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| Government Regulation of Commercial Speech The issue: How far may government go in regulating speech that proposes an economic transaction? |
| **Introduction****The Supreme Court for many years took the view that commercial speech--speech that proposes an economic transaction--was not protected by the First Amendment.  The Court reasoned that the broad powers of government to regulate commerce must reasonably include the power to regulate speech concerning articles of commerce.** **This view changed in the 1970s in a series of cases invalidating state regulations affecting services such as abortion providers and products such drugs.  In *Virginia State Board of Pharmacy* (1976), for example, the Court struck down a law prohibiting the advertising of prices for prescription drugs.  The Court noted that price information was very important to consumers, and suggested that the First Amendment protects the "right to receive information" as well as the right to speak.  Given the free speech interests at stake, the Court said, the state regulation must support a substantial interest.** ***City of Cincinnati v Discovery Network* is a somewhat atypical commercial speech case.  The case involved a challenge to a local ordinance that--for aesthetic reasons-- banned newsracks for primarily commercial publications such as shoppers and real estate guides.  The Court, 6 to 3, invalidated the law, noting that newsracks containing commercial publications are no uglier than newsracks containing traditional newspapers.  The Court viewed the ordinance as content-based, and applied something close to strict scrutiny.** **Four years later in *Central Hudson Gas & Electric v Public Service* *Commission* the Court announced a test for evaluating commercial speech regulations that would be used in many subsequent cases.  The *Central Hudson* test recognizes the constitutionality of regulations restricting advertising that concerns an illegal product or service, or which is deceptive.  For all other restrictions on commercial speech, however, the Court's test  requires that the government show that the regulation directly advances an important interest and is no more restrictive of speech than necessary.** ***44 Liquormart v Rhode Island* (1996), a decision invalidating a state law prohibiting price advertising of alcohol, is significant in several respects.  First, the Court emphatically rejects the suggestion made in a case a decade earlier that states have greater freedom to restrict advertising related to "vices" than other types of economic activities.  The Court also makes clear that the power to ban a product completely (in this case under the 21st Amendment) does not carry with it the "lesser power" to restrict advertising concerning that product.  Finally, several justices in *44 Liquormart* question whether the test for restrictions on non-misleading commercial speech should be the form of intermediate scrutiny suggested in *Central Hudson*-- indicating that they might favor something closer to the strict scrutiny applied to other content regulations of speech.** **The Court avoided revisiting the question of the proper test for commercial speech regulations in its 2001 decisions in *United States v United Foods* and *Lorillard Tobacco Co. v Reilly*.  The Court in *United Foods* struck down a law that required mushroom growers to financially support generic mushroom advertising.  The Court concluded that the regulation was an unconstitutional form of compelled speech--enough if commercial speech is entitled to less than full First Amendment protection. In *Lorillard*, the Court invalidated a series of Massachusetts regulations restricting the advertising of tobacco products.  Writing for the Court, Justice O' Connor noted that several members of the Court had previously argued for applying strict scrutiny to laws restricting commercial speech, but said that since the state could not meet even the intermediate standard of scrutiny, there was "no need to break new ground."**

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| [**The "Central Hudson"Test**](http://law2.umkc.edu/faculty/projects/ftrials/conlaw/centhud.html) ***This frequently invoked test for analyzing commercial speech regulations has recently been criticized by several justices.  At present, only four justices seem committed to using the test.*****Regulations affecting commercial speech do not violate the First Amendment if:** **1. The regulated speech concerns an illegal activity, 2. The speech is misleading, or** **3. The government's interest in restricting the speech is substantial, the regulation in question directly advances the government's interest, and 4.  The regulation is narrowly tailored\* to serve the government's interest. *\*The original Central Hudson test required that the government prove the regulation was no more restrictive of speech than necessary to serve its interest, but in a 1989 case the Court modified the test slightly to the form above.*** |

 | **Cases** [**Virginia State Bd. of Pharmacy v Virginia Citizen's Consumer Council (1976)**](http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/vaboard.html) [**44 Liquormart v Rhode Island (1996)**](http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/liquormart.html) [**City of Cincinnati v Discovery Network (1993)**](http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/cincy.html) [**Lorillard Tobacco Co. v Reilly (2001)**](http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/lorrilard.html) [**United States v United Foods (2001)**](http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/unitedfoods.html) http://law2.umkc.edu/faculty/projects/ftrials/conlaw/marlboroad2.jpg**In 2001, the Supreme Court considered the validity of a Massachusetts law limiting tobacco ads.** http://law2.umkc.edu/faculty/projects/ftrials/conlaw/camelad.jpg**Questions**1. What reasons are there for affording less First Amendment protection to commercial speech than to other forms of speech? 2. Why would Virginia pass a law prohibiting the price advertising of drugs?  Who benefits from such a law?  Who is hurt by such a law? 3.  Does it make sense to say, as the Court does, that the First Amendment protects "the right to receive information"?  What information do we have a right to receive? 4.  Should a state be able to prohibit advertising for a service or product that is illlegal in that state, but not in others?  For example, can any of the 49 states that criminalize prostitution ban an advertisement for a brothel in Nevada, where such establishments are legal under a county option? 5.  What test do you think should be used to analyze commercial speech restrictions? 6.  What do you make of the Court's continued reliance (in the 2001 decisions) of the *Central Hudson* test to strike down commercial speech regulations, while at the same time indicating its refusal to endorse suc |