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# SUPREME COURT SHOULD EXPAND COMMERCIAL SPEECH PROTECTION

by  
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Advocates, commentators, academics, and even Supreme Court justices have been questioning whether the so-called *Central Hudson* test is up to the task of protecting commercial speech from increasing attempts at censorship at every level of government. This LEGAL BACKGROUNDER suggests that the time for discussion on this issue is past. The Supreme Court now has within its ranks a majority of at least five justices whose views should move them at the next opportunity to adopt “strict scrutiny” as the standard for testing governmental efforts to ban or restrict commercial speech based on its content. Strict scrutiny is the test best suited to protect advertising against increasing government attempts to justify censorship “for the protection of children.” Existing decisions suggest that Justices Kennedy and Breyer will be the key antagonists in this coming test of First Amendment standards.

In *Greater New Orleans Broadcasting Ass’n, Inc. v. United States*, 527 U.S. 173 (1999), the Supreme Court, in an opinion by Justice Stevens joined by seven other justices, struck down the federal ban on broadcast advertising of private casino gaming. The majority relied upon the test announced in *Central Hudson Gas & Elec. Public Service Comm.*, 447 U.S. 557 (1980) in reaching this conclusion. Justice Thomas, who would have abandoned the *Central Hudson* test, concurred in the judgment only. Justice Stevens noted:

Partly because of \* \* \* intricacies [of *Central Hudson’s* four part test], petitioners as well as certain judges, scholars, and *amici curiae* have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech. As the opinions in *44 Liquormart* demonstrate, reasonable judges may disagree about the merits of such proposals. It is, however, an established part of our constitutional jurisprudence that we do not ordinarily reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground. \* \* \* *In this case*, there is no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision.

(Emphasis supplied.)

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*Central Hudson* may have been adequate to the task there, but will there be a case where the correct decision requires new, higher ground to be broken? The day for the Court's decision to raise the bar may not be far off, given the increasing frequency of advertising restrictions "to protect children." The "more straightforward and stringent test" referred to by Justice Stevens should be "strict scrutiny," the First Amendment standard of review for most speech and expression, which should replace the flabby "intermediate scrutiny" of *Central Hudson*, applied with decidedly mixed results over the last twenty years. While the trend line of *Central Hudson* decisions in the last decade has been climbing to higher levels of "strictness," there have been startling deviations from that trend in the lower courts, right up to recent days, and interim backsliding in the Court itself.

Despite the reliance on *Central Hudson* in *Greater New Orleans*, the signs that the Court may be close to adopting strict scrutiny have been visible for some time. The move to strict scrutiny will probably occur in a case where a restriction "to protect children" has been upheld. The advertising will be for legal products, services, or activities intended for, and popular with, adults who have an unquestionable right to receive information about them. The lower court, purporting to apply *Central Hudson*, will essentially have deferred to the legislative choice of censorship because of a "special solicitude for children," and a perceived "reasonable fit" of means and ends.

In *Greater New Orleans*, the fate of the irrationally deconstructed federal regime for restricting broadcast casino advertising was inescapable even under *Central Hudson*. But it will take a standard of review with much more stiffness to protect the First Amendment rights of adults when the "protect our children" mantra is invoked. The harbingers of the coming battle may be found in cases involving efforts to protect children from indecent (not obscene) speech or expressive activities. In the last term, *U.S. v. Playboy Entertainment*, 120 S. Ct. 1878 (2000), ("*Playboy*") was such a case.

What *Playboy* portends for commercial speech is that the key player will be Justice Kennedy who, with Justices Souter and Ginsburg, should join Justices Stevens and Thomas to form the necessary majority for strict scrutiny. Their key antagonist — and advocate of toleration of some censorship of adult-intended speech in order to protect children — will be Justice Breyer, whose dissent in *Playboy* and plurality opinion in *Denver Area Consortium v. FCC*, 518 U.S. 727 (1996), reveal a preference for a flexible, balancing application of First Amendment scrutiny which allows government considerable leeway in restricting speech "to protect children."

*Denver Area* involved a federal law which allowed cable operators to ban indecent cable programs to protect children "from exposure to 'patently offensive' materials" on leased access channels. Even when he writes in a strict scrutiny case, Justice Breyer's concept of that standard is not "strict" at all. According to the extraordinary lecture Justice Kennedy delivered in dissent to Justice Breyer's plurality opinion in *Denver Area*, the Breyer view is "adrift . . . ; it applies no standard; . . . most disturbing [is] \* \* \* its evasion of any clear legal standard in deciding these cases."

Justice Kennedy was joined only by Justice Ginsburg in this jeremiad about strict scrutiny standards in *Denver Area*. But if we fast forward to June, 2000, a different scenario emerged in *Playboy*, another cable and kids case, which involved a federal requirement that "adult" programs either be fully "scrambled" to prevent interludes of "signal bleed" (when fragments of indecent video or audio become discernible), or the programming confined to between 10:00 p.m. and 6:00 a.m. The result was self-censorship by cable operators of adult programming from 6:00 a.m. to 10:00 p.m. every day.

Another decision in the last term which must be reckoned with in this analysis is *City of Erie v. Paps*, 120 S. Ct. 1382 (2000), involving a ban of erotic nude dancing. It was not a commercial speech case, and the city did not claim to be protecting children. But *Erie* involved an area of First Amendment law which governments are increasingly using to justify advertising restrictions said to be for the protection of children — the offshoot of “time, place or manner” law created to control the “secondary effects” of adult entertainment. In commercial speech cases, government arguments ignore the requirement that restrictions upheld under that rubric must be content-neutral and designed to combat effects such as increased crime or physical deterioration of neighborhoods. They slide by the fact that virtually all commercial speech restricted “to protect children” is selected because of its content, by claiming that they are only regulating “location,” i.e., “place,” to zone the disfavored advertising away from areas where children congregate.

Interestingly, both Justices Kennedy and Breyer joined the plurality which upheld the *Erie* ordinance. Does that not cast doubt on the view that these two justices are at loggerheads? It does not, because *Erie* was an “intermediate scrutiny” case under *United States v. O’Brien*, 391 U.S. 367 (1968). Once Justice Kennedy saw the *Erie* ordinance as one enacted without reference to the content of the expressive activity, his strong bent for categorical application of strict scrutiny principles relaxed. On the other hand, Justice Breyer must have been quite comfortable supporting the ban because, as in *Denver Area*, its effect was to “zone away” indecent expressive activity from those to be protected. So the joinder of Justices Kennedy and Breyer in the *Erie* plurality signaled no bridging of the deep doctrinal gap separating them whenever the challenged censorship is content-based, as in most commercial speech cases.

Justice Kennedy’s opinion and Justice Breyer’s dissent in *Playboy* reveal that divide over restrictions on content still yawning wide. Justice Breyer cannot even bring himself to use the term “strict scrutiny” in indecency cases involving protection of children. He uses formulations like “examine with great care.” He sees the “scramble or channel” requirement in *Playboy* not as a “ban,” but a mere “burden.” More to the point of the relationship of cases like *Playboy* and *Denver Area* to commercial speech, Justice Breyer believes that “where the protection of children is at issue, the First Amendment poses a barrier that properly is high, but not insurmountable.” Worse, he seems ready to allow governments to surmount the barrier by reference to “secondary effects,” “time, place or manner” (content-neutral) principles, or the special rules applicable to broadcast (as in *FCC v. Pacifica*, 438 U.S. 726 (1978)), each of which provides less scrutiny than that required for content-based regulations.

The temptation is strong to invoke the indecency decisions as a way of justifying restrictions on advertising of disfavored products or services in order to protect children. If government can mount arguments to “channel” adult programming disfavored because of its content on a “time” basis in strict scrutiny cases, as Justice Breyer’s *Denver Area* opinion and *Playboy* dissent would have it, essentially similar arguments to limit the “places” where disfavored outdoor commercial advertising is permitted should be even stronger if *Central Hudson* intermediate scrutiny remains the test.

The lower courts must be instructed that the First Amendment commands that this temptation be resisted. When a “protection of children” commercial speech case is next presented, Justices Kennedy, Stevens, Souter, Thomas, and Ginsburg, will, hopefully, declare that the First Amendment requires strict scrutiny review of commercial speech. Under strict scrutiny, the protection of children from indecent adult material has not led the Court to abandon its long standing refusal to reduce the level of adult discourse to that suitable for a sandbox. *Bolger v. Youngs Drug*, 463 U.S.

60 (1983), citing *Butler v. Michigan*, 352 U.S. 380 (1957). The assaults on “commercial” speech working their way through the lower courts right now, most of which seek to “protect” children from the advertising of cigarettes or alcohol beverages, are going to test the Court’s commitment to the *Butler* principle as never before. They are also going to focus on the important role of parents in protecting their children, a role frequently recognized by the Court — as distinguished from governmental insinuation of itself *in loco parentis* on the claim of parental default or distraction.

A majority of Justices Stevens, Kennedy, Souter, Thomas, and Ginsburg can insure that these factors will be reviewed in the principled context of strict scrutiny, where the government’s censorship is presumed to be unconstitutional and requires satisfaction of a heavy burden of proof. If erotic activities on adult cable channels — expressive activities at or near the bottom of the First Amendment spectrum of protected activity — deserve full application of strict scrutiny principles, then advertising for legal products and services intended for adults certainly deserves the same level of protection.

In *Playboy*, Justice Kennedy cited commercial speech decisions under *Central Hudson*, such as *Greater New Orleans, Edenfield v. Fane*, 507 U.S. 761 (1993), and even *Board of Trustees v. Fox*, 492 U.S. 469 (1989), to emphasize the government’s heavy burden of proof under First Amendment principles. How much further is there left to go doctrinally when intermediate scrutiny cases are already being cited by the Court to develop the proper application of strict scrutiny principles?

In the end, the key factor will be the continued willingness of Justices Stevens, Kennedy, Souter, Thomas and Ginsburg to step up and perform the proper role of the judiciary in reviewing enactments that restrict advertising on the basis of its content, whatever their purpose. The other four justices seem prepared to hang back — to accord government a level of deferential review dictated by their perception of the seriousness of the problem addressed. This elasticity, so characteristic of *Central Hudson* decisions, has no place in strict scrutiny. Protecting children from the immediate, negative psychological effects of direct exposure to indecent adult activity, while very important, is a very different thing than protecting them from the alleged, highly questionable, influence of adult advertising. The urge to protect children is strong, but the Court has always recognized that it has limits as a rationale for censorship of content. At least five justices should soon declare that advertising for adults must remain outside the sandbox.