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Tension Between the First and Twenty-First Amendments in State Regulation of Alcohol Advertising

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I. INTRODUCTION

The twenty-first amendment of the United States Constitution,[1] adopted in 1933, repealed the eighteenth amendment[2] and gave states the power to regulate the delivery, possession, and use of alcohol within their borders. The twenty-first amendment is an

1. The twenty-first amendment states in part: "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 law thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2.

2. The eighteenth amendment states in part: "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." U.S. CONST. amend. XVIII, § 1.

exception to the normal operation of the commerce clause,[3] which restricts state regulation of activities affecting interstate commerce.

The twenty-first amendment enhances the states' traditionally broad police power to regulate alcohol.[4] Although the federal courts owe great deference to a state's exercise of its police power,[5] the Supreme Court never has held that the twenty-first amendment gives states the power to infringe on constitutionally protected individual rights while regulating alcohol. Recently, however, the Supreme Court has allowed state power under the twenty-first amendment to impinge upon first amendment protection of commercial speech. This may be partly due to the uncertain position of commercial speech in first amendment doctrine. The Supreme Court only recently had extended first amendment coverage to commercial speech.[6] Although the Court has extended first amendment protection to various forms of commercial advertising,

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3. Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 330 (1964); State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62-64 (1936). *But see* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 106-10 (1980) (public policy in favor of competition in Sherman Antitrust Act requires commerce clause protection despite twenty-first amendment); United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 299 (1945) (sustaining a federal antitrust prosecution of liquor price fixing).

The commerce clause states: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8. In 200 years of litigation the Court has waffled over the scope of the commerce clause. The Court has used the commerce clause as both a source of federal power to regulate commerce and a restraint on state regulations that interfere with interstate commerce. *See* EEOC v. Wyoming, 103 S. Ct. 1054 (1983); FERC v. Mississippi, 456 U.S. 742 (1982); Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981); United States v. Darby, 312 U.S. 100 (1941). *But see* National League of Cities v. Usery, 426 U.S. 833 (1976). The Court also has sustained the use of commerce power to effect the purposes of the Civil Rights Act of 1964. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). For a discussion of the scope of the commerce clause, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-1 to -27 (1978).

4. *See* Crane v. Campbell, 245 U.S. 304 (1917). In *Crane* the Court stated:

> It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment.

Id. at 307; *accord* California v. LaRue, 409 U.S. 109, 114 (1972) (states have general police power to regulate alcoholic beverages even in the absence of the twenty-first amendment).

5. *LaRue*, 409 U.S. at 116.

6. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983) (unsolicited contraceptive advertisements); Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (leaflets promoting energy use); Linmark Assocs. v. Willingboro, 431 U.S. 85 (1977) (real estate for sale signs); Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976) (informational pamphlets on contraceptives).

such as print media,[7] billboards,[8] and mail,[9] the Court has not yet fully defined the parameters of this new doctrine.[10]

This Recent Development examines the tension between the first and twenty-first amendments when a state uses its twenty-first amendment power to regulate advertisements of alcoholic beverages that qualify for first amendment protection. Part II of this Recent Development explores the Court's standard of review in cases in which the twenty-first amendment impinges upon a fourteenth amendment right. Part II also reviews the scope of constitutional protection that the first amendment accords commercial speech. Part III examines three recent cases in which states have regulated alcohol advertising. Part IV criticizes these decisions for misapplying the appropriate standard and for relying extensively on distinguishable cases and state power under the twenty-first amendment. Part V proposes an analytical framework for cases involving tension between the first and twenty-first amendments and then applies the framework to the recent decisions.

II. LEGAL BACKGROUND

A. *The Bill of Rights and the Twenty-First Amendment*

Although the Court often has upheld state regulation of alcohol against commerce clause challenges,[11] the Court has deduced that the twenty-first amendment does not limit the constitutional protections that the Bill of Rights guarantees individuals.[12] Thus,

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7. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809 (1975) (newspaper editor).

8. *See, e.g.*, Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (on-site commercial advertisements).

9. Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (leaflets in mailed billings).

The Court also has extended first amendment protection to different kinds of commercial advertising. *See, e.g.*, Bates v. Arizona State Bar, 433 U.S. 350 (1977) (private attorneys advertising prices); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (advertising of nonprescription contraceptives).

10. *See Central Hudson* 447 U.S. at 561-66.

11. *See, e.g.*, Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 330 (1964); State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62-64 (1936).

12. *See* Craig v. Boren, 429 U.S. 190, 206 (1976). According to the Court: "Neither the text nor the history of the Twenty-First Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned." *Id.* (quoting P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING, CASES AND MATERIALS 258 (1975)). The Court has held that many guarantees under the Bill of Rights apply to the states through the fourteenth amendment. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (plurality opinion) (Bill of Rights applies equally to the states through the fourteenth amendment); Near v. Minnesota, 283 U.S. 697, 707 (1931) (freedom of the press applies to the states through the fourteenth amendment);

when a party alleges that a state statute regulating the use of alcohol violates the Bill of Rights, the statute does not qualify for a more deferential standard of review merely because Congress passed the twenty-first amendment.[13]

In *Wisconsin v. Constantineau*[14] the Court rejected the argument that the twenty-first amendment permits a state to regulate alcohol consumption at the expense of procedural due process.[15] The challenged statute authorized local law enforcement officials to post the names of individuals who were irresponsible drinkers

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Fiske v. Kansas, 274 U.S. 380 (1927) (freedom of speech); *see also* L. TRIBE, *supra* note 3, § 11-2.

13. The Supreme Court has developed two principal levels of review that it applies to constitutional challenges to state regulations. The Court first suggested the two-tiered approach to equal protection in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (plurality opinion). The Court applies strict scrutiny analysis only if it finds a suspect classification or the infringement of a fundamental interest. *See, e.g.*, Hill v. Stone, 421 U.S. 289 (1975) (voting is a fundamental interest); Loving v. Virginia, 388 U.S. 1 (1967) (race is a suspect classification); *see also* Dunn v. Blumstein, 405 U.S. 330, 337 (1972) (classification can stand only if it is "necessary to promote a compelling state interest") (quoting Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969)).

Traditionally, the Court requires that the state demonstrate only a rational hasis for its regulation. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education); Lindsey v. Normet, 405 U.S. 56 (1972) (decent shelter). For a discussion of the history and current status of the rational basis test, see Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049 (1979).

During the *Lochner* era the Court applied "strict scrutiny" in substantive due process cases that concerned economic regulations. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905). The demise of the *Lochner* approach brought rational review to economic due process decisions. *See, e.g.*, Nebbia v. New York, 291 U.S. 502 (1934). In substantive due process cases the Court has revived the *Lochner* approach by applying strict scrutiny when a fundamental interest is at stake. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (right to abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate). The Court, however, has not revitalized strict scrutiny of economic regulation, *see* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 570-73, 584-91, 601 (10th ed. 1980), although occasionally it has used a more exacting rational basis test, *see infra* note 74. For further discussion of strict scrutiny and rational basis analysis, see Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8-24 (1972) [hereinafter cited as Gunther, *Evolving Doctrine*]; McCoy, *Recent Equal Protection Decisions—Fundamental Right to Travel or "Newcomers" as a Suspect Class?*, 28 VAND. L. REV. 987, 988-95 (1975).

14. 400 U.S. 433 (1971).

15. *Id.* at 437. Arguably no right to procedural due process could command as much constitutional protection as one of the guarantees specifically enumerated in the Bill of Rights. *See* L. TRIBE, *supra* note 3, § 11-3. For a discussion of the Court's use of procedural due process, see Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957); Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976); Van Alstyne, *Cracks in "The New Property"; Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977).

and to prohibit people from selling or giving alcohol to anyone whose name was on the list.[16] Although the state's police power was at its peak,[17] the Court held that the ordinance was unconstitutional because it failed to provide adequate procedural safeguards to protect an individual's right to reputation, honor, and integrity.[18]

In *Craig v. Boren*[19] the Court reaffirmed *Constantineau* by holding that the twenty-first amendment does not alter the appropriate standard for reviewing a state alcohol statute when a party challenges the statute on equal protection grounds.[20] The *Craig* Court invalidated a law that permitted women to purchase alcohol at age eighteen, but prohibited men from purchasing alcohol until age twenty-one.[21] The Court reasoned that the twenty-first amendment enhances the states' traditional police power to regulate alcohol directly, but determined that the amendment does not apply in equal protection cases.[22] Using the intermediate standard of review, which is appropriate in gender-based equal protection challenges,[23] the Court concluded that the empirical findings in the

16. *Constantineau*, 400 U.S. at 434 n.2.

17. *See* Dunagin v. City of Oxford, 718 F.2d 738, 744 (5th Cir. 1983) (quoting Castlewood Int'l Corp. v. Simon, 596 F.2d 638, 642 (5th Cir. 1979), *vacated and remanded sub nom.*, 446 U.S. 949, *panel opinion reinstated*, 626 F.2d 1200 (5th Cir. 1980)), *cert. denied*, 104 S. Ct. 3553 (1984); California v. LaRue, 409 U.S. 109, 114 (1972).

18. *See Constantineau*, 400 U.S. at 437. The Court emphasized:

> Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. "Posting" under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one. Under the Wisconsin Act, a resident of Hartford is given no process at all. This appellee was not afforded a chance to defend herself. She may have been the victim of an official's caprice. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.

Id. But see Paul v. Davis, 424 U.S. 693, 701 (1976) (right to reputation alone, without some more tangible interest such as employment, does not implicate liberty or property interests "sufficient to invoke the procedural protection of the Due Process Clause").

19. 429 U.S. 190 (1976).

20. *Id.* at 209.

21. *Id.* at 210.

22. *Id.* at 206-09.

23. *Id.* at 197-98; *see also* Reed v. Reed, 404 U.S. 71, 75-77 (1971) (implicit application of intermediate level scrutiny). The Court applies intermediate level review when it finds that a classification is not suspect, but deserves a higher level of protection than rational review. *See* Note, *Refining the Methods of Middle-Tier Scrutiny: A New Proposal for Equal Protection*, 61 TEX. L. REV. 1501 (1983). Even Justices who do not endorse the creation of an intermediate standard have acknowledged that the Court examines certain cases with more than ordinary deferential review, but with less than strict scrutiny. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 781-82 (1977) (Rehnquist, J., dissenting); Vlandis v. Kline, 412 U.S. 441, 458 (1973) (White, J., concurring).

record were not sufficient to sustain the state's unequal treatment of men and women.[24]

Even though the Supreme Court has continued to observe the principle that state power under the twenty-first amendment does not alter the standard of review when a state infringes upon a constitutionally protected individual right,[25] the Court has appeared to make an exception to this rule for some violations of the first amendment.[26] In *California v. LaRue*[27] the Court sustained a state regulation prohibiting certain kinds of grossly sexual entertainment in establishments that have liquor licenses.[28] The Court held that while some of the prohibited activity fell under the protection of the first amendment, the twenty-first amendment permits an incidental infringement on protected speech when alternative forums for the expression are available.[29]

Although a majority of the Court never explicitly endorsed intermediate level scrutiny, the Court has applied this heightened standard in a variety of cases. *See, e.g.*, Foley v. Connelie, 435 U.S. 291 (1978) (alienage); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (gender-based classification); Jimenez v. Weinberger, 417 U.S. 628 (1974) (nonsanctioned illegitimate children as a classification); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972) (unacknowledged illegitimate birth); Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimate birth); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote). As with the other standards of review, the Court uses certain language to characterize intermediate scrutiny. *See, e.g.*, Craig v. Boren, 429 U.S. at 197-98; *see also* G. GUNTHER, *supra* note 13, at 674. The language that the Court uses when applying intermediate review is sufficiently consistent to permit the inference of intermediate review even if the Court does not articulate the standard that it applies.

For further discussion of intermediate review, see L. TRIBE, *supra* note 3, §§ 16-25 to -32; Note, *supra*.

24. *Craig*, 429 U.S. at 201-04.

25. In Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982), the Court invalidated a statute that vested churches with the authority to veto applications for liquor licenses within a 500 foot radius of a church or school. *Id.* at 117. The Court based its holding on the establishment clause, but in a footnote indicated: "The State may not exercise its power under the Twenty-First Amendment in a way which impinges upon the Estahlishment Clause of the First Amendment." *Id.* at 122 n.5; *see also* White v. Fleming, 522 F.2d 730, 733 (7th Cir. 1975); Women's Liberation Union v. Israel, 512 F.2d 106, 108 (1st Cir. 1975).

26. *See* Kamenshine, California v. LaRue: *The Twenty-First Amendment as a Preferred Power*, 26 VAND. L. REV. 1035 (1973); Note, *Mississippi's Prohibition of Alcoholic Beverage Advertising: A Constitutional Analysis*, 5 COMM./ENT. L.J. 127 (1982) [hereinafter cited as Note, *Mississippi's Prohibition*]; Note, *Liquor Advertising: Resolving the Clash Between the First and Twenty-First Amendments*, 59 N.Y.U. L. REV. 157 (1984) [hereinafter cited as Note, *Liquor Advertising*]; Note, *The Constitutionality of Oklahoma's Prohibition on Liquor Advertising*, 16 TULSA L.J. 734 (1981); Comment, *Regulating Nude Dancing in Liquor Establishments—The Preferred Position of the Twenty-First Amendment*—Nall v. Baca, 12 N.M.L. REV. 611 (1982).

27. 409 U.S. 109 (1972).

28. *Id.*

29. *Id.* at 118.

Even though the state clearly infringed upon LaRue's first amendment rights, the Court did not reach a first amendment analysis.[30] Moreover, the majority substituted rational basis review for the strict scrutiny test, which a first amendment infringement usually warrants.[31] The Court justified this deferential analytical posture by asserting that the challenged law regulated liquor, not speech.[32] Thus, the Court gave the state maximum leeway to regulate liquor directly, while reducing first amendment protection of an indirect infringement on protected speech.[33] One peculiar aspect of the Court's deferential rational review, however, was its reliance on empirical findings that substantiated the state's concern over the effects of the mixture of alcohol and suggestive sexual activity.[34] Normally, rational review does not require empirical support.[35]

In *New York v. Bellanca*[36] the Supreme Court limited the extent to which the lower courts could confine *LaRue* to its facts.[37] In

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30. *Id.*

31. *See* L. TRIBE, *supra* note 3, § 11-1, at 565; *id.* § 12-2, at 581; Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 432-40 (1980) (discussing whether the first amendment provides absolute or balanced protection); Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107, 116, 118-19 (1982); *see also* Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Comm'n, 701 F.2d 314, 326 (5th Cir.), *vacated en banc sub nom.* Dunagin v. City of Oxford, 718 F.2d 738, 744-45 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 3553 (1984).

32. *LaRue*, 409 U.S. at 114.

33. *See also* United States v. O'Brien, 391 U.S. 367 (1968) (upholding federal ban on destruction of draft registration cards because the substantial governmental purpose was not to suppress speech but to prohibit certain conduct); L. TRIBE, *supra* note 3, §§ 12-6 to -7.

Occasionally, the Court makes a distinction between first amendment protection of speech and conduct. *See, e.g.*, Adderly v. Florida, 385 U.S. 39 (1966) (a demonstration on the premises of a county jail is unprotected conduct); Cox v. Louisiana, 379 U.S. 559 (1965) (upholding a statute preventing picketing near a courthouse as a valid regulation of conduct not "pure speech"); International Bhd. of Teamsters, Local 695 v. Vogt, 354 U.S. 284 (1957) (permitting a state law banning peaceful labor picketing for illegal purposes because it was "speech plus"). Professor Tribe points out that in one sense almost all speech is conduct. L. TRIBE, *supra* note 3, § 12-7, at 599. He argues that the distinction between speech and conduct is without merit and that the cases are irreconcilable. *Id.* at 599-600. Professor Trihe acknowledges, however, that the distinction likely will persist in first amendment jurisprudence. *Id.* at 601.

34. *LaRue*, 409 U.S. at 110-11 (state produced evidence of crime to support its regulation).

35. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 427 (1961) (sustaining a state Sunday closing law against an equal protection challenge without empirical evidence); United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938) (legislative findings not necessary to sustain economic regulation under rational review).

36. 452 U.S. 714 (1981) (per curiam).

37. Despite *LaRue*'s implications on the extent of an individual's first amendment

Bellanca the Court upheld a state statute that prohibited topless dancing in any establishment with a liquor license. The Court applied the rational basis test again,[38] but implied that empirical findings were not necessary to justify the state's interest, even when the state incidentally infringed upon an individual's first amendment right to free speech.[39] The Court followed *LaRue* in emphasizing that the statute regulated liquor, not speech.[40]

The *Bellanca* Court expanded the states' police power under the twenty-first amendment beyond the parameters that the Court established in *LaRue*.[41] In *Bellanca* the state did not have to justify its interest by producing empirical evidence or proof of "grossly sexual" behavior for the Court to uphold an incidental infringement on a first amendment right.[42] Thus, without even resorting to a first amendment analysis, the Court held that the states have sufficient police power under the twenty-first amendment to override first amendment interests when the challenged statute regulates sexually provocative entertainment in a facility that has a liquor license.[43]

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rights when a state exercises its twenty-first amendment police power, lower courts could have limited the holding to the facts in the case. The entertainment in *LaRue* included sexual activity, which the Court recognized as dangerous when viewed under the influence of alcohol. *LaRue*, 409 U.S. at 111. The entertainment included nude dancing, oral copulation, and public masturbation. *Id.* Technically, however, any activity that qualifies for constitutional protection qualifies for full constitutional protection. *See* Dunagin v. City of Oxford, 718 F.2d 738 (1983), *cert. denied*, 104 S. Ct. 3553 (1984). *But see* Van Alstyne, *supra* note 31, at 140 (arguing that no technical interpretation of the first amendment presents an adequate explanation of the kinds of analysis the Supreme Court undertakes in first amendment cases).

38. The Court followed the standards that it established in *LaRue*. *Bellanca*, 452 U.S. at 717-18.

39. The Court took judicial notice of the harms associated with nudity and alcohol by quoting an excerpt from the legislative memorandum accompanying the statute. The memorandum justified the statute from a "common sense" standpoint. *Id.* The Court asserted that the memorandum constituted legislative findings, but implied that even common sense support was not necessary to justify the state's interest. *Id.* at 714.

40. *Id.* at 715-16.

41. *See id.* at 718 (Stevens, J., dissenting). Justice Stevens sharply criticized the majority opinion, not because of its result, but because of the "mischievous suggestion that the Twenty-First Amendment gives states power to censor free expression in places where liquor is served." *Id.* at 723 (Stevens, J., dissenting).

42. *Id.* at 714. *But cf. LaRue*, 409 U.S. at 110-11 (state produced evidence of crime to support its regulation).

43. *Bellanca*, 452 U.S. at 718.

B. First Amendment Protection of Commercial Speech

First amendment protection of commercial speech is a recent development in Supreme Court jurisprudence.[44] In 1942 in *Valentine v. Christensen*,[45] the Court held that a state could prohibit the distribution of a handbill containing both commercial and noncommercial speech.[46] The Court reasoned that when the primary purpose of a handbill is commercial, the first amendment does not prevent the state from regulating the advertisement.[47] The Court, however, has retreated from this position in recent years and has held that the first amendment now protects certain kinds of commercial speech.[48] For example, in 1975 the Court ruled that the first amendment protects commercial speech that conveys information, as opposed to commercial speech that merely promotes an activity.[49]

In *Linmark Associates v. Township of Willingboro*[50] the Supreme Court struck down an ordinance banning real estate sale signs.[51] The purpose of the ordinance was to curtail panic selling and white flight that arose from fears that incoming minorities were causing property values to deteriorate. The Court unanimously found that while the governmental purpose of promoting stable, racially integrated housing was important, the ordinance was not necessary to achieve the town's objective.[52] Applying strict scrutiny, the Court held that the town had not provided evidence

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44. *See* L. TRIBE, *supra* note 3, § 12-15, at 652, 655. For a discussion of the new doctrine, see Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372 (1979); Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720 (1982).

45. 316 U.S. 52 (1942).

46. *Id.* at 55.

47. *Id.*

48. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 822 (1975) (newspaper editor may publish abortion advertisement); Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943) (the first amendment protects commercial speech that is incidental to religious speech); *cf.* Pittsburgh Press Co. v. Pittsburgh Human Relations Comm'n, 413 U.S. 376, 388 (1973) (hinting that the first amendment protects commercial speech that does not advocate illegal activity). *But cf.* Bates v. State Bar, 433 U.S. 350, 381 (1977) (overbreadth doctrine does not extend to commercial speech).

49. Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 770 (1975) (invalidating statute that prohibits prescription drug advertisements, despite the state's interest in regulating professional conduct); *see also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978) (discussing the low priority of commercial speech in the scale of first amendment values).

50. 431 U.S. 85 (1977).

51. *Id.* at 95-96.

52. *Id.* at 95. The Court adopted this approach in *Virginia Pharmacy*, 425 U.S. at 766.

establishing the necessary link between a ban on for-sale signs and panic selling.[53] Thus, under *Linmark* the first amendment does not permit a state to prohibit content-based commercial speech[54] even when the state's purpose coincides with a strong national commitment[55] and plausible assumptions support the means that the state chose to effect its purpose.[56]

In 1980 in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[57] the Court developed an intermediate level of review[58] consisting of a four-part test to determine what protection, if any, the first amendment accords commercial speech in a particular case.[59] First, to receive first amendment protection, commercial speech must not be misleading or concern illegal activity.[60] Second, if the commercial speech meets the first prong of the test, the state may regulate the speech if the state has a substantial interest in the speech.[61] Third, the regulation must directly promote the state interest.[62] The last prong of the *Central Hudson* test re-

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53. Even though the Court acknowledged that the town had a strong interest in promoting integrated housing, the Court concluded that the town had failed to establish that the ordinance was necessary to promote this interest. *Linmark*, 431 U.S. at 94-95. The requirement of demonstrating necessity is typical in strict scrutiny cases. *See* Dunn v. Blumstein, 405 U.S. 330, 337 (1972) (classification can stand only if it is "necessary to promote a compelling state interest"); *accord* G. GUNTHER, *supra* note 13, at 389. The Court did concede that the evidence permitted the "plausible" assumption that the for-sale signs caused panic selling. *Linmark*, 431 U.S. at 96 n.10.

In addition, the *Linmark* Court implied that absent an emergency, the Constitution prohibits resricting the free flow of truthful information: "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Id.* at 97 (quoting Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 770 (1975)).

54. The Court rejected the argument that the ordinance was only a time, place, and manner restriction and questioned whether the town had alternative channels of communication. *Linmark*, 431 U.S. at 93. The Court also pointed out that the motivation of the restriction was not "unrelated to the suppression of free expression." *Id.* at 93-94 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

55. *Linmark*, 431 U.S. at 95.

56. *Id.* at 96 n.10.

57. 447 U.S. 557 (1980).

58. *See id.* at 563. The Court stated that commercial speech deserves less protection than other forms of speech under the first amendment. If the regulation entirely suppresses commercial speech to pursue a nonspeech related policy, however, the Court will review the policy with "special care." *Id.* at 566 n.9.

59. *Id.* at 566.

60. *Id.* at 563.

61. For examples of substantial state interests, see Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 95 (1977) (racial integration in housing); Mathews v. Lucas, 427 U.S. 495, 509 (1976) (administrative convenience); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 170, 173 (1972) (efficient distribution of property and protecting the family unit).

62. *Central Hudson*, 447 U.S. at 564. Under the third prong of *Central Hudson* the

quires that the regulation must be no more extensive than necessary to promote the state interest.[63]

The Court has applied the *Central Hudson* test inconsistently. In *Bolger v. Youngs Drug Products Corp.*[64] the Court used the test protectively. The *Bolger* Court first determined that the pamphlets in question were commercial, even though they had some informational content.[65] The Court then held that a federal statute prohibiting the mailing of unsolicited advertisements about contraceptives[66] provided only limited support for the mail recipient's interest.[67] The Court struck down the statute because its only purpose was to exercise control over the mailbox.[68] The Court reasoned that the regulation was more extensive than necessary because it merely served the parental purpose of determining whether mail is worth reading or not.[69]

In *Metromedia, Inc. v. San Diego* [70] the Court applied minimum rational basis scrutiny to the third prong of the *Central Hudson* test.[71] A San Diego ordinance permitted on-site commercial advertisements, but prohibited most off-site commercial advertisements and any kind of noncommercial advertisements.[72] The Court considered whether the city's regulation passed constitutional muster under the *Central Hudson* test.[73] In holding that the regulation was constitutional, the Court characterized the nearly total off-site prohibition as a reasonable means of promoting the city's interest in safety and aesthetics.[74] The Court, however, did

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state must demonstrate a direct link between the means that the state employs to regulate an activity and the end that the state is seeking.

63. *Id.*

64. 463 U.S. 60, 103 S. Ct. 2875 (1983).

65. *Id.* at 2879-81.

66. The statute provides that "[a]ny unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs . . . ." 39 U.S.C. § 3001(e)(2) (1982).

67. *Bolger*, 103 S. Ct. at 2884.

68. *Id.*

69. *Id.*

70. 453 U.S. 490 (1981).

71. *Id.* at 509; *see supra* note 62 and accompanying text.

72. *Metromedia*, 453 U.S. at 503.

73. *Id.* at 507-12.

74. *Id.* at 508-09. The Court justified the requirement of a merely reasonable basis by quoting from Railway Express Agency v. New York, 336 U.S. 106 (1949). In *Railway Express* the Court gave highly deferential treatment to economic regulations that a party challenged under the equal protection clause. This approach may be out of date. *See* G. GUNTHER, *supra* note 13, at 688-704 (discussing the modern approach to equal protection challenges to economic regulations). Professor Gunther points out that the Burger Court has

not require empirical support for its means-ends analysis.[75] Whether the Court misapplied the third prong of the *Central Hudson* test, or attempted to amend it, is not clear.

III. Recent Developments

Three recent cases highlight the tension between the twenty-first amendment and the first amendment when a state regulates liquor advertisements.[76] Unlike *LaRue* and *Bellanca*, the statutes in question directly regulate speech and indirectly regulate alcohol.[77] In each case, the court applied the *Central Hudson* test and then rejected the petitioner's first amendment claim.

A. Queensgate

In *Queensgate Investment Co. v. Liquor Control Commission*[78] the Ohio Supreme Court rejected a first amendment challenge to a liquor advertising regulation that the state legislature promulgated pursuant to its power under the twenty-first amendment. Applying the *Central Hudson* test, the court upheld the constitutionality of a regulation that prohibited bottle or drink price advertisements visible from the exterior of any premise with certain categories of liquor permits.[79] First, the court found that the advertisement in question was protected commercial speech under

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given mixed signals regarding the appropriate level of scrutiny in economic regulation cases. In the early 1970s, the Court employed heightened scrutiny and sometimes required the government to provide an empirical justification for its economic regulations. *Id. But see* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (highly deferential review).

75. *Metromedia*, 453 U.S. at 508. The Court only stated that the city's solution was obviously no broader than necessary. *Id.* Historically, the Court has interpreted the *Central Hudson* test to require more than a rational relation between the state's goal and the method it chooses to accomplish that goal. *See* cases cited *infra* note 131.

76. In addition to the three state regulations that this Recent Development discusses, three other states have restricted alcohol advertising significantly. *See* Fla. Stat. Ann. § 561.42(10)-(12) (West Supp. 1983) (allows only one alcohol advertising sign per product in a liquor store window); Mass. Gen. Laws Ann. ch. 138, § 24 (West 1974) (allows the Alcoholic Beverages Control Commission to regulate liquor advertising); Utah Code Ann. § 32-7-26 to -28 (1953 & Supp. 1983) (allows each establishment only a single storefront sign).

77. *See supra* text accompanying notes 33 & 40.

78. 69 Ohio St. 2d 361, 433 N.E.2d 138, *appeal dismissed*, 459 U.S. 807 (1982).

79. *Id.* at 365, 433 N.E.2d at 141. The regulation provided, in pertinent part:

> No alcoholic beverages shall be advertised in Ohio except in the manner set forth in 4301:1-1-03 and as hereinafter provided.
>
> (A) As to advertising on the premises, holders of Class C, D, and G permits shall not advertise the price per bottle or drink of any alcoholic beverage, or in any manner refer to price or price advantage except within their premises and in a manner not visible from the outside of said premises.

Ohio Admin. Code § 4301:1-1-44 (1981).

the first amendment because the regulation did not concern unlawful activity or misleading information.[80] Second, relying on the twenty-first amendment, the court recognized the state's substantial interest in regulating alcohol.[81]

In assessing the state's compliance with the direct relationship or third prong of the *Central Hudson* test, the court asserted that the regulation concerned alcohol, not speech.[82] This assumption permitted the court to conclude, without analysis, that the state had complied with this prong of the test because the regulation directly advanced the government's interest in discouraging excessive drinking.[83] In finding that the regulation was no more extensive than necessary to further the state interest under the fourth prong of *Central Hudson*, the court asserted that advertising drink prices encourages excessive drinking.[84] Any other regulation, the court stated, would be more extensive than a prohibition of alcohol price advertising.[85] In applying the test, however, the court did not require the state to produce any empirical evidence to support the assumptions. The United States Supreme Court dismissed the petitioner's appeal for lack of a substantial federal question, which is technically an affirmance on the merits.[86]

B. Crisp

In *Oklahoma Telecasters Association v. Crisp*[87] the United States Court of Appeals for the Tenth Circuit found that a regula-

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80. *Queensgate*, 69 Ohio St. 2d at 365-66, 433 N.E.2d at 141.

81. *Id.*

82. *Id.* at 366, 433 N.E.2d at 142. The court reasoned that the regulation discouraged sales, not just competition. *Id.* The court, however, never explained how the restriction of advertising, which might affect sales, directly regulated intoxicants.

83. *Id.*

84. *Id.*

85. *Id.*

86. When the Supreme Court summarily dismisses or affirms an appeal from a lower court for lack of a substantial federal question, the decision is on the merits. Hicks v. Miranda, 422 U.S. 332 (1975). The precedential value of the decision, however, is limited to the precise issues that the lower court addressed. *See* Mandel v. Bradley, 432 U.S. 173 (1977) (per curiam). The Supreme Court has stated that a summary disposition upholds only the judgment of the lower court. Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979). In *Confederated Bands* the Court held that a summary disposition "does not . . . necessarily reflect [the ruling court's] agreement with the opinion of the court whose judgment is appealed." *Id.* at 477 n.20.

87. 699 F.2d 490 (10th Cir.), *rev'd on other ground sub nom.* Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 2694 (1984) (reversed due to federal preemption). The Supreme Court specifically declined to address the first amendment issue. *Capital Cities*, 104 S. Ct. at 2709 n.16.

tion prohibiting most alcoholic beverage advertisements did not violate the first amendment under the *Central Hudson* test.[88] The plaintiffs, telecasters and cable operators,[89] challenged a regulation banning virtually all alcohol advertising originating in state[90] and requiring broadcast media to block out alcohol advertisements originating outside the state.[91] The statute, however, did permit beer and liquor advertisements that appeared in out-of-state printed media.[92]

The Tenth Circuit began its analysis by noting that the twenty-first amendment gives an added presumption of validity to state regulation of alcohol.[93] The court, however, indicated that despite the state's police power to regulate alcohol under the twenty-first amendment,[94] the state may not violate individual rights that the fourteenth amendment guarantees.[95] The court then performed a *Central Hudson* analysis, concentrating on the third and fourth

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88. *Crisp*, 699 F.2d at 502.

89. *Crisp*, 699 F.2d at 492. In the context of broadcast media the Court has held that the federal government has additional police power. *See* FCC v. Pacifica Found., 438 U.S. 726 (1978) (rejecting a first amendment challenge to an FCC regulation banning the broadcast of offensive words despite the absence of obscenity).

90. The plaintiffs challenged OKLA. STAT. ANN. tit. 37, § 516 (West Supp. 1982). The Oklahoma Constitution provides the foundation for this regulation: "It shall be unlawful for any person, firm or corporation to advertise the sale of alcoholic beverage within the state of Oklahoma, except one sign at the retail outlet bearing the words 'Retail Alcoholic Liquor Store.'" OKLA. CONST. art. XXVII, § 5.

91. *Crisp*, 699 F.2d at 492. The Oklahoma Attorney General issued an opinion indicating that the state's alcohol advertising prohibitions apply to cable television as well as broadcast television. This policy reversed the state's prior practice of permitting cable operators to relay wine advertisements that originated in foreign states. *Id.* Although neither side raised this preemption issue in district or circuit court, the Supreme Court specifically asked the respondents to address the issue on appeal. *Capital Cities*, 104 S. Ct. at 2699 (1984).

92. *Crisp*, 699 F.2d at 502. The court addressed the precedential value of *Queensgate* before turning to the constitutionality of the Oklahoma regulation. After noting that a summary dismissal by the Supreme Court is a decision on the merits, *id.* at 495, the court determined that case law, nevertheless, requires a court to confine its summary holdings to their precise issues, *id.* at 496. The court referred to the Supreme Court's warning that the lower courts should not preoccupy themselves with the precedential weight of summary dispositions and neglect "to undertake an independent examination of the merits." *Id.* at 497 (quoting Mandel v. Bradley, 432 U.S. 173, 177 (1977) (per curiam)). The court, therefore, concluded that it must adjudicate the issues in the case. *Crisp*, 699 F.2d at 497; *see also supra* note 86 and accompanying text.

93. *Crisp*, 699 F.2d at 498 (quoting New York Liquor Auth. v. Bellanca, 452 U.S. 714, 718 (1981) (per curiam), which in turn quotes California v. LaRue, 409 U.S. 109, 118 (1972)).

94. *Crisp*, 699 F.2d at 498. The court reasoned that the states should regulate alcohol to protect citizens against its dangers. *Id.*

95. *Id.*

prongs of the test.[96] While the third prong requires that the regulation in question directly advance the state's interest, the court asserted that this prong does not require that the regulation advance the state's interest by the best means, but only by a direct means.[97] Relying on *Metromedia* and the twenty-first amendment, the *Crisp* court used only a rational basis standard[98] to examine the direct link requirement of the *Central Hudson* test.[99] The court then held, as a matter of law, that the prohibition against alcoholic beverage advertisements related reasonably to the proper regulation of the beverages.[100] Like the Supreme Court in *Metromedia*,[101] the *Crisp* court did not require empirical evidence to uphold the regulation.[102]

Turning to the fourth prong of the *Central Hudson* test, the court again relied on *Metromedia* and the twenty-first amendment to find that the regulation was no more extensive than necessary to advance the state's interest.[103] While the court conceded that the regulation was a burden to the plaintiffs, the court appeared to feel that the regulation was not unreasonable because it did allow for beer and liquor advertisements that appeared in out-of-state printed media.[104] The court concluded that the regulation was the least restrictive means of promoting the state's interest.[105]

The Supreme Court reversed *Crisp* on a federal preemption

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96. The court quickly disposed of the first two prongs of the *Central Hudson* test. *Id.* at 500. First, the court rejected the argument that because some of the advertisements portrayed public drinking, which is unlawful in Oklahoma, the advertisements failed under the unlawful activity strand of the first prong of the test. *Id.* at 500 n.8. The court also rejected the argument that the advertisements failed under the misleading activity strand of the first prong because the advertisements associated drinking with good living. *Id.* at 500 n.9. Second, the court determined that the state's police power to protect the health and safety of its citizens and its power under the twenty-first amendment easily complied with the second prong of the test, which requires that the state have a substantial interest in the activity. *Id.* at 500.

97. *Id.* at 500.

98. *Id.* at 500-01. Notwithstanding an earlier promise to the contrary, *id.* at 499, the court implied that the twenty-first amendment strengthens the case for requiring only a reasonable basis standard.

99. *Id.* at 501.

100. *Id.* The court concluded that the twenty-first amendment precludes judicial inquiry into the directness of the means-ends link.

101. 453 U.S. 490, 509 (1981).

102. *Crisp*, 699 F.2d at 501. Although the court acknowledged that the record did not demonstrate a direct link between the regulation and alcohol consumption, the court still held that the ban was reasonable as a matter of law. *Id.*

103. *Id.* at 501-02

104. *Id.*

105. *Id.* at 502.

ground without considering the Tenth Circuit's first amendment analysis.[106] The Court, however, did suggest that it would give less deference to the states under the twenty-first amendment when they did not directly seek to regulate alcohol.[107] The Court noted that the core of the states' twenty-first amendment power is to regulate directly the sale and use of alcohol.[108] When a state regulation only indirectly implicates the core twenty-first amendment power, the state's interest is weaker.[109] In *Crisp* the regulation was indirect because it had only a limited effect on the consumption of alcohol and did not apply to all alcohol advertisements.[110] The regulation's direct effect was on the alcohol advertisements that it prohibited. The Court, therefore, concluded that the federal interest in regulating cable television was more important than the state's indirect promotion of its core twenty-first amendment interest.[111]

C. Dunagin

In *Dunagin v. City of Oxford*[112] the Fifth Circuit, sitting en banc, upheld a Mississippi ban on alcoholic beverage advertisements originating within the state against a first amendment challenge. Unlike the regulation in *Crisp,* the Mississippi regulation[113] did not prohibit alcohol advertisements originating in a foreign state.[114] After noting that the Supreme Court might not extend

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106. Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 2694 (1984).

107. *Id.* at 2709.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. 718 F.2d 738 (5th Cir. 1983), *cert. denied,* 104 S. Ct. 3553 (1984). For a discussion of the district court decision, see Note, *Mississippi's Prohibition, supra* note 26, at 130-40.

113. *Dunagin,* 718 F.2d at 740 n.3. The court did follow *Crisp* in recognizing that *Queensgate* only has limited precedential value. *Id.* at 745-46. The court acknowledged that *Queensgate* cautions against striking down the Mississippi regulation, but does not relieve the court from undertaking its own examination of the case. *Id.* at 746.

114. The regulation in question provides in pertinent part:

> 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 as follows:
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> (1) On the front of any licensed retail package store building, and no higher than the top of the roof of the permitted place of business at its highest point, there may be printed without illumination, in letters not more than eight (8) inches high, the name of the business, the permit number thereof, which may be preceded by the words "A.B.C. Permit No. ____," and the words "Package Liquor Sold Here." Where the package retail store is located in a building of more than one story in height, the top of

first amendment protection to the advertising of products that the states may prohibit, the Fifth Circuit, nonetheless, applied the *Central Hudson* test.[115] Once the court decided that the commercial advertising was neither unlawful nor misleading under *Central Hudson*'s first prong, the court examined state power under the twenty-first amendment to determine whether the state had a substantial interest in regulating liquor advertising.[116] The majority noted that *LaRue* and *Bellanca* sustained regulations restricting *fully* protected speech when the Court relied on state power under the twenty-first amendment.[117] Relying on these precedents, the *Dunagin* court concluded that the state had a substantial interest in regulating alcohol.[118]

After a lengthy analysis the court also found that the challenged regulation directly advanced the state interest by the least restrictive means.[119] The court followed *Crisp* and *Metromedia* in sustaining the regulation because it had a reasonable connection to the state interest.[120] The majority also claimed to follow the *Central Hudson* approach by asserting that the advertisers in *Dunagin* aimed at expanding the alcohol market, not just at expanding their market share.[121] This assumption permitted the court to conclude that because the advertisers aimed to increase the amount of alco-

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such sign shall not be higher than the top of the first story.

MISS. CODE ANN. § 67-1-85 (1982), Regulation No. 6, *reprinted in Dunagin*, 718 F.2d at 740 n.3.

115. *Dunagin*, 718 F.2d at 749-50. The court stated:

> It probably makes no difference, however, whether this category of advertising is treated as outside of commercial speech protection or whether the *Central Hudson Gas* four-part test, discussed below, is applied, because cases of this category likely present state interests which justify advertising restrictions that pass the latter test as a matter of law.

Id. at 742.

116. *Id.* at 743-45.

117. *Id.* 745.

118. *Id.* The court's analytical procedure was unclear. After the court applied the first prong of the *Central Hudson* test, *id.* at 747, the court discussed state power under the twenty-first amendment, *id.* at 747-50. Courts typically examine state power under the twenty-first amendment as part of their state interest discussion under *Central Hudson*'s second prong. *See, e.g., Crisp*, 699 F.2d at 500. When the *Dunagin* court actually addressed the substantial state interest prong of the test, however, the court concluded, with little analysis, that the state had a substantial state interest in regulating alcohol. *Dunagin*, 718 F.2d at 747. Thus, the court may have wanted to incorporate by reference the long discussion of state power under the twenty-first amendment into its brief discussion of state interest under *Central Hudson*.

119. *Dunagin*, 718 F.2d at 747-51.

120. *Id.* at 747, 750.

121. *Id.* at 749.

hol that consumers purchased, the advertisers threatened the state interest in limiting alcohol sales.[122] Because the court employed only rational basis review, it did not require empirical findings to support this conclusion.[123] The court buttressed its approach with the observation that it "simply [did] not believe that the liquor industry [spent] a billion dollars a year on advertising solely to acquire an added market share at the expense of competitors."[124]

The court determined that the regulation[125] was no more extensive than necessary to promote the state interest under the fourth prong of *Central Hudson.*[126] Relying on *Central Hudson* and *Metromedia,* the court concluded that the state may prohibit alcohol advertising that endangers the public interest.[127]

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122. The majority rejected the dissent's contention that *Central Hudson* was distinguishable because it pertained to a monopoly whose advertising necessarily aimed at an increased market rather than an increased market share. *Id.* at 749. The dissent reasoned that a monopoly, by definition, has the full market. *Id.* The majority pointed out that in *Central Hudson* the electric utilities competed with other industries for a share of the market. *Id.* (quoting *Central Hudson,* 447 U.S. at 569).

123. *See supra* note 35 and accompanying text.

124. *Dunagin,* 718 F.2d at 750.

125. The court disagreed with the plaintiffs' argument that out-of-state liquor advertising, which the regulation permits, undercuts the effectiveness of the state regulations. The court gave three reasons for dismissing the plaintiffs' argument. First, the court asserted that the plaintiffs' vigorous litigation of the case suggested that they believed that additional advertising could increase their market share. The court inferred that liquor advertisements had not saturated the market if additional advertisements still could induce the public to buy more alcohol. *Id.* Second, the court pointed out that the number of liquor advertisements would increase dramatically without the regulation. The court reasoned that the plaintiffs would not have tried the case if they did not want to advertise. *Id.* at 750-51. Last, the court stated that in the event that liquor advertisements already had saturated the market, the regulation did not threaten commercial speech interests because the public could get the information from permitted advertisements. *Id.* at 751.

126. *Id.* at 751.

127. *Id.* After the court applied the *Central Hudson* test, the court addressed the plaintiffs' equal protection argument. *Id.* at 752-53. The court rejected the contention that the regulation violated a fundamental interest. *Id.* at 752. The court noted that no fundamental interest exists when the state has not violated a first amendment right. *Id.* The court also determined that the regulation did not violate the equal protection clause because the regulation did not discriminate among classes of consumers in Mississippi. *Id.* at 752-53. The court, therefore, concluded that rational basis scrutiny was appropriate, and held that the regulation passed muster under that standard. *Id.* at 753.

Judge Williams concurred in the result and agreed with the majority's application of the *Central Hudson* test. Judge Williams, however, disagreed with the majority's implication that state power under the twenty-first amendment permits states to infringe on individual liberties. *Id.* at 753-54 (Williams, J., concurring).

Judge Gee, writing for the five dissenting judges, referred to the vacated panel opinion, in which the court found the Mississippi regulatory scheme an unconstitutional restriction of commercial speech. *Id.* at 755 (Gee, J., dissenting). In that opinion the panel invalidated the regulation on the ground that it did not directly advance the state interest. Lamar Out-

IV. ANALYSIS

Queensgate, *Crisp*, and *Dunagin* are analytically defective for three reasons. First, the courts did not properly apply the *Central Hudson* test. Second, the courts relied too heavily on the precedential value of distinguishable cases. Last, the presence of state power under the twenty-first amendment improperly influenced the courts' first amendment analyses. This part of the Recent Development discusses each of these contentions in turn.

A. *The* Central Hudson *Test Requires Intermediate Review*

The Supreme Court developed the *Central Hudson* test because the Court felt that commercial speech merits first amendment protection.[128] The origin of first amendment protection of commercial speech suggests that the *Central Hudson* test employs an intermediate standard of review.[129] Justice Blackmun, in his concurrence in *Central Hudson*, referred to the test as an intermediate level of protection.[130] Moreover, the language that the Court uses in commercial speech cases is similar to the language that it applies in other intermediate review cases.[131]

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door Advertising, Inc. v. Mississippi State Tax Comm'n, 701 F.2d 314, 331-33, *vacated sub nom.* Dunagin v. City of Oxford, 718 F.2d 738 (5th Cir. 1983). The panel found that *Central Hudson* requires intermediate scrutiny, *id.* at 332, which in turn requires a close fit between legislative means and ends, as well as empirical evidence, *id.* at 332-33.

Judge Higginbotham joined the dissent in *Dunagin* and also wrote a separate dissenting opinion. *Dunagin*, 718 F.2d at 755 (Higginbotham, J., dissenting). Judge Higginbotham suggested that the majority's distaste for intruding into legislative judgment was the "unidentified hand" that restrained the court from rigorously applying the commercial speech doctrine. *Id.*

128. *See supra* notes 44-75 and accompanying text (discussing first amendment protection of commercial speech).

129. The range of standards applicable to first amendment violations is a fertile source of commentary. *See, e.g.*, L. TRIBE, *supra* note 3, § 12-2; Emerson, *supra* note 31, at 439-40, 449-51, 470-81; Van Alstyne, *supra* note 31. For a discussion of the intermediate standard of review, see *supra* note 23.

130. 447 U.S. at 573 (Blackmun, J., concurring); *accord* Case Comment, *Standard of Review for Regulations of Commercial Speech:* Metromedia, Inc. v. City of San Diego, 66 MINN. L. REV. 903, 910 (1982). In addition, Justice Blackmun has stated that some commercial speech infringements require strict scrutiny. *See Central Hudson*, 447 U.S. at 577 (Blackmun, J., concurring) (strict scrutiny necessary when a regulation suppresses information about a legally consumable product).

131. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982) (need for "direct, substantial relationship" between means and ends in equal protection challenges to gender based classifications); Craig v. Boren, 429 U.S. 190, 197 (1976) (important objectives must relate substantially to the state interest); Police Dep't v. Moseley, 408 U.S. 92, 95 (1972) (appropriate government interest); Bullock v. Carter, 405 U.S. 134, 144 (1972) (close scrutiny requires that a law is reasonably necessary to legitimate state objectives); Stanley v.

The second prong of the *Central Hudson* test requires a substantial state interest to sustain an infringement on commercial speech.[132] The Court uses the words "substantial" and "important" when it applies more than rational basis review, but less than strict scrutiny.[133] The third prong of the test requires that the challenged regulation must directly promote the state interest.[134] Under intermediate review, the state must demonstrate a close, immediate, or substantial relation between the regulation and the state interest.[135] Rational basis review, however, requires only a reasonable relation,[136] while strict scrutiny demands a necessary relation.[137] The third prong, therefore, mandates intermediate review—more than a rational relation, but less than a necessary one. In addition, the Court usually does not demand empirical evidence under the rational basis test.[138] Under intermediate review, however, the Court has suggested[139] the need for empirical support to justify a

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Illinois, 405 U.S. 645, 652 (1972) (legitimate interests); Bennett, *supra* note 13, at 1054 n.34.

132. *Central Hudson*, 447 U.S. at 564; *supra* text accompanying note 61.

133. *See* United States v. O'Brien, 391 U.S. 367 (1968) (equating substantial and important government interests).

134. *Central Hudson*, 447 U.S. at 564-65; *supra* text accompanying note 62.

135. *See* Comment, *Equal Protection and Due Process: Contrasting Methods of Review Under Fourteenth Amendment Doctrine*, 14 HARV. C.R.-C.L. L. REV. 529, 541-45 (1979).

136. *See* G. GUNTHER, *supra* note 13, at 676-81; Bennett, *supra* note 13, at 676-81.

137. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967). A necessary relation means that no other viable method is available to promote the state interest. *See Developments in the Law, Equal Protection*, 82 HARV. L. REV. 1065, 1101-03 (1969). For a discussion of rational basis review and strict scrutiny analysis, see *supra* note 13.

138. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 426 (1961) ("A statutory discrimination will not be set aside, if any state of facts reasonably may be conceived to justify it."); *see also* L. TRIBE, *supra* note 3, § 16-3 (conceivable basis test). *But see* Bennett, *supra* note 13 (arguing that the rational basis test requires a closer connection between the regulatory means and ends).

139. The Supreme Court never has stated expressly that intermediate review requires a state to present empirical evidence to justify a regulation. *Central Hudson*, for example, finds a direct link without empirical evidence. But if rational review demands only a reasonable means to advance the state interest, then intermediate review *should* require more than a reasonable or rational basis for the regulation.

Part of the problem lies in defining the word "reasonable." If reasonable means conceivable, *see* L. TRIBE, *supra* note 3, § 16-3, then rational review would require a logical absurdity to invalidate a regulation. If the Court uses reasonable to mean plausible, *see* Bennett, *supra* note 13, at 1057 (rational review requires a closer fit than conceivable); *supra* note 53 (*Virginia Pharmacy* Court invalidates regulation despite its premise relying on a "plausible" assumption), seemingly, or apparently valid, likely, or acceptable, *see* AMERICAN HERITAGE DICTIONARY 1005 (1971), then the Court could sustain a regulation that follows from assumptions which are more likely true than false. Although this definition still requires a value judgment, it provides a starting point from which to measure the strictness of an intermediate standard of review. Because intermediate review necessitates more careful

regulation, which is another indication that the third prong of the *Central Hudson* test mandates intermediate review.[140]

The fourth prong of the *Central Hudson* test requires that the state regulate commercial speech no more extensively than necessary to achieve the state goal.[141] This formulation, analogous to the least drastic means requirement of strict scrutiny,[142] suggests that *Central Hudson* mandates heightened review for two reasons. First, because the rational basis test requires only that the regulation be reasonable, whether a less extensive means of regulating the activity is available is irrelevant. A least restrictive means prong, therefore, does not make sense in a test requiring only rational review. Second, and more importantly, the least restrictive means prong of *Central Hudson* strengthens the argument in favor of requiring the state to provide empirical evidence to support a challenged regulation. If the fourth prong is to have any content, the state must demonstrate by evidence in the record that the regulation is no more extensive than necessary to serve the state's legitimate interests.[143] Moreover, the presence of an element of strict

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analysis than rational basis review, the constitutionality of a connection that the Court gives intermediate review should require more than a plausible assumption to invalidate the regulation. Absent a logically compelling inference, a state will have a hard time meeting this standard without empirical evidence. *See* Gunther, *Evolving Doctrine*, *supra* note 13, at 21.

140. The *Central Hudson* Court invalidated the link between a state interest and the regulation for lack of empirical support, while sustaining the link between a second state interest and the same regulation, even though the second link also lacked empirical support. The Court laheled highly speculative the link between the state's substantial interest in an equitable and efficient rate structure for utilities and the state's advertising ban. *Central Hudson*, 447 U.S. at 569. The link relied on the assumption that promoting off-peak usage also would increase peak usage, which might affect adversely the equity of the rate structure. The Court did not find that the link was irrational, but only too remote because it lacked empirical evidence. *Id.* In the second case, the Court found a direct link hetween the state interest in hanning advertising and the regulation by asserting that the utility would not protest the advertising han unless the utility thought the ban affected sales. *Id.* Arguably, this second link is less speculative because it assumes that the utility would not incur the expense of litigation if the advertising ban did not threaten the utility's economic interests. In the second case the Court may have had a more persuasive hasis on which to find a causal connection. *Cf.* Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 769 (1975) ("[An] advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information.").

141. *Central Hudson*, 447 U.S. at 570-72.

142. *See* Gunther, *Evolving Doctrine*, *supra* note 13, at 21. *But see* Emerson, *supra* note 31, at 450-51 (suggesting that the Court did not contemplate that the *O'Brien* "no greater than essential" test should be as rigorous as the "less drastic means" test).

143. *See Central Hudson*, 447 U.S. at 565-66; *see also* Linmark Assocs. v. Willinghoro, 431 U.S. 85, 95-96 (1977); Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Comm'n, 701 F.2d 314, 332-33, *vacated sub nom.* Dunagin v. City of Oxford, 718 F.2d 738 (5th Cir. 1983).

scrutiny in the *Central Hudson* test suggests that courts should apply the test rigorously by requiring empirical support for the directness prong as well.

In first amendment cases the Court examines the type of speech a government regulation infringes on when determining what protection the Constitution accords the speech.[144] Courts apply strict scrutiny to any infringement[145] upon political or core speech because the Supreme Court has held that political speech is one of the most important first amendment values.[146] Commercial speech, however, qualifies for a much more uncertain degree of first amendment protection. Prior to the Court's acknowledgement that commercial speech warrants protection under the first amendment,[147] the Court sustained reasonable regulations of commercial speech.[148] To continue to apply rational review in commercial speech cases would make the Court's subsequent grant of first amendment protection to speech insignificant. The Court has never developed a new test to apply to less than fully protected speech and then used only rational review.[149]

In *Crisp*[150] and *Dunagin*[151] the courts, relying on *Me-*

144. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 745-50 (1978) (dirty words in context of FCC regulation); Ohralik v. Ohio Bar Ass'n, 436 U.S. 447, 456 (1978) (commercial speech); Young v. American Mini Theatres, Inc., 427 U.S. 50, 61 (1976) (sexually explicit but nonobscene adult movies); Roth v. United States, 354 U.S. 476, 484-85 (1957) (obscenity receives no first amendment protection); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (fighting words do not receive first amendment protection). Some commentators feel that the Court's approach is inappropriate. *See, e.g.*, Emerson, *supra* note 31, at 451-53; Van Alstyne, *supra* note 31, at 107, 140.

145. For a discussion of the various levels of review that the Supreme Court may be applying in first amendment cases, see Emerson, *supra* note 31, at 439-40, 449-51, 470-81. Professor Emerson argues that expression should receive full first amendment protection, while action should receive due process and equal protection safeguards. *Id.* at 477-78.

146. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam); *see also* Van Alstyne, *supra* note 31, at 140; *accord* BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978).

147. *See supra* text accompanying note 44.

148. *See, e.g.*, Valentine v. Christensen, 316 U.S. 52 (1942); *supra* text accompanying notes 45-47 (discussing *Valentine*).

149. *See* L. TRIBE, *supra* note 3, § 12-2, at 580. Professor Tribe developed a two-track analytical model to describe the way in which the Supreme Court analyzes first amendment cases. Track one analysis presumes that a regulation is invalid whenever it directly infringes on the communicative effect of an act. *Id.* at 582. Track two analysis imposes a balancing test whenever the regulation has a direct effect on a noncommunicative act but incidentally affects expressive conduct. *Id.* Tribe's approach is comparable to Justice Marshall's sliding-scale approach in the equal protection area. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting).

150. 699 F.2d 490, 501 (10th Cir. 1983).

151. 718 F.2d 738, 750 (5th Cir. 1983).

tromedia,[152] improperly applied only rational review to the third and fourth prongs of the *Central Hudson* test.[153] In *Dunagin*, for example, the court stated that either the "accumulated commonsense" approach under *Metromedia* or judicial notice under *Central Hudson* would satisfy the third prong.[154] The application of either of these tests requires no more than a reasonable basis. Under these lines of analysis, the *Dunagin* court reasoned that the regulation injured the plaintiffs economically, or they would not have challenged the regulation. Thus, the court inferred that the regulation directly promotes the state interest in limiting the sale of alcohol.

This reasoning, however, suffers from two flaws. First, the plaintiffs in *Crisp* and *Dunagin* were advertisers, not liquor wholesalers or retailers. The plaintiffs' principal concern was advertising revenue, not alcohol revenue. The advertising ban, therefore, directly affected them. The states have a legitimate interest in regulating alcohol consumption, not advertising. The direct connection was between advertising revenue and the advertising ban. The *Crisp* and *Dunagin* courts never identified the link between alcohol consumption and the advertising ban. Second, as the dissent in *Dunagin* pointed out, *Central Hudson* concerned a monopoly, unlike the businesses in the present cases.[155] A monopoly aims its advertising to increase demand, while a business in competition in the market targets its advertising to increase its market share.[156]

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152. 453 U.S. 490 (1981).

153. *See supra* text accompanying notes 99-100 & 120 (*Crisp* and *Dunagin*). In *Queensgate* the standard was unclear but deferential.

154. *Dunagin*, 718 F.2d at 750. *Crisp* also relied on *Metromedia*. *See supra* text accompanying notes 98-102. Under the judicial notice approach, the *Dunagin* court found a direct link between the state interest in shielding its citizens from alcohol use and the advertising regulation, despite the existence of alcohol advertising that the regulation did not prohibit. The court reasoned that the plaintiffs would not litigate the issue if alcohol advertisements already saturated the market because further advertising would not increase overall alcohol consumption. *Dunagin*, 718 F.2d at 750-51. This approach, however, ignores the argument that the plaintiffs sought to increase their market share. *Lamar*, 701 F.2d at 331-32.

The court's second line of analysis—that without the regulation advertising would increase—does not address the underlying concern that the ban is permissible only if the advertising threatens public health and safety. In addition, the court's assertion that the regulation does not violate the first amendment if ample alcohol advertising exists disregards the first amendment rights of the individual advertisers. The state may not infringe upon commercial speech unless the infringement is necessary to further a state interest. *Central Hudson*, 447 U.S. at 564.

155. *See Lamar*, 701 F.2d at 332 n.24.

156. *Id.* The *Dunagin* court emphasized the Supreme Court's acknowledgement in *Central Hudson* that even a monopoly has competitors in alternative industries. *Dunagin*,

Thus, the judicial notice approach in *Central Hudson* is less effective when the business is not a monopoly.[157] At a minimum, the *Queensgate*, *Crisp*, and *Dunagin* courts should have required the state to produce evidence indicating that increased advertising was likely to cause increased alcohol consumption.[158]

The courts also should have required that the state demonstrate empirically that its regulations complied with *Central Hudson*'s fourth prong. In *Central Hudson* the Court found that the regulation was unconstitutional because the state failed to demonstrate empirically that the regulation was no more extensive than necessary.[159] The *Queensgate*, *Crisp*, and *Dunagin* courts, however, did not require empirical evidence when they analyzed the fourth prong. For example, in *Crisp* the court merely asserted that the regulation passed muster because the court could conceive of a more drastic regulation.[160] Similarly, the *Dunagin* court found that

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718 F.2d at 749-50 (quoting *Central Hudson*, 447 U.S. at 567). The Supreme Court in *Central Hudson* made this statement in the context of rejecting the argument that the first amendment does not protect a monopolist's speech. The Court reasoned that because utility customers could choose among alternative energy sources, they had a right to the information in the advertisements to help them decide which energy source to use. *Central Hudson*, 447 U.S. at 567-68. The Court added that the informational content of a monopolist's advertisements alone was sufficient to require first amendment protection. *See id.* Thus, the Court made its comment that a utility may attempt to gain market share in a different context than a discussion of the directness of the link between a state regulation and a state interest. Moreover, the *Central Hudson* Court made this observation in conjunction with an alternative rationale to provide first amendment protection to monopoly advertising. The *Dunagin* court's out-of-context citation supporting its assumption that the *Central Hudson* Court found that a monopoly may vie for market share is too tenuous to uphold an infringement of commercial speech. In the monopoly context, the market share rationale may be less viable.

157. In a monopoly situation, arguably a court may infer that a direct link exists between a regulation and the state interest because the monopolist is more likely to try to increase the overall demand for its product.

158. The *Dunagin* court contended that the issue of whether a direct correlation exists between advertising and consumption is a legislative question and not a justiciable issue of fact. *Dunagin*, 718 F.2d at 748 n.8. This argument fails to address the need for courts to evaluate the validity of legislative findings. When legislative findings are purely conclusory, as in *Dunagin*, courts should scrutinize carefully the link between means and ends.

The *Dunagin* court cites *Metromedia* and *Bellanca* for the proposition that the states need not provide empirical evidence. *Metromedia* and *Bellanca*, however, are distinguishable. *See infra* notes 168-82 and accompanying text. The court also cites Bolger v. Youngs Drug Prods. Corp., 103 S. Ct. 2875 (1983). *Bolger* struck down a law banning unsolicited contraceptive advertisements because the purpose of the law was to exercise control over the mailbox. Presumably, the state could have rebutted the plaintiff's arguments with legislative findings. *Id.* at 2884.

159. *Central Hudson*, 447 U.S. at 570.

160. *See Crisp*, 699 F.2d at 502. In addition, when the court applied the direct relationship prong, it indicated that the state only had to use a direct means to promote its

no less restrictive means would be effective to further the state interest, even though the court did not examine empirical evidence, as *Central Hudson* requires.[161]

The dissent in *Dunagin* distinguished the *Metromedia* approach on the ground that *Metromedia* concerned a content-neutral restriction,[162] which requires less rigid scrutiny than a content-based restriction.[163] *Queensgate*, *Crisp*, and *Dunagin* are content-based restriction cases because they single out alcoholic beverage advertising.[164] The Supreme Court has held that when the government is concerned with the substance of a communication, rather than its commercial nature, regulation of commercial speech is impermissible unless the speech is false or misleading.[165] *Central Hudson* itself states that strict scrutiny is appropriate when a regulation bans commercial speech for a nonspeech related reason.[166]

The *Queensgate*, *Crisp*, and *Dunagin* courts misapplied the *Central Hudson* test by not using intermediate review. The third and fourth prongs of the test require that the state produce empirical evidence to prove that the regulation directly supports a substantial state interest by means no more extensive than necessary.[167] In addition, the presence of content-based restrictions

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interest, not the best means. *Id.* at 500. This argument, however, ignores the fourth prong of *Central Hudson*, which requires the state to advance its interests by the least restrictive means.

161. *Dunagin*, 718 F.2d at 751; *accord* Note, *Liquor Advertising*, *supra* note 26, at 183-85.

162. *See Lamar*, 701 F.2d at 332 n.25. The dissent pointed out that *Metromedia* dealt with a form of advertising instead of a type of speech. *See Metromedia*, 453 U.S. at 493-94. In addition, *Metromedia* was a plurality decision and thus has limited precedential value. *See* Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756 (1980).

163. *See, e.g.*, Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 769-71 (1976) (commercial speech context); *see also* L. TRIBE, *supra* note 3, §§ 12-2 to -3; Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980) (arguing that content regulation should be permissible in certain cases); Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981) (contending that the Court should not distinguish between content-based and content-neutral restrictions).

164. *See supra* notes 91-92 & 113 and accompanying text.

165. Linmark Assocs. v. Township of Willingboro, 431 U.S. 91, 96 (1977).

166. *Central Hudson*, 447 U.S. at 566 n.9. Moreover, *Central Hudson* suggests that strict scrutiny is appropriate in *Crisp* and *Dunagin* because they concern a near total ban on speech for a nonspeech related reason. *But cf.* United States v. O'Brien, 391 U.S. 367 (1968) (state may infringe upon speech that is predominately conduct if the purpose of the infringement does not relate to the content of the speech and the state only incidentally infringes upon the speech).

167. *Central Hudson*, 447 U.S. at 564-65, 570-72.

militates in favor of an even stricter application of *Central Hudson*.

B. *Misuse of Precedent*

The *Crisp* and *Dunagin* courts' heavy reliance on *California v. LaRue*[168] and *New York v. Bellanca*[169] to sustain the states' twenty-first amendment power to regulate commercial speech[170] is improper because *LaRue* and *Bellanca* are not on point. First, in *LaRue* and *Bellanca* the Court did not undertake a first amendment analysis. Instead, the Court applied rational review, even though the Court never has held that rational review is the appropriate standard in first amendment cases. The Court's implicit explanation for its analytic approach in *LaRue* and *Bellanca* was that the challenged regulations governed liquor licenses, not speech.[171] This distinction is inappropriate in the present cases because the challenged regulations directly address protected commercial speech. Thus, *LaRue* and *Bellanca* have limited precedential value in cases concerning the direct regulation of commercial speech.[172]

A second reason that the *Crisp* and *Dunagin* courts' heavy reliance on *LaRue* and *Bellanca* is inappropriate is that the Supreme Court typically accords more deference to the partial regulation of

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168. 409 U.S. 109 (1972).

169. 452 U.S.714 (1981).

170. *Dunagin*, 718 F.2d at 743-45, 748 n.8, 750; *Crisp*, 699 F.2d at 498. *Crisp* and *Dunagin* also relied on *Queensgate*. Both courts insisted that controlling precedent required them to undertake an inquiry independent of the precedential value of the summary dismissal of the *Queensgate* appeal, but both courts still referred to *Queensgate* in their first amendment analysis. *Dunagin*, 718 F.2d at 750 ("*Queensgate* helps to establish the balance in favor of the state, *if balancing be necessary*" (emphasis added)); *Crisp*, 699 F.2d at 502 (*Queensgate* mandates shift of balancing test in the state's favor permitting regulation of commercial speech not otherwise subject to regulation under the twenty-first amendment). The extent to which *Queensgate* changed the result in *Crisp* and *Dunagin* is unclear. The *Crisp* and *Dunagin* courts both believed that the issue in *Queensgate* was close enough to the issues that *Crisp* and *Dunagin* addressed to serve as controlling precedent. *Dunagin*, 718 F.2d at 746; *Crisp*, 699 F.2d at 497. *Queensgate*, however, concerned only a partial ban on liquor advertising, while *Crisp* and *Dunagin* concerned almost total prohibition. *See supra* notes 91 & 113-15 and accompanying text.

171. *See Lamar*, 701 F.2d 314, 327.

172. The *Crisp* and *Dunagin* courts' reliance on *LaRue* and *Bellanca* to justify rational review is troubling for another reason. The Supreme Court might have sustained the regulations in *LaRue* and *Bellanca* even under strict scrutiny because the stato has a compelling interest in preventing the violence that often accompanies the mixing of drinking and sexually provocative dancing. *See infra* note 179. Moreover, the *LaRue* and *Bellanca* courts probably chose the least restrictive means to regulate the activity because the state prohibited only the *mixing* of alcohol and suggestive dancing.

expression[173] in *LaRue* and *Bellanca*[174] than it accords to the more complete alcohol bans in *Crisp* and *Dunagin*.[175] The regulations in *LaRue* and *Bellanca* only prohibited certain kinds of dancing in establishments with liquor licenses[176] and did not eliminate alternative forums for lewd dancing. Under *Crisp* and *Dunagin*, however, only minor exceptions exist to the prohibition of alcohol advertising.[177] Thus, the existence of alternative forums in *LaRue* and *Bellanca* provided the Court with a rationale to sustain the partial prohibition of alcohol. This rationale is not present in *Crisp* and *Dunagin*.

Third, reliance on *LaRue* and *Bellanca* is improper because they concerned more substantial state interests than *Crisp* and *Dunagin*. In *Crisp* and *Dunagin* the states asserted that the state legislature enacted the regulations prohibiting alcohol advertisements to protect the health and safety of the public. Thus, the state sought to indirectly discourage, but not prohibit, people from drinking alcoholic beverages.[178] The *LaRue* and *Bellanca* courts, however, did not face a problem of conflicting state policies. In *LaRue* and *Bellanca* the state sought to prohibit the potentially volatile mixture of sexually provocative entertainment and alcohol,[179]

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173. *See, e.g.*, Young v. American Mini Theatres, 427 U.S. 50 (1976) (upholding an "Anti-Skid Row" ordinance that allowed adult movie theatres throughout the city except in certain zoned locations).

174. *See supra* text accompanying notes 29 & 40.

175. *See supra* notes 89-91 & 112-14 and accompanying text.

176. *Bellanca*, 452 U.S. at 714; *LaRue*, 409 U.S. at 111-12.

177. *See Dunagin*, 718 F.2d at 738; *Crisp*, 699 F.2d at 492. For example, beer advertisements are generally permissible, while regulations limit liquor advertisements to signs on liquor-licensed premises. In addition, an exception exists in Mississippi for advertisements that originate outside the state. *See supra* note 114.

178. *See supra* notes 90, 112 & 118 and accompanying text. Justice Blackmun stated that he doubts "whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the state to 'dampen' demand for or use of a product." *Central Hudson*, 447 U.S. at 574 (Blackmun, J., concurring).

179. *See supra* text accompanying notes 28 & 43. *LaRue* and *Bellanca* may have relied implicitly on the established doctrine that states may prohibit speech when a clear and present danger exists. The Court set forth this doctrine in Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam). *Brandenburg* formulated two criteria that are necessary to take otherwise protected speech out of the ambit of first amendment protection. The test requires that the speech is (1) "directed to inciting or producing imminent lawless acts"; and is (2) "likely to incite or produce such action." *Id.* at 447; *see* L. TRIBE, *supra* note 3, §§ 12-9 to -11.

The Supreme Court has recognized that the mixture of alcohol and sexually provocative entertainment can be dangerous. *See LaRue*, 409 U.S. at 117-18. The record in *LaRue* revealed evidence of prostitution, rape, assaults, and indecent exposure near the licensed premises. *LaRue*, 409 U.S. at 111.

For a discussion of the clear and present danger standard, see Cohen v. California, 403

but did not ban alcohol consumption or nude dancing once separated.

The final reason that the *Crisp* and *Dunagin* courts' reliance on *LaRue* and *Bellanca* is inappropriate is that obscene or offensive speech or behavior, such as the dancing in *LaRue* and *Bellanca,* receives a reduced level of first amendment protection.[180] Even when obscene or offensive speech warrants first amendment protection, the Court has struggled with the precise degree of coverage to accord the speech because it is so far removed from fully protected political or core speech. Commercial speech, on the other hand, receives greater first amendment protection.[181] Thus, courts scrutinize infringements of commercial speech more carefully than they scrutinize infringements of nude dancing.[182]

C. *Undue Influence of the Twenty-First Amendment*

The courts in *Crisp* and *Dunagin* improperly allowed the presence of state power under the twenty-first amendment to diminish the first amendment protection of commercial speech. The courts' principal analytical flaw was their use of the twenty-first amendment[183] to emasculate the third and fourth prongs of the *Central*

U.S. 15 (1971) (offensive language printed on jacket); Feiner v. New York, 340 U.S. 315 (1951) (police could not prevent spectator violence if race-baiting speech continued); Terminiello v. Chicago, 337 U.S. 1 (1949) (race-baiting speech); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words).

180. *See supra* note 145.

181. *See* Van Alstyne, *supra* note 31, at 140.

182. Another feature that distinguishes *LaRue* and *Bellanca* from *Crisp* and *Dunagin* is that the protected activity in *LaRue* and *Bellanca* was conduct, not pure speech. *Bellanca,* 452 U.S. at 716-18; *LaRue,* 409 U.S. at 116-18. In United States v. O'Brien, 391 U.S. 367 (1968), the Court articulated a balancing test, an intermediate standard of review, for regulations that concern speech and conduct. Under the *O'Brien* test, a regulation governing activity containing speech and nonspeech elements is permissible if: (1) the regulation is within the constitutional power of the government; (2) the regulation furthers a substantial government interest; (3) the interest does not relate to the infringement of speech; and (4) the regulation is no greater than necessary to further the government interest. *Id.* at 377. Commentators have found this test less protective of the first amendment than strict scrutiny. *See* L. TRIBE, *supra* note 3, § 12-2, at 580, 685-86; *see also* G. GUNTHER, *supra* note 13, at 1317-19; Ely, *Flag Desecration: A Case Study in the Rules of Categorization and Balancing in First Amendment Analysis,* 88 HARV. L. REV. 1482 (1975).

The *LaRue* and *Bellanca* Courts may have believed that the expression of offensive speech through lewd dancing deserved even less protection than *O'Brien* affords. *See LaRue,* 409 U.S. at 116 (state not limited by *O'Brien* test). The offensive conduct element in *LaRue* and *Bellanca* may explain the Court's use of the deferential rational basis standard. *See id.* at 117-18.

183. The courts, however, properly used the states' twenty-first amendment power to find a substantial state interest.

Hudson test.[184] In *Crisp* the court held that, in light of state power under the twenty-first amendment, the regulation directly promoted the state interest as a matter of law.[185] The *Dunagin* majority was only slightly more tentative in a similar assertion.[186] The inquiry into the directness of a regulation, however, is a question of fact, not law. The *Crisp* and *Dunagin* courts also referred to a presumption of validity in favor of alcohol regulations under the state's twenty-first amendment power,[187] even though the *Central Hudson* test does not incorporate a presumption in the state's favor. Thus, even if a court finds that state power under the twenty-first amendment gives the state a substantial interest under the second prong of *Central Hudson*, a court cannot employ the twenty-first amendment to uphold a regulation that does not directly promote the state interest by the least restrictive means.[188] The Supreme Court expressly has rejected the theory that the twenty-first amendment alters the appropriate constitutional stan-

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184. *See supra* notes 117-19 and accompanying text. The *Queensgate* court's approach was more analytically sound. The court only used the twenty-first amendment to strengthen the state interest in the *Central Hudson* test. *Queensgate*, 69 Ohio St. 2d at 365-66, 433 N.E.2d at 141-42. The court did not refer to the twenty-first amendment in applying the third and fourth prongs of the test. *Id.* at 366-67, 433 N.E.2d at 142.

185. *Crisp*, 699 F.2d at 501. The court stated, "With particular emphasis on the . . . Twenty-first Amendment, we hold that the advertising prohibitions here are no more extensive than is necessary. . . . When the Twenty-first Amendment is [present] . . . , the balance shifts in the state's favor, permitting regulation of commercial speech that might not otherwise be permissible." *Id.* at 502.

186. *Dunagin*, 718 F.2d at 742. The court declared, "[I]t probably makes no difference . . . whether the *Central Hudson Gas* four-part test . . . is applied, because cases of this category likely present state interests which justify advertising restrictions that pass the latter test *as a matter of law*." *Id.* (emphasis added); *see id.* at 745 (questioning whether a balancing test is necessary when the court can rely on the twenty-first amendment).

187. *Dunagin*, 718 F.2d at 745; *Crisp*, 699 F.2d at 501-02. In *LaRue* the Court mentioned a presumption of validity that the Court accords state power under the twenty-first amendment. 409 U.S. at 118-19. This presumption, however, goes to the strength of state power, not to the link between a state's regulations and its interests.

188. Arguably, even a compelling state interest could not sustain a regulation infringing upon commercial speech if the regulation did not directly support the state's interest by the least restrictive means. Supreme Court jurisprudence does not provide explicitly for relative adjustments in the application of the *Central Hudson* test. In the future, however, the Court may require less empirical evidence for a given prong of the *Central Hudson* test without eliminating entirely the requirement of empirical evidence. Thus, an unusually strong state interest might require only a less direct link to the regulation, while an unusually close link might require a less substantial state interest. In both cases, however, the interest still would be substantial and the link still would be direct. Moreover, to eliminate the standards of the test because of the presence of the twenty-first amendment expressly would violate Supreme Court precedent. *See* Craig v. Boren, 429 U.S. 190 (1976); Wisconsin v. Constantineau, 400 U.S. 433 (1971); *supra* notes 14-24 and accompanying text (discussing *Craig* and *Constantineau*).

dard of review in equal protection cases.[189] The first amendment merits similar respect.[190]

The language that the *Crisp* and *Dunagin* courts employ suggests that they permitted the twenty-first amendment to water down their first amendment analysis.[191] In *Crisp* the court said that the twenty-first amendment permits the regulation of speech that the states otherwise could not regulate.[192] *Dunagin* questioned whether a first amendment analysis is necessary at all.[193]

The Supreme Court's decision in *Capital Cities*[194] reinforces the conclusion that the twenty-first amendment unduly influenced the lower courts. The Court noted that when the states use the twenty-first amendment only to limit indirectly the use and consumption of alcohol, federal interests may invalidate the state regulation.[195] In *Capital Cities* the Court found that the federal interest in regulating cable signals overrode the state interest in indirectly regulating alcohol.[196] Individual interests that the first amendment implicates certainly deserve as much respect as cable signals.

V. An Analytic Framework

A. *Proposal*

The Supreme Court should reaffirm the approach that it adopted in *Craig v. Boren*[197] and apply an independent first amendment analysis in state alcohol advertising cases. The Court should not permit the twenty-first amendment to diminish constitutionally protected individual rights. The Court should reverse the trend that it established in *LaRue* and *Bellanca* of carving out an exception to the *Craig* approach for violations of the first

189. Craig v. Boren, 429 U.S. 190, 204-05 (1976).

190. *Accord Lamar*, 701 F.2d at 329 n.20.

191. *See Dunagin*, 718 F.2d at 742-45; *Crisp*, 699 F.2d at 501-02.

192. *Crisp*, 699 F.2d at 502.

193. *Dunagin*, 718 F.2d at 743-45. Moreover, the concurrence in *Dunagin* referred to the inappropriate discussion of the twenty-first amendment in the majority's first amendment analysis as "mischievous and insidious." *Id.* at 753-54 (Williams, J., concurring). Judge Williams agreed with the majority's application of the *Central Hudson* test, *id.*, but he feared the majority's implication that the twenty-first amendment can justify "unusual and wholly unique intrusions upon the personal liberties of American citizens." *Id.* at 753.

194. 104 S. Ct. 2694 (1984), *reversing on other grounds sub nom.* Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490 (10th Cir. 1984).

195. *See supra* text accompanying notes 106-11.

196. 104 S. Ct. at 2709.

197. 429 U.S. 190 (1976); *see supra* text accompanying notes 19-24 (discussing *Craig*).

amendment.[198] The Court must apply the appropriate constitutional standard and not water down its analysis because of the twenty-first amendment. For example, if a standard requires a direct means-ends link, the presence of the twenty-first amendment should not reduce the requirement to a merely reasonable relation.

Second, the Court should recognize the sliding scale approach to first amendment cases that is implicit in constitutional jurisprudence.[199] In the first amendment context, courts consider political speech as a core value and, therefore, afford it the greatest protection.[200] The further the speech is from the core, the less first amendment protection the speech receives, and the less substantial the requisite state justification for regulating the speech.[201] Under this approach, a state could justify a content-neutral regulation with a more indirect link than the state could justify a content-based regulation.[202]

The sliding scale approach does not permit a court to alter the standard of review that it chooses to apply. Once a court chooses the appropriate standard, however, the sliding scale analysis does permit the court to make adjustments to reflect the relative interests of the parties. Thus, the presence of the twenty-first amendment arguably strengthens a state's interest, and a court justifiably may decide to require less empirical evidence in support of the relationship between the regulation and the state's goal. The state still would have to demonstrate empirically the link between the regulation and the state goal, but with less conclusiveness than a weaker state interest would require. Similarly, a court could demand more empirical support when the regulation concerns a content-based restriction rather than a content-neutral restriction. Any balancing of interest would occur above the threshold of the applicable standard of review. The sliding scale approach, therefore, does not permit a strong state interest to eliminate the requirement of empirical evidence, but only to reduce the requisite degree of empirical evidence that the state must put forth.

B. Application

Applying the proposed framework to *Queensgate* suggests that a court could sustain the Ohio regulation with only minimal empir-

198. *See supra* notes 25-43 and accompanying text (discussing *LaRue* and *Bellanca*).
199. *See supra* note 145.
200. *See* authorities cited *supra* note 146.
201. *See supra* text accompanying notes 144-46.
202. *See supra* note 188.

ical findings to show that the regulation promotes Ohio's interests. The alleged violation concerned commercial speech,[203] which receives less than full first amendment protection.[204] Moreover, the state limited its regulation of alcohol advertising,[205] and the Court views partial bans more favorably than full bans.[206] Thus, the state's strong interest under the twenty-first amendment might justify this partial alcohol advertising ban.[207] The Supreme Court, nevertheless, should have remanded the case to require the state to demonstrate empirical evidence supporting its regulation.[208]

In *Crisp* and *Dunagin*, on the other hand, the courts should have struck down the state regulations on first amendment grounds.[209] The asserted state interest, promoting health and safety by discouraging alcohol consumption, was substantial. The state regulation, however, prohibited almost all alcoholic beverage advertisements. Moreover, the content-based restriction required heightened first amendment protection. The courts should have invalidated the regulation because the state failed to establish em-

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203. *Queensgate*, 69 Ohio St. 2d at 365, 433 N.E.2d at 141.

204. *See supra* notes 44-75 and accompanying text; *see also* Van Alstyne, *supra* note 31, at 140.

205. *Queensgate*, 69 Ohio St. 2d at 366, 433 N.E.2d at 141-42. The regulation does not prohibit nonprice liquor and wine advertising in most forums of general information dissemination by the holders of class C, D, and G permits. The regulation also does not prohibit price advertising of original containers or packages of liquor or wine by the same license holders, provided that the advertisements do not make reference to price advantage. Thus, the affected permit holders have numerous forums in which to promote their products, unlike in *Crisp* and *Dunagin*.

206. *See supra* text accompanying notes 173-75.

207. *Queensgate* keeps the twenty-first and first amendment analyses separate. In *Queensgate* the Ohio Supreme Court claimed that the state aimed its regulation at intoxicants and not speech because the state's purpose was to discourage alcohol consumption, not competition among the sellers. *Queensgate*, 69 Ohio St. 2d at 366, 433 N.E.2d at 142; *cf. Bellanca*, 452 U.S. at 717; *LaRue*, 409 U.S. at 114. Apparently, the court believed that the asserted aim of the regulation reduced the stringency of the *Central Hudson* test. The court implied that the regulation in Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1975), would require more of a direct link with the state interest than the regulation in *Queensgate*. *Queensgate*, 69 Ohio St. 2d at 366, 433 N.E.2d at 142. The *Queensgate*, regulation, nevertheless, directly affects speech by prohibiting price advertising per bottle and drink in virtually all forums. *See supra* note 79 and accompanying text.

The *Queensgate* court also adopted the judicial notice approach regarding the least restrictive means prong of the test. 69 Ohio St. 2d at 366, 433 N.E.2d at 142; *cf. Bellanca*, 452 U.S. 714 (1981); *LaRue*, 409 U.S. 109 (1972).

208. Ironically, because Ohio has chosen to regulate advertising in a limited manner, the state may have difficulty proving even the diminished empirical demonstration that the proposal requires. The state must show that its limited price advertising proscriptions promote its interest in discouraging excessive alcohol consumption.

209. Remand in these cases is probably unnecessary because the states had ample opportunity to make the empirical demonstrations that this Recent Development advocates.

pirically a direct relationship between the state's means and ends,[210] or that the regulation was the least restrictive means available to accomplish the state's purpose.

VI. Conclusion

The twenty-first amendment provides states with broad power to regulate alcohol. This power, however, does not permit the states to infringe upon constitutional rights. The twenty-first amendment should not affect the determination of whether the state may infringe upon a constitutional right. *Queensgate*, *Crisp*, and *Dunagin* wrestled with difficult questions regarding the constitutionality of regulating alcohol advertisements. The courts, however, gave too much weight to the twenty-first amendment. The courts' faulty reasoning, if allowed to stand, could influence other courts and endanger constitutional guarantees of individual rights in the guise of state power under the twenty-first amendment.

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210. *See supra* notes 159-67 and accompanying text.