

Mercer Law Review

Volume 48
Number 2 *Lead Articles Edition - Choice of Law:
How It Ought To Be*

Article 16

3-1997

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Recommended Citation

Harrison, Laura (1997) "*44 Liquormart, Inc. v. Rhode Island*: The Supreme Court Overturns a Ban on Liquor Price Advertising," *Mercer Law Review*. Vol. 48 : No. 2 , Article 16.

Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol48/iss2/16

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44 Liquormart, Inc. v. Rhode Island: The Supreme Court Overturns a Ban on Liquor Price Advertising

In *44 Liquormart, Inc. v. Rhode Island*,¹ two licensed liquor retailers brought suit against the Rhode Island Liquor Control Administrator to challenge the First Amendment validity of state statutes that banned the price advertising of alcoholic beverages. In a unanimous decision, the United States Supreme Court overturned the ban,² a judgment which may render similar restrictions unconstitutional.

I. FACTUAL BACKGROUND

In 1991, 44 Liquormart, a licensed retailer of alcoholic beverages in Rhode Island, placed an advertisement in a local newspaper. Although the advertisement did not directly state liquor prices, it listed the prices of items such as peanuts and potato chips and included the word "WOW" next to pictures of rum and vodka bottles. The Rhode Island Liquor Control Administrator concluded that the advertisement violated the state's price-advertising ban through an implied reference to bargain liquor prices and fined 44 Liquormart.³ 44 Liquormart paid the fine and filed an action against the Administrator in the United States District Court for the District of Rhode Island. Peoples, a neighboring Massachusetts retailer that also wanted to advertise in Rhode Island, joined Liquormart in seeking a declaratory judgment that the Rhode Island statutes and implementing regulations violated the First Amendment.⁴

1. 116 S. Ct. 1495 (1996).

2. *Id.* at 1501. The principal opinion is in eight parts; only Parts I, II, VII, and VIII received a majority. Justices Thomas, Scalia, and O'Connor filed concurring opinions.

3. *Id.* at 1503. Specifically, the statutory ban provided that it was unlawful for vendors to advertise their alcoholic beverage prices, with the exception of price tags or signs placed on the merchandise so long as these were not visible from the street. *Id.* at 1501. Also, an implementing regulation provided that any media or advertising company who advertised the prices would be guilty of a misdemeanor. *Id.*

4. *Id.* at 1503.

After hearing conflicting expert testimony regarding the ban's impact on the promotion of temperance, the district court found that it had "no significant impact on . . . alcohol consumption in Rhode Island."⁵ The court concluded the ban was unconstitutional because it did not directly advance Rhode Island's interest in reducing alcohol consumption and because it was more extensive than necessary to serve the interest.⁶ While acknowledging it might be reasonable to assume a connection between the advertising ban and reduced consumption, the district court held that a mere rational basis was not sufficient to justify the speech restriction.⁷ The United States Court of Appeals for the First Circuit reversed, finding merit in Rhode Island's claim that allowing price advertising created a more competitive market, resulting in lower liquor prices and increased sales of alcoholic beverages.⁸ The court also agreed with the Rhode Island Supreme Court's reasoning in previous cases upholding the ban's constitutionality on the ground that the Twenty-First Amendment⁹ gives the statute an additional presumption of validity.¹⁰

The Supreme Court granted certiorari and reversed.¹¹ The Court held that Rhode Island's ban did not significantly advance the promotion of temperance, was more extensive than necessary, and was not within the legislature's authority to suppress truthful, nonmisleading speech.¹² Furthermore, the state's power under the Twenty-First Amendment did not render the statutes constitutional.¹³

II. LEGAL BACKGROUND

First Amendment protection of commercial speech is a relatively recent development in United States history. In a 1942 case, *Valentine v. Chrestensen*,¹⁴ the Court held that purely commercial speech is not protected. In 1976, the Court recognized, for the first time, the unconstitutionality of certain commercial speech restrictions in *Virginia*

5. *Id.* (quoting *44 Liquor Mart, Inc. v. Racine*, 829 F. Supp. 543, 549 (D.R.I. 1993)).

6. *Id.* (quoting *44 Liquor Mart*, 829 F. Supp. at 555).

7. *Id.*

8. *Id.* (citing *44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5, 7 (1st Cir. 1994)).

9. "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2.

10. *44 Liquormart*, 116 S. Ct. at 1503 (citing *44 Liquormart*, 39 F.3d at 8).

11. *Id.* at 1504-15.

12. *Id.* at 1506-10.

13. *Id.* at 1515.

14. 316 U.S. 52, 54 (1942).

*State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*¹⁵ The Court struck down a state law prohibiting prescription drug price advertising despite the state's asserted interest in preserving pharmacists' professional stature and the stability of pharmacist-customer relationships.¹⁶ The Court reasoned that the state's position was highly paternalistic because its protection of the citizenry was based on maintaining public ignorance.¹⁷ Because the restriction targeted the content of the message in fear of its effect on its recipients, the Court held the ban violated the First Amendment.¹⁸

In another important case that preceded *Virginia Pharmacy*, the Court in *California v. LaRue*¹⁹ considered the state's authority to prohibit "lewd or naked dancing and entertainment" in bars and nightclubs licensed to sell liquor.²⁰ The Court held that while California may not have the power to proscribe such performances under the First Amendment, the State did have the power to do so where it issued liquor licenses under the Twenty-First Amendment.²¹ The Court upheld the regulations and noted that the Twenty-First Amendment gave the law "the added presumption in favor of validity."²²

In 1980, the Court returned to the issue of First Amendment protection of commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,²³ a decision that would set the standard for regulation of commercial speech. In *Central Hudson*, the Court set out a four-step intermediate scrutiny test to evaluate the constitutionality of commercial speech restrictions.²⁴ In that case, an electrical utility challenged an administrative regulation that completely banned promotional advertising by the utility in light of the state's interest in energy conservation.²⁵ First, the Court held that where a communication is both related to a lawful activity and nonmisleading, governmental control is limited.²⁶ Second, the state interest must be substantial.²⁷

15. 425 U.S. 748, 770 (1976).

16. *Id.* at 772.

17. *Id.* at 770.

18. *Id.* at 772.

19. 409 U.S. 109 (1972).

20. *Id.* at 115.

21. *Id.* at 118-19.

22. *Id.* at 118.

23. 447 U.S. 557 (1980).

24. *Id.* at 566.

25. *Id.* at 559-60.

26. *Id.* at 566.

27. *Id.*

Third, the law must directly advance the interest.²⁸ Fourth, the restriction must be no more extensive than necessary to advance the state interest.²⁹

Six years later, in *Posadas de Puerto Rico Associates v. Tourism Co.*,³⁰ the Court addressed the constitutionality of a statute restricting casino gambling advertisements that targeted the residents of Puerto Rico, as opposed to tourists.³¹ The statute also prohibited the use of the word "casino" in promotional items such as matchbooks and napkins if the items were accessible to the general public.³² To justify these restrictions, Puerto Rico asserted several state interests, including the prevention of moral and cultural pattern disruption and the fear of increased crime and prostitution.³³ Because the speech at issue was purely commercial, the Court analyzed the restriction under the *Central Hudson* test.³⁴ Noting the regulation concerned a lawful, nonmisleading activity, the Court held that the law withstood the other three prongs of *Central Hudson* because (1) the state's asserted interests were substantial, (2) the restrictions directly advanced the legislature's end of reducing demand for games of chance among Puerto Rican residents, and (3) the regulation did so in a manner which was no more extensive than necessary.³⁵ The Court reasoned that Puerto Rico's power to ban casino gambling encompassed the lesser power to ban its advertising, calling it "strange constitutional doctrine"³⁶ to concede the legislature's authority to completely ban an activity yet deny it the authority to reduce demand for the activity through advertising.³⁷

Most recently, in *Rubin v. Coors Brewing Co.*,³⁸ the Court addressed a challenge to a federal law that prohibited beer bottlers from displaying alcohol contents on its labels.³⁹ The government argued that the ban was needed to minimize the possibility of strength wars among brewers, fearing they would base their marketplace competition on beer potency and also to promote state efforts to regulate alcoholic beverages under

28. *Id.*

29. *Id.*

30. 478 U.S. 328 (1986).

31. *Id.* at 330.

32. *Id.* at 333.

33. *Id.* at 341.

34. *Id.* at 340.

35. *Id.* at 340-43.

36. *Id.* at 346.

37. *Id.* at 345-46.

38. 115 S. Ct. 1585 (1995).

39. *Id.* at 1588.

the Twenty-First Amendment.⁴⁰ The Court again applied the *Central Hudson* test.⁴¹ Because the labels contained undisputedly truthful, nonmisleading factual information, the Court turned to the other three prongs of the test.⁴² It accepted the government's interest in protecting citizens by preventing competition based on alcohol strength, which could increase alcoholism, as substantial.⁴³ However, the Court reasoned that the law did not directly advance the interest because of the "overall irrationality" of the regulatory scheme.⁴⁴ Brewers were still able to divulge alcohol content through a more influential means advertising in much of the country.⁴⁵ Thus, if the government's goal was to stifle strength wars, the prohibition on labels made "no rational sense" and could not withstand *Central Hudson*.⁴⁶

III. RATIONALE OF THE COURT

In its decision in *44 Liquormart, Inc. v. Rhode Island*, the Court once again affirmed First Amendment protection of truthful, nonmisleading commercial speech.⁴⁷ Although the Court agreed with the common-sense conclusion that a price-advertising prohibition would temper competition and maintain prices at a higher level than in a free market, the Court ultimately found that the statute could not withstand the third and fourth prongs of *Central Hudson*.⁴⁸ Specifically, the Court concluded that even the State's own showing revealed that any connection between the restriction and a reduction in alcohol consumption "would be purely fortuitous."⁴⁹ The Court found Rhode Island had not carried its burden of proving that the prohibition directly advanced the state interest.⁵⁰ Calling the *Posadas* majority's deference to legislative judgment a "sharp break"⁵¹ from precedent, Justice Stevens, writing for the plurality, explained that speculation and conjecture are not acceptable as proof of the direct relationship.⁵² Thus, the restric-

40. *Id.* at 1590-91.

41. *Id.* at 1589.

42. *Id.* at 1590.

43. *Id.* at 1591.

44. *Id.* at 1592.

45. *Id.*

46. *Id.*

47. 116 S. Ct. 1495, 1507 (1996).

48. *Id.* at 1509-10.

49. *Id.* at 1510.

50. *Id.*

51. *Id.* at 1511.

52. *Id.* (citing *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)).

tion failed the third prong of *Central Hudson*.⁵³ Further, the State failed the fourth prong regarding whether the restriction was no more extensive than necessary.⁵⁴ The Court pointed out obvious alternatives to a speech ban, such as direct regulation and increased taxation, which would serve the same purpose as the ban.⁵⁵

The Court rejected Rhode Island's contention that the power to ban alcoholic beverages subsumes the lesser power to regulate related advertising.⁵⁶ Reasoning that prohibiting speech may sometimes be more intrusive than prohibiting conduct, the Court said Rhode Island's choice to license liquor retailers did not allow the state to "deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech."⁵⁷

Finally, the Supreme Court disavowed its reasoning in *California v. LaRue*⁵⁸ by rejecting Rhode Island's *LaRue*-based argument that the Twenty-First Amendment gave its ban "an added presumption in favor of validity."⁵⁹ The Court, without questioning the holding in *LaRue*, explained that the amendment does not authorize the states to disregard their obligations under other parts of the Constitution.⁶⁰

In his concurrence, Justice Thomas objected to the application of the *Central Hudson* balancing test.⁶¹ Instead, he argued that the State's asserted interest in keeping consumers "in the dark"⁶² in order to affect choices made in the marketplace was "per se illegitimate."⁶³ He stressed the Court's rationale in *Virginia Pharmacy* that even "speech that does 'no more than propose a commercial transaction'" came within First Amendment protection.⁶⁴ In addition, Justice Thomas faulted the plurality's reasoning in declaring the ban unconstitutional based in part on Rhode Island's failure to show that the ban significantly decreased consumption.⁶⁵ He noted that the plurality "seem[ed] to imply that if the State had been more successful at keeping consumers ignorant" and

53. *Id.* at 1510.

54. *Id.*

55. *Id.*

56. *Id.* at 1512.

57. *Id.* at 1513 (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

58. 409 U.S. 109 (1972).

59. 116 S. Ct. at 1514 (citing *LaRue*, 409 U.S. at 118-19).

60. *Id.* (citing *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984)).

61. *Id.* at 1515-16 (Thomas, J., concurring).

62. *Id.* at 1518.

63. *Id.* at 1516.

64. *Id.* (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)).

65. *Id.* at 1518.

thus decreased consumption, then the law might have been upheld.⁶⁶ Specifically, Justice Thomas characterized the potential implications of the plurality's holding as "quite sweeping"⁶⁷ because, under the fourth prong of *Central Hudson*, it appeared that direct regulation such as taxation would always be "at least as effective" as restricting advertising.⁶⁸

In her concurrence, Justice O'Connor, joined by Chief Justice Rehnquist, Justice Souter, and Justice Breyer, argued to apply the *Central Hudson* test to determine whether the restriction survived First Amendment scrutiny.⁶⁹ Finally, Justice Scalia, like Justice Thomas, was also uncomfortable with the plurality's application of *Central Hudson* and noted the lack of a discussion of legislative policies at the time the First Amendment was adopted.⁷⁰ However, because Justice Scalia did not believe the Court had before them "the wherewithal to declare *Central Hudson* wrong—or at least the wherewithal to say what ought to replace it—" he resolved the case consistent with the existing law.⁷¹

IV. IMPLICATIONS

This decision has already had a major effect on alcohol price advertising. The Supreme Court remanded two subsequent cases, *Anheuser-Busch, Inc. v. Schmoke*⁷² and *Hospitality Investments v. Pennsylvania State Police*,⁷³ for consideration in light of the new decision. Furthermore, *44 Liquormart* calls into question laws similar to the Rhode Island statutes.⁷⁴

Additionally, as the Court's most recent pronouncement on commercial speech, the decision in *44 Liquormart* will be important in determining the constitutionality of future restrictions, particularly the Food and Drug Administration's recent regulations on tobacco advertising aimed

66. *Id.*

67. *Id.* at 1519.

68. *Id.*

69. *Id.* at 1521 (O'Connor, J., concurring).

70. *Id.* at 1515 (Scalia, J., concurring).

71. *Id.*

72. 116 S. Ct. 1821 (1996) (mem.), *vacating and remanding* 63 F.3d 1305 (4th Cir. 1995).

73. 116 S. Ct. 1821 (1996) (mem.), *vacating and remanding* 650 A.2d 854 (Pa. 1994).

74. Other states, including Georgia, South Carolina, North Carolina, Arkansas, Connecticut, Kansas, Minnesota, Missouri, New Hampshire, Ohio, and Pennsylvania have laws in some way restricting liquor price advertising. Richard Carelli, *Justices Debating Liquor Ads*, THE LAS VEGAS REV. J., May 2, 1995, at 7D.

at children and adolescents.⁷⁵ These include the ban of billboard tobacco advertising within a thousand feet of schools and playgrounds,⁷⁶ the sponsorship of sporting events attended by young people such as NASCAR auto races, and giveaways of promotional items such as T-shirts.⁷⁷ In addition, advertisements in magazines frequently read by minors would be limited to black and white text.⁷⁸

The Food and Drug Administration ("FDA") argues, under the first prong of *Central Hudson*, that tobacco advertisements relate to an unlawful activity to the extent that they target minors.⁷⁹ Arguably, because the sale of tobacco to persons under age eighteen is illegal in all fifty states, advertising appealing to minors would relate to an unlawful activity, thus making this speech fall outside First Amendment protection.⁸⁰ On the other hand, critics point out that whether an advertisement targets a younger audience is difficult to determine because the use of cartoons, such as Joe Camel, can also target adults.⁸¹ Thus, they argue, because of this proof problem, tobacco advertising would most likely be given First Amendment protection.⁸²

Assuming the First Amendment encompasses the restrictions under the first prong, the next *Central Hudson* inquiry—whether the government interest is substantial—is generally not disputed.⁸³ The FDA argued that the government has a substantial interest in public health, and especially the well-being of children, and cited studies indicating the age one starts smoking will influence tobacco-related morbidity and mortality to support this proposition.⁸⁴

Next, under the third prong of *Central Hudson*, which requires that the restrictions directly advance the asserted interest, the FDA reviewed numerous studies on the effect of tobacco advertising on minors, concluding that the evidence "demonstrates that [the] FDA's judgment . . . is supported not only by common sense but by studies, anecdotes,

75. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (1996) (to be codified at 21 C.F.R. §§ 801, 803, 804, 807, 820, 897).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 44,471.

80. *Id.*

81. Mark R. Ludwikowski, Comment, *Proposed Government Regulation of Tobacco Advertising Uses Teens to Disguise First Amendment Violations*, 4 COMMLAW CONSPPECTUS 105, 111 (1996).

82. *Id.*

83. *Id.* at 112.

84. 61 Fed. Reg. at 44,472.

history, expert consensus . . . and empirical data."⁸⁵ However, critics say establishing a connection between advertising and consumption by minors is difficult, particularly when the law prohibits minors from purchasing tobacco products.⁸⁶ In addition, they cite research indicating the presence of smokers in the home and peer influence has a greater influence on teen smoking.⁸⁷

Finally, under the fourth prong, the FDA contended the regulations were "carefully crafted" to target only "advertising that children are routinely exposed to and that the available evidence shows has the greatest affect on youngsters, while leaving the informational aspects of advertising largely untouched."⁸⁸ It emphasized that, for example, the regulations do not ban print advertising, but only restrict the use of images and color that are especially appealing to children in publications with a largely young readership.⁸⁹ Thus, the FDA concluded that the regulations go no further than necessary to meet their purpose.⁹⁰

Regarding the black and white restriction, also called a "tombstone" limitation, some commentators believe this restriction, although less problematic than a total ban, still poses the problem of interfering with the speaker's choice of method for expression.⁹¹ They argue that, in some ways, tombstone limitations may be "even more pernicious"⁹² than a complete ban because "they give the illusion of allowing communication while in reality significantly interfering with the message."⁹³ Critics also point out that cartoon character Joe Camel "defies . . . description," and cannot necessarily be classified as targeting children.⁹⁴ However, they acknowledge that if characters which obviously appeal to children, such as Mickey Mouse, were restricted, the argument against the regulation would be less persuasive.⁹⁵

Given the decision in *44 Liquormart*, some commentators believe tobacco advertising cannot be regulated because it also relates to a vice

85. *Id.* at 44,474.

86. Ludwikowski, *supra* note 81, at 113-14.

87. *Id.* at 114.

88. 61 Fed. Reg. at 44,497.

89. *Id.*

90. *Id.*

91. Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 625-26 (1996).

92. *Id.* at 627.

93. *Id.*

94. *Id.* at 629.

95. *Id.*

activity.⁹⁶ However, the blanket ban on all liquor price advertising is distinguishable from the tobacco advertising regulations, which only apply under limited circumstances, thus making the question more complicated and the outcome more difficult to predict.

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96. Kathleen Sullivan, *Tobacco Ad Rules Would Limit Free Speech*, ST. LOUIS POST-DISPATCH, June 9, 1996, at 3B.