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Greater New Orleans Broadcasting Ass'n v. United States: A Retreat from Full First Amendment Protection for Commercial Speech

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Greater New Orleans Broadcasting Ass'n v. United States: A Retreat from Full First Amendment Protection for Commercial Speech

In *Greater New Orleans Broadcasting Ass'n v. United States*,[1] the United States Supreme Court considered whether 18 U.S.C. § 1304,[2] which prohibits the broadcast of gambling advertisements, violated First Amendment protection of commercial speech—speech related only to the speaker's and the audience's economic interests[3]—when applied to broadcast advertisements within states that have legalized casino gambling. Many critics expected, and perhaps hoped, the Supreme Court would seize this opportunity to discard, or at least drastically modify, the *Central Hudson*[4] balancing test that the Court has used in commercial speech cases for almost twenty years.[5] The Court refused to do so,[6] however, leaving the appropriate application of the test open to as much confusion as before. Still, the Court continued its trend of

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1. 119 S. Ct. 1923 (1999).

2. The statute provides, in pertinent part, as follows:

> Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever . . . knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance . . . shall be fined under this title or imprisoned not more than one year, or both.

18 U.S.C. § 1304 (1994)

3. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977).

4. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

5. *See* Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 YALE J. ON REG. 85 (1999) (calling for equal protection of commercial speech); Sean P. Costello, Comment, *Strange Brew: The State of Commercial Speech Jurisprudence Before and After* 44 Liquormart, Inc. v. Rhode Island, 47 CASE W. RES. L. REV. 681 (1997) (predicting the end of the *Central Hudson* test); Michael W. Field, Note, *On Tap*, 44 Liquormart, Inc. v. Rhode Island: *Last Call for the Commercial Speech Doctrine*, 2 ROGER WILLIAMS U. L. REV. 57 (1996) (same).

6. 119 S. Ct. at 1930.

extending protection to commercial speech by holding the statute violated First Amendment commercial speech protection as applied to the facts of this case.[7]

I. FACTUAL BACKGROUND

First enacted as Section 316 of the Communications Act of 1934,[8] Section 1304 has been expanded through the years to include television as well as radio broadcasting in its ban. Although this is a criminal statute with both criminal fines and penalties, the Federal Communications Commission ("FCC") has traditionally enforced the statute through administrative sanctions.[9]

Petitioners were an association of FCC-licensed Louisiana broadcasters who would have allowed advertisements of privately owned, for-profit casinos. They conceded that the language of Section 1304 bans advertising of gaming facilities, even in states like Louisiana that have legalized gambling. Supreme Court precedent and FCC interpretation supported this view. Petitioners, however, attacked the statute on the ground that it violated the First Amendment as it applied to commercial speech. They sought an injunction to prevent enforcement of the statute against them.[10]

The district court applied the *Central Hudson* four-prong test for assessing commercial speech restrictions and granted summary judgment in favor of the Government. The court noted that the statutory restrictions furthered the government's interests in protecting states without legalized gaming casinos and in reducing the social costs associated with gambling. Although divided, the Fifth Circuit Court of Appeals affirmed, reasoning that gambling is a "vice activity" and that the advertising of casinos can claim no greater constitutional protection than can the gambling itself. But the dissent pointed out the many recognized exceptions to Section 1304, thus calling into question the governmental interests ostensibly being advanced. Petitioners then sought certiorari.[11]

While that petition was pending, the Supreme Court in *44 Liquormart, Inc. v. Rhode Island*[12] decided that Rhode Island's statutes prohibiting the advertisement of liquor prices violated the First Amendment's

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7. *Id.* at 1936.
8. 48 Stat. 1064, 1088.
9. 119 S. Ct. at 1927, 1928.
10. *Id.* at 1928-29.
11. *Id.* at 1929.
12. 517 U.S. 484 (1996).

protection of commercial speech.[13] In *44 Liquormart* the Court determined that the *Central Hudson* test must be applied with "special care" when a government regulation places a complete ban on commercial speech, although the Justices were divided as to exactly what that meant when applying the third and fourth prongs of the *Central Hudson* test.[14] In light of this decision, the Supreme Court vacated the Fifth Circuit's decision in *Greater New Orleans Broadcasting* and remanded the case.[15]

Meanwhile, the Ninth Circuit Court of Appeals in *Valley Broadcasting Co. v. United States*[16] decided that Section 1304 violated the First Amendment's protection of commercial speech as applied to privately operated casinos in Nevada.[17] Yet the Fifth Circuit in *Greater New Orleans Broadcasting* found for the Government, though it acknowledged that prong four of the *Central Hudson* test had become more difficult to meet.[18] As a result of the inconsistent application of the *Central Hudson* test, the Supreme Court granted certiorari to petitioners in *Greater New Orleans Broadcasting*.[19] The Court reversed the Fifth Circuit's decision, holding that under the original *Central Hudson* test, Section 1304 violates the First Amendment's protection of commercial speech when applied to advertisements of privately operated casinos broadcast by stations located in states where casino gambling is legal.[20]

II. LEGAL BACKGROUND

In *Greater New Orleans Broadcasting Ass'n v. United States*, the United States Supreme Court extended First Amendment protection to a form of commercial speech that had been statutorily banned for almost sixty-five years.[21] In doing so, the Court attempted to clear up the confusion surrounding the application of the *Central Hudson* test, and it further weakened a statute already riddled with exemptions, calling into question the governmental policy supporting the statute.[22]

As early as 1827, Congress had enacted laws aimed at preventing lottery advertisements or tickets from passing through the United States

13. *Id.* at 516 (plurality opinion).
14. *Id.* at 504.
15. 119 S. Ct. at 1929.
16. 107 F.3d 1328 (9th Cir. 1997).
17. *Id.* at 1336.
18. 119 S. Ct. at 1929.
19. *Id.* at 1930.
20. *Id.* at 1936.
21. *Id.*
22. *Id.* at 1930.

mails.[23] Subsequent laws also restricted the dissemination through the mails of newspapers containing lottery information.[24] These laws are now codified at 18 U.S.C. §§ 1301-1303. The Supreme Court justified these restrictions in *Ex Parte Jackson*:[25]

> All that Congress meant by . . . [the Act of March 3, 1873] was, that the mail should not be used to transport such [obscene, lewd, or lascivious] corrupting publications and articles, and that any one who attempted to use it for that purpose should be punished. The same inhibition has been extended to circulars concerning lotteries,—institutions which are supposed to have a demoralizing influence upon the people.[26]

This "demoralizing influence" rationale has been the foundation of most defenses of the antilottery statutes.

When technology advanced to broadcasting capabilities, Congress extended its lottery restrictions to this medium through Section 316 of the Communications Act of 1934, which is now codified at 18 U.S.C. § 1304.[27] Through the years, Congress has added language to this statute to encompass television broadcasting in the ban; otherwise, they have made only minor changes in phraseology. Nonetheless, the broad language of the statute has been understood to ban not only lottery advertisements, but also advertisements of any enterprise involving chance, from local contests to gaming casinos.[28]

In 1950 Congress first narrowed the scope of Section 1304 when it exempted advertisements of nonprofit fishing contests, noting that these qualified as "'innocent pastimes . . . far removed from the reprehensible type of gambling activity which it was paramount in the congressional mind to forbid.'"[29] Then, in 1975 Congress exempted state-run lotteries from the reach of Section 1304, so long as they were advertised only in states that allowed lotteries.[30] In 1988 Congress likewise exempted tribal casinos from the ban through passage of the Indian Gaming Regulatory Act ("IGRA"),[31] which authorizes tribes to broadcast advertisements of their casinos even in states that have not legalized

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23. *See* Act of Mar. 2, 1827, § 6, 4 Stat. 238, 238 (1860).
24. *See, e.g.*, Anti-Lottery Act of 1890, § 1, 26 Stat. 465, 465.
25. 96 U.S. 727 (1877).
26. *Id.* at 736.
27. 119 S. Ct. at 1927.
28. *Id.*
29. *Id.* (quoting S. REP. NO. 2243, at 2 (1950), *reprinted in* 1950 U.S.C.C.A.N. 3010, 3011).
30. 18 U.S.C. § 1307 (1994).
31. 25 U.S.C. §§ 2701-2721 (1994).

gambling.[32] That same year, through the Charity Games Advertising Clarification Act of 1988, Congress also extended the exemption of Section 1304 to include not only state-run lotteries, but also any gaming activity conducted by any government, nonprofit, or commercial organization, so long as the commercial organization was only conducting a promotional activity "clearly occasional and ancillary to . . . [its] primary business."[33] All these congressionally approved exemptions severely limited the reach of Section 1304's ban on gambling advertising.

At the same time, the courts were also limiting the reach of other regulatory statutes like Section 1304 by extending First Amendment protection of commercial speech. Historically, commercial speech has received less protection under the First Amendment than other forms of speech. In 1942, for example, the Court held in *Valentine v. Chrestensen*[34] that an ordinance prohibiting the distribution of handbills in a street was a constitutional ban on speech.[35] The Court wrote,

> This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. *We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.*[36]

Nonetheless, as the Court pointed out in *Central Hudson*, the First Amendment affords commercial speech protection from unwarranted governmental regulation because commercial speech communicates accurate, even if incomplete, information.[37] Speech that informs the public is entitled to at least some protection.[38] Still, the government may regulate commercial speech so long as the limited First Amendment protections are not offended.[39]

In *Central Hudson* the Court explored the issue of when commercial speech is entitled to this constitutional protection. Central Hudson, a New York electrical utility company, wanted to advertise and thus promote electricity consumption, but New York's Public Service

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32. 119 S. Ct. at 1928.
33. 18 U.S.C. § 1307(a)(2)(B).
34. 316 U.S. 52 (1942).
35. *Id.* at 55.
36. *Id.* at 54 (emphasis added).
37. 447 U.S. at 561-63.
38. *Id.* at 562-63.
39. *Id.* at 563.

Commission issued a regulation that prohibited Central Hudson from any promotional advertising.[40] In deciding whether this prohibition violated the First Amendment's protection of commercial speech, the Court established a four-part balancing test to be employed in commercial speech cases:

> [1] At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [2] Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.[41]

The Court then found that although the first three prongs of the test were satisfied, the fourth was not because the regulation banned information about devices and services that would not affect energy consumption.[42] Therefore, the Court held the regulation violated the First Amendment because it was more extensive than necessary.[43]

In 1986, however, the Supreme Court seemingly retreated from its trend of granting First Amendment protection to commercial speech when it held in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*[44] that a statute prohibiting advertisements of gambling to Puerto Rican citizens was not unconstitutionally vague.[45] In reaching this controversial decision, the Court gave great deference to the government's interest in protecting its citizens from the evils that purportedly accompany gambling, while desiring to protect tourism for economic reasons.[46] The Court gave little attention to the "fit" between the ends and the means of the statute.[47] This approach differed from the Court's previous "no more extensive than necessary" standard,[48] and led to confusion concerning how the *Central Hudson* test would be applied.

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40. *Id.* at 558-59.
41. *Id.* at 566.
42. *Id.* at 570.
43. *Id.* at 572.
44. 478 U.S. 328 (1986).
45. *Id.* at 347-48.
46. *Id.* at 341.
47. *Id.* at 341-42.
48. *Id.* at 352.

It was against this backdrop that the Supreme Court in *United States v. Edge Broadcasting Co.*[49] decided that regulation of the broadcast of Virginia lottery information by a radio station licensed and located in North Carolina, a nonlottery state, did not violate the First Amendment as it applies to commercial speech.[50] Using the *Central Hudson* test, the Court determined that the lottery advertisement was unprotected commercial speech.[51] The Court focused on prong three of the *Central Hudson* test—the relationship between the government's substantial interest in balancing the interests of lottery and nonlottery states and the regulation employed to advance it.[52] The Court determined that the ban of lottery information on all North Carolina stations, even those located near the Virginia border, was not ineffective because, otherwise, the increase in listening time with lottery advertisements would not be without significance.[53] Thus, because listeners would be subjected to less lottery advertising, the prohibition was justified.[54]

Just three years later, however, the Court in *44 Liquormart,* in a severely fractured opinion, strengthened commercial speech protection when it overruled the approach taken in *Posadas* and decided a state's complete ban on nonmisleading speech concerning a legal product must be reviewed more carefully under the *Central Hudson* test.[55] Two liquor retailers, one from Rhode Island and one from Massachusetts, challenged Rhode Island's laws that banned advertisements of liquor prices except at the place of sale.[56] Because the restriction was a blanket prohibition on the liquor retailers' commercial speech, the Court determined the *Central Hudson* test must be applied with "special care."[57] Yet the Court noted that the regulation in question did not satisfy even the less stringent, normal application of the *Central Hudson* test.[58] The Justices could not agree, though, on whether the restriction directly advanced the government's interest (prong three) or whether it was more extensive than necessary (prong four).[59] Regardless, the stage was set for confusion over how the *Central Hudson* test should be applied—using a strict or intermediate level of scrutiny.

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49. 509 U.S. 418 (1993) (5-4 decision).
50. *Id.* at 423-24, 436.
51. *Id.* at 436.
52. *Id.* at 427-29.
53. *Id.* at 432-33.
54. *Id.* at 432.
55. 517 U.S. at 501, 509-10.
56. *Id.* at 492.
57. *Id.* at 504.
58. *Id.* at 507.
59. *Id.* at 488-89.

In 1997 the Ninth Circuit Court of Appeals in *Valley Broadcasting Co. v. United States*[60] held that Section 1304 violated the First Amendment's protection of commercial speech when applied to the broadcasting of privately owned casino advertisements within Nevada.[61] In reaching this conclusion, the court refused to apply strict scrutiny, as many believed *44 Liquormart* demanded.[62] Instead, the court found the government's interests, (1) reducing the social costs associated with the ills of gambling and (2) "'assist[ing] states that prohibit casino gambling . . . by regulating interstate activities such as broadcasting that are beyond the powers of the individual states to regulate,'" did not satisfy the original *Central Hudson* test, which called for only intermediate scrutiny.[63]

Soon afterwards, the Supreme Court vacated the Fifth Circuit's decision in *Greater New Orleans Broadcasting* and remanded for consideration in light of *44 Liquormart*.[64] On remand, the Fifth Circuit expressed its dissatisfaction with the unclear standard for the application of the *Central Hudson* test.[65] Then, after reconsidering the case, the court conceded that the directive of *44 Liquormart* made meeting prong four of the *Central Hudson* test more difficult for the Government, but held that the Government had nonetheless satisfied that higher standard.[66] The dissent then asserted that whether *Central Hudson* was applied more strictly or not, the statute still violated the First Amendment.[67]

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60. 107 F.3d 1328 (9th Cir. 1997).
61. *Id.* at 1336.
62. *Id.* at 1331-32.
63. *Id.* at 1336.
64. 119 S. Ct. at 1929.
65. 149 F.3d 334, 335 (5th Cir. 1998). The court protested,

> What seemed a fairly straightforward analysis when this panel first considered the constitutionality of the federal statute prohibiting the broadcast of radio and television advertisements for casino gambling, 18 U.S.C. § 1304, has dissolved into a welter of confusion following *44 Liquormart*. On one hand, in 1993, the Supreme Court upheld a companion provision that bans some broadcast advertising of state-sponsored lotteries .... On the other hand, after *44 Liquormart* was decided, the Ninth Circuit felt obliged to hold unconstitutional the provision at issue in this case, which bans radio and television advertisements for privately-run casino gambling. Has *Edge* lost its edge in the succeeding five years? Or on the contrary, has the rule of *Edge*, become a constitutional mandate? Such that Congress can now ban broadcast advertisements for gambling only in states that prohibit such gambling? Finally, has the Supreme Court gone over the edge in constitutionalizing speech protection for socially harmful activities?

Id. (footnote omitted).
66. *Id.* at 340.
67. *Id.* at 341.

III. THE COURT'S RATIONALE

Because of widespread criticism and confusion regarding the application of the *Central Hudson* test, the Supreme Court granted certiorari in *Greater New Orleans Broadcasting*, hoping to clarify its position.[68] Critics argued that the test had proven too open to the subjective interpretation of judges, especially in the lower courts.[69] Therefore, many hoped the Court would establish a new, clearer standard with which to assess commercial speech.[70] But the Court refused to "break new ground" by repudiating *Central Hudson* in favor of a more "straightforward and stringent" test and concluded that *Central Hudson*, as applied in recent cases, served to resolve the issue in *Greater New Orleans Broadcasting*.[71]

The most recent case of note was the splintered decision in *44 Liquormart*, which purported to adopt a stricter standard of review for commercial speech regulations, even though the regulation in question did not meet the more lenient standard of intermediate scrutiny.[72] However, in *Greater New Orleans Broadcasting* the Court failed to reach a consensus concerning exactly how to afford commercial speech greater protection, retreating from its more liberal assertions in *44 Liquormart*.[73] Thus, the Court ostensibly returned to the intermediate scrutiny originally established in *Central Hudson*.[74]

The Government was able to satisfy prongs one and two of the *Central Hudson* test in *Greater New Orleans Broadcasting*.[75] The Court ultimately held, however, that Section 1304 violated prongs three and four as applied to petitioners because the government's interests were not directly advanced by the overly extensive regulation.[76] First, the Court noted that the regulation in question obviously involved truthful,

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68. 119 S. Ct. at 1930.

69. *See, e.g.*, Troy, *supra* note 5, at 134; Valerie D. Wood, Comment, *The Precarious Position of Commercial Speech:* Rubin v. Coors Brewing Co., 19 HARV. J.L. & PUB. POL'Y 612, 612-13 (1996); Andrew S. Gollin, Comment, *Improving the Odds of the* Central Hudson *Balancing Test: Restricting Commercial Speech as a Last Resort*, 81 MARQ. L. REV. 873, 876 (1998).

70. *See* Gollin, *supra* note 69, at 877-78; Brian J. Waters, Comment, *A Doctrine in Disarray: Why the First Amendment Demands Abandonment of the* Central Hudson *Test for Commercial Speech*, 27 SETON HALL L. REV. 1626, 1645-56 (1997).

71. 119 S. Ct. at 1930.

72. 517 U.S. at 507.

73. 119 S. Ct. at 1930.

74. *Id.*

75. *Id.* at 1930-32.

76. *Id.* at 1932.

nonmisleading speech about a legal activity.[77] Second, the Court acknowledged that the government's interests, "(1) reducing the social costs associated with 'gambling'" and (2) assisting states that restrict or prohibit gambling within their borders, were substantial, though it indicated that "that conclusion is by no means self-evident."[78] Nevertheless, the Court withheld its attack on the constitutionality of Section 1304 until it applied prongs three and four.[79]

Under prong three the Court found that a ban on advertising did not directly advance the government's interests.[80] As for its first asserted interest—alleviating the societal ills associated with gambling—the Government argued a ban on promotional advertising would decrease the demand for gambling and its social costs.[81] Also, the Government argued that banning gambling advertisements would prevent compulsive gamblers from being lured to casinos.[82] The Court, however, found fault with these arguments for three reasons. First, although the demand for gambling might increase if casino advertising were allowed, the advertising really only served to encourage patrons to choose one casino over another.[83] Second, Congress's encouragement of tribal casino gambling had resulted in that industry's growth at a rate that privately owned casinos could not match through advertising alone.[84] Third, the Court found the myriad of exemptions to Section 1304 had undermined the purposes and policies behind the statute.[85]

Similarly, the government's second interest—helping to discourage gambling on the state level—could not hope to be achieved if the

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77. *Id.* at 1930.

78. *Id.* at 1931. The Court explained,

> [T]he social costs that support the suppression of gambling are offset, and sometimes outweighed, by countervailing policy considerations, primarily in the form of economic benefits . . . . Congress has not only sanctioned casino gambling for Indian tribes through tribal-state compacts, but has enacted other statutes that reflect approval of state legislation that authorizes a host of public and private gambling activities . . . . Whatever its character in 1934 when § 1304 was adopted, the federal policy of discouraging gambling in general, and casino gambling in particular, is now decidedly equivocal.

Id. at 1931-32 (citations and footnote omitted).

79. *Id.* at 1932.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 1932-33.

84. *Id.* at 1933.

85. *Id.* After all, government-sponsored gambling in the form of lotteries arguably is as demoralizing as other forms of gambling.

government could not discourage gambling on the federal level.[86] Besides, the amount of truthful information about legal activities sacrificed to Section 1304 was intolerable.[87] Additionally, even if broadcasts from Louisiana could be heard in Arkansas and Texas, which do not allow privately operated casinos, the government had defeated its own objective of protecting those consumers because Congress's exceptions to Section 1304 already permitted tribal casinos and certain lotteries to advertise in those states.[88]

As for prong four, the Court also found Section 1304 to be more extensive than necessary.[89] Although the Court reiterated its position that the government need not adopt the least restrictive means available to achieve its interests, the Court called for a narrow tailoring of the regulation to the interests.[90] Under Section 1304 broadcasters from every state were prohibited from carrying advertisements for privately operated casinos, regardless of whether the state had legalized gambling.[91] This restriction reached much further than was necessary, especially considering that IGRA exempts advertisements for tribal casinos from the prohibition in any state.[92] While the government might have sound reasons for protecting Native American businesses through regulation of competing non-Native American businesses, the Court pointed out this goal could be achieved by means other than regulating the competitors' speech.[93] Likewise, regulation of privately operated casinos could be achieved through various other means of regulation that do not interfere with speech and First Amendment protections.[94]

Chief Justice Rehnquist and Justice Thomas concurred separately in the opinion, though both argued for a stricter standard of protection for commercial speech. The Chief Justice focused on the least restrictive means approach to prong four.[95] He postulated that if Congress were to regulate the gambling industry itself, the multiple exemptions to Section 1304 might be tolerable.[96] But when Congress chooses to regulate only commercial speech, the Chief Justice agreed the *Central*

86. *Id.* at 1935.
87. *Id.*
88. *Id.*
89. *Id.* at 1932-33.
90. *Id.* at 1934.
91. *Id.* at 1933.
92. *Id.* at 1933-34.
93. *Id.* at 1934.
94. *Id.*
95. *Id.* at 1936 (Rehnquist, C.J., concurring).
96. *Id.*

Hudson test called for a more demanding standard of statutory review.[97] Justice Thomas, on the other hand, held firm to his belief that any interest in curtailing truthful, nonmisleading commercial speech is "'per se illegitimate'" and could justify regulation of neither commercial nor noncommercial speech, a belief he expressed in *44 Liquormart*.[98] Justice Thomas stated that the *Central Hudson* test should not have been applied in this case because the government wanted to keep people ignorant of a legal product and thereby manipulate their choices as consumers.[99]

IV. IMPLICATIONS

In *Greater New Orleans Broadcasting* the Supreme Court ignored a prime opportunity to clarify its approach to commercial speech protection. The Court could have reqiuired strict scrutiny, thus granting commercial speech the same First Amendment protection as noncommercial speech. Using strict scrutiny the Court could have discarded the inconsistent *Central Hudson* balancing test and adopted a least restrictive means approach. This method would be more easily and consistently applied by the lower courts and would offer a degree of stability and certainty to an uncertain area of law.

The Court's refusal to do so, however, does not necessarily indicate a more conservative attitude toward commercial speech protection. In a time of national economic prosperity, the Court is unlikely to uphold restrictions on advertising, which is a key tool in achieving that prosperity.[100] Instead, by reaffirming the *Central Hudson* test, the Court has chosen to avoid the turmoil that resulted in *44 Liquormart* when the Justices could not agree on a test to replace *Central Hudson*. In practice, though, the Court may merely have resorted to employing more creative means of finding impermissibility within the *Central Hudson* framework. After all, the test lends itself to subjective manipulation, and the Supreme Court, in cases since *Posadas* and *Edge*, has made clear its trend of liberally extending commercial speech protection.[101]

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97. *Id.*

98. *Id.* (Thomas, J., concurring).

99. *Id.*

100. *See* R. George Wright, *Freedom and Culture: Why We Should Not Buy Commercial Speech*, 72 DENV. U. L. REV. 137 (1994) (advocating less protection of commercial speech on the ground that consumerism is not a true indication of prosperity).

101. *See, e.g.*, Edenfield v. Fane, 507 U.S. 761, 763 (1993) (holding that Florida's ban on in-person business solicitation by certified public accountants was unconstitutional); Rubin v. Coors Brewing Co., 514 U.S. 476, 490-91 (1995) (holding that the Federal Alcohol Administration Act's ban on the display of alcohol content on beer labels was unconstitutional); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

Eventually, the Court will have to reformulate its approach. Continued manipulation of the *Central Hudson* test will cause further confusion and evoke additional criticism. Thus, the Court will be forced to extend equal protection to commercial speech outright. Otherwise, it will have to find a mutually agreeable, yet still more openly liberal, alternative.

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