COMMERCIAL SPEECH DOCTRINE AND VIRGINIA'S 'THIRSTY THURSDAY' BAN

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INTRODUCTION

Happy hour. For many Americans there are no two words in the English language that promise a more enjoyable respite from the daily grind.[1] This claim is especially true in Virginia where, in 2014, a regulation went into effect banning alcohol-serving establishments from using any terms other than "Happy Hour" or "Drink Specials" to promote their time-dependent discounts on alcohol products.[2] For many, this regulation was an improvement over the previous ban on all advertising related to time-dependent discounts on the sale of alcoholic products at bars and restaurants.[3] Prior to the new regulation, Virginia bars could not advertise any type of "happy hour" outside of their own premises.[4] The only way consumers could find out when a bar's happy hour was, was by going there in person or through word of mouth.[5]

However, this newfound ability for bars and restaurants to promote their happy hours did not come without seemingly irrational limitations. For example, as the Virginia Alcohol Control Board ("ABC") states on its website, while bars and restaurants can now

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1 *See* Kate Krader, *Can Happy Hour Save America's Top Tier Restaurants?*, BLOOMBERG (Aug. 24, 2016), http://www.bloomberg.com/news/articles/2016-08-24/top-restaurants-debut-new-happy-hours-in-nyc-la-chicago-sf.

2 VIRGINIA DEP'T OF ALCOHOLIC BEVERAGE CONTROL, RESPONSIBILITY GUIDE FOR LICENSEES: LEARN VIRGINIA ABC BASICS 27, https://www.abc.virginia.gov/library/education/pdfs/licensee%20guide.pdf?la=en (last visited Dec. 23, 2016).

3 Kathleen Shaw, *Governor's Office Approves ABC Regulations Changes Restaurants May Soon Advertise*, VIRGINIA.GOV (Jan. 16, 2014), https://www.abc.virginia.gov/about/media-room/2014/governors-office-approves-abc-regulations-changes-restaurants-may-soon-advertise-happy-hour.

4 3 VA. ADMIN. CODE § 5-50-160 (2013) (providing that "No retail licensee shall . . . [a]dvertis[e] happy hour in the media or on the exterior of the licensed premises.").

5 *See* Shaw, *supra* note 3.

promote their discounts along with a timeframe, like "Happy Hour 4-7!," promotions such as "Thirsty Thursday: Beer specials from 4–8 p.m." are strictly off limits.[6] Furthermore, a bar or restaurant is still restricted from advertising or promoting its specials, including the specific discount, because bars and restaurants may not convey price information or specific drink specials.[7]

While it is not entirely clear why this regulation bans drink promotions like "Thirsty Thursday," it nevertheless poses serious First Amendment concerns. Over the past half century, the Supreme Court has refined its doctrine concerning commercial speech protections under the First Amendment.[8] In that time, the Court has laid out its four-factor *Central Hudson* test. Under the *Central Hudson* test, for a ban on commercial speech to survive constitutional muster under the First Amendment, four elements must be met.[9] First, the speech at issue must concern lawful activity and must not be misleading.[10] Second, the asserted government interest must be substantial.[11] Third, the regulation must directly advance the governmental interest asserted.[12] Finally, the regulation must not be more extensive than is necessary to serve that interest.[13]

If this test seems somewhat vague and open to subjective interpretation, do not worry. You are not alone; many judges think so too.[14] Nevertheless, in the short time it has existed, the Supreme Court's doctrine on commercial speech has undeniably influenced the evolving relationship between both state and federal regulation and the First Amendment.[15]

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6 *Happy Hour Advertising*, VIRGINIA.GOV, https://www.abc.virginia.gov/licenses/retail-resources/happy-hour (last visited Oct. 23, 2016).

7 *Id*.

8 *See infra* Part I.

9 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).

10 *Id*.

11 *Id*.

12 *Id*.

13 *Id*.

14 *See* Daniel E. Troy, *Taking Commercial Speech Seriously*, 2 FREE SPEECH & ELECTION L. PRAC. GROUP NEWSL. 1 (1998) (arguing that *Central Hudson* balancing results in courts being more likely to uphold politically popular advertisement restrictions), http://www.fed-soc.org/publications/detail/taking-commercial-speech-seriously.

15 *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 VA. L. REV. 627, 631 (1990) (noting that despite the large quantity of commercial speech case litigation that have emerged since the *Central Hudson* decision, much uncertainty still exists when applying the four-factor test to any newly occurring set of facts).

This Comment will trace the development of the commercial speech doctrine for the purposes of making the argument that Virginia's recently adopted happy hour advertising restrictions violate the First Amendment. Part I of this Comment will trace the origin of commercial speech protection as afforded under the First Amendment and focus on Virginia's happy hour restriction and the potential First Amendment issues it entails. Part II of this Comment will attempt to apply modern commercial speech analysis as developed under *Central Hudson* to the Virginia happy hour statute to assess its constitutionality. Part III of this Comment will then address the seemingly paradoxical consequences of this analysis by examining some of the issues posed by the Virginia statute, compared to the previous blanket restriction on all happy hour advertising, and will propose a solution in commercial speech analysis that would keep outcomes more consistent with the fundamental theories underlying commercial speech protection.

I. BACKGROUND

A. *Virginia ABC Happy Hour Advertisement Restrictions*

Section 4.1-111(B)(15) of the Code of Virginia empowers the Virginia ABC to "[p]rescribe the terms for any 'happy hour' conducted by on-premises licensees. Such regulations shall . . . prohibit the advertising of any pricing related to such happy hour."[16] Thus, while the ABC may make modifications to its regulations governing advertising and happy hours, its statutory grant of authority precludes it from allowing establishments to broadcast price information.[17] In January 2014, Governor Bob McDonnell approved regulation changes in Virginia's happy hour advertising, amending the happy hour advertising restrictions.[18] Previously, the only happy hour promotions permitted were required to be on the vendor's premises.[19] The change in regulation allowed Virginia bars and restaurants to make use of their

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16 VA. CODE ANN. § 4.1-111(B)(15) (2015).

17 *See id.*

18 Shaw, *supra* note 3.

19 3 VA. ADMIN. CODE § 5-50-160 (2016) (providing that "No retail licensee shall. . .[a]dvertis[e] happy hour in the media or on the exterior of the licensed premises.").

social media accounts and websites to inform consumers as to what time their happy hours would be on any given day.[20]

However, the new regulation hardly opened the door to free-flowing information in the marketplace, as it came with several peculiar restrictions. First, alcohol serving establishments must refer to any discount promotion by using the phrases "Happy Hour" or "Drink Specials."[21] Second, alcohol serving establishments could not mention any specific price promotions or drink types related to those discounts.[22] This second requirement was later amended in mid-2016 to allow happy hour advertisements to include "a list of the alcoholic beverage products featured during a happy hour as well as the time period within which alcoholic beverages are being sold at reduced prices in any otherwise lawful advertisement."[23] Therefore, while alcohol serving establishments may list the items discounted in their advertisements, they are still prohibited from advertising the discounted prices.[24] The penalty for a licensee illegally advertising happy hours consists of a $500 fine or a seven-day suspension for a first-time offense.[25]

At least part of the justification for this prohibition on advertising "happy hour" pricing may have originated with the bar and restaurant industry in Virginia.[26] While the 2014 amendment was going through approval, the Chief Operating Officer of the Virginia ABC justified the decision to keep the prohibition on pricing information by noting that "The message that we got was that most restaurants don't want to be able to advertise happy hour specials that they offer because they don't want to get into a price war over who's got the best happy hour specials."[27]

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[20] *See id.*

[21] *Id.* (providing that licensees may only advertise alcohol discounts by using "the term 'Happy Hour' or 'Drink Specials' and the time period within which alcoholic beverages are being sold at reduced prices in any otherwise lawful advertisement.").

[22] *Id*.

[23] *Id*.

[24] *Id*.

[25] 3 VA. ADMIN. CODE § 5-70-210 (2016).

[26] Nathan Crushing, *Virginia Restaurants Can Now Advertise Happy Hours*, RVANEWS (Nov. 4, 2014), https://rvanews.com/news/regulations-on-happy-hour-advertising-set-to-change/104713.

[27] *Id*.

B. *Commercial Speech Protections in the Early and Mid-Twentieth Century*

For much of U.S. history, courts presumed the First Amendment to be inapplicable to commercial speech, and specifically to questions of advertising restrictions.[28] In *Schneider v. State*, the Supreme Court found that several local ordinances that banned the distribution of handbills to prevent litter build up violated the First Amendment, because they placed heavy restrictions on the distribution of information.[29] However, the Court also stressed that its ruling was not meant to apply to commercial bills, implying that bans on the distribution of commercial bills would not infringe the First Amendment.[30]

Nevertheless, distinguishing between what constituted a for-profit advertisement as opposed to protected speech was never a simple endeavor.[31] Thus, in *Valentine v. Chrestensen*, a businessman and historic submarine owner distributed handbills containing an image of the submarine and offering visitors admission to tour the vessel for a fee listed on the bill.[32] While the businessman distributed the handbills, the New York City Police Commissioner told him that a local sanitary code forbade distribution of "commercial and business advertising matter,"[33] but he could distribute bills devoted solely to "information or a public protest."[34] In an attempt to avoid the sanitary code, the businessman responded by making modifications to the handbill, removing the price figure and placing a statement on the back calling for a protest of the City Dock Department.[35] The

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[28] Valentine v. Chrestensen, 316 U.S. 52, 54-55 (1942) (holding that "the Constitution imposes no such restraint on government as respects purely commercial advertising").

[29] Schneider v. State, 308 U.S. 147, 162 (1939) ("We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it.").

[30] *Id*. at 165 (clarifying that "We are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires.").

[31] *Compare Chrestensen*, 316 U.S. at 53 (finding that a handbill simultaneously advertising a submarine tour while advocating for protest of the City Department was commercial speech), *and* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 387 (1973) (holding that a ban on putting employment advertisements in gender specific sections of a newspaper was a regulation of commercial speech), *with* Bigelow v. Virginia, 421 U.S. 809, 822-25 (1975) (finding that a ban on out of state abortion advertisements was not commercial speech and was therefore protected under the first amendment).

[32] *Chrestensen*, 316 U.S. at 53.

[33] *Id*.

[34] *Id*.

[35] *Id*.

Supreme Court affirmed the notion that commercial speech was outside the First Amendment's scope though it also refused to make delineations between what distinguished commercial speech from informative speech.[36] Instead, the Court merely held that the businessman was beyond constitutional protection precisely because he crafted his handbill with the "intent, and for the purpose" of avoiding the restriction on commercial advertising.[37]

The Supreme Court explored the question of what attributes a particular piece of speech must have to be classified as unprotected commercial versus protected informative speech in the landmark case *New York Times v. Sullivan*.[38] This case involved an official suing the *New York Times* for libel after the paper printed a full-page, paid advertisement that alleged a series of acts of oppression against nonviolent civil rights activists.[39] At the end of the advertisement was an appeal for funds for "support of the student movement, 'the struggle for the right-to-vote,' and the legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery."[40] The Court was faced with the question of whether paid-for advertisements in newspapers received any of the First Amendment protections which political speech normally receives.[41] The Court distinguished the case from *Chrestensen*, noting that the content of the ad was not purely commercial in that it was spreading political views and not proposing a typical business transaction.[42] It then held that just because the message was a paid advertisement, this did not mean that it was unprotected commercial speech for purposes of First Amendment analysis.[43]

The difference in approach between *Chrestensen* and *New York Times* forced courts to make content determinations about what types

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[36] *Id*. at 54-55 (holding that "the Constitution imposes no such restraint on government as respects purely commercial advertising").

[37] *Id*. at 55.

[38] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[39] *Id*. at 256.

[40] *Id*. at 257.

[41] *Id*. at 264.

[42] *Id*. at 266 (noting that the advertisement "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.").

[43] *Id*. (holding "that if the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement").

of advertisements were purely commercial versus more informative or editorial.[44] Thus, in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,* the Supreme Court found a city ordinance that banned newspapers from placing employment advertisements in gender-specific sections of the newspaper was commercial, and therefore received no First Amendment protections.[45]

In *Bigelow v. Virginia*, the appellant was convicted of violating a Virginia statute that prohibited encouraging the procurement of abortion through an advertisement or other means.[46] The appellant's ad read in part, "Abortions are now legal in New York. There are no residency requirements. FOR IMMEDIATE PLACEMENT IN ACCREDITED HOSPITALS AND CLINICS AT LOW COST Contact WOMEN'S PAVILION."[47] In finding that the law did infringe on the advertiser's First Amendment protections, the Supreme Court further reduced the scope of *Chrestensen*, by narrowing the bounds of speech considered to be "purely commercial."[48] The Court held that this advertisement was not purely commercial because, while it did propose a commercial transaction, it also "contained factual material of clear public interest."[49] Particularly noteworthy to the Court was that the advertisement informed its readers about the laws of another state and how they pertained to constitutional interests, such as the recently found right to abortion.[50] Nevertheless, clearly in the Court's view, the advertisement's commercial message alone seemed insufficient to merit protection.

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44 *Compare* Valentine v. Chrestensen, 316 U.S. 52, 53 (1942) (finding that a handbill simultaneously advertising a submarine tour while advocating for protest of the City Department was purely commercial), *with* New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (finding that an advertisement seeking donations for a political cause was not purely commercial).

45 Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (holding that the advertisements were more like those in *Chrestensen* than *Sullivan* because they did not argue that certain positions should be filled by one gender or the other but instead were merely "proposing employment").

46 Bigelow v. Virginia, 421 U.S. 809, 812-13 (1975).

47 *Id*. at 812.

48 *Id*. at 820-21.

49 *Id*. at 822 (internal quotation marks omitted).

50 *Id*. (noting that even the readers who might have no intention of contacting the pavilion might nevertheless stand to benefit from the advertisement by receiving knowledge of the existence of a place relevant to the then current political and legal debate over abortion. Therefore, in the Court's view, "appellant's First Amendment interests coincided with the constitutional interests of the general public.").

If *New York Times* cracked the door open for more inclusive commercial speech protection and *Bigelow* pushed it open, then *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, which was decided just a year after *Bigelow*, set fire to the door. In *Virginia Pharmacy*, the Supreme Court laid out the foundational reasoning of our modern commercial speech doctrine when it found that a Virginia ban preventing pharmacists from advertising the prices of their medicines fell within the purview of the First Amendment.[51] In doing so, the Court fully admitted that the regulation only prohibited commercial speech, and it was not therefore justified on similar editorial grounds as in *New York Times* or *Bigelow*.[52] The Court justified applying the First Amendment to purely commercial advertising by noting that:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decision making in a democracy, we could not say that the free flow of information does not serve that goal.[53]

Essentially, the Court's reasoning was that because commercial advertising containing pricing information actually carries with it information about the allocation of resources in a free market system, and because knowledge of this allocation of resources is essential to a

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[51] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (holding that "Virginia is free to require whatever professional standards it wishes of its pharmacists. . . [b]ut it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering.").

[52] *Id*. at 762-63.

[53] *Id*. at 765.

well informed electorate, commercial advertising served a public interest.[54] The Court also enumerated a set of criteria related to the ban that kept it under First Amendment protection.[55] In doing so, the Court laid the groundwork for the limitations on future commercial speech analysis.[56] Mainly, the Court found it particularly relevant that the ban did not contain any false information, promote illegal activity, and it was not a blanket restriction on all pricing information and so it was not narrowly tailored to any certain times, places, or manners.[57]

C. *Advent of the* Central Hudson *Test*

Central Hudson Gas & Electric Corp. v. Public Service Commission refined the principles laid out in *Virginia Pharmacy* by establishing a four-part test[58] that is still used today.[59] In *Central Hudson*, the Supreme Court analyzed whether a New York Public Service Commission regulation that completely banned an electric utility company from running ads promoting increased electricity consumption violated the First Amendment.[60] More specifically, the ban at issue in *Central Hudson* allowed advertisements advising consumers to shift their energy consumption to lower demand times, but prohibited advertisements directed at increasing overall electricity demand.[61]

The first factor of the test asks whether the banned speech concerns lawful activity and is not false or misleading.[62] The second factor asks whether the interest in the ban being asserted is substantial.[63] In this case, the government put forth two interests, both of which the Court found substantial: (1) the state's interest in energy conservation;

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54 *See id*.

55 *See id*.

56 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561-62 (1980).

57 Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

58 *See Cent. Hudson Gas & Elec. Corp*, 447 U.S. at 564-66; *Va. State Bd. Of Pharmacy*, 425 U.S. at 771-73.

59 *See, e.g.*, Sorrell v. IMS Health Inc., 564 U.S. 522, 570-72 (2011); Kiser v. Kamdar, 831 F.3d 784, 788-90 (6th Cir. 2016) (applying the four part *Central Hudson* test to a state dental board's regulation on what practitioners may call themselves); Crazy Ely Western Village, LLC v. City of Las Vegas, 618 F. App'x. 904 (9th Cir. 2015) (applying the *Central Hudson* test to liquor store price ordinance).

60 *Cent. Hudson Gas & Elec. Corp*, 447 U.S. at 559-62.

61 *Id*.

62 *Id*. at 564.

63 *Id*.

and (2) fair and efficient energy rates.[64] The third factor focuses on whether the restriction directly advances the state interest involved.[65] The justification for this factor drew precedent from *Virginia Pharmacy*, where the Court rejected the state government's assertion that the ban on pharmacists' advertising prices was necessary to maintain professionalism among competing pharmacists.[66] In *Central Hudson* however, the Court found that there was a direct connection between advertising and demand for electricity.[67] It stated, "Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales."[68] Finally, the fourth factor requires the government to show that its interest could not be served as well through a more limited restriction on commercial speech.[69] The Court found that the government had not met its burden for such a showing because the ban reached all advertising of electricity consumption regardless of its impact on total energy use.[70] The Court found specifically relevant that the ban prevented Central Hudson from promoting electric services that would actually decrease overall energy use.[71] Furthermore, the Court found that the government had not shown that a narrower restriction, such as one that would "require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future,"[72] would be ineffective in furthering the government's interest in energy conservation.

Throughout the 1980s, the Supreme Court continued to refine its *Central Hudson* test. For example, in *Bolger v. Youngs Drug Products Corp*., the Court found that a federal statute that prohibited unsolicited mailing of contraceptive advertisements was an unconstitutional

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64 *Id*. at 568-69.

65 *Id*. at 564. (holding that "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.").

66 Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 768-70 (1976) (finding that "The strength of these proffered justifications is greatly undermined by the fact that high professional standards, to a substantial extent, are guaranteed by the close regulation to which pharmacists in Virginia are subject.").

67 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 569 (1980).

68 *Id*.

69 *Id*. at 564.

70 *Id*. at 570.

71 *Id*. (finding that "To the extent that the Commission's order suppresses speech that in no way impairs the State's interest in energy conservation, the Commission's order violates the First and Fourteenth Amendments and must be invalidated.").

72 *Id*.

restriction on commercial speech.[73] In that case, the government put forth two interests advanced by the statute, neither of which Congress mentioned as purposes of the ban when it passed the statute 100 years earlier.[74] Nevertheless, the Court allowed the government to justify the ban on these new purported interests.[75] First, the government argued that it had a substantial interest in shielding "recipients of mail from materials they are likely to find offensive."[76] The Court found this interest was not substantial because it previously held that absent obscenity, offensiveness alone could not justify suppression of otherwise lawfully protected speech.[77] The Court however accepted the government's second proposed substantial interest in aiding "parents' effort to control the manner in which their children become informed about sensitive and important subjects such as birth control."[78] However, it found the ban did not meet the third and fourth factors of the test because parents already have a large amount of control over what mail their children see and the overly inclusive ban only marginally furthered the government's interest.[79]

In *Board of Trustees v. Fox*, the Supreme Court clarified that the fourth factor of the *Central Hudson* test did not demand government restrictions on commercial speech to be automatically invalid if they went beyond the least restrictive means to reach the desired end.[80] In its holding, the Court adopted an intermediate level of scrutiny that was less demanding than the least restrictive means standard but greater than a rational basis standard; the intermediate level of scrutiny required that the means of the ban be "narrowly tailored" to promote the government interest.[81] The Court applied that scrutiny standard four years later. In *Cincinnati v. Discovery Network*, the Supreme Court found that a Cincinnati ordinance prohibiting distribution of commercial handbills on public grounds to address the city's asserted substantial interest in promoting safety and aesthetics was

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73 Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 75 (1983).

74 *Id*. at 70-73.

75 *Id*. at 71 (holding that "the insufficiency of the original motivation does not diminish other interests that the restriction may now serve").

76 *Id*.

77 *Id*.

78 *Id*.

79 Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 73 (1983).

80 Bd. of Trs. of the State Univ. v. Fox, 492 U.S. 469, 477 (1989).

81 *Id*. at 480 (holding that this intermediate level of scrutiny merely looks for a "'fit' between the legislature's ends and the means chosen to accomplish those ends").

not narrowly tailored to promote that interest because newsstands containing only commercial material were a very small percentage of the total newsstands.[82] The Court found particularly relevant the city's arbitrary distinction between commercial and noncommercial speech news racks, as it did not affect a news rack's propensity to be any more of a public eye sore or safety hazard.[83]

D. Central Hudson *Applied to Alcohol Advertisements*

In *Dunagin v. City of Oxford*, decided shortly after *Central Hudson*, the Fifth Circuit faced a state alcohol regulation similar to that currently promulgated by the Virginia ABC.[84] The statute at issue severely limited nearly all in state alcohol advertising, including inside retail establishments.[85] Further, the regulation limited the specific phrases retail establishments could use for the limited advertising they were allowed to display.[86] The regulation banned the use of the phrase "happy hour" while permitting the phrase "lounge."[87] In finding that the ban met the third prong of *Central Hudson*'s analysis, the Fifth Circuit relied almost exclusively on a common sense notion that limiting alcohol advertising would directly advance a State's legitimate interest in promoting the health of its citizens.[88] In doing so, the Fifth Circuit reasoned that the liquor industry would not spend so much money on advertising if it did not increase overall consumption.[89] The

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82 Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417-18 (1993).

83 *Id*. at 424 (holding that "The distinction bears no relationship whatsoever to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city's admittedly legitimate interests.").

84 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980); Dunagin v. City of Oxford, 718 F.2d 738, 740 (5th Cir. 1983).

85 *Dunagin*, 718 F.2d at 740 n.3 (providing that "No person, firm or corporation shall originate advertisement in this State, dealing with alcoholic beverages by any means whatsoever, including but not limited to newspapers, radio, television, circular, dodger, word of mouth, signs, billboards, displays or any other advertising media, except" for several discrete exceptions (quoting MISS. CODE ANN. § 67-1-37(e))).

86 *Id*.

87 *Id*. (providing that "In other advertising media, an on-premises permittee may use the word 'lounge', but no other words of a similar nature, including, specifically, but not limited to 'cocktails', 'bar', and 'happy hour.' The word 'lounge' must be subordinated by restaurants to advertising placed for the other facilities offered at the place of business." (quoting MISS. CODE ANN. § 67-1-37(e))).

88 *Id*. at 751.

89 *Id*. at 750.

Supreme Court used a similar rationale in *Central Hudson,*[90] although in that case, Central Hudson was a monopolistic utility so its advertising did not necessarily serve the same competitive functions as that of alcohol advertisements.[91]

Likewise, the Fifth Circuit relied on a fairly weak interpretation of *Central Hudson*'s fourth prong, finding that the restriction was not overly extensive because the advertising was harmful, in and of itself.[92] Ultimately, the Court's application of the *Central Hudson* test was largely influenced by its view that, because states have a constitutional power to ban the sale of alcoholic products entirely under the Twenty-first Amendment, this power naturally influences states' power to regulate the advertising of alcoholic products.[93]

In *Rubin v. Coors Brewing Co.*, the Supreme Court considered the constitutionality of a federal regulation that prohibited beer manufacturers from displaying alcohol content percentages on the labels of their products.[94] The government took the position that the ban was necessary to prevent beer manufacturers from competing over the potency of their products and getting into strength wars.[95] While the Court granted the logic of the government's contention, it found the law to be irrational in its execution[96] because it prohibited alcohol content on labeling except where the state required labeling.[97] Further, the ban prohibited disclosing alcohol content only in states that also prohibited alcohol content in advertising.[98] Moreover, no similar

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90 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 569 (1980) (noting that "There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.").

91 *See id.*; Dunagin v. City of Oxford, 718 F.2d 738, 749-51 (5th Cir. 1983).

92 *Dunagin*, 718 F.2d at 751 (finding that the state believed the advertising represented a hazard to the health, safety, and welfare of its citizens because it would encourage excess consumption).

93 *See* U.S. CONST. amend. XXI, § 2 ("The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."); *Dunagin*, 718 F.2d at 750.

94 Rubin v. Coors Brewing Co., 514 U.S. 476, 478 (1995).

95 *Id*. at 479-80.

96 *Id*. at 489 (holding that ". . .the Government's interest in combating strength wars remains a valid goal. But the irrationality of this unique and puzzling regulatory framework ensures that the labeling ban will fail to achieve that end.").

97 *Id*. at 488.

98 *Id*.

ban existed for wine and liquor products, which tend to have higher potency percentages than beer.[99]

In *44 Liquormart, Inc. v. Rhode Island*, the Supreme Court found that a Rhode Island law banning all advertising of liquor prices other than inside liquor stores violated the First Amendment.[100] The Rhode Island government argued that the ban furthered the state's interest in promoting temperance by mitigating competition among distributors and thereby holding prices at an artificially higher rate than they would otherwise be; in turn, Rhode Island argued, this would lessen demand.[101] The Court found this argument unconvincing, as it was unlikely such a ban could significantly reduce market wide consumption.[102] Rhode Island also put forward an argument that it should be granted some deference because alcoholic beverages are "vice products."[103] In a prior opinion upholding a gambling advertisement restriction, the Court took specific note that gambling was a "vice" activity.[104] Thus, labeling gambling a "vice" activity suggested to some that the Court might be willing to provide a greater deference to advertising restrictions relating to other similar vices.[105] Nevertheless, the Court refused to carve out any sort of separate analysis or deference to the regulations of commercial speech dealing with so called "vice" activity.[106] Furthermore, Rhode Island also pursued the argument used by the Fifth Circuit in *Dunagin*, that its power to limit the sale of alcohol under the Twenty-first Amendment should afford the state deference in First Amendment analysis.[107] Similarly, a majority of the Court also rejected this argument, holding that "the Twenty-first Amendment does not qualify the constitutional prohibition

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[99] *Id*. at 489.

[100] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 (1996).

[101] *See id*. at 489, 505.

[102] *Id*. at 506 (finding that although there might have been some influence over the purchases made by temperate drinkers of modest means, it was unlikely to have any impact on a true alcoholic's purchasing decisions).

[103] *Id*. at 513.

[104] *See* United States v. Edge Broadcasting Co., 509 U.S. 418, 426 (1993).

[105] *See, e.g.*, Jennifer Costello, *The FDA's Struggle to Regulate Tobacco*, 49 ADMIN. L. REV. 671, 677 (1997).

[106] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 514 (1996) (holding that "the scope of any 'vice' exception to the protection afforded by the First Amendment would be difficult, if not impossible, to define. Almost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to 'vice activity.'").

[107] *Id*. at 515; Dunagin v. City of Oxford, 718 F.2d 738, 750 (5th Cir. 1983).

against laws abridging the freedom of speech embodied in the First Amendment."[108]

The Court was nevertheless divided on the question of whether blanket price bans, like the one at issue, should be analyzed under a stricter framework for the fourth prong of the *Central Hudson* test.[109] In the principle opinion of the case, three justices joined Justice Stevens in holding that where the states' substantial interest is unrelated to consumer protection or the fair bargaining process, a stricter review similar to noncommercial speech cases should be applied.[110] Three of the justices in the case disagreed however and were of the view that the *Central Hudson* test should be applied in an unmodified form.[111]

Disagreement among the concurring justices seemed to be more rooted in procedural concerns, however, rather than principled ones.[112] In writing her concurring opinion, Justice O'Connor noted the Court should not adopt any stricter formulation of *Central Hudson* because she believed the price ban in this particular case did not meet even the level of intermediate scrutiny normally applied using the *Central Hudson* test.[113] Justice Thomas, writing in concurrence, stated his view that a proposed interest which involves keeping users of a product blind to manipulate market behavior should be *per se* illegitimate, and that *Central Hudson* should not be to applied to such

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[108] *44 Liquormart, Inc.*, 517 U.S. at 516.

[109] *Id*. at 518 (Scalia, J., concurring); *id*. at 518-28 (Thomas, J., concurring); *id*. at 528-33 (O'Connor, J., concurring).

[110] *Id*. at 501. In *Liquormart*, the Court held

> The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them . . . . When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, non-misleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.

Id.

[111] *See id*. at 488-89.

[112] *See id*. at 517-18 (Scalia, J., concurring); *id*. at 518-28 (Thomas, J., concurring); *id*. at 528-33 (O'Connor, J., concurring).

[113] *See id*. at 532 (O'Connor, J., concurring) ("Because Rhode Island's regulation fails even the less stringent standard set out in Central Hudson, nothing here requires adoption of a new analysis for the evaluation of commercial speech regulation.").

circumstances at all.[114] In so finding, Justice Thomas noted the paradoxical consequences of the plurality's application of the *Central Hudson* test which "seem[ed] to imply that if the State had been more successful at keeping consumers ignorant and thereby decreasing their consumption, then the restriction might have been upheld."[115]

Following the *44 Liquormart* decision, in 2001 the Tenth Circuit faced the question of whether a prohibition on all restaurant liquor advertisements, except on menus within the establishment, violated the First Amendment protections for commercial speech.[116] The Tenth Circuit in that case rejected the state asserted substantial interest in "protecting nondrinkers from involvement with alcohol,"[117] using a similar rationale as that used in *Bolger*.[118] Protecting nondrinkers from advertisements they might find offensive was not a substantial government interest.[119] The Court did however find that Utah had a substantial government interest in promoting temperance among its citizens as well as operating a public business (the sale of liquor in Utah is operated as a public business controlled by the state) under state regulatory authority.[120]

The petitioners in that case argued that, under *Rubin*, the ban could not survive the third prong of *Central Hudson* because the advertising restrictions applied to only liquor and no other alcoholic beverages, such as beer.[121] The Tenth Circuit adopted this argument, noting Utah's own evidence on the dangers associated with increased alcohol consumption made no distinction between alcohol and beer.[122] The Tenth Circuit also rejected the argument that the state's interest in operating the public liquor business was directly advanced by the

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114 *See id*. at 523 (Thomas, J., concurring) (noting that "I do not believe that [the *Central Hudson* balancing] test should be applied to a restriction of 'commercial' speech, at least when, as here, the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark.").

115 *Id*.

116 Utah Licensed Beverage Ass'n v. Leavitt, 256 F.3d 1061, 1067-68 (10th Cir. 2001).

117 *Id*. at 1070.

118 Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 71-72 (1983).

119 *Leavitt*, 256 F.3d at 1070.

120 *Id*.

121 *Id*. at 1071.

122 *Id*. at 1073-74. The Tenth Circuit concluded the state lacked evidence distinguishing the adverse effects of beer and liquor advertisements:

> We note that while that evidence repeatedly warns of the dangers of alcohol, and suggests that these dangers may be aggravated by alcohol advertising, it makes virtually no distinction among different types of alcohol. In fact, while Utah's documents use the word 'alcohol' dozens of times . . . they refer to only two studies regarding a particular type of

ad-ban because the court found that "no matter how much a liquor licensee chose to advertise, it would still be forced to purchase its products from the state, and sell them in the manner prescribed by the state."[123]

Further, the Tenth Circuit also rejected Utah's argument that its Twenty-first Amendment authority could justify the ban under the third prong, relying in large measure on the Supreme Court's holding in *44 Liquormart*.[124] Even still, the Tenth Circuit found that if the restrictions survived the third prong, they would not survive the fourth prong because Utah did not make a showing that the same ends could not be achieved through other less speech-restrictive means.[125]

E. Sorrell*'s Effect on* Central Hudson*'s Application*

In 2011, the Supreme Court decided that strict scrutiny review was appropriate for content-based restrictions on commercial speech, at least absent some neutral justification by the state that the regulation was aimed to prevent certain consumer harms such as fraud.[126] In that case, *Sorrell v. IMS Health Inc.*, the ban at issue was not a typical advertisement restraint; rather, it involved a Vermont ban on the sale of information regarding a doctor's prescription practices without the doctor's consent.[127] The Court justified applying strict scrutiny because the law's content and speaker-based restrictions made it permissible for the prescribing information to be purchased from pharmacies for academic research but not for marketing.[128] In doing so, the Court held that restrictions that are content-based and viewpoint-discriminatory are entitled to stricter levels of scrutiny in commercial

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alcohol. Those studies point to the adverse effects of beer advertising. . . . If the words 'liquor' or 'wine' appear anywhere in Utah's evidence, this court is unable to find them.

Id.

123 *Id*. at 1074.

124 *Id*. at 1074-75.

125 Utah Licensed Beverage Ass'n v. Leavitt, 256 F.3d 1061, 1075 (10th Cir. 2001).

126 Sorrell v. IMS Health Inc., 564 U.S. 552, 579 (2011) (noting that non-content neutral advertising restrictions preventing fraud would not be subjected to strict scrutiny precisely because "the government's legitimate interest in protecting consumers from commercial harms explains why commercial speech can be subject to greater governmental regulation than non-commercial speech.").

127 *Id*. at 558-59.

128 *Id*. at 563-64.

speech cases.[129] In essence, it was not necessarily the overbreadth of the restriction with which the Court took issue, but rather its unequal application among receivers of the information.[130]

The Second and Ninth Circuits have since adopted this interpretation of *Sorrell* requiring a presumption of invalidity and heightened scrutiny for bans involving content and speaker based restrictions on commercial speech.[131] The Fourth Circuit, on the other hand, has held that *Sorrell* did not establish any new framework for analyzing commercial speech questions.[132]

II. ANALYSIS

Often it may be easier politically to regulate the advertising of an item rather than the actual use of the item itself. Nevertheless, over the last thirty years, the First Amendment protections the Supreme Court has afforded to commercial speech have made the process of regulating use of an item by regulating its advertising for that item, undeniably more difficult.[133] In order for the restrictions to survive analysis under the *Central Hudson* doctrine, a law must seek to curb false or misleading advertising or the state must have a substantial interest that is directly advanced by the restrictions, in a manner

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[129] *Id*. at 571 (finding that "[I]n the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory.").

[130] *Id*. at 580 (holding that "[t]he State has burdened a form of protected expression that it found too persuasive. At the same time, the State has left unburdened those speakers whose messages are in accord with its own views. This the State cannot do.").

[131] *See* United States v. Caronia, 703 F.3d 149, 163-64 (2d Cir. 2012) (finding that *Sorrell* adopted a two-step inquiry whereby it first asked whether the restrictions were content or speaker based and then either applied a heightened scrutiny or the traditional *Central Hudson* analysis); Retail Digital Network, LLC v. Applesmith, 810 F.3d 638, 648 (9th Cir. 2016) (holding that "*Sorrell* modified the *Central Hudson* test for laws burdening commercial speech. Under *Sorrell*, courts must first determine whether a challenged law burdening non-misleading commercial speech about legal goods or services is content- or speaker-based. If so, heightened judicial scrutiny is required."), *reh'g granted en banc sub nom.* Retail Digital Network, LLC v. Gorsuch, No. 13-56069, 2016 WL 6790810 (9th Cir. Nov. 16, 2016); Hunter B. Thomson, *Whither* Central Hudson*? Commercial Speech in the Wake of* Sorrell v. IMS Health, 47 COLUM. J.L. & SOC. PROBS. 171, 193, 195 (2013) (finding that the Second and Ninth Circuits have interpreted *Sorrell* as effecting a substantive change in the law while most other circuits have found that *Sorrell* merely preserved the status quo).

[132] *See* Wag More Dogs, Ltd. Liab. Corp. v. Cozart, 680 F.3d 359, 374 n.4 (4th Cir. 2012) (finding that "the Supreme Court's decision in *Sorrell* did not signal the slightest retrenchment from its earlier content-neutrality jurisprudence."); Thomson, *supra* note 131, at 194.

[133] *See supra* Part I.D.

which is narrowly tailored to serve that interest with relatively minimal infringement on speech.[134]

Essentially, Virginia's new happy hour advertising rule consists of two main advertising restrictions.[135] First, it places a ban on advertising any discounted price information during a happy hour period.[136] Second, it places a ban on phrases that may be used to promote the happy hour, only allowing "happy hour" or "drink specials."[137]

A. Central Hudson*'s First and Second Prongs Applied*

Much of the analysis of the *Central Hudson* test relies on a state's asserted substantial interest.[138] As the Court held in *Bolger*, a state's asserted substantial interests need not be the actual reasons that prompted the bill.[139] So, the question then becomes whether the state is able to assert any interest that the narrowly-tailored legislation directly advances.[140] In the case of Virginia's new happy hour advertising restrictions, the Virginia government has different interests from which it could feasibly assert that it has derived the ban. The Virginia government could likely argue, as the Rhode Island government did in *44 Liquormart*, that it has a substantial interest in promoting temperance among its citizens.[141] The government could also argue it has an interest in preventing price wars amongst alcohol serving establishments, similar to the interest asserted in *Rubin*.[142] This asserted interest would be problematic however. For instance, even

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134 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980) (holding that "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.").

135 *See* 3 VA. ADMIN. CODE § 5-50-160(B)(8) (2016). Virginia's administrative code provides rules for Happy Hour:

> No retail licensee shall. . .[a]dvertis[e] happy hour anywhere other than within the interior of the licensed premises, except that a licensee may use the term "Happy Hour" or "Drink Specials," a list of the alcoholic beverage products featured during a happy hour as well as the time period within which alcoholic beverages are being sold at reduced prices in any otherwise lawful advertisement.

Id.

136 *Id*. at § 5-50-160(B)(8).

137 *Id*.

138 *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564.

139 Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 71 (1983) (holding that "the insufficiency of the original motivation does not diminish other interests that the restriction may now serve.").

140 *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564.

141 *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 515-16 (1996).

142 *See, e.g.*, Rubin v. Coors Brewing Co., 514 U.S. 476, 479 (1995).

by allowing establishments to advertise their discounts, the 'race to the bottom' effect would not be as pronounced as it was in *Rubin* because the pricing relates to discount periods as opposed to alcohol content, which is a fixed attribute.[143] Virginia would also be unable to claim any sort of deference as a result of the Twenty-first Amendment because, as the Supreme Court noted in *44 Liquormart*, "[T]he Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment."[144]

After the state establishes its asserted interests, the court must consider whether the restrictions should receive a *Sorrell* presumption of unconstitutionality, which would subject them to a heightened scrutiny analysis.[145] For this regulation however, it would require some logical gymnastics to find that the ban on the happy hour advertisements implores content and speaker based restrictions similar to that used in *Sorrell*, though such a conclusion is not entirely inconceivable.[146]

First, the ban does raise concerns about content neutrality as it allows promotions using only certain permissible phrases such as "Happy Hour" or "Drink Specials."[147] In determining whether a speech regulation is content neutral, the principle question asked is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[148] Thus, an argument could be made that, in requiring certain terms and thereby banning other phrases, Virginia was expressing its disagreement with whatever messages it felt those phrases express.[149] However, such an argument stands on shaky ground because the state actually does have a substantial interest in promoting temperance amongst its citizens.[150]

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143 *See* 3 VA. ADMIN. CODE § 5-50-160(B)(8) (2016); *Rubin*, 514 U.S. at 479.

144 U.S. CONST. amend. XXI; *44 Liquormart*, 517 U.S. at 516.

145 *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 577 (2011).

146 *See* § 5-50-160(B)(8); *Sorrell*, 564 U.S. at 577-78.

147 § 5-50-160(B)(8).

148 Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989); *see* Andrew J. Wolf, *Detailing Commercial Speech: What Pharmaceutical Marketing Reveals About Bans on Commercial Speech*, 21 WM. & MARY BILL RTS. J. 1291, 1293 ("In determining whether to apply this form of intermediate scrutiny, the Court evaluates whether the government's purpose is substantially related to the content of the speech.").

149 *See* § 5-50-160(B)(8).

150 *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 504 (1996) (accepting Rhode Island's contention that the state naturally has a substantial interest in reducing alcohol consumption).

Thus, Virginia may argue that the use of other phrases such as "Thirsty Thursdays," would promote excessive alcohol consumption amongst its citizens, which it has a substantial interest in curtailing.[151]

Second, an argument could be made that the law is not speaker neutral.[152] For example, while the restriction bans retail establishments from promoting the pricing information associated with their alcohol advertisements, it does not bar other parties from spreading the information.[153] Nothing in the ABC restriction prevents customers from broadcasting the specific discount information for an establishment's happy hour period to the general public over the internet on social media or through other forms.[154] In fact, many websites and publications have begun spreading happy hour prices in aggregated form specifically to meet demand by customers for alcohol discount pricing information.[155] Nevertheless, the restriction does not distinguish among specific commercial parties in the same way the restrictions in *Sorrell*[156] or *Discovery*[157] did. Nor does it explicitly exempt any particular parties.[158]

In its 2015 *Reed v. Town of Gilbert* decision, the Court further expounded on the test for content neutrality by clarifying what it is not; it stated that "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."[159] However, *Reed* was not a commer-

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151 *See* 3 VA. ADMIN. CODE § 5-50-160(B)(8) (2016); *see also* Julie Marie Baldwin, John M Stogner & Bryan Lee Miller, *It's Five O'clock Somewhere: An Examination of the Association Between Happy Hour Drinking and Negative Consequences*, 9 SUBSTANCE ABUSE TREATMENT, PREVENTION, AND POL. 17, 2 (2014) (finding that a sample of observed college students were likely to increase their drinking behavior in the presence of happy hour specials).

152 *See* § 5-50-160(B)(8); *Ward*, 491 U.S. at 791-92.

153 *See* § 5-50-160.

154 *See id*. § 5-50-160(B)(8).

155 *See* Foursquare Lists, *The 15 Best Places with a Happy Hour in Richmond*, FOURSQUARE (Oct. 20, 2016), http://foursquare.com/top-places/richmond/best-places-happy-hour; *Happy Hour,* ARLINGTON UNWIRED, http://www.arlingtonunwired.com/hhour.php (last visited Oct. 23, 2016); Natalie Lescroart et al., *NoVa Happy Hours*, N. VA. MAG. (Apr. 21, 2010), http://northernvirginiamag.com/nova-happy-hours/.

156 *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011) (discussing the Vermont statute barring the sale, disclosure for marketing purposes, or use in marketing of information revealing the prescribing practices of individual doctors by pharmaceutical manufacturers).

157 *See* Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 424 (1993) (finding that Cincinnati instituted a categorical ban restricting commercial newsracks while leaving noncommercial newsracks unrestricted).

158 *See* 3 VA. ADMIN. CODE §5-50-160(C) (2016).

159 Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015).

cial speech case; rather, it involved church signs.[160] As a result, lower courts have been hesitant to apply the standard broadly in a manner that would render the Supreme Court's commercial speech jurisprudence moot.[161]

Thus, it is unlikely that the Court would find that Virginia's happy hour advertisement restrictions merit a heightened level of scrutiny on the basis enunciated in *Sorrell*.[162]

B. Central Hudson*'s Third and Fourth Prongs Applied*

Precedent shows that courts would likely uphold a Virginia government claim that promoting temperance is a substantial interest.[163] The third prong of *Central Hudson* would then demand a showing by the state that the ABC's restrictions on happy hour advertising directly advance the government's interest in promoting temperance.[164] The fourth prong requires that these restrictions represent a "'fit' between the legislature's ends and the means chosen to accomplish those ends[.]"[165]

In terms of the price ban component of the ABC's restriction, the state may argue that its interest in promoting temperance is directly advanced because the price ban artificially raises alcohol prices at bars and restaurants during their discount periods, which should in turn naturally reduce overall consumption on the whole.[166] Such a position

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160 *Id*. at 2224-25.

161 *See* Lone Star Sec. & Video, Inc. v. City of Los Angeles, 827 F.3d 1192, 1198-99 (9th Cir. 2016) (holding that a restriction is not content based just because it only applies to advertising); Dana's R.R. Supply v. Attorney Gen., 807 F.3d 1235, 1246 (2015) (holding that even content based commercial speech restrictions are not subject to strict scrutiny).

162 *See* 3 VA. ADMIN. CODE § 5-50-160(B); *Sorrell*, 564 U.S. at 571.

163 *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 504 (1996); Utah Licensed Beverage Ass'n v. Leavitt, 256 F.3d 1061, 1069-70 (10th Cir. 2001).

164 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).

165 Bd. of Trs. of the State Univ. v. Fox, 492 U.S. 469, 480 (1989); *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564.

166 *See* Dunagin v. City of Oxford, 718 F.2d 738, 750 (5th Cir. 1983) (holding that the billion dollars spent annually on advertising is sufficient evidence to convince the court that there is a link between advertising and consumption which justifies the ban, even in the absence of concrete scientific evidence). *But see* Jeffrey Milyo & Joel Waldfogel, *The Effect of Price Advertising on Prices: Evidence in the Wake of* 44 Liquormart*,* 89 AM. ECON. REV. 1081, 1095 (1999) (finding that Rhode Island's Liquor prices did not experience a significant decline relative to Massachusetts's, which had no such ban, after retailers were allowed to display their prices); Jon P. Nelson, *Advertising Bans, Monopoly, and Alcohol Demand: Testing for Substitution Effects Using State Panel Data*, 22 REV. OF INDUS. ORG. 1, 19-21 (2003) (finding in a study conducted over the years from 1982-1997, among 45 states, that when total alcohol consumption was moni-

would rely on a common sense notion employed by the State in *44 Liquormart* that, without easy access to price information, different restaurants and bars could not compete as intensely amongst each other with regard to their happy hour prices.[167] Thus, with these higher prices, alcohol consumption should decrease or at least be lower than they otherwise would be absent the advertising restriction.[168] One issue with this argument is that, while alcohol licensees may not advertise discounts, they may advertise the duration of their discount periods.[169] Additionally, when the price ban is coupled with the allowance for advertising of the discount's time period, under such reasoning, the advertising ban should actually have the effect of incentivizing retailers to lengthen their discount periods for alcoholic products.[170] Because bars can advertise that they have happy hours at certain times, but they cannot list what their deals actually are, the ban forces licensees to compete with one another on only the length of their happy hours, as opposed to their specific discounts.[171] Thus, a consumer choosing between two otherwise identical bars may likely pick the one with the longer happy hour.[172] As a result, a strong argument could be made that the ban not only fails to directly advance Virginia's interest in promoting temperance amongst its citizens, it actually works counter to that interest.[173]

Moreover, a similar argument to that adopted by the Fifth Circuit in *Dunagin* could also be made that unrestrained happy hour advertis-

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tored (meaning the study looked at alcohol consumption per capita across wine, liquor, and beer) that "neither billboard bans nor price bans have a significant effect on total alcohol demand." The authors behind the study reasoned that this was because "A restrictive law that applies to only one beverage (or one form of advertising) can result in substitution toward other beverages (or other forms of advertising). Allowing for substitution means that the net effect on total alcohol consumption is uncertain, and must be ascertained empirically.").

167 *See* 3 VA. ADMIN. CODE § 5-50-160(B)(8) (2016); *44 Liquormart*, 517 U.S. at 504 (noting Rhode Island's argument that the pricing ban directly advanced their interest in promoting temperance by keeping prices at an artificially high level).

168 *See* § 5-50-160(B)(8); *44 Liquormart*, 517 U.S. at 505.

169 § 5-50-160(B)(8).

170 *See* Nashwa Bawab, *Study: Alcohol Advertising Does Not Have a Significant Impact on Alcohol Consumption*, THE DAILY TEXAN (Mar. 31, 2015, 1:24 A.M.), http://www.dailytexanonline.com/2015/03/30/study-alcohol-advertising-does-not-have-a-significant-impact-on-alcohol-consumption.

171 *Id*.

172 *See* Sue Gleiter, *Pennsylvania Law Allows Longer Happy Hours in Bars, Restaurants*, PENN LIVE (July 2, 2011), http://www.pennlive.com/midstate/index.ssf/2011/07/pennsylvania_law_allows_longer.html.

173 *See* § 5-50-160(B); *44 Liquormart*, 517 U.S. at 506.

ing would increase the consumption of alcohol amongst Virginia's citizens.[174] However, when applied to the Virginia ban, this argument would stand on much weaker ground because it is not altogether clear that absent the happy hour advertising restrictions, total alcohol consumption would actually increase.[175] While the court in *Dunagin* was able to reason that the whole of alcohol advertisements must drive up consumption because otherwise manufacturers and retailers would not pay for it,[176] from an economics standpoint, this argument was tenuous at best.[177] Moreover, promotional advertisements are, by their nature, more aimed at capturing market share enjoyed by another venue as opposed to increasing overall consumption, which is an aim of traditional advertising.[178]

This ban does not clearly violate the third prong in the same manner as the *Utah Licensed Beverage Association* ban.[179] That ban prohibited liquor advertisements but not that of other alcoholic beverages such as beer.[180] In this case, the Virginia ban applies equally to all alcoholic products discounted by state licensees.[181] Nevertheless, while the Virginia ban does not arbitrarily discriminate amongst certain alcoholic beverages, it does discriminate arbitrarily with regards to the phrases that may be used in promotion.[182] Such a restriction does not have any consequential effects on the consumption of alcohol and could really only be justified on an offensiveness rationale which courts have routinely rejected.[183]

While failure to meet the third prong of *Central Hudson* would doom the restriction's constitutionality, if the regulation was found to directly advance the state's interest in promoting temperance, it is less

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174 *See, e.g.*, Dunagin v. City of Oxford, 718 F.2d 738, 750 (5th Cir. 1983) (holding that "sufficient reason exists to believe that advertising and consumption are linked to justify the ban, whether or not 'concrete scientific evidence' exists to that effect.").

175 *See* § 5-50-160(B)(8); *Dunagin*, 718 F.2d at 750.

176 *See Dunagin*, 718 F.2d at 749.

177 *See* Michel Kelly-Gagnon, *The Influence of Advertising on Consumption*, MONTREAL ECON. INST., June 2011, at 1, 2 (finding that "the banning of beer ads in 1974 in Manitoba did not diminish consumption in that Canadian province as compared with consumption in the province of Alberta, where advertising remained legal."); Nelson, *supra* note 166, at 21-22.

178 *See* Kelly-Gagnon, *supra* note 177, at 3.

179 *See* Utah Licensed Beverage Ass'n v. Leavitt, 256 F.3d 1061, 1074 (10th Cir. 2001).

180 *Id*. at 1065.

181 *See* 3 VA. ADMIN. CODE § 5-50-160(A)(2) (2016).

182 *See id*. at § 5-50-160(B)(8).

183 *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 71-72 (1983); *Leavitt*, 256 F.3d at 1070.

clear as to whether it would be able to survive the fourth prong of the *Central Hudson* test.[184] This is because, in practice, the ban affects the manner in which establishments can advertise their discount times, without banning all advertisements outright.[185] Unlike the previous ban on all happy hour advertising, the new regulation is more tailored, allowing licensees to promote their happy hours subject to the phrase requirement.[186] Nevertheless, while happy hour advertising is allowed under the new ban, no pricing information as to the discounts themselves can be promoted.[187] It would be massively inconsistent with *Virginia Pharmacy* to deprive consumers of valuable pricing information merely because "most restaurants . . . don't want to get into a price war over who's got the best happy hour specials," as the Chief Operating Officer of the Virginia ABC said while the 2014 regulation amendment was pending.[188]

Thus, the ban could be found to be over inclusive like the ban at issue in *Bolger*.[189] In that case, the Court found that a ban on unsolicited mailing of contraceptives was only directly serving those parents who were unable to prevent their children from getting into their mail.[190] Similarly, in this instance, the ban really only targets those who want to find good happy hour deals but do not know the local establishment's usual specials, and who choose not to obtain that information through a third party such as a local friend or a website.[191] Nothing in this ban prevents individuals from spreading pricing information publicly.[192] As a result, several websites have formed with the sole purpose of providing happy hour information for local Virginia bars.[193]

Nevertheless, because the state would be unable to show that Virginia's new happy hour restrictions directly advance the state's substantial interest in promoting temperance amongst its citizens, the

184 Wolf, *supra* note 148, at 1309 (noting that the fourth prong of the Central Hudson test generally prefers content based restrictions as opposed to overly broad bans).

185 *See* § 5-50-160(B)(8).

186 *See* 3 VA. ADMIN. CODE § 5-50-160(B)(8) (1994).

187 3 VA. ADMIN. CODE § 5-50-160 (2016).

188 *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976); Crushing, *supra* note 26.

189 *See* § 5-50-160; Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 75 (1983).

190 *Bolger*, 463 U.S. at 75.

191 *See* § 5-50-160.

192 *See id*.

193 *See* Lescroart, Saenz & Jacob, *supra* note 155.

restriction would likely be found unconstitutional under *Central Hudson*'s four prong test.[194] The Court would likely find that the ban provides only ineffective or remote support because the ban incentivizes licensees to extend their happy hours and because causality between promotional advertisements and increased alcohol consumption would be extremely difficult, if not altogether impossible to show.[195]

C. *Paradoxical Consequences of Analysis*

What is interesting about this outcome is that many of the facts specific to Virginia's new advertising ban that make it less likely to survive *Central Hudson* analysis were not present in the blanket ban on all happy hour advertising that existed before 2014.[196] That ban did not permit even certain phrases to promote happy hours or allow that time windows associated with the happy hours be promoted.[197] Thus, a much stronger argument could be made that the more speech restrictive blanket ban was more effective at furthering Virginia's interest in promoting temperance amongst its citizens. If non-misleading commercial speech really does have some inherent First Amendment value, the more that speech is restricted, the less likely it should be to withstand scrutiny under First Amendment analysis.[198] For example, it would seem rather ridiculous if the state's inability to ban certain newspaper articles depended on how effective the ban was in actually accomplishing the state's goal of suppressing information.[199]

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194 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980) (holding that "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.").

195 *See id*.

196 *See* 3 VA. ADMIN. CODE § 5-50-160 (2016); 3 VA. ADMIN. CODE § 5-50-160 (2012) (amended 2016).

197 3 VA. ADMIN. CODE § 5-50-160 (2012) (providing that "No retail licensee shall . . . [a]dvertis[e] happy hour in the media or on the exterior of the licensed premises.").

198 Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 (1976) (finding that while certain "time, place, and manner" restrictions on commercial speech may in some instances be permissible, because the Virginia pharmaceutical statute "singles out speech of a particular content and seeks to prevent its dissemination completely" it exceeded the bounds of the First Amendment).

199 *See* Miami Herald v. Tornillo, 418 U.S. 241 (1974) (finding that a Florida statute, which required newspapers to give equal space for political candidates to respond to any articles attacking them, violated the First Amendment).

In contrast however, applying *Central Hudson* allows the state to curtail broad categories of truthful speech, solely to manipulate its citizen's behavior, only when it can show that its ban actually succeeds at that task.[200] This conclusion seems to present a paradoxical consequence of *Central Hudson* application. Justice Thomas addressed this effect of *Central Hudson* analysis in his concurring opinion in *44 Liquormart.*[201] There, Justice Thomas noted that:

> Faulting the [s]tate for failing to show that its price advertising ban decreases alcohol consumption 'significantly,' . . . seems to imply that if the [s]tate had been more successful at keeping consumers ignorant and thereby decreasing their consumption, then the restriction might have been upheld. This contradicts *Virginia Board of Pharmacy*'s rationale for protecting 'commercial' speech in the first instance.[202]

One of the rationales behind commercial speech protection, as described in *Virginia Pharmacy*, was that the free flow of truthful commercial information in a market economy carries along with it an import not dissimilar from that accompanying other kinds of protected speech.[203] Therefore, it is at least odd that the factors that weigh into whether this protection is afforded are not more heavily linked to the actual breadth of the restriction.[204]

This is not to suggest that the quantum of speech restricted does not affect the Court's analysis under *Central Hudson*.[205] The essence of the fourth prong is that the speech restricted be narrowly tailored to achieving the state's asserted interest.[206] Nevertheless, the consequence of that application has been that the better the restriction is at achieving the State's interest, the broader the suppression of speech may be.[207] Under *Central Hudson*, when a State decides to restrict speech to regulate an area in which it has a substantial interest, it has

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200 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 570 (1980) (finding that the commission's order did not violate the First Amendment so far as it actually reduced energy consumption).

201 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518 (1996) (Thomas, J., concurring).

202 *Id*. at 523-24.

203 *Va. State Bd. of Pharmacy*, 425 U.S. at 765.

204 *See* Ward v. Rock Against Racism, 491 U.S. 781, 798-99 (1989).

205 *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564.

206 *See id.*

207 *44 Liquormart*, 517 U.S. at 521 (Thomas, J., concurring).

two concerns in determining how broad that restriction should be.[208] First, under the intermediate scrutiny applied in the fourth prong, the State must not make the restriction so broad that it no longer represents a "reasonable fit" between the legislatures' end, and the means used to achieve it.[209] Second, the third prong requires that the restriction must not be so narrow that the ban can no longer be said to directly advance the state's substantial interest.[210] In essence, legislatures looking to restrict truthful commercial speech can do so as long as the scope of the speech they choose to suppress falls within this 'sweet spot' created by the third and fourth prongs.[211]

As a result, many of the factors that weigh against Virginia in clearing the third prong of *Central Hudson*, such as, the seemingly arbitrary phrase requirement, or the ban's effect in incentivizing licensees to lengthen their discounts, are unrelated to the societal costs associated with restricting valuable truthful commercial speech.[212] Under the reasoning of *Virginia Pharmacy*, one might assume that the blanket ban on discount alcohol advertising by serving establishments would be inherently more suspect than, at least, the more tailored new restrictions.[213] However, under *Central Hudson*, this is not the case.[214] The old ban would undeniably have a stronger argument that it directly advances a state interest in reducing alcohol consumption because establishments would not be so incentivized to compete on happy hour length.[215] Additionally, while restricting what an establishment may call its happy hour in advertisements to certain phrases increases the level of speech from a full ban on happy hour advertising, it nevertheless makes the restriction more prone to constitutional failure under *Central Hudson*.[216] Allowing that only certain terms be used to characterize a promoted discount period cannot be said to

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208 *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564.

209 *See* Bd. of Trs. of the State Univ. v. Fox, 492 U.S. 469, 480 (1989).

210 *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564.

211 *See Fox*, 492 U.S. at 477.

212 *See* 3 VA. ADMIN. CODE § 5-50-160 (2016); *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564.

213 *See* § 5-50-160; Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 766 (1976).

214 *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564.

215 *See* § 5-50-160 (allowing establishments to advertise the time of their discount periods).

216 *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564.

advance a state's interest in reducing alcohol consumption amongst its populace.[217]

The *Sorrell* Court attempted to correct this seemingly paradoxical result of the *Central Hudson* test by incorporating the content and speaker discrimination framework normally applied to fully protected speech, to determine whether a heightened scrutiny should be applied in commercial speech cases.[218] The Court applied a similar approach in *Cincinnati v. Discovery Network, Inc.*, though it only used the content and speaker based discrimination of the news rack restriction as evidence that the restriction was not narrowly tailored.[219] Nevertheless, *Sorrell*'s application to the two Virginia bans seems to leave the broader ban still more constitutionally sound than the newer restriction, as that ban raised fewer concerns of content and viewpoint neutrality.[220] As a result, Virginia's previous blanket ban on all happy hour advertising would likely not have merited strict scrutiny under *Sorrell*, despite that it was all encompassing.[221]

D. *Applying Least Restrictive Means Standard to Blanket Restrictions*

The *Virginia Pharmacy* Court dismissed the state's claim that it needed to regulate price advertising to maintain high professional standards among its pharmacists.[222] In so rejecting, the Court relied on Virginia's ability to regulate the professional standards of its pharmacists directly to show that "the [s]tate's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance."[223] In other words, because the state could regulate directly in their substantial interest but instead chose to regulate through a blanket price ban on all dissemination of truthful pricing information, the ban was invalid.[224]

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217 *See id.* at 569.

218 *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 577-79 (2011).

219 Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 424 (1993).

220 *See* 3 VA. ADMIN. CODE § 5-50-160 (2016); 3 VA. ADMIN. CODE § 5-50-160 (2013); *Sorrell*, 564 U.S. at 577-79.

221 *See* 3 VA. ADMIN. CODE § 5-50-160 (2016); *Sorrell*, 564 U.S. at 577-79.

222 Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

223 *Id*. at 769 (finding that the advertising ban itself did not affect professional standards but only the "reactions it is assumed people will have to the free flow of drug price information.").

224 *See id*.

One potential solution that would seem more in line with *Virginia Pharmacy*, might be similar to the per se rule proposed by Justice Thomas in *44 Liquormart*.[225] Such a rule would require that any state asserted interest that is achieved by keeping users of a product blind to manipulate market behavior would be per se illegitimate.[226] However, this approach may be a step too far in the right direction. This standard would unnecessarily deprive legislatures of the ability to regulate commercial advertising even where an advertising ban would be the most effective means for a State to regulate in a matter of substantial interest.[227]

Other scholars have argued that the Supreme Court should apply a least restrictive means standard in *Central Hudson*'s fourth prong.[228] While such a rule would prevent legislatures from regulating through advertising restrictions they might regulate directly, it likely would not stop there.[229] A least restrictive means test for all commercial speech restrictions would require that legislatures essentially abstain from all advertising regulation, regardless of the breadth of the regulation, so long as it could be shown that some other avenue existed to achieve the legislature's desired end.[230]

A compromise between these two positions however would both relieve the current paradox in commercial speech doctrine as evinced by Virginia's happy hour restriction and do so in a manner consistent with the *Virginia Pharmacy* rationale underlying commercial speech.[231] Such a rule would apply the traditional "narrowly tailored" standard to restrictions which solely seek to regulate the time, place, or manner of certain advertising.[232] In contrast, the "least restrictive

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225 *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518 (1996) (Thomas, J., concurring) (noting that a government asserted interest in manipulating consumer behavior by banning lawful advertising information should be treated as "*per se* illegitimate").

226 *Id*.

227 *See* U.S. CONST. amend. X.

228 *See* Lora E. Barnhart Driscoll, Citizens United v. Central Hudson*: A Rationale for Simplifying and Clarifying the First Amendment's Protections for Nonpolitical Advertisements*, 19 GEO. MASON L. REV. 213 (2011) (arguing that a least restrictive means test is necessary to prevent states from regulating markets through speech restrictions).

229 *See* Bd. of Trs. of the State Univ. v. Fox, 492 U.S. 469, 479 (1989) (finding that the lower position afforded to commercial speech required a standard less than least restrictive means for the fourth prong).

230 *See 44 Liquormart*, 517 U.S. at 524 (Thomas, J., concurring).

231 *See* 3 VA. ADMIN. CODE § 5-50-160 (2016); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

232 *Fox*, 492 U.S. at 477-78.

means" standard could be applied to blanket bans which prohibit all advertising of a certain nature, and thus, are more likely to fall within the category of regulations that seek to manipulate market behavior through consumer ignorance.[233]

Under this standard, Virginia's previous ban on all discount advertising by licensee establishments would be subjected to a "least restrictive means" test as opposed to the current "narrowly tailored" standard[234] because Virginia's previous blanket ban left no avenue for licensees to advertise their discounts whatsoever.[235] As a result, restrictions could no longer avoid defeat under the *Central Hudson* test by extending their reach beyond mere time, manner, and place restrictions to meet the third prong.[236] Instead, to do so would subject the restriction to a greater scrutiny by requiring a showing that no less speech-restrictive means could effectively achieve the state's purpose.[237]

For example, under this modified *Central Hudson* rule, Virginia's current happy hour restriction would qualify as a time, manner, or place restriction as it controls only the manner in which licensees may promote their happy hours.[238] Nevertheless, it would still be just as likely to fail the traditional *Central Hudson* application for a failure to directly advance the state's interest in promoting temperance.[239] Importantly, however, Virginia's previous blanket ban on all happy hour advertising would also certainly fail, as it would be subjected to a least restrictive means test, and clearly there are less speech-restrictive means by which Virginia could regulate alcohol consumption amongst its citizens.[240] Just a few such examples would be increasing taxes on alcohol products or further restricting the time periods in which licensees may offer such discounts.[241]

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233 *See supra* Part II.D.

234 *See* § 5-50-160; 3 VA. ADMIN. CODE § 5-50-160 (2013); *Fox*, 492 U.S. at 479.

235 *See Va. State Bd. of Pharmacy*, 425 U.S. at 765.

236 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 570 (1980).

237 *See id*.

238 3 VA. ADMIN. CODE § 5-50-160 (2016).

239 *See supra* Part II.C.

240 *See* 3 VA. ADMIN. CODE § 5-50-160 (2013) (amended 2016); Bd. of Trs. of the State Univ. v. Fox, 492 U.S. 469, 479 (1989).

241 *See, e.g.*, 3 VA. ADMIN. CODE § 5-60-70 (2016) (provision for collecting excise tax on beer and wine coolers); §5-50-160 (providing that "No retail licensee shall . . . [c]onduc[t] a happy hour between 9 p.m. of each day and 2 a.m. of the following day.").

CONCLUSION

The legal evolution to extend First Amendment protections to advertising derives from an understanding that the First Amendment preserves the free flow of truthful information amongst the citizenry, regardless of whether or not the information proposes a commercial transaction.[242] As Justice Blackmun noted in *Virginia Pharmacy*, "Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price."[243] It derives from recognition that when a government chooses to suppress this free flow of information, they act in precisely the sort of paternalistic manner that the First Amendment forbids.[244]

Both Virginia's old and new happy hour restrictions evince this paternalism. While the old blanket ban may have a stronger argument that it directly advanced Virginia's interest in promoting temperance amongst its citizens,[245] the availability of many more effective and less restrictive means to advance this interest ought to render such blanket bans constitutionally fatal. Nevertheless, current *Central Hudson* analysis does not allow for least restrictive means review, even for those bans which altogether restrict advertising of a particular sort.[246] Unless courts adopt a least restrictive means test to evaluate blanket restrictions, such restrictions will continue to be able to work around the First Amendment, so long as the state can show that its paternalism is effective.

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242 *See supra* Part II.B.

243 Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

244 *See supra* Part II.B.

245 *See supra* Part II.D.

246 *See supra* Part II.B.