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## Commercial Speech, “Irrational” Clients, and the Persistence of Bans on Subjective Lawyer Advertising

Nat Stern\*

*Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond ‘irrationally’ to the truth.<sup>†</sup>*

### I. INTRODUCTION

Notwithstanding a string of defeats in the United States Supreme Court,<sup>2</sup> the organized legal profession has hardly relented in its efforts to limit lawyer advertising.<sup>3</sup> Among the most dubious restrictions to which many states have clung is the prohibition on “self-laudatory” claims or other subjective representations by attorneys.<sup>4</sup> This Article argues that a categorical ban on such claims rests on premises at odds with the Court’s commercial speech jurisprudence. In particular, the prohibition clashes with the Court’s disapproval of sweeping restrictions rooted in paternalistic assumptions about the public’s capacity to assess commercial advertising. Admittedly, the Court has indicated some latitude for states to curb representations about legal services that are not susceptible to objective verification. Given the broader foundations of commercial speech doctrine, however, these pronouncements

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1. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (Stevens, J., plurality).

2. *See infra* Part II.C.

3. *See generally* Ron Edelman, *Effective, Ethical Advertising*, 2 ANN. 2006 ATLA-CLE 2617 (2006); *Differences Between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct* (article on file with author); Michael D. Johnston, *The Litigation Explosion, Proposed Reforms, and Their Consequences*, 21 BYU J. PUB. L. 179, 198–99 (2007); Jay D. Kreisman & Menachem Lanner, Comment, *The Cahill Decision: Evolution or Revolution? An Analysis of Alexander v. Cahill and Its Effect on Attorney Advertising*, 21 GEO. J. LEGAL ETHICS 841, 841–42, 854–55 (2008).

4. *See, e.g.*, IND. RULES PROF’L CONDUCT R. 7.2(b) (2007); S.C. APP. CT. R. 7.2(f) (2008); S.D. CODIFIED LAWS § 16-18-appx-7.1(c)(3) (2009).

cannot be taken to support wholesale suppression of attorney advertising that exceeds the narrow presentation of data. On the contrary, ambiguities in the application of commercial speech principles to such provisions should be resolved in favor of the doctrine's fundamental impulse in favor of expression. Part II provides an overview of the Court's commercial speech doctrine, including discrete treatment of cases involving lawyer advertising and solicitation.<sup>5</sup> Part III sets forth central tenets underpinning the Court's approach to commercial speech. Part IV examines the tension between these principles and categorically forbidding self-laudatory and other subjective attorney advertising.

## II. COMMERCIAL SPEECH IN THE SUPREME COURT: AN OVERVIEW<sup>6</sup>

Qualified enthusiasm for First Amendment protection has marked the Court's modern approach to commercial speech. Indeed, the Court has emphasized that larger principles protecting freedom of expression substantially govern commercial speech. At the same time, a subsidiary strain has ceded to government-enhanced regulatory authority said to arise from the distinctive features of this category of expression.<sup>7</sup> These dual impulses are displayed by the

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5. For purposes of the analysis offered here, the formal distinction that can be drawn between advertising and solicitation is not significant. See *Koffler v. Joint Bar Ass'n*, 412 N.E.2d 927, 931 (N.Y. 1980); Rex R. Preschbacher & Debra Bassett Hamilton, *Reading Beyond the Labels: Effective Regulation of Lawyers' Targeted Direct Mail Advertising*, 58 U. COLO. L. REV. 255, 256 (1987); see also Robert Battey, Note, *Loosening the Glue: Lawyer Advertising, Solicitation, and Commercialism in 1995*, 9 GEO. J. LEGAL ETHICS 287, 287 n.7 (1995) (asserting that the distinction between advertising and solicitation "is becoming blurred" with respect to mailed material).

6. For a more detailed account, see JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 1227-62 (7th ed. 2004).

7. This mixed treatment of commercial speech falls roughly in the philosophical middle of the range of commentary inspired by the Court's decisions. At one end, many observers have criticized the Court's substantial constitutional recognition of a category of expression that they believe to be far removed from the core purposes of the First Amendment. See, e.g., C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976) ("[A] complete denial of first amendment protection for commercial speech is not only consistent with, but is required by, first amendment theory."); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 352-55 (1978) (asserting commercial advertising's irrelevance to political speech); Reza R. Dibadj, *The Political Economy of Commercial Speech*, 58 S.C. L. REV. 913, 916-19 (2007) (arguing that protection of commercial speech, unlike political speech, is not securely grounded in the Constitution's establishment of representative democracy); Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 38 (1979) (concluding that regulation of ordinary business

ambivalent character of the Court's two seminal decisions in the area, the larger trajectory of the Court's jurisprudence, and the specific treatment of restrictions on lawyer advertising.

A. Virginia Board of Pharmacy and Central Hudson: *Foundations of a Two-Track Commercial Speech Doctrine*

Two decisions, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>8</sup> and *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>9</sup> supply the origin and framework of the Court's commercial speech doctrine. While arguably not entirely compatible,<sup>10</sup> the Court's reasoning in both cases continues to inform its disposition of commercial speech issues. Depending on their construction in a given instance, both holdings

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advertising has "nothing to do" with freedom of expression); Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2645-49 (2008). By contrast, others have challenged commercial speech's status as a mode of expression warranting diminished First Amendment protection. A prominent exponent of this view has been Martin Redish, *see, e.g.*, Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 630-35 (1982) (arguing that similar constitutional protection of commercial and noncommercial speech would serve the First Amendment's value of self-realization), whose calls for placing commercial speech on a plane comparable to other expression have been echoed by numerous commentators. *See, e.g.*, William W. Eldridge, *Just Do It: Kasky v. Nike, Inc. Illustrates That It Is Time to Abandon the Commercial Speech Doctrine*, 12 GEO. MASON L. REV. 179, 208 (2003); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 627-53 (1990); Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1172-75 (1983) (arguing difficulty of determining contours of commercial speech category militates against lesser protection); *Leading Cases*, 110 HARV. L. REV. 135, 216 (1996). Between these two perspectives lies commentary expressing basic sympathy with the Court's approach. *See, e.g.*, James J. Barney, *The Mixed Message: The Supreme Court's Missed Opportunity to Address the Confused State of Commercial Speech in Nike, Inc. v. Kasky?*, 37 UWLA L. REV. 1, 25-26 (2004); Ronald A. Cass, *Commercial Speech, Constitutionalism, Collective Choice*, 56 U. CIN. L. REV. 1317, 1382 (1988) (favorably comparing Court's approach to commercial speech with proposed alternatives); Patrick D. Curran, *Diluting the Commercial Speech Doctrine: "Noncommercial Use" and the Federal Trademark Dilution Act*, 71 U. CHI. L. REV. 1077, 1095-96, 1098 (2004); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 290 (1981) (endorsing limited protection of commercial speech).

8. 425 U.S. 748 (1976).

9. 447 U.S. 557 (1980).

10. *See id.* at 576 (Blackmun, J., concurring) (arguing that *Virginia Board of Pharmacy* provided more stringent protection); *see also* Jeffrey Lefstin, *Does the First Amendment Bar Cancellation of REDSKINS?*, 52 STAN. L. REV. 665, 672 (2000); Todd J. Locher, Comment, *Board of Trustees of the State University of New York v. Fox: Cutting Back on Commercial Speech Standards*, 75 IOWA L. REV. 1335, 1338 (1990).

contain the seeds of both robust protection and diminished status for commercial speech.

In *Virginia Board of Pharmacy*, the Court explicitly embraced the proposition that First Amendment principles govern the regulation of commercial speech.<sup>11</sup> Rather than treat Virginia's ban on advertising prescription drug prices as ordinary commercial regulation,<sup>12</sup> the Court invoked a number of First Amendment values to strike down the prohibition. Prominent among these was self-realization.<sup>13</sup> With access to relative prices, reasoned the Court, consumers least able to bear the costs of prescription drugs could gain "the alleviation of physical pain or the enjoyment of basic necessities."<sup>14</sup> The Court also linked the free flow of commercial information to the First Amendment's fundamental concern with democratic decision-making. In the Court's estimate, the availability of commercial information is essential to informed public decisions about the manner in which America's economy should be regulated or altered.<sup>15</sup> Perhaps most importantly, the Court regarded Virginia's

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11. Several decades earlier, the Court had apparently deemed commercial speech unworthy of consideration under the First Amendment. *See* *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), *overruled by Va. State Bd. of Pharmacy*, 425 U.S. at 748 (declaring "purely commercial advertising" as outside the ambit of free speech guarantee). Even prior to *Virginia Board of Pharmacy*, however, the Court had effectively retreated from this position. *See, e.g.,* *Bigelow v. Virginia*, 421 U.S. 809, 826, 829 (1975) (invalidating enforcement of statute forbidding encouragement of abortions against advertisement of out-of-state abortion services); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (holding that allegedly defamatory statements otherwise eligible for constitutional protection "do not forfeit that protection because they were published in the form of a paid advertisement"); *Breard v. Alexandria*, 341 U.S. 622, 642 (1951) (reasoning that "the fact that periodicals are sold does not put them beyond the protection of the First Amendment," but upholding door-to-door solicitations of magazine subscriptions), *overruled by Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 & n.7 (1980); *see also* Ronald D. Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L. REV. 1080, 1084-1101 (reviewing development of commercial speech doctrine from *Chrestensen* to *Virginia Board of Pharmacy*).

12. *See Va. Bd. of Pharmacy*, 425 U.S. at 781 (Rehnquist, J., dissenting) (arguing for traditional deferential review of "a seller hawking his wares").

13. *See* C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646, 652 (1982) (referring to "self-realization" and "individual liberty" as values embodied in the First Amendment); *see also* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 810 (1999); Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 244-45 (1998).

14. *Va. Bd. of Pharmacy*, 425 U.S. at 763-64.

15. *Id.* at 765 (citing ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948)). The Court has frequently endorsed Meiklejohn's thesis, *see*

justifications for suppressing drug price advertising as incompatible with the First Amendment's basic assumption that government may not stifle expression for fear of its communicative impact.<sup>16</sup> The state had cited several potential adverse consequences from unrestrained advertising: consumers flocking to cheaper but less professional pharmacists, the undermining of stable pharmacist-customer relationships as consumers pursued momentarily lowest prices, and erosion of the profession itself because the pharmacist's image as a "mere retailer" would discourage entry of talented individuals.<sup>17</sup> Without entirely discounting these concerns, the Court found them insufficient in that they largely derived from the "advantages of [citizens] being kept in ignorance."<sup>18</sup> This "highly paternalistic approach," the Court determined, clashed with the First Amendment's decree that "the dangers of suppressing information" exceed "the dangers of its misuse if it is freely available."<sup>19</sup> Accordingly, the Court ruled that a state 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."<sup>20</sup>

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MEIKLEJOHN, *supra* at 22–27, that protection of discussion of public issues lies at the heart of the First Amendment's protection of free speech. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) ("The First Amendment affords the broadest protection to . . . political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" (citation omitted)); *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 604 (1982) ("The First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." (citation omitted)); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.").

16. This understanding of the First Amendment's powerful presumption in favor of unfettered speech was famously voiced by Justice Holmes, *see Abrams v. United States*, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting) ("Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech.'"), and Justice Brandeis, *see Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.") *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

17. *Va. Bd. of Pharmacy*, 425 U.S. at 768.

18. *Id.* at 769.

19. *Id.* at 770.

20. *Id.* at 773.

At the same time, the Court refused to equate commercial speech with fully protected forms of expression, suggesting that the nature of the state's regulatory interest and of commercial speech itself warrant a greater degree of restriction than would be tolerated elsewhere. The Court acknowledged that the state is entitled to curb impediments to the dissemination of "truthful and legitimate commercial information . . . ." <sup>21</sup> In assessing the validity of such measures, the Court would take into account two distinctive features of commercial speech. First, advertisers' familiarity with their product or service typically places them in position to evaluate the accuracy of their representations. <sup>22</sup> Second, the economic incentive to advertise reduces the possibility that appropriate regulation would severely deter commercial speech. <sup>23</sup> These attributes of comparative "objectivity" and "hardiness," reasoned the Court, might justify greater governmental authority in this realm to insist on truthful speech, to require forms of presentation and inclusion of information designed to prevent deception, and to impose prior restraints. <sup>24</sup>

Four years later in *Central Hudson*, the Court again coupled invalidation of a ban on advertising with a concession to state power to regulate commercial speech. <sup>25</sup> There, the Court struck down New York's prohibition of all advertising by electric utilities to promote the use of electricity. According to the Court, the state's blanket ban barred more speech than was necessary to further the State's interest in energy conservation. <sup>26</sup> This conclusion resulted from application of the final prong of a four-part standard for commercial speech regulation that the Court had promulgated earlier in the opinion. To qualify for protection, commercial speech must first concern lawful activity and must not be misleading. <sup>27</sup> Once past this threshold, the analysis shifts to the state's justification for the restriction at issue. In the second step, a court inquires "whether the asserted government interest is substantial." <sup>28</sup> If it is, the court then determines whether

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21. *Id.* at 772 n.24.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

26. *Id.* at 569-72. The Court noted both proscribed advertising that would not detract from the state's goal and less restrictive alternatives that might foster the state's interest just as effectively. *Id.* at 570-71.

27. *Id.* at 566.

28. *Id.*

the regulation directly advances the interest asserted, and—assuming the first three conditions are met—whether the regulation is “more extensive than necessary to serve that interest.”<sup>29</sup>

While the final requirement is the most stringent part of the test, and produced a speech-protective outcome in *Central Hudson*, even this criterion could be construed to afford the state significant power to limit commercial speech. In faulting the state’s failure to demonstrate that “a more limited restriction on the content of promotional advertising” would not achieve the state’s purpose,<sup>30</sup> the Court implied its potential approval of certain narrowly tailored restrictions. *Central Hudson* can thus be read to suggest that in some instances, accurate information about a legal product can be suppressed to dampen demand for that product.<sup>31</sup>

### *B. The Prevalence of Protection*

In confronting commercial speech issues, the Court has predominantly, though not invariably, been guided by the protective aspects of its two leading decisions. Even those decisions upholding restrictions can generally be explained by reference to their particular contexts rather than as signaling a wider regime of relaxed scrutiny. Both the tenor and results of more recent decisions underscore the Court’s commitment to searching review of commercial speech regulation.

Only one term after *Virginia Board of Pharmacy*, the Court affirmed that suppression of commercial expression, even in service of a worthy aim, would not be justified by fear of harmful reaction to truthful information. In *Linmark Associates, Inc. v. Township of Willingboro*,<sup>32</sup> the Court overturned an ordinance forbidding display of “For Sale” or “Sold” signs. The town had sought to “stem . . . the flight of white homeowners from a racially integrated

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29. *Id.*

30. *Id.* at 570.

31. *See id.* at 574 (Blackmun, J., concurring) (disagreeing with Court “when it says that suppression of speech may be a permissible means” to achieve energy conservation); Lefstin, *supra* note 10, at 672 (describing Court in *Central Hudson* as having “largely rejected” the suggestion in *Virginia Pharmacy* that commercial speech could not be singled out by its content); Jonathan Weinberg, Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720, 728 (1982) (referring to Court’s “explicit statement” in *Central Hudson* that “the state may indeed, using narrowly drawn restrictions, suppress commercial speech solely to dampen demand for a legitimate product”).

32. 431 U.S. 85 (1977).



community.”<sup>33</sup> Though acknowledging that the pursuit of stable, integrated housing constituted “an important governmental objective,”<sup>34</sup> the Court would not condone a ban on signs containing certain content based on fear that their message would “cause those receiving the information to act upon it.”<sup>35</sup>

In two other decisions, *Carey v. Population Services International*<sup>36</sup> and *Bolger v. Youngs Drug Products Corp.*,<sup>37</sup> the Court rejected rationales for barring commercial speech that would be insufficient in other settings. *Carey* involved a state’s prohibition of any advertisement or display of contraceptives. The Court dismissed out of hand the state’s justification that advertisements of contraceptive products would prove “offensive and embarrassing” to those exposed to them, noting its established principle that “the fact that protected speech may be offensive to some does not justify its suppression.”<sup>38</sup> Similarly, in *Bolger*, the Court struck down a ban on mailing unsolicited advertisements for contraceptives. In arguing that the statute shielded recipients from materials that they would probably find offensive, the government had sought to distinguish *Carey* by invoking the protection of seclusion in the home.<sup>39</sup> Even in the case of unsolicited commercial speech, however, the Court found that the “short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.”<sup>40</sup>

The tacit premise of *Carey* and *Bolger*—that commercial speech does not inherently receive lesser protection without consideration of its distinctly commercial aspects—received emphatic expression in

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33. *Id.* at 86.

34. *Id.* at 95.

35. *Id.* at 94.

36. 431 U.S. 678 (1977).

37. 463 U.S. 60 (1983).

38. 431 U.S. at 701 (citing *Cohen v. California*, 403 U.S. 15 (1971)); *see also* *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (describing as “a bedrock principle underlying the First Amendment that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”); *Hustler Magazine v. Falwell*, 485 U.S. 46, 55–56 (1988).

39. 463 U.S. at 71–72.

40. *Id.* at 72 (alteration in original); *cf.* *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 737 (1970) (upholding law authorizing householders to instruct mailer to stop all future mailings to householders where mailer has sent material that, in householders’ sole discretion, they believe to be erotically arousing or sexually provocative).

*City of Cincinnati v. Discovery Network, Inc.*<sup>41</sup> The city of Cincinnati wanted to increase its overall attractiveness and safety, and thus passed an ordinance prohibiting the distribution of “commercial handbills,” including from freestanding news racks, in public areas. Without questioning the substantiality of these interests, the Court struck down the ordinance for lacking a demonstrated “reasonable fit” between the scope of the ban and the city’s safety and aesthetic goals.<sup>42</sup> Given the larger number of news racks containing noncommercial publications, which were presumably creating similar harms to public safety and aesthetics, the Court would not approve the city’s singling out for prohibition news racks dispensing “commercial handbills.”<sup>43</sup> In particular, the Court pointedly rejected Cincinnati’s assertion that the “low value” of commercial speech could justify its “selective and categorical ban” on commercially-oriented news racks.<sup>44</sup> On the contrary, the Court chastised the city for “seriously underestim[ing] the value of commercial speech.”<sup>45</sup> Accordingly, the ordinance foundered on the city’s failure to assert any commercial harms that would be redressed by regulating the information distributed by the proscribed news racks.<sup>46</sup>

By contrast, the Court in *Friedman v. Rogers*<sup>47</sup> and *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*<sup>48</sup> sustained challenged restrictions on commercial speech. Unlike the cases

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41. 507 U.S. 410 (1993).

42. *Id.* at 417–18 (quoting *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

43. *See id.* at 417–18, 425–26 (noting that dispensing devices for newspapers and commercial handbills shared similar appearance and that the number of devices devoted to newspapers was greater).

44. *Id.* at 428. The Court was careful to distinguish its decision in *Metromedia, Inc. v. City of San Diego*, upholding a ban on advertising billboards except those on the premises of the billboard’s sponsor (“onsite”). 453 U.S. 490 (1981). Justice Stevens characterized *Metromedia* as involving disparate treatment of two types of commercial speech rather than discrimination between commercial and noncommercial speech. *Discovery*, 507 U.S. at 425 n.20. Stevens noted that the question of whether a city could distinguish between commercial and noncommercial offsite billboards that posed the same esthetic and safety concerns was not presented in the earlier case. *Id.* The impact of *Metromedia* is further limited by the absence of a majority opinion. *See Metromedia*, 453 U.S. at 569 (Rehnquist, J., dissenting) (describing the Court’s disposition of ordinance as “a virtual Tower of Babel, from which no definitive principles can be clearly drawn”).

45. *Discovery*, 507 U.S. at 419.

46. *Id.* at 426.

47. 440 U.S. 1 (1979).

48. 483 U.S. 522 (1987).

discussed above, however, this pair did not involve state attempts to deprive consumers of accurate information, protect the sensibilities of mature individuals, or automatically relegate commercial speech to inferior First Amendment status. Rather, the impetus for the restrictions appears to originate from the State's traditional regulatory role of promoting fair and efficient markets. For example, as the *Virginia Board* Court recognized, one of the State's major functions as market regulator is to prevent the dissemination of information in a way that conveys a false impression of the product or service offered.<sup>49</sup> In *Friedman*, the Court invoked this principle<sup>50</sup> to uphold a Texas law barring the practice of optometry under a trade name, which could distort the actual nature of the practice.<sup>51</sup> This ban only thwarted one means of presenting information that could be effectively communicated through other channels.<sup>52</sup>

Similarly, the Court's approval of the challenged restriction in *San Francisco Arts* rested on governmental power to enforce property rights rather than to impede expression.<sup>53</sup> The Court upheld the operation of a statute granting the United States Olympic Committee exclusive use of the word "Olympic" to preclude promotion of an athletic competition called the "Gay Olympic Games."<sup>54</sup> While the facial breadth of the statute arguably lent itself to a significant number of impermissible applications,<sup>55</sup> the Court found no "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court."<sup>56</sup>

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49. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976) (authorizing a state to require that commercial information "appear in such a form . . . as [is] necessary to prevent its being deceptive").

50. *Friedman*, 440 U.S. at 16.

51. *Id.* at 12–15. For example, a trade name could prominently include an optometrist whose reputation draws clients but who no longer remains with the practice. *Id.* at 13.

52. *Id.* at 16 (noting the right to advertise service prices and other factual information communicated by trade names).

53. *San Francisco Arts*, 483 U.S. at 532–35.

54. *Id.* at 525–27, 548.

55. *See id.* at 561 (Brennan, J., dissenting) ("The statute is overbroad on its face . . . and vests the USOC with unguided discretion to approve and disapprove others' noncommercial use of 'Olympic.'").

56. *Id.* at 536 n.15 (quoting City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984)); *see* Terence Dougherty, *Group Rights to Cultural Survival: Intellectual Property Rights in Native American Cultural Symbols*, 29 COLUM. HUM. RTS. L. REV. 355, 398 (1998) (stating that factors set forth in *San Francisco Arts* "legitimize the creation of an exclusive property right in a name or image"); Bruce P. Keller, *Condemned to Repeat the Past:*

Three other decisions—*Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,<sup>57</sup> *Board of Trustees of the State University of New York v. Fox*,<sup>58</sup> and *United States v. Edge Broadcasting Co.*<sup>59</sup>—support more expansive limitations on commercial speech. Developments after these holdings, however, appear to have undermined their precedential force. Of the trio, *Posadas* is at once the most problematic for rights of commercial speech and the least likely to command support today. There, the Court permitted Puerto Rico to forbid advertising for casino gambling aimed at Puerto Rican residents without outlawing the gambling itself.<sup>60</sup> Two features of the logic employed in Justice Rehnquist’s majority opinion seemed to augur a markedly less protective regime than that heralded by *Virginia Board of Pharmacy*. First, the opinion condoned the paternalistic legislative theory that Puerto Rico residents were “already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct.”<sup>61</sup> Second, and even more ominously, the Court declared that the government’s “greater power” to totally prohibit an activity such as casino gambling encompasses the power to take the “less intrusive step” of banning only advertising of that activity.<sup>62</sup> Thus, by extension, the government possesses comprehensive power to restrict advertising of all activities and products except those that have already been

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*The Recemergence of Misappropriation and Other Common Law Theories of Protection for Intellectual Property*, 11 HARV. J.L. & TECH. 401, 417–18 (1998) (citing *San Francisco Arts* for proposition that “the First Amendment does not protect any right to misappropriate valuable commercial property, even if the property can be characterized as speech”). *But see* Kozinski & Banner, *supra* note 7, at 649 (criticizing characterization of petitioner’s expression in *San Francisco Arts* as commercial speech as providing “a convenient avenue for denying protection to speakers who may have had something unpopular to say”); Robert N. Kravitz, *Trademarks, Speech and the Gay Olympics Case*, 69 B.U. L. REV. 131, 166–67, 172 (1989) (arguing that the Court should have found a First Amendment violation); Rebecca Tushnet, *Trademark Law As Commercial Speech Regulation*, 58 S.C. L. REV. 737, 746 (2007) (arguing that the property argument in *San Francisco Arts* “is entirely unimpressive with respect to noncommercial, expressive uses” and that “[i]t is dangerous to let legislatures or common law define intangibles as ‘property’ to fend off First Amendment challenges”).

57. 478 U.S. 328 (1986).

58. 492 U.S. 469 (1989).

59. 509 U.S. 418 (1993).

60. *Posadas*, 478 U.S. at 345–46 (“[T]he greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling . . .”).

61. *Id.* at 344.

62. *Id.* at 345–46.

accorded constitutional protection.<sup>63</sup> The drastic contraction in rights of commercial speech signaled by this reasoning, however, ultimately did not materialize. A decade later, a majority of Justices were either acknowledging that subsequent decisions had eroded the deferential doctrine of *Posadas*<sup>64</sup> or repudiating the opinion outright.<sup>65</sup>

On the other hand, the impact of the Court's opinion in *Fox* has been more ambiguous. The case is notable less for the specific dispute that it presented<sup>66</sup> than for the Court's exegesis of *Central Hudson*'s requirement that a restriction on commercial speech be "no[] more extensive than is necessary to serve [the State's] interest."<sup>67</sup> When applied to constraints on non-commercial speech, this type of standard normally conveys a stringent level of scrutiny.<sup>68</sup> In *Fox*, however, the Court disavowed any suggestion that the fourth part of *Central Hudson* amounted to a "least-restrictive-means" test.<sup>69</sup> Rather, what it required was a "'fit' between the legislature's ends and . . . means . . . that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition

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63. See *id.* at 345 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 700–02 (1977) (contraceptives); *Bigelow v. Virginia*, 421 U.S. 809, 818–29 (1975) (abortions)).

64. See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 531–32 (1996) (O'Connor, J., concurring).

65. See *id.* at 509–11 (Stevens, J., plurality); see also *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 193 (1999) ("[T]he power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct."); Arlen W. Langvardt & Eric L. Richards, *The Death of Posadas and the Birth of Change in Commercial Speech Doctrine: Implications of 44 Liquormart*, 34 AM. BUS. L.J. 483, 485 (1997) (asserting that 44 *Liquormart* "sound[ed] . . . the death knell for *Posadas* and its modes of analysis"). 44 *Liquormart* is discussed at text accompanying *infra* notes 94–99.

66. A company seeking to conduct a "Tupperware party" in a college dormitory challenged a university rule prohibiting commercial enterprises from operating on any of its campuses. *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 471–72 (1989). The Court ultimately remanded the case to determine, in light of the opinion's explanation of *Central Hudson*, whether the company's proposed activity was protected and, if not, "whether [the rule's] substantial overbreadth nonetheless ma[de] it unenforceable." *Id.* at 485–86.

67. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

68. See, e.g., *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (requiring restrictions on sexually explicit telephone messages to "be carefully tailored to achieve [the government's] ends"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (requiring restrictions on exposition of ideas by corporations to be "closely drawn to avoid unnecessary abridgement" (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam))).

69. *Fox*, 492 U.S. at 476–81.

but one whose scope is ‘in proportion to the interest served.’”<sup>70</sup> The suggestion that the call for a mere “reasonable fit” signaled a deferential approach provoked critical commentary,<sup>71</sup> and appeared to be borne out a few years later by the Court’s invocation of this standard to sustain a radio broadcast restriction.<sup>72</sup> The skeptical scrutiny applied in more recent cases,<sup>73</sup> however, belies the notion that *Fox* marked a decisive shift toward leniency. Thus, while the Court still occasionally recites *Fox*’s interpretation of *Central Hudson*’s fourth prong,<sup>74</sup> the implication that this version assures casual review of restrictions on commercial speech has receded in the wake of later invalidations.<sup>75</sup>

Finally, though *Edge*’s holding could have been viewed at the time as portending fewer safeguards for commercial speech,<sup>76</sup> it is better explained as the product of special circumstances and waning influences. *Edge* upheld a federal ban on lottery advertisements by broadcasters licensed in states that did not conduct lotteries.<sup>77</sup> Enforcement in this instance was not defeated by the presence of over ninety percent of *Edge*’s audience in a neighboring state that sponsored a lottery.<sup>78</sup> Even in this situation, the Court found a reasonable fit between the restriction and the legislative aim of supporting non-lottery states’ efforts to discourage participation in lotteries.<sup>79</sup> Given that rationale, it is hard to dispute that the ruling smacks of the paternalism condemned in *Virginia Board of Pharmacy*

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70. *Id.* at 480 (quotations and citations omitted).

71. See, e.g., Robert C. Hunter, *The Voice of the Little People—A Lost Value in Commercial Speech Analysis*, 16 VT. L. REV. 901, 909 (1992); Arlen W. Langvardt, *Protected Marks and Protected Speech: Establishing the First Amendment Boundaries in Trademark Parody Cases*, 36 VILL. L. REV. 1, 59–60 (1991); Albert P. Mauro, Jr., Comment, *Commercial Speech After Posadas and Fox: A Rational Basis Wolf in Intermediate Sheep’s Clothing*, 66 TUL. L. REV. 1931, 1950–51 (1992).

72. See *United States v. Edge Broad. Co.*, 509 U.S. 418, 429 (1993). The case is discussed in the text accompanying *infra* notes 76–84.

73. See *infra* Part II.C.

74. E.g., *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 188 (1999).

75. See text accompanying *infra* notes 85–134.

76. See Tara L. Lavery, Note, *Commercial Speech Suffers a First Amendment Blow in United States v. Edge Broadcasting Co.*, 14 N. ILL. U. L. REV. 549, 582 (1994); Laura J. Schiller, Note, *The Lottery in United States v. Edge Broadcasting Co.: Vice or Victim of the Commercial Speech Doctrine?*, 2 VILL. SPORTS & ENT. L.J. 127, 158 (1995).

77. *Edge*, 509 U.S. at 418, 436.

78. *Id.* at 423.

79. *Id.* at 429–30.

and *Linmark*.<sup>80</sup> However, the *Edge* Court's reliance on the now-discredited<sup>81</sup> logic of *Posadas*<sup>82</sup> suggests that the decision retains little value as precedent. Moreover, if *Edge* and *Posadas* together represented a particular indulgence of efforts to dampen demand for legal "vices" like gambling,<sup>83</sup> the Court has since abandoned that philosophy by subsequently rejecting similarly motivated restrictions.<sup>84</sup>

One of these decisions reflecting the Court's more recent protective philosophy is *Rubin v. Coors Brewing Co.*<sup>85</sup> In *Rubin*, a unanimous<sup>86</sup> Court struck down a federal ban on the disclosure of alcohol content of beer on labels or in advertising.<sup>87</sup> The government had justified the statute as designed to deter "strength wars" in which brewers would seek to lure consumers through the potency of their beer.<sup>88</sup> Rather than accept this explanation at face value, however, the Court undertook to assess whether the prohibition squared with other provisions of the government's regulatory scheme.<sup>89</sup> In light of the inconsistencies discovered,<sup>90</sup> the Court

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80. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976); *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 97 (1977) (citing and quoting *Va. Board of Pharmacy*, 425 U.S. at 770); see *Edge*, 509 U.S. at 439 (Stevens, J., dissenting) ("[T]he [government] has selected the most intrusive, and dangerous, form of regulation possible—a ban on truthful information regarding a lawful activity imposed for the purpose of manipulating, through ignorance, the consumer choices of some of its citizens.").

81. See *supra* notes 64–65 and accompanying text.

82. *Edge*, 509 U.S. at 434.

83. See Jef I. Richards, *Politicizing Cigarette Advertising*, 45 CATH. U. L. REV. 1147, 1164–67 (1996); Kathryn Murphy, Note, *Can the Budweiser Frogs Be Forced to Sing a New Tune?: Compelled Commercial Counter-Speech and the First Amendment*, 84 VA. L. REV. 1195, 1198–99 (1998).

84. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (tobacco products); *Greater New Orleans, Inc. v. United States*, 527 U.S. 173 (1999) (casino gambling); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (liquor); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (beer). These cases are discussed at text accompanying *infra* notes 94–120.

85. 514 U.S. 476 (1995).

86. Justice Stevens, however, did not join the Court's opinion because he wished to register more emphatic disapproval of the challenged restriction. See *id.* at 491 (Stevens, J., concurring) ("[T]he constitutional infirmity in the statute is more patent than the Court's opinion indicates.").

87. *Id.* at 478, 491.

88. *Id.* at 479.

89. *Id.* at 488–89.

90. For example, beer companies could still disclose alcohol content in advertisements in those states—a majority—that permitted it. *Id.* at 488.

expressed skepticism that the labeling ban could even survive *Central Hudson*'s third requirement that a regulation of commercial speech directly advance the relevant government interest.<sup>91</sup> Even if it did so, however, it would still fail the fourth step of the *Central Hudson* analysis, because less restrictive alternatives existed through which the government could advance its interest.<sup>92</sup> Thus, this regulation of speech was ruled "more extensive than necessary."<sup>93</sup>

A year later, another attempt to curb the dissemination of information about alcoholic beverages received similarly harsh treatment in *44 Liquormart, Inc. v. Rhode Island*.<sup>94</sup> Again with unanimous support, the Court invalidated a Rhode Island law forbidding advertisement of retail liquor prices except at the place of sale.<sup>95</sup> A majority of the Court seized the occasion to mount a wider attack on suppression of accurate commercial speech, but even the remaining Justices demanded meaningful congruence between means and ends. Speaking for four members of the Court, Justice Stevens denounced the state's "wholesale suppression of truthful, nonmisleading information" as a measure that had not been shown to "significantly advance" the state's interest in fostering temperance.<sup>96</sup> Assailing the ban even more strongly, Justice Thomas urged a full restoration of the *Virginia Board of Pharmacy* doctrine, which he believed categorically forbade "attempts to dissuade legal choices by citizens by keeping them ignorant."<sup>97</sup> While rejecting Rhode Island's law in somewhat less emphatic terms, Justice O'Connor's opinion on behalf of the four remaining Justices still found that the ban failed *Central Hudson*'s requirement that a restriction be no "more extensive than necessary to serve the State's interest."<sup>98</sup> Even under these Justices' less rigorous review, the evident availability of less intrusive methods by which the state might

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91. *See id.* at 489.

92. One option noted by the Court, directly limiting the alcohol content of beer, *id.* at 490, would presumably be more effective than the labeling ban and not restrict speech at all.

93. *Id.* at 491.

94. 517 U.S. 484 (1996).

95. *Id.* at 516.

96. *Id.* at 505 (Stevens, J., plurality).

97. *Id.* at 518, 526–28 (Thomas, J., concurring).

98. *Id.* at 529 (O'Connor, J., concurring).



attain its goal revealed an insufficient fit between the state's restriction of speech and its stated purpose.<sup>99</sup>

The Court's decision in *Greater New Orleans Broadcasting Ass'n. v. United States* confirmed the steady trajectory of closer scrutiny of commercial speech regulation.<sup>100</sup> Given an opportunity to realize *Edge's* more far-reaching implications of regulatory power, the Court instead subjected the government's defense to highly critical inspection.<sup>101</sup> In *Greater New Orleans*, a federal law prohibited broadcast of promotional advertisements for privately operated, for-profit casinos regardless of a station's or casino's location.<sup>102</sup> The Court's holding barred application of the law to prevent advertisements by broadcasters who were located in Louisiana, which allowed casino gambling.<sup>103</sup> The Court manifested its skeptical approach by questioning the substantiality of the government's interest under the second prong of *Central Hudson*. While accepting that the government could assert a "substantial interest in alleviating the societal ills" associated with gambling,<sup>104</sup> the Court took notice of federal and state laws permitting some forms of gambling as well as federal authorization of broadcast advertising for certain kinds of gambling.<sup>105</sup> Accordingly, the Court pronounced the federal policy of discouraging gambling "decidedly equivocal."<sup>106</sup> In any event, the Court determined that the federal scheme for regulating broadcast of gambling advertisement was "so pierced by exemptions and inconsistencies" that the challenged prohibition could not satisfy the third and fourth parts of the *Central Hudson* test.<sup>107</sup> As the Court pointed out, federal law permitted advertising of casino gambling through other media, broadcast advertising of other kinds of

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99. *Id.* at 530. Among the "less burdensome alternatives," *id.* at 529, identified by Justice O'Connor was increasing sales taxes on alcoholic beverages. *Id.* at 530.

100. 527 U.S. 173 (1999).

101. *Id.* at 186-87.

102. *Id.* at 190.

103. *Id.* at 176.

104. *Id.* at 186.

105. *Id.* at 187.

106. *Id.*

107. *Id.* at 190. Chief Justice Rehnquist suggested that these imperfections would not be fatal if Congress were to undertake substantive regulation of the gambling industry. *See id.* at 196 (Rehnquist, C.J., concurring). Justice Thomas found the operation of the statute unconstitutional based on his previously stated position that the government's interest in "keep[ing] legal users of a product or service ignorant in order to manipulate their choices in the marketplace" is per se illegitimate. *Id.* at 197 (Thomas, J., concurring) (citation omitted).

gambling, and even broadcast advertising of casino gambling by owners and operators besides those covered by the challenged provision.<sup>108</sup> Moreover, the Court did not hesitate to offer alternative regulatory tools that it believed would more effectively reduce casino gambling's social costs without trenching on speech.<sup>109</sup>

This solicitude for commercial speech and probing examination of restrictions continued when the Court considered restraints placed on advertising of tobacco products in *Lorillard Tobacco Co. v. Reilly*.<sup>110</sup> A series of regulations promulgated by the Massachusetts Attorney General was aimed at preventing the deceptive and unfair marketing and sale of cigarettes, smokeless tobacco, and cigars, and at curbing underage use of these products.<sup>111</sup> In a lengthy opinion, which also voided two provisions on preemption grounds,<sup>112</sup> the Court ruled that the state's concededly strong interest in combating underage use of tobacco<sup>113</sup> did not justify the extent to which the state had barred truthful speech about legal products.<sup>114</sup> The state's ban on outdoor advertising of smokeless tobacco or cigar advertising within one thousand feet of a school or playground, for example, would almost entirely suppress advertising of these products in some geographical areas.<sup>115</sup> Without showing that the Attorney General had carefully weighed the anticipated benefits against the burden on speech imposed by the "broad sweep"<sup>116</sup> of this restriction, the ban

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108. *Id.* at 190–92.

109. *Id.* at 192 (suggesting, *inter alia*, prohibitions of gambling on credit, placing limits on betting, and restricting locations).

110. 533 U.S. 525 (2001).

111. *Id.* at 533–34. The regulations were issued pursuant to MASS GEN. LAWS ch. 93A, § 2 (1997).

112. The Court held that the Federal Cigarette Labeling and Advertising Act (FCLAA) barred Massachusetts from regulating outdoor and retail point-of-sale cigarette advertising. *Lorillard Tobacco Co.*, 533 U.S. at 540–53 (citing 15 U.S.C. § 1333; 15 U.S.C. § 1334(b)). Four Justices disputed the majority's determination that the FCLAA precluded states and localities from regulating the location of cigarette advertising. *Id.* at 590–98 (Stevens, J., concurring in part and dissenting in part). Though he also took issue with the Court's First Amendment rulings, Justice Stevens, writing for three Justices, largely agreed with the majority's reasoning. *See id.* at 599, 605.

113. *See id.* at 556; *id.* at 561 (“[T]he record reveals . . . ample documentation of the problem with underage use of smokeless tobacco and cigars.”).

114. *Id.* at 561.

115. *Id.* at 562.

116. *Id.* at 561.

failed the fourth part of the *Central Hudson* inquiry.<sup>117</sup> The state also prohibited indoor, point-of-sale advertising of smokeless tobacco and cigars lower than five feet from the floor of a retail establishment located within one thousand feet of a school or playground.<sup>118</sup> These regulations failed the third and fourth steps of the *Central Hudson* analysis.<sup>119</sup> Both determinations were rooted in the Court's commonsense observation that some children are taller than five feet, while those of shorter stature "certainly have the ability to look up."<sup>120</sup>

Even a powerful interest in promoting health proved insufficient to save the restrictions at issue in *Thompson v. Western States Medical Center*.<sup>121</sup> The case involved drug compounding, a process by which pharmacists combine ingredients to create medication specifically tailored to a particular patient.<sup>122</sup> Under the Food and Drug Administration Modernization Act of 1997 (FDAMA), pharmacists could dispense compounded drugs if they did not advertise or solicit prescriptions for the compounding of a specific drug or type of drug.<sup>123</sup> The government defended this condition as a means of effectuating the important distinction between small-scale compounding and large-scale drug manufacturing.<sup>124</sup> To preserve their economic feasibility, compounded drugs were exempt from the safety and efficacy testing to which mass-produced drugs were subject under the approval process of the Food and Drug Administration (FDA).<sup>125</sup> The regulatory scheme therefore treated advertising as a proxy for exceeding the bounds of permissible small-

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117. *Id.* at 561–66. Justice Stevens, while largely in accord with the Court's analysis, would have vacated the summary judgment and remanded for further fact finding on some issues. *Id.* at 599–603 (Stevens, J., concurring in part and dissenting in part).

118. *Id.* at 535–36.

119. *Id.* at 566–67.

120. *Id.* at 566. Justice Thomas, though endorsing the Court's conclusions concerning the First Amendment challenges, would have employed a stricter standard than the *Central Hudson* framework to dispose of them. *Id.* at 572 (Thomas, J., concurring).

121. 535 U.S. 357 (2001).

122. *Id.* at 360–61.

123. 21 U.S.C. § 353a(a), (c) (2006).

124. *W. States Med. Ctr.*, 535 U.S. at 368–70. The FDA, afraid that some pharmacists were using a compounding as a guise to circumvent the process for the approval of new drugs, implemented various restrictions on compounding, including a prohibition on advertising and promoting certain compounds. *Id.* at 362–65.

125. *Id.* at 369–70.

scale compounding, which would act as a “trigger” for activating the required FDA approval process.<sup>126</sup>

After equivocal observations on whether the advertising ban directly advanced the government’s interest under the third prong of the *Central Hudson* test,<sup>127</sup> the Court struck down the ban for failing the fourth requirement that restrictions on commercial speech be no more extensive than necessary.<sup>128</sup> In the Court’s analysis, the government had not met its burden of showing why several alternative methods that did not affect speech<sup>129</sup> would not accomplish the asserted goal.<sup>130</sup> In addition, the majority was equally unimpressed with the dissenters’ argument that the restriction could be justified by the government’s interest in curbing the sale of compounded drugs to “patients who may not clearly need them.”<sup>131</sup> Aside from the absence of this explanation in the government’s briefs,<sup>132</sup> the Court found that the government’s position suffered from reliance on a rationale that had been rejected in *Virginia Board of Pharmacy*. Just as Virginia could not suppress price advertising by pharmacists for fear of its impact on consumers’ behavior, the federal government could not bar advertising of compounded drugs out of fear that people with dubious need would be roused to obtain prescriptions from their doctors.<sup>133</sup> For the Court, both prohibitions rested fatally on the strategy of “preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information.”<sup>134</sup>

### *C. Lawyer Advertising as Protected Speech*

The Court did not exempt broad and longstanding restrictions on lawyer advertising from the potent commercial speech doctrine

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126. *Id.* at 370.

127. *See id.* at 371.

128. *Id.*

129. Among the measures suggested by the Court were banning the use of commercial-scale equipment for compounding drugs, forbidding pharmacists to compound drugs beyond those needed to fill prescriptions already received, and limiting the amount of any particular compounded drug that a pharmacist could sell within a certain period. *Id.* at 372.

130. *Id.* at 373.

131. *Id.* (citing *id.* at 379 (Breyer, J., dissenting)). Justice Breyer’s dissent was joined by Chief Justice Rehnquist, Justice Stevens, and Justice Ginsburg.

132. *Id.* at 373–74 (rejecting “hypothesized justifications” under heightened review).

133. *Id.* at 374–75.

134. *Id.* at 374.

launched by *Virginia Board of Pharmacy*. Against a backdrop of decades of advertising prohibitions<sup>135</sup> and judicial deference to state regulation of the legal profession,<sup>136</sup> the Court brought lawyer advertising within its newly protective framework only a year after deciding *Virginia Board*. In *Bates v. State Bar of Arizona*,<sup>137</sup> the Court held that a state could not block attorney advertising about the price of routine legal services.<sup>138</sup> *Bates* sparked a series of rulings in which the Court mostly overturned state attempts to prevent lawyers from disseminating truthful information about their practice.

In *Bates*, Arizona advanced an array of justifications for its ban.<sup>139</sup> Central to the state's position was the contention that attorney advertising would inherently convey misleading impressions of the content and quality of the services promoted. In particular, the state argued that variations in the provision of services made meaningful comparisons through advertisement impossible, that clients cannot ascertain beforehand exactly what services they will need, and that attorneys' advertising would obscure the importance of skill by "highlight[ing] irrelevant factors."<sup>140</sup> To the Court, these arguments essentially amounted to a reprise of the same condescending logic that marred Virginia's attempt to shield consumers from advertised drug prices. Unlike the Arizona Supreme Court, the Court was willing to assume that clients could identify the general nature of the services that they sought,<sup>141</sup> and that they were sufficiently

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135. Lori B. Andrews, *Lawyer Advertising and the First Amendment*, 1981 AM. B. FOUND. RES. J. 967, 968. In the nineteenth century, however, advertising was common among American lawyers. See HENRY S. DRINKER, LEGAL ETHICS 213 (1953).

136. See, e.g., *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) ("The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'").

137. 433 U.S. 350 (1977).

138. *Id.* at 384. The offending newspaper advertisement stated that the appellants' "legal clinic" was offering "legal services at very reasonable fees" and listed their fees for services such as uncontested divorces and simple personal bankruptcies. *Id.* at 354.

139. The Court addressed each of these in turn: the commercialism fostered by price advertising would undermine professionalism, *id.* at 368-72; attorney advertising is inherently misleading, *id.* at 372-75; advertising would adversely affect the administration of justice by instigating litigation, *id.* at 375-77; the added costs of advertising would cause clients' fees to rise, *id.* at 377-78; the temptation to advertise standardized services regardless of individual need could harm the quality of services, *id.* at 378-79; policing more calibrated limitations on advertising would be too burdensome, *id.* at 379-80.

140. *Id.* at 372.

141. *Id.* at 374.

sophisticated to appreciate the limitations of advertising.<sup>142</sup> Invoking *Virginia Board of Pharmacy*, the Court repeated its wary view of justifications “based on the benefits of public ignorance.”<sup>143</sup>

Even after *Bates*, many states did not immediately comprehend or accept the level of constitutional protection afforded lawyer advertising. Many state bar associations clung to highly restrictive advertising codes.<sup>144</sup> Moreover, they were often supported by sympathetic local courts that displayed a reluctant acceptance of *Bates* and a narrow conception of its reach.<sup>145</sup> Encouraged by *Bates*’s recognition of advertising’s constitutional status, however, lawyers pressed the boundaries of state codes and secured the Court’s invalidation of a series of restrictions.

The provisions struck down in *In re R.M.J.*<sup>146</sup> illustrate the organized profession’s resistance to relaxing restrictions appreciably beyond the literal demands of *Bates*. Missouri had forbidden attorneys to advertise areas of practice other than in the precise language officially prescribed,<sup>147</sup> to list the courts in which they were admitted to practice,<sup>148</sup> and to mail professional announcement cards to anyone except specified categories of individuals.<sup>149</sup> In a unanimous and notably brief opinion, the Court briskly dispatched these prohibitions as applied to the attorney who had been charged with violating them. The state failed to demonstrate that any part of the attorney’s advertising—e.g., describing an area of practice as

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142. *See id.* at 375.

143. *Id.* at 375 (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 769–70 (1976)). The Court in *Bates* rejected the notion that the “public is better kept in ignorance than trusted with correct but incomplete information.” *Id.* The Court explicitly stated in *Virginia Board of Pharmacy* that public ignorance only serves to “insulate [vendors] from price competition and to open the way for [them] to make a substantial, and perhaps even excessive, profit in addition to providing an inferior service.” 425 U.S. at 769.

144. *See* LORI B. ANDREWS, *BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION* 43 (1980).

145. *See, e.g., In re Amendments to Code of Prof’l Responsibility and Canons of Judicial Ethics*, 637 S.W.2d 589, 604–05 (Ark. 1982); *Eaton v. Supreme Court of Ark.*, 607 S.W.2d 55, 59–60 (Ark. 1980); *In re Utah State Bar Petition for Approval of Changes in Disciplinary Rules on Adver.*, 647 P.2d 991, 993–94 (Utah 1982); *see also* *Petition of Felmeister & Isaacs*, 518 A.2d 188, 188–89 (N.J. 1986).

146. 455 U.S. 191 (1982).

147. *Id.* at 195 & n.6.

148. *Id.* at 198.

149. *Id.* at 196 (limiting recipients to “lawyers, clients, former clients, personal friends and relatives”).

“real estate” rather than “property”<sup>150</sup>—was misleading or inherently misleading.<sup>151</sup> The absence of such a showing signaled to the Court that the state could deal with any potential for deception through less restrictive means than its categorical prohibitions.<sup>152</sup>

The Court’s hostility to suppression of truthful advertising, though not its unanimity, continued in *Zauderer v. Office of Disciplinary Counsel*.<sup>153</sup> Zauderer, an Ohio attorney, had published a newspaper advertisement addressed to women who had used the Dalkon Shield intrauterine device.<sup>154</sup> The advertisement contained a drawing of the device and stated the firm’s willingness to represent women who had been harmed by it on a contingency-fee basis.<sup>155</sup> The Ohio Supreme Court had held that the advertisement offended the state’s disciplinary code on multiple grounds: inclusion of an illustration, recommending himself for employment to persons who had not sought his legal advice, and “failure to disclose the client’s potential liability for costs even if” her suit did not succeed.<sup>156</sup> While upholding enforcement of the disclosure requirement,<sup>157</sup> the Court dismissed the state’s remaining two objections to the advertisement.<sup>158</sup> Since the advice that women had potentially viable claims against Dalkon Shield was neither false nor deceptive, the state was obligated to demonstrate that banning self-

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150. *Id.* at 205.

151. *Id.* at 206.

152. *Id.* at 206–07.

153. 471 U.S. 626 (1985).

154. *Id.* at 630. Zauderer had also been disciplined for placing an advertisement offering to represent defendants charged with drunk driving and promising a full refund of the client’s legal fee if the client were convicted of this charge. *Id.* at 629–30. The Ohio Supreme Court found the advertisement deceptive because it failed to mention that under plea bargaining, a defendant who pleaded to a lesser offense than drunken driving would still be liable for legal fees. *Id.* at 634. The United States Supreme Court rejected Zauderer’s argument that his reprimand on this ground violated due process because Ohio’s Office of Disciplinary Counsel had originally found the advertisement in violation of the state’s disciplinary rules on a different theory. *Id.* at 654–55.

155. *Id.* at 630–31. The advertisement asked, “DID YOU USE THIS IUD?” and alerted the reader that it might not be too late for those harmed by the device to sue Dalkon Shield. *Id.*

156. *Id.* at 634–35. Zauderer’s acceptance of offers of employment resulting from the advertisement was also deemed a separate violation. *See id.* at 635.

157. *Id.* at 650–53. Justice Brennan, joined by Justice Marshall, dissented from the Court’s rulings in favor of the state as to the enforcement of disclosure requirements with respect to both of Zauderer’s advertisements. *Id.* at 656–57 (Brennan, J., concurring in part and dissenting in part).

158. *Id.* at 646–47.

recommendation based on this advice advanced a substantial state interest.<sup>159</sup> With three Justices dissenting,<sup>160</sup> the majority found all of the state's justifications wanting. The state had not demonstrated, and the Court would not assume, that legal advice in this form threatened to coerce readers or invade their privacy,<sup>161</sup> that a prophylactic rule was needed to deter instigation of meritless litigation,<sup>162</sup> or that legal advertising presented extraordinary obstacles to distinguishing deceptive from nondeceptive advertising on a case-by-case basis.<sup>163</sup> The Court similarly disposed of Ohio's ban on illustrations in attorney advertising. Noting the "important communicative functions"<sup>164</sup> served by illustrations in advertising, the Court refused to credit the state's "unsupported assertions"<sup>165</sup> that a blanket prohibition was needed to preserve attorneys' dignity or to prevent deception and manipulation.<sup>166</sup>

A comparable aversion toward prophylactic rules marked the Court's approach to a wholesale ban on targeted direct-mail solicitation in *Shapiro v. Kentucky Bar Ass'n*.<sup>167</sup> The Court observed that unlike the inherent potential for overreaching and undue influence that justifies prohibition of in-person solicitation,<sup>168</sup> a letter

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159. *Id.* at 639–41.

160. *Id.* at 674 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor was joined by Chief Justice Burger and Justice Rehnquist. Justice Powell did not participate in the decision.

161. *Id.* at 641–42.

162. *Id.* at 642–44. The Court's refusal to accept Ohio's prophylactic rationale apparently rested on the fourth part of the *Central Hudson* test. *See id.* at 644 (stating that restrictions on nondeceptive commercial speech must be "narrowly crafted to serve the State's purpose" and citing *Central Hudson*).

163. *Id.* at 644–47.

164. *Id.* at 647.

165. *Id.* at 648.

166. *Id.* at 648–49. The Court assumed but did not hold that maintaining attorneys' dignity in their communications with the public constituted a sufficiently substantial interest under commercial speech analysis. *Id.* at 647–48.

167. 486 U.S. 466 (1988). The petitioner sought to send to potential clients facing foreclosure suits a letter alerting the reader that "you may be about to lose your home," that "[f]ederal law may allow you to keep your home by *ORDERING* your creditor [sic] to *STOP*," and that "[i]t may surprise you what I may be able to do for you." *Id.* at 469 (alteration in original and internal quotation marks omitted). The Court did not resolve whether Shapiro's letter was protected. *Id.* at 479–80 (Brennan, J., plurality); *id.* at 480 (White, J., concurring in part and dissenting in part).

168. *Id.* at 475 (Brennan, J., plurality) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978)). *Ohralik* is discussed at text accompanying *infra* notes 189–98.



affords ample opportunity for reflection and rejection.<sup>169</sup> Even the heightened risk of deception posed by personalized letters did not support the state's total ban.<sup>170</sup> Regarding the burden from individualized review merely as "more work" for a state agency or bar association, the Court reiterated its "faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful."<sup>171</sup> Notably, however, Justice O'Connor, dissenting as she had in *Zauderer*, this time questioned the soundness of the larger judicial enterprise launched by *Bates*.<sup>172</sup> She argued that special hazards generated by lawyers' advertising and solicitation, along with the ideals of legal professionalism, counseled in favor of broad regulatory latitude by states.<sup>173</sup>

Justice O'Connor continued to register her opposition to the Court's "micromanagement" of state regulation in *Peel v. Attorney Registration & Disciplinary Commission*,<sup>174</sup> where a splintered Court nonetheless expanded the bounds of permissible lawyer advertising. Peel had been censured for stating on his letterhead that he was "certified as a civil trial specialist by the National Board of Trial Advocacy" (NBTA).<sup>175</sup> A majority of the Court expressed disapproval of Illinois's categorical prohibition of attorneys publicizing certification by private organizations. Four Justices, speaking through Justice Stevens, considered Peel's own letterhead protected because certification by "bona fide organizations" like the NBTA was neither actually nor inherently misleading.<sup>176</sup> A fifth Justice, Justice Marshall, agreed with the plurality's characterization of the letterhead, but regarded announcements of NBTA certification as potentially misleading and therefore susceptible to requirements of additional information to clarify the significance of

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169. *Id.* at 475–76.

170. *Id.* at 476.

171. *Id.* at 478 (quoting *Zauderer*, 471 U.S. at 646). The Court also suggested that the state's review could be facilitated by requiring lawyers to file proposed solicitation letters with an official agency. *Id.* at 476.

172. *Id.* at 480–81 (O'Connor, J., dissenting). Justice O'Connor was joined by Chief Justice Rehnquist and Justice Scalia.

173. *See id.* at 485–91.

174. 496 U.S. 91, 119 (1990) (O'Connor, J., dissenting).

175. *Id.* at 93 (Stevens, J., plurality).

176. *Id.* at 110.

this credential.<sup>177</sup> Justice White shared Justice Marshall's assessment; however, he would not have allowed the excessive scope of Illinois's total ban to preclude the state from forbidding circulation of the deficient letterhead.<sup>178</sup> Thus, while a majority of the Court would have permitted suppression of Peel's letterhead under a properly drawn regulation,<sup>179</sup> a larger majority viewed reference to his certification as protected when accompanied by an appropriate disclaimer.

Moreover, as the Court's subsequent holding in *Ibanez v. Florida Department of Business & Professional Regulation, Board of Accountancy*<sup>180</sup> demonstrated, even the presence of a disclaimer is not automatically required in all cases. Ibanez was a practicing attorney, also licensed by the state as a Certified Public Accountant (CPA) and authorized by a private organization, the Certified Financial Planner Board of Standards, to designate herself as a "Certified Financial Planner" (CFP).<sup>181</sup> The Florida Board of Accountancy sought to discipline Ibanez for referring to these credentials in her advertising and on her stationery.<sup>182</sup> While the Court summarily and unanimously dismissed the Board's objection to Ibanez's use of the CPA designation,<sup>183</sup> the question of CFP designation evoked extended discussion as well as dissent. The Board contended,<sup>184</sup> and two Justices agreed,<sup>185</sup> that the CFP designation was inherently—or at least potentially—misleading because its resemblance to the unelaborated CPA designation could lead the public to think that it reflected the state's imprimatur. In the eyes of the majority, however, the Board's failure to substantiate this claim militated against its demand for a disclaimer.<sup>186</sup> Rather, the status of

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177. *Id.* at 111–17 (Marshall, J., concurring). Justice Marshall suggested, for example, that a state might require a disclosure that the NBTA operates independently of state and federal government. *Id.* at 117.

178. *Id.* at 118–19 (White, J., dissenting).

179. Justice O'Connor's dissent was joined by Chief Justice Rehnquist and Justice Scalia. *Id.* at 119.

180. 512 U.S. 136, 146 (1994).

181. *Id.* at 138.

182. *Id.*

183. *See id.* at 143–44 (declaring the Board's position "entirely insubstantial" and stating that "we cannot imagine how consumers can be misled" by Ibanez's truthful communication that she held a CPA license).

184. *Id.* at 144, 146.

185. *Id.* at 150–52 (O'Connor, J., dissenting) (joined by Chief Justice Rehnquist).

186. *Id.* at 145–47.

“Certified Financial Planner” and “CFP” as “well-established, protected federal trademarks”<sup>187</sup> proved far more persuasive than the meager record on which the Board based its argument.<sup>188</sup>

While *Ibanez* culminated a succession of adverse rulings toward lawyer advertising restraints begun by *Bates*, the Court’s treatment of restrictions also featured two conspicuous exceptions to this pattern: *Ohralik v. Ohio State Bar Ass’n*<sup>189</sup> and *Florida Bar v. Went For It, Inc.*<sup>190</sup> Neither decision, however, substantially undermined the thrust of the Court’s broader approach to lawyer advertising’s place in commercial speech jurisprudence. Instead, both decisions can be understood as permitting states to shield potential clients in special circumstances that present heightened risks of undue influence and other attorney misconduct.

The *Ohralik* Court affirmed the state’s authority to prohibit in-person solicitation of clients “for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent.”<sup>191</sup> Whatever ambiguity the application of this standard might present under other conditions, Ohralik’s egregious behavior made for a straightforward resolution of his own case.<sup>192</sup> Ohralik had approached two young accident victims to solicit them as clients; one of them was lying in traction in a hospital when Ohralik asked her to sign an agreement that he would represent her.<sup>193</sup> In addition, he recorded his conversations with both of the young women with a concealed tape recorder.<sup>194</sup> After both attempted to terminate Ohralik’s representation, he sued one of them for breach of contract, relying on a recording of their conversation as evidence of the agreement.<sup>195</sup> In response to complaints filed by both women, the Supreme Court of Ohio ultimately suspended Ohralik indefinitely from practice for soliciting employment in violation of disciplinary

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187. *Id.* at 147.

188. *See id.* at 148. The Court noted that a consumer uncertain about the CFP credential could contact CFP Board of Standards or simply ask Ibanez to fulfill her obligation under Florida Bar rules to provide information on her qualifications to anyone who inquires. *Id.* at 145 n.9.

189. 436 U.S. 447 (1978).

190. 515 U.S. 618 (1995).

191. *Ohralik*, 436 U.S. at 449.

192. *See id.* at 449–52.

193. *Id.* at 450.

194. *Id.* at 450–51.

195. *Id.* at 452.

rules of the Ohio Code of Professional Responsibility.<sup>196</sup> Finding the situation “inherently conducive to overreaching and other forms of misconduct,” the Court upheld the state’s power to discipline lawyers for seeking remunerative employment under circumstances likely to involve such improper modes of solicitation.<sup>197</sup> Still, the Court’s emphasis on the aggressive nature of Ohralik’s conduct, as well as its later numerous decisions protecting written forms of advertising, indicate that *Ohralik* represents a discrete and relatively modest constraint on attorneys’ freedom to publicize their services.<sup>198</sup>

*Went For It*, though a more controversial holding than *Ohralik*,<sup>199</sup> appears to carve out an even narrower exception to the Court’s pattern of skepticism toward limitations on truthful lawyer advertising. The 5–4 decision upheld enforcement of a prohibition on personal injury lawyers’ sending targeted direct-mail solicitations within thirty days of an accident.<sup>200</sup> Admittedly, the majority opinion’s willingness to recognize an interest in guarding against

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196. *Id.* at 453–54.

197. *Id.* at 464. The Court had earlier identified “fraud, undue influence, [and] intimidation,” as other forms of “vexatious conduct.” *Id.* at 462 (quoting Brief for Appellant at 25).

198. See Martin H. Belsky, *The 1994 Term of the Supreme Court and Freedom of Speech*, 31 TULSA L.J. 485, 489–90 (1996); Rodney A. Smolla, *The Puffery of Lawyers*, 36 U. RICH. L. REV. 1, 9–10 (2002). Two other decisions underscore the limits of *Ohralik*’s reach. In *re Primus*, 436 U.S. 412 (1978), involved a lawyer’s written offer of free legal representation by the American Civil Liberties Union (ACLU) in connection with the alleged violation of the recipient’s constitutional rights. Overturning the state’s sanction, the Court determined that *Primus*’s solicitation was motivated by her desire to advance the political and civil liberties principles of the ACLU rather than by financial gain. *Id.* at 428–31. Accordingly, in contrast to the prophylactic rationale that sufficed in *Ohralik*, the *Primus* Court’s more exacting review required the state to establish that *Primus* had actually committed the type of misconduct that it wished to deter. *Id.* at 434–35. In *Edenfield v. Fane*, 507 U.S. 761 (1993), the Court declined to extend *Ohralik*’s approval of Ohio’s restriction on lawyers’ conduct to Florida’s prohibition of in-person solicitation by certified public accountants (CPAs). *Id.* at 761. Because of the differences between *Ohralik* and *Fane* in professional training, sophistication of the clients whom they approached, and the settings in which solicitation took place, Florida’s blanket ban could not be justified as a preventative measure. *Id.* at 775–76. As in *Primus*, a specific demonstration of misconduct was required. See *id.* at 776.

199. See Amy Busa & Carl G. Sussman, *Expanding the Market for Justice: Arguments for Extending In-Person Client Solicitation*, 34 HARV. C.R.-C.L. L. REV. 487, 502 (1999) (arguing that reasoning in *Went For It* “is incompatible with precedents like *Zauderer*, and with the more recent *Liquormart* decision’s heightened scrutiny of restrictions on commercial speech”); *Leading Cases*, 109 HARV. L. REV. 111, 195 (1995) (“[T]he Court’s decision in [*Went For It*] represents a clear break from the precedent of *Ohralik* and *Bates*.”).

200. Fla. Bar v. *Went For It, Inc.*, 515 U.S. 618, 635 (1995).

reputational harm to the legal profession<sup>201</sup> furnishes a rationale that, viewed in isolation, could justify wider restrictions.<sup>202</sup> That interest, however, was yoked to the state's primary aim of keeping "bereaved or injured individuals" from suffering a "willful or knowing affront to or invasion of [their] tranquility."<sup>203</sup> Disavowing reliance on paternalistic motives<sup>204</sup> and confining its approval to "the circumstances presented here,"<sup>205</sup> the *Went For It* Court does not appear to have laid the foundation for revisiting the protective premises of its jurisprudence in this area.<sup>206</sup>

### III. OVERARCHING THEMES

The course of Supreme Court decisions on commercial speech does not form a neat trajectory of successive inevitable outcomes. Still, the underlying direction of these decisions has, on balance, decidedly favored accenting the expressive function that warrants First Amendment recognition over the commercial element that excuses regulation. From *Virginia Board of Pharmacy* to *Western States Medical Center*, the Court has more often than not repulsed efforts to restrain otherwise protected communication by relegating it to a second-hand category of speech labeled "commercial speech." In general, the Court has carefully scrutinized the government's rationales for restrictions, and has usually found them wanting. In particular, the Court has insisted that state attempts to cabin lawyer advertising be supported by the strong justifications demanded of limitations on other forms of commercial speech.

#### A. *The Erosion of Separate Status*

While the Court has stopped short of conferring equal dignity on commercial speech, the boundary that separates it from "core"

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201. *See id.* at 630–31.

202. *See id.* at 639–40 (Kennedy, J., dissenting) (criticizing this interest as amounting to "manipulating the public's opinion by suppressing speech that informs us how the legal system works").

203. *Id.* at 630.

204. *Id.* at 631 n.2.

205. *Id.* at 620.

206. *See* Steven A. Delchin & Sean P. Costello, *Show Me Your Wares: The Use of Sexually Provocative Ads to Attract Clients*, 30 SETON HALL L. REV. 64, 97–98 (1999) (noting that courts, legislatures, and bar association have generally refused to read the *Went For It* holding broadly).

expression under the First Amendment has become increasingly blurred. In *Virginia Board of Pharmacy* the Court echoed a previously articulated First Amendment premise (expressed in presumably more lofty contexts<sup>207</sup>) that “people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.”<sup>208</sup> Indeed, the Court’s opinion in that case explicitly invoked decisions involving political speech,<sup>209</sup> distribution of religious literature,<sup>210</sup> and civil rights litigation.<sup>211</sup> In an observation quoted in later decisions, the *Virginia Board of Pharmacy* Court also disputed the notion that commercial speech is categorically inferior in value to political expression, asserting that “the particular consumer’s interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”<sup>212</sup> Affirming this comparison in *Bates*, the Court then elaborated:

[S]ignificant societal interests are served by [commercial] speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise

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207. See, e.g., *Terminiello v. Chicago*, 337 U.S. 1, 4 (1948) (“The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.”); *Thornhill v. Alabama* 310 U.S. 88, 102 (1940) (“Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”).

208. *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976); see also *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (stating, in course of striking down a restriction on solicitation by certified public accountants, that “the general rule is that the speaker and the audience, not the government, assess the value of the information presented”); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 575 (1980) (Blackmun, J., concurring) (“If the First Amendment guarantee means anything, it means that, absent clear and present danger, government has no power to restrict expression because of the effect its message is likely to have on the public. Our cases indicate that this guarantee applies even to commercial speech.” (citation omitted)).

209. *Va. Bd. of Pharmacy*, 425 U.S. at 761 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)).

210. *Id.* (citing *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)).

211. *Id.* (citing *NAACP v. Button*, 371 U.S. 415 (1963)).

212. *Id.* at 763, quoted in *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 366–67 (2002); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481–82 (1995).

system. In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.<sup>213</sup>

Thus, although the Court has not disavowed the “commonsense” distinction between commercial speech and other expression,<sup>214</sup> *Ohralik*’s assumption that commercial speech occupies a “subordinate position in the scale of First Amendment values”<sup>215</sup> appears to operate within an increasingly limited sphere. *Went For It*, too, declared that the Court had “always reserved a lesser degree of protection under the First Amendment” for commercial advertising.<sup>216</sup> It seems no coincidence, however, that these pronouncements were issued in cases where a singular constellation of factors prompted the Court to deviate from its general pattern of protection for truthful lawyer advertising and solicitation.<sup>217</sup> Commercial speech outside of such distinctive enclaves appears to enjoy a constitutional stature resembling classically preferred expressions of public concern<sup>218</sup> far more than “low-level” speech like obscenity.<sup>219</sup>

The state’s ability to address these special contexts and to curb deceptive advertising, then, does not imply a wider license to ignore basic First Amendment tenets when regulating other commercial speech. On the contrary, a rising chorus of voices on the Court has questioned the very premise that commercial speech should be governed by wholly separate standards. Justice Thomas, for example,

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213. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977) (citations omitted), *quoted in* *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 421 n.17 (1993); *see also* *United States v. United Foods, Inc.*, 533 U.S. 405, 413 (2001) (stating, in course of invalidating compelled assessment to fund advertising for promoting mushroom sales assumed to constitute commercial speech, that “speech need not be characterized as political before it receives First Amendment protection” (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977))); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 579 (2001) (Thomas, J., concurring) (comparing tobacco advertisements suggesting pervasive use of tobacco products to advertisement trying to “rally support for a political movement”).

214. *Va. Bd. of Pharmacy*, 425 U.S. at 771 n.24.

215. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

216. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634–35 (1995).

217. *See supra* notes 189–206 and accompanying text; *see also* *Edenfield v. Fane*, 507 U.S. 761, 774 (1993) (“*Ohralik*’s holding was narrow and depended upon certain ‘unique features of in-person solicitation by lawyers’ that were present in the circumstances of that case.” (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641 (1985))).

218. *See supra* note 15.

219. *See* *Miller v. California*, 413 U.S. 15, 23–24 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57–61 (1973).

has asserted the absence of any “philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial’ speech,”<sup>220</sup> and accordingly has called for strict scrutiny whenever “the government seeks to restrict truthful speech in order to suppress the ideas it conveys . . . whether or not the speech in question may be characterized as ‘commercial.’”<sup>221</sup> Three other Justices, after reciting broad First Amendment safeguards against restrictions on speech, declared that “[t]hese basic First Amendment principles clearly apply to commercial speech.”<sup>222</sup> In particular, the decline of *Posadas* as controlling precedent,<sup>223</sup> with its sweeping logic that the “greater power” to regulate a commercial activity encompasses the “lesser power” to ban advertising about that activity,<sup>224</sup> has removed a potentially formidable obstacle to robust protection for commercial speech.

### *B. The Triumph of Antipaternalism*

While the government retains power to restrain genuinely deceptive advertising,<sup>225</sup> attempts to restrict truthful, nonmisleading commercial speech out of fear of misguided consumer reactions have come to trigger a virtual per se rule of invalidity. The Court emphatically voiced this antipaternalistic stance at the outset of its modern commercial speech jurisprudence, denouncing Virginia’s ban on advertising prescription drug prices as an effort to shield presumably impressionable consumers from information that they would probably abuse.<sup>226</sup> Reviewing *Virginia Board of Pharmacy* two decades later, Justice Stevens described the decision’s animating principle: “[A] State’s paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot

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220. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring).

221. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001) (Thomas, J., concurring); *see also* *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring) (asserting that statute barring accurate communication of alcoholic content of malt beverages “should be subjected to the same stringent review as any other content-based abridgment of protected speech”).

222. *44 Liquormart, Inc.*, 517 U.S. at 501, 512 (Stevens, J., plurality).

223. *See supra* notes 64–65 and accompanying text.

224. *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 345–46 (1986).

225. *See Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992).

226. *See supra* notes 18–20 and accompanying text.



justify a decision to suppress it.”<sup>227</sup> Similarly, in *Linmark*,<sup>228</sup> the Court forbade the Township Council to ban home sale signs out of fear that “homeowners will make decisions inimical to what the Council views as the homeowners’ self-interest and the corporate interest of the township.”<sup>229</sup> The Court recognized that such authority would have empowered communities everywhere to suppress communication of facts adverse to their image “so long as a plausible claim can be made that disclosure would cause the recipients of the information to act ‘irrationally.’”<sup>230</sup> Later, in *44 Liquormart*, this concern was generalized into the observation that bans on truthful, nonmisleading commercial speech “usually rest solely on the offensive assumption that the public will respond ‘irrationally’ to the truth.”<sup>231</sup> The belief that “[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”<sup>232</sup> also informed the outcome in *Western States Medical Center*.<sup>233</sup> Exercising this skepticism, the Court “rejected 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 information about compounded drugs.<sup>234</sup>

The Court has invalidated other commercial speech restrictions on the basis of the state’s condescending estimate of the capacities of its citizens. In *Bates*,<sup>235</sup> for example, the Court disparaged Arizona’s argument that advertising provides an incomplete basis for choosing an attorney as “assum[ing] that the public is not sophisticated enough to realize the limitations of advertising.”<sup>236</sup> The Court ultimately rejected this argument, which it suspected rested on an “underestimation of the public,” as a basis for totally banning lawyer

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227. *44 Liquormart, Inc.*, 517 U.S. at 497 (Stevens, J., plurality).

228. See *supra* notes 32–35 and accompanying text.

229. *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 96 (1977).

230. *Id.*

231. *44 Liquormart, Inc.*, 517 U.S. at 503 (Stevens, J., plurality); see also *id.* at 526 (Thomas, J., concurring) (advocating position that “all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible”).

232. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 375 (2002) (citation omitted).

233. See *supra* notes 121–26 and accompanying text.

234. *W. States Med. Ctr.*, 535 U.S. at 374.

235. See *supra* notes 137–43 and accompanying text.

236. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 374–75 (1977).

advertising.<sup>237</sup> Similarly, in *Peel*,<sup>238</sup> Justice Stevens's plurality opinion sharply rejected the State's "paternalistic assumption" that readers of Peel's letterhead would not distinguish between a private organization's certification and official state endorsement.<sup>239</sup> *Greater New Orleans*<sup>240</sup> invoked the converse of this impermissible assumption, basing its invalidation of broadcast restrictions on the "presumption that the speaker and the audience, not the Government, should be left to assess the value of accurate and nonmisleading information about lawful conduct."<sup>241</sup> Even the otherwise accommodating *Went For It* Court<sup>242</sup> cast its earlier holding in *Bolger*<sup>243</sup> as a rejection of "the Federal Government's paternalistic effort to ban potentially 'offensive' and 'intrusive' direct-mail advertisements for contraceptives."<sup>244</sup>

### C. The Invigoration of Central Hudson's Tailoring Test

For a time, some incongruity existed between the literal rigor of the fourth part of the *Central Hudson* test—requiring that regulations of commercial speech not be "more extensive than is necessary to serve . . . [the government's] interest"<sup>245</sup>—and the more relaxed construction suggested by *Fox*.<sup>246</sup> The predominant manner in which the Court has described and applied this standard, however, indicates that a potent version has prevailed. Even if not fully equivalent to the least-restrictive-means test that the Court has applied in other contexts,<sup>247</sup> *Central Hudson*'s final prong now

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237. *Id.* at 375.

238. *See supra* notes 174–79 and accompanying text.

239. *Peel v. Attorney Registration & Disciplinary Comm'n.*, 496 U.S. 91, 105 & n.13 (1990) (opinion of Stevens, J.); *see also Ibanez v. Fla. Dep't. of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 146 (1994) (refusing to accept state's unsupported contention that lawyer's truthful communication of status as Certified Financial Planner was potentially misleading to clients).

240. *See supra* notes 100–09 and accompanying text.

241. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 195 (1999).

242. *See supra* notes 199–206 and accompanying text.

243. *See supra* notes 39–40 and accompanying text.

244. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 630 (1995).

245. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

246. *See supra* notes 66–72 and accompanying text.

247. *See, e.g., Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (striking down blanket prohibition of indecent interstate commercial telephone messages because denial of adult access to telephone messages that were indecent but not obscene exceeded what was

mandates that states carefully tailor regulation of commercial speech to the interest that evoked it.

In a sense, the Court has simply placed renewed emphasis on the principle stated elsewhere in *Central Hudson* that “if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.”<sup>248</sup> The *Western State Medical Center* Court, underscoring that *Central Hudson*’s standard is “significantly stricter” than the rational basis test,<sup>249</sup> explained that “if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so.”<sup>250</sup> In *Greater New Orleans*, the Court spoke of the government’s obligation to show “narrow tailoring” of the regulation to the asserted interest;<sup>251</sup> the *Discovery Network* Court referred to its consideration of “less drastic measures” by which the city could achieve its goals.<sup>252</sup> While the language in these and other cases<sup>253</sup> varies, their similar outcomes demonstrate the typically fatal result when plausible, less speech-restrictive alternatives exist.

In conducting its review, the Court has found a variety of measures to serve as sufficient alternatives to the state’s outright ban. In the case of lawyer advertising, the Court has repeatedly expressed its preference for disclaimers or other disclosures to prevent the misleading effect that the state has sought to avert through barring certain advertising altogether. Even as the Court sustained the plaintiffs’ challenge to Arizona’s broad ban in *Bates*, it took pains to note the possibility that “some limited supplementation, by way of

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necessary to limit access of minors to such messages); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981) (striking down state’s denial of unemployment compensation benefits to claimant who quit his job because his religious beliefs forbade participation in production of armaments); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979) (striking down state’s requirement that new political parties and independent candidates obtain more than 25,000 signatures on nominating petitions if person was seeking office that would serve less than the entire state).

248. *Central Hudson*, 447 U.S. at 564.

249. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002) (citation omitted).

250. *Id.* at 371.

251. *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 188 (1999).

252. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993).

253. *See, e.g.*, *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation, Bd. of Accountancy*, 512 U.S. 136, 142 (1994) (requiring state to show that a restriction on commercial speech “directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest”).

warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled.”<sup>254</sup> In *Zauderer*, the Court pointed to “disclosure requirements [that] are reasonably related to the State’s interest in preventing deception of consumers,”<sup>255</sup> as “one of the acceptable less restrictive alternatives to actual suppression of speech.”<sup>256</sup> Following this principle, a majority of Justices in *Peel* favored a disclaimer, where appropriate, to clarify a lawyer’s certification by a private organization over a categorical prohibition on communicating this credential.<sup>257</sup>

In other areas of commercial speech as well, the Court has looked to the efficacy of additional speech as a means of combating dangers that the state has addressed through censorship. In *Central Hudson* itself, the Court suggested that the state might advance its interest in energy conservation by directing Central Hudson to supplement its promotion of an electric service with information about the service’s relative expense and efficiency.<sup>258</sup> In addition, the state itself is not powerless to add its own voice. For example, the *Linmark* Court noted opportunities for the city to promote integrated housing through expression to counter the feared effects of the “For Sale” signs that it had tried to forbid—e.g., continuing its “process of education” and publicizing the number of white residents remaining in the township.<sup>259</sup>

In addition to disclosures and official counterspeech, the Court has also identified a number of nonspeech measures through which the government could discourage behavior that it had sought to dampen by limiting access to information. As noted earlier, the *Greater New Orleans* Court discussed numerous regulations of conduct that could reduce the ills associated with casino gambling as substitutes for the ban on broadcasting promotional

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254. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977).

255. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

256. *Id.* at 651 n.14.

257. *See Peel v. Attorney Registration & Disciplinary Comm’n*, 496 U.S. 91, 110 (1990) (Stevens, J., plurality); *id.* at 117 (Marshall, J., concurring); *id.* at 118 (White, J., dissenting); *see also Ibanez*, 512 U.S. at 146 (reserving question of whether “in other situations or on a different record, the Board’s insistence on a disclaimer might serve as an appropriately tailored check against deception or confusion”).

258. *Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Co.*, 447 U.S. 557, 570–71 (1980).

259. *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 97 (1977) (internal quotation marks omitted).

advertisements.<sup>260</sup> Likewise, the *Western States Medical Center* Court could conceive a host of ways that the government could confront the dangers posed by compounded drugs before resorting to prohibition of advertising.<sup>261</sup> Perhaps most direct and obvious was the Court's observation in *Rubin* that the government's concern with the prospect of strength wars among brewers could be addressed by simply limiting the alcohol content of beers.<sup>262</sup>

Nor do these steps exhaust the range of satisfactory alternatives to completely barring allegedly problematic commercial speech. For example, the *Linmark* Court noted that a community concerned about abandonment of neighborhoods could offer financial incentives for people to retain their homes.<sup>263</sup> In *Shapero*, the Court recognized that having lawyers file targeted direct-mail solicitation letters with a state agency would constitute a "far less restrictive and more precise means" of dealing with potential abuses and mistakes than wholesale suppression.<sup>264</sup> That reasoning was reminiscent of the Court's response to Virginia's concerns about the impact of price advertising on the professional standards of pharmacists—*viz.*, that the state was capable of maintaining those standards through direct regulation.<sup>265</sup> Moreover, the Court has been prepared to have consumers themselves assume some responsibility for assessing commercial speech. When Justice O'Connor objected that consumers could not verify Ibanez's Certified Financial Planner's credentials,<sup>266</sup> the Court responded that they could call the CFP Board of Standards for this information.<sup>267</sup>

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260. See *supra* note 109 and accompanying text.

261. See *supra* note 129–30 and accompanying text.

262. See *supra* note 92 and accompanying text; see also *Central Hudson*, 447 U.S. at 582 (Stevens, J., concurring) (asserting that "if the perceived harm associated with greater electrical usage is not sufficiently serious to justify direct regulation," the suppression of promotional advertising is not justified).

263. *Linmark*, 431 U.S. at 97.

264. *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 476 (1988).

265. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 768–69 (1976).

266. *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 150 (1994) (O'Connor, J., concurring in part and dissenting in part).

267. *Id.* at 145 n.9.

*D. The Burden of Demonstration*

Much of the potency of the Court's review of commercial speech regulation stems from the level of proof that has been demanded of the state. In conducting this analysis, the Court has taken seriously the principle that "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it."<sup>268</sup> The burden of showing that the restriction is carefully designed to address a demonstrable harm has frequently proved an insurmountable barrier for the government.

In some cases, the government has failed even to satisfy the Court that "the harms it recites are real,"<sup>269</sup> much less that the limitation on commercial speech is properly tailored to meet them. In *Linmark*, the record did not establish the existence of substantial panic selling by white homeowners, a necessary predicate to the township's ban on "For Sale" signs as a means of slowing this phenomenon.<sup>270</sup> Similarly, attempts to restrict lawyer advertising have often foundered on the Court's refusal to "allow rote invocation of the words 'potentially misleading'"<sup>271</sup> to substitute for actual evidence of harmful effects. Thus, even while conceding that the conspicuous listing of membership in the Bar of the Supreme Court of the United States was potentially misleading, the *R.M.J.* Court rejected Missouri's attempt to ban it absent a credible finding that the public would be misled by this information.<sup>272</sup> In *Ibanez*, the state had not "shouldered the burden it must carry" to prohibit Ibanez's references to her status as a CPA and CFP because it had not "demonstrated with sufficient specificity that any member of the public could have been misled by Ibanez' [sic] constitutionally protected speech or that any harm could have resulted from allowing that speech to reach the public's eyes."<sup>273</sup> This assessment of the record was echoed by *Peel's* plurality opinion, which, finding no supporting evidence, refused to credit the claim that communicating

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268. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n.20 (1983)); see also *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 183 (1999) ("[T]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction.").

269. *Edenfield*, 507 U.S. at 771.

270. *Linmark Assocs. v. Twp. of Willingboro*, 431 U.S. 85, 95 (1977).

271. *Ibanez*, 512 U.S. at 146.

272. *In re R.M.J.*, 455 U.S. 191, 205-06 (1982).

273. *Ibanez*, 512 U.S. at 138-39.

National Board of Trial Advocacy certification would convey an exaggerated notion of its holder's qualification.<sup>274</sup>

By extension, the Court has also demanded a persuasive evidentiary showing to meet *Central Hudson's* third requirement that a restraint on commercial speech directly advance a substantial governmental interest. In marked contrast to the generous assumptions of the rational relationship standard,<sup>275</sup> the Court has repeatedly refused to allow this burden to be satisfied by "mere speculation or conjecture."<sup>276</sup> The state must "*show*[]" that the restriction directly and materially advances a substantial state interest<sup>277</sup> when addressing harms by limiting commercial speech, the state "must *demonstrate* that . . . its restriction will in fact alleviate them to a material degree."<sup>278</sup> Thus, in *Edenfield*, the absence of studies or other supporting evidence led the Court to conclude that the state had "not demonstrated that . . . the ban on CPA solicitation advances its asserted interests in any direct and material way."<sup>279</sup> In *44 Liquormart*, the state's failure to put forward evidence of the utility of suppressing advertisement of retail liquor prices likewise prompted disagreement with the state's contention that the ban would "significantly advance the State's interest in promoting temperance."<sup>280</sup> An absence of evidence has therefore

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274. *Peel v. Attorney Registration. & Disciplinary Comm'n*, 496 U.S. 91, 102 (1990) (Stevens, J., plurality).

275. *Nguyen v. INS*, 533 U.S. 53, 77 (2001) (stating that rational basis standard "permits a court to hypothesize interests that might support legislative distinctions, whereas heightened scrutiny limits the realm of justification to demonstrable reality"); *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (stating that under rational basis review, the burden is upon the challenging party to disprove existence of "any reasonably conceivable state of facts that could provide a rational basis for the classification"); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (stating that under rational basis review, those attacking rationality of legislative classification have the burden "to negative every conceivable basis which might support it." (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940))).

276. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). Three other cases that quote this phrase from *Edenfield* are *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188 (1999); *Rubin v. Coors Brewing Co.* 514 U.S. 476, 487 (1995); and *Ibanez*, 512 U.S. at 143. *See also* *Cent. Hudson Gas & Elec., Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 569 (1980) (rejecting asserted link between advertising ban and equity of utility's rate structure as "highly speculative").

277. *Ibanez*, 512 U.S. at 142 (emphasis added).

278. *Edenfield*, 507 U.S. at 771(emphasis added).

279. *Id.*

280. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (Stevens, J., plurality); *see also* *Linmark Assocs. v. Twp. of Willingboro*, 431 U.S. 85, 95-96 (1977)

generated the default inference that the state has not met its burden. In striking down Massachusetts's point-of-sale advertising regulations in *Lorillard*,<sup>281</sup> the Court explained that “[a] regulation cannot be sustained if it ‘provides only ineffective or remote support for the government’s purpose,’ or if there is ‘little chance’ that the restriction will advance the State’s goal.”<sup>282</sup>

Finally, the fourth and most stringent aspect of *Central Hudson*'s test, barring restrictions more extensive than necessary to serve the state's interest,<sup>283</sup> also presents the most imposing evidentiary burden. The state must show that less restrictive alternatives that occur to the Court will not adequately advance the state's goal—a difficult if not impossible challenge if the state has not already experimented with such measures. In *Central Hudson* itself, the ban on promotional advertising foundered on the state's failure to “demonstrate[] that its interest in conservation cannot be protected adequately by more limited regulation” of the utility's commercial expression.<sup>284</sup> By the same token, the outdoor advertising regulations for smokeless tobacco and cigars in *Lorillard* fell because the Massachusetts Attorney General had “failed to show” that they did not restrict speech more than was necessary to further the state's interest in preventing underage tobacco use.<sup>285</sup> In *Western States Medical Center*, again, the government did not meet its evidentiary burden—*viz.*, to show that the Court's suggested alternatives to the prohibition on advertising compounded drugs would be insufficient to prevent the harm at which the ban was aimed.<sup>286</sup>

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(“[T]he record does not confirm the township's assumption that proscribing [‘For Sale’] signs will reduce public awareness of realty sales and thereby decrease public concern over selling.”).

281. See *supra* notes 118–20 and accompanying text.

282. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 566 (2001) (quoting *Edenfield*, 507 U.S. at 770).

283. See *supra* note 29 and accompanying text.

284. *Cent. Hudson Gas & Elec., Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 570 (1980); see also *id.* at 571 (refusing to approve total ban on utility's advertising “[i]n the absence of a showing that more limited speech regulation would be ineffective” (internal citations omitted)).

285. *Lorillard*, 533 U.S. at 565.

286. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).



*E. The Rejection of Legal Exceptionalism*

If the profusion of cases involving lawyer advertising has molded the subject “into its own distinct area of common law,”<sup>287</sup> that area is not distinguished by exemption from the application of larger principles governing commercial speech. On the contrary, the frequent invalidation of restrictions that began with *Bates* has flowed from the Court’s refusal to treat attorney advertising as an altogether different species from advertising of other goods or services. It is one thing for the Court to take into account the particular nature of legal services when considering regulation of lawyer advertising.<sup>288</sup> However, the argument that the special dynamics of the practice of law warrant suspension of ordinary commercial speech analysis has, on the whole, been a minority position within the Court.<sup>289</sup> More representative of majority sentiment was the Court’s rebuff to Ohio’s attempt to suppress Zauderer’s advertisement: “The State’s contention that the problem of distinguishing deceptive and nondeceptive legal advertising is different in kind from the problems presented by advertising generally is unpersuasive.”<sup>290</sup>

Thus, the Court has routinely assumed that regulation of lawyer advertising is reviewed within the framework of the *Central Hudson* standard.<sup>291</sup> In particular, lawyer advertising has not been spared the rigorous version of *Central Hudson*’s fourth prong discussed

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287. Kozinski & Banner, *supra* note 7, at 630.

288. *See, e.g.*, *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) (“[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising.”).

289. *See, e.g.*, *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 487 (1988) (O’Connor, J., dissenting) (“The roots of the error in our attorney advertising cases are a defective analogy between professional services and standardized consumer products and a correspondingly inappropriate skepticism about the States’ justifications for their regulations.”); *Bates*, 433 U.S. at 386 (Burger, C.J., concurring in part and dissenting in part) (“[P]rice advertising can never give the public an accurate picture on which to base its selection of an attorney.”).

290. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 644 (1985). *But see Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995) (“[P]articularly because the standards and conduct of state-licensed lawyers have traditionally been subject to extensive regulation by the States, it is all the more appropriate that we limit our scrutiny of state regulations to a level commensurate with the ‘subordinate position’ of commercial speech in the scale of First Amendment values.” (citation omitted)). As discussed earlier, however, *Went For It* represents an exception to the trend in the Court’s decisions concerning lawyer advertising. *See supra* notes 199–202 and accompanying text.

291. *See, e.g.*, *Shapero*, 486 U.S. at 472; *Zauderer*, 471 U.S. at 637–38; *In re R.M.J.*, 455 U.S. 191, 203 (1982).

earlier.<sup>292</sup> In addition to the examples previously noted,<sup>293</sup> the *R.M.J.* Court pointed out that the state might address the potential abuses arising from general mailings of announcement cards by supervising them rather than confining their circulation; the state's restriction therefore failed *Central Hudson's* requirement because there was "no indication in the record of a failed effort to proceed along such a less restrictive path."<sup>294</sup> The state's "unsupported assertions" in *Zauderer* of the dangers of illustrations in lawyer advertising likewise proved unavailing in the absence of evidence that abuses "cannot be combated by any means short of a blanket ban."<sup>295</sup> Whatever the merits, then, of Justice O'Connor's lament that the Court "took a wrong turn" with *Bates* and that it "has compounded this error by finding increasingly unprofessional forms of attorney advertising to be protected speech,"<sup>296</sup> it has failed to persuade the Court that restrictions on lawyer advertising should receive relaxed scrutiny.<sup>297</sup>

#### IV. THE INVALIDITY OF BANS ON SELF-LAUDATORY CLAIMS AND FUNCTIONALLY EQUIVALENT PROHIBITIONS

Viewed through the prism of the Supreme Court's principles governing commercial speech generally and lawyer advertising in particular, wholesale bans on self-laudatory advertising claims by attorneys appear to be insupportable. And indeed, the number of states expressly forbidding such claims has plummeted in recent years.<sup>298</sup> Nevertheless, courts that approved prohibitions on self-laudatory advertising have, by and large, refrained from repudiating these precedents. That reasoning is therefore presumably available to

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292. See *supra* Part III.C.

293. See *supra* notes 253–54 and accompanying text.

294. In re *R.M.J.*, 455 U.S. at 206.

295. *Zauderer*, 471 U.S. at 648.

296. *Edenfield v. Fane*, 507 U.S. 761, 778 (1993) (O'Connor, J., dissenting).

297. For the argument that the state has less reason to regulate clients' selection of attorneys than their choice of products, see Andrews, *supra* note 135, at 995 ("The quality of professional services is itself regulated initially by the bar exam and then by the state ethics codes and thus, if a client *does* choose an attorney for the wrong reasons, there are independent reasons to suppose that the attorney will do an adequate job.").

298. In 1985, provisions in twenty-seven states could be identified. See Scott Makar, Note, *Advertising Legal Services: The Case for Quality and Self-Laudatory Claims*, 37 U. FLA. L. REV. 969, 1002 n.204 (1985). A search conducted in 2009 disclosed three explicit prohibitions. See IND. R. PROF'L CONDUCT 7.2(b) (2007); S.C. APP. CT. R. 7.2(f) (2008); S.D. CODIFIED LAWS § 16-18-appx-7.1(c)(3) (2009).

sustain restrictions that reach substantially the same type of advertising at which bans on self-laudatory claims were aimed. A prominent example of this type of provision treats as proscribable false or misleading communication that “compares the lawyer’s services with other lawyers’ services, unless the comparison can be factually substantiated.”<sup>299</sup> An examination of the flaws in prohibitions of self-laudatory claims suggests that categorically forbidding comparisons is similarly vulnerable to challenge.

*A. The Unfocused Opposition to Self-Laudatory Advertising*

The tenuous constitutionality of bans on lawyers’ self-laudatory communications arises in part from their indeterminacy. Just as the Court noted in *Zauderer* that Ohio’s rule against self-recommendation could theoretically bar all advertising,<sup>300</sup> so might prohibitions of self-laudation be construed as reaching all information about an attorney—however accurate and pertinent—that reflects well on the attorney.<sup>301</sup> Presumably, however, states do not contemplate such a patently impermissible sweep. Rather, these bans appear to reflect a concern that self-laudation in some instances can lead potential clients astray by presenting exaggerated or unverifiable claims about an attorney’s competence.<sup>302</sup> For this reason, though, it is difficult to isolate an independent set of harmful self-laudatory communications apart from those that can plausibly be described as false, deceptive, or misleading. Rather, the designation

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299. COLO. RULES PROF’L CONDUCT R. 7.1(a) (2008); FLA. BAR REG. R. 4-7.2(c)(1)(I) (2008); GA. RULES PROF’L CONDUCT R. 7.1(a)(3) (2008); HAW. RULES PROF’L CONDUCT R. 7.1(c) (2008); IDAHO RULES PROF’L CONDUCT R. 7.1(c) (2006); ILL. RULES PROF’L CONDUCT R. 7.1(c) (2008); KAN. RULES PROF’L CONDUCT R. 226:7.1(c) (2007); KY. SUP. CT. R. 3.130(7.15)(c) (2008); MD. LAWYER’S RULES PROF’L CONDUCT R. 7.1(c) (2008); MICH. RULES PROF’L CONDUCT R. 7.1(c) (2008); MINN. RULES PROF’L CONDUCT R. 7.1(c) (2005); MISS. RULES PROF’L CONDUCT R. 7.1(d) (2008); MO. SUP. CT. R. 4-7.1(e) (2007); NEV. RULES PROF’L CONDUCT R. 7.1(c) (2008); N.H. RULES PROF’L CONDUCT R. 7.1(c) (2008); N.J. COURT RULES, RPC 7.1(a)(3) (2008); N.C. RULES PROF’L CONDUCT R. 7.1(a)(3) (2008); N.D. RULES PROF’L CONDUCT R. 7.1(c) (2008); TENN. SUP. CT. R. 8 § 7.1(c) (2008); VT. RULES PROF’L CONDUCT R. 7.1(c) (2008); VA. SUP. CT. R. pt. 6, § II, 7.1(a)(3); W. VA. RULES PROF’L CONDUCT 7.1(c) (2008); WIS. SUP. CT. R. 20:7.1(c) (2008); WYO. RULES PROF’L CONDUCT 7.1(c) (2008).

300. 471 U.S. at 639.

301. See Linda Sorenson Ewald, *Content Regulation of Lawyer Advertising: An Era of Change*, 3 GEO. J. LEGAL ETHICS 429, 481 (1990) (“[S]ome might regard advertisements which focus on the lawyer’s qualifications, experiences, or clientele as self-laudatory.”).

302. See *infra* notes 319–26 and accompanying text.

seems to function largely as a catchall term for claims that cannot be verified, and that may be objectionable on more specific grounds.

The indefinite scope of bans on self-laudatory expression is reflected by the statutes in which the prohibition appears. In Indiana, for example, self-laudation is not singled out in an independent proscription; rather, it appears in the disjunctive under a broader rule against using “public communication containing a false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement or claim.”<sup>303</sup> The dominant concern with the other elements enumerated in this provision is apparent from reported cases. Conduct for which the provision has been invoked to justify discipline includes a lawyer’s maintaining a website suggesting that parents of special needs children lie to school officials during mediation,<sup>304</sup> issuance of a misleading press release,<sup>305</sup> misrepresentation of the racial composition of a firm in a billboard promoting the firm’s diversity,<sup>306</sup> issuance of a false and misleading press advisory concerning his retention in a suit,<sup>307</sup> misrepresentation of a firm’s identity,<sup>308</sup> and a prosecutor’s sham employment of a deputy prosecutor to operate the prosecutor’s private law practice.<sup>309</sup>

Even where the conduct involved might be broadly characterized as self-laudation, it has frequently assumed a form that makes it susceptible to narrower prohibitions imposed by the state. In some instances—in both Indiana and elsewhere—the gravamen of the charge appears to be the attorney’s dubious citation to past performance to assure future results. One group of attorneys, for example, sponsored an advertisement stating that they “offer[ed] the track record and resources you need to win a settlement.”<sup>310</sup> In another case, a firm’s television commercials featured testimonials of past clients, which, in the court’s view, may have “create[d] unjustified expectations of similar outcomes in the future without taking into account the peculiarities of the particular cases.”<sup>311</sup>

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303. IND. RULES PROF’L CONDUCT R. 7.2(b) (2007).

304. *In re Philpot*, 820 N.E.2d 141, 141 (Ind. 2005).

305. *In re Boesch*, 816 N.E.2d 414, 414 (Ind. 2004).

306. *In re Gerling*, 777 N.E.2d 1097, 1097–98 (Ind. 2002).

307. *In re Allen*, 783 N.E.2d 1118, 1120–21 (Ind. 2002).

308. *In re Foos*, 770 N.E.2d 335, 336–37 (Ind. 2002).

309. *In re Riddle*, 700 N.E.2d 788, 791–92 (Ind. 1998).

310. *In re Anonymous*, 689 N.E.2d 442, 444 (Ind. 1997) (quotation marks omitted).

311. *Office of Disciplinary Counsel v. Shane*, 692 N.E.2d 571, 573 (Ohio 1998). The *Shane* court noted that “[c]omments about past successes may create unjustified expectations

In some instances where a disputed communication could be cast as “purely” self-laudatory, other considerations may sometimes bear on a court’s decision to impose discipline. In *Kentucky Bar Ass’n v. Mandello*,<sup>312</sup> for example, the court designated as self-laudatory the following statement made by an attorney to a potential client: “I would like to represent you and feel that my background provides me with a *strong basis* of knowledge with which to protect your interests . . . .”<sup>313</sup> While this assertion furnished grounds for finding a violation of the ban on self-laudatory communications,<sup>314</sup> the context of the statement appears to present the most troubling aspect of Mandello’s conduct. Mandello made the statement in a letter sent to a widow whose husband’s death in a local hospital Mandello attributed to gross negligence.<sup>315</sup> Moreover, the letter also expressed Mandello’s belief that “God has reasons for everything and if it is in his perfect plan that I represent you, then he will provide the means.”<sup>316</sup> In light of the widow’s subsequent dismissal of her current attorney in favor of Mandello,<sup>317</sup> the case thus displayed elements of overreaching that prompted the Court’s approval of restrictions in *Orhalik*<sup>318</sup> and *Went For It*.<sup>319</sup>

Admittedly, in some instances the essence of attorney advertising that triggers disciplinary proceedings can be viewed as self-laudatory in the sense that it offers a subjectively favorable portrayal of the lawyer’s services. The statements in *Capoccia v. Committee on Professional Standards, Third Judicial Department, State of New York*<sup>320</sup> and *Office of Disciplinary Counsel v. Furth*<sup>321</sup> illustrate this

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of similar outcomes in the future without taking into account the peculiarities of the particular cases.” *Id.*; see also *In re Benkie*, 892 N.E.2d 1237, 1239–40 (Ind. 2008) (brochure describing prior successful representations); *In re Coale*, 775 N.E.2d 1079, 1080–81 (Ind. 2002) (attorneys’ materials referring to their success in other disaster-related litigation); *In re Allen*, 783 N.E.2d at 1120 (Ind. 2002) (lawyer’s press release referring to previous verdicts obtained in transportation-related accidents, including statistical data and past success, deemed “an implied indication of future success”).

312. 32 S.W.3d 763 (Ky. 2000).

313. *Id.* at 765.

314. *Id.*

315. *Id.* at 763–64.

316. *Id.* at 764.

317. *Id.*

318. See *supra* notes 189–98 and accompanying text.

319. See *supra* notes 199–206 and accompanying text.

320. 1990 WL 211189, at \*1 (N.D.N.Y. Dec. 20, 1990).

321. 754 N.E.2d 219 (Ohio 2001).

phenomenon. The complaint in *Capoccia* was based on the attorney's commercial referring to him as a "smart, tough lawyer."<sup>322</sup> Similarly, Furth's website description of the attorney as a "passionate and aggressive advocate"<sup>323</sup> was deemed to constitute an impermissibly self-laudatory statement.<sup>324</sup> A more generic representation violating a ban on self-laudation occurred in *Florida Bar v. Lange*, where the attorney's Yellow Pages advertisement had stated, "When the Best is Simply Essential."<sup>325</sup> It is easy to appreciate why these and comparable claims<sup>326</sup> would arouse the opposition of the organized bar. As the remainder of this Part argues, however, the concerns raised by such statements do not justify blanket bans on self-laudation or variations of such prohibitions.

### *B. The Clash with Commercial Speech Doctrine*

Bans on self-laudation and similar prohibitions on lawyer advertising, then, are bottomed on the danger of exposing the public to claims of competence that cannot be objectively verified. Ultimately, this rationale must rely on the observation in *Bates* that claims relating to the quality of legal services "probably are not susceptible of precise measurement or verification and, under some circumstances, might well be deceptive or misleading to the public, or even false."<sup>327</sup> Extrapolating this qualified dicta to authorize categorical suppression of subjective representations of quality, however, is in tension with the larger principles that the Court has developed to govern commercial speech. Such blanket bans are rooted in dubious premises about the capacity of consumers, the validity of prophylactic measures, the level of justification required, and the singularity of attorney advertising.

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322. *Capoccia*, 1990 WL 211189, at \*2 (quoting advertisement as stating, "If you've been injured you deserve a fast fair cash compensation . . . Andrew Capoccia understands, he's a smart tough lawyer who's on your side").

323. *Furth*, 754 N.E.2d at 225.

324. *Id.* at 231-32.

325. *Fla. Bar v. Lange*, 711 So. 2d 518, 521 (Fla. 1998).

326. *See, e.g.*, *Medina County Bar Ass'n v. Grieselhuber*, 678 N.E.2d 535, 536-37 (Ohio 1997) (lawyer's Yellow Pages advertisement stating "We Do It Well" found to violate rule against communication of claims that could not be verified).

327. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 366 (1977).

*1. The paternalistic character of bans on self-laudation*

If sweeping bans on lawyers' self-laudatory advertising have any coherent explanation, it is the public's presumed inability to assess representations about legal services that cannot be factually corroborated.<sup>328</sup> Indeed, judicial disapproval of attorney advertising that is not confined to objectively demonstrable information often includes expressions of solicitude for gullible or irrational consumers. This low estimate of the reasoning faculties of citizens, however, is difficult to reconcile with the powerful antipaternalistic impulse that

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328. Some courts have also indicated that limitations on lawyer advertising are largely rooted in concerns about lawyers' professionalism and the dignity of attorneys. *See, e.g.*, Fla. Bar v. Pape, 918 So. 2d 240, 246–47 (Fla. 2005) (justifying ban on lawyer's use of logo of pit bull with spiked collar and "pit bull" in telephone number as, in part, "one step we can take to maintain the dignity of lawyers"); The Fla. Bar: Petition to Amend the Rules Regulating the Fla. Bar—Adver. Issues, 571 So. 2d 451, 475 (Fla. 1990) (Barkett, J., concurring in part, dissenting in part) (questioning validity of certain restrictions on lawyer advertising adopted by the Florida Supreme Court as "only regulat[ing] decorum"); Comm. on Prof'l Ethics & Conduct of Iowa State Bar Ass'n v. Humphrey, 377 N.W.2d 643, 647 (Iowa 1985) (explaining prohibition of lawyers' television advertisements that "contain background sound, visual displays, more than a single, nondramatic voice or self-laudatory statements" as part of effort to draw line between "the dissemination of protected information and crass personal promotion"); Comm. on Prof'l Ethics & Conduct of Iowa State Bar Ass'n v. Humphrey, 355 N.W.2d 565, 572 (Iowa 1984) (Larson, J., dissenting) (criticizing certain restrictions on content of attorney advertising as unconstitutional effort to stem "perceived assault on the 'professionalism' of the bar"), *vacated*, 472 U.S. 1004 (1985); Petition of Felmeister & Isaacs, 518 A.2d 188, 193 (N.J. 1986) (noting concern raised by attorney advertising that legal profession "will degenerate into just another trade"); *id.* at 196 (expressing concern that lawyer's advertisement employing "attention-getting technique . . . has the potential for bringing both the bar and bench into disrepute"); *In re* Petition for Rule of Court Governing Lawyer Adver., 564 S.W.2d 638, 644 (Tenn. 1978) (asserting that lawyers' advertising "should be conducted with decorum" and that handbill, circular and billboard advertising is "beneath the dignity of the profession"); *In re* Utah State Bar Petition for Approval of Changes in Disciplinary Rules on Adver., 647 P.2d 991, 993 (Utah 1982) (urging that rules governing lawyer advertising "guard against the making of common, cheap or undignified claims and . . . harmonize with the purpose of maintaining . . . high standards of dignity and professionalism").

Rodney Smolla has argued convincingly, however, that limitations on lawyer advertising designed to protect the dignity of attorneys cannot justify restrictions on truthful, nonmisleading advertising. *See generally* Rodney A. Smolla, *Lawyer Advertising and the Dignity of the Profession*, 59 ARK. L. REV. 437 (2006); *see also* Grievance Comm. for Hartford-New Britain Judicial Dist. v. Trantolo, 470 A.2d 228, 234 (Conn. 1984) (protecting arguably "distasteful" but truthful lawyer advertising); *In re* Marcus, 320 N.W.2d 806, 808–10, 816 (Wis. 1982); *id.* at 817 (Beilfuss, C.J., concurring) (belief that lawyers' advertisements were "degrading and lack the sense of professionalism we should expect of lawyers" deemed insufficient to ban them). This Article accepts Smolla's thesis as its premise and focuses on the notion that self-laudatory advertising tends to mislead potential clients.

has characterized the Court's commercial speech jurisprudence since *Virginia Board of Pharmacy*.

Courts that resist deviations from dry recitation of established facts in lawyer advertising often state the necessity of rescuing the public from its inability to evaluate subjective claims. Without the protective cloak of state-enforced restrictions, the lay audience will presumably succumb to ingenious appeals to its emotional and irrational tendencies. Thus, the Arizona Supreme Court instructed the bar to "examine lawyers' advertisements to determine whether, taken as a whole, they are predominately informational or are simply emotional, irrational sales pitches;"<sup>329</sup> the latter deprives consumers of the ability to "mak[e] informed, rational choices of counsel."<sup>330</sup> Similarly seeking to shield hapless consumers, a federal court endorsed "strict, self-imposed controls" over lawyer advertising.<sup>331</sup> Otherwise, unrestrained advertising would "encourage extravagant, artful, self-laudatory brashness in seeking business and thus could mislead the layman."<sup>332</sup> This conception of consumers as putty in the hands of manipulative lawyers rather than rational, autonomous individuals was captured by the Tennessee Supreme Court when, in a decision that pre-dated *Peel*, it upheld a broad ban on lawyers' advertising areas of specialization.<sup>333</sup> Such restrictions, the court announced, were needed to ensure that "the public is not victimized by any form of advertising that has the effect of a holding out to the public of special or unique qualification or expertise."<sup>334</sup> To a naïve and uncomprehending public, communication of the impression that a lawyer possesses a particular expertise would inevitably be "deceptive and misleading."<sup>335</sup>

The tacit operation of this condescending philosophy can be observed in the Florida Supreme Court's decision in *Florida Bar v. Pape*.<sup>336</sup> There, the court upheld discipline for two personal injury attorneys who placed television advertising featuring their firm's pit

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329. *In re Zang*, 741 P.2d 267, 279 (Ariz. 1987).

330. *See id.*

331. *Lovett & Linder, Ltd. v. Carter*, 523 F. Supp. 903, 909 (D.R.I. 1981).

332. *Id.* at 908.

333. *In re* Petition for Rule of Court Governing Lawyer Adver., 564 S.W.2d 638, 644–45 (Tenn. 1978).

334. *Id.* at 645.

335. *Id.*

336. *Fla. Bar v. Pape*, 918 So. 2d 240 (Fla. 2005).



bull logo and pit bull telephone number.<sup>337</sup> While the opinion principally addressed the affront that this imagery posed to the dignity of the legal profession,<sup>338</sup> the court also faulted the commercial's use of the logo and phone number for "not convey[ing] objectively relevant information about the attorneys' practice."<sup>339</sup> The basis for this conclusion was the commercial's absence of any "indication that [the attorneys] specialize in either dog bite cases generally or in litigation arising from attacks by pit bulls specifically."<sup>340</sup> The Court contrasted the attorneys' commercial with the illustration of the Dalkon Shield intrauterine device in *Zauderer*, which had been found to be "an accurate representation . . . and ha[ve] no features that are likely to deceive, mislead, or confuse the reader."<sup>341</sup> The notion that viewers would suffer confusion over the pit bull theme—that they would interpret it as anything other than the attorneys' holding themselves out as tenaciously pursuing their clients' claims<sup>342</sup>—seems at odds with the assumptions of consumer intelligence and rationality underpinning modern commercial speech doctrine.

Also in tension with this antipaternalistic foundation is the almost reflexive opposition that some courts display toward advertisements that promote lawyers by means of dramatization. In *Farrin v. Thigpen*,<sup>343</sup> for example, the offending television advertisement showed an obviously fictional meeting of insurers who immediately choose to settle when they learn the identity of the claimant's attorney.<sup>344</sup> Even an impressionable viewer would have recognized that this flattering portrayal of the attorney's reputation was a creation of the attorney himself. The commercial included a disclaimer: "Dramatization by actors. No specific result implied.

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337. *Id.* at 242. The number was "1-800-PIT-BULL." *Id.*

338. *See supra* note 328 (discussing *Pape*); Smolla, *supra* note 328, at 445 (describing restrictions on lawyer advertising upheld in *Pape* as "animated largely by the felt need to protect the dignity of the legal profession").

339. *Pape*, 918 So. 2d at 249.

340. *Id.*

341. *Id.* at 248–49 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985)).

342. The referee had found that pit bulls are perceived as "loyal, persistent, tenacious, and aggressive," and that these qualities are "objectively relevant to the selection of an attorney." *Id.* at 243. By contrast, the Florida Supreme Court ascribed "darker" connotations to this image: "malevolence, viciousness, and unpredictability." *Id.* at 245.

343. 173 F. Supp. 2d 427 (M.D.N.C. 2001).

344. *Id.* at 433–35.

Vaughn[, who appeared on camera after the vignette to urge accident victims to contact the firm,] is a paid spokesperson for The Law Office of James Scott Farrin.”<sup>345</sup> Nevertheless, the court found the commercial inherently misleading, endorsing a finding of fact that it was “likely to create an unjustified expectation about results that the lawyer can achieve” and “misrepresent[ed] the importance of the myriad of factors that are taken into consideration by an insurance company, or its lawyers, when deciding whether and for how much a claim should be settled.”<sup>346</sup> The court’s determination that the advertisement exaggerated the intimidating power of the attorney’s reputation and simplified the process by which claims are resolved is unexceptionable. The implication that viewers could not reach this conclusion on their own, however, assumes a demeaning conception of the capacity of viewers to make allowances for commercial dramatization in a culture that is saturated with advertising of this nature.

The premise of consumer credulity and irrationality in the face of dramatic lawyer advertising on television was laid bare in decisions by the highest courts of New Jersey and Iowa. In *Petition of Felmeister & Isaacs*,<sup>347</sup> the New Jersey Supreme Court promulgated a rule prohibiting the use of “drawings, animations, dramatization, music or lyrics” in television attorney advertising.<sup>348</sup> Asserting its authority as arbiter of what constitutes “the really significant information about attorney competence” that should appear in advertisements,<sup>349</sup> the court declared its duty to “prevent attorneys from securing clients through nonrational means” and to shield the public from portrayals of attorneys as “person[s] having none of the qualities that the consumer should consider in selecting a lawyer.”<sup>350</sup>

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345. *Id.* at 434.

346. *Id.* at 433.

347. 518 A.2d 188 (N.J. 1986).

348. *Id.* at 188–89.

349. *Id.* at 194.

350. *Id.* at 196. In contrast, the Oklahoma Supreme Court recognized the paternalistic basis underlying state attempts to bar lawyer advertising that evokes feelings along with communicating information. In *State ex rel. Okla. Bar Ass’n v. Schaffer*, 648 P.2d 355 (Okla. 1982), the state bar had sought to suppress an advertisement promoting legal adoption that included such language as “to love and cherish as your very own.” *Id.* at 356. The court rejected the argument that the advertisement could be prohibited because it appealed solely to the emotions of the reader. This justification, the court found, rested “on the need for protecting an unsophisticated lay public from potential harm from lawyer advertising.” *Id.* at 358.

Similarly, in *Committee on Professional Ethics and Conduct of Iowa State Bar Ass'n v. Humphrey*,<sup>351</sup> the Iowa Supreme Court sustained a rule prohibiting lawyers' television advertisements that contained background sound; visual displays; more than a single, nondramatic voice; or self-laudatory statements.<sup>352</sup> Among the commercials barred by this rule was one portraying two members of a bowling team, shown lamenting the absence of a member of their team who was "injured through the negligence of others," agree that the teammate should consult a lawyer, and describe the choice of lawyer as important.<sup>353</sup> In its original opinion in the case, the court found that the techniques employed in such ads "would manipulate the viewer's mind and will."<sup>354</sup> Upon revisiting the issue, the court continued to subscribe to the proposition that a vulnerable public needs state protection from the overpowering impact of electronic media advertising. Viewers of such advertising lack "the opportunity accorded to the reader of printed advertisements to pause, to restudy, and to thoughtfully consider,"<sup>355</sup> and therefore can more readily be misled by it.<sup>356</sup>

Prohibitions of self-laudatory statements and similar bans on claims of quality, then, often embody a belief that consumers cannot respond rationally to lawyer advertising that strays from a narrow literalism. In a society steeped in boastful claims about myriad goods and services, however, it seems doubtful that the public cannot place attorneys' claims of excellence or expertise in proper perspective.<sup>357</sup>

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351. 377 N.W.2d 643 (Iowa 1985).

352. *Comm. on Prof'l Ethics & Conduct of Iowa State Bar Ass'n v. Humphrey*, 355 N.W.2d 565, 566 (Iowa 1984) (describing the rule adopted by Iowa regarding attorney advertisements), *vacated*, 472 U.S. 1004 (1985).

353. *Id.*

354. *Id.* at 571.

355. *Humphrey*, 377 N.W.2d at 646.

356. *Id.* at 570; *see also* *Hirschkop v. Va. State Bar*, 604 F.2d 840, 843 (4th Cir. 1979) (declining to strike down the state's ban on self-laudatory statements in wake of *Bates* because such statements "are not so easily verifiable [as 'the truthful advertising of prices [for] routine legal services'], particularly by lay persons" (citations and inner quotations omitted)); *Lyon v. Ala. State Bar*, 451 So. 2d 1367, 1368 (Ala. 1984) (sustaining requirement that lawyer advertising include disclaimer that "[n]o representation is made about the quality of legal services to be performed or the expertise of the lawyer performing such services").

357. *See* *Andrews*, *supra* note 135, at 1005 (noting, in response to argument that "a prohibition against quality claims is necessary to protect the public from 'puffing,'" that consumers may "already [be] so used to discounting the 'puffing' in communications about products that they will likewise be able to give self-laudatory comments in lawyers' communications their proper weight"); *Smolla*, *supra* note 198, at 18 (rejecting "the claim

Moreover, this sharply limited notion of the lawyer advertising to which consumers can safely be exposed conflicts with antipaternalistic principles that transcend commercial speech doctrine. Decisions upholding broad bans on subjective claims by lawyers necessarily assume that where such claims are not noxious, they are at best unhelpful. Yet, the very subjectivity that makes them not susceptible to objective verification also renders them not demonstrably false. In other contexts, the Court has resisted state attempts to decide which communications in the realm of opinion are worthy of expression.<sup>358</sup> Even if the commercial context warrants a heightened wariness of the effect of such communications, wholesale condemnation of the entire class seems a disproportionate response. The state's confident assumption that lawyers' subjective representations of their services have no value to potential clients—that they would not, for example, signal to some a welcome degree of confidence—collides with the skeptical view of government's role found in the Court's broader First Amendment jurisprudence.

## *2. The availability of less restrictive alternatives*

If broad prohibitions of lawyers' self-laudatory statements rest on invalid paternalistic premises, their fate under the prevailing *Central Hudson* framework inexorably follows. Under the fourth prong of *Central Hudson*, a wholesale ban on self-laudation—or for that matter, related categorical bans on comparisons of service or on representations of quality—restricts more speech than is necessary to achieve the state's purpose. That purpose is presumably to prevent false, misleading, or deceptive attorney advertising. The less restrictive measure is obvious, and already universally in place—*viz.*, direct prohibition of all communication that has real potential to deceive potential clients, regardless of any other pigeonhole to which it might be assigned. Targeting subjective lawyer expression that poses the danger at which wider bans are aimed not only conforms to the Supreme Court's aversion to blanket prophylactic restrictions. Given the Court's reluctance to apply the overbreadth doctrine in

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that consumers of legal services need special protection against lawyers who make self-promoting claims about their skills or their tenacity" because "[c]onsumers are simply not that gullible").

358. *See, e.g.*, *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988); *Greenbelt Coop. Publ'g Co. v. Bresler*, 398 U.S. 6, 13–14 (1970).

the commercial speech context,<sup>359</sup> focusing on whether a particular advertisement actually conveys a false impression of the attorney's services is more consistent with the Court's approach.<sup>360</sup>

Even if a general prohibition of misleading and deceptive lawyer advertising is too blunt an instrument to curb the confusion that might result from subjective claims, completely forbidding certain kinds of advertising would still clash with the Court's imperative that categorical bans are a last resort. If stark self-laudation, comparisons, or other claims of quality sometimes carry real potential to induce consumers to make ill-considered decisions about the selection of lawyers, the cure is presumably more information, not censorship. In today's electronic era, a massive amount of data can be made available online. Thus, directing consumers to a website with information that the state reasonably deems pertinent is more compatible with *Central Hudson's* tailoring requirement than a blanket prohibition of subjective representations. In addition, as with products and services generally, limited disclaimers might be required when they do not impose an undue burden on attorneys' communications.<sup>361</sup>

Similarly, a campaign of education by the organized bar to promote its views of thoughtful ways to select a lawyer is more consistent with First Amendment principles than dictating the content of advertisements. As far back as *Bates*, the Court observed that "[i]f the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its

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359. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1970) ("[T]he justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context.").

360. See Ewald, *supra* note 301, at 481 (asserting that states may regulate self-laudatory claims that are misleading, but that "they should do so because of a constitutionally permissible reason rather than because they are self-laudatory"); see also *Schwartz v. Welch*, 890 F. Supp. 565, 573 (S.D. Miss. 1995) (describing the testimony of a scholar in the field of professional responsibility who stated that most states "simply prohibit false, deceptive and misleading advertising," "question[ed] the prohibition against 'self-laudatory' advertisements," and "not[ed] that advertising is self-laudatory by its very nature, emphasizing as it does the qualities of the goods or services advertised").

361. See *Mason v. Fla. Bar*, 208 F.3d 952, 958 (11th Cir. 2000) (invalidating the requirement that an attorney place a disclaimer on his advertisement, which accurately stated that he received the highest rating from Martindale-Hubbell National Law Directory, because such a requirement failed the third prong of the *Central Hudson* test).

proper perspective.”<sup>362</sup> Indeed, what may create the greatest incentive for blanket bans on self-laudation and other subjective claims to the bar and state agencies is their work-saving potential, sparing these bodies the trouble of educating the public and identifying deceptive advertisements individually. As the Court ruled in *Shapero*, however, “the First Amendment does not permit a ban on certain speech merely because it is more efficient.”<sup>363</sup>

### *3. Attempting to circumvent the state’s burden*

Of course, a restriction on lawyer advertising is not subject to the rigorous scrutiny of *Central Hudson’s* fourth prong if the advertisement fails to survive the first part of that test because it is misleading.<sup>364</sup> The state, however, does not meet its burden of demonstrating the misleading nature of an advertisement or category of advertising merely by incanting the dangers of misleading speech. Rather, it must present persuasive evidence that the advertising that it seeks to suppress has genuine potential to sow misunderstanding among the public. Reviewing the *Bates* Court’s analysis of lawyer advertising, the Wisconsin Supreme Court inferred that “sufficient evidence must be introduced to support a finding that the advertisement is improper” to warrant discipline.<sup>365</sup> Even more to the point, the Eleventh Circuit Court of Appeals in *Mason v. Florida Bar*<sup>366</sup> recognized that “[a] state cannot satisfy its burden to demonstrate that the harms it recites are real and that its restrictions will alleviate the identified harm by rote invocation of the words “potentially misleading.”<sup>367</sup>

The context in which the *Mason* court issued its pronouncement aptly illustrates the intolerance for unsupported assumptions that proper application of commercial speech doctrine entails. The Florida Bar found that Mason’s advertisement, stating that he was “AV’ Rated, the Highest Rating Martindale-Hubbell National Law

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362. *Bates*, 433 U.S. at 375.

363. *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 473 (1988).

364. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

365. *In re Marcus*, 320 N.W.2d 806, 812 (Wis. 1982) (citing *Bates*, 433 U.S. at 382).

366. 208 F.3d 952 (11th Cir. 2000).

367. *Id.* at 956.

Directory,” violated its proscription of self-laudatory statements.<sup>368</sup> For Mason to convey this admittedly accurate information, the Bar ruled that his advertisement must include an elaborate explanation of the rating’s meaning and the process by which it was attained.<sup>369</sup> The Eleventh Circuit, however, rejected the Bar’s unsubstantiated contention that the lay person’s unfamiliarity with Martindale-Hubbell’s system would induce the public to exaggerate the significance of Mason’s rating. The court was especially unimpressed that the Bar had “presented no studies, nor empirical evidence of any sort to suggest that Mason’s statement would mislead the unsophisticated public.”<sup>370</sup> This deficiency was not mitigated by the Bar’s requirement of a disclaimer rather than a total prohibition, for “[e]ven partial restrictions on commercial speech must be supported by a showing of some identifiable harm.”<sup>371</sup> Having failed to meet its burden of “producing concrete evidence” that Mason’s advertisement threatened to mislead the public, the Bar could not justify imposing an “unduly burdensome disclosure requirement[] [that] offend[s] the First Amendment.”<sup>372</sup>

The *Mason* court did not call into question the facial validity of the Florida Bar’s rule or of prohibitions on describing the quality of legal services.<sup>373</sup> Nevertheless, its logic concerning the burden of showing harm from advertising that the state seeks to suppress raises doubts about broad bans on lawyers’ subjective claims about their services. The court itself acknowledged that a bright line between objective and subjective statements cannot serve as a categorical touchstone for the protection of lawyer advertising. Apparently alluding to Martindale-Hubbell’s reliance on opinions expressed by confidential sources,<sup>374</sup> the court addressed the Bar’s contention that its required disclaimer advanced an interest in encouraging attorney rating services to use objective criteria.<sup>375</sup> Absent explanation or

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368. *Id.* at 954 (stating that the rule forbade lawyers to make “statements that [were] merely self-laudatory or statements describing or characterizing the quality of the lawyer’s services in advertisements and written communication”).

369. *Id.*

370. *Id.* at 957.

371. *Id.* at 958.

372. *Id.* (quoting *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation, Bd. of Accountancy*, 512 U.S. 136, 146 (1994) (internal quotation marks and citation omitted)).

373. *See id.* at 959.

374. *See id.* at 954.

375. *Id.* at 956.

evidence from the Bar, the court found this interest insubstantial because it “fail[ed] to see the value in the distinction between objective and subjective criteria” in rating services.<sup>376</sup> Though confined to this context, the court’s skepticism toward that distinction can be extended to the larger resistance to lawyers’ subjective characterizations of their service. The thrust of commercial speech doctrine suggests that it no longer suffices to base the position that such claims are inherently misleading on intuition and common sense. The state must prove it.

#### *4. Persistent belief in the singularity of lawyers*

Ultimately, of course, the entire edifice of special restrictions on lawyer advertising rests on the premise that offers of legal services pose special hazards to an unwary public. The *Bates* Court’s dicta on the potentially misleading nature of claims as to the quality of services<sup>377</sup> was rooted in the premise that “the public lacks sophistication concerning legal services.”<sup>378</sup> Whatever the force of that tentative logic as an original matter, it has been eroded by the Court’s own repeated rejection of official efforts to suspend the principles governing commercial speech in the realm of attorney advertising.<sup>379</sup>

At some point, the Court may confront the tension between the idea that First Amendment protection is confined to lawyers’ verifiable claims and the aggregate effect of Court refusals to treat lawyer advertising as a disfavored subclass of commercial speech. That confrontation could well come in the context of a challenge to the proscription of attorneys’ self-laudation or of subjective comparisons to other attorneys. Protecting such advertising when the state has not shown it to be misleading would align the Court’s doctrine with the trend of its holdings in this area and with its larger commercial speech jurisprudence. Conversely, treating lawyer advertising as a zone of stunted constitutional protection could prove an unsustainable enterprise. The practice of law is obviously a distinctive and honorable profession. Assigning the speech of its

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376. *Id.*

377. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 366 (1970); *see also* discussion *supra* Part IV.B.

378. *Bates*, 433 U.S. at 383.

379. *See supra* Part III.B.



practitioners to the same constitutional regime that governs the expression of others advances, rather than undermines, the profession's eminent status.<sup>380</sup>

#### V. CONCLUSION

In recent decades, the Supreme Court has struck down numerous restrictions on commercial speech that were not justified as needed responses to demonstrable harms. Attempts by the organized bar and its state allies to restrain lawyer advertising have not been exempt from the potent scrutiny of modern commercial speech doctrine. As a result, the Court has repeatedly struck down restraints on lawyers' expression grounded in unsupported assumptions about the ignorance or irrationality of the public. In the wake of these decisions, rules against subjective claims remain one of the last bastions of restrictions on attorneys' advertising. Categorical bans on self-laudation, comparisons with other lawyers, and other subjective claims, however, are increasingly hard to square with the Court's broader approach to commercial speech. Given the Court's reluctance to apply the overbreadth doctrine in this area, such prohibitions may be whittled away piecemeal rather than facially invalidated. Still, even this more limited development would advance the salutary notion that the profession charged with defending First Amendment principles also enjoys their protection.

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380. A template for this approach may be found in the Court's holding in *Republican Party of Minn. v. White*, 536 U.S. 765 (2002). There, the Court struck down on First Amendment grounds a Minnesota law prohibiting a candidate for judicial office from "announc[ing] his or her views on disputed legal or political issues." *Id.* at 770-74. The Court pointedly rejected the argument that "[j]udges are not politicians, and the First Amendment does not require that they be treated as politicians simply because they are chosen by popular vote." *Id.* at 821 (Ginsburg, J., dissenting). Rather, writing for the majority, Justice Scalia declared: "If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles." *Id.* at 788 (internal quotation marks and citation omitted). Similarly, the Court may conclude that a legal profession, operating in a manner like that of other commercial enterprises in a market economy, is governed by widely applicable First Amendment standards.