speech, Fleeting Expletives, and the Causation Quagmire: Was Justice Scalia Wrong in Fox Television Stations?, 47 SAN DIEGO L. REV. 737, 773 (2010) (suggesting that empirical evidence must be coupled with moral and social concerns to properly adjudicate issues arising under the third prong of the Central Hudson test).


60 See id. at 555 (expressing that history, consensus, and simple common sense was sufficient evidence to justify strict scrutiny in prior strict scrutiny cases); see also Fla. Bar, 515 U.S. at 628 (suggesting history, consensus, and simple common sense would satisfy the intermediate scrutiny standard set forth in the Central Hudson test); Alexander v. Cahill, 598 F.3d 79, 92-94 (2d Cir. 2010) (advocating for the strong view of the common sense standard); Educ. Media Co. v. Swecker, 602 F.3d 583, 589–90 (4th Cir. 2010) (using the logical nexus approach to the common sense standard to conclude that alcohol advertising causes an increase in binge drinking); WV Ass’n of Club Owners & Fraternal Servs., Inc. v. Musgrave, 553 F.3d 292, 303, 305 (4th Cir. 2009) (applying the logical nexus approach to the common sense standard to hold that video advertising at casinos may cause gambling addicts to compulsively spend money); IMS Health, Inc. v. Ayotte, 550 F.3d 42, 57–59 (1st Cir. 2008) (adopting the legislative deference view to the simple common sense standard); Pagan v. Fruchey, 492 F.3d 766, 777 (6th Cir. 2007) (holding that the strong common sense standard is the appropriate approach); G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1073 (9th Cir. 2006) (adopting the legislative deference standard to hold that legislative deliberation, a dynamic dialogue with the city’s residents and businesses, extensive hearings, and a city council’s reliance on the experience of other cities were sufficient evidence to institute a commercial sign restriction on certain sizes, types, and designs of signs on city roads); Pac. Frontier v. Pleasant Grove City, 414 F.3d 1221, 1235 (10th Cir. 2005) (supporting the strong view approach in applying the common sense standard to invalidate a city’s ordinance establishing a solicitor’s licensing procedure because it violated the plaintiff’s First Amendment commercial speech rights); Missouri ex rel. Nixon v. Am. Blast Fax, Inc., 323 F.3d 649, 654–55 (8th Cir. 2003) (holding that the legislative deference standard was the correct interpretation of the common sense standard, and proving that legislative findings showed that prohibitions on unsolicited commercial fax advertisements directly and materially advanced the government’s asserted interest); Mason v. Fla. Bar, 208 F.3d 952, 957 (11th Cir. 2000) (expressing that the strong view approach to the common sense standard was correct and that “the Supreme Court has not accepted ‘common sense’ alone to prove the existence of a concrete, non-
that references to studies and personal accounts of particular incidents could potentially meet the government’s burden of proof. The government has even been given the power to combine reports and anecdotes from different locales to justify the government’s interest. Like Central Hudson’s third prong, the fourth prong of the analysis has also been subject to multiple interpretations.

2. The Court’s Interpretation of Central Hudson’s Fourth Prong

Initially, the Court declared that the fourth prong of the Central Hudson test requires that a restriction on commercial speech be no more extensive than necessary to serve the government’s substantial interests. The Court has redefined this standard to mean that the government restriction must be accomplished by the least restrictive means possible. Currently, however, the Court has stated that


515 U.S. at 624. The Florida Bar Court referenced City of Renton v. Playtime Theaters, Inc., which held that a city could justify zoning ordinances that required adult movie theaters to be 1,000 feet away from schools, parks, and churches in order “to prevent crime, protect the city’s retail trade, maintain property values, and generally ‘protec[t] and preserv[e] the quality of [the city’s] neighborhoods, commercial districts, and the quality of urban life.’” Id. (alterations in original) (quoting City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 46, 48 (1986)). In Renton, the Court held that, rather than conduct its own study, the city of Renton could base its substantial interest in reducing crime, protecting trade, and preserving property values to rezone an adult theater by referencing a twenty-year-old study created by the city of Detroit. Renton, 475 U.S. at 50–51. The Court has also held that empirical evidence does not have to necessarily be obtained to win a free speech case. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1812–13 (2009).

62 Fla. Bar, 515 U.S. at 628.

63 See infra Part II.B.2 (demonstrating that the Court has used both the least restrictive means standard and the reasonable fit standard to adjudicate the fourth prong of the Central Hudson test).

64 See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 566 (1980) (stating that, for the fourth prong, the Court will ask if the restriction on commercial speech “is not more extensive than is necessary to serve [the government’s] interest”); see also Andrew L. Howell, Cincinnati v. Discovery Network, Inc.: What Scrutiny Should be Applied to Government Regulations on Truthful Commercial Speech?, 45 MERCER L. REV. 1089, 1094 (1994) (stating that the no more than necessary standard currently “lies somewhere between a ‘rational basis’ test and a ‘least restrictive means’ test”).

65 See 44 Liquormart v. Rhode Island, 517 U.S. 484, 507 (1996) (holding that a pricing ban on all alcohol advertising was unconstitutional since “alternative forms of regulation that would not involve any restrictions on speech [such as the maintenance of higher price, the rationing of per capita purchases, or the use of educational campaigns focused on drinking problems] would be more likely to achieve the [state’s] goal of promoting temperance”); Rubin v. Coors Brewing Co., 514 U.S. 476, 491 (1995) (“The FAA’s defects are further highlighted by the availability of alternatives that would prove less intrusive to the First
prohibitions on commercial speech do not have to be achieved by the least restrictive means possible. For example, in Board of Trustees v. Fox, the Court declared that a state may not prohibit commercial speech by purporting to have a mere rational basis. Rather, the government must demonstrate that there is a fit between the legislature’s ends and the means chosen to accomplish those ends. This fit does not need to be perfect, nor does it necessarily have to represent the single least restrictive means taken to achieve that end. Thus, as expressed in Greater New Orleans Broadcasting Ass’n v. United States, restrictions must be narrowly drawn to regulate speech only to the extent that the restriction would further the state’s substantial objective. A good example of the tension between competing interpretations of the Central Amendment’s protections for commercial speech.” (emphasis added)); see also Eugene Volokh, Crime-Facilitating Speech, 57 STAN. L. REV. 1095, 1134 (2005) (arguing that the least restrictive means test will be met if it is an unavoidable side-effect of the restriction of harmful speech).

See Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 479 (1989) (“[O]ur [past] decisions upholding the regulation of commercial speech cannot be reconciled with a requirement of least restrictive means.”); Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 341 (1986) (“The last two steps of the Central Hudson analysis basically involve a consideration of the ‘fit’ between the legislature’s ends and the means chosen to accomplish those ends.”).

Id.; see also City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 418 n.13 (1993) (explaining that “we rejected mere rational-basis review” for judging restrictions on commercial speech). But see Hinegardner, supra note 31, at 529-30 (“[T]he ‘common sense’ rationale . . . [automatically] creates a de facto rational basis standard because ‘common sense’ provides absolutely no basis for the judiciary to review legislative decisions.”).

See Posadas, 478 U.S. at 341 (stating that the reasonable fit test was to be applied to the fourth prong of the Central Hudson test).

See Fox, 492 U.S. at 480 (“[A] fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is ‘in proportion to the interest served,’ that employs . . . a means narrowly tailored to achieve the desired objective.” (citation omitted)). The Court held that:

The Government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest—“a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.”

Id.
Hudson test can be seen in Pitt News v. Pappert and Educational Media Co. at Virginia Tech v. Swecker.


Before Pitt News and Swecker, a battle was brewing over binge drinking on college campuses.71 Within the past decade, several colleges throughout the United States have attempted to reign in student binge drinking following several incidents resulting in death,72 sexual abuse,73

71 See NIAAA Council Approves Definition of Binge Drinking, NAT'L INST. ALCOHOL ABUSE & ALCOHOLISM NEWSLETTER (Dep't of Health & Human Servs./Nat'l Inst. of Health, Rockville, Md.), Winter 2004, at 3, available at http://pubs.niaaa.nih.gov/publications/Newsletter/winter2004/Newsletter_Number3.pdf (explaining that binge drinking is defined as a pattern of drinking that brings a person's blood alcohol content to a level of 0.08% or more within two hours). Binge drinking typically occurs when adult men consume five or more drinks, or adult women consume four or more drinks, in about two hours and that drink is defined as one twelve-ounce beer, one five-ounce glass of wine, or one 1.5-ounce shot of distilled spirits. Id.; see also William DeJong, The Role of Mass Media Campaigns in Reducing High-Risk Drinking among College Students, J. STUD. ALCOHOL, supp. no. 14, 2002 at 182, 183–85 (reviewing the informational advertising campaigns, social norm marketing campaigns, and advocacy campaigns that colleges utilize to reduce alcohol consumption and awareness through advertisements in newspapers, television, radio, and other mediums); Henry Wechsler, Jae Eun Lee, Meichun Kuo & Hang Lee, College Binge Drinking in the 1990s: A Continuing Problem, 48 J. AM. C. HEALTH 199, 200, 202–03 (2000) (reporting that a survey, which included 119 colleges throughout the United States and more than 14,000 students, revealed that approximately two out of every five students (44%) were binge drinkers, 19% were abstainers, and 23% were frequent binge drinkers in 1999); Evan Thomas, How to Fight Binge Drinking: Would Lowering the Legal Age Help Colleges Curb Alcohol Abuse?, NEWSWEEK (Sept. 10, 2008), http://www.newsweek.com/2008/09/10/how-to-fight-binge-drinking.html (reporting that 150 college presidents signed a letter to change the drinking age to eighteen so that minors are not as tempted to drink heavily).


73 Meichun Mohler-Kuo, George W. Dowdall, Mary P. Koss & Henry Wechsler, Correlates of Rape while Intoxicated in a National Sample of College Women, J. STUD. ALCOHOL, Jan. 2004, at 37, available at http://www.hsph.harvard.edu/cas/Documents/rapeintox/037-Mohler-Kuo.sep1.pdf. This study was conducted by the Department of Society, Human Development and Health, Harvard School of Public Health. Id. The researchers conducted evaluations at 119 schools and used a sample size of 215 randomly selected students at each school. Id. at 38. The study concluded that there is a strong correlation between rape and alcohol. Id. at 43. Specifically, roughly one in twenty college women
and violent riots. These have prompted universities to create a wide range of alcohol policies including: (1) three strike rules; (2) zero-tolerance regulations; (3) parental notification; and (4) alcohol advertising bans.

Id. at 42. Among those who experienced rape since the beginning of the school year, 72% of these women were so intoxicated that they were unable to consent. Id.

Id. See Pat Borzi, On College Football Game Days, Efforts to Deter Binge Drinking, N.Y. TIMES, Nov. 18, 2009, http://www.nytimes.com/2009/11/19/sports/ncaafootball/19drunk.html?_r=1 (reporting on the University of Minnesota’s new drinking policy mandating breathalyzer testing for all student football season ticket holders who have been ejected from a game, which was instituted because of extensive property damage and numerous arrests that occurred during past rioting on the campus in which excessive drinking was cited as a factor in the unruly behavior); Jenna Johnson, Crowded Off-Campus Party Degenerates into ‘War Zone’, WASH. POST, Apr. 13, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/04/12/AR2010041204291.html?hpip=topnews (reporting on an 8,000-person James Madison University Springfest party that turned into a riot after partygoers shattered car and house windows as well as threw rocks, beer bottles, and cans, injuring dozens of people).


Any student under the age of 21 who consumes and/or possesses alcohol in violation of Rhode Island law will be sanctioned as follows:[...]

[...]

The second offense, within [three] semesters, the mandatory minimum sanction will be mandatory education and evaluation and a minimum fine of $100. [...]

The third offense within three semesters [of the first offense], the mandatory minimum sanction will be suspension from the [u]niversity for two semesters with readmission possible on presentation of proof of treatment.

Id.

Univ. of Colo., Student Conduct Student Conduct Code Policies and Procedures, § 24, Possessing, using, providing, manufacturing, distributing, or selling alcoholic beverages in violation of law or university policies (2010—2011), available at http://www.colorado.edu/studentaffairs/studentconduct/downloads/StudentConductPoliciesandProcedures.pdf. The University of Colorado’s alcohol policy states that it applies to “an underage student...who knew, or reasonably should have known, s/he was in the presence of alcoholic beverages, or possessed, displayed, or was in the presence of an alcohol container or containers” and that “[i]n the case of a student who is found responsible via the student conduct process to have endangered the health, safety, or welfare of an individual through the provision of alcohol, the minimum disciplinary sanction shall be suspension.” Id.; see also Drug and Alcohol Policy, Tex. Lutheran Univ. (2010), http://www.tlu.edu/podium/default.aspx?i=6648&dm=Drug+and+Alcohol+Policy&lid=33689&ptid=129339&pttid=2&scid=1 (citing the Texas Lutheran University alcohol policy, which states that “[t]he university will impose a minimum disciplinary penalty of
Nevertheless, many reporters and scholars have criticized the ineffectiveness of these collegiate alcohol policies as well as the methods used to enforce them. In response to the alleged failure of these alcohol policies, many cities and states have enacted ordinances, regulations, and statutes, some of which are related to alcohol advertising. Currently,

suspension for a specified period of time or suspension of rights and privileges, or both, for conduct related to the use, possession, or distribution of drugs that are prohibited by law").

77 UNIV. OF MO., COLLECTED RULES AND REGULATIONS, 180.025, Parental Notification of Alcohol and Controlled Substances Violations (2010). The University of Missouri’s alcohol policy states:

The [u]niversity may notify only parent(s) or legal guardian(s) who have not declined to participate in the parental notification program under the following conditions: (a) if the student is under 21 years of age at the time of disclosure; and (b) when the student has been determined under the Rules of Procedures in Student Conduct Matters, § 200.020 of the Collected Rules and Regulations of the University of Missouri to have violated the student conduct code concerning alcohol or controlled substances on campus including operating a vehicle . . . under the influence of alcohol . . . as prohibited by law of the state of Missouri as stated in § 200.010 B.8; and (c) the violation is an initial severe, second or a subsequent violation of the student conduct code concerning alcohol or controlled substances. An initial severe offense is one that . . . endangers self, or others, or that may result in the potential loss of campus housing privileges, or have an impact on student status. (d) the University reserves the right not to notify parent(s) or legal guardian(s) even though the above conditions are satisfied, upon the written recommendation of a health care provider who determines that such notification would not be in the best interest of the student and would be detrimental to the student’s health, safety or welfare.

Id.


79 See David J. Hanson, Effective and Ineffective College Alcohol Policies, ALCOHOL PROBLEMS & SOLUTIONS, http://www2.potsdam.edu/hansondj/youthissues/1131472758.html (last visited Nov. 14, 2011) (criticizing universities’ “tough on drinking” policies that ban all beer sales and punish non-drinkers caught at parties where alcohol is present); Tara Parker-Pope, Party Colleges Do Little to Curb Drinking, N.Y. TIMES (Oct. 19, 2009), http://well.blogs.nytimes.com/2009/10/19/colleges-do-little-to-curb-drinking/?scp=9&sq=alcohol%20fight%20college&st=cse (stating that college alcohol policies focus on alcohol education programs but ought to educate students about how their drinking habits compare to those of other students and to show them that regular excessive drinking is not the norm).

only two states have statutes aimed at reducing alcohol products from being advertised in conjunction with education-related activities. However, several states have promulgated regulations that prohibit or restrict advertisements that encourage the use, sale, consumption, or distribution of alcohol in the educational setting. These state statutes issue a summons to underage drinkers for their first offense; Social Host Ordinance Produces Unintended Consequences, DAILY NEXUS (June 3, 2010), http://www.dailynexus.com/2010-06-03/social-host-ordinance-produces-unintended-consequences/ (stating that the city of Isla Vista’s new ordinance lacks clear guidelines to prevent the law from being unduly directed at the Isla Vista community and will primarily affect UCSB and SBCC students); see also David Vladeck, Gerald Weber & Lawrence O. Gostin, Commercial Speech and the Public’s Health: Regulating Advertisements of Tobacco, Alcohol, High Fat Foods and Other Potentially Hazardous Products, 32 J.L. MED. & ETHICS 32, 32 (2004) (acknowledging that many laws that ban advertising for products that diminish public health stem from legislators’ beliefs that advertisers’ inherent advantages in funding and control over the message drown out competing public health statements).

81 See 47 P A. CONS. STAT. ANN. § 4-498(e)(3) (West 2003) (effective Feb. 7, 2003) (prohibiting print advertisements of alcoholic beverages within three hundred feet of any church, school, or public playground); TENN. CODE ANN. § 49-6-2109(e) (West 2009) (effective July 1, 2009) (permitting advertising on the rear of school buses but expressly prohibiting any alcohol or tobacco advertisements).

82 See FLA. ADMIN. CODE ANN. r. 6C1-2.003(2)(b) (2010) (prohibiting advertisements for the use, sale, consumption, or distribution of alcohol including: (1) two-for-one specials; (2) beat-the-clock deals; (3) happy hours; (4) lady’s night; or (5) illustrations or photos depicting these activities at the University of Florida); 905 IND. ADMIN. CODE 1-38-2 (2010) (prohibiting a primary supplier, wholesaler, or salesman of alcoholic beverages or the holder of a retailer’s or dealer’s permit to sell alcoholic beverages from erecting or maintaining any sign advertising alcoholic beverages within two hundred feet of a church or school); 4 N.C. ADMIN. CODE 25.1006(c) (2010) (banning alcoholic beverage advertising in any programs for events or activities in connection with any elementary or secondary schools and prohibiting any alcoholic beverages advertising connected with these events when broadcast over radio or television); OHIO ADMIN. CODE 4301:1-1-44(D)(1) (2010) (forbidding billboard advertisements within five hundred feet of any church, school, or public playground); UTAH ADMIN. CODE r. 81-1-17(2)(j)(iv) (2010) (prohibiting alcohol advertisements directed at or appealing primarily to minors by placing advertising in any school, college or university magazine, newspaper, program, television program, radio program, or other media, or sponsoring any school, college, or university activity); 3 V A. ADMIN. CODE § 5-20-40(2)(2010) (prohibiting advertisements of alcoholic beverages in college student publications unless in reference to a dining establishment); WASH. ADMIN. CODE § 314-52-070 (2010) (prohibiting outdoor advertising of liquor placed within five hundred feet of schools where the administrative body of these schools object to such placement, or any place which the Liquor Control Board, in its discretion, finds contrary to the public interest); W. VA. CODE R. § 126-23-3 (2010) (prohibiting all alcohol and tobacco advertisements on any school property). But see MICH. ADMIN CODE r. 436.1861 (2010) (permitting brewers, vendors of spirits, wine makers, out-of-state sellers of beer and wine, and licensed wholesalers of beer or wine to advertise in any newspaper or periodical published or circulated on the campus of a two- or four-year college or university located in the state); TENN. COMP. R. & REGS. 0100-05-03 (2010) (limiting advertising of distilled spirits and wines to brand names and only by direct mail and/or email; and narrowing advertising of distilled spirits, wines, and alcoholic beverages to newsletters, catalogues, or similar communications).
and local regulations have led to litigation and conflicting opinions in many jurisdictions.\textsuperscript{83}

1. The \textit{Pitt News} Opinion

\textit{Pitt News} is an independent, student-run newspaper at the University of Pittsburgh that is published daily during the school year and weekly during the summer.\textsuperscript{84} The publication is distributed free of charge to students and staff at over seventy-five locations around the university’s campus.\textsuperscript{85} The paper is governed by a student publications board, which selects an editor-in-chief, who has final editorial control over any content in the paper.\textsuperscript{86} The publication follows a fifty-fifty formula, whereby half of the paper is devoted to news content and the other half to advertisements.\textsuperscript{87}

In 1996, the Pennsylvania Legislature enacted an amendment to the state Liquor Code known as Act 199.\textsuperscript{88} The Act prohibited all alcohol advertisements that were in any way linked to an educational institution or directed at minors.\textsuperscript{89} The Act banned advertisements in almost all

\textsuperscript{83} Compare Educ. Media Co. v. Swecker, 602 F.3d 583, 591 (4th Cir. 2010) (holding that a state statute prohibiting alcohol advertising on collegiate campuses was constitutional), with \textit{Pitt News} v. Pappert, 379 F.3d 96, 101 (3d Cir. 2004) (holding that a state statute prohibiting alcohol advertising on collegiate campuses was unconstitutional).

\textsuperscript{84} \textit{Pitt News}, 379 F.3d at 101. The \textit{Pitt News} is a student-run publication, created by the University Board of Trustees, which represents the independent speech of students, and is not an official publication disseminated on behalf of the public university. \textit{Id}.

\textsuperscript{85} \textit{Id}. In fall 1997, the University of Pittsburgh had 25,461 students on its campus and employed 7,742 faculty members and staff. Brief of Appellant at 6, \textit{Pitt News} v. Pappert, 379 F.3d 96 (3d Cir. 2004) (No. 03-1725), 2003 WL 24302476. At that time, over seventy-five percent of the university’s population was over the age of twenty-one. \textit{Id}. Many local people outside of the university were also readers of the publication. \textit{Id}.

\textsuperscript{86} \textit{Id}. at 5.

\textsuperscript{87} \textit{Id}. at 6. Due to this format, and because advertising represents \textit{Pitt News}’s sole source of revenue, the length of the paper is directly determined by the amount of advertising sales. \textit{Id}. In the 1998–99 school year, the budget for \textit{Pitt News} was $603,000. \textit{Id}.

\textsuperscript{88} \textit{Pitt News}, 379 F.3d at 102.

\textsuperscript{89} 47 P A. STAT. ANN. § 4-498(e)(4)-(5) (West 1997 & Supp. 2011). The statute stated:

\begin{quote}
(e) The following shall apply to all alcoholic beverage and malt beverage advertising:
\begin{itemize}
\item \textit{......}
\item (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.
\item (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 on behalf of any educational institution.
\end{itemize}
\end{quote}
forms of media. Act 199 was interpreted by state officials to apply only to advertisers who paid for their advertisements in the mediums proscribed by the law.

On December 9, 1997, the general manager of the Pitt News received a fax from the owner of Fuel & Fuddle, a local restaurant, canceling the establishment’s advertising contract with the paper. Fuel & Fuddle terminated the contract because the Bureau of Liquor Control Enforcement sent a letter to the restaurant notifying the business that it could be fined or have its alcohol license revoked for placing advertisements for alcoholic beverages in a newspaper published by an educational institution. To protect its advertisers, Pitt News stopped accepting all alcoholic beverage advertisements.

Subsequently, Pitt News filed a complaint against state officials, and the case eventually reached the Third Circuit Court of Appeals. There,

\[90\] 47 PA. STAT. ANN. § 4-498(g). The statute stated: “The term “advertisement” shall mean any advertising of alcoholic beverages through the medium of radio broadcast, television broadcast, newspapers, periodicals or other publication, outdoor advertisement or any other printed or graphic matter, including booklets, flyers or cards, or on the product label or attachment itself.

\[91\] Pitt News, 379 F.3d at 102. Faith Diehl, a representative of the Pennsylvania Liquor Control Board, testified that Title 47, section 4-498 of the Pennsylvania code only applied to advertisers, and not the media. Id. Further, she testified that, to be convicted under this section, the media publishing the advertisement had to receive compensation for placement of that advertisement. Id.

\[92\] Id. at 103.

\[93\] Id. Specifically, the letter stated that Fuel & Fuddle “had advertised . . . alcoholic beverages, either directly or indirectly, in a publication published by, for or in [sic] behalf of an educational institution.” Id. (alteration in original). Further, the Bureau of Liquor Control Enforcement threatened to suspend or revoke Fuel & Fuddle’s liquor license. Id.

\[94\] Id. In 1998, the practice of not accepting alcohol advertisements resulted in a $17,000 operating loss for the paper which, consequently, affected its length.

\[95\] Id. In April 1999, Pitt News filed a complaint and moved for a preliminary injunction against the enforcement of Act 199, alleging a violation of freedom of the press, freedom of expression, and equal protection of the law. Id. Initially, the district court denied the injunction request, holding that Pitt News lacked standing. Id. On appeal, a panel of the Third Circuit affirmed the district court’s denial of the injunction on behalf of the paper’s advertisers and readers but held that Pitt News had standing for a First Amendment claim of its own. Id. Despite this finding of standing, the court subsequently held that Pitt News was unlikely to succeed on the merits and dismissed the case. Id. at 104. This case was then taken by the Third Circuit for review. Id. The Third Circuit held that, by passing Act 199, the government aimed to discourage speech it deemed to have harmful content by imposing a financial burden on the paper. Id. at 106. Therefore, Act 199 had to satisfy the four-pronged Central Hudson test because it was a restriction on commercial speech. Id. According to the court, Act 199 undisputedly passed the first and second prongs of the
the court held that the government had failed *Central Hudson’s* third prong because it did not prove that Act 199 alleviated underage drinking or alcohol abuse to a material degree. The court concluded that the government had relied on speculation and conjecture to prove that eliminating the advertisements in *Pitt News* would reduce underage drinking, thus failing to meet the requirements outlined by the third prong. Moreover, the court held that the government had not established a reasonable fit between the legislature’s ends and the narrowly tailored means chosen to accomplish those ends. The court concluded that Act 199 was severely over- and under-inclusive. Furthermore, the court found that the government could have used alternative methods to fight underage drinking. Although important,
Pitt News does not represent the only opinion on these facts. A strikingly similar case, Educational Media Co. at Virginia Tech v. Swecker, came out of the Fourth Circuit.

2. The Swecker Opinion

Swecker involved two different collegiate newspapers, the Collegiate Times, published by Virginia Polytechnic Institute and State University, and the Cavalier Daily, published by the University of Virginia. Both newspapers rely heavily on advertising to stay within their budget.

The Virginia Department of Alcoholic Beverage Control is a state agency that controls the importation and distribution of alcoholic beverages within Virginia. The Alcoholic Beverage Control Board promulgated Section 5-20-40(B)(3), which prohibited advertisements of alcoholic beverages in any college student publication. A college student publication is defined as any college or university publication that is: (1) prepared, edited, or published primarily by students; (2) sanctioned as a curricular or extracurricular activity; and (3) distributed or intended to be distributed primarily to persons under twenty-one years of age.

101 Educ. Media Co. v. Swecker, 602 F.3d 583, 587 (4th Cir. 2010). Both the Collegiate Times and the Cavalier Daily are student-run newspapers that rely on advertising to operate. Id. The Collegiate Times is owned by the Educational Media Company at Virginia Tech. Brief of Appellees at 1, Educ. Media Co. v. Swecker, 602 F.3d 583 (4th Cir. 2010) (No. 08-1798), 2009 WL 1399396. The Collegiate Times is distributed free of charge to the Virginia Tech community and is available at select locations around campus. Id. at 2. The Collegiate Times is published four times a week and approximately 14,000 copies of the paper are circulated daily during the fall and spring semesters. Id. at 1–2. The Cavalier Daily is owned by The Cavalier Daily, Inc. Id. at 2. The Cavalier Daily is printed five days a week during the school year, and about 10,000 copies of the paper are distributed free of charge to the University of Virginia community each day. Id. Additionally, the Cavalier Daily is distributed free of charge to the community at campus locations as well as off-campus, at local restaurants near the University of Virginia. Id. at 3. As of September 2006, 49% of the on-grounds students at the University of Virginia were under the age of twenty-one, and 51% of the students were over the age of twenty-one. Id. The paper’s readership also includes university faculty and staff, who are generally over the age of twenty-one. Id.

102 Id. at 6–7. In 2005, 98.7% of the Collegiate Times’ budget came from advertising. Id.

103 Swecker, 602 F.3d at 586. The Alcoholic Beverage Control Board serves three main functions: (1) it is a law enforcement organization aimed at implementing Virginia’s alcohol laws; (2) it is an educational organization designed to inform citizens about the dangers of drinking; and (3) it is an administrative organization created to issue alcohol licenses as well as revoke and suspend them through proceedings in administrative courts. About ABC, VIRGINIA.GOV, http://www.abc.virginia.gov/admin/aboutabc.html (last visited Dec. 24, 2010).


105 Id.
As a result of this regulation, the Collegiate News and the Cavalier Daily each lost $30,000 in revenue. The Fourth Circuit held that Section 5-20-40(B)(3) was a constitutional restriction on commercial speech because it survived the four prongs of the Central Hudson test. The court held Section 5-20-40(B)(3) met the first prong of the Central Hudson test because the law regulated truthful advertisements, which were lawfully directed at some students and faculty that were twenty-one years of age or older. Additionally, the government met the second prong because the state had a substantial interest in combating underage drinking. Under the third prong of the Central Hudson test, the court found that the state’s ban on alcohol advertising in collegiate newspapers did directly advance the government’s substantial interest in eliminating underage alcohol consumption. The court reasoned that history, consensus, or simple common sense supported a causal link between the advancement of the government’s substantial interest and the advertising ban. Concerning the fourth prong of the analysis, the court held that there was a reasonable fit between the government’s interest in decreasing underage alcohol consumption and Section 5-20-40(B)(3)’s restriction on

106 Swecker, 602 F.3d at 587.
107 Id. Both newspapers asked the courts to grant them injunctive relief to enjoin the enforcement of the Alcohol Beverage Control Board’s enforcement ability under the regulation. Id.
108 Id. at 591. The court overturned the district court’s decision, holding that the regulation was a facially unconstitutional ban on commercial speech. Id. at 587.
109 Id. at 589. The court held that, although the law was primarily intended to apply to underage students, it did not restrict speech solely to underage students; rather, it infringed on the rights of the “of age” students to receive the message, and therefore, triggered the Central Hudson test protections. Id.
110 Id.
111 See id. at 590 (“[I]t is illogical to think that alcohol ads do not increase demand.”).
112 Id. at 589. The court held that a common sense link between alcohol advertising and alcohol consumption could be found because alcoholic beverage companies would not advertise in these publications if they did not believe that it would help sell their products. Id. The court stated that, “[I]t is 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 demand by college students.” Id. Further, the court noted that the government did not need to produce any empirical evidence to satisfy the third prong of the Central Hudson test. Id. Moreover, the court noted that the college newspapers did nothing to contradict this link or recognize the distinction between advertisements in the local newspapers and advertisements in mass media publications. Id. at 590. On the other hand, the dissent opposed the majority’s analysis because “underage . . . drinking by college students has not diminished since the enactment of this regulation; rather, the evidence demonstrates that the problem has grown and exacerbated over time, despite the decades-old restriction.” Id. at 593–94 n.5.
commercial speech. Further, the court held that the ban on alcohol advertisements was sufficiently narrow and was a cost-effective prevention method.

Pitt News and Swecker are clear examples of the varying interpretations of the Central Hudson test that have damaged the solidarity of the commercial speech doctrine. The inconsistent application of the Central Hudson test persists today mainly because of multiple standards used by the Supreme Court and the divided philosophies of the Justices.

113 Id. at 590.
114 Id. at 591. The majority found that the alcohol ban in the newspapers was a reasonable fit because it did not affect all possible publications on college campuses due to the fact that it only limited the advertisements in publications that targeted students under twenty-one years of age. Id. However, the dissent recognized that:

There is no evidence that these newspapers are “targeted at students under twenty-one.” [Rather,] [t]he record reveals that the majority of the readership of these newspapers is of legal age to drink. Accordingly, under the fourth step of the Central Hudson test, the regulation . . . is not “a means narrowly tailored to achieve the desired objective . . . .”

Id. (citing Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555 (2001)). Moreover, the court conceded that, although the government may have other less restrictive and more effective means in fighting underage drinking, this reasonably effective method of combating underage drinking was sufficient to meet the reasonable fit standard. Id. at 591. Alternatively, the dissent noted that, while the majority correctly recited that the law restricting speech does not have to be the single best method of achieving the government’s interest, it failed to realize that “a commercial speech restriction must be a necessary as opposed to merely convenient means of achieving the [government’s] interests, and the costs and benefits associated with the restriction must be carefully calculated.” Id. at 595 (internal quotations omitted). The dissent observed that there were more direct and less restrictive means of decreasing alcohol consumption by minors on college campuses such as: (1) increased taxation on alcohol; (2) counter-advertising to correct perceptions of college drinking habits; and (3) publishing editorial pamphlets about alcohol abuse and distributing them to college students and their parents. Id. at 596.

115 Compare Swecker, 602 F.3d at 589–90 (using the common sense standard to conclude that alcohol advertising bans logically cause a decrease in drinking without any extrinsic evidence and holding that the government’s ban on alcohol advertising in collegiate newspapers had a reasonable fit with decreasing alcohol demand on college campuses), with Pitt News v. Pappert, 379 F.3d 96, 107 (3d Cir. 2004) (using the material degree standard to prohibit the government from banning alcohol advertisements in college newspapers because the government had no evidence that eliminating alcoholic beverage advertisements in college newspapers would combat underage or abusive drinking and holding the fit between banning alcohol advertisements in college newspapers and underage drinking was not reasonable).

116 See Edenfield v. Fane, 507 U.S. 761, 777 (1993) (Blackmun, J., concurring) (“[C]ommercial speech that is free from fraud or duress or the advocacy of unlawful activity is entitled to only an ‘intermediate standard.’”); Id. at 778 (O’Connor, J., dissenting). O’Connor stated that:
III. ANALYSIS

Interpreting the Central Hudson test has been a difficult task for the Supreme Court. Presently, the Court permits the use of both the material degree standard and the common sense standard to prove that a restriction on commercial speech directly advances a government interest.117 This bifurcated analysis has created a split in the circuits concerning the burden of proof necessary to show materiality.118 Moreover, the standard that governs Central Hudson’s fourth prong remains unsettled due to the fact that the Supreme Court has not decided a case on this prong for a decade, and less than a handful of cases have applied the reasonable fit standard.119 Likewise, some individual Justices on the Court have expressed concern over the legitimacy of the commercial speech doctrine as a whole, while others have vehemently

117 Compare Edenfield, 507 U.S. at 770–71 (holding that more than mere speculation or conjecture must be presented by the government to justify a restriction on commercial speech), with Fla. Bar v. Went for It, Inc., 515 U.S. 618, 628 (1995) (stating that “history, consensus, and ‘simple common sense’ has been sufficient to justify restrictions on speech in strict scrutiny cases).

118 See Hinegardner, supra note 31, at 570 (detailing the various approaches in regard to the common sense standard that the lower courts have taken in interpreting the third prong of the Central Hudson test).

119 See Reilly, 533 U.S. at 556 (holding that, in Florida Bar, the Court “made it clear that the ‘least restrictive means’ is not the standard; instead, the case law requires a reasonable fit between the legislature’s ends and the means chosen to accomplish those ends, . . . . a means narrowly tailored to achieve the desired objective” (citations omitted)); Fla. Bar, 515 U.S. at 632 (“In Fox, we made clear that the ‘least restrictive means’ test has no role in the commercial speech context.”); Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989) (“Whatever the conflicting tenor of our prior dicta may be, we now focus upon this specific issue for the first time, and conclude that the reason of the matter requires something short of a least-restrictive means standard.”). But see 44 Liquormart, Inc., v. Rhode Island, 517 U.S. 484, 507 (1996) (suggesting that the least restrictive means test was applicable because “[t]he [s]tate also cannot satisfy the requirement that its restriction on speech be no more extensive than necessary. It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the [s]tate’s goal of promoting temperance.”).

Id.; see also Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 572 (2001) (Thomas, J., concurring) (“I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as ‘commercial.’”).
fought over its governing standards. Nevertheless, critics argue that commercial speech should be protected to: (1) safeguard a consumer’s right to receive truthful information about commercial products; (2) limit over- and under-inclusion; (3) decrease the government’s paternalistic actions; and (4) diminish the probability that the government will act arbitrarily. Undeniably, the uncertainty

120 See Reilly, 533 U.S. at 572 (Thomas, J., concurring) (“I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as ‘commercial.’”); 44 Liquormart, 517 U.S. at 518 (Scalia, J., concurring) (“Since I do not believe we have before us the wherewithal to declare Central Hudson wrong—or at least the wherewithal to say what ought to replace it—I must resolve this case in accord with our existing jurisprudence . . . . [Therefore,] I am not disposed to develop new law, or reinforce old, on this issue, and accordingly I merely concur in the judgment of the Court.”); Rubin v. Coors Brewing Co., 514 U.S. 476, 497–98 (1995) (Stevens, J., concurring) (“In my opinion, the Government’s asserted interest, that consumers should be misled or uninformed for their own protection, does not suffice to justify restrictions on protected speech in any context, whether under ‘exact ing scrutiny’ or some other standard.”).

121 Compare Reilly, 533 U.S. at 585 (holding that a law prohibiting the advertisement of tobacco to prevent children from smoking was over-inclusive if it also restricted adult access to the information in the advertisement), and BLACK’S LAW DICTIONARY, supra note 34, at 1213 (defining over-inclusion as legislation that “extend[s] beyond the class of persons intended to be protected or regulated” and articulating that over-inclusive laws burden more people “than necessary to cure the problem[s]” being targeted), with Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 86, 93 (1977) (holding that a township ordinance banning “For Sale” or “Sold” signs was under-inclusive because it only banned the use of for sale signs for real estate, but permitted all other for sale signs in other contexts), and THEFREEDICTIONARY.COM, supra note 99 (defining under-inclusion as legislation that prohibits some conduct but fails to prohibit other similar conduct).

122 See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976) (“As to the particular consumer’s interest in the free flow of [truthful] commercial information, that interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”); see also 44 Liquormart, 517 U.S. at 495–96 (“Advertising has been a part of our culture throughout our history…. In accord with the role that commercial messages have long played, the law has developed to ensure that advertising provides consumers with accurate information about the availability of goods and services.”).

123 See CHEMERINSKY, supra note 12, at 928 (expressing the idea that if government is to decide what is true and right and suppress everything else, then government will inevitably censor speech to serve its own ends); MICHAEL E. PORTER, COMPETITIVE STRATEGY 28–29 (1980) [hereinafter COMPETITIVE STRATEGY] [arguing that the government
surrounding the third and fourth prongs of the *Central Hudson* test have hampered the growth of the commercial speech doctrine and have created irreconcilable differences between holdings in different jurisdictions.\(^{125}\)

Part III.A of this Note will analyze the strengths and weaknesses of the differing standards given by the Supreme Court regarding the third prong of the *Central Hudson* test.\(^{126}\) Specifically, Part III.A.1 will discuss the material degree standard and Part III.A.2 will discuss the common sense standard.\(^{127}\) Then, Part III.B will examine the strengths and weaknesses of the differing standards handed down by the Court concerning the fourth prong of the *Central Hudson* test.\(^{128}\) In particular, Part III.B.1 will evaluate the least restrictive means test and Part III.B.2 will assess the reasonable fit test.\(^{129}\) Lastly, Part III.C will evaluate the implications of this issue if it is not resolved.\(^{130}\)

### A. Different Standards for Central Hudson’s Third Prong

*Central Hudson* held that the restriction on speech must directly advance the government’s substantial interest.\(^{131}\) Over time, the Court encountered cases that forced it to discern how much and what kinds of evidence are needed to prove direct advancement.\(^{132}\) Presently, there are

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\(^{125}\) See *supra* Part II.B (discussing the various cases that utilize different approaches for the third and fourth prongs of the *Central Hudson* test).

\(^{126}\) See *infra* Part III.A (distinguishing the different standards mentioned by the Court concerning the third prong of the *Central Hudson* test).

\(^{127}\) See *infra* Part III.A.1 and Part III.A.2 (explaining the diverse evidentiary thresholds of the material degree and common sense standards).

\(^{128}\) See *infra* Part III.B (discussing the conflicting standards applied by the Court regarding the fourth prong of the *Central Hudson* test).

\(^{129}\) See *infra* Part III.B.1 and Part III.B.2 (exploring the repercussions resulting from an application of the least restrictive means and reasonable fit standards to the fourth prong of the *Central Hudson* test).

\(^{130}\) See *infra* Part III.C (pinpointing the long-term consequences of ignoring the different standards set forth in the third and fourth prongs of the *Central Hudson* test).


\(^{132}\) See *Edenfield v. Fane*, 507 U.S. 761, 771 (1993) (finding that the state presented “no studies that suggest personal solicitation of prospective business clients by CPA’s creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear” and that the government did “not disclose any anecdotal evidence, either from Florida or another state, that validates the Board’s suppositions”); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 648 (1985) (stating that,
two radically different standards—the material degree standard and the common sense standard—that courts can follow to satisfy this element of the Central Hudson test. The two sections below will outline the positive and negative aspects of each standard and explain how they differ.

1. The Material Degree Standard

The Supreme Court has appointed the third prong the vanguard of the Central Hudson test. The material degree standard states that the government can comply with the third prong of the Central Hudson test only if it proves, through minimal empirical or anecdotal evidence, that a restriction on speech directly furthers its interest. This safeguard protects First Amendment rights from being violated by speculative

“nowhere does the [s]tate cite any evidence or authority of any kind for its contention that the potential abuses associated with the use of illustrations in attorneys’ advertising cannot be combated by any means short of a blanket ban”); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 73 (1983) (holding that a law that criminalized sending information about contraceptive through the mail was unconstitutional under the third prong of the Central Hudson test because it “provide[d] only the most limited incremental support for the interest asserted”); In re R. M. J., 455 U.S. 191, 205–06 (1982) (concluding that it was unconstitutional for a state to reprimand an attorney for placing an advertisement in a newspaper when “[t]here is nothing in the record to indicate that the inclusion of this information was misleading”).

133 See Edenfield, 507 U.S. at 770–71 (holding that the government must present some evidence that its ban on commercial speech will reduce the harm done and that mere speculation or conjecture will not suffice to meet this standard). But see Fla. Bar v. Went for It, Inc., 515 U.S. 618, 628 (1995) (holding that case law does not “require that empirical data come to us accompanied by a surfeit of background information [and] . . . speech restrictions [may be justified] by reference to studies and anecdotes pertaining to different locales altogether, or even, . . . based solely on history, consensus, and ‘simple common sense’” (citations omitted) (emphasis added)).


[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. We cautioned that this requirement was critical; otherwise, a [s]tate could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.

Id. (citations omitted) (internal quotation marks omitted).

135 See Lorillard Tobacco Co. v. Reilly, 533 U.S. 325, 555 (2001) (“[T]he speech restriction [must] directly and materially advance[e] the asserted governmental interest.”). However, the Court does not “require that ‘empirical data come . . . accompanied by a surfeit of background information . . . . W[e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether.’” Id. (alterations in original).
harms alleged by the government. Thus, by requiring a scintilla of empirical or even anecdotal evidence, the government is prevented from acting as a paternalistic force.

Furthermore, if empirical evidence is necessary to prove a correlation between commercial advertising and societal harm, then the interference with citizens’ autonomy is less severe. As a consequence, the government is required to prove objectively that a restriction on speech will actually mitigate its cited harm. Therefore, before a commercial message is arbitrarily taken off of the shelves of the intellectual marketplace, depriving consumers of their constitutional right to receive the message, the government will have to justify the suppression of speech by pointing to empirical facts supporting its action. The material degree standard can help prevent the government from subjectively deciding what advertising is too harmful to hear or what products are too dangerous to promote.

Despite the apparently straightforward nature of the material degree standard, the Court has convoluted the principle, and in so doing, diluted its strength. In *Edenfield*, the Court held that the government cannot “directly advance” its interests through “mere speculation [and]

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136 See *Edenfield*, 507 U.S. at 770 (holding that the government could not directly advance its cited interest through “mere speculation or conjecture”).

137 See *Hinegardner*, *supra* note 31, at 557 (proposing “a significant, verifiable, and reasonable quantum of evidence” standard to satisfy the third prong of the *Central Hudson* test, which would, in effect, reject the common sense standard).

138 See infra text accompanying note 141 (noting that the material degree standard can help prevent the government from determining what advertising is too harmful or what products are too dangerous to endorse).


[id].

140 See, e.g., *Edenfield*, 507 U.S. at 771 (holding that the government failed to meet the third prong of the *Central Hudson* test when it banned certified public accountants from soliciting new clients in-person as the government had no factual basis for believing that this practice would further fraud).

141 See *Hinegardner*, *supra* note 31, at 570 (arguing that a material evidence test would “prevent dilution of *Central Hudson* [and] intermediate scrutiny to an unlawful, de facto rational basis level by providing the Court with an ample amount of evidence for it to make an informed decision”).
conjecture.” This implies that the government must present some hard evidence to restrict commercial speech. Yet, this is not the approach that the Supreme Court has taken. In fact, the Court has expressed that it will uphold a law restricting commercial speech without the production of any empirical evidence whatsoever. Therefore, this paradoxical standard leaves practitioners with little guidance and lower courts bewildered about what evidence is necessary to sustain a restriction on commercial speech.

2. The Common Sense Standard

The Supreme Court has never expressly accepted the common sense standard as a means to satisfy the third prong of the Central Hudson test. Nevertheless, this standard has been utilized by the First, Second,

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142 Edenfield, 507 U.S. at 770. The Court stated, “[t]his 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.” Id. at 770–71.

143 Fla. Bar v. Went for It, Inc., 515 U.S. 618, 628 (1995). The Court stated:

In any event, we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and “simple common sense.”

144 See Lorillard Tobacco Co. v. Reilly, 553 U.S. 525, 556 (2001) (“We do not, however, require that ‘empirical data come . . . accompanied by . . . background information.’” (first alteration in original)); see also Fla. Bar, 515 U.S. at 628 (holding that there does not need to be a showing of any empirical evidence to sustain a ban on commercial speech because “[n]othing in Edenfield, a case in which the [s]tate offered no evidence or anecdotes in support of its restriction, requires more”).

145 Compare Pagan v. Fruchey, 492 F.3d 766, 777 (6th Cir. 2007) (holding that a city had to produce sufficient empirical evidence showing that private commercial signs on streets were a threat to motorists because “the intermediate scrutiny we apply in the commercial speech context charges the government with the burden of justifying its chosen form of regulation. Thus, even common sense decisions require some justification.”), with G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1073 (9th Cir. 2006) (holding that legislative deliberation, a dynamic dialogue with the city’s residents and businesses, extensive hearings, and a city council’s reliance on the experience of other cities was sufficient evidence to institute a commercial sign restriction on city roads).

146 Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation, Bd. of Accountancy, 512 U.S. 136, 148 (1994). The Court suggested that the government must present some evidence of the causal link between the government’s substantial interest and advertising when it stated, “[w]e have never sustained restrictions on constitutionally protected speech based on a record so bare as the one on which the [b]oard relies here.” Id. Arguably, the Court molded this new interpretation of Central Hudson’s third prong from two sources. The most evident source, which is cited in Florida Bar, is from Justice Blackmun’s plurality opinion in Burson v.
Fourth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuit Courts in deciding commercial speech cases.\textsuperscript{147} Moreover, the common sense standard can be justified on the grounds that progressive policy implications result from its application.\textsuperscript{148}

A principal benefit derived from the common sense standard is that a presumption is created in favor of the government. It is assumed that, if there is a correlation between advertising and demand for a particular product, a statute or regulation directly advances the government’s interest in restricting commercial speech.\textsuperscript{149} Legislators may utilize this efficient and powerful tool when attacking advertisements that promote

\textit{Freeman, Fla. Bar}, 515 U.S. at 628. In that case, the Court upheld a restriction on solicitors distributing campaign materials to voters within 100 feet of a polling station’s entrance. Burson v. Freeman, 504 U.S. 191, 211 (1992). The Court recognized both the First Amendment right to free speech and the right to cast a ballot in an election free from the taint of intimidation and fraud. \textit{id.} at 206–07. After applying strict scrutiny, the Court held that “[a] long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary . . . . Given the conflict between these two rights, we hold that requiring solicitors to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise.” \textit{id.} at 211. Second, in \textit{Central Hudson}, the Court more subtly noted that “our decisions have recognized ‘the “commonsense” distinction between speech proposing a commercial transaction . . . and other varieties of speech.’” \textit{Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.}, 447 U.S. 557, 562 (1980).

\textsuperscript{147} \textit{See Educ. Media Co. v. Swecker, 602 F.3d 583, 589–90 (4th Cir. 2010)} (using the common sense standard to uphold a ban on alcohol advertising in college newspapers); \textit{Alexander v. Cahill, 598 F.3d 79, 92–96 (2d Cir. 2010)} (using the common sense standard to strike down a law banning attorney advertising); \textit{WV Ass’n of Club Owners & Fraternal Servs. v. Musgrave, 553 F.3d 292, 303–05 (4th Cir. 2009)} (applying the common sense standard to uphold a state ban on using a state’s video lottery system to advertise); \textit{IMS Health Inc. v. Ayotte, 550 F.3d 42, 59 (1st Cir. 2008)} (using the common sense standard to allow the legislature to assume “that net medical outlays will decrease as a result of the withdrawal of prescribing histories from detailers”); \textit{Pagan v. Fruchey, 492 F.3d 766, 777, 779 (6th Cir. 2007)} (using the common sense standard to aid in reversing a district court’s judgment that upheld a ban on parking automobiles with “For Sale” signs on public streets); \textit{G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1073 (9th Cir. 2006)} (concluding that the common sense standard permits a ban on street signs to further the city’s interest in improving traffic safety); \textit{Pac. Frontier v. Pleasant Grove City, 414 F.3d 1221, 1235 (10th Cir. 2005)} (supporting using the common sense standard to invalidate a city’s ordinance establishing a solicitor’s licensing procedure); \textit{Missouri ex rel. Nixon v. Am. Blast Fax, Inc., 323 F.3d 649, 655, 658 (8th Cir. 2003)} (using the common sense standard to approve a ban on unsolicited faxes containing advertisements because these faxes shifted the costs of advertising from the sender to the recipient); \textit{Mason v. Fla. Bar, 208 F.3d 952, 957–58 (11th Cir. 2000)} (using the common sense standard to aid in invalidating a state bar rule prohibiting self-laudatory advertisements by lawyers).

\textsuperscript{148} \textit{See infra} notes \textsuperscript{150–60} (discussing the policy implications of applying the common sense standard).

\textsuperscript{149} \textit{See Swecker, 602 F.3d at 589–90} (holding that the common sense standard is met if the government demonstrates a strong link between advertising bans and decreases in the consumption of harmful products).
harmful products.\textsuperscript{150} In effect, this standard provides a weapon to preemptively strike commercial advertising that encourages unhealthy behavior in society.\textsuperscript{151} Also, under the common sense standard, government entities are not required to scour studies or collect data to prove the obvious problems linked to a particular strain of commercial speech.\textsuperscript{152}

In some circumstances, there is limited or incomplete evidence to support the government’s assertion that the commercial speech is producing a precise harm.\textsuperscript{153} If only inadequate or underdeveloped studies exist on the particular subject, then many municipalities and state governments may be forced to abandon cases against harmful commercial speech.\textsuperscript{154} This is likely due to the lack of adequate funding or resources needed to complete the empirical studies and reports required to prove the detrimental effects of the alleged commercial harm.\textsuperscript{155} Alternatively, in many cases, the government cannot draw

\textsuperscript{150} See id. at 590 (holding that it is self-evident that alcohol vendors spend money on advertisements in college newspapers because they believe these advertisements will increase revenues and gross sales of their products).

\textsuperscript{151} See, e.g., Zick, supra note 60, at 132. Zick states: [L]egal empiricists and their counterparts in other disciplines collected heaps of data, but they had difficulty drawing conclusions from their observations, which often pointed in several directions at once. With indeterminate data, the empiricists failed to advance either the rule-determination or predictive realist agendas. Essentially, empirical stalemates left them with nowhere to go.

\textsuperscript{152} See FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1813 (2009) (“There are some propositions for which scant empirical evidence can be marshaled” and that “[i]t is one thing to set aside agency action... because of failure to adduce empirical data that can readily be obtained. It is something else to insist upon obtaining the unobtainable.” (citation omitted)); see also Calvert & Bunker, supra note 57, at 773 (suggesting that empirical data must only play a limited part in determining the causation element of a commercial speech case because empirical evidence can be too much of a good thing if the persistence in pursuing it causes courts to overlook obvious moral and social consequences of allowing certain commercial speech).

\textsuperscript{153} See Edenfield v. Fane, 507 U.S. 761, 771 (1993) (holding that a state statute prohibiting certified public accountants from conducting in-person solicitations to potential clients was unconstitutional because the state had failed to present studies or anecdotal accounts that certified public accountants were perpetuating fraud; thus, the state could not continue its attack on this perceived danger); Zick, supra note 60, at 149–51 (comparing and contrasting the Edenfield and Florida Bar cases to suggest that, under the current Supreme Court interpretation, states cannot passively enact statutes limiting commercial speech). Rather, states must get their hands dirty and find ways to collect empirical evidence to support these restrictions or these laws will be declared void by the courts). Id. at 149–51.

\textsuperscript{154} See Fox Television Stations, Inc., 129 S. Ct. at 1813 (stating that “[o]ne cannot [always] demand a multiyear controlled study” to prove a purported harm).
concrete conclusions from the evidence presented because social scientists have collected such enormous sets of data, which offer several different rational explanations of how the cited harm has been created. The common sense standard eliminates roadblocks such as the administrative burden of creating volumes of reliable data and sifting through conflicting reports, and therefore helps courts to reach a decision on whether the advertising is linked to a societal harm.

Some advertisements do not give much, if any, helpful or reliable information to consumers about the company’s products. The central premise of the commercial speech doctrine is that it grants consumers the ability to gather the truthful information they need to make critical daily economic decisions. Therefore, the undemanding nature of the common sense standard aids the government in regulating harmful advertisements by filtering out messages that have lost their informational value, only allowing truthful advertising to reach consumers.

Despite the benefits of adopting the common sense standard, lower courts have not been able to come to a consensus over its interpretation ever since the Court hinted at its viability. While many circuits recognize the common sense standard, no two courts precisely agree on

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156 See Zick, supra note 60, at 132 (arguing that social science stalemates produce poor scientifically predictive observations that hinder reliable judicial outcomes and hamper social value judgment).

157 See id. at 128–30 (stating that some legal formalism scholars believe that courts should decide the constitutionality of rights and powers through concepts and hypothetical examples, rather than through overwhelming, mundane, and sometimes contradictory data).

158 See Shimp & Preston, supra note 2, at 22–23, 30 (concluding that more advertisers are relying on deceptive, evaluative advertising that uses puffery and ambiguous terms to lure in consumers, rather than factual advertising that can be objectively analyzed in the product by looking at the inherent qualities of the product, because the Federal Trade Commission has discouraged advertisers from using factual claims and evaluative marketing protects brand name products).


160 See Hinegardner, supra note 31, at 548–52 (explaining that there are four classifications of appellate court interpretations regarding the common sense standard). The four classifications are: (1) the strong view, which holds that the court can utilize its common sense in adjudicating commercial speech cases, but it must couple this with some empirical evidence to support the existence of a public harm; (2) the legislative deference view, which holds that the First Amendment requires states to assess their own interests realistically and to take only reasonable steps in furtherance of these discerned interests; (3) the logical nexus view, which holds that there is a legislative presumption that advertising increases consumption; and (4) the irrationality view, which states that statutes riddled with exceptions cannot directly and materially advance its purpose when other provisions of the statute directly undermine or counteract the state’s interest. Id.
how it is to be implemented.\textsuperscript{161} Additionally, confusion among lower courts has produced an unclear definition of common sense.\textsuperscript{162} In some cases, the government meets the third prong’s scrutiny merely by alleging a specific harm and rationally tying it to commercial advertising.\textsuperscript{163} In other jurisdictions, the connection between an

\textsuperscript{161} See Educ. Media Co. at Va. Tech. v. Swecker, 602 F.3d 583, 589–90 (4th Cir. 2010) (using the logical nexus approach to the common sense standard to conclude that alcohol advertising causes an increase in binge drinking); Alexander v. Cahill, 598 F.3d 79, 92–96 (2d Cir. 2010) (advocating for the strong view of the common sense standard); WV Ass’n of Club Owners & Fraternal Servs. v. Musgrave, 553 F.3d 292, 303 (4th Cir. 2009) (applying the logical nexus approach to the commonsense standard to hold that video advertising at casinos may cause gambling addicts to compulsively spend money); IMS Health Inc. v. Ayotte, 550 F.3d 42, 58–59 (1st Cir. 2008) (adopting the legislative deference view to the simple common sense standard); Pagan v. Fruchey, 492 F.3d 766, 782 (6th Cir. 2007) (Rogers, J., dissenting) (holding that the strong view is the appropriate common sense standard because “[i]t simply does not follow from Edenfield that [the government] is not free, without evidence or studies, to make a common sense determination that allowing business to be conducted in the street presents certain hazards”); G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1073 (9th Cir. 2006) (adopting the legislative deference standard to hold that legislative deliberation, a dynamic dialogue with the city’s residents and businesses, extensive hearings, and a City Council’s reliance on the experience of other cities was sufficient evidence to institute a commercial sign restriction on certain sizes, types, and designs of advertisements on city roads); Pac. Frontier v. Pleasant Grove City, 414 F.3d 1221, 1235 (10th Cir. 2005) (supporting the strong view approach in applying the common sense standard to invalidate a city’s ordinance establishing a solicitor’s licensing procedure because it violated the plaintiff’s First Amendment commercial speech rights); Missouri ex rel. Nixon v. Am. Blast Fax, Inc., 323 F.3d 649, 654–55 (8th Cir. 2003) (holding that the legislative deference standard was the correct interpretation of the common sense standard and proving that legislative findings showed that prohibitions on unsolicited commercial fax advertisements directly and materially advanced the government’s asserted interest); Mason v. Fla. Bar, 208 F.3d 952, 957 (11th Cir. 2000) (expressing that the strong view approach to the common sense standard was correct and that “the Supreme Court has not accepted ‘common sense’ alone to prove the existence of a concrete, non-speculative harm”).

\textsuperscript{162} Compare Pitt News v. Pappert, 379 F.3d 96, 107 (3d Cir. 2004) (holding that no state official had provided evidence that the elimination of alcohol advertisements in \textit{Pitt News} had “ma[d]e it harder for would-be purchasers to locate places near campus where alcoholic beverages may be purchased” and “[c]ommon sense suggests that would-be drinkers [would] have no difficulty finding those establishments despite” the law banning these advertisements), \textit{with Swecker}, 602 F.3d at 589 (“[C]ommon sense support[s] the link between advertising bans in college newspapers and a decrease in demand for alcohol among college students.”).

\textsuperscript{163} See \textit{Swecker}, 602 F.3d at 590 (holding that an advertising ban on alcohol in college newspapers passed the \textit{Central Hudson} test because alcohol vendors would not advertise in these publications unless they believed that it would increase consumption of their product by underage college students); \textit{Musgrave}, 553 F.3d at 305 (concluding that restrictions on advertising on a state’s video lottery system avoided failing the third prong of the \textit{Central Hudson} test because there was a rational link between reducing the demand for the lottery as well as the spread of private lotteries and restricting video advertising); \textit{Ayotte}, 550 F.3d at 59 (finding that a state legislature could reasonably assume that “net medical outlays
advertisement and the government’s cited harm, however logical it may be, has resulted in a dismissal of the case when it is not coupled with any supporting empirical data.\textsuperscript{164}

Moreover, the common sense standard is naturally paternalistic.\textsuperscript{165} In upholding government-sanctioned restrictions on commercial speech, courts permit the government to establish what it thinks to be in the best interests of its citizens.\textsuperscript{166} Consequently, citizens are limited in their ability to make independent decisions about commercial products. Furthermore, this method of government action effectively operates as a prior restraint on free speech because it prohibits certain advertisements from ever being disseminated, regardless of the balanced content included in the advertisement.\textsuperscript{167} Messages can be pulled from the media before ever appearing in a newspaper or over the airwaves. This is an extreme measure; an alternative is to punish advertisers after

\textsuperscript{164} See Alexander, 598 F.3d at 92 (holding that a thirty-day moratorium for targeted solicitation following a specific incident, including targeted ads on television or in other media, was unconstitutional because the government did not produce any evidence that there were any consumer complaints or academic studies showing that attorney advertising tarnished the profession’s integrity); Pagan, 492 F.3d at 777–78 (holding that a city ordinance banning street signs could not be upheld because the city failed to provide any evidence that the signs created an increase in traffic risks); Pac. Frontier, 414 F.3d at 1236 (finding that a city’s ban on solicitation without submitting a fingerprint sample and posting a bond was unconstitutional because the city did not present any evidence that these procedures would decrease damage done to private property by solicitors).

\textsuperscript{165} See Hinegardner, supra note 31, at 556–57 (suggesting that a challenger in a common sense standard case could easily make an argument that a law is paternalistic because the state in these cases does not have to produce any evidence before the court). Alternatively, by making the government put forth evidence that “a proscriptive measure” is necessary, the legislature has proof that its actions were legitimate. Id. at 556–57.

\textsuperscript{166} See id. at 554 ("Paternalism triggers hefty First Amendment consequences when governments proceed under its auspices; the ‘government’s power ebbs when it tells us what to say or hear for own good [sic].’").

\textsuperscript{167} See Post, supra note 23, at 583 (arguing that past court decisions have encouraged states to regulate commercial speech by using prior restraints because of “the assumption that the constitutional value of commercial speech lies in the circulation of information rather than in the independent interests of commercial speakers”); see also Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 564 n.6 (1980) (stating in dicta that prior restraints on commercial speech may be permissible because the expression of self-interested marketers should be subject to extensive regulation and advertisers are in the best position to evaluate the accuracy of their statements).
publishing false or misleading assertions.\textsuperscript{168} If this occurs, then honest marketers are prevented from making truthful information available to consumers. Further, public advertisements may be the only warning about specific products or services that reach consumers, even if this message is found in a small disclaimer or written in fine print.\textsuperscript{169}

The common sense approach allows the government to zealously protect its citizens against misleading or false advertisements that threaten unsuspecting consumers.\textsuperscript{170} However, this presumes that consumers are incapable of making informed decisions for themselves and are unable to see through the veil of vague, yet captivating, commercial advertisements.\textsuperscript{171} Further, it assumes that the government has a foolproof method to protect its constituents—with or without supporting empirical data. Like the third prong of the \textit{Central Hudson} test, the fourth prong has been clouded by multiple standards and different interpretations that have shifted throughout its existence.

\textsuperscript{168} See, e.g., Neb. Press Ass'n v. Stuart, 427 U.S. 539, 554, 559–60 (1976) (stating that professional discipline, defamation, and other civil sanctions should be instituted as alternatives to prior restraints due to the fact that the postponement or concealment of speech may totally prevent important ideas from ever reaching the public).


\textsuperscript{170} See supra Part III.A.2 (noting that the common sense standard allows the government to protect citizens from alleged commercial harms by banning advertising when there is little evidence to support these claims or to show that the costs of obtaining such information would be burdensome).

\textsuperscript{171} See Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002) ("[W]e reject the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information."); 44 Liquormart v. Rhode Island, 517 U.S. 484, 503 (1996) ("[B]ans against truthful, nonmisleading commercial speech...usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth. [Yet,] [t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." (citation omitted)).
B. Different Standards for Central Hudson’s Fourth Prong

Although the Court may have unintentionally created ambiguity in the analysis of the third prong of the Central Hudson test, it is undisputed that a fierce battle exists over the precise standard that should govern the fourth prong.172 Since the birth of the test, the Court has debated whether the least restrictive means standard should be applied.173 Alternatively, many Justices strongly believe that the reasonable fit standard should be implemented.174 Currently, the reasonable fit standard is being used by the Court, and according to this standard, the government must demonstrate the narrow tailoring of a challenged regulation to its asserted interest—a fit that is not necessarily perfect, but reasonable—that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.175 Nevertheless, due to the back-and-forth history of this prong, the legitimacy of the reasonable fit standard remains questionable.176

172 Compare 44 Liquormart, 517 U.S. at 524 n.6 (Thomas, J., concurring) (arguing that the Court has held, in decisions such as Discovery Network, that “commercial speech restrictions [are] impermissible if alternatives are ‘numerous’ and obvious”), with id. at 529 (O’Connor, J., concurring) (arguing that the proper inquiry about the fourth prong of the Central Hudson test concerns the fit between the government’s goal and the legislature’s method “that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served”).

173 See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 566 (1980) (holding that a restriction on commercial speech could not be more extensive than necessary to serve the government’s substantial interests); see also 44 Liquormart, 517 U.S. at 507 (“[A]lternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the [s]tate’s goal of promoting temperance.”); Rubin v. Coors Brewing Co., 514 U.S. 476, 491 (1995) (“The FAAA’s defects are further highlighted by the availability of alternatives that would prove less intrusive to the First Amendment’s protections for commercial speech.”).

174 See Greater New Orleans Broad. Ass’n v. United States, 527 U.S. 173, 188 (1999). The Court held that:

Government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.”

Id. The Court has also expressed that “our [past] decisions upholding the regulation of commercial speech cannot be reconciled with a requirement of least restrictive means.” Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 479 (1989).

175 Greater New Orleans Broad. Ass’n, 527 U.S. at 188.

176 Compare id. at 188–89 (reaffirming the reasonable fit standard), and Fox, 492 U.S. at 480 (stating that narrowly tailored in the commercial speech context means that there “is a ‘fit’ between the legislature’s ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is ‘in proportion to the interest served’” (citation omitted)),
two sections below analyze the pros and cons of implementing each standard.

1. The Least Restrictive Means Test

In Rubin v. Coors Brewing Co., the Court found that the government must show that the restriction on commercial speech is “no more extensive than necessary to serve” the government’s substantial interest.\footnote{514 U.S. at 486.} To meet this standard, the government is required to prove that its goal is narrowly tailored so that there is no less speech restrictive alternative available.\footnote{See id. at 491 (“[T]he availability of [alternative] options, all of which could advance the Government’s asserted interest in a manner less intrusive to respondent’s First Amendment rights, indicates that [a law] is more extensive than necessary.”).} Therefore, the “no more extensive than necessary” standard exponentially increases the burden of proof that the government must carry to constitutionally restrict commercial speech. This approach also pushes the Court’s standard of review towards strict scrutiny.\footnote{See, e.g., Fallon, Jr., supra note 13, at 1326 (stating that the narrow tailoring requirement used in Supreme Court strict scrutiny cases is synonymous with the least restrictive alternative standard).}

The least restrictive means test is attractive for a number of reasons. First, it creates a bright-line rule in the blurry area of law pertaining to commercial speech.\footnote{See Howell, supra note 64, at 1094 (stating that “[t]he Court purports to apply a standard that lies somewhere between a ‘rational basis’ test and a ‘least restrictive means’ test,” and arguing that the Court has left practitioners confused because they have avoided drawing a bright line rule); see also City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 419 (1993) (rejecting the least restrictive means test as the standard for the fourth prong of the Central Hudson test and refusing to draw “bright lines that will clearly cabin commercial speech in a distinct category”).} If a court finds that there is a more moderate approach to containing a societal harm than completely banning a particular product’s advertisements, the challenger easily wins the case.\footnote{See 44 Liquormart, 517 U.S. at 524 (Thomas, J., concurring) (arguing that if there are obvious alternatives to restricting commercial advertising, such as rationing, taxing, or controlling the price of products, then a ban on commercial speech ought to fail.).} Moreover, if a speech restrictive law does pass this lofty standard, the elimination of that message is truly necessary to protect the
well-being of consumers. 182 Second, the least restrictive means test can stifle the harmful effects of over-inclusive commercial speech laws. 183 Under the heavy burden of proof associated with the least restrictive means test, the government’s attempts to paternalistically suppress speech can be thwarted. 184 Therefore, the least restrictive means test prohibits the government from drafting overreaching laws that could potentially ban truthful commercial content. 185 Third, by requiring the government to use the least restrictive method on speech to achieve its goal, the government is more apt to combat harmful conduct, rather than mute truthful speech. 186 Alternatives such as increased taxation and removal of the harmful products from the marketplace pose less of a burden on the First Amendment and more logically achieve the goal of eliminating harm. 187 Therefore, by using the least restrictive means standard, the government is still able to achieve its desired result and avoid entangling itself in the First Amendment’s net.

182 See id. at 523–26 (stating that if all other methods have failed to protect consumers from harmful products, then a ban on advertising should be permitted; however, this ought to be a tool that is used as a last resort).
183 See Fallon, Jr., supra note 13, at 1328 (stating that it is uncertain exactly how the least restrictive means and over-inclusiveness relate to one another, but it can be said that strict scrutiny will be satisfied and the least restrictive means test will be met “as long as no narrower regulation would suffice, [and] the prohibition against over-inclusiveness suggests that a statute might be condemned for lack of narrow tailoring even if no less restrictive alternative existed”); Volokh, supra note 65, at 1136 (stating that it is unclear whether a least restrictive means test will meet strict scrutiny, even if the regulation is over-inclusive).
184 See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 578 (2002) (Thomas, J., concurring) (stating that “the sweeping overinclusivity of the regulations” is impermissible if the state “has done nothing to target its prohibition to advertisements appealing to ‘excitement, glamour, and independence’; the ban applies with equal force to appeals to torpor, homeliness, and servility”).
185 See, e.g., 44 Liquormart, 517 U.S. at 510 (using the least restrictive means test to “conclude that a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for [the] paternalistic purposes” of creating temperance throughout its population).
186 See id. at 502–03 (expressing that a state’s interest in protecting consumers from “commercial harm[ ]” is the reason why commercial speech is subject to intermediate scrutiny; however, “bans that target truthful, nonmisleading commercial messages rarely protect consumers from such harms. Instead, such bans often serve only to obscure an ‘underlying governmental policy’ that could be implemented without regulating speech” (footnote omitted)).
187 See id. at 507 (“[A]llernative forms of regulation that [do] not involve any restriction on speech would be more likely to achieve the [s]tate’s goal . . . . As the [s]tate’s own expert conceded, higher prices can be maintained either by direct regulation or by increased taxation.”); Rubin v. Coors Brewing Co., 514 U.S. 476, 498 (1995) (Stevens, J., concurring) (“Congress may limit directly the alcoholic content of malt beverages. But Congress may not seek to accomplish the same purpose through a policy of consumer ignorance, at the expense of the free speech rights of the sellers and purchasers.”).
Nonetheless, the least restrictive means standard severely impairs the government’s ability to regulate commercial harms.\footnote{See generally Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 481 (1989) (stating that the Court will “take account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide the [l]egislative and [e]xecutive [b]ranches needed leeway in a field (commercial speech) ‘traditionally subject to governmental regulation’”).} Under that approach, the government may find it extremely difficult to withstand First Amendment scrutiny if there is a plausible alternative to restricting commercial speech.\footnote{See City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n.13 (1993) (“A regulation need not be ‘absolutely the least severe that will achieve the desired end,’ but if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the ‘fit’ between ends and means is reasonable.” (citation omitted)); Fox, 492 U.S. at 480 (stating that “the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful,” but the Court will not “impose upon [the government] the burden of demonstrating that the [differentiation] is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end”; rather, the Court will give deference to “governmental decisionmakers to judge what manner of regulation may best be employed” (internal quotations omitted)).} For example, the government might believe that imposing a tax on a particular product will achieve the same change in consumer behavior as would a restriction on advertising.\footnote{See, e.g., 44 Liquormart, 517 U.S. at 509 (recognizing that the Rhode Island legislature decided that a ban on price advertising of alcohol would achieve the same result in promoting temperance as an increase in taxes).} However, the government could be forced to ignore the harmful effects of a product if it does not want to take the drastic measure of taxing an entire population for the item.\footnote{See, e.g., id. at 504-07 (holding that Rhode Island unconstitutionally banned price advertising of alcohol because the less speech restrictive alternative of increasing taxes on it existed and that, through taxes, the state could promote temperance).}

Therefore, the least restrictive means standard hinders the government’s ability to attack societal problems from multiple vantage points.\footnote{See, e.g., id. at 530 (O’Connor, J., concurring) (stating that the government’s ban on advertising ought to fail if alternatives controlling consumer behavior, such as administering taxes, limiting per capita purchases, conducting educational campaigns, or prohibiting the sale of the product feasibly exist, even if these measures would not produce exactly the same results).} Additionally, it forces legislators into a Catch-22, compelling them to make a choice between eliminating products from the marketplace altogether, increasing the tax on those allegedly harmful items, or ignoring the potential harm being done to society. At its most extreme, the ban it-, tax it-, or forget about it-rationale may coerce legislators into committing political suicide by requiring them to either choose between banning a popular commercial product—such as...
cigarettes or alcohol—or remaining passive in the face of a serious danger that the product poses society—either way angering one or more groups of people.193

2. The Reasonable Fit Standard

The current standard adopted by the Court concerning Central Hudson’s fourth prong is the reasonable fit standard.194 Under this standard, the government is given deference in determining how to meet its objectives.195 Specifically, the government can impose restrictions on commercial speech if the costs and benefits of the burden on speech are “carefully calculated.”196

The reasonable fit standard gives the government an enhanced ability to stop commercial harms.197 The government can obstruct efforts to market harmful products without making these items illegal.198 Therefore, with multiple methods available to tackle the societal problems caused by advertising dangerous products, the government is not forced into an all-or-nothing ultimatum.199

Further, this standard limits over-inclusion by not requiring the government to impose a total ban on select commercial products to all

193 See infra text accompanying notes 201–03 (explaining that bans on advertising are an alternative that legislators would rationally use to limit the negative effects of harmful products on the public).

194 See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001) (finding that there must be a “fit” between a commercial speech restriction’s ends and means, which does not need to necessarily be perfect, but must be reasonable (internal quotation marks omitted)).

195 Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989).

196 See City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993) (holding that a city did not “carefully calculate[]’ the costs and benefits associated with the burden on speech imposed by its prohibition” on news racks).

197 Reilly, 533 U.S. at 561. For example, the Court has articulated that restrictions on the size and placement of advertisements may all be regulated. Id. at 563. Further, the government may impose restrictions on the distance of certain advertisements in relation to particular locations such as churches, schools, or parks. Id. at 561–62. The Court has even held the government may restrict how the advertisement is communicated to the recipient. Id. at 563. This means that the government can selectively or comprehensively ban oral, written, or visual advertisements. Id. at 561–63.

198 See Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 346 (1986) (arguing that the government has the power to completely ban gambling; therefore, it should have the less intrusive power of restricting advertising for it). But see id. at 359 (Stevens, J., dissenting) (agreeing that the government has the power to prohibit activities such as gambling, prostitution, or the consumption of marijuana or liquor, but might not have the power to restrict speech about these items).

199 See supra Part III.B.1 (arguing that by using the least restrictive means standard the government is often forced to either ban the product completely or ignore the threat to society to appease the voters that use the dangerous product in question).
Although commercial advertising for the alleged product may be diminished, the product in question can still be accessed on the open market, and thus its utility can still be spread through word-of-mouth communication. Moreover, the reasonable fit standard limits under-inclusion because the government can simply limit the time, place, and manner of the advertisements, rather than make tough decisions on which products to completely ban, restrict access to, or absolutely tolerate.

However, the reasonable fit standard does have pitfalls. First, it is highly paternalistic. This standard gives the government deference to make a carefully calculated cost-benefit analysis in deciding whether to prohibit commercial speech. This means that the government’s decision to restrict commercial speech will be respected as long as truthful commercial information can plausibly get to consumers in an alternative form or method. This strategy gives the government

200 See supra note 123 (stating that over-inclusion occurs when legislation extends beyond the class of persons or things that it was intended to protect or regulate and burdens more people or things than necessary to cure the problems targeted).

201 See Harvir S. Bansal & Peter A. Voyer, Word-of-Mouth Processes within a Services Purchase Decision Context, 3 J. SERV. RESEARCH 166, 175 (2000) (finding that word-of-mouth advertising for services is extremely effective when there is a close relationship between a sender and a receiver and the receiver’s high knowledge or expertise for a given service); Paula Fitzgerald Bone, Word-of-Mouth Effects on Short-Term and Long-Term Product Judgments, 32 J. BUS. RESEARCH 213, 221–22 (1995) (determining that word-of-mouth advertising can be more effective than print advertising and expert word-of-mouth advertising messages have a stronger effect than non-expert opinions; both negative and positive word-of-mouth messages have short- and long-term effects on the consumption rates of consumers).

202 See Bayer, supra note 4, at 356–59 (exploring the implications of proposed FDA regulations and the congressional efforts to ban tobacco advertising); Vladeck et al., supra note 80, at 33–34 (expressing the tension between the government and commercial advertisers over the burden of proof when the government restricts particular messages from being publicized when there is insufficient data to prove that the message is harmful or inaccurate).

203 See Greater New Orleans Broad. Ass’n v. United States, 527 U.S. 173, 197 (1999) (Thomas, J., concurring) (disagreeing with the proposition that deference should be given to legislators for commercial speech and stating that the Central Hudson test should not be applied to uphold the government’s interest in keeping “legal users of a product or service ignorant in order to manipulate their choices in the marketplace”).

204 See City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993) (concluding “that the city failed to address its . . . concern about newsracks by regulating their size, shape, appearance, or number, which indicates that it has not ‘carefully calculated’ the costs and benefits associated with the burden on speech imposed by its prohibition”). Further, the ordinance failed to meet the reasonable fit standard as applied to newsracks because it was enacted to combat littering, not permanent fixtures on city streets. Id.

205 See 44 Liquormart v. Rhode Island, 517 U.S. 484, 529–30 (1996) (O’Connor, J., concurring) (“If alternative channels permit communication of the restricted speech, the regulation is more likely to be considered reasonable.”).
unfettered power to limit commercial speech via particular mediums, substantially diluting the message, or significantly diminishing the listening audience.206

Therefore, having complete authority to prohibit the transmission of commercial messages through specific mediums and in particular manners, the government can effectively divert certain ideas from the information superhighway.207 This approach can lead consumers astray and affect their choices regarding which products to purchase.208 Unless consumers use personal initiative to learn about certain products from private sources, or the government actively launches its own informational advertising campaign to warn constituents about potentially harmful products, it is unlikely that citizens will ever obtain the knowledge they need to optimally direct their behavior.

C. Potential Implications if the Issues Remain Unresolved

The Court must eliminate the bifurcated analysis that exists in the Central Hudson test. This change can be done by expressly accepting either the material degree standard or the common sense standard and reaffirming the use of the reasonable fit test.209 If nothing is done about Central Hudson’s distorted interpretation, then the consequences of its ambiguity will only become more exaggerated.210 If the Supreme Court does not intervene soon, the split in the circuits over the interpretation of

206 See, e.g., Brief of Appellant at 6, Pitt News v. Pappert, 379 F.3d 96 (3d Cir. 2004) (No. 03-1725), 2003 WL 24302476 (articulating that Pitt News used a fifty-fifty format, where the newspaper’s pages with news content equaled its pages with advertisements; further, when the state banned alcohol advertising in the paper, the newspaper was forced to eliminate actual news articles as well to decrease its cost in producing the newspaper after it lost critical advertising revenue).

207 See CHEMERINSKY, supra note 12, at 928 (explaining that many scholars fear that if the government is able to fully control speech, then it will inevitably abuse this power to advance its own goals, and many truthful messages will be censored from the general public).

208 See, e.g., COMPETITIVE STRATEGY, supra note 124, at 108–09 (stating that most manufacturers sell their products to many different buyers, who in turn use these products in different ways). Therefore, it is essential for manufacturers to utilize every strategy possible to reach out to the buyer, including advertising, to meet the consumer’s demands for quality, quantity, durability, and customer service; moreover, rational consumers will not buy a manufacturer’s product unless their educational needs regarding the product are thoroughly satisfied. Id.

209 See infra Part IV.A (arguing that the Court should adopt the material degree standard).

210 Compare Educ. Media Co. v. Swecker, 602 F.3d 583, 589–90 (4th Cir. 2010) (using the common sense standard to conclude that alcohol advertising logically causes an increase in underage drinking without any extrinsic evidence), with Pitt News v. Pappert, 379 F.3d 96, 107 (3d Cir. 2004) (using the material degree standard to prohibit government from banning alcohol advertisements in college newspapers because the government had no evidence that newspaper advertisements lead to underage or abusive drinking).
the third prong will continue to grow. This split is particularly troublesome for national retailers and marketers.\textsuperscript{211} Inconsistent results throughout the judicial system may cause businesses to refuse to enter certain markets and deliberately exit others.\textsuperscript{212} Further, it is egregious to allow the First Amendment to be applied in a disparate manner throughout the nation.

These differing interpretations of the \textit{Central Hudson} test especially harm small business, which rely solely on advertising to attract a customer base.\textsuperscript{213} For example, a tobacco shop on the East Coast may be forced to shut down due to a restriction on advertising interpreted under the common sense approach; however, a similar business in the Midwest could prosper because its speech was interpreted under the material degree standard.\textsuperscript{214} Ultimately, these inconsistencies will either coerce businesses out of one market and force them into another that allows particular commercial advertising, or compel them to close shop forever.\textsuperscript{215} Alternatively, those businesses that do thrive will be more apt to form oligopolies and monopolies.\textsuperscript{216} Without advertisements, consumers will be unable to make informed decisions as to what

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\item \textsuperscript{211} See Michael E. Porter, \textit{Competitive Advantage} 40, 56 (1985) [hereinafter \textit{Competitive Advantage}] (finding that many large domestic and international firms rely on geographical interrelationships, such as uniformity in the law, to keep the costs of their product low and to universally coordinate value activities, one of which is marketing and sales).
\item \textsuperscript{212} See \textit{Competitive Strategy}, supra note 124, at 13 (articulating that government policies, such as licensing or controls, are a major barrier that can limit or foreclose entry into industries).
\item \textsuperscript{213} See Zimmerman, supra note 13, at 595 (“An overbroad set of regulations that unfairly singles out the commercial use of recorded phone messages fails to substantially advance the government’s interest in protecting home privacy and excludes measures that would address privacy concerns in an even-handed manner without unduly burdening the First Amendment rights of small businesses.”).
\item \textsuperscript{214} See, e.g., supra Part ILC (describing how Pitt News was permitted to solicit alcoholic beverage vendors and recoup its advertising revenue after the Third Circuit struck down Pennsylvania’s law banning alcohol advertisements in education-related media, but the Cavalier Daily and the Collegiate Times were forced to cut sections from their newspapers after the Fourth Circuit held that the newspapers had to comply with Virginia’s ban on alcoholic beverage advertisements in education-related media).
\item \textsuperscript{215} See \textit{Competitive Advantage}, supra note 211, at 448–55 (stating that uncertainties, such as government policies, affect competition through industry structure and cause companies to adjust their strategies, leading some companies to determine that a once fertile market has too-high entry barriers or that competition has dwindled, so that exiting a particular market is in the best interest of the company).
\item \textsuperscript{216} See Jackson & Jeffries, Jr., supra note 22, at 28 (concluding that “it seems plausible to assume that the consequence of a reduced flow of information will lead to some situational monopolies that would not exist if advertising were unrestricted”; this would lead to lower economic efficiency).
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products and services are superior in quality or price.\textsuperscript{217} Thus, brand-name products may take over the market if consumers are unaware of potentially better opportunities elsewhere.\textsuperscript{218}

Given the unique opportunity to adjudicate the \textit{Pitt News} and \textit{Swecker} cases, which strangely parallel each other, the Court can put to rest the contention over the conflicting interpretations.\textsuperscript{219} Additionally, the commercial speech doctrine would finally be able to blossom, and the goal of the \textit{Central Hudson} Court to move away from a case-by-case analysis will come to fruition at last.\textsuperscript{220}

IV. CONTRIBUTION

Confusion will continue to cloud the commercial speech doctrine if courts use varying standards for the third prong of the \textit{Central Hudson} test and the Supreme Court does not provide the proper standard for the fourth prong.\textsuperscript{221} The circuit in which a business is located should not be determinative in adjudicating whether the business has the ability to promote a particular product.\textsuperscript{222} Therefore, the Supreme Court, to mend the contradictory interpretations that have created inconsistency and ambiguity in the commercial speech doctrine, must reconcile the conflicting standards that it has created.\textsuperscript{223}

\textsuperscript{217} See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 766–71 (1976) (noting that price competition between retailers can be a positive economic policy and that consumers will not necessarily choose the best price for a product if it diminishes the quality of service that they get in return for their money).

\textsuperscript{218} See \textit{id}. (finding that it is better to assume that commercial information itself is not harmful and that people will rationally balance the quality, the price, and other characteristics of services and products before they buy from a particular retailer if they are equipped with all possible material information).

\textsuperscript{219} See supra Part II.C.1 and Part II.C.2 (outlining the factual similarities of \textit{Pitt News} and \textit{Swecker}).

\textsuperscript{220} See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 563–66 (1980) (creating a four prong test to deal with commercial speech cases after the Court recognized that commercial speech was entitled constitutional protection in \textit{Virginia State Board of Pharmacy}); 44 Liquormart v. Rhode Island, 517 U.S. 484, 526–27 (1996) (Thomas, J., concurring) (“The courts, including this Court, have found the \textit{Central Hudson} ‘test’ to be, as a general matter, very difficult to apply with any uniformity.”).

\textsuperscript{221} See supra Part III.A and Part III.B (analyzing how courts have struggled to uniformly adopt either the material degree standard or the common sense standard for the third prong of \textit{Central Hudson’s} interpretation and how the Supreme Court has flip-flopped on the least restrictive means and reasonable fit standards over the past twenty years for the fourth \textit{Central Hudson} prong).

\textsuperscript{222} See supra Part III.C (stating that the results of similar cases in different circuits can have drastically different outcomes depending on whether the common sense standard or the material degree standard is employed).

\textsuperscript{223} See supra text accompanying notes 173–77 (outlining the existing battle over the precise standard that should govern the fourth prong of the \textit{Central Hudson} test).
First, Part IV.A will argue that the burden of proof for the third prong should rest on the material degree standard.\textsuperscript{224} Second, Part IV.B will suggest elements the Court should adopt in analyzing the third prong.\textsuperscript{225} Third, Part IV.C will argue that the reasonable fit test should be confirmed as the standard for the fourth prong and propose a set of factors courts can employ in adjudicating this prong.\textsuperscript{226} Finally, Part IV.D will discuss the implications of this new test for the \textit{Pitt News} and \textit{Swecker} decisions.\textsuperscript{227}

\textbf{A. The Burden of Proof}

The burden of proof in commercial speech cases should be the material degree standard.\textsuperscript{228} This would require the government to present empirical evidence supporting any commercial speech ban.\textsuperscript{229} The goal of the government should be to increase the availability of information to the public, not to restrict it. This standard would allow substantive information to flow to the public. Also, the government would appear to be acting with valid authority when it attempts to protect society from harmful advertising, rather than appearing as a paternalistic force in its citizens’ lives.\textsuperscript{230}

Further, in keeping with traditional constitutional law norms, the government has the burden of proof in intermediate scrutiny cases. By placing the burden of proof on the government in commercial speech cases, the Court would continue to apply a consistent, bright-line rule for all intermediate scrutiny cases, instead of creating different standards

\textsuperscript{224} See infra Part IV.A (stating that the material degree standard should govern the third prong of the \textit{Central Hudson} test because factual evidence ought to be required before the government can justify a restriction on a person’s right to freedom of speech).

\textsuperscript{225} See infra Part IV.B (arguing that sub-elements must be placed under the third prong of the analysis to ensure that the government does not arbitrarily or wrongfully deprive commercial advertisers of their speech rights).

\textsuperscript{226} See infra Part IV.C (articulating that the reasonable fit test should be confirmed as the correct standard for the fourth prong and that a factors test should be used to guide decisions so that they are not determined solely on a case-by-case basis).

\textsuperscript{227} See infra Part IV.D (arguing that the newly proposed test would harmonize the conflicting \textit{Pitt News} and \textit{Swecker} decisions because they would both fail under this analysis).

\textsuperscript{228} See supra Part III.A.1 (articulating the pros and cons of the material degree standard).

\textsuperscript{229} See supra Part III.B (arguing that the reasonable fit standard safeguards the public from a paternalistic government because it requires hard evidence that there is a societal harm being caused by a particular strain of commercial speech).

\textsuperscript{230} See supra text accompanying notes 123 and 124 (noting that critics argue commercial speech should be protected to limit over- and under-inclusion and governmental paternalism).
Therefore, in commercial speech cases, the government should have the burden of proof to show that its interest in limiting commercial speech is materially advanced through empirical evidence.

B. Sub-Elements of the Third Prong of Central Hudson

To ensure that the government does not arbitrarily restrict commercial speech, the following test for Central Hudson’s third prong should be implemented: (1) the target group must actually suffer an injury from the commercial speech; (2) the defendant, disseminating information individually, must substantially cause the injury to the target group; and (3) a favorable judgment must materially mitigate the harm done to the target group.

First, the government must prove that the target group actually suffered an injury. This proof can be shown by: (1) identifying the group of people that the government wishes to protect; and (2) offering statistical evidence to show the existence of a causal relationship between particular strains of commercial speech and the harm done to the specific group. By mandating that the government offer empirical evidence to uphold a restriction on commercial speech, the Court would instantly legitimize the injury done to society.232 Further, the Court would promote awareness of how consumers psychologically respond to certain advertisements. Additionally, by forcing states and municipalities to hypothesize about the harms allegedly created as a result of advertising and to produce data to support these claims, the government would give academics the ability to analyze data nationwide in order to determine the likely cause of the specific societal harm.233

Second, the government must prove that the defendant, acting alone, is causing harm to society. This criterion would prevent the under-inclusive censoring of commercial speech, such as prohibiting printed advertisements when television advertisements substantially add to the harm as well.234 Further, the government would be able to list

231 See supra text accompanying note 117 (explaining that courts inconsistently apply Central Hudson because the Court has subsequently applied different standards and because the Justices are divided philosophically).
232 See supra Part III.A.1 (arguing that speculative evidence presented by the government, without any factual data, appears paternalistic).
233 See supra Part III.A.1 (stating that the government must point to some scintilla of evidence either in the form of statistics or anecdotes to justify a restriction on commercial speech).
234 See supra text accompanying note 100 (describing Pitt News, where the Third Circuit found Act 199 was dangerously over- and under-inclusive).
companies in a specific industry as joint defendants showing that, acting together, they are the root cause of the harm.

Third, the government must prove that its action materially mitigates the harm done by commercial speech. To satisfy this sub-element, the government would have to prove, through empirical evidence, that its action against an advertisement actually reduces a particular threat to society.\textsuperscript{235} In other words, the government must have factual proof before it closes any channels of communication.

C. Reaffirmation of the Reasonable Fit Test and Proposed Factors

To give the \textit{Central Hudson} test a solid foundation and thus strengthen the commercial speech doctrine, the Supreme Court must reaffirm its holding that the reasonable fit test governs the fourth prong.\textsuperscript{236} Likewise, the Court must provide criteria for determining what is a reasonable fit to opt out of a case-by-case approach to the commercial speech doctrine.

One possible way of creating this structured analysis is through a factors test. Factors a court can utilize in assessing the fit between the means and ends of a restriction on commercial speech are: (1) are there alternatives other than a total ban on commercial speech; (2) is the restriction medium-neutral; (3) do similar products face similar restrictions; (4) what locality created the law; (5) is the range of speech restricted or banned; and (6) is enforcement of other laws impractical.

The existence of other alternatives to a total ban on commercial speech is an important factor in assessing the fit between the ends and the means of a restriction on commercial speech. For example, the taxation of a particular product may be a more reasonable and effective alternative to reduce the harm caused by that product.

Additionally, the existence of medium-specific laws should be taken into account.\textsuperscript{237} If the government prohibits advertising in one medium, but permits it in another, there must be a justification for this discrepancy. If the alleged harm is truly pervasive, then it should be presumed that the government’s restriction must uniformly ban all forms of speech concerning that product to be effective. Further,

\textsuperscript{235} See supra Part III.A.1 (describing \textit{Central Hudson}’s material degree standard).
\textsuperscript{236} See supra Part III.B (explaining that the Court has historically flip-flopped on the standard governing the fourth prong of the \textit{Central Hudson} test and that the Supreme Court has heard very few commercial speech cases since it instituted the reasonable fit test a decade ago).
\textsuperscript{237} See supra Part III.B.2 (discussing that a pitfall of the reasonable fit standard is that it currently gives the government too much discretion to pick and choose what mediums to regulate).
medium-neutral laws eliminate divisiveness among mediums and allow the government to appear unbiased.

A significant factor in deciding if there is a reasonable fit is uniform speech rights for similar products. If the government’s interest in banning a substance is to limit the effects of its consumption, then the government ought to impose uniform regulations on all manufacturers of similar products.238 This principle promotes fairness throughout industries and bolsters the effect of the government’s action.

Furthermore, the locality of the jurisdiction implementing the law should be a factor in assessing whether the restriction on commercial speech is a reasonable fit. This approach would require courts to look at the history and tradition of each state’s legislature regarding commercial speech. It would also require courts to account for the norms of each jurisdiction.

The range of speech being restricted is also a critical factor in assessing whether the government’s constraint is a proper fit. A court should examine questions such as: (1) where the speech is restricted; (2) how the speech is restricted; and (3) to what extent product information can still enter the market.239 For example, a court may find that banning solicitation, but permitting advertising, is sufficient to advance the government’s interest.

Lastly, courts should inquire into whether the enforcement of other laws is possible, rather than restricting speech. The policing of other laws, aimed at consumers, could decrease a particular societal harm just as effectively. In this case, the legislature should focus on regulating these laws, rather than punishing advertisers because consumers abuse their products.

D. The Newly Proposed Test Applied in Swecker and Pitt News

If this newly proposed test is applied in Pitt News and Swecker, both cases would undoubtedly fail Central Hudson’s third prong. In Pitt News, the government would not be able to prove that alcohol advertisements would mitigate the consumption of alcohol by underage students to a material degree.240 Likewise, in Swecker, evidence showed that alcohol

238 See, e.g., Rubin v. Coors Brewing Co., 514 U.S. 476, 487–90 (1995) (arguing that the federal policy banning alcohol manufacturers from printing the alcohol content on malt beverage containers, but not on wine or spirit containers, was illogical because wine and spirits have a greater alcohol percentage, and thus present a greater danger to the public).

239 See supra text accompanying notes 181–83 (describing the least restrictive means test).

240 See Pitt News v. Pappert, 379 F.3d 96, 107 (3d Cir. 2004) (holding that the law banning alcohol advertisements in college newspapers provided ineffective and remote support for the government’s purposes).
consumption on the state university campuses had increased even after the law had been enacted.\textsuperscript{241}

Moreover, the government would likely not be able to show a reasonable fit under the proposed factors test in \textit{Swecker} or \textit{Pitt News}. In both cases, there were alternatives to banning alcohol advertisements in college newspapers; most notably, the greater enforcement of underage drinking laws. Further, both cases involved medium-specific laws.\textsuperscript{242} Alcohol advertisements were banned in school newspapers, but not on the television channels that played on dorm-room TVs.\textsuperscript{243} Lastly, the states did not attempt to ban advertising for similar products such as tobacco, contraceptives, or prescription medication in college newspapers—all equally obtainable by young people. Therefore, these laws were severely under-inclusive.

\section*{V. Conclusion}

Without any guidance from the Supreme Court on how to interpret the third prong of the \textit{Central Hudson} test, the split in the circuit courts will surely grow. Further, multiple standards concerning the commercial speech doctrine will diminish the legitimacy of the First Amendment. Concrete and predictable rules are essential if the rights listed in the Constitution can flourish and be enjoyed by all. By instituting the material degree standard on a uniform basis, courts can guarantee that advertisers understand the laws that govern their actions and consumers will be delivered only reliable, safe, and necessary commercial messages.

Moreover, by adopting the set of proposed fourth-prong factors in this Note, the Court can shift from a case-by-case analysis to a more unified body of commercial speech case law. More importantly, by analyzing a set of predetermined factors, the integrity of court decisions will improve because judgments will be viewed as founded in law, not in judicial discretion.

When the government impedes on intimate things, such as the right to receive and convey ideas, there ought to be a universal rule applied to

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\item[\textsuperscript{241}] See Educ. Media Co. v. Swecker, 602 F.3d 583, 593–94 n.5 (4th Cir. 2010) (Moon, J., dissenting) (stating that the government had conceded that drinking on college campuses had increased after the law banning alcohol advertisements in college newspapers was passed).
\item[\textsuperscript{242}] See 47 PA. CONS. STAT. ANN. § 4-498(e)(5) (1996) (prohibiting alcohol advertisements in any booklet, program book, yearbook, magazine, newspaper, or other publication of any educational institution); 3 VA. ADMIN. CODE § 5-20-40 (2010) (prohibiting alcoholic beverage advertisements “in college student publications”) (as amended).
\item[\textsuperscript{243}] Pitt News, 379 F.3d at 107.
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all. Surely, if the Court does not soon address the current Central Hudson analysis, unjust case-by-case adjudications will thwart the progress of the commercial speech doctrine and ultimately lead to its demise. In the meantime, small newspapers and media outlets like the *Pitt News*, *Cavalier Daily*, and *Collegiate Times* will be forced to cut sections and perhaps even close. As a result, the vital information, both political and commercial, disseminated by these small, low-budget media sources will cease to flow to the public.

Matthew Passalacqua∗

∗  J.D. Candidate, Valparaiso University School of Law (2012); B.A. Philosophy and Political Science, University of Rhode Island (2009). Special thanks is given to Jennifer Sanders and Professor Ivan Bodensteiner for their insights and thoughtfulness regarding this Note.