

Supreme Court Case Files

Lewis F. Powell Jr. Papers

10-1979

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York

Lewis F. Powell Jr.

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/casefiles



Part of the Constitutional Law Commons

Recommended Citation

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York. Supreme Court. Case Files Collection. Box 71. Powell Papers. Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, Virginia.

This Manuscript Collection is brought to you for free and open access by the Lewis F. Powell Jr. Papers at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Supreme Court Case Files by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Que substanted

W. J. Pub. Sanse Conece. bannes catality adventising that promoted use of electricity. Purpose was to conserve energy.

Drop commercial speach cases were distinguished on ground that the speech banefiled the public (e.g. Va Pharmany) or educated public (Bellotte). Have, it was hald

PRELIMINARY MOMORANDOM was remed

November 21, 1979 Conference List 3, Sheet 1

No. 79-565-ASX

Appeal/from NY Ct.App. (<u>Cooke</u>)

CENTRAL BUDSON GAS & BLAC. COR

ν.

PUBLIC SERVICE COMMN. OF N.Y. Federal/Civil

Timely

- SUMMARY. Whether an order of the Public Service Comm's prohibiting electric utilities from promoting the use of electricity through advertising violates the Pirst Amendment on the Equal Protection Clause.
- FACTS. The Public Service Comm'n issued an order in 1973, in response to the Arab oil embargo, prohibiting electric

Hard questions about content-based probably regulations of commercial speech. This case will not Waffected by No. 74-134, Con Ed. v. Pullic Suc Conson of NI. because that case deals with public affairs messages [over]. use of advertising, subsidy payments . . . or employee incentives." In 1976, the Commission held informal rulemaking proceedings on the order, and concluding that the ban on promotion of electricity sales should remain in effect. The Commission reasoned: "[C]onservation of energy resources remains our highest priority . . . It is reasonable to believe that a continued proceription of promotion of electric sales will result in some dampening of unbecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales." The New York Supreme Court and the Appellate Division upheld the advertising ban.

3. OPINION BOLOW. The New York Court of Appeals affirmed. After determining that the Commn's order was authorized by state law, the court reached the constitutional issues. The court noted that the regulation is content-based and that it directly suppresses an entire category of speech. However, it concluded that commercial speech is protected primarily due to its benefit to consumers. The free flow of information is not so important in this situation because the utility has been granted a monopoly status. Given the noncompetitive situation, advertising of electricity will not contribute greatly to society's informed and reliable decisionmaking. Further, the advertising banned does not seek to provide information as to "availability, nature and prices," but rather to encourage increaced use of electricity. Its content might be affirmatively detrimental to society.

4. CONTINUIONS. Appellant's major argument is that electric utilities are in competition with other energy suppliers, such as oil and natural gas companies, and that promotion is beneficial to consumers who must choose between different forms of energy. None of the differences between commercial speech and political speech justify the restraint here. This Court has recognized that commercial speech may be regulated to prevent deceptive or misleading advertising, and that certain forms of promotion may be prohibited. The speech prohibited here is entirely truthful. Appellant also argues that promotion of some forms of electricity usage may help conserve energy, because electricity may be more efficient than other energy sources.

Appellant argues that the order is void for vagueness, overbreadth and lack of standards. Although the Commission was concerned primarily with space heating and cooling, the order is not confined to that area. The order would be promotion of electric lighting, which uses far less energy that heating and cooling, and involves safety. It would also be promotion of electric cars, even if they are more efficient than other cars. Finally, it gives no guidance to Central Hudson. Would a speech to a civic organization describing various ways electricity can serve its needs be banned?

Finally, appellant argues that the order deprives it of equal protection because other energy suppliers, i.e., oil and gas companies, are not prevented from advertising. This Court has long recognized that discrimination in speech restrictions is unconstitutional. A strict standard of review applies to classifications affecting Sirst Amendment interests.

Appellee moves to dismiss the appeal or affirm the judgment. Appellee begins with the assertion that commercial speech is entitled to less protection than other forms of speech. The interests of the speaker and the audience must be balanced against the government's interest. Here the state interest in energy conservation should prevail in the balancing process.

Most energy users do not face a choice between electricity, gas and oil. Homeowners generally do not change heating systems. The builder decides which type of heating system to install initially. Thus information directed to the general public about relative benefits of electricity would produce only a "meager" public benefit, which does not outweigh the substantial interest in conservation. The order does not prohibit manufacturers of electrical applicances from advertising them, so consumers are provided with an alternative source of information. Advertising by manufacturers, unlike advertising by a utility, does not imply that the energy crisis is not real.

The Commission argues that the vagueness/overbreadth arguments were not made below. Further, the order is clear and not overbroad. The order is not confined to heating and cooling, it purposefully bans all promotion.

Appellee also orges that the order does not deprive appellant of equal protection. Oil and gas are highly competitive industries. Further, the commission has no authority to regulate these companies.

In its reply, appellant argues that it did raise the vagueness/overbreadth arguments in the Court of Appeals. In any event, a challenge to the validity of a state statute on First Amendment grounds subsumes the questions of lack of standards, overbreadth and vagueness.

An amicus brief has been filed by the Edison Electric
Institute, an association of electric utilities, in support of
the pets.

5. <u>DISCUSSION</u>. This is a proper appeal. The Court of Appeals opinion makes clear that the order was attacked as invalid under the Pirst Amendment. The First Amendment question is substantial and not answered by this Court's prior cases. I recommend that jurisdiction be noted.

There is a response (motion to dismiss), an amicus brief and a reply.

11-11-79

Hair

Ops. in App. to Peta.

Court	Voted on 19							
Argued	Assigned	No. 79-565						
Submitted 19	Anomored, 19.							

CENTRAL HUDSON GAS & ELECTRIC CORP.

V\$,

PUBLIC SERVICE COMMN. OF NEW YORK

Also motion to dismiss or affirm.

Noted set with Consolated Ed-79-134

	 :	- <u> </u>				· · · · · · · · · · · · · · · · · · ·							
	M 02.0	CERT	JUNISBECTIONAL STATEMENT			MERITS		MOTION		AP22.7-0	No.		
	ron	'S ID	N 19641	140- 1	APP '	KEN ARE	-:		i				
Burger, Ch. J								:	- 		٠.		
Brennan, J			X.,,	ļ	;	4	0			! ∴			
Stewart. J	!]سار	Con	rote	4	12	K						
White, J								ļ.,			.,		
Marshell, J.,	:	;	·	<u>.</u>]			l					
Blackistin, J	<u>.</u> .	.	<u> </u>	<u> </u>]								
Powell, J.,													
Rehaquist, J]								
Stevens, J	/]							· · · · · · ·	
	,		! 	:			l	:		į.			

JS 3/17/80

SUPPLEMENTAL MEMORANDUM

To: Mr. Justice Powell

Re: No. 79-565, Consolidated Hudson v. Public Service Commission

I fear that my analysis of this case may have been overshadowed in my Bench Memorandum by discussion of the Con Edcase. Because this case presents a close question in an uncharted area of the Pirst Amendment, you may be aided by further discussion.

This Court's commercial speech cases support three queerning principles: (1) Prohibition on advertising in a free market is unconstitutional, <u>Virginia State Board</u>, <u>Bates</u>, and <u>Linmark Associates</u>. (2) Commercial speech related to an economic transaction involving exercise of a fundamental constitutional

right may not be suppressed. Bigelow v: Virginia. (3) Commercial speech that is misleading or intertwined with conduct that may be injurious to consumers may be prohibited. Obtalik: Priedman.

I do not believe that this case falls either in catagory (2) or (3). There is no fundamental right to electrical energy, nor is there a contention that the speech itself will mislead or injure consumers.

The question is whether this case is controlled by

Virginia State Board. The Court in that case weighed the interests in favor of speech against the state interest in suppression. Here the interest of the utility company is purely economic. Unlike Virginia State Board, however, there is no free market for the sale of electricity. Thus, insofar as protection for commercial speech furthers consumers' ability to make rational economic decisions and society's interest in efficient allocation of resources, the interest in protecting speech is less than it was in Virginia State Board. The market for eletricity is imperfect in three ways: [1] Utilities have a monopoly on the supply of electricity, (2) Even where energy purveyors compete, the price and availability of electricity is determined by a state regulatory commission rather than by the invisible hand of the market, and (3) the resp believes that current electricial rates are imporfect and, therfore, the price consumers pay for peak time electricity does not actually cover the marginal cost of the production of additional energy. Thus,

But there is some conspectation

it can be argued that the interest in ensuring a free flow of information is not as great for in a heavily regulated market because consumer decisions have a smaller effect on market allocation.

ı!

The State interest seems more substantial than the state interest in <u>Virginia State Board</u>. In that case, the State feared that consumers would not use information widsly, but it had no interest in deterring well-informed consumer decisions to purchase less expensive drugs. In this case, however, the State has a legitimate interest in discouraging the economic transaction—the purchase of electricity.

Several arquements can be made, however, the support the application of Virgini State Board. First, the consumers interest here is substantial. Although consumer choices may not have as great an effect on market transactions as in Virginia State Board, monetheless each consumers has a considerable interest in choosing from among energy sources, and consumer choices as a whole will surely affect the decisions of the state regulatory commission. Any flaws in the pricing scheme for electricity should be eradicated through changes in the rates, not through suppression of speech.

It can also be arqued that the State's interest is like the interest in <u>Virginia State Board</u>. The State fears that consumers will not comprehend the extent of the energy crisis if they see promotional advertising. This is a paternalistic

attitude.

If it is agreed that the consumer interest here is less and the State interest greater than in <u>Virginia State Board</u>, then the remaining question is whether the state interest is sufficiently substantial to justify the ban. This is an area of commercial speech doctrine Court has yet to explain. Two models exist; neither wholly applicable. If the question concerned the State's ability to enforce an energy rationing program, then the inquiry would be simply whether the State could show that its economic legislation was rational and not arbitrary. If the State were attempting to suppress noncommercial speech, then it would have to demonstrate a compelling state interest.

my

The degree of interest sufficient to uphold a ban on commercial speech probably falls in the middle of those two models. In Ohralik, your opinion for the Court noted "the 'commonsense' distinction between spech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." As you stated, the Court has "afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in th realm of non-commercial expression." 436 U.S., at 456.

Your opinion for the Court in <u>Friedman v: Rogers</u> also offers insight into the showing of governmental interest needed

to upho)d a suppression of commercial speech. The Court upheld a ban on trade names on the basis of a "significant possibility that the trade names will be used to mislead the public." 440 0.5., at 13. There was scant evidence that the person opposing the ban had actually engaged in misleading conduct. It was sufficient, the Court noted, that he used "a trade name to facilitate the large-scale commercialization which enhances the opportunity for misleading practices." Thus, the Court upheld the ban on the basis that the speech might be, but was not necessarily, misleading. Friedman was not based merely on the principle that false commercial speech is unprotected, because the Court did not demand any showing that the speech was, in fact, deceptive. Friedman indicates, therefore, that the States have an appreciable leeway in controlling commercial speech.

÷

This case demands that the Court decide whether resp has presented sufficient justification for the ban. Unless the Court is prepared to accept the contention that truthful commercial speech may never be suppressed (a contention which is inconsistent with the weighing of interest in <u>Virginia State Board</u>), I believe that this case presents a close question. As before, I lean slightly to uphold the prohibition because of the State's strong interest in energy conservation.

79-12- FEW Tay lost for Petr) Argued 3/17/80 montional ban' on bill

Supreme Court of the United States

Memorandum

factor

Sally - I mestateally ted Energy Comm. regimes used their sheet or is lawful. no gost for Telford's conquirent tim.

we wan ordered in 73. There is of oil today, the we are foreign oil

ald prevent acto, promoting on ground to their would

See Brief p 15 - quote from who of n 4 c/apper - over looke fact that cos share of space heating in somewar. H- house beating oil dominable market - 16.

Long Irland Lighting Cock-16

Facts as to relative maints of competiting sources of energy are imp to public - us in Va Pharmery & Baker Telford Taylor (Petr) - Cont,

agreement leve or conservated speech
Arguer Him in stronger case for 1st ained.

Them Bellati because speech here in
adventising to protect burners of co.

This ban to close int involve

possibility of false information or

over-reaching (as in Ohralich). The factors

weighted is commercial speech in

Shoolik & Fredwan Rogers

Doder in over hood of applier in Mis care (what did Ct roy in Bater?). Notes that heat-pumps conserve electricity, & yet in adv. in banned.

no other state except Oblahowa har imposed such a bow & state court invalidated it

Schiff (Rich)
Validly of bow depends on fact that
Petr. in a regulated manapoly.

Commercial specach care 79-565 Central Hudson (Pre Confesence meno). Subject to G. descurion, m inclined to Keverre - tho case in close for me because of state 5 authority over utilities Bellotte emphasized the public interest in being informed; not the Bank's Commercial interest Court must weight all Here interests: Petrs, State's, and public. as this is commercial. not political - speech, State interest need not be compelling It must be substantiali. Its interest in conservation - but need doesn't make needs to know comparative ments.

the would be donned well for apout bear to showned chose actuen competitues Public in selenced helpful un m Reverse & 7 Bytem 2. B.R.W. parsed

79-565 Central Mudson v. Public Service

Conf.: 3/19/80

The Chief Justice Reverse

energy as it seen it. May request south say what can't say, va Phanusay held truthful wif count be restrained. (C.J. cital "here tree or Die Cose in way 9 ded it understand).

Mr. Justice Brennan afferme

Much tongher case than Con Ed. The bon Comme can limit production. The bon in one way of bringing about lear production time a sufficiently compelling state in feach her been shown.

Mr. Justice Stewart Range

another extremely defeared case. Comme, can limit customers, etc., but reme of these currence 1st Amend. Then been does.

There is not much deflevent in premaple from Con Ed care

Mr. Justice White Para - Wat at Rest

Nevere 1 3/27/80

Mr. Justice Marshall Raverse

agree with P.S.

Mr. Justice Blackmun Rauce

relevant prescriptor. The latter docint contral

not vaque.

Mr. Justice Powell Reverse

Mr. Justice Rehnquist affam (tentation)

Here thin ban in met limited

to bile insert. It in a flat out

probletion of deisonmetern of information

"Peoples right to know in a coloque

of the media - not the people."

Mr. Justice Stevens Rover

t can't probelet discussion.

JS 3/19/80

SECOND SUPPLEMENTAL MEMORANDUM

To: Mr. Justice Powell

Ret No. 79-565, Central Hudson v. PUC

When faced with a troublesome case, you sometimes ask your clerks which outcome would be easier to write. I have come (too slowly perhaps) to the conclusion that it would be slightly easier to justify a decision reversing the prohibition on promotional advertising.

My first supplemental memorandum outlined the competing arguments that can be advanced as to the applicability of <u>Virginia State Board</u> to this case. As we have discussed, the case is very close under that analysis. But consideration of the principles outlined in your opinion in <u>First Mational Bank v.</u>

Beilotti may tip the balance.

In <u>Beilotti</u> your opinion for the Court rejected the Massachusett Subreme Judicial Court's focus on the right of a corporation to speak. Bather, you stated that the guestion presented was whether the state statute abridged expression that the First Amendment was designed to protect. You concluded that it did by assessing not only the corporation's right to speak, but society's interest in being informed. You stated that "(t]he inherent worth of the speech in terms of its capacity for informaing the public does not depend upon the identity of its source." Thus you emphasized a "right to hear" in addition to the "right to speak." You characterized the commercial speech cases in the same manner: "A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it 'furthers the free flow of commercial information.'" quoting Virginia State Board.

It is true, of course, that the purely commercial speech involved in this case is entitled to lesser protection than the political speech at issue in <u>Beliotti</u>. But use of the "right to be informed" analysis in this case may tip the balance against the prohibition.

You could conclude that societal interest in the free flow of truthful commercial information prohibits any suppression of such speech absent a substantial (but less than compelling) state interest. Thus, so long as the free choice of

consumers to choose electrical heating is unhampered, there is a speech interest that is not outweighed by the state's interest in conservation. Of course, the right to be informed is not the right to be deceived. Thus, a state may force commercial enterprises to include additional information in advertisements necessary to ensure that consumers are fully informed of the risk of an economic transaction (such as a warning label on cigarette packages). Perhaps the resp could, in this case, force the utility to inform consumers of the costs of electrical space heating. But, you might conclude, there is little state interest is allowing consumers to make economic transactions, but not allowing then to be informed.

Of course, I do not suggest that a "right to know" analysis could be stretched so far as to compel private enterprises to advertise, or to [orce governments to reveal information. The First Amendment does not incoporate a Preedom of Information Act. However, assessment of the societal interest may, as in Bellotti, be relevant to resolution of this case.

Resolution of this case demands that the Court weighthe petr's interest, the consumers' interest, and the state's interest. As you stated in <u>Bellotti</u>, the commercial speech cases "illustrate that the First Amendment does beyond the protection of the press and the self-expression of individuals to probibit government from limiting the stock of information from which members of the public may draw. "The difficulty of writing the

case this way would be to show that the public interest outweighs the state interest in energy conservation. I think you would have to suggest that the state must, where feasible, take a non-speech related means to achieve a non-speech related end. Perhaps the state would not be forced to use the <u>least</u> restrictive means, but at the minimum it should explore other means to satisfy the public interest. Perhaps the other means would involve a speech-related requirement that promotional advertising note the relative efficiencies of electrical and non-electrical energy sources, or perhaps a restriction on new costumets using electrical space heating.

Supreme Court of the Aluited Scales Mashington, D. G. 20543

снивые об этимун рочус воп'єсь

March 27, 1980

Sally - hote on my docket sheet.

Re: No. 79-565 - Central Hudson G & E Corp. v. PSC of N. Y.

Dear Chief,

I passed in Conference on this case,
 I now join the crowd to reverse.

Sincerely yours.

The Chief Justice Copies to the Conference

<u>вемс</u>и-мемованним

TO: Mr. Justice Powell

FROM: David

DATE: April 25, 1980

RE: No. 79-565, Central Hudson Gas * Flectric Corp: v: Public

Service:Comm'n:of:the:State:of:New:York

The attached draft represents my best efforts to date on this issue. I would like to raise a couple of points, however. Most significantly, Part II of the draft makes a substantial effort to develop a standardized "test" for use in commercial speech cases. I think it may be time for this kind of a move. The first commercial speech cases could not be especially rigorous in this way because they were still breaking free of the demons of Valentine v: Christenson. By now, however, it seems appropriate to try to apply a disciplined approach instead of the more ad-hoc balancing methods used in the early cases. This offort is not without problems. porticular, the test as I have articulated seems a hit elaborate and academic. Some might say it borders on self-parody. The teason for its four-step approach is that it is difficult to find a middle ground of scrutiny in any legal situation. Courts are most coherent when they either apply per-se rules (or heavy presumption rules, such as the prior restraint doctrine), or if they defer to all but the

work outlandish of covernmental acts. But your objection in Friedman virkovers recognized that commercial speech must be less protected than other forms of expression, or the First Amendment will be cheapened. I agree with that view. Consequently, I have tried to develop a middle-level test that is something more oregise than balancing, by using some of the analytical tools of other First Amendment doctrines. Although I remain uncertain of the workshillty of this test, I must admit that I prefer it to another round of balancing.

A second point focuses on the impact of the test on this Part III of the opinion involves fairly claborate analysis of the substantive arguments but forth by the Commission. This sort of analysis is uncommon in Pirst Amendment cases, but becomes necessary when applying a middle-level standard like the commercial speech doctrine. As Jackson and Jeffries aroue in their Virginia Law Poview article, the approach becomes indistinguishable from substantive due process, and shares many of the drawbacks of that doctrine. Indeed, the motivating principle of the Court's recent commercial speech cases -- that commercial information must be disseminated as widely as possible -- could probably be derived from "Mr. Herbert Socncer's Social Statics," to paraphrase Holmes in Lochner. Perhaps there is a stronger aroument for holding that the First Amendment, rather than the due process clause, does embody this preference for the free market. My impression, nevertheless, is that the Court is wading deeper and deeper into this area, and that -- as a practical matter -- the lines being drawn will eventually beain to cross and overtab. I doubt that the Court can be deterred from pursuing these ideas, but I am also dubious that it will end well.

A more mundane coint involves the very end of the draft, in Part III(C), which deals with the Commission's energy conservation rationale. The argument for finding the Commission's advertising has to be overinclusive turns on the existence of energy-saving for at least energy-neutral; electrical devices. On this record, there is no firm basis for believing or disbelieving that such devices exist. Thus, at the end of the draft, I simply accept the likelihood that they do (see, especially, footnote 12). This may well be criticized as a fairly thin basis for stomping on the Commission. It is, however, the best I could come up with.

Finally, footnote 13 includes some fairly outradeous dicta about possible courses of action for the Commission in the future. As we have discussed, the Court has tended to include in such excesses in commercial speech cases, presumably on the theory that the new doctrine needs a bit of fleshing out. On that theory, I have added this footnote.

July

LFP/lab 4/28/80

To:

David

Date: April 28, 1980

From:

L.F.P., Jr.

No. 79-565 Central Hudson v. Public Service Comm. of NY

I have read your draft of 4/25 with considerable interest, especially as I gave you a difficult assignment without clear guidance. My initial reactions are as follows.

No problem, of course, with Part I. In view of your accompanying memo of 4/25, I have read Part II with special interest. My first impression definitely is affirmative.

The four-step analysis does not seem too
"elaborate" or "academic". Your summary on page 11 lays it
out quite simply. The first step (whether the speech is
"commercial") usually will be simple. The second step
(whether the governmental interst is substantial) presents a
familiar question that usually is a judgment call. The next
two steps are: whether the regulation is related directly to
the state interest, and whether it restricts expression
unrelated to the state interst. These also are "judgment
calls", and yet they are familiar ones, and the four together

do contribute - I think - to an orderly, step-by-step analysis. I do note that step four can be construed as a form of "overbreadth", and in view of what we have said about the inapplicability of overbreadth to commercial speech, this step has to be handled with special care.

In sum as to Part II, I think you have been imaginative in the best sense of that term. I will be interested in how your co-clerks react to this, and suggest that they be given a copy of your memo of April 23 when we give them a draft of the opinion to review.

My contentment with Part II is tempered a bit by the way you apply it in Part III. I do not think it is made sufficiently clear that you are applying a four-step analysis. You focus primarily, and necessarily, on the third and fourth steps. The structure of Part III will, however, be viewed - I think - as somewhat of a blending of the steps together.

In Matthews v. Eldridge, I tried to do for procedural due process analysis, what you are suggesting that I do for commercial speech analysis. After identifying the "steps" in Eldridge, I think the reader of the opinion can clearly see that I applied each step separately and consistently with the identification of it at the outset.

The leadoff paragraph in Part III is, I take it, a

summary of what is to follow. Normally this is helpful, and yet after the last paragraph in Part II. I would have expected a clearer correlation between the two paragraphs. It might be well to commence Part III with a simple introductory sentence along the following lines:

"We now examine the arguments advanced in support of the Commission's regulation in light of the foregoing criteria."

Following a brief introduction, then perhaps you could have Subparts A, B, C, and D. Or, it may be that (if the briefs support it) we could commence by stating, with a supporting sentence or two (see the Rider I dictated for page 17) that it is conceded that the governmental interest asserted here is substantial. I have no doubt that it is. If Part III were commenced in this way, then the analysis could focus briefly in a Subpart A on the contention that actually the speech here is not "commercial speech" in the customary sense of that term. Then, in the next two Subparts, we could consider whether the regulation is related directly to the state interest (I view this as easy to answer briefly), and finally come — as you do — to the tough question: whether the regulation unduly restricts expression.

I would appreciate your taking a second close look

at the organization of Part III. My rough suggestion above is "off-the-cuff". My primary interest is to make it somewhat clearer that your four-step analysis fits.

Now for a bit of a "hombshell". Despite your thoughtful and careful draft, I am not yet chirely persuaded that we are right. After you have put this through a second draft, what would you think of doing an alternate Part III that ends up "the other way", affirming rather than reversing?

Let's talk about this.

L.F.P., Jr.

LFP/lab 4/28/80

To: David Date: April 28, 1980

Prom: L.F.P., Jr.

No. 79-565 Central Nudson v: Public Service Comm: of NY

As indicated in my other memo to you of this date, the weakest link ("step") in your four-part analysis is whether the restriction on advertising reaches expression beyond the state interest. On this point, the draft states (p. 17):

"The Commission has failed to show that the ban limits only speech that would subvert energy consumption."

You make a good argument in support of this statement. Yet, it is hardly overwhelming - as we have agreed. Without having thought very deeply about what one would say to the contrary, the following thoughts come to mind.

We start with the Commission's responsibility. It has been delegated legislative power to regulate the monopolies that provide electric energy for the public. It is easy to say that the state's interest in continuing an

adequate supply is as compelling as almost any state interest one can imagine. We must concede that there is no current "crisis", as there appears to be an adequate supply of oil and gas at the present time. One would be rash indeed, however, to formulate quiernment action on the theory that there may not be another 1973 crisis or a far worse one. Events of last week may well have increased the risk that the Mid-East source of energy could be denied the United States in major part, or even possibly entirely. Apart from the ever present threat of Soviet intervention, there is the danger - I view it as the greater danger - of further disorders and revolution among the Arab states by forces that are encouraged by the USSR and that are bitterly hostile to our country.

In any event, the uncertainties are such as to require prudent government to plan against eventualities that could be serious indeed. Is it unreasonable, therefore, for the Commission to reason that the addition of new customers or expanded usage by old customers will increase the demand for (dependence upon) electric energy?

In the exercise of legislative power, in the furtherence of a compelling state interest, I question whether a "less restrictive means" type of analysis is appropriate. Putting it differently, is the regulation at

issue invalid merely because it reaches beyond what appears to be the immediate problem, when it might be justified as a reasonable precautionary measure for the future? Or, are we not really talking about "overbreadth analysis" which has only the most limited applicability to commercial speech?

These thoughts, in briefest summary, underline my concern as to whether I am on the right side of the issue.

L.F.P., Jr.

DOS



MEMORANDUM

TO: Mr. Justice Powell

FROM: David

DATE: May 4, 1980

RR: No. 79-565, Central Hudson Gas & Electric Corp. v. Public

Service Commin of the State of New York

I am attaching the two drafts you requested in this case. Some changes have taken place, however, with respect to both.

The draft reversal incorporates a modified four-step test. As we have discussed, the problem in commercial speech cases is staking out a coherent "middle level" analysis. Such an analysis would lie between the strict standards of usual First Amendment scrutiny and lax, "rational basis" analysis. Under the first approach, the government always loses; under the second, it always wins. Some of the commercial speech cases -- notably Virginia State Board of Pharmacy -- use "less restrictive means" analysis (LRM). Under that approach, the state cannot control speech if a nonspeech regulation is available. I have strained to avoid LRM for commercial speech, on the theory that its protections are too great in view of the concededly lower value of commercial expression. Thus was born the four-step test.

On reflection, though, I think the original four-step test

was insensitive to the particular dangers presented by complete suppression of commercial speech in pursuit of subspeech policy. quals. The Court has approved complete prohibitions on torms of commercial speech when the expression itself was flowed. Pittsburgh Press, the expression related to unlawful activity: in Obralik, it was presented in a coercive and overboaring setting; in Priedman v. Rogers, it was both deceptive and without substantive content. But the Court has not approved outright bans on commercial specch that was not objectionable for some basic reason relating to the speech itself. A good reason to draw that line relates to the ability of the people to monitor government requiation. When the government pursues a nonspeech policy by banning advertising, it reduces the information available to the public in that area and partially screens the regulation itself from public scrutiny. Before the State can do that, I would require it to demonstrate that less restrictive speech restrictions -- disclaimers, etc. -- would not be adequate.

The significant point for me here is to require a showing that other speech restrictions would not serve the state's interest adequately, but not to require a showing that nonspeech restrictions were also not available. In order to make this distinction between the analysis in this case and standard-brand LRM analysis, I have talked about more limited "techniques" of speech requlation as part of the fourth step of the test (which previously looked only to whether the regulation was overinclusive, reaching speech unrelated to the asserted state interest.) I have also modified the first step, to emphasize that some speech by commercial actors -- deceptive

speech, etc. -- is not protected and thus may be banned outright.

The net effect of these changes on this case is to add another ground for overturning the Commission's order. There has been no demonstration that more limited techniques of speech restriction would not serve the State's interest in conservation as well. I think this modification substantially strengthens the case for reversing the New York court. Indeed, I now feel convinced that that is the correct outcome.

Nevertheless, I have also altered the draft affirmance. The opinion now construes the utility's challenge as an overbreadth attack and then dismisses it as inappropriate to the commercial speech context. I find this a more satisfying approach, though it does raise the prospect that it will be impossible to bring a declaratory challenge against commercial speech regulation. That might not be the worst thing in the world, but it is somewhat disconcerting. I have retained the old four-step test in the affirmance, primarily because the modified four-step test generates another reason for reversal that I cannot gainsay.



Supreme Court of the United States Mushington, D. C. 20583

CHANTEN OF JUSTICE BIRON & WHITE

May 13, 1980

Re: 79-565 - Central Hudson G & E Corp. v. PSC of New York

Dear Lewis,

I have had trouble with this case from the beginning, and I shall take a little more time in coming to rest.

Sincerely yours,

A-

Mr. Justice Powell

Copies to the Conference

cmc

Supreme Conet of the Anited States Washington, D. C. 20549

THANGES OF JUSTICE THURSOOD MARSHALL

May 14, 1980

Re: No. 79-565 - Central Hudson Gas & Electric Corp. v. Public Service Commission

Dear Lewis:

Plcase join me,

Sincerely,

fur.

T,M,

Mr. Justice Powell

co: The Conference

Supreme Court of the United States Washington, D. C. 20343

CHANGES OF GUSTICE WILLIAM H REHNQUIST

May 14, 1980

Re: No. 79-565 Central Hudson Gas & Electric Corp. v. Public Service Commission of New York

Dear Lewis:

Bill Brennan earlier suggested that I write whatever separate views were going to be written in this case, and in due course I will circulate an opinion which may be either a dissent in toto or a concurrence in part and a dissent in part.

Sincercly.

www

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States Anshington, D. C. 2054.3

CHANGED OF JUSTICE POTTER SHI WART

May 15, 1980

Re: 79-565 - Central Hudson Gas v. Public Service Commin

Dear Lewis:

I am glad to join your opinion for the Court.

Sincerely yours,

(s.

Mr. Justice Powell

Copies to the Conference

Supreme Quart of the Mailes States [Plantington, M. C. 2050; 3] Contract John Paul, Signey May 16, 1980 Re: 79-565 - Central Hudson Gas v. Public Service Commission Dear Lewis: Your thoughtful four-part analysis seems to me to

Your thoughtful four-part analysis seems to me to be an excellent approach to the regulation of commercial speech if we define that concept narrowly. Specifically, if the concept is limited to "speech proposing a commercial transaction" (see page 4), I think the analysis is acceptable. I am troubled, however, by two thoughts: (1) I do not helicve all of the advertising involved in this case would fit within that marrowly defined concept; and (2) you define the commercial speech concept much more broadly at page 3 of your opinion. You there define commercial speech as "expression related solely to the economic interests of the speaker and its audience." In my judgment, much speech that fits within that broad definition -- e.g. a labor leader's advocacy of a strike--would be entitled to the fullest measure of constitutional protection. Indeed, as I reflect on this case I am inclined to believe that the real vice in what New York has done is that it has flatly prohibited communication that is entitled to greater protection than ordinary commercial speech. It is, therefore, not necessary to rely on the four-part analysis to condemn this total censorship.

I want to think about this case further, but I may well end up by writing separately.

Respectfully,

Mr. Justice Powell

Copies to the Conference

Same 28 a

P.S. I should add that at the moment I am not persuaded by either of the reasons you give in fontnote 4 as a justification for regulation of the content of commercial speech. Speakers in other contexts can be equally well informed about the accuracy of their messages and may have a motivation that is every bit as darable as economic self-interest. In my judgment, the more important point is that there is a lesser First Amendment interest in protecting proposals to engage in commercial transactions than there is in more pure forms of communication.

Supreme Court of the Thited States **Pashington, D. C.** 20983

COMMERCE OF ኒክ, ዲኖ ሮሮ ...ውስፍ የአባር ይግኛሃይዛኝ

-G

May 16; 1980

79-565 - Central Hudson Gas v. Public Service Re: Commission

Dear Lewis:

Your thoughtful four-part analysis seems to me to be an excellent approach to the regulation of commercial speech if we define that concept narrowly. Specifically, if the concept is limited to "speech proposing a commercial transaction" (see page 4), I think the analysis is acceptable. I am troubled, however, by two thoughts: (1) I do not believe all of the advertising involved in this case would fit within that narrowly defined concept; and (2) you define the commercial speech concept much more broadly at page 3 of your opinion. You there define commercial speech as "expression related solely to the economic interests of the speaker and its audience." In my judgment, much 1 484 40 speech that fits within that broad definition--e.g. a labor leader's advocacy of a strike--would be entitled to the fullest measure of constitutional protection. Indeed, as I reflect on this case I am inclined to believe that the real vice in what New York has done is that it has flatly prohibited communication that is entitled to greater protection than ordinary commercial speech. It is, therefore, not necessary to rely on the defended? Other come four-part analysis to condemn this total censorship.

I want to think about this case further, but I may well end up by writing separately.

Respectfully,

Mr. Justice Powell

Copies to the Conference

John says there is more Home commercial speach excertify the " pune" from the

recent feel

foten

In a merchant who true to petacoda the public to been him goods. Alle a fellow to been the hour goods.

P.S. I should add that at the moment (am not persuaded by either of the reasons you give in footnote 4 as a justification for regulation of the content of commercial speech. Speakers in other contexts can be equally well informed about the accuracy of their messages and may have a motivation that is every bit as durable as economic self-interest. In my judgment, the more important point is that there is a lesser First Amendment interest in protecting proposals to engage in commercial transactions than there is in more pure forms of communication.

DOS

₹.

BENCH MEMORANDUM

TO: Mr. Justice Powell

FROM: David

DATE: May 16, 1980

RE: No. 79-565, Central Hudson Gas v. Public Service Commin

Because I cannot quite figure out Justice Stevens' concerns in this case, I thought a background memorandum might best law out our options. Justice Stevens raises three points: 1) he is concerned that we define commercial speech too broadly when we call it "expression related solely to the economic interests of the speaker and its audience"; 2) he thinks that some of the speech at issue in this case may be classed properly as more like "pure" or "political" speech and should be protected accordingly; 3) he thinks, in his postscript, that commercial speech is subject to less protection because it is just less important, not because it is such a hardy breed. Perhaps not suprisingly, I find his concerns inapt.

1) <u>Definition of Commercial Speech</u>: The commercial speech opinions of this Court have used both of the definitions that we refer to in the draft opinion in this case. In <u>Pittsburgh Press Co.v. Human Relations Commin</u>, 413 U.S. 376, 385 (1973), vour opinion described speech that does "no more than propose a commercial transaction." <u>Virginia State Board of Pharmacy v. Virginia Consumer</u>

Council, 425 U.S. 748, 762 (1976), reproduces that definition and adds its own: "we may assume that the advertiser's interest is a purely economic one." Bates v. State Bar of Arizona, 433 U.S. 350, 363-364 [1977), combines the two in two consecutive sertences: "(Commercial) speech should not be withdrawn from protection merely because it proposed a mundane commercial transaction. Even though the speaker's interest is largely economic, the Court has protected such speech in certain contexts." In Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 [1978], your opinion for the Court mentions only "speech proposing a commercial transaction," but Friedman v. Rogers, 440 U.S. 1, 8 (1979), notes that in Virginia Board "the economic nature of the pharmacists' interest in the speech did not preclude First Amendment protection of their advertisements." (I would note that Justice Stevens loined all of these opinions except Pittsburgh Press and Virginia State Board, which predate his tenure.)

On the basis of these statements, I resolved to use hoth definitions in the draft opinion. I am not convinced that they have significantly different reach taken on their own, and certainly do not think they do in view of the Court's obvious conviction that they are interchangeable. Justice Stevens, however, suggests that by defining commercial speech as that regulation "solely related to the economic interests of the speaker and the audience," we may sweep too broadly. In particular, he suggests that we will reach the expression of a labor leader. This is ludicrous. The commercial speech opinions squarely rely on the fact that speech in labor contexts were accorded First Amendment protection long before Pittsburgh Press was written. For example, Virginia State Board

observes, "The interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the first Amendment when they express themselves on the merits of the dispute in order to influence its outcome. See, e.g., NLRB v. Gissel Packing Co., 395 U.S. 575, 617-618 (1969); NERB v. Virginia Electric & Power Co., 314 U.S. 469, 477 (1941); AFL v. Swing, 312 U.S. 321, 325-326 (1941); Thornhill v. Alabama, 310 U.S., at 102." 425 U.S., at 762. A similar passage appears in Bates, 433 U.S., at 364. Thus, the Court relied on the protected nature of speech in labor contexts to justify protection of other commercial speech. Like commercial speech, I would note, speech in the labor context is subject to some regulations. In Gissel Packing the Court said it was all right to bar "coercive" speech by employers, while the provision against secondary boycotts is plainly another regulation on speech.

I think this discussion demonstrates three points: 1) our definitions of commercial speech were unremarkable; 2) labor-related speech is not within the Court's articulation of the commercial speech doctrine; 3) labor-related speech, however, has been viewed by the Court as analogous to commercial speech. On the merits, I see no reason to alter the current language. Nevertheless, I doubt if we lose very much by relying entirely on the definition of commercial speech as that "which proposes a commercial transaction." If that would make Justice Stevens happy, I really see little loss.

2) <u>"Other" kinds of speech at issue</u>: Justice Stevens apparently thinks that this is not a pure commercial speech case. I do not see his point. There is no claim that the right to

no dem war made by Pool. Telphol Taylor person that

electricity is constitutionally protected, like the right to abortions in Bigelow v. Virginia. There is also no discernible political content to the exhortation to buy electricity. Perhaps Justice Stevens is relying on Spinoza's view [and Lemin's] that all of man's acts are political, but I can see no defensible distinction) event between the advertising of drugs by regulated pharmacists and the advertising of electricity by regulated power companies. wishes to go off on this point, I would recommend bidding him a puzzled farewell. Change

 Commercial speech is just less important: Our entire opinion revolves around this idea. In the middle of page four, we note the description in Ohralik of the "'common-sense' distinction between Speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." Thus, our reasons for establishing the fourpart test are hardly confined to footnote 4, as Justice Stevens suggests. I think our discussion plainly reflects the view that Justice Stevens expresses in his postscript. Indeed, the draft does on to note the "lesser protection accorded" to commercial speech, a lesser protection that is not justified only by the additional reasons offered in (nothote 4. Nevertheless, I would be willing to add (perhaps in a footnote) the further observations of that bassage in <u>Ohralik: "To require a parity of constitutional protection for </u> commercial and noncommercial speech alike could invite dilution, 70% simply by a leveling process, of the force of the Amendment's quarantee with respect to the latter kind of specch."

My inclination would be to make an attempt to mollify Justice Stevens on the first and third points -- perhaps through private negotiations or a personal communication. I will draft whatever you think appropriate.

Sec. 10.

Supreme Court of the Aniled States. Mashington, B. C. 20543

SHAMPLANDS OF POWERLY JA

May 17, 1980

Re: No. 79-565, <u>Central Modeon Gas & Electric Corp.</u>
v. Public Service Commin

Dear John:

I share several of the concerns about the commercial speech doctrine that you have expressed in your letter. Nevertheless, I believe that the current draft upinion respends in large part to several of your concerns.

You note the alternative descriptions of "commercial speech" that appear on pages three and four of the draft opinion. Those formulations are derived directly from our recent decisions, in which the Court has used both definitions interchangeably. Pittsburgh Press Co. v. Human Relations Commin, 413 U.S. 376, 385 (1973), the foregunner of the current doctrine, referred to specch that does "no more than propose a commercial transaction." Our first major decision protecting "pure" commercial speech, Virginia State Board of Pharmacy v. Virginia Communer Council, 425 U.S. 748, 762 (1976), reproduces that definition and adds its own: "we may assume that the advertisor's interest is a purely economic one." <u>Nates v. State Bar of Arizona</u>, 433 U.S. 350, 363-364 (1977), combines the two formulations in consecutive sentences: "[Commercial! speech should not be withdrawn from protection merely because it proposed a Mondaco commercial transaction. Even though the speaker's interest is largely economic, the Court has protected such speech in certain contexts." In Ohralik v. Chio State Bar Ass'n. 436 U.S. 447, 456 (1978), the Court mentions only "speech proposing a commercial transaction," But Prindman V. Rogers; 440 U.S. 1, 8 (1979), notes that in Virginia Roard "the economic nature of the pharmacists' interest in the speech did not proclude Pirst Amendment protection of their advertisements."

In sum, I believe it is entirely consistent with precedent to rely on both formulations. To me, they seem to have substantially the same reach, certainly in view of their interchangeable use in previous opinions. I would hemitate

to endertake a new formulation.

You ask whether the description of commercial speech as that "related solely to the economic interests of the speaker and its audience" might include the expression of a lubor leader. On its face, I suppose it might. But our cases recognize that labor relations speech occurs in a special regulated context. There is, however, home analogy between that speech and commercial expression. (The first dommercial agreek objidions relied on the First Amendment's protection to: labor-related speech. For example, Virginia State Board observes, "The interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the morits of the dispute in order to influence its outcome. Ser, e.c., NLRB v. Gissel Packing Co., 395 U.S.;575, 617-618 ('969); NLRH v. Virginia Electric & Power Co., 314 U.S. 469, 477 (1941); APL v. Swing, 312 U.S. 321, 325-326 (1941); Thornhill v. Alabama, 310 U.S., at '02." 425 U.S., at 762. A similar possage appears in Bates, 433 U.S., at 364. Like commercial speech, expression in the labor context is subject to some regulation. In Gissel Packing, for example, the Court approved limits on "coercive" speech by employers.

The postscript to your memorandum suggests that icotnote 4 of the draft opinion contains the only expressed rationale for according a lesser protection to commercial speech. But the first full paragraph of page four guotes the statement in Ohralik that there is a "'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject Lo government revulation, and other varieties of speech." I Relieve that this passage reflects your view (with which I adree) that "thore is a lesser First Amondment introduct in protecting proposals to engage in commercial fransactions." I am, however, adding a footcote to quote further from Obrolik as follows: "To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's quarantee with respect to the latter kind of speech."

Finally, you suggest that this may not be a pure commercial speech case. This argument was not made by Prof. Telford Taylor in the course of this littuation. Perhaps i miss your thought, but I see no political content in the exhaustion to purchase electricity. I have not thought there was any First Amendment distinction between the advertising of drugs by regulated pharmacists and the advertising of electricity by regulated power companies.

ti vi i i

I do appreciate your writing, and hope: this meets your concerns.

Sincerely,

Jastice Streens

lf#/dos

cc: The Conference

Lewis

JP3 majerts no defention. Blanket ban . 3,5

To: The Court (Estate
Mr. Justice Browner
Tr. Justice Stowart
Mr. Justice Stowart
Mr. Justice Entshall
Tr. Justice Blackman
Tr. Justice Powell
Mr. Justice Powell
Mr. Justice Powell

Print Er. Justice Stevens

Caronieros, RW 4 80

Recirculated: . . .____

79:565 - Contral Budson Gas v. Public Service Commin

MR. JUSTICE STEVENS, concurring in judy, only.

Because "commercial speech" is afforded less constitutional protection than other forms of speech, 1/3t is important that the commercial speech concept not be defined for broadly less speech deserving of greater constitutional protection be inadvertantly suppressed. The issue in this case is whether New York's prohibition on the promotion of the use of electricity through advertising is a ban on nothing but commercial speech.

In my judgment one of the two definitions the Court uses in uddressing that issue is too broad and the other may be somewhat too narrow. The Court first describes commercial speech as "expression related solely to the economic interests of the speaker and its audience." Appe, at 3. Although it is

^{1/} See Obra'ik v. Oh)o State Bar. 436 U.S. 497, 456, quoted ante, at 4 e.4. of. Smith v. Obited States, 431 U.S., 291, 318 (SrEVENS, J., dissenting).

natter of the spench or the mativation of the spenker as the limiting factor, it seems clear to be that it encompasses speech that is entitled to the maximum protection afforded by the Firsh Amendment. Noither a 'about 'coder's extertation to strike, nor an economist's dispertation on the money supply, should receive any lesser protection because the subject matter concerns only the economic interests of the audience. Nor should the economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward. Thus, the Court's first definition of commercial speech is inquestionably too broad.2/

The Court's second definition refers to "speech proposing a conmercial transaction." Anne, at 4. A salescent's solicitation, a broker's offer, and a manufacturer's publication of a price list or the terms of his standard warranty would inquestionably fit within this concept. The Presumably, the definition is intended to encompass advertising that advices possible buyers of the availability of specific products at specific prices and describes the advantages of

<u>3</u>/ See <u>i₫</u>., at 306 397.

١.

purchasing such items. Perhaps it also extends to other communications that do little more than make the name of a product or a service more familiar to the general public. Whatever the precise contours of the concept, and perhaps it is too early to enunciate an exact formulation, I am persuaded that it should not include the entire range of communication that is often described as "promotional advertising."

This case involves a governmental requiation that completely bans promotional advertising by an electric utility. This bun enemplesses a great Acal more than more proposuls to angage in certain kinds of concerdial Transactions. It prohibits all advocacy of the immediate or \geq (uture use of electricity. If curtails expression by an informed and interested group of persons of their point of view on questions relating to the production and consumption of electrical energy questions frequently discussed and debated by our political leaders. For example, an electric company's advocacy of the use of electric heat for environmental reasons, us opposed to wood-burning stoves, would seem to fail squarely. within New York's promotional advectising ban and also within. the bounds of muximum First Amendant protection. The breadth of the ban thus exceeds the boundaries of the commercial speech concept, however that concept may be defined.

The justification for the requisition is nothing more than the expressed feat that the audience may find the utility's message persuasive. Without the aid of any pooreion,

deception, or misinformation, truthful communication may persuade some ditizens to consume more electricity than they otherwise would. I assume that such a consequence would be undesirable and that government may therefore prohibit and punish the unnecessary or excessive use of electricity. But if the perceived harm associated with greater electrical use is not sufficiently serious to justify direct regulation, surely it does not constitute the kind of clear and present danger that can justify the suppression of speech.

Although they were written in a different context, the words used by Mr. Justice Brandeis in his concurring opinion in Whitney v. California, 274 U.S. 357, 376-377, explain my teaction to the prohibition against advocacy involved in this case:

"But even advocacy of violation, however reprehensible morally, is not a justification for denving free speech where the advocacy falls short of incidement and there is a nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immedite serious violence was to be expected or was advocated, or that the past conduct formished reason to believe that such advocacy was then contemplated.

"Those who wor our independence by revolution were not coverds. They did not fear political change. They did not exalt order at the cost of liberty. To entrageous, self-reliant men, with confidence in the power of free and featless reasoning applied through the processes of popular government, so danger flowing from speech can be deemed clear and procest, unless the incidence of the evil apprehended is so imminent that it has befall before there is opportunity for full discussion. If these be time to expose through discussion the falsehood and fallecies, to

avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify reprecision. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution." 774 U.S. 357, 376-377 ((optnote omitted).4/

In som, I concur in the result because I do not consider this to be a "commercial speech" case. Accordingly, 7 see no need to decide whether the Court's "our part analysis, anto, at 7, adequately protects commercial speech—as properly defined—in the face of a blanket ban of the sort involved in this case.

^{14/} Justice Branders quoted Lord Justice Scrutton's comment in Rex v. Secretary of Home Affairs, Ex parte D'Brien, 119231 ? K.B. 361, 382: "You really be leve in Freedom of speech, if you are willing to allow it to men whose opinions seem to you wrong and even dangerous; . . ." 14., at 377, r.4.

See also Young v. American Nini Theatres, 427 U.S. 50, 63 (Opinion of STEVENS, J.).

To: The Chief Jestice
Mr. Justice Breaman
Mr. Justice Stewart
Mr. Justice Thite
Mr. Justice Markey 11
Mr. Justice Blacksup

Mr. Justice Powell Mr. Justice Rollmoplet

From: Mr. Fosting Stevens Circulators JUN 6 20

Hoptroulated: _____

79-565 - Central Redson Das v. Public Service Commin

MR. JUSTICE STEVENS, concerting.

Brotaction than other forms of speech, 1/ it is important that the commercial speech concept not be defined too broadly lest speech describing of greater constitutional protection be inadvertantly suppressed. The issue in this case is whether New York's prohibition on the promotion of the use of electricity through advertising is a ban on mothing but commercial speech.

In my judgment one of the Lwo definitions the Court uses in addressing that issue is too broad and the other may be somewhat too narrow. The Court first describes conmercial speech as "expression related solely to the economic interests of the speaker and its audience." <u>Anter</u> at 3. Although it is

I/ See Obrails v. Obio State Bor, 436 U.S. 447, 456, quoted and Charle, at 4 n.4. of Smith v. United States, 431 U.S., 201, 318 y Charle. (Smevens, J., dissenting).

matter of the speech or the motivation of the speaker as the limiting (actor, it doesn clear to me that it encompasses speech that is entitled to the maximum protection afforded by the First Amendment. Neither a labor leader's exhortation to strike, nor an economist's dissertation on the money supply, should receive any lesser protection because the subject matter concerns only the economic interests of the sudjence. Nor should the economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward. Thus, the Court's first definition of commercial speech is unquestionably too broad. ?/

The Court's second definition refers to ispeech proposing a commercial franspotion." Anto, at 4. A salesman's solicitation, a broker's offer, and a manufacturer's publication of a price list or the terms of his standard warranty would unquestionably fit within this concept. \frac{1}{2}

Presumably, the definition is intended to encompass advertising that advised possible buvers of the availability of specific products at specific prices and describes the advantages of

Z/Sec Parber, Commercial Speech and Minot Amendment Theory, 74 NW. U. N. Rev. 372, 387-383 (1979):
"Keenomic metivation could not be made a disqualifying factor if you maximum protection] without encomens during to the first amendment. Tittle purpose would be served by a first amendment which failed to protect newspapers, paid public speakers, political candidates with partially economic metives and professional authors." (Rectmeter cuitied).

<u>3</u>/ See <u>₹d</u>., at 385-387.

- 3 - A STATE OF THE STATE OF T

purchasing such items. Perhaps it also extends to other communications that do little more than make the name of a product or a service more familiar to the general public. Whatever the precise contours of the concept, and perhaps it is too early to enunciate an exact formulation, I am persuaded that it should not include the entire range of communication | West that is often described as "promotional advertising."

This case involves a governmental requiation that completely bans promotional advertising by an electric utility. This ban encompasses a great deal more than more proposals to engage in certain kinds of commercial transactions. If prohibits all advocacy of the immediate or future use of electricity. It curtains expression by an

informed and interested group of persons of their point of view on questions relating to the production and concumption of electrical energy-squestions frequently discussed and debated by our political leaders. For example, an electric company's advocacy of the use of electric heat for environmental reasons, as opposed to wood-burning stoves, would seem to fall squarely within New York's promotional advocticing han and also within the bounds of maximum first Amendment protection. The breakth of the ban thus exceeds the boundaries of the commercial speech concept, bowever that concept may be defined.

The fustification for the regulation is nothing more than the expressed tear that the audience may find the utility's message persuasive. Without the aid of any chercioe,

A drung of the second of the s

MCORNES John

1

deception, or misinformation, truthful communication may persuade some cilizens to consume more electricity than they otherwise would. It assume that such a consequence would be undestrable and that government may therefore prohibit and punish the unnecessary or excessive use of electricity. But if the perceived berm associated with greater electrical use is not sufficiently serious to justify direct regulation, surely it does not constitute the kind of elear and present darger that can justify the suppression of speech.

Although they were written in a different context, the words used by Mr. Justice Brandeis in his concurring opinion in Whitney v. California, 274 U.S. 357, 376-377, explain my reaction to the prohibition against advocacy involved in this case:

"But even advocacy of violation, however reprehensible morally, is not a justification for denving free speech where the advocacy falls short of inditement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and inditement, between preparation and attempt, between assembling and conspiracy, but he home in mind. In order to support a finding of clear and present danger if must be shown either that immedite serious violence was to be expected or was advocated, or that the past confect furnished reason to believe that such advocacy was then contemplated.

"Those who was our independence by revolution were not cowards. They did not fear political charge. They did not exult order at the cost of liberty. To consequence, self-reliant men, with confidence in the power of five and fearless reasoning applied through the processes of popular government, no danger 'lowing from speech can be deemed clear and present, esiess the incidence of the evil apprehended is so imminent that it may befull before there is opportunity for full discussion. If there be hime to expose through discussion the falsehood and fallucies, to

avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution." 274 U.S. 357, 376-377 (footnote omitted). 4/

In sum, I concur in the result because I do not consider this to be a "commercial speech" case. Accordingly, I see no need to decide whether the Court's four-part analysis, ante, at 7, adequately protects commercial speech-as properly defined—in the face of a blanket ban of the sort involved in this case.

^{4/} Justice Scandels quoted Sord Justice Scrution's comment in Rex v. Secretary of Rome Affairs, Sx pacts O'Brien, 1973) ? K.B. 361, 362; "You really believe in Freedom of speech, if you are willing to allow it to mee whose opinions seem to you wrong and even dangerous; . . ." Id., at 377, n.4.

See also Young v. American Mini Theatres, 427 U.S. 50, 63 (Opinion of SMEVENS, J.).

Supreme Court of the United States Machington, N. C. 20543

PHARMETON OF POWERLAND

May 17, 1980

Re: No. 79-565, <u>Central Pudson Gas & Electric Corp.</u>
v. Public Service Comm^an

Dear John:

I share several of the concerns about the commercial speech dectrine that you have expressed in your letter. Nevertheless, I believe that the current draft opinion responds in large part to several of your concerns.

You note the alternative descriptions of "commercial speech" that appear on pages three and four of the draft opinion. Those formulations are derived directly from our recent decisions, in which the Court has used both definitions interchangeably. Pittsheroh Press Co. v. Numan Relations Commin, 413 U.S. 376, 385 (1973), the forerunner of the current doctrine, referred to speech that does "no more than propose a commercial transaction." Our first major decicion protecting "pure" commercial speech, Viccinia State Board of Pharmacy v. Virginia Consumer Council, 425 U.S. 748, 762 (1976), reproduces that definition and adds ats own: "we may assure that the advertiser's interest is a purely economic one." Bates v. State Bar of Arizona, 433 U.S. 350, 463-464 (1977), combined the two formulations in consecutive sentonces: "[Commercia]] speech should not be withdrawn from protection merely because it proposed a mundame commercial transaction. Even though the speaker's interest is largely economic, the Court has protected such speech in certain " In Ohralik v. Chio State Bor Ass'n, 436 C.S. 447, contexts. 456 (1978), the Court mentions only "speech proposing a connercial transaction," but Priedran v. Bogers, 440 U.S. 1, 8 (1979), notes that in Mircinia Board "the economic nature of the pharmaeists' interest in the speech did not preclude Pirst Amendment protection of their advertisements."

In sum, I believe it is entirely consistent with precedent to rely on both formulations. To me, they seem to have substantially the same reach, certainly in view of their interchangeable use in previous opinions. I would besitate

to undertake a new formulation.

You ask whether the description of commercial speech as that "colated solely to the economic interests of the speaker and its audience" might include the expression of a labor leader. On its face, I suppose it might. But our cases recommize that labor relations appear occurs in a special regulated context. There is, however, some analogy between that speech and commercial expression. The first commercial speech opinions relied on the First Amendment's protection for labor-related speech. For example, Virolnia State Board observes, "The interests of the contestants in a Tabor dispute are primerily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome. See, e.c., NLRB v. Gissel Packing Co., 395 U.S. 575, 617-615 (1969); NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 477 (1941); APL v. Swing, 312 U.S. 321, 325-326 (1941); Thornhill v. Alabama, 310 U.S., at 102. " 425 U.S., at 762. A similar passage appears in Bates, 433 U.S., at 364. Wike commercial speech, expression in the labor context is subject to some regulation. In Gissel Packing, for example, the Court approved limits on "coercive" speech by employers.

The postscript to your Memorandum suggests that fournote 4 of the draft opinion contains the only expressed rationale for according a lesser protection to commercial speech. But the first full paragraph of page four quotes the statement in Ohralik that there is a "'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." I believe that this passage reflects your view (with which J acree) that "there is a lesser First Amendment interest in protecting proposals to engage in commercial transactions." I am, however, adding a footnote to quote further from Ohralik as follows: "To require a parity of constitutional protection for commercial and noncommercial secretablike could invite dilution, simply by a leveling process, of the force of the Amendment's quarantee with respect to the latter kind of speech,"

Pinally, you suggest that this may not be a pure commercial speech case. This argument was not made by Prof. Telford Taylor in the course of this litigation. Perhaps I miss your thought, but I see no political content in the exhortation to purchase electricity. I have not thought there was any First Amendment distinction between the advertising of drugs by regulated pharmacists and the advortising of electricity by regulated power companies.



CHAMBLES OF THE CHIEF LUSTICE

Supreme Court of the Aniled States Bushington, B. C. 20543



June 4, 1980 PERSONAL

RE: 79-565 - Central Mudson Gas & Electric Corp. v. Public Service Comm'n.

Dear Lewis:

I have some lingering reservations but you can assume I will make a "5th" to have a Court opinion. $\begin{tabular}{ll} \begin{tabular}{ll} \begi$

Regards,

LBB

Mr. Justice Powell

DOS

mote great we?

MEMORANDUM

TO: Mr. Justice Powell

FROM: David

DATE: June 5, 1980

RE: No. 79-565, Central Hudson Gas v. Public Service Comm'n

I have reviewed this case in the light of today's events. Although I regret changing field on you, I now recommend substantial revision of our response to Justice Stevens' concurrence. I would retain the additional citations we inserted on page 3. But I would withdraw the proposed footnote 4. I would not want to attribute a standard of review to Justice Stevens when he did not intend to propose one.

think this is a commercial speech case, our response plainly should the proposition that it is a commercial speech case.

The current draft more or less takes this proposition as a given.

The only direct reference is the first sentence in Part II, on page and 3: "The Commission's order restricts only commercial speech, that is, expression related solely to the economic interests of the Aspeaker and its audience." I would propose two substantive additions and to buttress this assertion. First, I would add to the statement of facts in Part I a passage from the Commission's Policy Statement.

When in this ?

2.

The passage details the Commission's definition of "promotional" advertising. I would insert it as the first sentence of the first paragraph on page 2, and revise the following paragraph (the revision of the paragraph is mostly tinkering, but I think it smooths the narrative a good bit):

"The Policy Statement divided advertising expenses "into two broad categories: promotional -- advertising intended to stimulate the purchase of utility services -- and institutional informational, a broad category inclusive of all advertising not clearly intended to promote sales." App. to Juris. St., at 35a. The Commission declared all promotional advertising contrary to the national policy of conserving energy. The agency acknowledged that the advertising ban is not a perfect vehicle for conserving energy. For example, the Commission's order prohibits promotional advertising to develop consumption during periods when demand for electricity is low. By limiting growth in "off-peak" consumption, the ban limits the "beneficial side effects" of such growth in terms of more efficient use of existing power plants. Id., at 37a. And since oil dealers are not under the Commmission's jurisdiction and thus remain free to advertise, the agency recognized that the ban can achieve only "piecemeal conservationism." Still, the Commission adopted the ban because it was likely to "result in some dampening of unnecessary growth" in energy consumption. Ibid."

The other revision would be a new footnote 4, on page 4, where the present Footnote 4 appears. This note would address

Justice Stevens' argument directly. I would highlight for you the use in the the druft footnote of only the narrower definition of commercial speech -- expression proposing commercial transactions. I stuck with this definition in an effort to demonstrate that even the narrowest possible definition will not satisfy Justice Stevens' concern.

In an opinion concurring in the judgment, MR. JUSTICE suggests that the Commission's order reaches beyond commercial speech to suppress expression that is entitled to the full protection of the First Amendment. See post, at 3. There is no support for this claim in the record of this case. The Commission's Policy Statement excluded "institutional and informational" messages from the advertising ban, which was restricted to all advertising "clearly intended to promote sales." App. to Juris. St., at 350. The complaint in this case alleged only that the "prohibition of promotional advertising by Petitioner is not reasonable regulation of Petitioner's commercial speech. . . . ** Id., at 70a. Moreover, the state court opinions and the arguments of the parties before this Court also viewed this litigation as involving massly commercial Nevertheless, the concurring opinion of insists that the Commission's order would suppress more commercial speech because it would outlaw, for example, advertising that promoted electricity consumption by tooting the environmental See post, at 3. The concurring opinion benefits of such uses. would accord full First Amendment protection to all promotional advertising that includes claims "relating to . . . questions

Barrel Stete entre/

tend to blur fur ther the line the court has sought to draw

4.

frequently discussed and debated by our political leaders." Post, at 3.

"Although this approach responds to the serious issues surrounding our mational energy policy as raised in this case, it would, freate an garden unjustified exception to the commercial The reoccuseing opinion would grant speech doctrine. constitutional protection to any advectising that links a product to a current public debate. But many, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety. We rule today in Consolidated Edison Co. v. Public Service Comme'n of New York, supra, that utilities enjoy the full panoply of First Amendment protections for their direct comments on public issues. There is no bearing for providing similar complete constitutional protection when those statements are made in the context of commercial transactions. In that context, for example, the state and retain the power to "insurie) that the stream of commercial information flow[s] cleanly as well as freely." Virginia State Board, 425 U.S., at 772. This Court's Accisions on commercial expression have rested on the premise that such speech, although meriting some prolection, is of less constitutional moment than other forms of speech. As we stated in Ohralik, Supra, the failure to distinguish between commercial and noncommercial speech "could invite dilution, simply by a leveling process, of the force of the [First] Amendment's quarantee to the latter kind of speech." 436 U.S., at 456."

In response to the second point in this footnote, Justice

Stevens might protest that his opinion addresses only the situation in this case. I would think, however, that by using the hypothetical on Page 3 of his opinion, Justice Stevens has scaled off that particular argument. He could conceivably aroue that the state may regulated the commercial aspect of advertising while keeping hands off the political message involved. This argument, however, would have to rely on very sensitive action by public officials. Perhaps the most likely response would be that if his analysis undercots the commercial speech doctrine, we must accompdate ourselves to it because it is mandated by the Pirst Amendment. We might wish to observe in response the distance from Valentine v. Christensen of that proposition, but I would not contemplate very extensive rebuttal.

I have attempted to avoid an apocalyptic tone in the footnote. The only way truly to do so, however, would be to Stop after the first paragraph. Finally, I am sorry for instigating the misreading of Justice Stevens' opinion. I quite frankly did not think it meant what I have now been told it means. I regent any discomfiture my error may have caused for you.

Supreme Court of the Anited States Mushington, P. C. 20543

CHAMBLES OF JUSTICE LEWIS F POWELL, JA

June 5, 1980

79-565 Central Budson v. Blectric Corp.

MEMORANDUM TO THE CONFERENCE:

TO BE ADDED ON PAGE 3 OF THE CURRENT DRAFT, FOLLOWING THE
FIRST SENTENCE OF PART I:

"Virginia State Board of Pharmacy v. Virginia
Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1975);
Bates v. State Bar of Arizona, 433 U.S. 350, 363-364 (1977);
Friedman v. Rogers, 436 U.S. 447, 456 (1978)."

TO BE ADDED AS A NEW FOOTNOTE 4, FOLLOWING THE FULL PARAGRAPH
ON PAGE 4, which ends, "served by its regulation."

"In his concurring opinion, MR. JUSTICE STEVENS suggests that this description of commercial speech is "too narrow," while he finds "too broad" the description on page 3, supra. When dealing with a subject as complex as commercial speech, no abstract definition is likely to satisfy all valid concerns. But this Court can continue the process of developing an adequate working definition of commercial speech by applying to particular cases the carefully worded descriptions used in earlier decisions.

2.

This incremental approach is preferable to attempts to reformulate the concept of commercial speech in response to new fact situations. For example, the difficulty of the Tatter approach is illustrated by MR. JUSTICE STEVENS' suggestion that speech classified as "commercial" be limited to issues not "frequently discussed and debated by our political leaders. Post, at 3. This formulation would recast established commercial specch doctrine, as most of our decisions in this area have involved advertising on subjects frequently discussed by political leaders: the prices and availability of drugs in Virginia State Board of Pharmacy, the provision of legal services in Bates, and the proper conduct of lawyers in Ohralik. Moreover, as we noted in Ohralik, the failure to distinguish between commercial and noncommercial expression "could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." 436 U.S., at 456."

L.F.P., Jr.

DOS

BENCH MEMORANDUM

TO: Mr. Justice Powell

PROM: David

DATE: June 5, 1980

RR: No. 79-565, Central Hudson Gas v. Public Service Comm'n

In response to Justice White's concerns, we might undertake the following revisions on page 11 (as partially marked on the attached draft). The last sentence that starts on the page and carries over onto page 12 would be revised as follows:

"The Commission's order thus suppresses speech by Central Hudson that would in no way impair the State's interest in energy conservation. 12/ Therefore, the Commission's order violates the First and Fourteenth Amendment and must be invalidated."

Then, the new footnote, marked in that passage, would read as follows:

"__12/ Recause Central Hudson challenges restrictions on its own expression, we have no occasion to consider the relevance for commercial speech of "overhreadth" doctrine. That theory permits a litigant prosecuted under a statute to argue that a statute

unconstitutionally restricts speech, even if that litigant's own rights were not effected. The doctrine is based on "a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." <u>Proadrick v. Oklahoma</u>, <u>supra</u>, 413 U.S., at 612. See n. 6 <u>supra</u>."

The last two sentences of the footnote are somewhat redundant. We might simply out off the note after the first sentence with a cross-cite to footnote 6.

June 5, 1980 79-565 Central Rudson v. Public Service Dear Byron: Since we talked, I have tinkered with some language that may help a little. It will emphasize that we don't purport to be applying the overbreadth analysis. (1) The last sentence that starts on the page and carries over onto page 12 would be revised as follows: *The Commission's order thus suppresses speech by Central Hudson that would in no way impair the State's interest in energy conservation. 12/ Therefore, the Commission's order violates the First and Fourteenth Amendment and must be invalidated.* (2) A new footnote, marked in that passage, would read as follows: 12/ Because Central Hudson challenges restrictions on its own expression, the "overbreadth" doctrine is not relevant to this case. That theory permits a litigant proscouted under a statute to argue that a statute unconstitutionally restricts speech, even if that litigant's own rights were not effected. The doctrine is based on "a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." Broadrick v. Oklahoma, suora, 413 U.S., at 612. See n. 7 supra. If you think it would be helpful, I'll be glad to add the above to the opinion. I would welcome any suggestions. Sincerely, Mr. Justice White 1fp/es

DOS

(surport

Dear Byron"

In response to the concerns you articulated today, I would propose the following revisions on page 11 of our current draft:

1) The last sentence that starts on the page and carries over onto page 12 would be revised as follows:

"The Commission's order thus suppresses speech by Contral Budson that would in no way impair the State's interest in energy conservation. __12/_ Therefore, the Commission's order violates the First and Fourteenth Amendment and must be invalidated."

- 2) A new footnote, marked in that passage, would read as follows:
- "12/ Recause Central Hudson challenges restrictions on its own expression, the "overbreadth" doctrine is not relevant to this case. That theory permits a litigant prosecuted under a statute to argue that a statute unconstitutionally restricts speech, even if that litigant's own rights were not offected. The doctrine is based

on "a judicial predicton or assumption that the statute's vervexistence may cause others not before the court to refrain from constitutionally protected speech or expression." Broadrick v. Oklahoma, supra, 413 U.S., at 612. See n. supra."

I hope this is responsive to your concerns.

Helper, I ce be glad to to add the about to the openine. I would welcome any maggestioner.

Succeedy

June 5, 1980

79-565 Central Rudson v. Pulbic Service Comm'n

Dear John:

Earlier this afternoon, I circulated a proposed additional footnote in response to your concurring opinion. My clerk tells me that your Chambers thinks I have misinterpreted the import of your discussion of the definition problem. When I learned this, you had left the Court.

I understand, however, that you are not suggesting any particular standard. Rather, your view is that this case really does not involve commercial speech and therefore we need not identify a standard.

Perhaps I did read your opinion a bit too hurriedly. With the "paper chase" going on here at this season of the Term, I am afraid this can happen. In any event, I am asking my clerk David Stewart to check with your Chambers in the morning and be sure we make changes in my note that accurately identify your view. I will then recirculate.

Sincerely,

Mr. Justice Stevens

lfp/ss

DOS

BENCH MEMORANDUM

TO: Mr. Justice Powell

FROM: David

DATE: June 5, 1980

RE: No. 79-565, Central Hudson Gas & Electric Corp. v. Public

Service Comm'n

In response to Justice Stevens' opinion, I would make the following modifications on page 3 of the current draft.

After the first sentence of part II, I would add the following citations in text: "Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1973); Bates v. State Bar of Arizona, 433 U.S. 350, 363-364 (1977); Friedman v. Rogers, 436 U.S. 447, 456 (1978)." I would then drop a footnote, stating:

"In his concurring opinion, MR. JUSTICE STEVENS suggests that this description of commercial speech is "too broad," while he electrical "too narrow" the description quoted on page 4, infra, from Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 455-456 (41978). When dealing with a subject as complex as commercial speech, no abstract definition is likely to satisfy all valid concerns. But this Court

far

the cent's prior

can develop an accurage—and meaninoful (definition of commercial speech by applying to particular cases the carefully worded descriptions used in earlier decisions. This incremental approach is preferable to attempts to reformulate entirely the concept of commercial speech in response to new fact situations. For example, The difficulty of him reproches the be clearfuled the only apparent definition of commercial obsect offered by MR. JUSTICE STEVENS (is that involves issues that are not "frequently discussed and debated by our political leaders. Post, at 3. definition [would fundamentally recast the commercial speech doctrine, for most of our decisions in this area have involved advertising on subjects that were certainly the subject of discussion by political leaders 🚓 the prices and availability of drugs in <u>Viroinia State</u> Board of Pharmacy, the provision of legal services in Bates, and the proper conduct of lawyers in Ohralik. Moreover, as we noted in failure to distinguish between commercial noncommercial expression "could invite dilution, simply by a leveling process, of the force of the Amendment's quarantee with respect to the latter kind of speech." 436 U.S., at 456."

It might be too abrupt to place this footnote where I have suggested. The footnote might also be placed, with minor modifications, at the end of the full paragraph on page 4, following formation by its regulation." Finally, in an earlier letter to Justice Stevens, we promised to add a footnote on page 4, quoting the same language from Ohralik that I propose to use at the end of this footnote. I see no need for that footnote now, but perhaps we should alert the Conference to the situation of the situation of the conference to the conference

MEMORANDUM

TO: Mr. Justice Powell

FROM: David

DATE: June 5, 1980

RE: No. 79-565, Central Hudson Gas & Electric Corp. v. Public

Service Comm'h

Having read Justice Stevens' concurring opinion several times, I think I have some idea what he is saying. We now have four votes on your opinion (us, PS, TM, and CJ), with no word yet from HAB or WJB. WJB voted against us in Conference, but since the other dissenter was WHR, WJB's clerk suggested that they may end up on our side. BRW passed in Conference, joined our side afterwards, and greeted our circulation with the news that we had driven him back into neutrality. There have been no further numblings from his chambers. In this unsettled picture, I am not sure that it makes sense to fire back at Stevens. Nevertheless, I do want to track his extraordinary analysis.

As a preliminary matter, Justice Stevens mischaracterizes the New York Commission's action in this case. He claims that it "prohibits all advocacy of immediate or future use of electricity."

P. 3. This is incorrect. The ban reaches only advertising designed to increase aggregate consumption. On meatier matters, Justice

Stevens' opinion breaks down into two marginally related parts: First, he expresses dissotisfaction with our definition of commercial speech; second, he arques that this is not commercial speech at all.

commercial speech are, in order, too broad and too narrow. The first definition is "expression related solely to the economic interests of the speaker and its audience." Justice Stevens fears that this includes speech by a labor leader, or an economist, or even Shakespeare. He neglects the full contours of the definition: it identifies speech solely related to economic interests of both the speaker and the audience. Thus, most of Justice Stevens' examples are misleading because they do not involve solely economic interests, while they also ignore that the interests of the speaker and the audience are involved. Thus, an economist has a strong professional interest in communicating his view of economic conditions; Shakespeare's audience had only an artistic interest in his plays.

The second definition concerns "speech proposing a commercial transaction." Although Justice Stevens initially terms this definition too narrow, on page 3 he complains that it would "extend() to other communications that do little more than make the name of a product or a service more familiar to the general public." Thus, he seems to find the definition too broad because it would reach "image advertising." (I think Justice Stevens has somewhat indirectly struck a distinction between the two definitions -- in my view the first one would reach "image advertising," while the second would not.)

We can respond to Justice Stevens on several levels.

These definition, like ment, and less than they must know the confect in which they must know the confect in which they must know the confect in which ment they we following our previous memo in response to his earlier letter, we following our previous from previous opinions to demonstrate that we are hardly blazing new trails. We can dispute his application of the first definition to labor leaders, economists, and Shakespeare. And we can point out that Justice Stevens has contradicted himself in his criticism of the second definition. ! would note, however, that WJB's clerk suggested previously that they preferred the second definition -- "speech proposing a commercial transaction."

apeach, Justice Stevens argues that this case involves noncommercial speech. His definition of such expression appears to be on page 3 -- speech relating to "questions frequently discussed and debated by our political leaders." I find this idea seriously flawed. All advertising involving regulated industries would become political speech, since by definition regulation is frequently discussed by political leaders. For example, the blanket ben on lawver advertising in Bates would certainly fall within Justice Stevens' view of noncommercial speech. I think the course charted by Justice Stevens runs the risk of debasing First Amendment protections denerally -- which you noted in Ohralik -- by failing to distinguish between commercial and noncommercial messages.

Finally, Justice Stevens dives all the way through the Reflection glass and applies "clear and present danger" analysis to this case. I haven't the foguiest idea what he is doing here. In the last footnote of your opinion, you reserve the question of what the Commission's powers would be in an emergency situation. I suppose that, in some sense, that is Justice Stevens' message. But he

wa

certainly piles some additional -- and in my view unnecessary -- doctrinal baggage into the poor little case.

Turre

lfp/ss 6/6/80

79-565 Central Hudson v. Public Service
MEMORANDUM TO THE CONFERENCE:

I "[ired" too quickly vesterday in responding to John's concurring opinion. My present understanding is that he does not think this fairly can be considered a commercial speech case. I recognize, of course, that this is a perfectly arguable position. But I do not think it is supported by the record or our prior decisions.

Accordingly, I am proposing the changes in my opinion that are attached hereto.

The first is simply a revision of the first paragraph on page 2. The second is a revision and enlargement of footnote 4 on page 4.

I am withdrawing the proposed footnote that I circulated yesterday afternoon.

June 6, 1980 79-565 Central Hudson v. Public Service MEMORANDUM TO THE CONFERENCE! J "fired" too quickly yesterday in responding to John's concurring opinion. My present understanding is that he does not think this fairly can be considered a commercial speech case. I reconnize, of course, that this is a perfectly arguable position. But I do not think it is supported by the record or our prior decisions. Accordingly, I am proposing the changes in my opinion that are attached hereto. The first is simply a revision of the first paragraph on page 2. The second is a revision and enlargement of footnote 4 on page 4. I am withdrawing the proposed footnote that I circulated yesterday afternoon. L.P.P., Jr. 86

lfp/ss 6/6/80

. ≖-.

The first full paragraph on page 2 of the draft opinion would be replaced with the following:

*The Policy Statement divided advertising expenses "into two broad categories; promotional -- advertising intended to stimulate the purchase of utility services -- and institutional and informational, a broad category inclusive of all advertising not clearly intended to promote sales." App. to Juris, St., at 35a. The Commission declared all promotional advertising contrary to the national policy of conserving energy. The agency acknowledged that the advertising ban is not a perfect vehicle for conserving energy. For example, the Commission's order prohibits promotional advertising to develop consumption during periods when demand for electricity is low. By limiting growth in "off-peak" consumption, the ban limits the "beneficial side effects" of such growth in terms of more efficient use of existing power plants. Id., at 37a. And since oil dealers are not under the Commmission's jurisdiction and thus remain free to advertise, the agency recognized that the ban can achieve only "piecemeal conservationism." Still, the Commission adopted the ban because it was likely to "result

in some dampening of unnecessary growth" in energy consumption, Ibid."

The other revision is a new footnote 4, on page 4, where the present footnote 4 appears.

* 4/ In an opinion concurring in the judgment, MR. JUSTICE STEVENS suggests that the Commission's order reaches beyond commercial speech to suppress expression that is entitled to the full protection of the First Amendment. See post, at 3. We find no support for this claim in the record of this case. The Commission's Policy Statement excluded "institutional and informational" messages from the advertising ban, which was restricted to all advertising "clearly intended to promote sales." App. to Juris. St., at 35a. The complaint alleged only that the "prohibition of promotional advertising by Petitioner is not reasonable regulation of Petitioner's commercial speech. . . . Id., at 70a. Moreover, the state court opinions and the arguments of the parties before this Court also viewed this litigation as involving only commercial speech. Mevertheless, the concurring opinion of MR. JUSTICE STEVENS views the Commission's order as suppressing more than commercial speech because it would outlaw, for example, advertiging that

promoted electricity consumption by touting the environmental benefits of such uses. See post, at 3. Apparently the concurring opinion would accord full Pirst Amendment protection to all promotional advertising that includes claims "relating to . . . questions frequently discussed and debated by our political leaders." Post, at 3.

4.

"Although this approach responds to the serious issues surrounding our national energy policy as raised in this case, we think it would blur further the line the Court has sought to draw in commercial speech cases. It would grant broad constitutional protection to any advertising that links a product to a current public debate. But many, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety. We rule today in Consolidated Edison Co. v. Public Service Comm'n of New York, supra, that utilities enjoy the full panoply of Pirst Amendment protections for their direct comments on public issues. There is no reason for providing similar constitutional protection when such statements are made only in the context of commercial transactions. In that context, for example, the state retains the power to "insur(e) that the stream of commercial information flow[s] cleanly as well as freely." Virginia State Board, 42S U.S., at 772. This Court's decisions on

commercial expression have rested on the premise that such speech, although meriting some protection, is of less constitutional moment than other forms of speech. As we stated in <u>Chralik</u>, <u>supra</u>, the failure to distinguish between commercial and noncommercial speech "could invite dilution, simply by a leveling process, of the force of the [First] Amendment's quarantee to the latter kind of speech." 436 C.S., at 456."

2,3

To: The Chief Jd Mr. Justice Br Wr. Justice Stewart Wr. Justice White Mr. Justice Marchall Mr. Juniice Blackmud Mr. Dustine Powell Me. Jorifra Reznquist

From: Mr. Justice Stevens

Circulated: ____

1st PRINTED DRAFT

Restroulated: JN 10 80

SUPBEME COURT OF THE UNITED STATES

No. 79-565

Central Hudson Gas & Electric) Corporation, Appellant,

Public Service Commission of New York.

On Appeal from the Court of Appeals of New York,

[Jane —, 1980]

Ma. Justice Stevens, concurring only in result & saying
Because "commercial speech" is afforded less constitutional to consider
protection than other forms of speech, it is important that the commercial speech concept not be defined too broadly lest sucy 4 Part speech deserving of grouter constructional projection be justivertantly suppressed. The issue in this case is whether New Quelly ser-York's probabition on the promotion of the use of electricity through advertising is a han on nothing but commercial speech.

In my judgment one of the two deficitions the Court uses in addressing that issue is too broad and the other many be somewhat too nurrow. The Court first describes commercial speech as "expression related solely to the economic interests of the speaker and its sudjence." Ante, at 3. Although it is not entirely clear whether this definition uses the subject matter of the speech or the motivation of the speaker as the limiting factor, it seems clear to me that it encompasses speech that is entitled to the empiremen protection afforded by the First Amendment. Neither a later leader's exhortation to strike, nor an economist's dissertation on the money supply, should receive any lesser protection because the subject mat-

¹ See Objection of Object State Rev. 436 11 S. 447, 456 quoted wide of A. n. 4. Cl. South v. United States, 400 U. S., 291, 318 (Success, J., di∍enting).

2 CENTRAL HUDSON GAS r. PUBLIC SERVICE COMMON

ter concerns only the economic interests of the audience. Not should the economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pseumary reward. Thus the Court's first definition of commercial speech is unquestionably too broad?

The Court's second definition refers to "speech proposing a commercial transaction." Ante. at 4. A substitution of a price list or the terms of his standard warranty would inquestionably fit within this concept." Presamably, the definition is intended to encompass advertising that advises possible buyers of the availability of specific products at specific prices and describes the advantages of purchasing such items. Perhaps in also extends to other communications that do lattle more than make the name of a product or a service more familiar to the general public. Whatever the precise contours of the concept, and perhaps it is too early to enunciate an exact formulation. I are persuaded that it should not include the entire range of communication that is embased within the 1 term "promotional advertising."

This case involves a governmental regulation that completely hans promotional advertising by an electric utility. This but encompasses a great deal more than mere proposals to regage in certain kinds of commercial transactions. It prohibits all advocacy of the immediate or future use of electricity. It curtails expression by an informed and interested group of persons of their point of view on questions relating

See Further, Commercial Specificand First American Theory, 74 No. B. R. et 372, 382-383 (1979);

[&]quot;Remount mean stem could not be made a degrality as factor [from ascampling partection] within the destinant demans to the first emendment. Little purpose root(1 be retyred by a breadment which Soled to present) properly public speakers political randicates with partially exception matrices and probessional authors." (Pastnotes university)

⁴ Sec. of Lat. 389-387.

to the production and consumption of electrical energy—questions frequently discussed and debuted by our political leaders. For example, an electric company's advocacy of the assent electric heat for environmental reasons, as apposed to wood-harming stoves, would seem to fall squarely within New York's promotional advertising ban and also within the bounds of maximum First Amendment protection. The breadth of the ban thus exceeds the boundaries of the con-

The justification for the regulation is nothing more than the expressed from that the addictor may find the addity's noessage persuasive. Without the aid of any coercion, deception, or mainformation, trathful consenuncation may persuade some entirens to consider more electricity than they otherwise would. I assume that such a consequence would be undesirable and that government may therefore prohibit and punish the unnecessary or excessive use of electricity. But if the perceived harm associated with greater electrical usage is not sufficiently serious to justify direct regulation, surely it does not constitute the kind of clear and present danger that can justify the suppression of speech.

Although they were written in a different context, the words used by Mr. Justice Brandels in his concurring opinion in Whitney v. California, 274 U. S. 357, 376-377, explain my

⁽The multiply characterization of the Complission's London its complaint as the deep companion of specific hearty does not bond the Court consistence theory of the First Amendment respectivelying they need and evolving area of constitutional Law.

Nor have the Country and intention for the epipters "Institutional and informational" speech maps of the Cody considered speech" will be suppressed. The bitters have between the two categories of speech has the practical effect of populog that the stabless either retains from speech they achieve to the unit or sock orbit of from the Poblac Service Consmission. Here the Commission that the construction that the possess the new sary expects on disflag with those superior that the possess in quasi-superior and in one event, reductive speech portion to a prior clearance proceeding with a generation agency.

4 CENTRAL HUDSON GAS v. PUBLIC SERVICE COMMUN.

reaction to the prohibition against solvecacy involved in this case:

"But even advocacy of violation, however reprehensible morally, is not a justification for debying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct formished reason to behave that such advocacy was then contemplated.

"Those who wan our independence by revolution were put rowneds. They did not lear political change. They rlid not exalt order at the cost of liberty. To courageous, self-relight men, with randdence in the power of free and fearless masoning applied through the protesses of popular government, no danger flowing from speech can be decined clear and present, unless the incolerace of the evil apprehended is so insuinced that it may befull before there is opportunity for full discussion. If there be thus to expose through discussion the falsehood and fallucies. to averagine exil by the processes of education, the remedy to be applied is more speech, and enforced allence. Only an emergency can justify repression. Such must be the righ if authority is to be reconsided with freedom. Such, in my opinion, is the communed of the Constitution," 274 F. S. 357, 3704377 (feetnets omitted).

They true Branders quarted Land distance Secretories communicate Rex. v. Secretory of Hilbert Affairs, Exploits DiRicher [1828] 2 K. B. 361, 382; 2 You ready belows in translations speech of your are willing to diaw of to map whose equations seem to you wrong each even sheaperous ($\sim 10^{-6}\ Hz$ $_21/377$ m $_2$ k.

See that Young v. American Min. Theology, 1.77–15, S. 50, 63 haptman of Springer, 1.5.

79-365+CONCUR

CENTRAL HEDSON GAS A PUBLIC SURVICE COMMENT 5

In sum. I concur in the result because I do not consider this to be a "communicial speech" case. Accordingly, I see no need to decide whether the Court's fone-part analysis untr. at 7, adequately protects commercial speech—as properly defined in the face of a blanket han of the sort involved in this case,

RENCE MEMORANDUM

TO: Mr. Justice Powell

PROM: David

DATE: June 10, 1980

RE: No. 79-565, Central Hudson Gas & Electric Corp. v. Public

Service Comm'n

I have been able to put my finger on what bothers me about Justice White's position. It requires that the Court view the Commission's Policy Statement as severable. To do so, the Court must impose on the Policy Statement the distinction between encrove efficient and non-efficient advertising. But the Statement itself does not make that distinction. In the lower court opinion in Carey v. Brown, 602 F.2d 791, 795 m.6 (CA7 1979), Judge Tone noted that the entire residential picketing statute had to be struck down, "The labor dispute exception is not severable from the remainder of the statute because its excision would subject a group of persons to criminal sanctions that the Illinois General Assembly did not intend to subject to those sanctions. . . . There is some Dasis for treating the Policy Statement as severable, since it would seem both that "standing alone, legal effect can be given" to the Statement's with respect to non-efficient advertising, and that the Commission intended to reach such advertising if it could not reach energy efficient advertising. <u>Dorchy v. Kansas</u>, 291 U.S. 186, 190 (1924). A small problem arises because the Policy Statement is a creature of state law and thus its severability generally should be determined by the state courts, see <u>ibid.</u>; <u>Chaplinsky v. New Hampshire</u>, 315 U.S. 568, 572 (1942), but the Court has turned a blind eye to that rule when it wished to. <u>F.g.</u>, <u>Berea:College v.:Kentucky</u> 211 U.S. 45 (1909).

On balance, my concern with severability does not alter my previous conclusion that we should attempt to accomodate Justice White, if possible. In response to his letter, I would suggest a reply along the following lines:

Dear Byone continue affort to find a way

to safe the magne three words

There viewed characters analysis as a standing doctrine, and lines, not directly relevant to this case because Central Hudson alleges that it witness to engage in advertising that should be protected by the Constitution. Thus I do not think the present draft opinion applies overbreadth analysis. Your letter argues with some force, however, that even in the absence of a standing problem, the proper course may be to "strike down" the Commission's regulation only insofar as it reaches protected speech. Although this raises some concern for me as to whether we properly may sever an undonstitutional part of the Policy Statement from the remainder, there ments to be some basis for that approach.

Subject to approve by Brothere

"Consequently, I am interested in your suggestion to confine.

the runing based on the Commission's energy conservation rationale. This could be accomplished by revising the current third draft as follows. The first sentence on page 12 could read: "To the extent that the Commission's order suppresses some speech that in no way attests advantally affect in energy conservation, it violates the

First and Pourteenth Amendments and must be invalidated."

["I would point out, however, that this revision would not "save" the regulation. The next paragraph of the draft opinion states that we cannot approve the outright suppression of Central Nudson's advertising "(i)n the absence of a showing that more limited speech regulation would be ineffective.." -

"As a final matter, I do not believe the record succests that the Commission would approve advertising of energy efficient services that might be submitted to it for prepublication review. The Commission's A order stated that it would approve only "informational and institutional" advertising, excluding promotions \take would be designed to increase aggregate demand for electricity. Since I be trace that this policy would suppress advertising of energy efficient services, as is explained on page 11 of the draft opinion, I do not think we can rely on the pre-publication review to safeguard protected speech.

If the change suggested above must with "In-sum, - 1- would" be willing to pursue your suggestion to the ruling on the Commission's energy conservation

your approval, I will make it egether with the other changer noted in my rationale. If this would make the opinion agreeable to you, I would, of course, need to explore the matter with the other Justices who have joined this opinion."

Section 2

I have some doubts as to the need for the fourth paragraph of the draft letter, which is in brackets. As he has amply demonstrated, Justice White is a bright fellow. I am not sure we need to point out for him that there is a second ground of decision. Nevertheless, his letter never mentions it. The draft opinion I am attaching includes the changes in response to Justice Stevens' opinion.

Supreme Court of the Anited States. Wasifington, D. C. 20549

JAMARKA DE JUSTICE BARON PI WHITE

June 10, 1980

Re: 79-565 - Central Hudson Gas & Electric Corp.
v. Public Service Commin of New York

Dear Lewis,

Although it is late in the Term, I wish to pursue our conversation of the other day about this case.

I accept the proposition that overbreadth analysis is applicable in non-commercial speech cases. Suppose that a statute forbids both speech type A and speech type B and that B is protected speech but A is not. If X is doing A or wants to do it, he may challenge the statute on its face and have it invalidated in its entity because it also bars B, even though there is no prospect that X himself will engage in B. Of course, X's facial attack would also be sustained if in fact he wanted to engage in both A and B.

Overbreadth, however, has not been applied in commercial speech cases. See <u>Bates</u> and your <u>Ohralik</u>. Thus, in the above example, if A and B are types of commercial speech, X's facial attack should fail if he wants to do A, but has no plans to do B. Even if he wants to do both A and B, there is no reason to do more than strike down the ban on B, leaving the statute in force as to A.

Civen your conviction that only commercial speech is involved in this case, if promotion of energy-costly installations (A) may be forbidden but pushing devices that conserve (B) may not be banned, why should A, a valid prohibition, have to fall with B? I doubt that it should, whether the company wants to engage in A alone, B alone or both A and B.

In the end, then, I suppose I object to the 4th step of your analysis: why should a regulation fail entirely if it goes farther than it should and farther than need be to cure the evil aimed at? Why not invalidate only insofar as it goes too far, that is, only insofar as it bans the advertising of energy efficient improvements? And if it were reliably evident from the record that the Commission would approve such ads if submitted in advance, why "strike down" anything at this time?

Sincerely yours,

Bym

Mr. Justice Powell

стко

26

Promi 127. Special Estadous Servers

Promi 127.

We: The Chief Juntice Mr. Justice Assessed de. Justice Andrew Me. Journey Coases

Reciroulated: _

Re: No. 79-565 Central Mudson Cha & Electric Corp. v. Public Sorvice Commission of the State of New York

MR. BUSTICE REMNQUES, dissenting.

The Court today invalidates an order issued by the New York Public Service Commission designed to promove a policy that has been declared to be of critical national consecut. The order who issued by the Commission in 1973 is response to the mid-eastern oil embargo crisis. It probibits electric corporations "from promoting the use of electricity through the use of advertising, subsidy pagaenta . . . or employee incentives." State of New York Public Service Commission, Case No. 26532 (December 5, 1973), App. to Juris. St., p. 31a (emphasis added). Although the immediate exists created by the oil embargo has subsided, the ban on promotional advertising remains in effect. The regulation was reexamined by the New York Public Service Commission in 1977. Its constitutionality was subsequently upheld by the New York Court of Appeals, which concluded that the paramount national interest is energy conservation justified its criention. V

The Court's asserted justification for invalidating the New York Jaw is the public interest discerned by the Court to underlie the First Amendment in the fre- flow of compagnial information. Frier to this Court's recent decision in Vigginia State Board of Pharmary v. Virginio Citizena Consumer Councel, Inc., 425 U.S. 748 (1976), however, commercial speech was afforded no protection under the First Amendment whatsorver, Sec. e.g., Breard v. City of Alexandria. 341 D.S. 622 (1951); <u>Valentine</u> v. <u>Chrestopsen</u>, 316 U.S. 52 (1942).

Given what sooms to be full recognition of the holding of <u>Virginia</u>

<u>Board</u> that commercial speech is entitled to some degree of first.

Amendment protection, I think the Court is nonetheless incorrect in invalidating the carefully considered State ban on promotional advectising in light of pressing mational and State energy needs.

The Court's analysis in my view is wrong in several respects. Initially, I disagree with the Court's conclusion that the speech of a State-prested monopoly, which is the subject of a comprehensive regulatory scheme, is entitled to protection under the Pirst Amendment. I also think that the Court erro tere in (ailing to recognize that the State law is most accurately viewed as an economic regulation and that the speech involved (if it falls within the scope of the Pirst Amendment at all) occupies a significantly more subordinate position in the biorarchy of First Amendment values than the Court gives it today. Finally, the Court in reaching its decision improperly substitutes ats own judgment for that of the State in deciding how a proper ban on promotional advertising should be drafted. With regard to this latter point, the Court adopts as its final part of a four-part test a "no more extensive than necessary" analysis that will unduly impair a State Legislature's ability to adopt legislation reasonably designed to promote interests that have always been rightly thought to be of great importance to the State.

. 1

In concluding that appellant's promotional advertising constitutes protected speech, the Court reasons that speech by electric utilities is valuable to consumers who must decide whether to use the monopoly service or turn to an alternate energy source, and if they decide to use the service how much of it to purchase.

Ante, pp. 7-8. The Court in so doing "assume[s] that the willingness of a business to promote its product reflects a belief that consumers are interested in the advertising." Ante, p. 9. The Court's analysis ignores the fact that the monopoly here is entirely State-created and subject to an extensive state regulatory scheme from which it derives benefits as well as begiene.

> "A public utility is a state-created monopoly. See, o.g., N.Y. Pub. Serv. Law 9 68 (McKimmey 1955); Jones, Origins of the Certificate of Public Convenience and Necessity; Developments in the States 1870-1920, 79 Columbia J., Roy. 426. 458-461 (1979); Comment, Utility Rates, Consumers, and the New York State Public Service: Commission, 39 Albany L. Rev. 767-709, 714 (1975). Although monopolies generally are against the public policies of the United States and of the State of New York, see e.g., M.Y. Gen. Bus. (as § 340 (McKinney 1958), . . . utilities are permitted to operate as monopolies because of a determination of the State that the public interest is better served by protecting them from competition. See 2 A. Kahn, The Moonomics of Regulation 113-171 (1971). [**] This exceptional grant of power to private enterprises justifies: extensive oversight on the part of the State to protect the rate payers from exploitation of the menopoly power through excessive rates and other forms of overcoucking. . . . New York law gives its Public Service Commission plenary supervisory powers over all property, shall and phrisonal, 'Use or to be used for or in connection with or to facilitate the . . . sale or furnishing of electricity for light, heat or power.' N.Y. Deb. Serv. Daw § 9 2.12 and 66.1 (McKinney 1985)."

Thus, although <u>First National Bank of Boston</u> v. <u>Bellotti</u>, 435 U.S. 765 [1978] holds that speech of a corporation is entitled to some First Amendment protection, it by no means follows that a utility with monopoly power conferred by a State is also entitled to such protection.

The State-created monopoly status of a utility arises from the unique characteristics of the services that a utility provides. As recognized in Canton v. Detroit Wilson Co., 428 U.S. 579, 595-596 (1976), "public utility regulation typically assumes that the private firm is a natural schopoly and that public controls are necessary to protect the consumer from exploitation." The consequences of this natural monopoly in my view justify much more wide-ranging supervision and control of a utility under the Mirst Amendment than this Court hold in Bollotti to be permissible with regard to ordinary corporations. Comporate status is generally conferred as a result of a State's determination than the corporate characteristics "enhance its officiency as an economic entity." First National Bank of Boston v. Pellotti, 435 U.S., at 825-826 (REHNQUIST, J., dissenting). A utility, by Contrast, fulfills a function that serves special public interests as a result of the natural menopoly of the service provided. Indeed, the extensive regulations governing decision-making by public utilities suggests. that for purposes of First Amendment analysis, a utility is far closer to a State-controlled enterprise than is an ordinary corporation. 3/ Accordingly, I think a State has broad discretion in determining the statements that a utility may make in that such statements emanate from the entity created by the State to provide important and unique public services. And a State regulatory body charged with the oversight of these types of cervices may reasonably decide to impose on the utility a special duty to conform its conduct to the agency's conception of the public interest. Thus I think it is constitutionally permissible for it to decide that promotional advertising is inconsistent with the public interest in energy conservation. I also think New York's ban on such advertising falls within the scope of permissible State regulation. of an economic activity by an entity that could not exist in corporate form, say nothing of enjoy monopoly status, were it not for the laws of New York, W

ıı.

This Court has previously recognized that although commercial speech may be estilled to First Amendment protection, that

protection is not as extensive as that accorded to the advocacy of Ideas. Thus, we stated or <u>Obralik</u> v. <u>Ohio State Nor Association</u>, 436 U.S. 447, 455-456 (1978):

"Expression concerning purely commercial transactions has come within the ambit of the Amendment's protection only recently. In rejecting the notion that such speech 'is wholly outside the protection of the First Amendment, ' Virginia Paurnacy, Supra, at 761, we write careful not to held That it is wholly undifferentiable from other forms! of speech. 425 U.S., at 771 m. We have not discarded the 'common serse' distinction between speech proposing a commercial transaction, which occurs in an area. traditionally subject to government regulation, and other varieties of opench. Ibid. To require a pacity of constitutional protection for commercial and non-commercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's quarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of non-commercial expression." (footnote omitted.)

The Court's decision today fails to give due deference to this subordinate position of commercial speech. The Court is so doing returns to the bygone era of <u>Lochner v. New York</u>, 198 U.S. 45 (1905), in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies.

I had thought by now it had become well established that a State has broad discretion in imposing economic regulations. As this Court stated in Nabbia v. New York, 291 U.S. 502, 537 (1934),

"[C]here can be so doubt that upon proper occasion and by appropriate measures the state may degelate a business in any of its appeals . . . [5] So far as the requirement of due process is concerned, and in the absence of other

constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legiclation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functors officio. . . [I]t does not lie with the courts to determine that the rule is anwise."

And Mr. Bustice Black, writing for the Court, observed more recently in Ferguson v. Skrupa, 372 U.S. 726, 730 (1963):

"The doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely -- has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies who are elected to pass laws."

The State of New York has determined here that commonic realities require the grant of monopoly status to public utilities in order to distribute efficiently the services they provide, and in granting utilities such status it has made them subject to an extensive regulatory scheme. When the State adopted this scheme and when its Public Service Commission issued its initial ban on promotional advertising in 1973, commercial speech had not been held to fall within the scope of the First Amendment at all. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), however, subsequently accorded commercial speech a limited measure of first Amendment protection.

The Court today holds not only that commercial speech is entitled to First Amendment protection, but also that when it is protected a State may not regulate it unless its reason for doing to amounts to a "substantial" governmental interest, its regulation "directly advances" that interest, and its manner of regulation is

"not more extensive than necessary" to serve the interest. Ante, p.
7. The test adopted by the Court thus clevates the protestion accorded commercial speech that fulls within the scope of the First Amendment to a level that is virtually indistinguishable from that of non-commercial speech. I think the Court in so doing has effectively accomplished the "devitalization" of the First Amendment that it counseled against in Obralik. I think it has also by labelling economic regulation of business conduct as a restraint on "free speech" gone for to resurrect the discredited docrine of cases such as Jochney and Typon & Brother v. Bunton, 273 U.S. 418 (1927). New York's order here is in my view more akin to an economic regulation to which virtually complete deference should be accorded by this Court.

of New York's conservation effort if the Public Service Commission had chosen to raise the price of electricity, see, e.g., Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 38) (1940), Old Dearborn Distributing Co. v. Sezgram-Distillers Corp., 299 U.S. 183 (1936), to condition its sale on specified terms, see, e.g., Nebbia v. Mew York, 291 U.S. 502, 527-528 (1934), or to restrict its production, see, e.g., Wickard v. Pilburn, 317 U.S. 111 (1942). In terms of constitutional values, I think that such controls are virtually indistinguishable from the State's ban on promotional advertising.

An ostensible justification for striking down New York's bon on promotional advertising is that this Court "has previously rejected the 'highly paternalistic' view that government has complete power to suppress or regulate connercial speech. 'People will perceive their own best interest only if they are well enough informed and . . . the best means to that end is to open up the channels of communication, rather than to close them. . . .'" Ante, p. 4. Whatever the merits of this view, I think the Court has carried its logic too far here.

The view apparently derives from the Court's frequent reference to the "marketplace of ideas," which was deemed analogous to the commercial market in which a <u>laister</u> foice policy would lead to

optimum economic decisionmaking under the guidance of the "Invisable hand." See, e.g., Adam Smith, Wealth of Nations (1909). This notion was expressed by Mr. Justice Schmes in his dissenting opinion in Abrarg v. United States, 250 U.S. 616, 630 (1919), wherein he stated that "the best test of truth is the power of the thought to get accepted in the competition of the market. . . . " See also, e.g., Coppolidated Edison v. Public Service Commission, ___ U.S.__ , ___ (1900), Silp Op. p. 3; Mill, On Liberty (1952); Milton, Areopagitica, A Speech for the Liberty of Unlicensed Frinting (1909).

While it is true that an important objective of the First Amondment is to foster the free flow of information, identification of speech that falls within its protection is not aided by the methaphorical reference to a "marketplace of ideas." There is no reason for believing that the marketplace of ideas is free from market imperientions any more than there is to believe that the Invisible hand will always lead to optimum economic decisions in the commercial market. See, e.g., Baker, Scope of the First Amendment Freedom of Speech, 25 DCLA L. Rev. 964, 967-981 (1978). many types of speech have been held to fall outside the scope of the First Amendment, thereby subject to governmental regulation, despite this Court's references to a marketplace of ideas. Soo, g.q., Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (flighting words); <u>Beaubarnais</u> v. <u>Illinois</u>, 343 p.S. ZSC (1952)(group libel); <u>Roth</u> v. United States, 354 C.S. 476 (1956)(obscenity). It also has been held that the government has a greator interest in regulating some types of protested speech than others. See, g.g., FCC v. Pacifica Foundation, 438 U.S. 736 (1978) (indecemb speech); Virginia State Board of Supervisors v. Virginia Citizens Conquest Council, 425 D.S. 748 (1976) (commercial speech). And as this Court stated in Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 n. 9 (1974), "Of course, and opportunity for rebuttal seldom suffices to undo [the] harm of a defamotory falsehood. Indeed the law of defamation is rooted in Our experience that the truth carely datches up with a lin." The Court similarly has recognized that false and misleading commorbial speech is not entitled to any Pirot Amendment protection. Sec. e.g., ante, p. 7.

The above examples illustrate that in a number of instances government may constitutionally decide that societal isterests justify the imposition of restrictions on the free flow of information. When the question is whether a given commercial message is protected, I do not think this Court's determination that the information will "assist" consumers justifies judicial invalidation of a reasonably drafted State restriction on such speech when the restriction is designed to promote a concededly agingtantial State interest. I consequently disagree with the Court's conclusion that the societal interest in the dissemination of commercial information is sufficient to justify a restriction on the State's authority to regulate promotional advertising by atilities; indeed, in the case of a regulated mosopoly, it is difficult for me to distinguish "society" from the state logislature and the Public Service Commission. Nor do I think their is any basis for concluding that individual citizens of the State will recognize the need for and act to promote energy conscryation to the extent the government doese appropriate, if only the channels of communication are left open, 2^f marker, I would hald here that the State's decision to ban promotional advertising, in light of the substantial State interest at stake, is a constitutionally permissible exercise of its power to adopt regulations designed to promote the interests of its ditizens.

III.

The Court concedes that the State interest in energy concervation is plainly substantial, <u>onte</u>, p. 2, as is the State's concern that its rates be fair and efficient. <u>Ante</u>, p. 10. It also concedes that there is a direct link between the Commission's ban on promotional advertising and the State's interest in conservation.

<u>Ante</u>, p. 11. The Court nonetheless strikes down the ban on promotional advertising because the Commission has failed to demonstrate, under the final part of the Court's four-park test, that its regulation is no more than secessary to serve the State's interest. <u>Ante</u>, pp. 11-12. In reaching this conclusion, the Court conjuces up potential advertisements that a utility might make that

conceivably would result in net energy savings. The Court does not indicate that the New York Public Service Commission has in fact construct its ban on "promotional" advertising to preclude the dissemination of information that clearly would result in a net energy savings, nor does it even suggest that the Commission has been confronted with and rejected such an advertising proposal. 5/ The final part of the Court's test thus leaves room for so many hypothetical "better" ways that any ingenious lawyer will surely seize on one of them to secure the invalidation of what the State agency actually did. As SR. JUSTICE BLACKMUN observed in 173, 188-189 (1979). (concerning opinion:)

"A judge would be unimaginative indeed if he could not come up with something a little less 'deastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to strike legislation down."

Here the Court concludes that the State's interest in energy conservation cannot justify a blanket bun on promotional advertising. In its statement of the facts, the Court observes that the Commission's bun on promotional advertising is not "a perfect vehicle for conserving energy." It states:

"[T]he Commission's order prohibits promotional advertising to develop consumption during periods when demand for electricity is low. By limiting growth in 'oti-peak' consumption, the ban limits the 'hemoficial side effects' of such growth in terms of more efficient use of existing power plants. [App. to Juris, St.!, at 37a." Ante, p. 2.

The Court's analysis in this regard is in my view fundamentally misgaided because it halls to recognize that the beneficial side effects of "more efficient use" may be inconsistent with the goal of energy conservation. Indeed, the Commission explicitly found that the promotion of eff-peak consumption would impair conservation of off-peak consumption would impair conservation

"Indreased off-peak generation, . . . while conferring some beneficial side effects, also consumes valuable energy resources, and, if it is the result of increased sales, recrusarily preates incremental air pollution and thermal discharges to waterways. More important, any increase in oit-peak generation from most of the major companies producing electricity in this State would not, at this time, be produced from coul or nuclear resources, but would require the use of oil-(iged generating Capilities. The indreased requirement for fuel oil to serve the incremental off-yeak load created by promotional advertising would aggreeate the nation's already unacceptably high level of dependence on foreign sources of supply and would, in addition, frusticate rather than encourage conservation efforts." App. to Junis. St., p. 37a.8/

The Court also observes, as the Commission acknowledged, that the ban on promational advertising can achieve only "piecement connervationism" because oil dealers are not under the Commission's jurisdiction, and they remain free to advertise. Until I have mastered electrical engineering and marketing, I am not prepared to contradict by virtue of my judicial office those who assume that the ban will be successful in making a substantial contribution to conservation efforts. And I doubt that any of this Court's First Amendment decisions justifies striking down the Commission's order because more steps howard conservation could have been made. This is especially true when, as here, the Commission lacks authority over oil dealers.

The Court concludes that the Commission's ban on promotional advertising must be struck down because it is more extensive than necessary: It may result in the suppression of advertising by utilities that promotes the use of electrical devices or services that equal no net increase in total energy use. The Court's reasoning in this regard, however, is highly opeculative. The Court provides two examples that it claims support its conclusion. It first states that both parties acknowledge that the "heat pump" will be "a major improvement in electric heating," and that but for the bon the utilities would advertise this type of "energy

efficient()" product,2/ The New York Public Service Commission, however, considered the merits of the heat pupp and concluded that it would most likely tesult in an overall increase in electric energy consumption. The Commission stated:

"[I]sstallation of a heat pump means also installation of central air-conditioning. To this extent, promotion of off-peak electric space heating involves promotion of on-peak usage of electricity for water heating. And the price of electricity to most consumers in the State does not now fully reflect the much higher marginal costs of on-peak consumption in summer peaking markets. In these circumstances, there would be a subsidization of consumption on-peak, and consequently higher rates for all consumers." App. to Juris. St., p. 58a.

Subsidization of peak consumption not only may encourage the use of scarce energy resources during peak periods, but also may lead to larger resource generating capacity requirements for the State.

The Court next assetts that electric heating as a back-up to solar and other heat may be an efficient alternate energy source.

Ante, p. 11. The Court fails to establish, however, that an advertising proposal of this sort was properly presented to the Commission. Indeed, the Court's concession that the Commission did not make findings on this issue suggests that the Commission did not even consider it. Nor does the Court rely on any support for its assertion other than the assertion of appellants. Rather, it speculates that "In the obsence of authoritative findings to the contrary, we pust credit as within the realm of possibility the claim that electric heat can be an efficient alternative in some circumstances." Ante, p. 11.10/

Ordinarily it is the role of the State Public Service Commission to make factual determinations concerning whether a device or service will result in a not energy savings and, if so, whether and to what extent State law permits dissemination of information about the device or service. Otherwise, as here, this Court will have no factual basis for its assertions. And the State will never have an opportunity to consider the issue and thus to construct its law in a

manner consistent with the Pederal Constitution. As stated in Barrous v. Jackson. 345 U.S. 319, 296 (1953):

"It would indeed be madesirable for this Court to econsider every conceivable consideration which might possibly arise in the application of complex and comprehensive legislation. Not are we so ready to frustrate the expressed will of Congress or that of the State legislatures. Cf. Southern Pacific Co. v. Gaileger, 306 U.S. 167, 1727"

I think the Court would do well to beed the admonition in <u>Barrows</u> here. The terms of the order of the New York Public Service Commission is my view indicate that advertising designed to promote net savings in energy use does not fall within the scope of the ban. The order probibits electric corporations "from promoting the age of electricity through the use of advertising, subsidy payments . . . or employee incentives." App. to Juris. St., p. 31a (emphasis added). It is not alear to me that advertising that is likely to result in her savings of energy is advertising that "promot(es) the use of electricity," now does the Court point to any language in the Commission order that suggests it has adopted this construction. Rather, it would seem more accurate to Characterize such advertising as designed to "discourage" the use of electricity. 11/ Indeed, I think it is quite likely that the Commission would view advertising that would clearly result in a new savings in energy as consistent with the objectives of its order and therefore permissible. 22/ The Commission, for example, basis authorized the dissemination of information that would sesult in shifts in electrical demand, thereby opeaking not savings is energy by reducing peak demand. App. to Juris. St., p. $37a.\frac{13}{2}$ / It has also indicated a willingness to consider at least some other types. of "specific proposals" submitted by utilities. Id., pp. 372-384. And it clearly permits informacional us opposed to promotional. Biogemination of information. Id., pp. 43a-46a. Even if the Commission were uttimately to reject the view that its ban on promotional advertising does not include advertising that results is net energy savings, I think the Commission should at least be given an appartunity to consider it.

It is in my view isappropriate for the Court to invalidate the State's ban on commercial advertising here based on its speculation that in some cases the advertising may result in a net savings in electrical energy use, and in the cases in which it is clear a net energy savings would result from utility advertising the Public Service Commission would apply its ban so as to proscribe such advertising. Even assuming that the Court's speculation is correct, I do not think it follows that facial invalidation of the ban is the appropriate course. As stated in <u>Parker</u> v. <u>Levy</u>, 417 U.S. 733 (1974), "Even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the states. . . . covers a whole range of easily identifiable and constitutionally permissible . . . conduct <u>CSC</u> v. <u>Letter Carriers</u>, 413 U.S. 548, 580-581 (1973). This is clearly the case here.

For the foregoing reasons, I would affire the judgment of the New York Court of Appeals.

The New York Court of Appeal stateGr

"In light of cutrest exigencies, one of the policies of any public service legiplation must be the conservation of our vital and irreplaceable resources. The Legislature has but recently imposed upon the Commission a duty 'to encourage all persons and comporations . . . to formulate and carry out long-range programs . . . (for) the preservation of devironmental values and the conservation of natural recourses." (Public Service Law, § 5(subd. 2). Implicit in this amendment is a legislative recognition of the decious situation which confronts our State and Mation. More important, conservation of resourced has become an avoided legislative policy. embodied in the Commission's enabling act (see, also, Matter of New York State Council of Retail Merchants v. Public Serv. Comm. of State of N.Y., 45 N.Y.2d 66), 673-674). App. to Juris. St. pp. $4A-5A_{\odot}$

In this regard the New York Court of Appeals stated: "Public objlities, from the earliest days in this State, have been regulated and Cranchised to serve the commonweal. Our policy is 'to withdraw the unrestricted right of competition between corporations occupying . . . the public streets . . . and supplying the public with their products or of lities which are well high necessities! (People ex rel. New York Edicon Co. v. William, 207 N.Y. 86, 99; Matter of Mew York Electric Lines Co., 301 N.Y. 331). The realities of the situation all but dictate that a utility be granted monopoly status (see People ex rel. New York Electric Lines Co. v. Squize, 10/ N.Y. 593, 603-605). To protect against abuse of this superior economic position extensive governmental degulation has been deemed a necessary coordinate (see <u>People ex rel. New York, Edison</u> Co. v. Willcox, supra, at pp. 93-94," App. to

Junis, St., p. 13a.

The Commission's restrictions on promotional advertising are grounded in its concern that electric utilities fulfill their obligation under the New York Public Service Law to provide "adequate" service at "just and reasonable rates." N.Y. Pob. Serv. Law, 9 65(1). The Commission, under state law, is required to set reasonable rates. N.Y. Pub. Serv. Law 5 9 66(2) and (12); 72. The Commission has also been authorized by the Legislature to prescribe "such reasonble improvements [in electric atilities' practices] as: will best promote the public interest " N.Y. Pub. Serv. Law § 66(2). And in the performance of its duties the Commission is required to "encourage all persons and corporations subject to its jurisdiction to formulate and carry out long-range programs, andividually or ocoperatively, for the performance of their public sorvice responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values, and the conservation of natural resources." N.Y. Pub. Serv. Daw § 5(2). Here I think it was quite reasonable for the State Public Service. Commission to conclude that the ban on promotional advertising was necessary to prevent utilities from using their broad. State-conferred monopoly power to promote their own economic well-being at the expense of the State interest in energy conservation -- as interest that could reasonably be found to be inconsistent with the propotion of greater profits for utilities.

Although the Constitution attaches great importance to freedom of speech under the First Amendment so that (ndividuals will be better informed and their thoughts and ideas will be uninkibited, it does not follow that "people will perceive their own best interests," or that if they do they will act to promote them. With respect to governmental policies that do not offer immodeate tangible benefits and the buccess of which depends on indicatemental. contributions by all members of society, such as would seem to be the case with energy conservation, a strong argument can be made. that while a policy may be in the long run interest of all members of society, some rational individuals will perceive it to their ownshort-run advantage to not set in accordance with that policy. When the regulation of commercial speech is at issue, I think this is a consideration that the government may properly take into account. As was observed in <u>Townsond</u> v. <u>Yeomans</u>, 201 U.S. 441, 451 (1937), "the legislature, acting within its sphere, is presumed to know the needs of the people of the State." This observation in my view is applicable to the determination of the State Public Service Commission here.

Indeed appelled in its brief states:

"(N)either Central Budson nor any other party made an attempt before the Commission to demonstrate or argue for a specific advertising strategy that would avoid the difficulties that the Commission found inherent in electric utility promotional advertising. The Commission, therefore, continued to enforce its ban on promotion which it had instituted in 1973." Brief of appellee, p. 15.

The Court makes no attempt to address this statement, or to explain why, when no State body has addressed the issue, this Court should nonetheless resulve it by invalidating the State regulation.

In making this finding, the Commission distinguished "between promotions) advertising designed to shift existing companytion from yeak to off-peak hours and advertising designed to promote additional consumption during off-peak hours." App. to Juris. St., p. 58a, n. 2. It proscribed only the latter. Id.

And in denying appellant's petition for rehearing, the Cormission again stated:

"While promotion of off-peak usage, princularly electric space beating, is touted by home as desirable because it might increase off-peak upage and thereby improve a summer-peaking company's load factor, we are convinced that off-peak promotion, aspecially in the context of importantly structured electric rates, is inconsistent with the public interest, even if it could be divorced in the public mind from promoting electric usage generally. As we pointed out in our Policy Statement, increases in generation, even off-peak generation, at this time, regulars the burning of scarce oil resources. This increased requirement for tuck oil aggravates the nation's already high level of dependence on foreign sources of supply." App. to Juris, St., p. 58a.

As previously discussed, however, it does not follow that because a product is "energy efficient" it is also consistent with the goal of energy conservation. Thus, with regard to the heat pemp, consel for appelless stated at oral argument that "Central Hedson mays there are some [heat pumps] without air conditioning, but . . they have never advised us of that." Transcript of Oral Argument, pp. 32-33. The electric heat pump, he continued, "normally carriles) with it air conditioning in the summer, and the commission found that this would result in air conditioning that would not otherwise happen." Id., at 33. This is but one example of the veritable Sarganso Sea of difficult nonlegal issues that we wade into by adopting a rule that requires judges to evaluate highly complex and often controversial questions arising in disciplines quite foreign to ours.

shown too little. For the regulation to truly be "no more extensive than necessary," it must be established that a more efficient energy source will serve only as a means for saving energy, rather than as an inducement to consume more energy because the cost has decreased or because other energy using products will be used in conjugation with the more efficient one.

This characterization is supported by the reasoning of the New York Court of Appeals, which stated:

"[P] conditional advertising . . . seeks . . . to encourage the increased consumption of electricity, whether during peak hours or off-peak hours. Thus, not only does such communication lack any beneficial content, but it may be affirmatively detrimental to society. Conserving diminishing resources is a matter of vital state concern and increased use of electrical energy is inimical to our interests. Promotional advertising, if permitted, would serve only to exacerbate the crisis." App. to Juris. St., pp. 13a-14a.

At oral argument counsel for appellants conceded that the ban would not apply to utility advertising promoting the ton-use of electricity. Transcript of Oral Argument, p. 6. Indeed, counsel stated "If the use reduces the amount of electricity used, it is not within the ban. The promotional han is defined an anything which might be expected to increase the use of electricity." Ibid. And counsel for appellee stated that "the only thing that is involved here is the promotion by advertising of electricity usage." Id., at 30. "And if a phowing can be made that promotion in fact is going to conserve energy," counsel for appellee continued, "which . . . has never been made to us, the commission's order says we are ready to relax out ban, we're not interested in burning for the sake of banning it. We think that is basically a bad idea, if we can avoid it. In gas, we have been relaxing it as more gas has become available." Id., at 40.

By contrast, as previously discussed, the Public Service Commission does not permit the proportion of off-peak consumption alone. Supra, p. __ and n. __.

BENCH MEMORANDOM

TO: Mr. Justice Powell

FROM: David

DATE: June 12, 1980

RE: REPORT FROM THE PRONT: No. 79-565, Central Budson Gas v.

Public Service Comm'n

Although our forces were caucht in a crossfire Vesterday, I do not believe we have suffered any unanticipated losses. I have reviewed again the assault from the 'left' (NAB's concurrence in the judgment). The only response I consider reasonable would be a () footnote stating simply that the test for commercial speech that HAB for articulates would provide commercial expression with the same protections that political and "pure" speech now enjoy. Not good show

Not surprisingly, the attack from the 'right' was a bit stronger. Section I of WHR's dissent argues simply that Central Mudson is a regulated utility so the State can do whatever the State wants to it. I think we have already refuted that argument in § III(A) of the opinion (pp. 8-9). (I did enjoy WHR's lengthy quotation in support of his position from HAB's dissent in Consolidated Edison.) I also find nothing to respond to in WHR's second argument, which is a generalized assault on the commercial speech doctrine. He seems to be the only one still fighting that

hattle,

WHR's Part III, however, scores a few points. By focusing on the absence of facts in this litigation, he poorpoos the "presumptions" we draw from the arguments. (I particularly like his reference in footpote 9 to "the veritale Sargasso Sea of difficult nonlegal issues.) I would draw three aspects of WHR's argument to your attention. First, on page 13, he attempts a "saving" construction of the Commission's Policy Statement. I do not think that effort is in any way successful, and think that might be worth stating in a footnote. Second, on page 14, WSR raises BRW's point that perhaps we should not strike down the entire regulation for limited flaws. Should we proceed with the revision to satisfy BRW, I think WHR's point would be answered. Finally, WHP never recognizes the second ground for our decision -- that the Commission did not establish that less restrictive forms of speech regulation would not work in this context. Thus, at bottom, I do not think he undermines our approach.



BENCH MEMORANDUM

TO: Mr. Justice Powell

PROM: David

DATE: June 12, 1980

PR: No. 79-565, Central Mudson Gas v. Public Service Comm'n

In response to Justice Blackmun's opinion, I would append the following paragraph to footnote θ in the current draft:

JUSTICE BLACKMON urges that the "content" of commercial speech, as opposed to the "quality" of such expression, cannot be regulated unless all other forms of nonspeech regulation are impossible. Since the quality of speech can only be determined by reviewing its content, I question whether the distinction drawn in the concurring opinion is tenable. Indeed, Indeed, the period the result of that analysis political and other "pure" forms of speech. Our decisions have rejected precisely that outcome. See p. 4 supra."

all distinction

Je house. In response to Justice Pehnouist's dissent, I would propose dropping a footnote at the end of the first sentence of Insert A on page 2. I suggest this location in order to identify our disagreement with Justice Pehnouist as one of interpretation of the Policy Statement, and also to avoid qualifying our step 4.

"The dissenting opinion suggests that under the Policy Statement, the Commission would approve of advertising that would result "in a net savings of energy" even if consumption of electricity increased. Post, at 13. But the Policy Statement is phrased in terms of "the

purchase of utility services" and "sales" of electricity, P)ainly, the Commission did not intend to consider the overall energy efficiency of particular electrical services."

June 12, 1980

No. 79-565, Central Hudson Gas v. Public Service Comm'n MEMORANDUM TO THE COMPRENCE:

In view of the plethora of opinions circulated, I plan to add two additional notes making mild retorts:

Add to footnote 8:

region and

"In an opinion concurring in the judgment, MR. JUSTICE BLACKMUN urges that the "content" of commercial speech, as opposed to the "quality" of such expression, cannot be regulated unless all other forms of nonspeech regulation are impossible. See post, at 2. The distinction is more than a little elusive, and its implications are ambiguous. Since the quality of speech rarely can be determined without reviewing its content, the practical effect of the distinction could be minimal. Alternatively, if "quality" of speech refers to a narrowly defined category of characteristics, the result of this analysis could -- in many situations -- obliterate all distinction between commercial expression and "pure" forms of speech. Our decisions have rejected precisely that result. See Priedman v. Roders, 440 U.S. 1, 10 & n. 9 (1979); Ohralik v. Ohio State Bar, supra, 436 U.S., at 455-456; Bates v. Arizona State Bar, supra, 433 U.S., at 379-381; Virginia State Board of Pharmacy, supra, 425 U.S., at 770-773.

Add a new footnote following the first full sentence on page $\frac{2}{2}$.

"The dissenting opinion attempts to construe the Policy Statement to authorize advertising that would result "in a net savings of energy" even if the

37

advertising enouraged consumption of additional electricity. Post, at 13. The attempted construction fails, however, since the Policy Statement is phrased only in terms of advertising that promotes "the purchase of utility services" and "sales" of electricity. Plainly, the Commission did not intend to permit advertising that would enhance net energy efficiency by increasing consumption of electrical services. "

L.P.P., Jr.

Supreme Court of the Pointed States Washington, B. C. 20543

EMANATAS OF JUSTICE W. J. BRENMAN JR

June 12, 1980

RE: No. 79-565 Central Hudson Gas and Electric Co. v. Public Service Commission

Dear Harry and John:

Please join me in your respective concurring opinions.

I am also adding the enclosed statement.

Sincerely,

Rul

Mr. Justice Blackmum

Mr. Justice Stevens

co: The Conference

Supreme Court of the Anited States Mushington, P. C. 20543

CHARBERT OF
JUSTICE HARRY A BLACKMUN

June 13, 1980

Re: No. 79-565 - Central Hudson Gas & Electric Corp.

Public Service Commission of New York

Dear Lewis:

This is just to let you know that, as of now, I plan no further response in this case.

Sincerely.

Mr. Justice Powell

ce: The Conference

Supreme Court of the United States Washington, B. C. 20543

THANKSON OF WHITE

June 16, 1980

 $\sqrt{}$

Re: 79-565 - Central Hudson Cas & Electric Corp. v. Public Service Cormission of New York

Dear Lewis,

Please join me.

Sincerely yours,

Mr. Justice Powell Copies to the Conference omc



Supreme Court of the United States Mashington, D. C. 20543



CHAMMES OF THE CHIEFLUSTICE

June 17, 1980

RB: 79-565 - Central Hudson Gas and Electrical Corp. v. Public Service Commission of New York

Dear Lewis:

This will confirm my tentative "join."

Regards,

Mr. Justice Powell

Copies to the Conference

June 17, 1980 79-565 Central Hudson Gas & Electric Corp. v. Public Service Commission MEMORANDUM TO THE CONFERENCE: I propose to make the verbal change in footnote 9 of this opinion, as noted on the attached sheet. L.P.P., Jr. 22

Supreme Court of the United States Washington, D. C. 20543

CHANDED OF LUSTICE HAPTER A BLACKMUN

June 18, 1980

Re: No. 79-565 - Central Hodson Gas & Electric Corp.
v. Public Service Commission

Dear Lewis:

The various changes made in your recirculation of June 16 and your memorandum of June 17 require that I recast my concurring opinion. This is because of the various cross-references to your opinion and the necessary changes in quotations from it.

I am sending mine to the Printer today and hope that this can be done before Friday. If not, I ask that the case go over.

Sincerely,

Harry

Javiel - Lady Luck has fround upon us! See of 1+AB'S

Mr. Justice Powell

cc: The Conference

clark will show you the "recorting". If it is not extensive, I may

talle to Cornies.

June 18, 1980 79-565 Central Hudson v. Public Service Commin MEMORANDUM TO CONFERENCE: In light of the changes that Marry has circulated in his concurring opinion this afternoon, I have deleted the second paragraph of footnote 9 of my opinion as it is no longer relevant. Low Cornio advises that this deletion will not prevent this case from being ready for Friday. L.F.P., 3r. ននិ

Supreme Court of the United States Mashington, D. C. 20343

CHAMBLES DE JUANICE WILLIAM HI REHNGOIST

June 18, 1980

MEMORANDUM TO THE CONFERENCE

Re: 79-565 Central Mudson Gas & Riectric Corp. v. Public Service Commission of New York

Attached are the changes and additions I will make to my dissenting opinion in this case.

Sincerely, N

0950A

Changes and additions to dissenting opinion of MR. JUSTICE REHNQUIST in Central Hudson Gas & Electric Corporation v. Public Service Commission of New York, No. 79-565.

On p. 12 I will replace "Rather," with the following: "Thus, even if I were to agree that commercial speech is entitled to some.

Pirst Amendment protection, . . . "

After the last sentence immediately preceding Part III on p. 12, I will make the following addition:

"The plethora of opinions filed in this case highlights the doctrinal difficulties that emerge from this Court's decisions granting First Amendment protection to commercial speech. My BROTHER STEVENS, quoting Mr. Justice Brandeis in Whitney v. California, 274 U.S. 357, 376-377 (1927), includes Mr. Justice Brandeis' statement that "those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty." Ante, p. 4. MR. JUSTICE BLACKNEW, in his separate opinion, joins only in the Court's

judgment because he believes that the Court's opinion "does not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech." Anle, p. 1. Both MR. JUSTICE STEVENS, ante, pp. 4-5, and MR. JUSTICE BLACKMUN, ante, p. 6. would apply the following formulation by Mr. Justice Brundeis of the clear and present danger test to the regulation of speech at issue in this case:

"If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not entorced silence. Only an emergency can justify repression." Whitney v. Californie, 274 U.S. 357, 377 [1927] (concurring opinion).

Although the Court today does not go so far as to adopt this position, its reasons for invalidating New York's ban on promotional advertising make it quite difficult for a legislature to draft a statute regulating promotional advertising that will satisfy the First Amendment requirements established by the Court in this context. See Part III, infra.

Two ideas are here at war with one another, and their resolution, although it be on a judicial battlefield, will be a very difficult one. The sort of "advocacy" of which Mr. Justice Brandeis spoke was not the advocacy on the part of a utility to use more of its product. Nor do I think those who won our independence, while declining to "exalt order at the cost of liberty," would have viewed a merchant's unfettered freedom to advertise in banking his wares as a "liberty" not subject to extensive regulation in light of the government's substantial interest in attaining "order" in the economic sphere.

While I agree that when the government attempts to regulate speech of those expressing views on public issues, the speech is protected by the First Amendment unless it presents "a clear and present danger" of a substantive evil that the government has a right to prohibit, see, e.g., Schenck v. United States, 249 U.S. 47, 52 (1919), I think it is important to recognize that this test is appropriate in the political context in light of the central

importance of such speech to our system of self-government. As observed in <u>Buckley</u> v. <u>Valeo</u>, 424 U.S. 1, 14 (1976):

"Discussion of public (sames and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the breadest protection to such political expression in order 'to assure [the] unlettered interchange of ideas for the bringing about of political and social changes desired by the people.'"

And in <u>Garrison</u> v. <u>Louisiana</u>, 379 U.S. 64, 74-75 (1964), this Court stated that "speech concerning public affairs is more than . self-expression; it is the essence of self-government."

The Pirst Amendment, however, does not always require a clear and present danger to be present before the government may regulate speech. Although First Amendment protection is not limited to the "exposition of ideas" on public Iosues, see, e.g., Winters v. New York, 333 U.S. 507, 510 (1948) -- both because the line between the informing and the entertaining is clusive and because art, literature and the like may contribute to important First Amendment interests of the individual in freedom of speech -- it is well

established that the government may regulate obscenity even though its does not present a clear and present danger. Compare, e.y., Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57-58 (1973) with Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). Indecent speech, at least when broadcast over the airwaves, also may be regulated absent a clear and present danger of the type described by Mr. Justice Brandeis and required by this Court in Brandenburg. FCC v. Pucifica, 438 U.S. 736 (1978). And in a slightly different context this Court declined to apply the clear and present danger test to a conspiracy among members of the press in violation of the Sherman Act because to do so would "degrade" that doctrine. Associated Press v. United States, 326 U.S. I, 7 (1945). Nor does the Court today apply the clear and present danger test in invalidating New York's ban on promotional advertising. As noted above, in those and other contexts the Court has clearly rejected the notion that there must be a free "marketplace of ideas."

If the complaint of those who feel the Court's opinion does not go far enough is that the "only test of truth is its ability to get itself accepted in the marketplace of ideas" -- the test advocated by Thomas Jefferson in his first inaugural address, and by Mr. Justice Nolmes in Abrams v. United States, 250 U.S. 616, 630 (1919) (dissenting opinion) =- there is no reason whatsoever to limit the protection accorded commercial speech to "truthful, nonmisleading, noncoordive" speech. See ante, p. 1 (BLACKMEN, J., concurring). If the "commercial speech" is in fact misleading, the "marketplace of ideas" will in time reveal that fact. It may not reveal it sufficiently scon to avoid barm to numerous people, but if the reasoning of Brandeis and Holmes is applied in this context, that was one of the risks we took in protecting free speech in a democratic society.

Un(ortunately, although the "marketplace of ideas" has a historically and sensibly defined context in the world of political speech, it has virtually none in the realm of business

transactions. Even so staunch a defender of the First Amendment as Mr. Justice Black, in his dissent in <u>Breard</u> v. <u>Alexandria</u>, 341 U.S. 622, 650 (1951) stated:

"Of course I believe that the present ordinance could constitutionally be applied to a 'merchant' who goes from door to door 'selling pots.'"

And yet, with the change in solicitation and advertising techniques, the line between what Central Hudson did here and the peddler selling pots in Alexandria a generation ago is difficult, if not impossible to fix. Doubtless that was why Mr. Justice Black joined the unanimous opinion of the Court in Valenting v. Chrestensen, 316 U.S. 52 (1942), in which the Court stated that:

"This Court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of use, are matters for legislative judgment." (emphasis added.)

I remain of the view that the Court unleashed a Pandora's box when it "elevated" commercial speech to the level of traditional political speech by according it first amendment protection in <u>Virginia State Board of Pharmacy v. Virginia Citizens Consumer</u> Council, Inc., supra. The line between "commercial speech," and the kind of speech that those who drafted the First Amendment had in mind, may not be a technically or intellectually easy one to draw, but it surely produced far fewer problems than has the development of judicial doctrine in this area since Virginia Board. For in the world of political advocacy and its marketplace of ideas, there is no such thing as a "fraudulent" idea: there may be useless proposals, totally unworkable schemes, as well as very sound proposal that will receive the imprimator of the "marketplace of ideas" through our majoritiarian system of election and representative government. The free flow of information is important in this context not because it will lead to the discovery of any objective "touth," but because it is essential to our system of self-government.

The notion that more speech is the remedy to expose falsehood and fallacies is wholly out of place in the commercial bazagr, where if applied logically the remedy of one who was defrauded would be merely a statement, available upon request, reciting the Latin maxim "caveat emptor." But since "fraudulent speech" in this area is to be remediable under Virginia Board, supra, the remedy of one defrauded is a lawsuit or an agency proceeding based on commmon law notions of fraud that are separated by a world of difference from the reals of politics and government. What time, legal decisions, and common sense have so widely severed. I dealined to join in Virginia Board, and regret now to see the Court reaping the seeds that it there sowed. For in a democracy, the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to re-learn many years becce. "

The

1fp/ss 6/19/80 79-565 Central Hudson Gas & Electric Corp. v. Public Service Commission

This is another case involving a restriction, imposed by the Public Service Commission of New York, upon the speech of a public utility. It differs, however, from the Consolidated Edison case - that I just announced - in that here the restriction applied to a form of commercial speech rather than what is sometimes called political or pure speech.

In this case, the Public Service Commission issued a complete ban on promotional advertising by electric utilities in New York State. Its purpose was to "dampen demand for electricity", and thereby conserve energy. The New York Court of Appeals sustained the ban, concluding that the state interest in the conservation outweighed the relatively limited constitutional value of commercial speech.

Again, we disagree with the decision of the New York Court of Appeals.

Our reasons are set forth in full in the opinion indicate.
filed today. I therefore sommerize briefly our holding.

We accept, of course,

We accept, of course, the argument that conservation/is an important national goal. Regulatory bodies, such as appellee, are empowered to take appropriate action to further this qual.

When, however, such action involves the suppression of speech, the First and Fourteenth Amendments require that the restriction be no more extensive than is necessary to serve the state interest. In this case, the record before us fails to show that the total ban on promotional advertising meets this requirement.

Therefore, to the extent that the Commission's order suppresses speech that in no way impairs the state's interest in energy conservation, its order violates the Constitution.

We inerefore reverse the judgment of the Court of Appeals of New York.

Mr. Justice Brennan has filed a separate opinion concurring in the judgment, and has joined separate opinions concurring in the judgment/filed by Mr. Justice Blackmun and Mr. Justice Stevens. Mr. Justice Rehnquist has written a dissenting opinion.

		;	; 	John 576	2)/h/9
				Someone !	12 11/5 # 5/16 12 14 5/16 12 14 14 14 14 14 14 14 14 14 14 14 14 14
79-56		 		· · · · · · · · · · · · · · · · · · ·	10/10 03/10 03/
5 Coctral Endson v. 3		<u> </u>	Esis dust not dust	111/10 5/15/80 6/13/80 6/13/80 5/15/80	27 hayend 3/3/180
Public Service	 		the stronger		Constant L

marter

Reviewed
4/27
4/30 av
revised

DOS, 4/25/80

No. 79-565, <u>Central Hudson Electric Corp.</u>

v. Public Service Commission of New York

MR. JUSTICE POWELL delivered the opinion of the Court:

This case presents the question whether the Public Service Commission of the State of New York violated the Pirst Amendment when it completely banned "promotional" advertising by an electric utility.

I

In December 1973, the Commission, appelled here, ordered that electric utilities in New York.

State coase all advertising that "promotion the

continue furnishing all customer demands for the 1973-1974 winter." App. to Juris. St., at 31a.

Three years later, when the fuel shortage had eased, the Commission requested comments from the public on a proposal to continue the ban on promotional advertising. Central Budson Gas & Electric Corporation, the appellee in this case, submitted a letter to the Commission apposing the ban on First Amendment grounds. App. Alo. After reviewing the public comments, the Commission extended the prohibition in a Policy Statement issued on February 25, 1977.

The Commission rejected the argument that utilities should advertise to develop consumption during periods when demand for electricity is low. The agency acknowledged that higher consumption in "off-peak" periods would have "beneficial side effects" in permitting more efficient use of generating capacity of existing gower plants. But

Other energy sources not regulated by the 350 Commission, they remain free Consequently, the Commission stated, its ban could achieve only "piecemeal conservationism." Still, the agency defended About ban as likely to "result in some dampening of unnecessary growth" in energy consumption. ld., at 37a. Commission The stipulated that it would permit "informational" advertising designed to encourage "shifts of consumption" from peak demand times to periods of low electricity demand. Id., at 37a-38a (emphasis in original). Informational advertising would not seck to increase aggregate consumption, but would invite a levelling of demand throughout any given 24-hour period. The agency offered to review "specific proposals companies bу th∺ specifically described [advertising] programs that meet these criteria." Id., at 382.

When it rejected requests for rehearing on

Appellant challenged the order in State court, arguing that the Commission had restrained commercial speech that is protected by the First Amendment. 2/ The Commission's order was upheld by the trial court and at the intermediate appellate level. 3/ The New York Court of Appeals affirmed. It found little value in

electric power," the court denied that "promotional advertising might contribute to society's interest in 'informed and reliable' economic decisionmaking." <u>Ibid.</u> The court also observed that by encouraging consumption, promotional advertising of electric power would only exacerbate the "present energy crisis." <u>Id.</u>, at 110, 390 N.E.2d, at 758. The court concluded that the governmental interest in the prohibition outweighed the limited constitutional value of the commercial speech at issue. We granted certiorari, _____U.S. (1979), and now reverse.

II.

The Commission's order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience. Central Sudson argues that promotional advertising would be useful to

The First Amendment, as applied to the states through the Fourtconth Amendment, protects commercial speech from unwarranted government regulation. Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976). Commercial expression not only serves the interest of the speaker, but also aids consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "(P)cople wil) perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them. . . . " Id., at 770; see Linmark Associates, Inc. v. Township of Willinghoro, 431 C.S. 85, 92 (1977). Even if advertising communicates only an

Nevertheless, our decisions. have recognized "the 'commonsense' distinction between speech proposing a commercial transaction, which area traditionally subject to occurs in government regulation, and other varieties of speech. . . : " Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-456 (1978). 4/ Pollowing that distinction, we accord a lesser protection to commercial speech than to most other forms of expression. Ohralik, supra, at 456, 457. The First Amendment interests at stake in each case must be weighed against the governmental interests to be served by the proposed regulation. In commercial speech cases, a substantial state interest in restraining expression ordinarily will sustain content-based regulation. For example, the government may regulate commercial speech more likely to deceive the public than to inform "t, Priedman v. Rogers, 440 U.S. 1, 13, 15-16 [1979],

however, this Court has been particularly attentive to the congruence between the regulation chosen and the interest to be served. ____5/_ Even if the asserted State interest is substantial, the limitation on First Amendment rights cannot survive unless the method of regulation is carefully designed to achieve the State's goal. Two basic criteria have been used to evaluate limitations on commercial speech: (i) whether the restriction is closely related to the governmental interests to be served; and (ii) whether the restriction reaches only that speech which imperils those interests.

Overturned regulations that are asserted to serve state interests relatively remote from the expression at issue. In both <u>Mates</u> and <u>Virginia</u> <u>Board of Pharmacy</u>, the Court concluded that advertising could not be prohibited simply to protect the ethical or performance standards of a

770: See Ohralik v. Ohio State Bar Assin, supra, 436 U.S., at 460-462. And the state may pursue those interests by limiting the form and content of advertising, even to the point of requiring specific disclaimers. Bates, supra, 433 U.S., at 384. But the Court found the advertising too obliquely related to professional integrity and ability to justify outright suppression. As the Court noted in Virginia Board of Pharmacy, "The advertising ban does not directly affect professional standards one way or the other." 425 U.S., at 769. Similarly, in Linmark Associates v. Township of Willingboro, supra, we found no definite connection between the township's qual of integrated housing and its ban on the use of "For Sale" signs in front of houses. 431 U.S., at 95-96. In contrast, Ohralik upheld restrictions on lawyer solicitation because those restrictions directly reduced "the potential for overreaching

good quote

of the restriction on commercial speech. 6/ Our decisions have recognized that the First Amendment mandates a preference for "narrowly drawn rules" in this area. In re Primus, 436 U.S. 412, 438 (1978). In Carey v. Population Services, Inc., 431 U.S. 678, 701-702 (1977), we hold that the State's "arguments do not justify the total suppression of advertising concerning contraceptives." This holding left open the possibility that the State could implement more carefully drawn restrictions. See id., at 712 (POWELL, J., concurring); see id., at 716-717 (STEVENS, J., concurring). Although the prohibition against lawyer advertising was struck down in Bates, we explicitly did not "foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required" in promotional materials. 433 U.S., at 384. The Court followed a like analysis in Friedman V. Robert. 440 U.S. 1

speech of Texas opnometrists," while those professionals still could advertise their services, prices, and manner of doing business. Id., at 15-16.

In response to the first Amendment issues raised by commercial soeech, then, a sequential analysis has developed. At the outset, we must determine if the expression falls within the category of commercial speech and if the asserted governmental interest is a substantial one. If both inquiries yield positive answers, the regulation still must be linked directly to the state goal, and it must not restrict expression unrelated to that interest.

ĪΙΊ

We now apply this four-step analysis for commercial speech to the Commission's arguments in

protection as commercial speech. Because appellant holds a monopoly over the sale of electricity in its service area, the State court suggested that the Commission's order restricts no commercial speech of any worth. That court stated that advertising in such a "noncompetitive market" could not improve the decisionmaking of consumers. 47 N.Y.2A, at 110; 390 N.E.2d, at 757. Since the informational function of advertising is the primary basis for its protection under the First Amendment, see First National Bank of Boston V. Bellotts, 435 U.S. 765, 783 (1978), the court Saw no constitutional problem with barring commercial speech that includes little useful information.

This reasoning, however, falls should of establish that appellant's advertising is not commercial speech protected by the Pirst Amendment.

Monopoly over the supply of a product provides no protection from competition with substitutes for

West Ohio Gas Co. v. Public Utilities Commin, 294
U.S. 63, 72 [1935], and each energy source
continues to offer peculiar advantages and
disadvantages. That electric utilities are
regulated by the State does not eliminate their
competition with other energy providers in
particular markets. For consumers in those
markets, advertising by unregulated firms, 8/

advertising reduces the information available for consumer decisions and articles the source of the First Amendment. The New York court's argument appears to assume that the providers of a monopoly service or product are afflicted with an irrational desire to pay for ineffective advertising. Most businesses — even regulated monopolies — are unlikely to underwrite promotional advertising that

Even in monopoly markets, suppression of

monopoly service at all, or how much of the service he should use. In the absence of factors that would distort the utility's decision to advectise, the fact that a business is willing to pay to promote its products reflects a belief that the advertising is of interest to consumers. 9/ Since no such extraordinary conditions have been identified in this case, appellant's monopoly position does not alter the First Amendment's protection for its commercial speech.

В

The Commission offers two state interests as justifications for the ban on promotional advertising. The first focuses on the current energy situation. Any increase in demand for electricity -- during peak or off-peak periods -- means greater consumption of energy. The Commission argues, and the New York court agreed,

resources beyond our control, no one can doubt the importance of energy conservation. Clearly, therefore, the state interest asserted is substantial.

The Commission also arques promotional advertising will aggravate inequities caused by the failure to base the utility's rates on marginal cost. The utilities argued to the Commission that if they could promote the use of electricity in periods of law demand, they would improve their utilization of generating capacity. The Commission responded that promotion of off-peak consumption also would increase consumption during peak periods. If peak demand were to rise, the lack of marginal cost rates would mean that the true costs of expanding production would not be reflected in the rates charged for the additional power. Instead, the extra costs would be borne by all higher overall rates. consumers through

supply and distributional fairness, 10/ a choice properly confided to the regulatory bodies that oversee utilities. We make recognize the State's interest in fair and effective tatemaking as clear and substantial.

¢

In evaluating restrictions on commercial speech, we focus on the relationship between the State's interests and the advertising ban. The State's interest in energy conservation is closely related to the Commission order at issue bere. The immediate connection between advertising and demand for electricity is plain. Central Budson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct would not between the state interest in conservation and the suppression of petitioner's advertising.

In contrast, the Commission's laudable

ratemaking philosophy is, at most, tenuous. Even
if the Commission is correct that promotional
advertising unfairly will raise rates of all
consumers, the many available means of rectifying a
skewed rate structure must be attempted before we
may approve the sacrifice of First Amendment
Out the record before un;
interests. The Commission's ratemaking wernissions
simply too remote from the speech at issue here to

D

Commission's suppression of commercial speech is affect adversally limited to advertising that would subvert the state interest in energy conservation. The blanket ban at issue here does not satisfy this criterion. The Commission's order reaches all promotional advertising, regardless of the impact of the touted service on overall energy use. The energy

use.

7500

would advertise products and services that are and would consume 11/ But the Commission's order prevents petitioner promoting electric services that either reduce energy use by diverting demand from less efficient Sources, or that consume roughly the same amount of energy as do alternative sources. In either situation, the utility's advertising would not endanger conservation or emit "misleading signals" to the public. By suppressing speech that in no way impairs the State's interest in energy conservation, the Commission's order violates the Pirst Amendment and must be invalidated. See First National Bank of Boston v. Bellotti, supra.

Appellant insists that but for the ban, it

Accordingly, the judgment of the New York

Court of Appeals is

Lange Lange

No. 79-365, <u>Central Mudson Gas & Slectric</u> Corp. v. Public Service Comm'n of State of New York

POOTNOTES

DOS, 4/25/80

1/ "Marginal cost" has been defined as the "extra or incremental cost of producing an extra unit of output." P. Samuelson, Economics 467 (10th cd. 1976) (emphasis supplied).

2/ Central Hudson also alleged that the Commission's order reaches beyond the agency's statutory powers. This argument was rejected by the New York Court of Appeals, 47 N.Y.2d 94, 102-104; 390 N.E.2d 749, 752-754 (1979), and was not

arqued to this Court. Immaddition, this idiagation

does-not-gow-involvestherthorny-question of whether

Havid

St., at 2% (Feb. 17, 1978) (State Supreme Court).

4/ See Bates v. State Bar of Arizona,
433 U.S. 350, 381 (1977); Jackson & Jeffries,
Commercial Speech: Economic Due Process and the
First Amendment, 65 Va. E. Rev. 1, 38-39 (1979).

5/ See generally Note, Pirst Amendment Protection for Commercial Advertising: The New Constitutional Doctrine, 44 U. Chi. L. Rev. 205, 243-251 (1976).

6/ It is important to distinguish this analysis from the "overbreadth" doctrine. The latter theory permits the invalidation of regulations on First Amendment grounds even when the litigant challenging the regulation has engaged in no constitutionally protected activity. $\underline{\text{E.g.}}$,

Barrel a defly written theepful note Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973);
see Note, The Overbreadth Doctrine and the First
Amendment, 83 Harv. L. Rev. 844, 853-858 (1970).
The likelihood of this restraint is far less in the commercial speech context where the expression is "linked to commercial well-being" and therefore is not "particularly susceptible to being crushed by overbroad regulation." Bates v. State Bar of Arizona, 433 U.S. 350, 381 (1977).

In this case, the Commission's prohibition acts directly against the promotional activities of Central Budson. Thus, we apply standards derived from Jess-restrictive-means analysis to judge the actual speech restriction on appellant, not the hypothetical impact on third parties. See p.

infra. This approach tollows the Court's consistent view that government may not adopt wide-ranging speech restrictions when more precise

emergency situation. Although the advertising ban initially was prompted by critical fuel shortages in 1973, those same conditions did not prevail when the present order was approved. The Commission makes no claim that an emergency now exists. Our decision today does not address the powers that the state would have over utility advertising in emergency circumstances. See State v. Oklahoma Gas & Electric Co., 536 P.2d 887, 895-896 (Oxl. 1977).

B/ Several commercial speech decisions have involved enterprises subject to extensive state regulation. E.g., Friedman v. Rogers, 440 U.S. 1 (1979) (optometrists): Bates v. Arizona State Bar, 433 U.S. 350 (1977) (lawyers); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (pharmacists).

distorts the economic decision whether to advertise. Unregulated businesses pass on promotional costs to consumers, and this Court expressly approved the practice for utilities in West Objo Gas Co. v. Public Otilities Commin, 294

<u>10/</u> See W. Jones, Requiated Industries 191-287 (2d ed. 1976).

Among these devices are the "heat 11/ Barred -9 a put pump," which both parties acknowledge to be a major substance. improvement in electrical heating, and the use of of Ries in fext. electric heat as a "back-up" to solar and other and do. heat soutces. Although the Commission to say when questioned the efficiency of those devices burlen of services before this Court, neither the Commission's Policy Statement nor its order denying

devices and ?

Commission's advertising policy violates the First
Amendment, we do not reach petitioner's claims that
the agency's order also violated equal protection

under the Fourteenth Amendment, and that it is both

Key Heir to last

Overbroad and vague.

David - We invalidate the Commission's order

add to that pecause it restricts advertising with a positive of

| |neutral__impact__on__energy__conservation. In

neutral impact on energy conservation.

sespense, the Commission might consider a system of previewing advertising campaigns to assure that

they will not defeat conservation policy. -The

agency has instituted such a program for approving

"informational" advertising under the Policy

Statement challenged in this case. See p.

supra. We have observed in the past that commercial speech is such a hardy breed that

traditional prior restraint docurine may now apply

muster so long as it includes adquate procedural safequards. <u>Preedman v. Maryland</u>. 380 U.S. 51 (1968).

AFFIRM

DOS, 5/80

No. 79-565, <u>Central Budson Electric Corp.</u> v. Public Service Commission of New York

MR. JUSTICE POWELL delivered the opinion of the Court:

This case presents the question whether the Public Service Commission of the State of New York violated the First Amendment when it completely hanned "promotional" advertising by an electric utility.

I,

In December 1973, the Commission, appelled here, ordered that electric utilities in New York State cease all advertising that "promot[es] the

had eased, the Commission requested comments from the public on its proposal to continue the ban on promotional advertising. Central Hudson Gas & Electric Corporation, the appellant in this case. opposed the ban on First Amendment grounds. App. All. After reviewing the public comments, the Commission extended the prohibition in a Policy Statement issued on February 25, 1977.

The Commission rejected the argument that utilities should advertise to develop consumption during periods when demand for electricity is low. The agency acknowledged that higher consumption in "off-peak" periods would have "beneficial side effects" in permitting more efficient use of generating capacity of existing power plants. App. to Juris. St., at 37s. But the Policy Statement opposed all promotional advertising as contrary to the national policy of conserving energy. Since oil dealers are not under the Commission's

dampening of unnecessary growth" in energy consumption. Id., at 37a.

The Commission's order explicitly permitted "informational" advertising designed to encourage "shifts of consumption" from peak demand times to periods of low electricity demand. Ibid. (emphasis in original). Informational advertising would not seek to increase aggregate consumption, but would invite a levelling of demand throughout any given 24-hour period. The agency offered to teview "specific proposals by the companies for specifically described (advertising) programs that meet these criteria." Jd., at 38a.

When it rejected requests for rehearing on the Policy Statement, the Commission supplemented its rationale for the advertising ban. The agency observed that additional generation of electricity probably would be more expensive to produce than existing output. Because electricity rates in New

additional electricity then would be subsidized by all consumers through generally higher rates. Id., at 57a-58a. The state agency also thought that promotional advertising would give "misleading signals" to the public by appearing to encourage energy consumption at a time when conservation is needed. Id., at 59a.

Appellant challenged the order in state court, arguing that the Commission had restrained commercial speech in violation of the First Amendment. 2/ The Commission's order was upheld by the trial court and at the intermediate appellate level. 3/ The New York Court of Appeals affirmed. It found little value in advertising in "the noncompetitive market in which electric corporations operate." 47 N.Y.2d 94, 110, 390 N.E.2d 749, 757 [1979]. Because consumers "have no choice regarding the source of their electric gower," the court denied that "promotional

promotional advertising of electric power would only exacerbate the current energy situation. Id., at 710, 390 N.S. 20, at 758. The court concluded that the governmental interest in the prohibition outweighed the limited constitutional value of the commercial speech at issue. We noted jurisdiction, 0.S. (1979), and now reverse.

II.

The Commission's order restricts only commercial speech, that is, expression related to the economic interests of the speaker and its audience. Central Hudson argues that promotional advertising would aid consumers in choosing among energy sources, and could encourage uses of electricity that are not inconsistent with the Commission's goal of energy conservation.

The First Amendment, as applied to the states through the Fourteenth Amendment, protects

only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of valuable information. In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "[2]eople will perceive their own bost interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them. . . . " Id., at 770; see Linmark Associates, Inc. v. Township of Willinghoro, 431 U.S. 85, 92 (1977). Even if advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accorate information is better than no information at all. Bates v. State Bar of Arizona, 433 U.S. 350, 374 (1977).

Nevertheless, our decisions have

speech." Ohralik v. Ohio State Mar Assin, 436 U.S. 447, 455-456 (1978). 4/ Following that distinction, we accord a lesser protection to commercial speech than to other constitutionally guaranteed expression. Id., at 456, 457. First Amendment interests in every case must be weighed against the governmental interests to be served by the proposed regulation. In commercial speech cases, a substantial State interest in restraining expression ordinarily will sustain governmental regulation. For example, the quietnment may regulate commercial speech more likely to deceive the public than to inform it, Friedman v. Rogers, 440 U.S. 1, 13, 15-16 (1979), or commercial speech related to illegal activity, Pittsburgh Press Co. v. Pittsburgh Comm'n on Homan Relations, 413 U.S. 376, 388 (1973).

The second of th

In applying this lower standard of review, however, this Court has been particularly

unless the method of regulation is carefully designed to achieve the State's qual. Two basic criteria have been used to evaluate limitations on commercial speech: (i) whether the restriction directly advances the governmental interests to be served; and (ii) whether the restriction reaches only that speech which imperils those interests.

Overturned regulations that do not serve directly the state interests offered to support the restriction. In both Bates and Virginia Board of Pharmacy, the Court concluded that advertising could not be prohibited simply to protect the ethical or performance standards of a profession. The profession itself certainly may be regulated to further the state's interest in the integrity and competence of its practitioners. Virginia Board of Pharmacy, Supra, 425 U.S., at 770; See Ohralik v. Ohio State Bar Ass'n, Supra, 436 U.S., at 460-462.

the Court found the advertising too obliquely related to professional integrity and ability to justify outright suppression. Id., at 368-369. As the Court noted in Virginia Board of Pharmacy, "[t]he advertising ban does not directly affect professional standards one way or the other." 425 U.S., at 769. Similarly, in Linmark Associates v. Township of Willingboro, supra, we found no definite connection between the township's goal of " integrated housing and its ban on the use of "For Sale" signs in front of bouses. 431 U.S., at 95-96. In contrast, Ohralik upheld restrictions on lawyer solicitation because those restrictions directly reduced "the potential for overreaching that is imberent in a lawyer's in-person solicitation of professional employment. 436 U.S., at 468.

The second criterion focuses on the extent to which the restriction on commercial speech

In re Primus, 436 U.S. 412, 438 (1978). In Carey v. Population Services, International, 431 U.S. 678, 701-702 (1977), we held that "arouments do not justify the total suppression of advertising concerning contraceptives." This holding left open the possibility that the State could implement more carefully drawn restrictions. See id., at 712 (POWELL, J., concurring in part and concurring in the judgment); see id., at 716-717 (STEVENS, J., concurring). Although a prohibition of lawyer advertising was struck down in Bates, we explicitly old not "foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required" in promotional materials. 433 U.S., at 384. The Court followed a like analysis in Friedman v. Rogers, 440 U.S. 1 (1979), when we sustained a regulation prohibiting the use of trade names by optometrists. We stressed that the restriction

Thas only the most incidental effect on the content of the commercial speech of Texas optometrists," and that those professionals still could advertise their services, prices, and manner of doing business. Id., at 15-16.

In response to the First Amendment issues raised by commercial speech, then, a four-part analysis has developed. At the outset, we must determine of the expression is within the category category of commercial speech. Next, we ask whether the asserted quovernmental interest is substantial. If both inquiries yield positive answers, then the regulation is valid if it directly advances the state interest and if it does not restrict expression unrelated to that interest.

The New York Court of Appeals questioned whether Central Hudson's advertising is entitled to protection as commercial speech. Because appellant holds a monopoly over the sale of electricity in its service area, the State court suggested that the Commission's order restricts no commercial speech of any worth. That court stated that advertising in such a "noncompetitive market" could not improve the decisionmaking of consumers. 47 N.y.2d, at 110; 390 N.E.2d, at 757. Since the informational function of advertising is the primary basis for its protection under the Pirst Amendment, see First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978), the court saw no constitutional problem with barring commercial speech that includes little useful information.

This reasoning, however, falls short of establishing that appellant's advertising is not commercial speech protected by the First Amendment.

markets, such as those for home heating and industrial power. This Court noted the existence of interfuel competition forty-five years ago, see West Ohio Gas Co. v. Public Utilities Comm'n, 294 U.S. 63, 72 (1935), and each energy source continues to offer peculiar advantages and disadvantages that may influence consumer choice. Por consumers in those competitive markets, advertising by utilities is just as valuable as advertising by unregulated firms. 8/

Even in monopoly markets, suppression of advertising reduces the information available for consumer decisions and inhibits the realization of the goals of the First Amendment. The New York court's argument appears to assume that the providers of a monopoly service or product are afflicted with an irrational desire to pay for ineffective advertising. Most businesses -- even regulated monopolies -- are unlikely to underwrite

business. A consumer may need information to aid his decision whether or not to use the monopoly service at all, or now much of the service he should purchase. In the absence of factors that would distort the utility's decision to advertise, the fact that a business is willing to pay to promote its products reflects a helief that the advertising is of interest to consumers. 9/Since no such extraordinary conditions have been identified in this case, appellant's monopoly position does not alter the First Amendment's protection for its commercial speech.

B

The Commission offers two state interests as justifications for the ban on promotional advertising. The first focuses on the current energy situation. Any increase in demand for electricity -- during peak or off-peak periods -- means greater consumption of energy. The

In view of our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation. Clearly, therefore, the otate interest asserted is substantial.

that Commission also arques The promotional advertising will aggravate inequities caused by the failure to hase the utility's rates on marginal cost. The utilities argued to the Commission that if they could promote the use of electricity in periods of low demand, they would improve their utilization of generating capacity. The Commission responded that promotion of off-peak consumption also would increase consumption during peak periods. If peak demand were to rise, the absence of marginal cost rates would mean that the true costs of expanding production would not be reflected in the rates charged for the additional power. Instead, the extra costs would be borne by structures involves difficult questions of economic supply and distributional fairness, 10/ a choice properly confided to the regulatory bodies that oversee utilities. We recognize, of course, the State's clear and substantial interest in fair and effective ratemaking.

C

In evaluating restrictions on commercial speech, we focus on the relationship between the State's interests and the advertising ban. The State's interest in energy conservation is closely related to the Commission order at issue here. The immediate connection between advertising and demand for electricity is plain. Central Nudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the suppression of petitioner's advertising.

speech protected by the First Amendment. The link between the advertising prohibition and appellant's rate structure is, at most, tenuous. The impact of promotional advertising on the equity of appellant's rates is highly speculative. Advertising to increase off-peak usage would have to increase peak usage, while all other factors directly affecting the fairness and efficiency of appellant's rate structure remained constant. Such conditional and remote eventualities simply cannot justify suppression of appellant's advertising.

 \circ

Finally, we consider whether the Commission's suppression of commercial speach is limited to advertising that would affect adversely the substantial state interest in energy conservation. Central Undson emphasizes that the ban reaches all promotional advertising, regardless of the impact of the touted service on overall

saving of energy, or that would cause no net increase in energy use. But for the ban, appellant continues, it would advertise products and services that are efficient in their use of energy.

When the State regulates commercial speech to advance directly a substantial state interest. the challenging party most identify concrete instances where the restrictions overstep the underlying justification: Because this case involves a facial attack on the Commission's order, the record provides no basis for evaluating appellant's contention that its advertising has been suppressed wrongfully. 12/ We cannot determine whether in fact appellant has been prevented from promoting electric services that are in harmony with the Commission's policy of restraining energy consumption. The record provides no authoritative evidence that appellant currently can offer services that would conserve -

"overbroad." Overbreadth theory permits a litigant to allege a First Amendment violation even if the challenged regulation has not restricted the litigant's speech. Broadrick v. Oklahoma, 413 U.S. theory derives from the 601. 612-613. The recognition that overbroad regulation of expression may deter protected speech of parties not before the court and thereby escape judicial review. But analysis, which is disfavored overbreadth generally, Id., at 614, is especially inappropriate in the context of commercial speech. We have noted that commercial speech -- the offspring of economic self interest -- is a particularly hardy breed of expression. A commercial speaker is not likely to be deterred from communication and is in a 4000 position to determine whether its expression is protected by the First Amendment. See Bates v. Arizona State Bar, supra, 433 U.S., at 380-381; Virginia State Board of Pharmacy, supra, 425 U.S.,

Central Hudson presents two other constitutional objections to the advertising ban: That it denies the utility equal protection of the laws under the Fourteenth Amendment, and that it is unconstitutionally vaque. Neither claim has merit.

Appellant's equal protection argument emphasizes that the advertising ban does not apply to enterprises that market other forms of energy. As a result, Central Hudson contends, the ban irrationally singles out the expression of electric utilities. This argument ignores the State's reliance on its special authority over regulated industries. It also runs counter to the many decisions of this Court holding, even as to unregulated businesses, that so long as the government has a rational basis for its action, it may undertake partial regulation in pursuit of a valid goal. See, e.g., McGowan v. Maryland, 366 We also see no fatal vaqueness in the agency's order. The Commission banned promotional advertising and permitted informational advertising that would not increase aggregate sales. "[M]en of common intelligence" would have little difficulty parsing the Commission's order. Connally v. General Construction Co., 269 U.S. 385, 391 (1926). In any event, the Commission's mechanism for screening "informational" advertising would provide important quidance to appellant in understanding the precise reach of the Commission's order. See CSC v. Letter Carriers, 413 U.S. 548, 580 (1973).

Accordingly, the judgment of the New York

Court of Appeals is

Affirmed

Harm

No. 79-565, <u>Central Budson Gas & Electric</u> Corp. v. Public Service <u>Commin of State of New York</u>

PROTNOTES

DOS, 5/1/80

1/ "Marginal cost" has been defined as the "extra or incremental cost of producing an extra unit of output." P. Samuelson, Economics 467 (10th ed. 1976) (emphasis supplied).

2/ Central Hudson also alleged that the Commission's order reaches beyond the agency's statutory powers. This argument was rejected by the New York Court of Appeals, 47 N.Y.2d 94, 102-104; 390 N.E.2d 749, 752-754 (1979), and was not argued to this Court. In addition, this litigation does not now involve the thorny question of whether

Division of State Supreme Court); App. to Juris. St., at 22a (Feb. 17, 1978) (State Supreme Court).

- 4/ See Bates v. State Mar of Arizona,
 433 U.S. 350, 381 (1977); Jackson & Jeffrics,
 Commercial Speech: Economic Due Process and the
 First Amendment, 65 Va. L. Rev. 1, 38-39 (1979).
- 5/ See generally Note, Pirst Amendment Protection for Commercial Advertising: The New Constitutional Doctrine, 44 U. Chi. L. Rev. 205, 243-251 (1976).
- 6/ It is important to distinguish this analysis from the "overbreadth" doctrine. The latter theory permits the invalidation of regulations on First Amendment grounds even when the litigant challenging the regulation has engaged in no constitutionally protected activity. E.g.,

Broadtick v. Oklahoma, 413 U.S. 601, 612-613 (1973); see Note, The First Amendment Overbroadth Doctrine, 83 Harv. L. Rev. 844; 853-858 (1970). The likelihood of this restraint is less in the commercial speech context where the expression is "linked to commercial well-being" and therefore is not "particularly susceptible to being crushed by overbroad regulation." Bates v. State Bar of Arizona, 433 U.S., at 381 (1977).

In this case, the Commission's prohibition acts directly against the promotional activities of Central Hudson. Thus, the overbreadth doctrine's concerns as to a litigant's standing are not relevant here, as we discuss below. See op. infra.

7/ We note that the Commission order at issue here was not promulyated in response to an makes no claim that an emergency now exists. Our decision today does not address the powers that the state would have over utility advertising in emergency circumstances. See State v. Oklahoma Gas & Electric Co., 536 P.24 887, 895-896 (Okl. 1977).

B/ Several commercial speech decisions have involved enterprises subject to extensive state regulation. E.g., Priedman v. Rogers, 440 U.S. 1 (1979) [optometrists]: Bates v. Arizona State Bar, 433 U.S. 350 (1977) (lawyers): Virginia State Bar, of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (pharmacists).

9/ There may be a greater incentive for a utility to advertise if it can include promotional expenses in determining its rate of return rather than pass those costs on solely to shareholders. Such a policy, however, hardly

West Ohio Gas Co. v. Public Utilities Comm'n, 294
U.S. 63, 72 (1935).

10/ See W. Jones, Regulated Industries 191-287 (2d ed. 1976).

11/ Among these devices are the "heat pump," which both parties acknowledge to be a major improvement in electrical heating, and the use of electric heat as a "back-up" to solar and other heat sources. The Commission, however, disputes the efficiency of those devices and services, and neither the Commission's Policy Statement nor its order denying rehearing addressed this issue.

12/ Indeed, when Central Hudson commented on the proposal to continue the advertising ban, it stated only general First Amendment objections to the prohibition. See App.

which the Commission acted. In view of the wide mandate ordinarily accorded regulatory bodies, the New York Commission's powers are unremarkable. The Commission holds authority for the "general supervision" of electric utilities, Public Service Law, § 66, subd. 1 (McKinney 19__), as well as "all powers necessary or proper to enable it to carry out the purcoses of" the Public Service Law. Id., § 4, subd. 1. The Legislature also has instructed the agency "to encourage all persons corporations . . . to formulate and corry out longrange programs . . . [for] the preservation of environmental values and the conservation of natural resources." <u>Id.</u>, § 5, subd. 2. These grants of authority raise no constitutional difficulties.

Reviewed LIP 5/5-b

DOS. 5/1/80

No. 79-565, Central Hudson Electric Corp.

v. Public Service Commission of New York

REVERSE, VERSION (I

MR. JUSTICE POWELL delivered the opinion of the Court:

This case presents the question whether the Public Service Commission of the State of New the First Amendment completely banned "promotional" advertising by an <u>ect</u>ric utility,

Ϊ

In December 1973, the Commission, appellee here, ordered that electric utilities in New York State coase all advertising that "oromotles" the

Three years later, when the fuel shortage had cased, the Commission requested comments from the public on its proposal to continue the ban on promotional advertising. Central Sudson Gas & Electric Corporation, the appellant in this case, opposed the ban on first Amendment grounds. App. A10. After reviewing the public comments, the Commission extended the prohibition in a Policy Statement issued on February 25, 1977.

The Commission rejected the argument that utilities should advertise to develop consumption during periods when demand for electricity is low. The agency acknowledged that higher consumption in "off-peak" periods would have "beneficial side effects" in permitting more efficient use of generating capacity of existing power plants. App. to Juris. St., at 37a. But the Policy Statement opposed all promotional advertising as contrary to the national policy of conserving energy. Since oil dealers are not under the Commission's

said that its action was likely to "result in some dampening of unnecessary growth" in energy consumption. Id., at 37a.

The Commission's order explicitly permitted "informational" advertising designed to encourage "shifts of consumption" from peak demand times to periods of low electricity demand. Ibid. (emphasis in original). Informational advertising would not seek to increase aggregate consumption, het would invite a levelling of demand throughout any given 24-hour period. The agency offered to review "specific proposals by the companies for specifically described ladvertising) programs that meet these criteria." Id., at 38a.

When it rejected requests for rehearing on the Policy Statement, the Commission supplemented its rationale for the advertising ban. The adency observed that additional generation of electricity probably would be more expensive to produce than existing output. Secause electricity rates in New

- — -

additional electricity then would be subsidized by all consumers through generally higher rates. Id., at 57a-58a. The state agency also thought that promotional advertising would give "misleading signals" to the public by appearing to encourage energy consumption at a time when conservation is needed. Id., at 59a.

Appellant challenged the order in state court, arquing that the Commission had restrained commercial speech in violation of the first Amendment. 2/ The Commission's order was upheld by the trial court and at the intermediate appellate level. 3/ The New York Court of Appeals affirmed. It found little value in advectising in "the noncompetitive market in which electric corporations operate." 47 N.Y.2d 94, 110, 390 N.E.2d 749, 757 (1979). Because consumers "have no choice regarding the source of their electric power," the court denied that "promotional

observed that by encouraging consumption, promotional advertising of electric power would only exacerbate the current energy situation. Id, at 110, 390 N.E.2d, at 758. The court concluded that the governmental interest in the prohibition outweighed the limited constitutional value of the commercial speech at issue. We noted jurisdiction, U.S. _____ (1979), and now reverse.

II.

commercial speech, that is, expression related to the economic interests of the speaker and its audience. Central Hudson arques that promotional advertising would aid consumers in choosing among energy sources, and could encourage uses of electricity that are not inconsistent with the Commission's goal of energy conservation.

The First Amendment, as applied to the states through the Fourteenth Amendment, protects

commercial speech from unwarranted governmental regulation. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 D.S. 748, 761-762 (1976). Commercial expression not only serves the economic interest of the speaker, also assists consumers and furthers the societal interest in the fullest possible dissemination of valuable information. In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "[Pleople will perceive their own bost interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them. . . . " Id., at 770; see Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 92 (1977). Even if advertising communicates only an incomplete version of the relevant facts, the First

recognized "the 'commonsense' distinction between speech proposing a commercial transaction, which area traditionally subject Occurs government regulation, and other varieties of speech." Onralik v. Ohio State Bar Ass'n, 436 U.S. 447. 455-456 (1978). 4/ Ballowing Sabat. dectinotion We accorded a lesser protection to commercial speech than to other constitutionally quaranteed expression. <u>Id.</u>, at 456, 457. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests to be served by its regulation.

The first Amendment's concern for commercial speech is based on the informational function of such advertising. See <u>first National</u>

Bank of Boston v. Bellotti, 435 U.S. 765, 783

(1978). Consequently, there can be no constitutional objection to the suppression of

Rogers, 440 U.S. 1, 13, 15-16 (1979); Obrajik v. Ohio State Bar Ass'n, 436 U.S., at 464-465, or commercial speech related to illegal activity, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973). 5/

If the communication is neither misleading nor related to unlawful activity, the government's power is more dircumscribed. The state must assert SubStantial interest to he achieved by. restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. Even if the asserted State interest is substantial, the limitation on First Amendment rights commot survive unless the method of regulation is carefully designed to achieve the State's goal. This concern may be measured by two criteria. First, the restriction must directly advance the state interest involved; it may not be sustained if it provides only ineffective or remote

Under the first criterion, the Court has declined to uphold regulations with only relationship to the state interest indirect In both Bates and Virginia Board of involved. Pharmacy, the Court concluded that an advertising han could not be imposed simply to protect the ethical or performance standards of a profession. The Court noted in Virginia Board of Pharmacy. "[t]he advertising ban does not directly affect professional standards one way or the other." 425 at 76**9.** In Bates, we overturned designed advertising probibition that was "quality" of a lawyer's protect the "Restraints on advertising . . . are an ineffective way of deterring shoddy work." 433 U.S., at 378. 67 .

The second criterion recognizes that the Pirst Amendment mandates that speech restrictions be "narrowly drawn." In re Primus, 436 U.S. 412,

Boston v. Bellotti, <u>supra</u>, 435 U.S., at 794-795, nor can it completely suppress information when narrower restrictions on expression would serve its interest as well. For example, in Baces we explicitly did not "foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required" in promotional materials. 433 C.S., at 384. Virginia State Board of Pharmacy, Supra, 425 U.S., at 773. And in Carey v. Population Services, International, 431 U.S. 678, 701-702 (1977), we held that the State's "arguments do not justify the suppression of advertising concerning. contraceptives." This holding left open the possibility that the State could implement more carefully drawn restrictions. See id., at 712 (POWELL, J., concurring in part and concurring in the judgment); see id., at 716-717 (STEVENS, J.,

circumstances, there is a danger that a ban on speech will partly screen from public view the underlying governmental policy. See <u>Virginia State</u>

Board of Pharmacy, <u>supra</u>, 425 U.S., at 780 n.8 (STEWART, J., concurring). Indeed, in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity.

part analysis has developed. At the outset, we must determine if the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must because whether the asserted governmental interest is substantial.

If both inquiries yield positive answers, we must determine if the regulation directly advances the governmental interest asserted, and if it is no

We now apply this tour-step analysis (or commercial speech to the Commission's arguments in support of its but on promotional advectising.

Α

The Commission does not claim that the issue here either is inaccurate or speech at relates to unlawfu! activity. Yet the New York Appeals questioned whether Central Court of Hudson's advertising is entitled to protection as Because appellant holds a commercial speech. monopoly over the sale of electricity in its service area, the State court suggested that the Commission's order restricts no commercial speech That court exacts that advertising of any worth. The court stated. in such a "moncompetitive market" could not improve

the decisionmaking of consumers. 47 N.Y.24, at

2

This reasoning however falls short of establishing that appellant's advertising is not commercial speech protected by the First Amendment. Monopoly over the supply of a product provides no protection from competition with substitutes for Electric utilities compete with that product. suppliers of fuel oil and natural gas in Several markets, such home heating and those industrial power. This Court noted the existence of interfuel competition forty-five years ago, see West Ohio Gas Co. v. Public Otilities Commin, 294 72 (1935), and 63, each energy Source E G offer peculiar advantages disadvantages that may influence consumer choice. consumers in those competitive markets, advertising by utilities is just as valuable as advertising by unregulated firms. 9/

Even in monopoly markets, the suppression of advectising reduces the information available

for many blanch record filected with an invational desire to pay for wholly ineffective advertising. Host businesses -- even regulated monopolies -- are unlikely to underwrite promotional advertising that is of no interest or use: to consumers. A monopoly enterprise legitimately may wish to alert the public that it has developed new services or terms of doing business. A consumer may need information to aid his decision whether or not to use the monomoly service at all, or how much of the service he Should purchase. In the absence of factors that would distort the utility's decision to advertise, we may assume that the willingness of a business to

promote its products reflects a belief that the advertising is of interest to consumers. Since no such extraogdinary conditions have been identified in this case, appellant's monopoly position does not alter the First Amendment's protection for its commercial speech.

David - 9 engry Him sentence but it not please ma y 9 went on Ry CF

conservation. Any increase in demand electricity -- during peak or off-peak periods -greater consumption ምክው υf епетпу. Commission argues, and the New York court agreed, that the State's interest in conserving energy is sufficient to support suppression of advertising designed to increase consumption of electricity. In view of our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation. therefore, the state interest ĺŚ asserted substantial.

The Commission also argues that promotional advertising will approvate inequities caused by the failure to base the utility's rates on marginal cost. The utilities argued to the Commission that if they could promote the use of electricity in periods of low demand, they would improve their utilization of generating capacity.

true costs of expanding production would not be reflected in the rates charged for the additional power. Instead, the extra costs would be borne by all through bigher overal? consumers Without promotional advertising, the Commission stated, this inequitable term of events would be less likely to occur. The choice among rate structures involves difficult questions of economic supply and distributional fairness, 11/ choice properly confided to the regulatory bodies that oversee utilities. We recognize, of course, the State's clear and substantial interest in tair and effective ratemaking.

C

Next, we focus on the directness of the relationship between the State's interests and the advertising ban. Under this criterion, the Commission's laudable concern over the equity and efficiency of appellant's rates does not provide a

We come finally to the critical inquiry in this case: whether the Esimo Commission's complete suppression of speech normally protected by the First Amendment is a valid means of furthering the interest of the state in energy conservation.

equity of promotional advertising on the appellant's rates is highly speculative. Advertising to increase off-peak usage would have to increase peak usage, while other factors that directly affect the fairness and efficiency of Such appellant's rates remained constant. conditional and remote eventualities simply cannot justify silencing appollant's promotional advertising.

energy conservation is directly advanced by the Commission order at issue here. There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.

Commission's order reaches a!1 promotional advertising, regardless of the impact of the touted service on overall energy use. rationale, as important us justify suppressing information about cannot electrical devices or services that #ould result in a net saving of energy, or even that would cause no not increase in energy use. In addition, Sterre been no showing that a more limited requiretory on the content of prometernal abuntaring technique, such as a requirement what advertusing,

an well-

Appellant insists that but (or the han, it would advertise products and services that are efficient in their use of energy. These include the "heat pump," which both parties acknowledge to be a major improvement in electric heating, and the

conservations.would not serve the State's interest .

need

Statement nor its order denying rehearing made findings on this issue. In the absence of authoritative findings to the contrary, we must credit as within the realm of possibility the claim that electric heat can be an efficient alternative in some circumstances.

The Commission's order prevents petitioner from promoting electric services that either would reduce energy use by diverting demand from less efficient sources, or that would consume roughly amount of energy as do alternative In either situation, the utility's sources. advertising would not endanger conservation or mislead the public. By suppressing some speech that in no way impairs the State's interest in the Commission's energy conservation, violates the First Amendment 5a s must invalidated. See First National Bank of Boston v.

Bellotti, supra. 12/

lfp/ss 5/6/80 Rider-A; p: 20 (Central-Hudson)

We are not unmindful of the national interest in energy conservation. We accept without reservation the argument that conservation, as well as the development of alternate energy sources, is an imperative mational goal. Administrative bodies empowered to regulate electric utilities such as the New York Commission as the authority -- and indeed the -- to take appropriate action to further this goal. When, however, such ction involves the suppression of speech, the First Amendment requires that the astruction -%af be no more extensive than is necessary to serve the state interest. In this case, as we have shown above, the record before us fails to show that the total ban on promotional advertising meets this requirement.

policy of conservation, the Commission could attempt to restrict the format and content of Central Hudson's advortising. It might require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future. Cf. Banzhaf v. FCC, 405 F.2d (CADC 1968), cert. denied, 396 U.S. (1969). In the absence of a [compelling] showing limited speech regulation would be ineffective, we cappot approve the eing of Central Hudson's advertising. ___13/

IV

We reach our judgment today with a full appreciation of the imperative national interest in energy conservation. Regulatory bodies like the New York Commission have the authority, and the duty, to take appropriate action to resolve this



only that speech that is shown to be contrary to conservation; and it must adopt regulatory techniquest that still permit the widest possible dissemination of information.

Accordingly, the judgment of the New York Court of Appeals is

Rovorsed.

REVERSE

No. 79-565, Centra) Hudson Gas & Electric

Corp. v. Public Service Comm'n of State of New York

REVERSE, VERSION II

POOTNOTES

DOS, 5/4/80

1/ "Marginal cost" has been defined as
the "extra or incremental cost of producing an
extra unit of output." P. Samuelson, Beonemics 463
(10th ed. 1976) (emphasis in original).

2/ Central Hudson also alleged that the Commission's order reaches beyond the agency's statutory powers. This argument was rejected by the New York Court of Appeals, 47 N.Y.2d 94, 102-104; 390 N.E.2d 749, 752-754 (1979), and was not argued to this Court...

433 U.S. 350, 381 (1977); Jackson & Jeffries, Commercial Speech: Economic Due Process and the First Amendment, 65 Vo. L. Rev. 1, 38-39 (1979).

In most other contexts, the First

Amendment prohibits speech regulation that is based on the content of the message. Consolidated Edison Co. v. Public Service Comm'n of New York, No. 79-134 (, 1980) slip op., at ___. Two features of commercial speech permit regulation of its content. First, commercial speakers extensive knowledge of both the market and their products. Thus, they are well-situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. Bates v. State Bar of Arizona, 433 U.S., at 381 (1977). In addition, commercial speech, the offspring of economic solfIn there
interest, is a particularly hardy breed of Compatible expression that is not "particularly susceptible to

definite connection between the township's goal of integrated housing and its han on the use of "For Sale" signs in front of houses. 431 U.S., at 95-96.

7/ It is important to distinguish this analysis from the "overbreadth" doctrine. latter theory permits the invalidation of regulations on Pigs: Amendment grounds even when the litigant challenging the regulation has engaged in no constitutionally protected activity. E.q., <u>Kunz v. New York</u>, 340 U.S. 290 (1951). The overbreadth doctrine derives from the recognition that unconstitutional restriction of expression may deter protected speech of parties not before the and thereby escape judicial review. court Broadrick v. Oklahoma, 413 U.S. 601, 612-613 (1973); see Note, The First Amendment Overbreadth Doctrine, 83 Harv. E. Rev. B44, B53-858 (1970).

regulation." Bates v. State Bar of Arizona, 433
U.S., at 381 (1977).

in this case, the Commission's problition acts directly against the promotional activities of Central Hudson. Consequently, overbreadth analysis is not relevant to this decision.

Was not promulgated in response to an emergency situation. Although the advertising ban initially was prompted by critical fuel shortages in 1973, those same conditions did not prevail when the present order was approved. See App. to Juris. St., at B4a. The Commission makes no claim that an emergency now exists. Our decision today does not address the powers that the state would have over utility advertising in emergency circumstances. See State v. Oklahoma Gas & Electric Co., 536 P.2d

887, 895-896 (Ak), 1977).

David I Would it not be better to sucre. Nin Wate to our frank I Heink it would state regulation. E.q., Friedman v. Rogers, 440
U.S. 1, 4-5 (1979) (optometrists); Bates v. Arizona
State Bar, 433 U.S. 350 (1977) (lawyers); Virqinia
State Bd. of Pharmacy v. Virqinia Citizens Consumer
Council, Inc., 425 U.S. 748, 750-752 (1976)
[pharmacists).

10/ There may be a greater incentive for a utility to advertise if it can include promotional expenses in determining its rate of teturn rather than pass those costs on solely to shareholders. Such a policy, however, hardly distorts the economic decision whether to

advertise. Unregulated businesses pass on promotional costs to consumers, and this Court expressly approved the practice for utilities in West Ohio Gas Co. v. Public Utilities Commin, 294

system of previewing advertising campaigns to insure that they will not defeat conservation policy. It has instituted such a program for approving "informational" advertising under the Policy Statement challenged in this case. See p. , supra. We have observed that commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it. Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S., at 771 n.24 (1976). And in other areas of speech regulation, such as obscenity, we have recognized that: a prescreening arrangement can pass constitutional muster so long as it includes adequate procedural safequards. Procedman v. Maryland, 380 U.S. 51 (1965).

13/ In view of our conclusion that the Commission's advertising policy violates the First

.fp/ss 5/6/80 Rider-A; p:-1 (Central Hudson)

This case presents the question whether a regulation of the Public Service Commission of the State of New York is violative of the First Amendment because it completely bans promotional advertising by an electical utility.

CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-565

Central Hudson Gas & Electric Corporation, Appellant.

υ.

Public Service Commission of New York.

On Appeal from the Court of Appeals of New York.

[May +, 1980]

Mr. Justice Powers delivered the opinion of the Court.

This case presents the question whether a regulation of the Public Service Commission of the State of New York violates the First Amendment because it completely bans pronotonal advertising by an electrical utility.

In December 1973, the Commission, appelled here, ordered that electric fallities in New York State cease all advertising that "promot(es) the use of electricity." App. to Juris. St., at 31a. The order was based on the Commission's finding that "the interconnected utility system in New York State does not have sufficient furl stocks or sources of supply to continue furnishing all customer demands for the 1973-1974 winter." Id., at 26a.

Three years later, when the fuel shortage had eased, the Commission requested comments from the public on its proposal to continue the ban on promotional advertising. Control Hudson Gas & Electric Corporation, the appellant in this case, apposed the bar on First Amendment grounds. App. A10. After reviewing the public concreats, the Commission extended the prohibition in a Policy Statement esseed on February 25, 1977.

whiteh?

2 CENTRAL BUDSON GAS & PUBLIC SERVICE COMM'N

The Commission rejected the argument that utilities should advertise to develop consumption during periods when demand for electricity is low. The agency acknowledged that higher consumption in "off-peak" periods would have "beneficial side effects" in permitting more efficient use of generating capacity of existing power plants. App. to Juris, St., at 37a. But the Policy Statement opposed all promotional advertising as contrary to the national policy of conserving energy. Since oil dealers are not under the Commission's jurisdiction and thus temain free to advertise the agency recognized that the ban can arbieve only "preceded conservationism". Still, the Commission said that its action was likely to "result in some dampening of unnecessary growth" in energy consumption. Id., at 37a.

The Commission's order explicitly permitted "informational" advertising designed to encourage "shifts of consumption" from peak demand times to periods of low electricity demand. *Hid.* (emphasis in orginal). Informational advertising would not seek to increase aggregate consemption, but would invite a levelling of demand throughout any given 24-hour period. The agency offered to review "specific proposals by the companies for specifically described (advertising) programs that meet these criteria." *Id.*, at 38a.

When it rejected requests for reheaving on the Policy Statement, the Commission supplemented its rationals for the advertising han. The agency observed that additional generation of electricity probably would be more expensive to produce than existing output. Because electricity rates in New York were not then calculated on the basis of marginal cost, the Commission feared that additional output would be priced below the actual cost of providing that extra power. This additional electricity then would be subsidized by all con-

^{***}Marginal cost** has been defined as the "extra or horomental cost of producing an extra must of outgot." P. Saintel-an, Economics 463 (10th ed. 1976) (emphasis in original).

somers through generally higher rates. Id., at 57a-58a. The state agency also thought that promotional advertising would give "misleading signals" to the public by appearing to encourage energy consumption at a time when conservation is needed. Id., at 59a.

Appellant challenged the order in state court, arguing that the Commission had restrained commercial speech in violation of the First Amendment." The Commission's order was upheld by the trial court and at the intermediate appellate level.? The New York Court of Appeals affirmed. It found little value in advertising in "the noncompetitive market in which electric corporations operate." 47 N. Y. 2d 94, 110. 390 N. E. 2d 749, 757 (1979). Because consumers "have no choice regarding the source of their electric power." the court denied that "promotional advertising of electricity might contribute to society's interest in finformed and reliable' recommic decisionmaking." Ibid. The court also observed that by encomaging consumption, promotional advertising of electric power would only exacerbate the current energy situation. Id., at 110, 390 N. E. 2d. at 758. The court concluded that the governmental interest in the prohibition untweighed the familied constitutional value of the commercial speech at issue, We noted jurisdiction, U. S. — (1979), and now reverse,

Ħ

The Commission's order restricts only commercial speech, that is, expression related to the economic interests of the 3 speaker and its audience. Central Hudson argues that promotional advertising would aid consumers in choosing among energy sources, and could encourage uses of electricity that

that it]_

second speech of commispeech some a tet to top use the proposes a commercial transaction" from Att.

⁵ Critical Hudson also alleged they she Commission's order reaches beyond the agency's statutery powers. This argument was rejected by the New York Court of Appeals, 47 N. Y. 2d 34, 102-204; 300 N. E. 2d 749, 732-754 (1979), and was not argued to this Court.

^{*03} App. Div. 2d 354 (1978) (Applifiate Division of State Suprame Court). App. to Junz St., at 22s (Feb. 17, 1978) (State Supreme Court).

4 CENTRAL HUDSON GAS in PUBLIC SURVICE COMMEN.

are not inconsistent with the Commission's goal of energy conservation,

The First Amendment, as applied to the States through the Fourteenth Amendments protects commercial spreah from unwarranted governmental regulation. Virginia State Board of Pharmacy v. Viriginia Citizens Consumer Council, Inc., 425. U. S. 748, 761-762 (1976). Commercial expression not only. serves the economic interest of the speaker, but also assists consumers and furthers the societal interest to the fullest possible dissemination of information. In applying the First Assendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "IP leople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them, Id at 770: see Linmark Associates, Inc. v. Township of Willingborg, 431 U. S. 85, 92 (1977). Even if advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all. Bates v. State Bar of Arizona, 433 U. S. 350, 374 (1977).

Nevertheless, our decisions have recognized "the footmore-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation and other varieties of speech " Obta-Fib v. Ohio State Bar Asso., 436 U. S. 447, 455-456 (1978). We therefore have accorded a losser protection to commercial speech than to other constitutionally guaranteed expression, Id., at 456, 457. The protection available for particular commercial expression turns on the nature bests of the expression and of the governmental interests to be served by its regulation.

¹ See Bobs v. State Bur of Arizona, 433 H. S. 350, 381 (1977). Levelop (A. 1865 novembrio de Sprech et Francisco Day, Provess and The First Amendment, 65 Va. L. Roy, 1, 38, 39 (1979).

The First Amendment's concern for enumercial speech is based on the informational function of such advertising. See First National Bank of Reston v. Bellotti, 435 U. S. 765, 783 (1978). Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may bun forms of communication more likely to deceive the public than to inform it; Friedman v. Rogers, 440 U. S. 1, 13, 15-16 (1979); Ohralk v. Ohio State Bar Assa., 436 U. S. at 464-405 for commercial speech related to illegal activity. Pittsburgh Press Co. v. Pittsburgh Comm'n on Humad Relations, 413 U. S. 376, 388 (1973).

If the communication is neither misleading nor related to unlawful activity, the government's power, is more circumscribed. The State most assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. Even if the asserted state interest is substantial, the limitation on Fast Amendment rights cannot survive unless the method of regulation is carefully designed to achieve the State's goal. This concern may be measured by two criteria, First, the restriction must directly advance the state interest involved: it may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, the State may not adopt a particular regulation if its asserted

Tun hange ferhaps a separate sentence:

? Goer say this? never than legit mate? British a cute?

Fin most other contexts, the First Ameridanest prelibits speech regularities that is haven on the content of the massage. Considered Education that is haven on the content of the massage. Considered Education, v. Public Service Commiss of New York, No. 70-134 (——, 1986) step op., at ——. Two features of commercial speech permit regulation of its content. First, incommercial speakets have extensive knowledge of both the market and their products. Thus, they are wild-inducted to evaluate the accuracy of their messages and the landounces of the underlying activity. Before v. State Bar of Angeora 433 G.S. at 381 (1977). In addition, connected speech, the observing of grounding sufferences, is a particularly hardy broad at expression that is not "particularly susceptible to being crushed by overhaund regulation." This.

79-365-OPINION

6 CENTRAL HUDSON GAS & PUBLIC SERVICE COMBINA

interest could be served as well by a more limited restriction on commercial speech.

Under the first criterion, the Court has declined to uphold regulations with only an indirect relationship to the state interest involved. In both Botes and Unglisia Board of Pharmacy, the Court concluded that an advertising ban could not be imposed simply to protect the cinical or performance standards of a profession. The Court meted in Vaginia Board of Pharmacy, "I't the advertising ban does not directly effect professional standards one way or the other." 425 U.S., at 769. In Bates, we overturned an advertising probabilities that was designed to protect the "quality" of a lawyer's work, "Restraints on advertising ... are an ineffective way of determint shockly work." 433 U.S., at 378,"

• The second criterion recognizes that the First Amendment mandates that speech re-defictions be "percoade drawn." In the Primar, 436 U.S. 412, 438 (1978). The regulatory technique may extend only as far as the interest to be served.

"In Lieuwith Association to Township of Williamberry, was no observed that there was an eleft in a new time between the town-high made of integrated bearing and its has an ille use of "For Sale" sizes in front of bottom 431 U.S. of 95-95.

before 431 U.S. 2195-09

This important to disruptive Proceedings the forest by the forest part of decreased. The later threat process the invalidation of regular cases a First Americans grounds even when the highest of denging the resultant less coraged in the encountries by protected settings. H. q., Known K. K. Y. C. 200 (1951). The averbreadth decrease derives from the magnificant flat in experimental metallication of expression may deter protected speech of pattern at the first and therefore course judgical ground. Resolved to the forest tenters, 413 U.S. 601 (1943) course indicated process from the First Americans Complete of the English of the St. 1983 Sec. (1970). The indicates of this resolved in the special community where the expression is larked to community the first in the first is not Ske't to be determed by from This regulation."

But a v. State Res. of Adigment 400 St. S. pt. 231 (1977).

In this case, the Compission's probabilism is to directly access the promotental participes of Control Madeon. Consequently, overlay, figurearly is is not relevant to this director.

CENTRAL HUDSON GAS v. PUBLIC SERVICE COMM'N

The State cannot regulate speech unrelated to the asserted in 15 thin and state interestance First National Bank of Boston C. Bellotti, super, $435~\mathrm{U, S_{\odot}}$ at $794\text{--}795_3$ por can it completely suppress information where narrower restrictions on expression would serve its interest as well. For example, in Bates we explicitly did not "forrelose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required" in promotional materials. 433 U.S., at 384. Ser Virginia State Board of Phormacy, supra, 425 U.S., at And in Caren v. Population Services, International, 431. U. S. 678, 701-702 (1977), we held that the State's "arguments do not justify the total suppression of advertising concerning contraceptives." This holding left open the possibility that the State could incolonent more carefully drawn restrictions. See id., at 712 (Powers, J., concurring in part and concurring in the judgment); see (d., at 716-717 (Stevens, $\mathbf{J}_{i,j}$ concurring).³

In commercial speech cases, then, a four part analysis has developed. At the outset, we must determine if the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful artivity and not be misleading. Next, we ask whother the asserted governmental interest is substantial. (Il both whether inquiries yield positive answers, we must determine another regulation directly galvances the governmental interest asserted, and thit is no more extensive than is necessary to serve

that interest.

• We review with special care those regulations that entirely suppress. compared a speech in order to partyne a policy unrelated to the goalges of the gaggegage really. In these circumstances, there is a danger that a lane of specifically partly screen from public view the null rhying governmental policy. See Virginia State Board of Pharmacy, supra, 425 U.S., at 720, p. S (Strower, J., toneurring). Indost, in recent years this Court has not approved a blanket him on commencial speech unders the expression (1909) way flowed as some away, either because it was deceptive or related to unlawful activity.

· dure chal which has no clean meaning . has bed to problems in often context

Whether

79-55/4---OPTNION

8 CENTRAL HUDSON GAS # PUBLIC SERVICE COMMIN

111

We now apply this four-step analysis for commercial speech to the Commission's arguments in support of its ban on promotional advertising.

A

The Correlission does not claim that the speech at issue here either is inaccurate or relates to unlawful artivity. Yet the New York Court of Appeals questioned whether Central Hadson's advertising is entitled to protection as commercial speech. Because appellant holds a monopoly over the sale of electricity in its service area, the state court suggested that the Commission's order restricts to commercial speech of any worth. The court stated that advertising in such a "concompetitive market" could not improve the decisionnaking of consumers. 47 N. Y. 2d. at 110: 390 N. E. 2d. at 757. Consequently the court saw no constitutional problem with harring commercial speech (that it viewed as conveying little useful information.)

This reasoning fells short of establishing that appellant's advertising is not commercial speech protected by the First Amendment. Monopoly over the supply of a product provides no protection from competition with substitutes for that product. Electric atilities compete with suppliers of fuel-oil_and-natural-gas-in_sweral markets, such as those for home heating and industrial power! This Court noted the existence of interfac! competition 45 years ago are West Obio Gas Co. v. Public Utilities Commin. 294 II, S. 63, 72 (1935), and each energy source centimes to offer peculiar advantages and disadvantages that may influence consumer choice. For consumers in those competitive markets advertising by utilities is just as valuable as advertising by unregulated firms.

BAN Shah

^{————} P Several remanerals), specific decisjons have involved enterprises subject to extensive state argulation. E. g., Friedman v. Rogers, 440 & S. 1, 4-5 (1973). (opposessists); Bates v. Adjona State Bur, 433 U.S. 330 (1977).

Even in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and inhibits-the realization of the poals of the First Amendment. The New York court's argument appears to assume that the providers of a monopoly service or product may be willing to may for wholly tenffective advertising. Most businesses even regulated monopolies-are limitely to underwrite promotional advertising that is of no interest or use to consumers. A monopoly enterprise legitimately may wish to inform the public that it has developed new services or terms of doing business. A consumer may need information to aid his decission whether or not to use the monopoly service at all or how much of the service he should purchase. In the absence of factors that would distort the attlity's decision to advertise. we may assume that the willingness of a business to promote its products reflects a belief that the advertising is of interest to consumers.** Since no such extraordmany conditions have been identified in this case, appellant's monopoly position does not after the First Amendment's protection for its commercial speech.

В

The Commission offers two state interests as justifications for the ban on momentional advertising. The first concerns energy conservation. Any increase in demand for electricity—during peak or off-peak periods—means greater consumption of energy. The Commission argues, and the New York court

(Lawyers); Virginia State Rd. of Pharming v. Virginia Citizens Commer Council Inc., 425-17-8, 748-750-752 (1976) Irbitationics. FIST & Conseder

-alle.

The year mean of the son we want of investment of the son of the s

If There may be a greater incentive for a tribut to advertise if it can include promotional expenses in determining its rate of return rather than pass those certs on solely to disrebelders. Such a polecy however, leavily distorts the common dension whether to advertise. Unregulated businesses pass on promotorial etc. to consumers, and this Court expressly aggreesed the practice for at ities in West Ohio Gaz Co. v. Public Multitles Controls, 294 U. S. 63, 72 (1935).

79-563-OPINION

ICENTRAL HUDSON GAS r. PUBLIC SERVICE COMMON

agreed, that the State's interest in conserving energy is sufficient to support suppression of advertising designed to increase consumption of electricity. In view of our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation. Plainly, therefore, the state interest asserted is substantial.

The Commission also argues that promotional advertising will aggravate inequities caused by the failure to base the utility's rates on marginal cost. The utilities argued to the Commission that if they could promote the use of electricity in periods of low demand, they would improve their utilization of generating capacity. The Commission responded that primotion of off-peak consumption also would increase consumption during peak periods. If peak demand were to rise, the absence of marginal cost rates would becan that the true costs of expanding production would not be reflected in the rates charged for the additional power. Instead, the extra costs would be borne by all consumers through higher overall rates. Without promotional advertising, the Commission stated, this inequitable turn of events would be less likely to occur. The choice among rate street res involves difficult. questions of economic supply and distributional fairness," a choice properly confided to the regulatory bodies that oversee utilities. We recognize of convert the State's clear and substantial interest in fair and effective ratemaking.

(See p.7)

Next, we focus on the directness-of-the relationship between the State's interests and the advertising ban. Under this criterion, the Commission's landable concern over the conity and efficiency of appullment rates does not provide a constitutionally intequate reason for restricting speech protected by the First Amandment. The tink between the advertising prohibition and appellant's rate structure is at most.

C

M See W. Jones, Regulated Industries 191-287 (2d ed. 2076).

79-505--- OPINION

CENTRAL HUDSON GAS b. PUBLIC SERVICE COMMIN 11

tenuous/ (The impact of promotional advertising on the equity of appellant's rates is highly speculative. Advertising to increase off-peak usage would have to increase peak usage, while other factors that directly offect the fairness and officiency of appellant's rates remained constant. Such conditional and remote eventualities simply cannot justify silencing appellant's promotional advertising.

In contrast, the State's interest in energy conservation is directly advanced by the Commission order at issue here. There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order:

D

We come finally to the critical inquiry in this case: whether the Commission's complete suppression of speech ordinarily protected by the First Amendment is a valid mount of furtherman, the interest of the State in energy conservation. The Commission's corder reaches—all—promotional advertising, regardless of the impact of the touted service on overall energy use. But the energy conservation rationale, as important as it is, cannot justify suppressing information about electrical devices or services that could result in a retraining of energy or even that would cause no net increase in energy—tise. In addition, no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests.

Appellant insists that but for the ban, it would advertise products and services that are efficient in their use of energy. These include the "heat pomp," which both parties acknowledge to be a major improvement in electric heating, and the use of electric heat as a "back-up" to solar and other heat sources. Although the Commission has questioned the efficiency of electric heating before this Court, neither the Com-

The season of the come of the

Perhaps I have moundoust

to a safe of the same of the s

12 CENTRAL HUDSON GAS & PUBLIC SERVICE COMM'N

mission's Policy Statement nor its order denying rehearing made findings on this issue. In the absence of authoritative findings to the contrary, we must credet as within the realm of possibility the claim that electric locat can be an efficient alternative in some circumstances.

The Commission's order prevents petitioner from promoting electric services that either would reduce energy use by diverting demand from less efficient sources or that would consume roughly the same amount for energy as do afternative sources. In father situation, the utility's advertising would not endanger conservation or mislead the public. By suppressing some speech that in no way impairs the State's interest in energy conservation, the Commission's order violates the First Amendment, and must be involved. See First National Bank of Boston v. Belloth, supre 15

The Conneission also has polydeneoustrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression. To further its policy of conservation, the Commission could attempt to restrict the format and content of Central Hudson's advertising. It might for example, require that the advertise-ments include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future. Cf. Banzhaf v. FCC. — U. S. App. D. C. — 405 F-2d-1082-61968)—rert-dened-396-U; ST 842 (1969). In the absence of a showing that more limited

7

¹⁵ The Commission also might consider a system of provious advertising exceptions to insure that they will not detect conservation pelber. It has instituted such a program for approxing "informational" advertising under the Palmy Statement challenged in this case. See p. —. supra. We have observed that commend deproch is such a strong by set of expression that traditional prior restraint decrease they not apply to it. Veryion Board of Phoenically Veryion Colleges Container Council for 425 U.S., at 771, at 24 (1976). And in other array of speech regulation, such as observity, we have renegatized that a presence also presented and pairs constitutional number has long with includes adequate procedural sufficients. Freedman v. Marylond, 380 U.S. 51 (1965).

CENTRAL HUDSON GAS 5. PUBLIC SERVICE COMMON 13

speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising."

W

We are not unmindful of the national interest in energy conservation. We accept without reservation the argument that conservation as well as the development of alterente energy sources is an imperative national goal. Administrative bodies empowered to orgalate electric arbities have the authority—and indeed the dety—to take appropriate action to further this goal. When, however, such action involves the suppression of speech, the Pirst Amendment requires that the restriction be no more extensive than is accessary to serve the state interest. In this case, the record before us fails to show that the total ban on promotional advertising meets this requirement."

Accordingly, the judgment of the New York Court of Appeals is

Reversed.

¹³ In view of our condition that the Countries such advertising policy violates the First Assemble int. We do not be the policies claims that the appropria order also violated just a protestion which the Fourteenth Assemble at the Contries in the Contries of Assemble at the Contries of the Contries

¹⁰ The Commission order at them here was not promognized in response to an emergency situation. All eagle the advertising han antially was prompted by entired fact shortages in 1973, there early conditions slid not provid when the process order was approved. See App. to Jeric, St. at 84a. The Commission makes no claim that an energetary now exists Our decision test y does not address the powers that the 8t to would have over utility advertising in emergency pronouncianous. See State v. Oklahama (ins. & Electric Co., 536-9, 24-887, 895-896 (Okla, 1977).

CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-565

Central Hudson Gas & Electric Corporation, Appellant,

ν.

Public Service Commission of New York.

On Appeal from the Court of Appeals of New York,

[May —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a regulation of the Public Service Commission of the State of New York violates the First Amendment because it completely bans promotional advertising by an electrical atility.

I

Jo December 1973, the Commission, appelled here, ordered that electric utilities in New York State/cease all advertising that "promot[es] the use of electricity." App. to Juris, St., at 31s. The order was based on the Commission's finding that "the interconnected utility system in New York State does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973-1974 winter." Id., at 26s.

Three years later, when the fuel shortage had eased, the Commission requested comments from the public on its proposal to continue the ban on promotional advertising. Central Hudson Gas & Electric Corporation, the appellant in this case, opposed the ban on First Amendment grounds. App. A10. After reviewing the public comments, the Commission extended the probabilism in a Policy Statement issued on February 25, 1977.

79-565--- OPENTON

CENTRAL HUDSON GAS v. PUBLIC SERVICE COMMIN

The Commission rejected the argument that utilities should advertise to develop consumption during periods when demand for electricity is low. The agency acknowledged that higher consumption in "off-peak" periods would have "beneficial side effects" in permitting more efficient use of generating equality. of evisting power plants. App. to Juris, St., at 37a. But the Policy Statement opposed all promotional advertising as contrary to the national policy of conserving energy. Since oil dealers are not under the Commission's jurisdiction and thus remain free to advertise, the agency recognized that the ban can achieve only "pieremeal conservationism," Still, the Commission said that its action was likely to "result in some dampening of unnecessary growth" in energy consumption. Id., at 37a.

The Commission's order explicitly permitted "informational" advertising designed to encourage "shifts of consumption" from peak demand times to periods of low electricity demand. Ibid. (emphasis in organol). Informational advertision would not seek to increase aggregate consumption, but would invite a leveling of demand throughout any given 24born period. The agency offered to review "specific proposals by the companies for specifically described [advertising] programs that meet these criteria." Id., at 38a.

When it rejected requests for relicating on the Policy Statement, the Commission supplemented its rationale for the advertising ban. The agency observed that additional serme. tion of electricity probably would be more expensive to produre than existing output. Because electricity rates in New York were not then calculated on the hadron marginal cost." the Commission feared that additional, military would be priced below the actual root of providing that extra moves. This additional electricity there would be subsidized by all con-

"Marginal cast" has been defined as the "extra or instance tollogist of producing an extention of output," P. Santaelson, Economics 463 (10th cd, 1976) (corpliant in original).

power

based in

general from

Beclared

sumers through generally higher rates, Id., at 57a-58a. The state agency also thought that promotional advertising would give "taisleading signals" to the public by appearing to empurage energy consumption at a time when conscruation is beedist. Id., at 59a.

Appellant challenged the order in state court, arguing that the Commission had restrained commercial speech in violation of the First Amendment. The Commission's order was upbeld by the trial court and at the intermediate appellate tevel? The New York Court of Appeals affirmed. It found fittle value a advertising in "the noncompetitive market in which electric corporations operate." 47 N. Y. 2d 94, 110, 390 N. E. 2d 749, 757 (1979). Bearing consumers "have no choice regarding the source of their electric power." the court dersed that "promotional advertising of electricity might contribute to society's interest in Culorand and reliable' economic. decisionmaking," Ibid. The court also observed that by encouraging consumption, promotional advertising of about its person would only exacerbate the current energy situation. 1d., at 110, 390 N. E. 2d. at 758. The court concluded that the governmental interest in the prohibition outweighted the limited constitutional value of the commercial speech at issue We noted/jurisdiction JU. S. — - (1979), and now reverse.

The Commission's order restricts only commercial speech, that is expression related) to the economic interests of the speaker and its audience, /CentraleHudson-argressthathpro-ு motional advertising sworld-aid recognitions in choosing arming energy-sources-end/could-ethourage usrs-of-electricity_that

*Central Hod-on also alleged that the Commission's order reaches has youd the against's statutory powers. This argument was rejected by the New York Court of Appends, 47 N. Y. 2d 94, 102-104; 300 N. D. 26 749,

752 754 (1979), and was not argued to the Court.

3 63 App. Die 2d 364 (1968) JAppellide Division of State Supremo Court \$; App. to June St., at 22a (Feb. 17, 1978) (Station Supplement).

N.Y. Sup. CT.

CENTRAL HUDSON CAS * PUBLIC SERVICE COMMIN

are-not-inconsistent with the Commission's -goal of Emergy_____ ≟chnservatjon;-

The First Amendment, as applied to the States through the 🍇 Foreteenth Amendment, protects commercial speech from unwarranted governmental regulation. Pirginia State Board of Phormacy v. Viriginia Citizens Consumer Conneil, Inc., 425 U. S. 748, 761-762 (1976). Commercial expression sor only. serves the economic briefest of the speaker but also assists consumers and furthers the societal interest an the fullest possible disservination of information. In applying the First Amendment to this area, we have rejected the "highly patermalistic" view that government has complete hower to suppress or regulate commercial speech. "IP leople will perceive their own best interests if only they are well enough informed. and ... the best account to that end is to open the channels of communication, rather than to close them. . . $C \cdot Id$., at 770; suc Linmark Associates: Inc. v. Toyonship of Williamboro. 431 U. S. 85, 92 (1977). Ever 4 advertising communicates. only an incomplete version of the relevant facts, the First Appendicated presumes that some accurate information is better than no information et all. Bates v. State Bar of Arizona, 433 U. S. 350, 374 (1977).

Nevertheless, our decisions have repenized "the featimensetem? distinction between speech proposing a commercial transaction, which occurs to an area traditionally subject to covernment regulation, and other varieties of sucech." Ohra-15k v. Obio State Bar Assn., 436 U. S. 447, 455-456 (1978). We therefore turns accorded a lesser protection to commercial speech than to other constitutionally guaranteed expression. $^{\prime}$ Id , at 456, 457 . The protection available for particular comaterial expression turns on the nature both of the expression and of the governmental interests 🕳 🗫 served by its regulation.

See Butra v. State Box of Arizona, 423 D. S. 350, 381 (1977); Juckson & JoSnes, Commercial Specific Feorencie Due Prodes and the First Atacadasent, C5 Va. L., Rev. 1, 38-39 (1979).

The First Amendment's concern for commercial speech is 👝 based on the informational function of an inflavorations. See First National Bank of Boston v. Bellotti, 435 U. S. 765, 783 (1978). Consequently, there can be no constitutional objection to the suppression of commercial messages that do not acceptately inform the public about lawful activity. The goverament may ban forms of communication more likely to deceive the public than to inform it, Friedman v. Rogers, 440 U. S. 1, 13, 15-16 (1979); Chralift v. Ohio State Bar Assa., 436 U. S., at 464-465 or commercial speech related to illegal activity, Pittsburgh Press Co. v. Putsburgh Comm'n on Hyaan Relations, 413 U.S. 376 388 (1973).

If the concernication is neither mishading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technoque must be in proportion to that interest.

Deca Machine accorded at takes in according a substitution for lamitation on First Americances sinks cannot survive unless the method of regulation is @orefolis; designed to achieve the State's goal. It was a many be measured by two criteria. Come liance with First, the restriction most directly advance the state interest involved: to may not be sustained if it provides only ineffective or remote support for the government's purpose. Second. the State may not adopt a particular regulation if its assignation

Erptis 1 . One

Πs

the governmenta

This my warmen't

*In most other contexts, the Pirst Amershapat probabits each regulation that is based up the content of the message. Considerated Educa-Co. v. Public Service Conords of New York, No. 79-131 (++, 1980) Sep. हार्क की . The features of commercial speech permat regulation of its content. Pirst, gamma read speaking have extensive knowledge of both the market and their producty. Thus, they are well situated to evaluate the accuracy of their messages and the lawfullers of the underlying activity | Babes v | Stat. Bar of Adzana, 483 W. S., in 350 (1977). | Insublition, connecteful speech, the offspring of rentional, self-interest, is a particularly family brend of expression that is not "paytoniarly vacceptable to being emistral by overbroad regulation." Ibid.

79-565-OPIN!ON

6 CENTRAL HUDŠON GAŠ + PUDLIC ŠERVICE COMMIN

interest could be served as well by a more limited restriction on commercial speech.

that

Under the first criterion, the Coart has declined to uphald regulations with only as indirect retaring him to the state interest involved. In both Bates and Virginia Board of Pharmach, the Court concluded that an advertising ban could not be imposed a profession. The Court noted in Virginia Board of Pharmach "I the advertising ban does not directly affect professional standards one way or the other." 425 U.S., at 769. In Bates, we overtureed an advertising prohibition that was designed to protect the "quality" of a lawyer's work. "Restraints on advertising ... are an ineffective way of deterries shaddy work." 433 U.S., at 378.

The second exiterion recognizes that the First Amendment mandates that speech restrictions be "narrowly drawn." In the Frimus, 436 U.S. 412, 438 (1978). The regulatory technique may extend only as far as the interest in a served.

strant further

*In Lemmark Associates v. Towardin of Williaghoro, some we absorved that there was no definite correction between the townships goal of integrated beginning and its ban on the use of "For Sale" signs in fourt of Should be being, 431 U.S. at 95-95.

24 is important to distinguish his analysis from the "evertee the dectrice. The latter theory permits the invalidation of explaines on First
Amendment grounds even when the lit gant challenging the regulation
last normed in no constitutionally protected activity. E. e. Kung v.
New York, 240 U.S. 200 (2001). The combination destribe degives from
the retreation that unconstitutional restriction of expression may deter
protected speech of parties not before the court and thereby escape individterions. Becoming v. Olishema, 413-15-8, 601, 612-613 (2073); see

1. Nate. The First Amendment Overloss of the particle, 83 Hare 3. They 844,
853-858 (1970). The liabilities of this restraint is less in the first particle of the expression is laked to generate it well-being and therefore is not in land to be distorted by lovering disregulation."

Bates v. State Bur a) Arizona, 433 U.S. at 382 (1977)

وصع: ام

In this case, the Commission's probabilities and directly against the promotional activities of Court Hudson. Consequently, everlapsed analysis is not relevant.

_[=

distinguished

(itely)

(evel)

Ьη

79-565--- OPINIÓN

CENTRAL HUDSON GAS b. PUBLIC SERVICE COMMIN

that posses , No dangery to

The State cannot regulate speech unrelativity the a state interest, see First National Bank of Boston v. Belletti, supra, 435 U. S., at 794-795, nor can it completely suppress. information when narrower restrictions on expression would serve its interest as well. For example, in Bates we explicitly did not "forcelose the possibility that some limited supplementation, by way of warning or disclaimer or the like, neight be required? in promotional materials. 433 U.S. at 384. See Virginia State Board of Pharmorn, supra, 425 W.S., at 773. And in Carry v. Population Services, International, 431. U. S. 678, 701-702 (1977), we hold that the State's flarguments do not justify the total suppression of advertising concorning contracentives." This holding left open the possibility that the State could implement more carefully drawn restrictions. See id., at 712 (Powern, J., concurring in part and recentring in the judgment): ****** id., at 716–717 (Stevens.) ${
m J...}$ concurring ${
m h}^{
m p}$

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine the regulation directly advances the governmental interest asserted, and it is no more extensive than is necessary to serve that interest.

Wester

whether

whether

We review with perial case the regulations that entirely suppress garanteered speech in order to pursue a policy unrelated to the quality of the expression as if In those coronications, the underlying governmental policy. See Virginia State Board of Pharmony, supra, 425–15. S., at 780, in S. (Sulworz, J., concurring). Indeed, in record years this Court has not approved a black, than on returneed speech others the expression itself was flawed in some way, either because it was deceptive or related to unlawful networy.

Could

79-505--OPINION

8 CENTRAL HUDSON GAS & PUBLIC SERVICE COMM'N

111

We now apply this four-step analysis for commercial speech to the Commission's arguments in support of its ban on promotional advertising.

Α

Cypnession

The Commission does not claim that the second at issue here either is inaccurate or relates to unlawful activity. Yet the New York Court of Appeals questioned whether Central Hudson's advertising is entitled to protection a connectial speech. Because appellant holds a monopoly over the sale of electricity in its service area, the state court suggested that the Commission's order restricts no connectial speech of any worth. The court stated that advertising in a "noncompetitive market" could not improve the decision-making of consumers. 47 N. Y. 2d. at 110: 390 N. E. 2d. at 757 Constitution of the court saw no constitutional problem with barring commercial speech that it viewed as conveying little useful information.

This reasoning falls short of establishing that appellant's advertising is not commercial speech protected by the First Amendment. Monopoly over the supply of a product provides no protection from competition with substitutes for that product. Electric utilities compete with suppliers of fuel oil and natural gas in several markets, such as those for home heating and industrial power. This Court noted the existence of interfed competition 45 years ago, see West Ohio Gas Co. v. Public Utilities Comm'n, 294 U. S. 63, 72 (1935).

Explicate energy source continues to offer penaltic advantages and disadvantages that may influence consumer choice. For consumers in those competitive markets, advertising by utilities is just as valuable as advertising by unregulated firms.

^{*}Several commercial speech decisions I are involved enterprises subject to extensive state regulation. Et y. Felicibera v. Rom vs. 440 U.S. 1, 4-5 (1979) (optemptrists); Bates v. Antona State Box, 433 U.S. 350 (1977)

794565--- OPTNSON

CENTRAL HUDSON GAS in PUBLIC SERVICE COMMIN

⊈ee-ia-in-t-sa-valuable-as-adaectising-by=ifffe@elated_fires:* Even in manopuly markets, the suppression of advertising reduces the information available for consumer decisions and in Killies - the required two of the goeth of the Piret Amendiana (2) The New York court's argument appears to assume that the providers of a monopoly service or product willing to pay for wholly ineffective advertising. Most businesses even regulated monopolies some to underwrite proanotional advertising that is of no interest or use to consumers. A monopoly enterprise legitimately may wish to inform the public that it has developed new services or terms of doing business. A consumer may need information to aid his decision whether or not to use the monopoly service at all, or how much of the service be should purchase. In the absence of factors that would distort the control decision to advertise. we may assume that the willingness of a business to promote its products reflects a belief that the advertising is of interest.

interested in

В

cial speech.

torconsumers. 19 Since no such extraordinary conditions have been identified in this case, appellant's recompoly position dues not after the First Amendment's protection for its commer-

The Commission offers two state interests as justifications for the ban on promotional advertising. The first concerns energy conservation. Any increase in demand for electricity—during peak or off-peak periods—means greater consumption of energy. The Commission argues, and the New York court

(Lawyets); Verglein State Rd, of Pharmacy v. Virginia Citizen Communicational, Inc. 425 N. S. 748, 750-750 (1976) (pharmacets)

Without may be a greater incentive for a Calify to expertise if it can be premoted aspects in determining its rate of retera father than pass three mats on table to shareholders. According heavy that the description whether to advective. Universited businesses pass on percentised costs to economics and the Court expressly approved the practice for utilities in West Olio Gas Co. V. Public Utilities Compile, 294 U. S. 63, 72 (1935).

That greating

79-565-OPINION

10 CENTRAL HUDSON GAS v PUBLIC SERVICE COMMON

agreed, that the State's interest in conserving energy is sufficient to support suppression of advertising designed to increase consumption of electricity. In view of our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation. Plainly, therefore, the state interest asserted is substantial.

The Commission also argues that promotional advertising will aggravate inequities caused by the failure to have the trillity's rates on marginal cost. The atilities argued to the Commission that if they could promote the use of electricity in periods of low deteand, they would improve their utilization of generating espacity. The Commission responded that promotion of off-peak consumption also would increase consumption during peak periods. If peak demand were to rise, the absence of marginal cost rates would mean that the Total -costs of engranding-production and an entitle subsector in the rates charged for the additional power. Instead, the extracosts would be burne by all consumers through higher overall. Without promotional advertising, the Commission stated, this inequitable turn of events would be less likely to occur. The choice among rate structures involves difficult questions of economic supply and distributional fairness. • charge properly confided so the regulatery body show about averse. tilities. We are opinion of course the State's clear pod antitantial interest in fair and offerlies entenaking.

on the case,

Next, we focus on the distance of relationship between the State's interests and the advertising ban. Under this criterion, the Commission's landable concern over the equity and efficiency of appellant's rates does not provide a constitutionally adequate reason for restricting speech protected and the first amount. The link between the adver-

tising prohibition and appellant's rate structure is, at most,

would not replect the true costs of expanding production

and important

Concern that willed

responsable a clear

<u>state</u> interest

¹⁰ See W. Jones, Regulated Judistries 191-287 (2d ed. 1976).

79-565---OPINION

CENTRAL HUDSON GAS # PUBLIC SERVICE COMM'N 11

tenuous. The impact of promotional advertising on the equity of appellant's rates is highly speculative. Advertising to increase off-peak usage would have to increase peak usage, while other factors that directly affect the fairness and efficiency of appellant's rates remained constant. Such conditional and remote eventualities simply cannot justify silencing appellant's promotional advertising.

In contrast, the State's interest in energy conservation is directly advanced by the Commission order at issue here. There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.

D

We come finally to the critical inquiry in this case: whether the Commission's complete suppression of speech ordinarily protected by the First Amendment is a reliable to the furthermy the interest of the State in energy conservation. The Commission's order reaches all protectional advertising, regardless of the impact of the touted service on overall energy use. But the energy conservation rationale, as important as it is, cannot justify suppressing information about electrical devices or services that could be be a suppressed information about

use. In addition, so showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests.

Appellant insists that but for the ban, it would advertise products and services that a efficient their use of energy. These include the "heat pump," which both parties acknowledge to be a major improvement in electric heating, and the use of electric heat as a "back-up" to solar and other heat sources. Although the Commission has questioned the efficiency of electric heating before this Court, neither the Com-

extensive than necessary to

omel

efficiently

79-565-OPINION

12 CENTRAL HUDSON GAS v. PUBLIC SERVICE COMMIN

mission's Policy Statement nor its order denying relicaring made findings on this issue. In the absence of authoritative findings to the contrary, we must reedily as within the realizated possibility the claim that electric heat can be an efficient alternative in some circumstances.

The Commission's order prevents petitioner from proceeding electric services that will a would reduce energy use by diverting demand from less efficient sources, or that would consume roughly the same amount of energy as do alternative sources. In either situation, the utility's advertising would a bendangles conservation or mistead the public. By suppressing some speech that in no way impairs the State's interest in energy conservation, the Commission's order violates the First Amendment and most be invalidated. See First National Bank of Hoston v. Belletti, supress

The Commission also has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression. To further its policy of conservation, the Commission could attempt to restrict the format and content of Central Hudson's advertising. It might, for example, require that the advertisements include information about the relative efficiency and expense of the effected service both under current conditions and for the foreseeable future. Cf. Benzhaf v. FCC. — U.S. App. D. C. —, 405 F. 2d 1982 (1968), cert, dened, 396 U.S. 842 (1969). In the absence of a showing that more limited

State

T.

[&]quot;The Countission also tright consider a system of predexing advertising comparing to insure that they will not defeat conservation policy. It has instituted such a program for instroding "informational" advertising under the Policy Statement de bened in this cook. See it. A super We have adopted that connected speech is such a standy broad of expension that traditional prior restrict dustries now are apply to it. Vitalian flowed of Phase only Virginia Citizen Consumer Council, Inc. 425 U.S. at 774, it. 24 (1976). And in other areas of speech regulation, such as charactery we have remained that a impersuper arrangement can pass constitution of potency a large of the characteristic per characteristic of a characteristic per characteristic per constitution.

79-565-OPINION

CENTRAL HUDSON GAS c. PUBLIC SERVICE COMM'N

speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising.18

17

We be not retaindful of the national interest in energy conservation. We accept without reservation the argument that conservation, as well as the development of alternate energy sources, is an imperative national goal. Administrative before emphasized to regulate details while have the authority—and indeed the duty—to take appropriate action to restriction of speech. The First Amendment requires that the restriction be no more extensive than is necessary to serve the state interest. In this case, the record before us fails to show that the total ban on promotional advertising meets this requirement.

Accordingly, the judgment of the New York Court of Appeals is

Reversed.

"In view of our conclusion that the Commission's advertising policy violates the East Amerifment, we do not reach petitioner's claims that the agency's order also violated especial protections in the Frantiscoth Americana, and that it is both everbrood and vigue.

19 The Commission order at issue here was not premulated in response to an emergency situation. Although the advertising han initially was practical by critical fuel shortages in 1973. 1975, while conditions below the proceed anti-review approved. The Appelloduse 19 to the Commission makes on claim that are emergency now exists. On the other bases of the powers that the State whose over nother advertising in configurate incommunitaries. See State v. Dilahoud Gra & Electric Co., 336 P. 2d 887, 895 896 (Okla. 1977).

the do not consider

One decision today in now wony despured

All levels .

Sul when

0.4.9

CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-565

Central Hudson Gas & Electrica Corporation, Appellant,

Public Service Commission of New York.

On Appeal from the Court of Appeals of New York,

[May —, 1980]

Mr. Justice Powers delivered the opinion of the Court.

This case presents the question of ether a regulation of the Public Service Commission of the State of New York violates the First Amendment because it completely bank promotional advertising by an electrical utility.

In December 1973, the Commission appelled here, ordered Chat chestric utilities in New York State Jonase all advertising (bat /prount[es] the use of electricay. App. to June, St., at 31a. The order was based on the Commission's feeding that "the interconnected utility system in New York State does not have sufficient fuel stocks or sources of supply to continue. furnishing off customer demands for the 1973-1974 whater." M₁ at 26a.

Three years later, when the fugl shortage had eased, the Commission requested conseques from the public on its preposed to continue the ban on promotional advertising. Central Hadson Gas & Electric Corporation, the appollant in this case, opposed the ban on First Amendment grounds. App. A10 After reviewing the public comments, the Commission explainled the probibition in-a-Policy-Statement issued-op issue 🖨 🖨 🥱 -k"ebruary-25,⊶4477,∞

CENTRAL HUDSON GAS at PUBLIC SERVICE COMMIN

The Commission rejected the argument that utilities should advertise to develop consumption during periods when descand for electricity is low. The agency acknowledged that higher consumption in "off-peak" periods would have "heneficial ridge efforts" is permitting more efficient use of generating canacity. of existing power plants. App. to Juris, St., at 37a. But the Policy Statement opposed all promotional advertising-as con- declares trary to the national policy of conserving energy. Since oil dealers are not under the Commission's jurisdiction and thus 📝 remain free to advertise, the agency recognized that the ban can achieve only "precesseal conservationism,". Still, the Commission said that its action was likely to "result in some dampening of unaccessary growth" in energy consumption, Id., at 37a.

The Commission's order explicitly permitted "informational" advertising designed to generate "shifts of consumption" from peak demand times to periods of low electricity. demand. Poid. femphasis-in-orginal).— Informational advertising would not seek to increase aggregate consumption, but would invite a levelling of demand throughout any gives 24bour period. The agency offered to seview "specific proposals. by the companies for specifically described [advertising] progroups that recet these criteria." Id., at 3\$a.

When it rejected requests for relicating on the Policy Statement, the Commission supplemented its rationale for the advertising ban. The agency observed that additional generation-of electricity probably would be more expensive to prodice than existing output. Because electricity rates in New Since York were not then balantated on the besie of marginal cost. to /625 all on the Commission feared that additional opions would be priced below the actual rest of providing-that-rates-powers. This generalizes. additional electricity, then would be subsidized by all con- therefore,

J. Bon (rund

Enions

^{1 &}quot;Marginal root" has been defined as the "cates or incomental cost of producing an extra quit of output." P./Samuelson, Economics 462 (10th ed. 1976) -(emphasis-imprigion).

sumers through generally higher rates. -Id, at 57a=58a. The state agency also thought that promotional advertising would give "misleading signals" to the public by appearing to encourage energy consumption at a time when conservation is needed, Id., at 59a,

Appellant challenged the order in state court, arguing that the Commission had restrained commercial speech to violation of the First Amendment? The Commission's order was uplield by the trial court and at the intermediate appellate level." Tag New York Court of Appeals affirmed. It found Bitle value in advertising in 5the noncompetitive market in which electric corporations operate." 47 N. Y. 2d 94, 110, 390 N. E. 24 749, 757 (1979). Because consumers "have no 🗫 choice regarding the source of their electric power." the court denied that "promotional advertising of electricity might contribute to society's interest in finformed and reliable' economic decisionmaking." Ibi<u>d. The court also ob</u>served tha<u>t by</u> encouraging consumption promotional advertising of electrical power would only exacerbate the current energy situation. Id., at 110, 390 N. E. 2d. at 758. The court concluded that the governmental interest in the probabition outweighed the fimited constitutional value of the communial speech at issue. We noted jurisdiction $\{U, S, \longrightarrow (1979)\}$ and know reverse.

The Commission's order restricts only commercial speech, that is, expression related to the economic interests of the speaker and its audience. Control Hudson argues that promotional advertising would find consumers up choosing among helpo/-e energy sources, and early forcerage uses of electricity that

3 Central Budson also alleged that the Conuni-sion's order reaches beyoul the agency's statutary powers. This argument was rejected by the New York Coopt of Appeals, 47 N. Y 24 24, 102 404; 330 N E 2d 749, #52-7515(1979) panil-was not argued to this Cent).

* 63 App. Div. 2d 36% (1978) L(Appellate Disjoint of State-Supreme— 5 Court) y App. to Juris, \$6, at 22. (Feb. 17, 1978) (State Supreme Court)

aren The Alys?!

cless

CENTRAL HODSON GAS w. PUBLIC SERVICE COMMON

are not-inconsistent with the Commission's goal of energy! conservation,

The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. Virginia State Board of Pharmacy v. Viriginia Citizens Consumer Council, Inc., 425 U. S. 748, 761-762 (1976). Commercial expression not only. serves the economic interest of the speaker, but also sasfets consumers and furthers the societal interest in the fullest pessible dissemination of information. In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "[P]cople will perceive their own best interests if only they are well crough informed, and . . . the best means to that end is to open the channels of examination, rather than to close them. . . . " Id., at 770; see Linmark Associates, Inc. v. Township of Willingboro. only on incomplete version of the relevant facts, the First Amondment presumes that some compate information is better than no information as all. Butes v. State Bar of Arizona. :433 U. S. 350, 374 (1977).

Nevertheless, our decisions have recognized "the fermionsense distinction between specific proposing a commercial transaction, which occurs in an area traditionally subject to government regulation and other varieties of speech." Ohrg-Blev. Obio State Bar Assa., 436 U. S. 447, 455-456 (1978)." We therefore have accorded to less protection to commercial speech than to alber constitutionally gnoranteed expression. Id., at 450, 457. The protection available for particular commercial expression turns on the nature both of the expres. Some sion and of the governmental interests to be served by its regulation. 🦠

See Bater v. State Bur of Arizona, 43'l U. S. 350, 381 (1977); Jackson. & Afterior, Commercial Speech, Respective Due Process and the First Amendment, 65 Va. L. Rev. 1, 33-39 (1979).

Just the same thing? of 1st someone on

79-505—OPINION

CENTRAL HUDSON GAS & PUBLIC SERVICE COMMIN

The First Amendment's concern for commercial speech is Taskillage the informational function of such advertising. See 2-18-2 Füst National Bank of Boston v. Bellatti, 435 U. S. 765, 783 (1978) Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The goverument may but forms of communication more likely to deceive the public than to inform it, Friedman v. Rogers, 440 U. S. J. 13, 15-16 (1979); Ohralik v. Ohio State Bar Assa. 436 U. S., at 464-465, or commercial speech related to illegal. activity, Pittsburgh Press Co. v. Pittsburgh Commin on Human Relations, 413 U. S. 376, 388 (1973).

If the communication is neither misleading nor related to unlawful artivity, the government's power is more circumscribed. The State - must casser Su-substantial interest - to - be = achieved by gestrictions or commercial speech. Moreover, the 🚙 regularity technique must be in preparties to that interest. And Even if the successed state interest is substructial, the limitation-on-First Amendment rights cannot survive unless the mothed of regulation is carefully designed to achieve the State's goal. Whis concern may be measured by two criteria. $C_{accept} = \delta accept$ First, the restriction must directly advance the state interest involved: it may not be sustained of it provides only meller. He regulation tive or remote support for the government's purpose. Second., the State may not adopt a particular regulation if Ate

* In most other contexts, the Fact Americantal problems open-procedution than 39 based on the content of the massage <u>Commidated Edison</u> Co. v. Pablic Service Commin of New York, <u>No. 79-134</u> (<u>—</u>, 1988)<u>Ediff</u> operate —. Two feetates of commercial speech permit regulation of its content. First, commercial speakers have estensive knowledge of both the market and their products. Thus, this are well-directed to evaluate the accuracy of their accessings and the low-intress of the underlying activity - Bates v. State Bar of Arizona, 483 U.S. at 381 (1977). Apr வத்தினு, commercial speech, the off-pring of economic self-intenses, is a 🗗 🖛 📥 particularly leady breed of experssion that is not "particularly sisterable." to being emished by averbroad regulation." Abid.

The regular

UNTER

79-505-- OPINION

GENTRAL HUDSON GAS & PUBLIC SERVICE COMM'N the govern

Linterest could be served as well by a more finited restriction on commercial speech.

Under the first editorion, the Court has declined to aphold regulations with only an indirect relationship to the state interest involved. In both Bates and Virginia Board of Phormacy, the Court concluded that/an advervising ban could up. 5/2/60 - co-- 🔎 he irreposed simply to protect the othical or performance standards of a profession. The Court seted in Virginia Board of Pharmacy P(t) he advertising how does not directly affect that -otherwise professional standards one way or the other," 425 l'. S., at 760. In Bates, we overturned an advertising problimition that was designed to protect the "quality" of a lawyer's work. "Restraints on advertising , . . are an ineffective way of deterrhes shoddy work." 433 U. S., at 378.5

The second enterior recognizes that the First Amendment requires analizates that smeets restrictions be "narrowly drawn." In restrictions on / re Primux. 436 U. S. 412, 438 (1978). The regular fry tooks - ion. mique may extend only as for as the interest to in server it / -5

100 Chainsth Associates v. Tourishin of Williamhorn, sensor we referred to forward that there was no definite connection between the township's goal at integrated broking and his boar on althous and "For Side" steers at front of palaching Smiles 1999 10 Squt 95-99.

5 It is important to disranguish this analysis from the flow threathful does trane. The fatter theory permits the special time of regulations on First Amendment grounds even when the liberon challenging the mentation has curaged in the constitution for protected definity (E, ϕ) , K_{Hab} γ Note Park, NOTES 200 (1984). The combined by destrine derives from the recognition that unconstitutional instruction of expression may deter as protected speech policities but before the court field in the grant of the court field for a little of the field of the fi Note, The First Amendment Overbrendth Dortrine, 83 Harv. L. Rev. \$44, 853-858 (1970). The likelihood of this content is less in the commercial speech readers adapted by expression as baked to commercial well-bring," and therefore is not likely to be deferred by "overboard regulation." Bater v. 8060- Rev of Arizova, 430, U. S., 51, 281, (1977).

<u>In this case, the Commission's grability on</u> acts disortly against the promotional activities of Cristial Rudson's Consequently, exembratian analyses as not relevant to this decision.

CENTRAL HUDSON GAS 6. PUBLIC SERVICE COMM'N

The State connot regulate speech unrelated to the asserted state interest, see First National Bank of Boston v. Bellotti, supra, 435 U.S., at 794-795 not can it completely suppress information when narrower restrictio<u>ns on expressi</u>on would serve its interest as well. For example fin Beleefve explicitly con / for did not "fereelose the possibility that some limited samplementation, by way of warning or disclaimer or the like, might be required" in promotional materials. 433 U.S. at 384f See Virginia State Board of Pharmacy, supro. 425 U.S. at 773. And in Carry v. Population Services, International, 431 U. S. 678, 701-702 (1977), we held that the State's "arguments do not justify the total suppression of advertising concoming contraceptives." This holding left open the possibility that the State could implement more carefully drawn restrictions (Sec. id., at 712 (Powers, J., concurring in part and concurring in the judgment); way id at 716-717 (Stevens, J., concurring).*

In commercial speech eases, then, a four-part analysis has developed. At the outset, we most determine if the express a large sion is projected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be talsleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine it the 🛹 🕡 regulation directly advances the governmental interest asscribed, and if it is no here extensive than is necessary to serve bhut-interests

 We review with special caregifical regulations that entirely supports compared it grows in order typical at a policy to related to the quality of the expression as M. Trettheen internationer, athere is a danger that a horion speciels will perfect between from guidde view the underlying governmental policy. So: Virgoria State Bound of Pharmony, report 425 W. S., at 280, § S. (Stewner, J., concurring). Indeed, in recent years this Court has not approved a blanker ban on commercial speech unless the expression itself was flavord in same way, either because it was desentive or related to unlawful pelisaty.

79-565--OPINION

CENTRAL HUDSON GAS & PUBLIC SURVICE COMM'N

Iπ

We now apply this four-step analysis for commercial speech to the Commission's arguments in support of its ban on promotional advertising.

The Commission does not clarge that the speech at issue here either is inaccurate or relater to unlawful activity. Yet the New York Court of Appends questioned whether Central Hudsma's advertising is satisfied to protection—as commercial —a. speech. Bregge appellant holds a monagoly over the sale 5rm. of electricity in its service area, the state court suggested that the Commission's order restricts no commercial speech of any worth.) The court stated that advertising in such a "moncompetitive market" rould not improve the decisionacking of consampre 47 N. Y. 2d, at 110: 390 N. F. 2d. at 757. Gall ន្ទស្នំព្រមព័ត្និទ្រី the court saw no constitutional problem with bar- 🎩 ring confinercial speeck that it viewed as conveying little useful information.

This reasoning Latts shortful ortablishing that appellant's And to asta block advertising is not commercial speech profected by the First Amendment Monopoly over the supply of a product provides no protection from competition with substitutes for that product. Electric utilities compete with suppliers of fact oil and cotoral gas in several markets, such as those for home heating and industrial power. This Court voted the existence of interfuel competition 45 years ago, see West Ohio. Gas Co. v. Public Utilities Commin. 294 U. S. 63, 72 (1935). and each energy source continues to offer povelias advantages. and disadvantages that may influence consumer choice. For consenters be those competitive markets, advertising by ptillties is just as valuable as advertising by unregulated firms.

*SeveralJeommercial specch decisions large involved enterplises subjects to excelling state regulation | Ε π., Ευσθώνουν, Hopers 430 U S + 4-5 (1979) (optemetrists); Hates V. Arazana State Bar, 433 U. S. 350 (1977).

Even in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and inhibits the realization of the goals of the First Amendment. The New York rours's argument appears to assume that the pay for wholly meffective advertising. Most businesseseven regulated introopqlies-are to likely to underwrite premotional advertising that in of no interest or use to consumers. Lotter - Blacking A monopoly enterprise lagitumately may wish to inform the public that it has developed new services or terms of doing business. A consumer may need information to kind his decide halp him decide sion whether or wy to use the monopoly service at all or now much of the service he should purchase. In-tige-absence of factors that would distort the utility's decision to advertise, we may assume that the willingness of a incinest to prount a 🙃 💆 🕳 🗘 😅 its products reflects a bolief that the advertising he of internal resemble like he to consumers." Since no such extraordinary conditions have been identified in this case, appellant's menopoly position does not after the First Amendment's protection for its commercial speech.

В

The Commission offers two state interests as justifications for the ban on promotional advertising. The first concerns energy conservation. Any increase in demand for electricity—during peak or eff-peak periods—means greater consumption of energy. The Commission argues, and the New York court

(Larversh): Weginia State (R4) of Phoromory v. Virginia Catazer Consumer Canada Fac., 425-10 S. 748, 750-752 (1976) (Idamore elects)

O'There may be a greater incentive for a notify to advertice if it can be hide premational expenses in determined its interpretation rather than pass those costs on rolely to shareholders. Since Appelled Herweyer, hardly detects the generous decision whether to advertice. The golden because on promotional costs to consumers, girl this Court expressly approved the practice for attrices in that One Gas Co v. Public Utilities Court's, 294 U. S. 63, 72 (1935).

the rate base

are marestal

The 25st the costs in

CENTRAL HUDSON GAS v. PUBLIC SERVICE COMMIN

cient to support suppression of advertising designed to in-هـــــه @ crease/consumption**/** of clostricity. In view of our country's dependence on energy resources beyond our control, no one 🛶 🕳 can doubt the importance offenergy/conservation. Plainly, conservatherefore, the state interest asserted is substantial.

The Commission also argoes that promotional advertising will apprayate inequities caused by the failure to base the utility's rates on marginal cost. The utilities argued to the Commission that if they could promote the user of relectricity in periods of low-demand, they would improve their facilities, seed tion of generating capacity The Commission responded that +4promotion of off-peak consumption also would increase consumption during peak periods. If peak demand were to rise, the absence of marginal cost rates would mean that the true. costs of expanding production would not be reflected in the rates charged for the arbitional power. Instead, the extra costs would be betne by all consumers through higher overall Without promotional advertising, the Commission stated, this inequitable turn of events would be less likely to occur. The choice among rate structures involves difficult questions of reconomic supply and distributional fairness." a choice properly confided to the regulatory bodies that oversee utilities. We rerognize, of course, the State's clear and substantial interest in fair and effective ratemaking.

C.

Next, we focus on the directness of the relationship be-Iwon the State's interests and the advertising has. Under Testas 64 this criterion, the Commission's laudable concern over the equity and efficiency of appellant's rates does not provide a constitutionally adequate reason for restricting spench protested by the First Amendment. The link between the advertising prohibition and appellant's rate structure is at most

⁴⁴ See W. Jones, Regulated Industries 191-287 (2d ed. 1976).

tenuous. The impact of promotional advertising on the equity of appellant's rates is highly speculative. Advertising to increase off-peak usage would have to increase peak usage, while other factors that directly affect the farmess and efficiency of appellant's rates remained constant. Such conditional and remote eventualities simply cannot justify silencing appellant's promotional advertising.

In contrast, the State's interest in energy conservation is directly advanced by the Commission order at issue here. There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.

_

We come finally to the critical inquiry in this case: whether the Commission's complete suppression of speech ordinarily protected by the First Amendment is a valid means of furthering the interest of the State in energy conservation. The Commission's order reaches all promotional advertising, regardless of the impact of the touted service on overall energy use. But the energy conservation rationale, as important as it is, cannot instily suppressing information about electrical devices or services that could result in a net saving of energy for even that would cause no net increase in energy use. In addition, no showing has been made that a more limited restriction on the content of premotional advertising would not serve adequately the State's interests.

760

Who has p. ?.

CENTRAL HUDSON GAS & PUBLIC SERVICE COMM'N

mission's Policy, Statement nor its order denying rehearing made findings on this issue. In the absence of authoritative findings to the contrary, we must credit as within-the resturoi-passibility thefelsion that electric/heat/can be an efficient not in **a⊈e**≠n**a**i⊊e îu sonê circunstances.

The Commission's order provents petationer from promoting electric/services that either/wasifferduce energy use by divert-roughly, the same function of energy as do alternative sources. In either station, the utility's advertising would prependent to 74/-3/-3/ ger conservation or mislead the public. By suppressing sense 🛌 speech that in no way impairs the State's interest in energy conservation, the Commission's order violates the First Assembly and must be invalidated See First National - A

Bank of Boston v. Bellotti, supra. (*)

The Commission also has not demonstrated that lits interest in conservation cannot be protected adequately-by-more lift. ited-regulation-<u>ni-appellant</u>is-comme**rcial-e**xpression®. To further its policy (conservation) the Commission could attempt to restrict the format and content of Central Hudson's advertising. It might, for example, require that the advertisements include information about the relative efficiency and expense of the offered service (both-maler-entrem-conditions and-torobe-foresceable tuture Cf. Ranaba) v. FCC, — U.S. App. D. C. ---, 405 F. 2d 1082 (1968), cort. dened, 396 U. S. \$42 (1969). In the absence of a showing that more limited

~ ~ ~ { \(\text{\tin}\text{\tin\tint{\text{\text{\text{\text{\text{\text{\text{\text{\text{\tint{\text{\text{\text{\text{\text{\text{\text{\text{\text{\text{\text{\text{\text{\text{\text{\text{\text{\text{\tin}\tint{\tex{\text{\text{\text{\text{\text{\text{\text{\text{\text{\text{\ti}\titt{\text{\ti}\tint{\text{\text{\text{\text{\tin}\tint{\text{\text{\texit{\text{\text{\text{\texi}\tint{\text{\tiin}\tiint{\titt{\text{\tin}\tint{\text{\tiint{\text{\text{\tint}\tint{\tint{\

would and

المعالمية

20 The Commission also might consider a visiters of previously thees-Going compargue to insure that they will not defeat conservation policy In his distributed such a program for approving theforeational Cadvertising under the Police Statement Mallinzed in the case. See p. -- , super-We have abserved that contacteful speech is such a storely brand of exprevious that trichmond prior restraint destribe may not apply to it. Virginia Board of Photomica v. Virginia Citizens Consumer Council Inc., 425 U. S., at 771, at 24 (1976). And in other areas of specific regif from such as observing, we large reorgaized that a prescreening astronoment call, goes constructed and to providing as at authors independ procedure, safegaurds. Procedmon v. Maryland, 380 (l. S. 51 (1965).

79-565-OPINION

CENTRAL HEDSON GAS at PUBLIC SERVICE COMMON 13

speech regulation would be ineffective, we cantut approve the complete suppression of Control Hudson's advertising.

11

We are not unmindful of the national interest in energy conservation. We accept without reservation the argument that conservation, as well as the development of alternate energy sources, is an imperative national goal. Administrative bodies empowered to regulate electric utilities have the authority—and indeed the duty—to take appropriate action to further this goal. When mowever, such action involves the suppression of speech like First Americanett requires that the restriction be no more extensive than is necessary to serve the state interest. In this case, the record before us tails to show that the Juda, ban on promotional advertising meets this requirement.

Accordingly, the judgment of the New York Court of Appeals is

Recorsed.

e.p. a the

12 In view of our eccelosics that the Commission's a tvertising golder visualization. First Amendment, we do not reach polarighters about the section of the commission of the

The Commission order at some large reason for all in response to an energy magnetic field shorters in 1973 these are enabled and intended on prompted by true a full shorters in 1973 these are enabled and had proved which the proved order was approved. See As p. to Jupis, St., of 84a. The Commission trakes to claim that an emergency tow exists. Our decision today does not address the powers that the State and five over utility advertising in emergency creamstances. See Soft v. Otherwise Ges & Electric Co., 536 P. 2d. 887, 895, 896 (Ord., 1977).

rague, and a service of the equal protection guaranteed lang The 14th A."

W/SJ1943

/5 5-1**8**-80 To: The Chief July of the Section of the Justice Stewart Mr. Justice Stewart Mr. Justice Marefall Mr. Justice Ranguist Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: MAY 12 1980

Recirculated: ____

DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-565

Central Hudson Gas & Electric Corporation, Appellant,

g.

Public Service Commission of New York.

On Appeal from the Court of Appeals of New York,

(May -..., 1980)

Me. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a regulation of the Public Service Commission of the State of New York violates the First Amendment because it completely hans promotional advertising by an electrical utility.

Ι

In December 1973, the Commission, appelles here, ordered electric attilities in New York State to cease all advertising that "promot[es] the use of electricity." App. to Juris. St., at 31a. The order was based on the Commission's finding that "the interconnected utility system in New York State does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973–1974 winter." Id., at 26s.

Three years later, when the fuel shortage had eased, the Commission requested comments from the public on its proposal to continue the han on promotional advertising. Central Hudson Gas & Electric Corporation, the appellant in this case, opposed the han on First Amendment grounds. App. A10. After reviewing the public comments, the Commission extended the prohibition in a Policy Statement issued on February 25, 1977.

and [fourteenthy

3.55

2 CENTRAL HUDSON GAS & PUBLIC SERVICE COMMIN

The Constrission rejected the argument that utilities should advertise to develop consumption during periods when demand for electricity is low. The agency acknowledged that higher consumption in "off-peak" periods would have "beneficial side effects" in pertaiting more efficient use of generating capacity of existing power plants. App. to Juris. St., at 37a. But the Policy Statement declared all promotional advertising contrary to the national policy of conserving energy. Since oil dealers are not under the Commission's jurisdiction and thus remain free to advertise, the agency recognized that the ban can achieve only "piecement conservationism." Still, the Commission said that its action was likely to "result in some dampening of unnecessary growth" in energy consumption, Id., at 37a.

The Commission's order explicitly permitted "informational" advertising designed to encourage "shifts of consumption" from peak demand times to periods of low electricity demand. Ibid, (emphasis in original). Informational advertising would not seek to increase aggregate consumption, but would invite a leveling of demand throughout any given 24-hour period. The agency offered to review "specific proposals by the companies for specifically described [advertising] programs that most those criteria." Id., at 38a.

When it rejected requests for rehearing on the Policy Statement, the Commission supplemented its rationale for the advertisting ban. The agency observed that additional electricity probably would be more expensive to produce than existing output. Because electricity rates in New York were not then based on marginal cost? the Commission feared that additional power would be priced below the actual cost of generation. This additional electricity would be subsidized by all consumers through generally higher rates. Id., at 57a-58a.

^{*&}quot;Marginal cost" has been defined as the "extra or incremental cost of producing an extra unit of oraget". P. Sanuelson, Economics 483 (10th ed. 1976). (diaphores in original).

49-565--0PINION

(and Frunteenth)

CENTRAL HUDSON GAS E. PUBLIC SERVICE COMMIN.

The state agency also thought that promotional advertising would give "misleading signals" to the public by appraising to encourage energy consumption at a time when conservation is needed. Id., at 50a.

Appellant challogged the order-in state court, arguing that the Commission had restrained commercial speech in violation of the First Amountments. The Commission's order was upheld by the trial court and at the intermediate appellate level,* The New York Court of Appeals affirmed. It found little value to advertising in 6the noncompetitive market in which electric corporations operate." 47 N. Y. 2d 94, 110, 390 N. E. 2d 749, 757 (1979). Since consumers "have no choice regarding the source of their electric power," the court denied that "promotional advertising of electricity might contribute to society's interest in 'informed and reliable' economic decisionmaking." Ibid. The court also observed that by encouraging consemption, promotional advertising would only exacerbate the current energy situation. Id., at 110, 390 N. E. 2d. at 758. The court concluded that the governmental Sittems), in the probibition outweighed the limited constitutional value of the commercial speech at issue. We noted probable jurishetian. — $U.~S.~\longrightarrow~(1979)$, and now reverse.

II

The Commission's order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its ambience. The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. Virginia State Board of Pharmacy v. Virginia

² Counted Hardson also alleged that the Commission's order reaches beyond the egency's statutory powers. This argument was rejected by the New York Court of Appeals, 47 N. Y. 23 94, 192-104; 390 N. E. 24 749, 752-754 (1979), and was not argued to the Court.

⁴⁶³ App. Die 2d 364 (1978) (N. Y. Sup. Ct. Appellate Division of State Supreme Court); App. in Juris. St., 50 225 (Feb. 17, 1978).

79-565-OPINION

4 CENTRAL HUDSON GAS v. PUBLIC SERVICE COMMON

Citizens Consumer Council, Inc., 425 U. S. 748, 761-762 (1976). Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area. we have rejected the "highly paternalistic" view that governtoent has complete power to suppress or regulate commercial speech. "[P]cople will perceive their own best interests if only they are well enough informed and . . . the last means to that end is to open the channels of communication, rather than to close them. . . . " Id., at 770; see Linmark Assocrates, Inc. v. Township of Willingboro, 431 U. S. 85, 92 (1977). Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all. Bates v. State Bar of Arizana, 433 U.S. 350, 374 (1977)..

Nevertheless, our decisions have recognized "the teammon-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." Obra-life v. (thio State Bar Assn., 436 U. S. 447, 455-456 (1978); "see also Jackson & Jeffries. Commercial Speech: Economic Duc Process and the First Amendment. 65 Va. L. Rev. 1, 38-39 (1979). We therefore accordates reprotection to commercial speech than to other constitutionally guaranteed expression, td., at 456, 457. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation,

The First Amendment's concern for commercial speech is the state of Heritage Read on the Supposession of commercial messages that do not accurately inform

Supra-)AT

(3)

FOF Advertising

(the)

the public about lawful activity. The government may be forms of communication more lakely to deceive the public than to inform it, Friedman v. Rogers, 440 U. S. 1, 13, 15-16 (1979); Ohrolik v. Ohio State Box Assn., 436 U. S. at 464-465, or commercial speech related to illegal activity, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U. S. 376, 388 (1973).

If the communication is neither misleading nor related to unlawful activity, the government's power as more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression cannot survive unless the method of regulation is designed carefully to achieve the State's goal. Compliance with the requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, the State may not adopt a particular regulation if the governmental interest could be served as well by a more limited restriction on commercial speech

Under the first criterion, the Court has declined to unhold regulations that only indirectly advance the state interest involved. In both Bates and Vargotia Board of Phormacy, the Court concluded that an advertising ban could not be

^{*}In most offer contexts, the First Amendment prohibits negligition is sed on the content of the massage. Considered Edition Co. (*Public Service Considered Edition Co.) Public Service Considered of New Took, No. 79:134 (1984) (ii) op., 31:6-8. Two features or commercial speech permit regulation of its content. This commercial speakers have expansive knowledge of both the market and their products. Thus, they are well-simulated to evaluate the securacy of their messages and the lawfainess of the moderlying periods. House v. State Bar of America, 433-46, \$1, at 381 (1977). In addition, experienced speech, the affisping of economic self-interest, to a particularly largely breed of expression that is not "particularly susceptible to being emisted by analysis of regulation." This.

79-565-OPINION

The Court

CENTRAL HUDSON GAS & PUBLIC_SERVICE COMMEN

imposed to protect the ethical or performance standards of a profession. The Court, noted in Virginia Board of Pharmany that "[1] be advertisting but does not directly affect professional standards one way or the other" 425 U.S. at 769. In Bates, we overturned an advertising prohibition that was designed to protect the "quality" of a lawyer's work. "Restraints on advertising . . . are an ineffective way of deterting should work." 433 U.S. at 378.

The second criterion recognizes that the First Amendment manufaces that speech restrictions be "nerrowly drawn," In re Primue, 436 U. S. 412, 438 (1978). The regulatory technique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state jutcrest, see First National Bank of Baston v. Bellotti, supra, 435 U. S., at 794-795, nor can it completely suppress information when narrower restrictions on expression would serve its interest us well. For example, in Bates we explicitly did not "forcelose the possibility that somethicited

"In Limited Associates V. Touriship of Millingbury, supra, we observed that there was no definite correction between the town-hope pool of integrated bousing and its ball on the use of "For Sale" signs in front of houses. 431 U.S., at 95-96.

"This analysis should be distinguished from the "averbreadth" doctrine. The latter theory permits the modification of regularious on First Amendment grounds even when the hitigant/challenging the regulation has engaged in no constitutionally protected activity. E. q. Kinz v. None York, 340 to 8, 290 (1951). The averbreadth decrine derives from the recognition that ineventions of rectains of expression may deterprete ted speech by parties not before the court and the rely isotate policial review. Broadrick v. Oblahama, 413 to 8, 490, 612-613 (1956); see Note, The First Amendment Overbreadth Doctrine, 83 Harv. I. the 544, 833-838 (1970). This restrict in is less likely where the expression is linked to "communical" well-being" and therefore is not easily determed by Toverbroad regulation." Bates v. State Roy of Arizona, 433 to 8, 45-381.

In this case, the Cenemission's prohibition acts directly against this promotorial activities of Central Bindson. Consequently, overbreadth army signs in our polyment here.

the Come

supplementation, by way of warning or disclaimer or the like, might be required" in promotional materials. 433 L' S. at 384. See Virginia State Board of Pharmacy, supra, 425 L', S. at 773. And in Carry v. Population Services, International, 431 U. S. 678, 701-702 (1977), we held that the State's "argaments do not justify the total suppression of advertising concerning contraceptives." This holding left open the possibility that the State could implement more carefully drawn restrictions. See id., at 712 (Powerl, J., concurring in part and concurring in the judgment); id., at 716-717 (Stevens, J., concurring)."

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it as least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

We now apply this four-step analysis for commercial speech to the Commission's arguments in support of its ban on promotional advertising.

A

The Commission does not claim that the expression at issue Shere either is inaccurate or relates to unlawful activity. Yet

I We review with special take regulations that entirely suppress confident of speech in order to just-ne a policy marelated to the quality of the expression itself. In total effectives, a bar on speech could action from judgle yew the underlying governmental policy. See Fitzgiair State Bound of Pharmaca, argued 425 U. S., at 750, c. S. (Standart, J., congruzting). Indeed, in resent years this Court has not approved a blunket but on connected speech unless the expression itself was flowed in some way, either because it was deceptive or related to unlawful or origin.

the New York Court of Appeals questioned whether Central Hudson's advertising is protected commercial speech. Because appellant holds a monopoly over the sale of electricity in its service area, the state court suggested that the Commission's order tratricts no commercial speech of any worth, The court stated that advertisingly "innecompetitive market" could not improve the decisionnaking of consumers. 47 N, Y, 2d at 110; 390 N E, 2d, at 757. The court saw no constitutional problem with barring commercial speech that it viewed as conveying little useful information.

This reasoning talls short of establishing that appellant's solvertising is not commercial speech protected by the First Amendment. Monopoly over the supply of a product provides no protection from competition with substitutes for that product. Electric utilities compete with suppliers of fuel oil and natural gas in several markets, such as those for home heating and industrial power. This Court noted the existence of interfact competition 45 years ago, see West Ohio Gas Co. v. Public I tildies Comm'a, 294 U.S. 63, 72 (1935). Each energy source continues to affer peruliar advantages and disadvantages that may influence consumer choice. For emissioners in those competitive markets, advertising by utilities is just as valuable as advertising by unregulated firms.

Even in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment. The New York court's argument appears to assume that the providers of a monopoly service or product are willing to pay for wholly ineffective advertising. Most husinesses—even regulated monopolies—are unlikely to underwrite pro-

¹ Several commercial speech docisions have involved enterprises subject to extensive state regulation. R. q., Friedman, v. Rogert, 440 U. S. 1, 4-5 (1970). (optometrists); Bates v. Azigona State Bar, 433 U. S. 356 (1977). [lawyers); Virginia State Bai, at Pharmacy v. Virginia Citizena Consumer Council Jun. 425 U.S. 748, 750-752 (1976) (pharmacytes).

motional advertising that is of no interest or use to consumers. Indeed, a monopoly enterprise legitimately may wish to inform the public that it has developed new services or rems of doing business. A consumer may need information to aid his decision whether or not to use the nonopoly service at all, or how much of the service he should purchase. In the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising.* Since no such extraordinary conditions have been identified in this case, appellant's monopoly position does not after the First Amendment's protection for its commercial speech.

В

The Commission offers two state interests as justifications for the ban on promotional advertising. The first concerns energy conservation. Any increase in demand for electricity—during peak or off-peak periods—means greater conscription of energy. The Commission argues, and the New York court agreed, that the State's interest in conserving energy is sufficient to support suppression of advertising designed to increase consumption of electricity. In view of our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation. Plainly, therefore, the state interest asserted is substantial.

The Commission also argues that promotional advertising will aggravate inequities caused by the failure to base the utility's rates on marginal cost. The utilities argued to the Commission that if they could promote the use of electricity

^{*}There may be a greater incention for a utility to advertise if it can use promotional expresses in determining its rare of neutral rather than pass those costs on solely in shareholders. That practice, however, hardly 65-tor's the economic decision whether to advertise. Unrightest businesses pass on principlical costs to considers, and this Congle expressly approved the bracket for artificials in West Ohio Gas Colly Public Utilities Computer, 294 U.S. 63, 72 (1935).

10 CENTRAL HUDSON GAS & PUBLIC SURVICE COMMEN

in periods of low demand, they would improve their utilization of generating capacity. The Commission responded that pronotion of off-peak consumption also would increase consumption during peak periods. If peak demand were to rise, the absence of marginal cost rates would beam that the rates charged for the additional power would not reflect the true costs of expanding production. Instead, the extra costs would be borne by all consumers through higher overall rates, Without promutional advertising, the Commission stated, this inequitable turn of events would be less likely to occur. The choice among rate structures involved difficult and important questions of economic supply and distributional fairness." The State's concern that rates be fair and efficient represents a clear and substantial governmental interest.

C

Next, we focus on the relationship between the State's interests and the advertising ban. Under this criterion, the Commission's hadable concern over the equity and efficiency of appellant's rates does not provide a constitutionally adequate reason for restricting protected speech. The fink between the advertising prohibition and appellant's rate structure is, at most, tenuous. The impact of promotional advertising on the equity of appellant's rates is highly speculative. Advertising to increase off-peak usage would have to increase peak usage, while other factors that directly affect the fairness and efficiency of appellant's rates remained constant. Such emiditional and remote eventualities simply cannot justify silencing appellant's promotional advertising

In contrast, the State's interest in energy conservation is directly advanted by the Commission order at issue here. There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would

⁴⁹ See W. Jones, Regulated Industries 191-287 (3d ed. 1976).

becrease its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.

We come finally to the critical inquiry in this case; whether the Commission's complete suppression of speech ordinarily protected by the First Amendment is no more extensive than necessary to further the State's interest at energy conservation. The Commission's order reaches all promotional advertising, regardless of the impact of the footed service on overall energy use. But the energy conservation rationals, as important as it is, cannot justify suppressing information about electric devices or services that would rause up not increase in total energy use. In addition, no showing has been made that a more limited restriction on the content of promotional advertising would not serve migrately the State's interests.

Appellant insists that but for the bac, it would advertise products and services that use energy efficiently. These icelade the "heat pump," which both parties acknowledge. to be a major improvement in electric heating, and the use of electric heat as a "back-up" to solar and other heat sources. Although the Commission has questioned the efficiency of electric heating before this Court, neither the Commission's Policy Statement nor its order denying rehearing made findings on this issue. In the absource of authoritative findings to the contrary, we must credit as within the realm of possibility the claim that electric light can be an efficient alternative in some circumstances.

The Commission's order prevents petitioner from promoting electric services that would reduce energy ase by diverting descard from less efficient sources, or that would consume roughly the same amount of energy as do alternative sources. In neither situation would the utility's advertising endanger conservation or mislead the public. By suppressing some speech that its no way impairs the State's interest in energy conservation, the Commission's order violates the First

Grad Front Bruth

79-282--- OPINION

CENTRAL HUDSON GAS & PUBLIC SERVICE COMM'N

Amendmentkand must be invalidated. See First National Bank of Baston v. Bellotti, supra.

The Commission also has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression. To further its policy of conservation, the Commission could attempt to restrict the format and content of Central Hudson's advertising. It might, for example, require that the advertise-toods include information about the relative efficiency and expense of the offered service, both under current conditions and for the foresceable future. Cf. Banzhaf v. FCC. — U. S. App. D. C. ——, 405 F. 24 1082 (1969), cert. deced 396 U. S. \$42 (1969). In the absence of a showing that toole limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising.

IV

Our decision today is no way disparages the national interest in energy conservation. We accept without reservation the argument that conservation, as well as the development of alternate energy sources, is an imperative national goal. Ad-, to injertuitive bodies empowered to regulate electric unlarge

If he view of our conclusion that the Commission's advertising policy year test the Fact thresholders, we do not reach positioner's claims that the greaty's order decision in the Four-to-cuts Amendated, and that it is both negative and vages,

and Frinteenth

(M)

¹⁰ The Commission also might consider a system of previously advertising compaigns to be one that they will not defect construction policy. It has instituted such a progress for approxing "informational" advertising under the Policy Statement challenged in this c. s. See p. 2, supra We have observed that commercial speech is such a stordy braid of expectation that to discrete them do for a retaint the range may not apply to justificate them do for the commercy a Propolar Cataon Consumer Council Test support 425 To S. at 771, at 24. And to other areas of speech regard that on his observing, we have recognized that a pursuance may arrange them on his observing and moster if it metador adequate procedured subserving. For common v. Manydood, 380 To S. 51 (1995)

79-505-OPINION

CENTRAL BUDSON GAS I, PUBLIC SERVICE COMM'S

have the authority and indeed the duty to take appropriate When however action to further this goal. Bay when such action involves the suppression of speech, the First Amendment requires that the restriction be no more extensive than is necessary to serve the state interest. In this case, the record before us fails to show that the total ban on promotional advertising meets this resignation of the

Accordingly, the judgment of the New York Court of Appeals in

. Reversed.

and Fourteauth

O'The Countission order of Issue here was not promulgated in response to an energetely situation. Although the givertising hen initially was prompted by critical (ne) decreage in 1973, the Commission makes no elemthe an empty may make such a Words are marker the powers that the State might have aver ord by advertising in the igency circ instances. See Spare v. Oxfoliorea Con. A. Electric Con., 536–12, 26–887, 897-886 4080 (2007).

To: The Chief Justice

Mr. Justica brannan

Mr. Justice Str**vert**

gram justics thereball

1,3,4,6,7,

J-15-80

Caroline Powell Prom: Ma

Circulated: L

2nd DRAFT

Recipoulated: WAY 15 (280)

SUPREME COURT OF THE

No. 70 565

Central Hudson Gas & Electric Corporation, Appellant,

Public Service Commission of New York,

On Appeal from the Court of Appeals of New York.

[May -, 1980]

Mil. Justice Powers delivered the opinion of the Court.

This case presents the question whether a regulation of the Public Service Commission of the State of New York violates the Past and Fourteenth Americanously because it considerely [bans promotional advertising by an electrical utility.

In December 1973, the Commission, appeller here, ordered elector offlities in New York State to cease all advertising that "promotles] the esc of electricity." App. to Juris. St., at 31a. The order was based on the Commission's finding that "the interconnected utility system in New York State does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973-1974 winter." Id., a), 26a.

Three years later, where the fuel shortage had eased, the Commission requested comments from the public on its proposal to continue the ban on promotional advertising. Central Hudson Gas & Electric Corporation, the appellant in this case, opposed the ban on First Amendment grounds. App. A10. After reviewing the public comments, the Commission extended the probabilion in a Policy Statement issued on February 25, 1977,

79-500-OPINION

2 CENTRAL HUDSON GAS & PUBLIC SERVICE COMMIN

to premited

Althe Commission rejected the argument that utilities should advertise to develop consumption during periods when demand for electricity is low. The agency seknowledged that higher consumption in "off-peak" periods would have "beneficial side effects" in permitting more efficient use of generating capacity of existing power plants. App. to Juris, St., at 37a. But the Policy Statement declared all promotional advertising contrary to the national policy of conserving energy. Since oil dealers are not under the Commission's jarisdiction and thus remain free to advertise, the agency renognized that the ban can achieve only "piecemeal conservationism." Still, the Commission said that its action was likely to "result in some dampening of unnecessary growth" in energy consumption. Id., at 37a.

The Commission's order explicitly permitted informational advertising designed to encourage "shifts of consumption" from peak demand times to periods of low electricity demand. *Ibid.* (couplinsis in original). Informational govertising would not seek to increase aggregate consumption, but would invite a leveling of demand throughout any given 24-hour period. The agency offered to review "specific proposals by the companies for specifically described [advertising] programs that meet these criteria," *Id.*, at 38c.

When it rejected requests for rehearing on the Policy Statement, the Commission supplemented its rationale for the advertisting ban. The aponcy observed that additional electricity probably would be more expensive to produce than existing output. Because electricity rates in New York were not then based on marginal cost, the Commission feared that additional power would be priced below the actual cost of generation. This additional electricity would be subsidized by all consumers through generally higher rates. Id., at 57a-58a.

The Policy Statement divided advertising expenses into two broad insegones:

promotional - advertism about it stimulates the punchase of which y services - and institutional and informational, a broad cartegory inclusive of all adventising not clearly intended to promote seles. App. to Junis, St., at 35%.

^{4&}quot;M, tgird co-t" has been defined as the "extra or incremental cost of producing an extension of couplet". P. Samuelson, Economics 463 (16th ed. 1976) (employs in original).

The state agreey also thought that promotional advertising would give "misleading signals" to the public by appearing to encourage energy consumption at a time when conservation is needed. Id., at 59a.

Appellant challenged the order in state court, arguing that the Commission had restrained commercial speech in violation of the First and Fourteenth Amendments." The Commission's order was apheld by the trial court and at the intermediate appellate level? The New York Court of Appeals affirmed. It found little value to advertising in 7the noncompetitive market in which electric corporations operate," 47 N. Y. 2d 94, 140, 390 N. E. 2d 749, 757 (1979). Since consumers "have no choice regarding the source of their electric power," the roart desired that "promotional advertising of electricity rought contribute to society's interest in 'informed and reliable economic decisions aking." This, The court also observed that by encouraging consumption, promotional advertising would only exacerbate the current overgy situation. Id., at 110, 390 N. E. 2d, at 758. The court concluded that the governmental interest in the prohibition outweightd the limited constitutional value of the commercial speech at joine. We noted probable jurisdiction, -- U. S. -- (1979), and now heberse.

Īῖ

The Commission's order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience. The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. Virginia State Board of Pharmacy v. Virginia

² Ceptral Hudson also alleged that the Commissionis under reaches between the agency's stationary powers. This argument was rejected by the New York Court of Appends, 47 N. Y. 2d 94, 102-104; 300 N. E. 2d 749.

FOSTNOTE 34/

NEW INSERT +

^{762-754 (1979),} and was not argued to this Court.

*68 App. Div. 2d 264 (1975) (N. Y. Sep. C). Appelloss Division of 2006 September Court); App. to Juris, Su, an 22a (Feb. 17, 1975).

PENTING OF DESON GAS & PUBLIC SERVICE COMMEN

Categoria Companier Council, Inc., 475 11. (1976). Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fallest possible dissemination of information. In applying the First Amendment to this area. we have to cettel the "highly pateriolistic" view that government has complete power to suppress ar regulate commercial speech. "TP leaply will peregive their own best interests if andy they are well enough informed and . . . the best means to that end is to open the channels of communication, rather than to close them. . . ." Id., 40 770; see Lemmack Assoemites, Inc. v. Township of Willinghorn 431 U. S. 85, 92 (1977). Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some archeste information is better than no information at all. Bates v. State Bur of Arizona, 433 U.S. 350, 374 (1977).

Nevertheless, our decisions have recognized "the 'communson-e' distinction between speech proposing a communical transaction, which occurs in an area straditionally subject to government regulation, and other varieties of speech." Obva-16, v. Oloo State Bur Assa., 436 V. S. 447, 455-456 (1978); see Bures v. State Bur of Arczona, supra at 381; see also Jackson & Joffens, Commercial Speech: Economic Due Process and the First Amendment 65 Va. L. Rev. 1, 38-39 (1979). The Construction therefore areads a lesser protection to commercial speech. (Sam to other constitutionally guaranteed expression and of the governmental interests served by its regulation.

The First Amendment's concern for connected speech is based on the informational function of advertising. See First Authorn Bank of Buston v. Bellutti 435 U.S. 765-783 (1978). Consequently, there cay be no constitutional objection to the suppression of communical passages that do not accurately

Ohrelek,

inform the public about lawful activity. The government may law forms of communication more filely to decrive the public than to inform it. Fractionary, Rogers, 440 U.S. 1, 13, 45–46 (1979). Chiralic v. Ohio State Bar Assn., 436 U.S., at 464–465, or commercial speech related to allegal activity, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973).

If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression cannot survive unless the method of regulation is designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two crateria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, the State may not adopt a particular regulation if the governmental interest could be served as well by a more builted restriction on commercial speech

Under the first criterion, the Court has declined to uphold togulations that only indirectly advance the state interest involves. In both Bates and Virginia Board of Pharmacy, the Court concluded that an advertising has could not be

imposed to protect the othiral or performance standards of a profession. The Court noted in Virginia Board of Pharmony that "[1] he advertisting box does not directly affect professional standards one way or the other." 425 U.S., at 769. In Bates, the Court overtimed an advertising probibilition that was designed to protect the "quality" of a lawyer's work. "Restraints on advertising are an ineffective way of deterring shouldy work." 433 U.S., at 378.

The second criterion recognizes that the Fust Amendment mandates that speech restrictions to "narrowly drawn." In re-Primus, 436 U. S. 412, 438 (1978). The regulatory technique may extend only as far as the interest it serves. The State rannot regulate speech that poses no danger to the asserted state interest, see First National Bank of Boston v. Bellotti, supra, 435 U. S. at 794-795, nor can it completely suppress reformation when carrower restrictions on expression would serve its interest as well. For example, in Butter the Court explicitly that not "forcelose the possibility that some!

I be Librard' Associates a Translep of Whitephore, supra we abserved that there was no definite remove an between the rows, highly goal of integrated handing and its famous the use of "For Sale" signs in front of houses. 431 U.S., at 95-96.

^{*}This analysis should be distinguished from the troverbreadth" does the . The latter theory persons the invalidation of regulations on First Ameralment grounds even when the Erigant challenging the regulation has concern in no constitutionally protected activity "E. a. Know v. New York 340 U.S. 290 (1952). The overtireadth destrine derives from the recognition that encorrectionated perfection of expression may deterprete ted across by pattics and occur, the court and thereby example judicial nation. Headed to v. Olimbourg. (13 U.S. 601, 612-613 42953) - see Note The First Ameralment Overbre, 2th Doetgine S3 Hare I. Rev 844, 853 858 (1950). The restricted as less likely where the expression is linked to be connected in cell-being and the reform is not easily described by novertice if regulation." Bathery, State the of Advisors 155 J. F. 1984.

To this case, the Commission's gradelition sets directly agency, the promotivally activities of Control Hudson Consequently, overbreadth story six is not relevant Leig.

linited supplementation, by way of warning or disclainer or the like, might be required in promotional materials. 433 U. S., at 384. See Virginia State Board of Pharmacy, suppa. 425 U. S. at 773. And in Caquee, Population Services, International, 431 U. S. 678, 701 702 (1977), we held that the State's "arguments do not justify the total suppression of advertising concerning contraceptives." This holding left open the possibility that the State could implement more emetally drawn restrictions. See 51. at 712 (Powers, J., concerning in the judgment); id., at 716-717 (Shevers, J., concerning).

In commercial speech mases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment, a For commercial speech to come within that provision, it at least most concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both impriries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

111

We now apply this four-step analysis for commercial speech to the Commission's arguments in support of its ban on promotional advertising.

A

The Commission does not claim that the expression at issue either is ingregate or relates to unlawful activity. Yet



The review with special care regulations that entirely suppress conmercial special in order to pursue a policy correlated to the epidicy of the expression itself. In these eigenvaluess, in but on speech could some time, pursue view the underlying governmental policy. See Virgiolo State Board of Photogray super, 425 U.S. et 780, v. 8 (Surveyer, 4), conversing to Indical, in recent years this Court has not approach a blanket bar an commercial speech under the expression itself was those in some very, other because it was deceptive or related to tollywich activity.

the New York Court of Appeals questioned whether Central Hudson's advertising is protected commercial speech. Because appellant holds a monopoly over the sale of electricity in its service area, the state court suggested that the Commission's order restricts no commercial speech of any worth. The court stated that advertising in a "moneouspetitive market" could not improve the decisionmaking of consumers. 47 N Y, 2d. at 110; 390 N. E. 2d. at 757. The court saw no constitutional problem with barring commercial speech that it viewed as conveying little useful information.

This reasoning fails short of establishing that appellant's advertising is not commercial speech protected by the First Amendment. Monopoly over the supply of a product provides no protection from competition with substitutes for that product. Electric utilities compete with suppliers of fact oil and natural gas in several markets, such as those for home heating and bedustrial power. This Court noted the existence of interfact competition 45 years ago, see West Ohio Gas Co. v. Public Utilities Commin. 294 U.S. 63, 72 (1936). Each energy source continues to offer peculiar mivantages and disadvantages that may influence massumer choice. For consumers in those competitive markets, advertising by utilities is just as valuable as advertising by unregulated figures.

Even in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Autodiment. The New York court's argument appears to assume that the providers of a monopoly service or product are willing to pay for wholly ineffective advertising. Must businesses—even regulated manopolies—are unlikely to underwrite pro-

Several entrager of specific decisions have modered enterprises subject to extensive state tegrilation. E. g., Friedman V. Ragers, 440 U. S. 1, 4-5 (2020) (ephracticity). Bates v. deigona State Rev. 433 U. S. 350 (1977) (however); Virginia State Rei, of Pharmacy V. Virginia College Consumer County June 425 U. S. 748, 759-752 (1976) (phagmansts).

motional advertising that is of no interest or use to emsurees, backed, a monopoly enterprise legitimately may wish to inform the public that it has developed new services or terms of thing business. A consumer may need information to aid his decision whether or not to use the monopoly service at all, or how much of the service he should purchase. In the absence of factors that would distort the decision to advertise, we may assume that the willinguess of a business to promote its products reflects a belief that consumers are interested in the advertising. Since no such extraordinary conditions have been identified in this case, appellant's menopoly position does not after the First Amendment's protection for its commercial speech.

ľ

The Commission offers two state interests as justifications for the ban on promotional advertising. The first concerns energy coaservation. Any increase in demand for electricity—during peak or off-peak periods—means greater consumption of energy. The Commission argues, and the New York court agreed that the State's interest in conserving energy is sufficient to support suppression of advertising designed to increase consumption of electricity. In view of our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation. Plainly, therefore, the state interest asserted is substantial.

The Commission also argues that promotional advertising will aggravate inequities caused by the failure to base the utility's rates on marginal cost. The utilities argued to the Commission that if they could promote the use of electricity

There may be a greater pacinity for a utility to advertise if in caps not prenoticial expenses in determining its take of rotatic sather than pure three costs no salely to slogelylders. That prictice, bewever, hardly deterts the economic decision algebra to advertise. Furgulated becomes pass on promotional costs to consumers and this Court expensely approved the practice for utilities in Blest Oldo Gas Co. v. Public Utilities Courtin, 294-17-8, 63, 72 (1935).

in periods of low demand, they would improve their utilization of generating capacity. The Commission responded that promotion of off-peak consumption also would increase consumption during peak periods. If peak demand were to rise, the absence of marginal cost rates would mean that the rates charged for the additional power would not reflect the true costs of expanding production. Instead, the extra costs would be borne by all consumers through higher overall rates. Without promotional advertising, the Commission stated, this inequitable turn of events would be less likely to occur. The choice aroung rate structures involves difficult and important questions of economic supply and distributional fairness. The State's concern that rates be fair and efficient represents a clear and substabilial governmental interest.

Ċ

Next, we focus on the relationship between the State's interests and the advertising ban. Under this criterion, the Commission's landship concern over the equity and efficiency of appellant's rates does not provide a constitutionally adequate reason for restricting protected speech. The link between the advertising prohibition and appellant's rate structure is, at most, tengons. The impact of promotional advertising on the equity of appellant's rates is highly speculative. Advertising to increase off-peak usage would have to increase peak usage, while other factors that directly affect the fairness and efficiency of appellant's rates remained constant. Such conditional and remote eventualities simply cannot justify silencing appellant's promotional advertising.

In contrast, the State's interest in energy conservation is directly advanced by the Commission order at assue here. There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would

¹³ See W. Jon S. Regalated Jushist firs 191-287 (2d ed. 1976).

70-505---OPINION

CENTRAL HUDSON GAS & PUBLIC SERVICE COMMUN. 11

Increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.

 \mathbf{D}

We come finally to the critical inquiry in this case: whether the Commission's complete suppression of speech ardinarily protected by the First Amendment is no more extensive than necessary to further the State's interest in energy conservation. The Commission's order reaches all promotional advertising, regardless of the impact of the touted service on overall energy use. But the energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use. In addition, no showing has been made that a more limited restriction on the context of promotional advertising would not serve adequately the State's interests.

Appellant inserts that but for the ban, it would advertise products and services that use energy efficiently. These include the "heat pump," which both parties acknowledge to be a pojor improvement in electric heating, and the use of electric heat as a "back-up" to solar and other heat sources. Although the Commission has questioned the efficiency of electric heating before this Court, neither the Commission's Policy Statement nor its order denying reheating made findings on this issue. In the absence of authoritative findings to the contrary, we must credit as within the realm of possibility the claim that electric heat can be an efficient alternative in some circumstances.

The Commission's order prevents and the from promoting electric services that would reflace energy use by diverting demand from less efficient sources, or that would ensume roughly the same amount of energy as do alternative sources. In mid-er situation would the atility's advertising endanger conservation or mish ad the paidle.

special of the way impairs the State's interest in energy equivariant the Commission's order violates the First and

The Commission's order that reppeases appeared by Central Hardson that would

12/ Bacane Control Hudson to chellenges restrictions on its own expression, we have no corresion to consider the relevance for commercial speach of overbroadth theory. Thus

appellant

晃

79-565-- OPINION

12 CENTRAL HODSON GAS 6, PUBLIC SERVICE COMMYN

Fourtrenth Amendraents and must be invalidated. See First Naturnal Bank of Boston v. Belotti, supra.

The Commission also has not demonstrated that its interest in conservation cannot be protected adequately by more lines ited regulation of appellant's commercial expression. To further its policy of conservation, the Commission could attempt to restrict the format and content of Central Hadson's advertising. It might, for example, require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable furnite. Cf. Haushof v. FCC.——U. S. App. D. C. ——, 405 F. 2d 1082 (1968), cert. depent, 396 F. S. 842 (1969).**—In the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising.**

11/

Our decision today in no way disparages the national interest in energy conservation. We accept without reservation the argument that conservation, as well as the development of alternativenergy sources, is an imporative national goal. Ad-

Is hardow of our conclusion that the Commission's powertising paires violates the First and Frontierath Absolutions see do not rock to close that the agency's error also violated the Equal Protection Commission of the Figure 505 Americans and right in is both a controlled views.

appellantis

^{**}The Countries in also might consider a system of proviowing adversalising a top-signs to metric that they will not defeat conservation policy to be instituted such a program for approving "information I" advertising each to the Policy Statement challenged in this case. See p. 2. Represent that the Policy Statement challenged in this case. See p. 2. Represent the Policy of that commercial speeds is some a storicy brand of expression that tradition I produced setting the trade they not apply to it. Uniquent State Remain of Philadenia, v. Virginal Operator Commercial Englands for country 325 t. S. or 771, n. 24. And it orbits to set for each regulation, such as obsteady we have templified that a pro-proving arrangement can proving accommendational anisotropic tradesics polygon's provident sufferences. For domain v. Harybood 330 U.S. 51 (1995).

10.598--OPINION

CENTRAL HUDSON GAS A PUBLIC SERVICE COMMON 13

ministrative bodies empowered to regulate electric utilities have the authority—and indeed the duty—to take appropriate action to further this goal. When, however such action involves the suppression of speech, the First and Fourteenth Amendments require that the restriction be no more extensive than is more sarry to serve the state interest. In this case, the record before as fails to show that the total ban on promotional advertising meets this requirement.



Accordingly, the judgment of the New York Court of Appeals is

Reversed.

¹⁵ The Commission order at is a chere was not precollected in respense to the energy recynistration. Although the advertising important the despense prompted by explicit fine, shortage in 1973, the Coppersion rankes profug in that are energy, a power as: We denote on the the prover-that the State orgin has over other materials. See State v. Qualitational Graph Eliciteis, Co., 500–32, 22, 237, 865–866 (Okla, 1977).

_2,} 5-}6-80At The Chief Justice
Ht. Justice Browner
Ht. Justice Stewart
Ht. Justice Stewart
Ht. Justice Stewart
Ht. Justice History

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70~365

Central Hudson Gas & Electric Corporation, Appellant,

Public Service Commission of New York,

On Appeal from the Court of Appeals of New York.

(May —, 1980]

Mr. Justice Powers delivered the opinion of the Court.

This case presents the question whether a regulation of the Public Service Commission of the State of New York variates the First and Fourteenth Assendments because it completely bans promotional advertising by an electrical utility.

ſ

In December 1973, the Commission, appelled here, ordered electric utilities in New York State to pease all infvertising that "promot[es] the use of electricity." App. to Juris, St., at 31a. The order was based on the Commission's finding that "the interconnected utility system at New York State does not have sufficient find stocks of sources of supply to continue fornishing all austomez demands for the 1973-1974 winter." Id., at 26a.

Three years later, when the fact shortage had eased, the Commission requested comments from the public on its proposal to continue the ban on promotional advertising. Control Harison Gas & Electric Corporation, the appellant in this case, opposed the ban on First Amendment grounds. App. A10. After reviewing the public connectes, the Commission extended the prohibition in a Policy Statement issued on February 25, 1977.

₱9-565—0PINION

2 CENTRAL HUDSON GAS 1. PUBLIC SERVICE COMMIN.

The Conneission rejected the argument that utilities should advertise to develop consumption during periods when demand for electricity is low. The agency acknowledges that higher consumption is "off-peak" periods would have "beneficial side effects" in permitting more efficient use of generating capacity of existing power plants. App. to Juris, St. at 37a. But the Policy Statement declared all promutional advertising contrary to the national policy of conserving energy. Since oil dealers are not under the Commission's jurisdiction and thus remain free to advertise, the agency recognized that the ban can achieve only "pieceoical conservationism." Still, the Conneission said that its action was likely to "result in some dampening of unnecessary growth" in energy consumption. Id., at 37a.

The Connelssion's order explicitly permitted "informational" advertising designed to expourage "rhifts of consumption" from peak demand times to periods of low electricity demand. *Hold.* (emphasis in original). Informational advertising would not seek to increase aggregate consumption, but would make a leveling of demand throughout any given 24-bour period. The agency offered to review "specific proposals by the companies for specifically described [advertising] programs that meet these criteria." *Id.*, at 38a.

When it rejected requests for rehearing on the Policy Statement, the Commission supplemented its rationale for the advertisting Lam. The agency observed that additional electricity probably would be more expensive to produce than existing output. Because electricity rates in New York were not ther based on marginal cost," the Commission feared that additional power would be priced below the actual cost of generation. This adixional electricity would be subsidized by all consumers through generally higher rates. Id., at 57a-58a,

³ "Marginal cost" has been defined as the "extra or incremental cost of producing an extra unit of output". P. Sanandson, Pronounces 193 (1954, ed., 1976) (confluence in original).

CENTRAL HUDSON GAS & PUBLIC SERVICE COMMUN

The state agency also thought that promotional advertising would give "misleading signals" to the public by appearing to corourage energy consumption at a time when conservation is needed. Id., at 59a.

Appullant challenged the order in state court, arguing that the Commission had restrained commercial speech in violation of the First and Fourteenth Amendments.' The Commission's order was upheld by the trial court and at the intermediate appellate level.' The New York Court of Appeals affirmed. It found little value to advertising in "the noncompetitive market in which electric corporations operate," 47 N. Y. 24 94 110, 300 N. E. 2d 749, 757 (1979). Since consumers "have no choice regarding the source of their electele power." the court denied that "promotional advertising of electricity might contribute to acciety's interest in informed and reliable economic decision-naking." Ibid. The court also observed that by encouraging consumption, promotional advertising would only exacerbate the current energy situation. Id., at 110, 390 N. E. 2d, at 758. The court concluded that the governmental interest in the prohibition natweighed the limited constitutional value of the commercial speech at issue. We noted probable jurisdiction, -- U.S. - (1979), and now terpress.

ΪĪ

The Commission's order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience. The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. Varyinia State Board of Pharmacy v. Virginia

^{*}Control Hudson also alloged that the Commission's order reaches beyond the agency's statutory powers. This argument was rejected by the New York Court of Appends 47 N. Y. 2d 94, 102-104; 390 N. E. 2d 748, 752-754 (1979), and was not argued to this Coupt.

^{*63} App. D.v. 2d 364 (1978) (N. Y. Sap. Ct. Appellare Division of State Sourceae Court); App. to June. 8-4, or 224 (Feb. 17, 1978).

79-515- OPENION

CENTRAL HUDSON GAS & PUBLIC SERVICE COMM'N

Citizens Consumer Council, Inc., 425 U. S. 748, 761-762 (1976) Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the semetal interest in the fullest possible dissemination of calormatics. In applying the First Amendment to this area. we have reported the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "Tipleople will perceive their own best interests if only they are well enough informed and , . . the best means to that end is to open the channels of communication, rather than to close them. . . . " Id., at 770; see Librark Asseciotes, Inc. v. Township of Willingboro, 431 U. S. S5, 92 (1977). Even when advertising communicates only on incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all. Butes v. State Bur of Arizona, 433 U.S. 350, 374 (1977).

Nevertheless, our decisions have recognized "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally schied to government regulation and other varieties of speech." Obestlik v. Ohio State Bur. Assn., 436 U. S. 447, 455–456 (1978); see Bures v. State Bur. of Arizona, supra at 381; see also Jackson's Jetimes, Commercial Speech. Resonante Due Process and the First Americanem, 65 Va. L. Rev. 1, 38-30 (1979). The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. Id., at 456, 457. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.

RENUMBER

SUBSEQUENT

FOOTNOTES

The First Amondment's concern for commercial speech is based on the adjoinant and function of advertising. See First Nutronal Back of Haston v. Helbori, 435 U.S. 765-783 (1978). Consequently, there can be no constitutional charetion to the suppression of concerred time-sages that do not accurately

The opinion in Ohnelik added, "To require a parity of constitutional protection for commercial and noncommercial speach alike well musto distribution, simply by a leveling process, of the force of the Amendment's quarante with respect to the latter.

Amendment's quarante with respect to the latter.

June of speech. Obrahd . Ohio State Bar, 456 U.S. 447, 456 (478).

inform the public about lowful activity. The government may have forms of communication more likely to descive the public than to inform it. Friedman v. Rogers, 440 U. S. 1, 13, 15-16 (1979); Obrabk v. Obio State Bar Asso., 435 U. S., at 464-465, or communical speech related to idegal activity, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U. S. 376 388 (1973)

If the communication is neither misleading nor related to unlawful activity) the government's power is more circumscribed. The State must assert a substantial interest to be addreved by restrictions on comparcial speech. Moreover, the regulatory technique must be no proportion to that interest of The limitation on expression connot survive unless the method of regulation is designed carefully to achieve the State's goal. Complement with this requirement may be recasured by two triteria. First, the restriction must directly arivance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second the State may not adopt a particular regulation if the governmental interest could be served as well by a more limited restriction on connected speech.

Under the first criterion, the Court has declined to uphold tegedations that only indirectly advance the state interest involved. In both Bates and Virginia Board of Pharmacy, the Court concluded that an advertising ban could not be

In an stronger contexts, the First Amendment prohibits regulation besed on the context of the receives go - Connollated Edison Co. s. Public Secrete Common of No. Viol. No. 79-911 (+), 16860 ship up and 6-9. Two features of semantical specific prior regulation of its context kind, connected to pulkers have extensive knowledge of both the market and their product. Thus, then are well-semanted to evaluate the semantic of their measures and the Lowfairest of the underlying represent Bates v. Since Box of Automa 433 U.S., at 381 (1977). In addition, commercial specific the affection of recommon self-interest is a particularly hardy breed of expression that is not "particularly strought by to being crushed by not thread regulation." Third.

imposed to protect the ethical or performance standards of a profession. The Coast noted in Virginia Board of Phormou y that "fifthe advertisting lane does not directly affect professional standards one way or the other." 425 U.S. at 769. In Bales, the Court overtained an advertising prohibition that was designed in protect the "quality" of a lawyer's work. "Restraints on advertising . . . are an ineffective way of deterring shootly work." 433 U.S. at 3785

The second criterion recognizes that the First Amendment mandates that speech restrictions be "narrowly drawn." In m Primus, 436 U.S. 412, 438 (1978). The regulatory technique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest, see First National Bank of Boston v. Bellotti, supra, 435 U.S. at 724-795, our can it completely suppress information when parrower restrictions on expression would serve its interest as well. For example, in Bates the Court explicitly did not "fercelose the possibility that some

In this case, the Country-way probabilion acts descrip against the promotional activities of Central Hudson. Consequently, overbrealth analysis a por relevant here.

⁶ Am Lamonth Astociates v. Township of Williambons, source, we observed that there was no defined connection between the recessing good of integrated bensing and its homeon the use of "For Sale" signs in front of homeon 131 till Signs 195.08.

This analysis chaotid for disting if 3nd from the floredist of the distribution. The latter theory parants the involid four of regulations on First Amendment grounds even other the litizant challenging the regulation has engaged in an constitutionally protected a tivar. E. g., Kanz v., Nov. Vol. 330 C. S. 200 (1954). The overloss of distribution derives from the transposition that most strational restriction of exclusion may dear protected speech by patters (a) before the court and therefore escape judicial region. Recorded v. Oktoberg. 413 U. S. 601, 612-613 (1973); see Note The Ford Amendation Overloss of Decrue 83 Hard 1, Rec. 844 833-838 (1970). This restriction is less incole where the expression is larked to the outstood well-being" and therefore is not useful determed by "overloss regulation." Hours v. State Hard of Amenda to the outstood. "Hours v. State Hard of Amenda to the S., at 381

limited supplementation, by way of warning or disclaimer or the like, neight be required in promotional naterials. 433 U. S., at 384. See Virginia State Board of Pharmacy, supra, 425 U. S., at 773. Assum Caffel Pharmacy, supra, 425 U. S., at 773. Assum Caffel Pharmacy, supra, 426 U. S. at 773. Assum Caffel (1977), we held that the State's farguments do not justify the total suppression of advectising concerning contraceptives.' This holding left open the possibility that the State could implement more carefully drawn restrictions. See id., at 712 (Powert, J., concurring in part and concentring in the judgment); id., at 716-717 (Stevens, J., concurring).

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both lequiries yield positive answers, we must determine whether the regulation directly mixances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

111

We now apply this foar-step analysis for commercial speech to the Commission's arguments in support of its ban on promotional advertising.

A

The Commission does not elaim that the expression at issue either is indecentate or solutes to unlawfull activity. Yet

We seeked with special rate significant throughout an index suppress come partial special in order to purses a policy unrelated to the quality of the expression itself. In those or constructs a later on special entitle settern from public view the underlying governmental policy. See View quality State Rancel of Photocoma, vapor, 425 (i) S. at 788, c. 8. (Successor, J., cost atting). Indeed, in possitive the Court less not approach a labeled bar or commerced special the expression (to if was flawed in some way, cutter foodness it was disciplined at relaxed to unlowful activity.

8 CENTRAL HUDSON GAS 1 PUBLIC SERVICE COMM'N

the New York Court of Appeals questioned whether Central Hudson's advertising is protected commercial speech. Because appellant holds a monopoly over the sale of electricity in its source area, the state court suggested that the Commission's under restricts no commercial speech of any worth. The court stated that advertising in a "noncompetitive market" could not improve the decisionmaking of consumers. 47 N. Y. 20 of 410; 390 N. E. 2d. at 757. The court saw no constitutional problem with barring commercial speech that at viewed as conveying little useful information.

This reasoning falls short of establishing that appellant's advectising is not commercial speech protected by the First Amendment. Monopoly over the supply of a product provides no protection from competition with substitutes for that product. Electric utilities compete with suppliers of feel all and natural gas in several markets such as those for home hearing and industrial power. This Court noted the existence of interfeel competition 45 years ago, see West Ohio Gus Co. v. Public Ottilities Commin. 294 U.S. 63, 72 (1935). Each energy source continues to offer peculiar advantages and disadvantages that may influence consumer choice. For consumers in those competitive markets, advertising by utilities is just as valuable as advertising by upregulated firms?

Even in monopoly markets, the suppression of advertising technos the information available for consumerial existency and thereby defeats the purpose of the First Amendment. The New York court's argument appears to assume that the providers of a monopoly service or product are willing to pay for wholly ineffective advertising. Most businesses—even regulated monopolics—are available to anderwrite pro-

^{**}PSeveral constructed speech decision, have jovalved entraption subject to exaction state regulation. E. g., Friedman v. Rugers, 440 U.S. 1, 4-5 (1970). Applying restal: Rates v. Astrona State Ray, 433 U.S. (2004) (Conserts): Varying State Roll of Pharmacy v. Virginia Official Consumet Connect Inc., 425 U.S. 748, 750–752 (1970). (ph. rams ists).

CENTRAL EUDSON GAS & PUBLIC SERVICE COMMIN

motional advertising that is of an interest or use to consumers. Indeed, a monopoly caterprise legitimately may wish to inform the public that it has developed new services or terms of doing business. A consumer may need information to aid his decision whether or not to use the monopoly service at all, or how much of the service be should purchase. In the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising Ale Since no such extraordinary conditions have been identified in this case, appellant's manopuly position does not after the First Amendment's protection for its commercial speech.

В

The Commission offers two state interests as justifications for the ban on promotional advertising. The first conterns energy conservation. Any increase in demand for electricity—during peak or off-peak periods—means greater consumption of energy. The Commission argues, and the New York court agreed, that the State's interest in conserving energy is sufficient to support suppression of advertising designed to increase consumption of electricity. In view of our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation. Plainly, therefore, the state interest asserted is substantial.

The Commission also argues that promotional advertising will aggravate inequities caused by the failure to base the utility's rates on marginal cost. The utilities argued to the Commission that if they could promote the use of electricity

^{**}These may be a greater investige for a orday to advertise at a can use promotecual repeats in determining its case of retain, rather than puss those roots on salely to shareholders. That practice, however, had be distorts the communications on whether to advertise. Untegrabled because a gass on prematicual costs to consumers, and this Court expression approved the practice for ordains in West Ohio Goy Co. v. Public Utilities Commin. 224 O. S. 63, 72 (1995).

10 CUNTRAL BUDSON GAS # PUBLIC SURVICE COMMUN.

in periods of low demand, they would improve their utilization of generating capacity. The Commission responded that promotion of off-peak consumption also would increase consumption during peak periods. If peak demand were to rise, the absence of marginal cost rates would mean that the rates charged for the additional power would not reflect the true costs of expanding production. Instead, the extra costs would be borne by all consumers through higher overall rates. Without promotional advertising, the Commission stated, this inequitable turn of events would be less blody to occur. The choice among rate smoothers involves difficult and important questions of economic supply and distributional fairness.¹⁰ The State's enecond that rates be fair and efficient represents a clear and substantial governmental interest.

O

Next, we focus on the relationship between the State's interests and the advertising has. Under this endeated the Commission's landable concern over the equity and efficiency of appellant's rates ones put provide a constitutionally adequate reason for restricting protected speech. The link between the advertising probabilition and appellant's rate structure is, at most, tenuous. The impact of promptimal advertising on the equity of appellant's rates is highly speculative. Advertising to increase off-peak usage would have to increase peak usage, while other factors that directly affect the fairness and efficiency of appellant's rates remained constant. Such conditional and remote eventualities simply cannot justify silencing appellant's procedural advertising.

In contrast, the State's interest in energy conservation is directly advanced by the Commission order at issue here, There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban codess it believed that promotion would

⁴⁴ P See W. Jones, Regulated Industries 191-287 (2d ed. 1976).

increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.

D

We come finally to the critical impairy in this case: whether the Commission's complete suppression of speech ordinarily protected by the First Amerdment is no more extensive than necessary to further the State's interest in energy conservation. The Commission's order reaches all promotional advertising, regardless of the impact of the toxted service on overall energy use. But the energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use. In addition, no showing has been made that a more braited restriction on the content of promotional advertising would not serve adequately the State's interests

Appellant insists that but for the ban, it would indirectise products and services that use energy efficiently. These include the "heat pump," which both parties acknowledge to be a major improvement in electric heating, and the use of electric heat as a "back-up" to solar and other heat sources. Although the Commission has questioned the efficiency of electric heating before this Court, neither the Commission's Policy Statement nor its order decaying reagaing made findings on this issue. In the absence of authoritative findings to the contrary, we must credit as within the reals; of possibility the claim that electric heat can be an efficient alternative in some circumstances.

The Commission's order prevents positioned from promoting electric services that result reduce energy use by diverting demand from less efficient sources or that would consume roughly the same around of energy as do alternative sources. In neither situation would the atility's advertising endanger conservation or mislead the public. By suppressing some speech that in no way impures the State's interest in energy conservation, the Commission's order violates the Fust and

appellant

12 CENTRAL HUDSON GAS & PERLIC SERVICE COMM'N

Foretreenth Amendments and must be invalidated. See Prest | Notesian Bunk of Bustion's Bulletti, supra.

The Commission also has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression. To further its policy of conservation, the Commission could attempt to restrict the format and context of Central Hudson's advertising. It might, for example, require that the judgertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the forescrable future. Cf. Banzhaj v. FCC, —— U.S. App. D. C. ——, 405 F. 2d 1082 (1968), cert. denich 396 U.S. 842 (1969) A 17 In the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising A 18

IV

Our decision today in no way disparages the national actoress in energy conservation. We accept without reservation the argument that conservation, as well as the development of alternate energy sources, is an imperative national goal. Ad-

The Commission also might consider of system of previouing advertising compagns to insure that they will not defeat conservation golds. At his metabolism in a program for approxime furthermore of a department of the case. See p. 2, again we have observed that compact of speech is such a stardy hand of expression had evaluated at practice of practice of the more more had apply to it brighten State Board of Phaemaca C. Fireness Clarens Consumer Council for, rapid, \$25 till S. 2.771, b. 24. And in other areas of speech regulation, such as closerably, we be recognized that a preserved against near that purpose constitution I near that it is closerable prosecuted subgrade. Excellently, Macadood, 380 till S. 51 (1968)

In view of our confedence that the Commission's advertising pulley violates the Forst and Functionally Amendments, we do not reach the Torst and Functionally artists used very all the fixed I Propose on Types all the Fouriesceth Amendment, and they at a South overlymant and vigue.

appellants

3

79-565 OPINION

CENTRAL HUDSON GAS at PUBLIC SERVICE COMMUN. 13

ministrative hodies empowered to regulate electric utilities have the authority—and indeed the duty—to take appropriate action to further this goal. When, however such action involves the suppression of speech, the First and Fourteenth Amendments require that the restriction be no more extensive that is necessary to serve the state interest. In this case, the record before as fails to show that the total ban on promotional advertising meets this requirement of

Accordingly, the judgment of the New York Court of Appeals is

Reversed,



PTLe Commission order at issue here was not practing acted in terponse to an emergency situation. Although the advertising both anticity was producted by critical fiel dust, go at 1973, the Commission makes no character at example to every teaching. We do not consider the powers that the State aught have over utility advertising in emergency distributions. See Ringer v. Otherwise Gar & Elector Unit 534-P. 2d 887, 895-896 (Okla, 1977).

4,11,12

To: The Chief Bustice 🕳 Mr. Justice Brennan Mr. Justice Stewart Mr. Jestina "Fite Mr. Junting D rehalf Mr. Justine 8) անգացո 🖳 Justina Romanian

Foot Notes Ranomber Ett. Justice Stevens

Prop: Mr. Justice Powell

 $5 - 22 \cdot 80$

....

Circulated: _____ Rectroulated: MAY 22 1980

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-565

Central Hudson Gas & Electric Corporation, Appellant,

Public Service Commission of New York.

On Appeal from the Court of Appeals of New York,

[May -, 1980]

Mr. Justice Powert delivered the opinion of the Court.

This case presents the question whether a regulation of the Public Service Commission of the State of New York violates the First and Fourteenth Americanents because it completely bans promotional advertising by an electrical atjuty.

In December 1973, the Commission, appelled here, ordered electric utilities in New York State to cease all advertising that "promot[es] the use of electricity." App. to Juris. St., at 31a. The order was based on the Commission's finding that "the interconnected utility system in New York State does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1978-1974 winter." Id., at 26a.

Three years later, when the fuel shortage had eased, the Commission requested comments from the public on its proposal to continue the ban on promotional advertising. Central Hudson Gas & Electric Corporation, the appellant in this case, opposed the ban on First Amendment grounds. App. A10. After reviewing the public comments, the Commission extended the prohibition in a Policy Statement issued on February 25, 1977.

CENTRAL HUDSON GAS v. PUBLIC SERVICE COMMIN

The Commission rejected the argument that utilities should advertise to develop consumption during periods when demand for electricity is low. The agency acknowledged that higher consumption in "off-peak" periods would have "beneficial side effects" in permitting more efficient use of generating capacity of existing power plants. App. to Juris, St., at 37a. But the Policy Statement declared all promotional advertising contrary to the national policy of conserving energy. Since oil dealers are not under the Commission's jurisdiction and thus remain free to advertise, the agency recognized that the bancan achieve only "piecemeal conservationism." Still, the Commission said that its action was likely to "result in some denipening of unaccessary growth" in energy consumption. Id., at 37a.

The Cotomission's order explicitly permitted "informstional" advertising designed to encourage "shifts of consumption" from peak demand times to periods of low electricity demand. Ibid. (emphasis in orginal). Informational advertising would not seek to increase aggregate consumption, but would invite a leveling of demand throughout any given 24hour period. The agency offered to review "specific proposals by the companies for specifically described [advertising] programs that meet these criteria." Id., at 38a.

When it rejected requests for rehearing on the Policy Statement, the Commission supplemented its rationale for the advertisting ban. The agency observed that additional electricity probably would be more expensive to produce than existing output. Because electricity rates in New York were not then based on marginal cost. The Commission feared that additional power would be priced below the actual cost of generation. This aditional electricity would be subsidized by all consumers through generally higher rates. Id., at 57a-58a.

¹ "Marginal cost" has been defined as the "extra or incremental cost of producing an extra unit of output." P. Samaelson, Economics 463 (10th) ed. 1976) (complosis in original).

CENTRAL HUDSON GAS to PUBLIC SERVICE COMMON

The state agency also thought that promotional advertising would give "misleading signals" to the public by appearing to encourage energy consumption at a time when conservation is needed. Id., at 59a,

Appellant challenged the order in state court, arguing that the Commission had restrained commercial speech in violation of the First and Fourteenth Amendments. The Commission's order was uphebl by the trial court and at the intermediate appellate level.* The New York Court of Appeals affirmed. It found little value to advertising in "the noncompetitive market in which electric corporations operate." 47 N. Y. 2d 94, 110, 390 N. E. 2d 749, 757 (1979). Since consumers "have no thoice regarding the source of their clostrie power." the court denied that "promotional advertising of electricity might contribute to society's interest in finformed and reliable economic decisionmaking." Had, The court also observed that by encouraging consumption, promotional advertising would only exacerbate the current energy situation. Id., at 110, 390 N. E. 2d. at 758. The court concluded that the governmental interest in the prohibition outweighed the limited constitutional value of the commercial speech at issay, We noted probable jurisdiction, --- U.S. --- (1979), and now married.

ΤI

The Commission's order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience. The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. Virginia State Board of Pharmacy v. Virginia

³ Control Budson also alloged that the Commission's order reaches beyond the agency's statutory powers. This argument was rejected by the New York Court of Appenda 47 N. Y. 2d 91, 102-104; 396 N. E. 2d 749, 752-754 (1970), and was not argued to this Court.

^{*}B3 App. D.v. 2d 364 (1979) (N. Y. Sup. Ct. App-liste Division of State Supreme Coart); App. to Jutis. St., 2t 222 (Feb. 17, 1978).

4 CENTRAL HUDSON GAS v. PUBLIC SERVICE COMM'N

Citizens Consumer Council, Inc., 425 V. S. 748, 761-762 (1976). Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that governreent has complete power to suppress or regulate commercial speech. "[Pleople will perceive their own best interests if only they are well enough informed and . . . the best means to that end is to open the channels of communication, rather than to close them. . . ." Id., at 770; see Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 92 (1977). Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all. Bates v. State Bar of Arizona, 433 U.S. 350, **374** (1977).

Nevertheless, our decisions have recognized "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Ohrolik v. Ohio State Bar Assn.*, 436 U. S. 447, 455-456 (1978); see Bates v. State Bar of Arizona, supra, at 381; see also Jackson & Jeffries. Commercial Speech: Economic Dae Process and the First Amendment, 65 Va. L. Rev. t. 38-39 (1979). The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. Id., at 456, 457. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.

[&]quot;The epision in Ohmili which "To require a partic of constitutional protection for computered and nanocrapterial speech able could mean delation, simply by a leveling process of the force of the An endanger's quartantee with respect to the fatter kind of speech," Ohmili v. Ohlis State Rev. 436 (1), \$147, 456 (1978).

CENTRAL HUDSON GAS at PUBLIC SERVICE COMM'N

The First Amendment's concern for commercial speech is based on the informational function of advertising. See First National Bank of Boston v. Bellotti, 435 U. S. 765, 783 (1978). Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, Friedman v. Rogers, 440 U. S. 1, 13, 15-16 (1979); Ohralik v. Ohio State Bar Asson, 436 U. S., at 464-465, or commercial speech related to illegal activity, Pittsburgh Press Co. v. Pittsburgh Commin on Human Relations, 413 U. S. 376, 388 (1973).

If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression cannot survive unless the method of regulation is designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, the State may not adopt a particular regulation if the governmental interest could be served as well by a more limited restriction on commercial speech.

^{*} In most other contexts, the First Amendment probable regulation based on the content of the acrossing. Convolunted Edison Co. v. Public Section Country of New York, No. 79-134 (—, 1980) slip op., at 6-9. Two features of commercial specific permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and choir products. Thus, they are well-attented to evaluate the occuracy of their messages and the inoclohose of the uniforlying activity. Botte v. State Bar of Arizona, 433 U.S., at 384 (1977). In middition, commercial speech, the off-citing of communic self-interest, is a particularly bardy brend of expression that is not "particularly susceptible to being crushed by avertoned regulation." Ibud.

79-565-OPINION

6 CENTRAL HUDSON GAS n. FUBLIC SERVICE COMMUN.

Under the first criterion, the Court has declined to uphold regulations that only indirectly advance the state interest involved. In both Bates and Virginia Board of Phermacy, the Court concluded that an advertising han could not be imposed to protect the ethical or performance standards of a profession. The Court noted in Virginia Board of Pharmacy that "[t]he advertisting ban does not directly affect professional standards one way or the other." 425 U.S. at 769. In Bates, the Court overturned an advertising prohibition that was designed to protect the "quality" of a howyer's work. "Restraints on advertising . . . are an ineffective way of deterring shoddy work." 433 U.S. at 378."

The second criterion recognizes that the First Amendment mandates that speech restrictions be "narrowly drawn." In the Primus, 436 U.S. 412-438 (1978). The regulatory treh-cique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest, see First National Bank of Roston v. Bellotti, supra, 435 U.S., at 794-795, nor can it completely

All Lieuwerk Associations. Transitioned Walnufferer sugarance observed that there was no definite enumeration between the pseudobj's goal of integrated landing and its homeon the use of "For Sale" signs in front of houses $-430~\mathrm{U}_{\mathrm{c}}\mathrm{S}_{\mathrm{c}}$ at 95-96

Fifthe analysis should be distriptioned from the towerbroadth" dorstine. The latter theory permits the invalidation of regulations on First Amendment grounds even when the litigant challenging the regulation has engaged in an constitutionally protected activity. K. g., Klaur v., New York, 340-15, 8, 290 (1952). The overbreadth doctrine derives from the temperature that automatational restriction of expression may deterprotected speech by parties not before the court and thereby escape judicial review. Remarks & Oklahoma, 413-U. S. 502, 612-613 (1953); see Note, The First Amendment Openbreadth Doctrine, SS Harvi I. Rev. 834, 853-858 (1970). This restrains is used body where the expression is linked to "commercial well-being" and therefore is not easily descript by "inverbroad regulation." Bates v. State fier of Angewer 445-51. S. a 381.

In this case, the Commission's probabition airs directly against the protectional activities of Control Hudson. Consequently, overbreadth analysis is not relevant here...

suppress information when narrower restrictions on expression would serve its interest as well. For example, in Bates the Court explicitly did not "forcelose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required" in promotional materials, 433 U.S., at 384. See Virginia State Board of Pharmacy, supra, 425 U.S., at 773. And in Categor, Population Services, International, 431 U.S. 678, 701-702 (1977), we held that the State's "arguments do not justify the total suppression of advertising concerning contraceptives." This hubbling left open the possibility that the State could implement more carefully drawn restrictions. See Id., at 712 (Powell, J., concurring in part and concurring in the judgment); Id., at 716-717 (Stevens, J. concurring)."

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Ш

We now apply this four-step analysis for commercial speech to the Commission's arguments in support of its ban on promotional advertising.

We review with special care regulations that entirely suppress connected special in order to pursue a pulicy unselated to the quality of the expression likely. In those extrementates, a ban on specific and streen from public view the underlying governmental polary. See Parginia State Board of Pharmacy, supra, 425 G, S, at 780, n. S (Strawart, J., concurring). Indeed, as recent years this Court has not approved a blanket ban on examinated speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity.

79-585-OPINION

8 CENTRAL HUDSON GAS b. PUBLIC SERVICE COMM'N

A

The Commission does not claim that the expression at issue either is inaccurate or relates to unlawful activity. Yet the New York Court of Appeals questioned whether Central Hudson's advertising is protected commercial speech. Because appellant holds a monopoly over the sale of electricity in its service area, the state court suggested that the Commission's order restricts no commercial speech of any worth. The court stated that advertising in a "noncompetitive market" could not improve the decisionmaking of consumers. 47 N, Y, 2d, at 110; 390 N. E. 2d. at 757. The court saw no constitutional problem with barring commercial speech that it viewed as conveying little useful information.

This reasoning falls short of establishing that appellant's advertising is not commercial speech protected by the First Amendment. Monopoly over the supply of a product provides no protection from competition with substitutes for that product. Electric utilities compete with suppliers of fuel oil and natural gas in several markets, such as those for home heating and industrial power. This Court noted the existence of interfuel competition 45 years ego, see West Ohio Gas Co. v. Public Utilities Commin. 294 U.S. 63, 72 (1935). Each energy source continues to offer peculiar advantages and disadvantages that may influence consumer choice. For consumers in those competitive markets, advertising by utilities is just as valuable as advertising by unregulated firms.

Even in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Ameadment. The New York court's argument appears to assume that the

^{*} Sectod - Standere'al speech decreases have involved enterprises subject to extensive state regulation. E. q., Friedman v. Royers, 449 U.S. 1, 4-5 (1979) (optometriess): Bates v. Arisona State Bar, 430 U.S. 350 (1977) (howyers): Virginia State Bd. of Pharmacy v. Virginia Cutzona Consumer Council, Inc., 425 U.S. 748, 750-752 (1976) (pharmacists).

providers of a monopoly service or product are willing to pay for wholly meffective advertising. Most businesseseven regulated monopolies—are unlikely to underwrite promotional advertising that is of no interest or use to consumers. Indeed, a monopoly enterprise legitimately may wish to inform the public that it has developed new services or terms of doing business. A consumer may need information to aid his decision whether or not to use the monopoly service at all, or how much of the service he should purchase. In the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising." Since no such extradordinary conditions have been identified in this case, appellant's monopoly position does not after the First Amendment's protection for its commercial speech.

В

The Commission offers two state interests as justifications for the ban on promotional advertising. The first concerns energy conservation. Any increase in demand for electricity—during peak or off-peak periods - means greater consumption of energy. The Commission argues, and the New York court agreed, that the State's interest in conserving energy is sufficient to support suppression of advertising designed to increase consumption of electricity. In view of our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation. Plainly, therefore, the state interest asserted is substantial.

The Commission also argues that promotional advertising

PriThere may be a greater incentive for a mility to advertise if it can use promotional expenses in determining its rate of settom, rather than pass those costs on solely to shareholders. That practice, however, hardly distorts the economic decision whether to advertise. Onergulated businesses pass on promotional costs to consumers, and this Court expressly approved the practice for addition in West Okio Gas Co. v. Public Utilities Commun, 294 U. S. 63, 72 (1935).

will aggravate inequities caused by the failure to base the utility's rates on marginal cost. The utilities argued to the Commission that if they could promote the use of electricity in periods of low demand, they would improve their utilization of generating capacity. The Commission responded that promotion of off-peak consumption also would increase consumption during peak periods. If peak demand were to rise, the absence of marginal cost rates would mean that the rates charged for the additional power would not reflect the true costs of expanding production. Instead, the extra costs would he borne by all consumers through higher overall rates. Without promotional advertising, the Commission stated, this inequitable turn of events would be less likely to occur. The choice among rate structures involves difficult and important questions of economic supply and distributional fairness " The State's concern that rates be fair and efficient represents a clear and substantial governmental interest.

C

Next, we focus on the relationship between the State's interests and the advertising ban. Under this criterion, the Commission's laudable concern over the equity and efficiency of appellant's rates does not provide a constitutionally adequate reason for restricting protected speech. The link between the advertising prohibition and appellant's rate structure is, at most, tenuous. The impact of promotional advertising on the equity of appellant's rates is highly speculative. Advertising to increase off-peak usage would have to increase peak usage, while other factors that directly affect the fairness and efficiency of appellant's rates reingined constant. Such conditional and remote eventualities simply cannot justify silencing appellant's promotional advertising.

In contrast, the State's interest in energy conservation is directly advanced by the Commission order at issue here.

M. Son W. Jones, Repulsival Industries 194-287 (2d ed. 1976).

state interest in conservation and the Commission's order.

D

We come finally to the critical inquiry in this case: whether the Commission's complete suppression of speech ordinarily protected by the First Amendment is no more extensive than necessary to further the State's interest in energy conservation. The Commission's order reaches all promotional advertising, regardless of the impact of the touted service on overall energy use. But the energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use. In addition, no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests

Appellant insists that but for the han, it would advertise products and services that use energy efficiently. These include the "heat pump," which both parties acknowledge to be a major improvement in electric heating, and the use of electric heat as a "back-up" to solar and other heat sources. Although the Commission has questioned the efficiency of electric heating before this Court, neither the Commission's Policy Statement nor its order denying reheating made findings on this issue. In the absence of authoritative findings to the contrary, we must credit as within the realm of possibility the claim that efectric heat can be an efficient alternative in some circumstances.

The Coemission's order prevents appellent from promoting belectric services that would reduce energy use by diverting demand from less efficient sources, or that would consume roughly the same amount of energy as do alternative sources. In neither situation would the utility's advertising endangement

79-565-OPINION

12 CENTRAL HUDSON GAS & PUBLIC SERVICE COMM'N.

ger conservation or mislead the public. By suppressing some speech that in no way impairs the State's interest in energy conservation, the Commission's order violates the First and Fourteenth Amendments and most be invalidated. See First National Bank of Boston v. Belotti, supra.

The Commission also has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression. To further its policy of conservation, the Commission could attempt to restrict the format and content of Central Hudson's advertising. It might, for example, require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable fature. Cf. Banzhof v. FCC, — U. S. App. D. C. —, 405 F. 2d 1082 (1968), cert, decied, 306 U. S. S42 (1969). In the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising.

IV

Our decision today in no way disparages the national interest in energy conservation. We accept without reservation the

Fibe Compassion also might easister a system of precieving advertising employers to instite that they will not defeat conservation policy. It has instituted such a program for approving "informational" advertising ember the Policy Statement challenged in this case. See p. 2, supra We have observed that commercial speech is such a standy brand of expression that traditional prior instrumt distribute may not apply to it. Virginia State Board of Pharmary v. Virginia Cities Commerc Capacit, Inc., supra, 425 U.S., at 771, p. 24. And in other areas of speech regulation, such as descently, we have recognized that a preservening arrangement can preserve to this indicate procedural sufergraph. Excelling v. Maryland, 380 U.S. 51 (1965)

Of a view of our correlation that the Commission's advertising policy violates the First and Pointeenth Americances, we do not reach appetulately senses that the agrees sorder discovered relation Dipole Protection Chaise of the Fourteenth Americances, and that it is both overbroad and ragion.

argument that conservation, as well as the development of alternate energy sources, is an imperative national goal. Administrative boffies empowered to regulate electric utilities have the authority-and indeed the duty-to take appropriate action to further this goal. When, however, such action involves the suppression of speech, the First and Fourteenth Amendments require that the restriction be no more extensive then is necessary to serve the state interest. In this case, tho record before us fails to show that the total but on primotional solvertising meets this requirement."

Accordingly, the judgment of the New York Court of Appeals is

Reversed.

Of the Commission of let at assurance was not promulgated at response to an energency situation. Abbough the advertising ban initially was prompted by explical fuel chartage in 1673, the Commission universes domthat aplemergency uses two (s.) We do not consider the powers that the State might have over arthry towertising in energency circumstances. See State v. Oldohomo Gos & Electric Co., 586 P. 2d 887, 895-896 (Oklo, 1977).

To: The Cale: dustice Mr. Justice Brennan Mr. Juntine Stewart FNS renumbered Er. Justice Marshall Er. Justice Marshall Er. Justice Echinquist Er. Justice Stevens

2, 4-9, 135 rom: Mr. Justice Powell

6-16-80

Recirculated: _____

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-565

Central Hudson Gas & Electric: Corporation, Appellant,

Public Service Commission of New York.

On Appeal from the Court of Appeals of New York.

[May -, 1980]

Mr. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a regulation of the Public Service Commission of the State of New York violates the First and Fourteenth Amendments because it completely bans promotional advertising by an electrical utility.

In December 1973, the Commission, appelles here, ordered electric utilities in New York State to cease all advertising that "promot[es] the use of electricity." App. to Juris. St., at 31a. The order was based on the Commission's finding that "the interconnected utility system in New York State does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973-1974 winter." Id., at 28a.

Three years later, when the fuel shortage had cased, the Commission requested comments from the public on its proposal to continue the ban on promotional advertising. Centrai Hudson Gas & Electric Corporation, the appellant in this case, opposed the ban on First Amendment grounds. App. A10. After reviewing the public comments, the Commission extended the prohibition in a Policy Statement issued on February 25, 1977.

2 CENTRAL HUBSON GAS v. PUBLIC SERVICE COMMIN

The Policy Statement divided advertising expresses "into two broad categories: productional sulvertising intended to stimulate the purchase of utility services—and institutional and informational, a broughcategory inclusive of all advertising not elearly intended to promote sales "App. to Juris St., at 35a. The Commission declared all promotional advertising contrary to the national policy of conserving energy. It are knowledged that the ban is not a perfect vehicle for conserving energy. For example, the Commission's order prohibits promotional advertising to develop rous magnetical during periods. when designed for electricity is low. By familing growth in "off-peak" consumption, the ban limits the "benefical side offects" of such growth in terms of more efficient use of existing power plants. Id., at 37a. And since oil dealers are not under the Commission's purisdiction and thus remain free to advertise, it was recognized that the han can arthove only "picotaseal conservationism," Still. The Containsion adopted the restriction because it was dremed to "result in some dampening of unnecessary growth" in energy consumption. I find,

The Commission's order explicitly permitted "informational" advertising designed to encourage "skills of consumption" from peak demand times to periods of low electricity demand. Ibid. femphasis in original). Informational advertising would not seek to increase aggregate consumption, but would invite a leveling of demand throughout any given 24-hour period. The agency offered to review "specific proposals by the companies for specifically described [advertising] programs that meet these criteria." Id., at 38a.

History Ches. Articles.

likely

^{177°} characting against attempts to construct the Policy Statement to authorize advictising that would result that are covering of overgotic for if the advictising open or god consulption of addition I electronic Past, 21-13. The attempted construction follow, correspond to Policy Statement is played only in terms of advictising that provinces the parchase of utility services" and "holes" of electricist. Which, the Commission dalors around the periods also triping that would enhance too cavery effectively by in true large consumption of electrical activities.

CENTRAL HUDSON GAS # PUBLIC SERVICE COMMUN |

When it rejected requests for rehearing on the Policy Statement, the Commission supplemented its rationale for the advertisting han. The agency observed that additional electricity probably would be more expensive to produce than existing output. Because electricity rates in New York were not then based on numerical cost of the Commission feared that additional power would be priced below the actual cost of generation. This additional electricity would be subsidized by all consumers through generally higher rates. Id., at 57a-58a. The state agency also thought that promotional advertising would give "misleading signals" to the public by appearing to encourage energy consumption at a time when conservation is needed. Id., at 59a.

Appellant challenged the order in state court, arguing that the Commission had restrained connected speech in violation of the First and Fourteenth Amendments. The Commission's order was upbeld by the trial court and at the intermediate appellate level. The New York Court of Appeals affirmed It found little value to advertising in "the non-competitive market in which electric corporations operate," 47 N. V. 2d 94, 110, 390 N. E. 2d 749, 757 (1979). Since consumers "have no choice regarding the source of their electric power," the court depied that "promotional advertising of electricity might contribute to society's interest in finformed and reliable' economic decisionmaking," Ibid. The court also observed that by encouraging consumption, promotional advertising would only exacerbate the current energy situation.

* (Maryan dices)? Les boen défined as the fination or fectoment dicest ef producing an Caten una el cuspat ". P. Samuelous, Ekonomies 463 (10th ed., 2974). (emphasis in original).

² Control Fluid-on place Eigent that the Commission's order was before your the agency's statutory powers. This argument was rejected by the New York Court of Appeals, 47 N. Y. 2d 94, 102-104; 500 N. E. 2d 740, 752-754 (1979), and was not argued to this Court.

^{2.73} App. 15 v. 24 forth (1978) (N. N. Sep. C. Appelliste (2018) of State Suprems Court); App. to Juria, Sc, at 22a (Feb. 17, 1978).

79-565--- OPINION

4 CENTRAL HUDSON GAS v. PUBLIC SERVICE COMM'N

Id., at 110, 390 N. F. 2d. at 758. The court concluded that the governmental interest in the prohibition outweighed the limited constitutional value of the commercial speech at issue. We noted probable jurisdiction, — U. S. — (1979), and now reverse,

II .

The Commission's order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience. Virginia State Board of Plans many v. Varginia Citizens Consumar Council, Inc., 425 V. S. 748, 762 (1975); Bates v. State Bar of Arizono, 433 G, S. 350. 363-364 (1977); Friedoma V. Rogers 436 U. S. 447, 456 (1979). The First Amendment, as applied to the States. through the Fourteenth Amendment, profests contacreial speech from upwarranted governmental regulation. Thyinia State Board of Phyromacy, 425 H. S., at 761–762. Contracreial expression and only serves the germontic interest of the speaker. hug also assists consumers and forthers the societal interest in the fullest possible discentination of information. In applying the Fast Amendment to this area, we have rejected the "highly paternalistic" view that government has complete nower to suppress or regulate commercial speech. "iPle-ople will perceive their own best interests if only they are well enough informed and . . . the best means to that end is to open the channels of communication, rather than to close them." Id., at 770; see Linnark Associates, Inc. v. Transkip of Willingboro 431 F. S. 85, 92 (1977). Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some uccurate information is better than no information at all. Butes v. State Bar of Arizona, supra, 433 U.S., at 374.

Nevertheless, our decisions have recognized "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." Ohralik v. Ohio State Bar Assn., 435 U. S. 447, 455-456 (1978); see Bates v. State Bar of Arizona, supra, at 381; see also Jackson & Jeffries. Comparcial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1, 38-39 (1979).

5 Its an ophasoa concurring in the judgment. Mr. Justick Strucks suggests that the Commission's order reaches is yould confinered speech to suppress expression that is entitled to the full protection of the First Ametalment. See post, at 3. We find an support for this claim in the treated of this case. The Commission's Pathey Sciencem excluded high statistical and informational" answers from the advertising bars, which trus fest to ted to all advertising federally intended to promate sales " App. to Juris 30, at 35s. The complaint alleged mily than the typical brains ad promotional advertising by Peragoner is not researable regularies of Determined commercial speech and all the at 70s. Marenver, the stateearth operates and the arguments of the purities 2s for this Court also viewed this litigation as javelying unit commercial spends. Nevertheless, the constraint ophisics of Mic Justian Segregs were the Commission's order as suppressible more than commercial speed, because a weight andlaw, for exitogle, advertising that promoted electricity consumption by torning the enterior model benefits of with uses. See part, at 3. Apparently the expourring opinion would accord full First Atmendment protection to all promotional advertising that includes claims frelating to . . . unestians frequently them-sed and debated by our political leaders ". Post, at 4

Although this approach responds to the serious issues zorrounding and residual energy policy as raised in this case, we think at would like further

the Fig. the Court has sought to do were expressed it speech cases. It would great breed constitutional protection to any advertising that links a soughest to a current public delays. But many is not a set, products a perfect to the public concepts will the conveniental economic police, or indicated to the public concepts will the conveniental economic police, or indicated to the public section of New York, separa that artistics enjoy the full prouple of First Americanest protections for their direct consensus or public section. There is no proceeding supplied section. There is no proceeding supplied to the expression of engagement of translations. In that contest, for example, the State retains the power to this (r) I that the stream of consequent information flowly).

clearly as well as freely." Virginia State Bound, \$25.4. $S_{\rm cl}$ at 772. Take Court's decisions on monners of expression have restricted for the promise that such speech, although therefore some protection, is of less constitutional

| ENETGY

5

Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. *Id.*, at 456, 457. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.

The First Amendment's concern for commercial speech is based on the informational function of advertising. See First National Bank of Boston v. Bellotti, 435 U. S. 765, 783 (1978). Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about howful activity. The government may ban forms of communication more likely to decrive the public than to inform it. Friedman v. Ragers, 440 U. S. 1, 13, 15-16 (1979); Obralik v. Ohio State Bar Assa, 436 U. S., at 464-465, or commercial speech related to allegal activity, Pittsburgh Press Co. v. Pittsburgh Commin on Human Relations, 413 U. S. 376, 388 (1973).

If the communication is neither misbuding nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on communical speech. Moreover, the regulatory technique must be in proportion to that interest.

Smarter there expert forths of specific As we stated in $O(\log t)$, adjoin the factors of the ingrish discussion common of pool consummerial specific two-lift quarter decreases, simply law a leveling process, of the force of the UFFs. Amoscing a Sanction of the UFs kind of specific 436 U.S., at 456

The constraints assument of the First American problems and blace between of the assume. Committee of the assume. Committee of Public Series Committee of New York No. 79-134 (——, 1980) slip optical 6-9. Two Instance of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well-situated to evaluate the accuracy of their products. Thus, they are well-situated to evaluate the accuracy of their products. Thus, they are well-situated to evaluate the accuracy of their products, 430 U.S., at 381 (2007). In addition commercial speech, the adopting of recommits of interest, is a particularly broad of expression that is not appropriately governable to being crushed by overbroad regulation." Had.

The limitation on expression resigned carefully to achieve the MUST be areal by two criteria. First, the restriction must directly advalues the state interest involved; the regulation may not be sustained if it provides only ineffective at remote support for the government's purpose. Second, if the governmental interest rould be served as well by a trure limited restriction on commercial speech, the excessive restrictions cannot survive.

Under the first criterion, the Court has declined to uphold regulations that only indirectly advance the state interest involved. In both Bates and Virginia Board of Pharmacy, the Court concluded that an advertising ban rould not be imposed to protect the ethical or performance standards of a profession. The Court noted in Virginia Board of Pharmacy that "[t]he advertisting ben does not directly affect professional standards one way or the other." 425 $U_{\rm s} S_{\rm o}$ at 769. In Bates, the Court overturned an advertising prohibition that was designed to protect the "quality" of a lawyer's work. "Restraints on advertising . . . are an ineffective way of deterring shoddy work." 433 U.S., at 378.5

The second criterion recognizes that the First Amendment mandates that speech restrictions be "narrowly drawn." Inre Primus, 436 U. S. 412, 438 (1978). The regulatory tech-

[&]quot;In Dismark Associations, Toron-display Willingtons, supra, we observed that there was no definite connection between the toweship's goal of incegrated housing and its ban on the use of "For Sale" signs in front of hotrage. 431 U S., nt 95-98.

This people is not in application of the "overlassifth" doctrine. The latter theory persons the invalidation of regulations on Farst Amendment grounds even when the litigant challenging the segulation has eneaged in no constitutionally protected activity, $R_{\rm eff}$, $R_{\rm eff}$, $R_{\rm eff}$ v. New York, 340 U. S. 200 (1951). The excepted the doctrine derives from the recognition that maconstitutional restriction of expressing may deter protected speech by parties not before the react and thereby escape judicial review. Brandrick v. Oklahoma, 413 U. S. 601, 612-613 (1973); see Note, The Farst Amendment Overbreadth Ductrine, 23 Harv, L. Rev. 844, \$\$3-\$88 (1970). This restraint is less likely where the expression is linked

79-565-OPINION

8 CENTRAL HUDSON GAS 6. PUBLIC SERVICE COMM'N

mique may extend only as far as the interest it serves. The State cannot regulate speech that poses no dauger to the asserted state interest, see First National Bank of Boston N. Bellotti, supra, 435 U. S., at 794-795, nor can it completely suppress information when narrower-restrictions on expression would serve its interest as well. For example, in Bates the Court explicitly did not "foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required" in promotional materials, 433. U. S., at 384. See Virginia State Board of Pharmacy, supra. 425 U. S. at 773. And in Carey v. Population Services, Intermational, 431 U.S. 678, 701-702 (1977), we held that the State's "arguments do not justify the total suppression of advertising concerning contraceptives." This holding left open the possibility that the State could implement more carefully drawn restrictions. See id., at 712 (Powers, J., concurring in part and concurring in the judgment); id., at 716-717 (STAYENS, J., concurring).*

to "commercial well-being" and therefore is not easily detected by "over-broad resolution." Bates v. State Bar of Arizona, 433, F. S. 55, 381.

In this case, the Commission's probabilition acts directly against the procontant activities of Control Hodron, and to the extent the Signations are undercovery to serve the State's attended they are jumped.

"We to now with special care regulations that coursely suppress solumerous speech in order to pursue a policy unrefered to the quality of the expression itself. In these rimmerances, a ben on speech rould streen from public view the enderlying governmental policy. See Varginia State Board of Phormacy suppress 425 U.S., at 780, n.S. (Stremant, J., concurring). Indeed, in zeront years this Court has not approved a blanket had an economical speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity.

In an option concurring in the pulgraeou Min Justice Biologous urges that the "content" of creamerical speech, as appeared to the "quality" of state extression cannot be regulated unless all other forms of nonspeech regulation are impossible. See post at 2. The sitting-time of more than a little elastic anality antifications for analogous State the quality of speech tarrely can be determined without removing its content, the gractical effect of the destination could be minorial. Alternatices, it regulative

CENTRAL HUDSON GAS v. PUBLIC SERVICE COMM'N.

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

111

We now apply this four-step analysis for commercial speech to the Commission's arguments in support of its ban on promotional advertising.

A

The Commission does not claim that the expression at issue either is inaccurate or relates to unlawful activity. Yet the New York Court of Appeals questioned whether Central Hudson's advertising is protected commercial speech. Because appellant holds a monopoly over the sale of electricity in its service area, the state court suggested that the Commission's order restricts no commercial speech of any worth. The court stated that advertising in a "noncompetitive market" could not improve the decisionmaking of consumers. 47 N. Y. 2d. at 110; 390 N. E. 2d. at 757. The court saw no constitutional problem with barring commercial speech that it viewed as conveying little useful information.

of speech refers to a narrowly deligned category of characteristics, the result of this analysis could who may saturation—addition of distinction between connected expression and "pure" torus of speech. Our decisions have reacted greeisely that results. See Fractiona. C. Ragers, 440 %, S. 1, 20, and n. 2, 41979 is Obtohic v. Ohio State Bac, supply, 436 U.S. at 455–456; Butter v. Arrana State Bac, supply, 436 U.S. at 379–384; Verginia State Backet, at 770–773.

79-565--- OPTNION

10 CENTRAL HUDSON GAS # PUBLIC SERVICE COMM'N

This reasoning fells short of establishing that appellant's advertising is not commercial speech protected by the First Amendment. Monopoly over the supply of a product provides no protection from competition with substitutes for that product. Electric utilities compete with suppliers of fuel oil and natural gas in several markets, such as those for home heating and industrial power. This Court noted the existence of interfuel competition 45 years ago, see West Ohio Gas Co. v Public Utilities Comm'n, 204 U. S. 63, 72 (1935). Each energy source continues to offer peculiar advantages and disadventages that may influence consumer choice. For consumers in those competitive markets, advertising by utilities is just as valuable as advertising by unregulated firms.⁵⁰

Even in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment. The New York court's argument appears to assume that the providers of a monopoly service or product are willing to pay for wholly ineffective advertising. Most businesseseven regulated monopolies are unlikely to underwrite promotional advertising that is of no interest or use to consumers. Indeed, a monopoly enterprise legitimately may wish to inform the public that it has developed now services or terms of doing business. A consumer may need information to aid his decision whether or not to use the monopoly service at all, or how much of the service he should purchase. In the chsence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising." Since on such extraordinary conditions have

¹³ Several commuteful speech decisions have involved enterprises subject to extensive state regulation. B. q., Friedman v. Ragers, 440 U. S. 1, 4-5 (1979) (optometrists); Bates v. Arizona State Rar, 433 U. S. 350 (1977) (convers); Pirginia State Bd. of Phirmnery v. Virginia Citizena Consumer Council, Inc., 425 U. S. 748, 750-752 (1976) (pharmacists).

²⁴ There may be a greater inectified for a utility to advertise if it can

been identified in this case, appellant's monopoly position does not after the First Amendment's protection for its commercial speech,

B

The Commission offers two state interests as justifications for the han on promotional advertising. The first concerns energy conservation. Any increase in demand for electricity—during peak or off-peak periods—means greater consumption of energy. The Commission argues, and the New York court agreed, that the State's interest in conserving energy is sufficient to support suppression of advertising designed to increase consumption of electricity. In view of our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation. Plainly, therefore, the state interest asserted is substantial,

The Commission also argues that promotional advertising will aggravate inequities caused by the failure to base the utility's rates on marginal cost. The utilities argued to the Commission that if they could promote the use of electricity in periods of low demand, they would improve their utilization of generating capacity. The Commission responded that promotion of off-peak consumption also would increase consumption during peak periods. If peak demand were to rise, the absence of marginal cost rates would mean that the rates charged for the additional power would not reflect the true costs of expanding production. Instead, the extra rosts would be horne by all consumers through higher overall rates. Without promotional advertising, the Commission stated, this inequitable turn of events would be less likely to occur. The choice among rate structures involves difficult and important

use promotional expenses in determining its rate of return, rather than pass those rosts on solely to shareholders. That practice, however, hardly distorts the economic decision whether to advertise. Unregulated husinesses pass on promotional costs to constitute, and this Court expressly approved the practice for utilities in West Ohio Gua Co, v. Public Utilities Commin, 294 U. S. 63, 72 (1935).

79-505-OPINION

12 CENTRAL RUDSON GAS v. PUBLIC SERVICE COMMIN.

questions of comonic supply and distributional fairness.¹² The State's concern that rates be fair and efficient represents a clear and substantial governmental interest.

C

Next, we focus on the relationship between the State's interests and the advertising ban. Under this criterion, the Commission's laudable concern over the equity and efficiency of appellant's rates does not provide a constitutionally adequate reason for restricting protected speech. The link between the advertising prohibition and appellant's rate structure is, at most, tenuous. The impact of promotional advertising on the equity of appellant's rates is highly speculative. Advertising to increase off-peak usage would have to increase peak usage, while other factors that directly affect the fairness and efficiency of appellant's rates remained constant. Such conditional and remote eventualities simply cannot justify silencing appellant's promotional advertising.

In contrast, the State's interest in energy conservation is directly advanced by the Commission order at issue here. There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising han unless it believed that protection would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.

D

We come finally to the critical inquiry in this case: whether the Commission's complete suppression of speech ordinarily protected by the First Amendment is no more extensive than necessary to further the State's interest in energy conservation. The Commission's order reaches all promotional advertising, regardless of the impact of the touted service on overall energy use. But the energy conservation rationale, as im-

See W. James, Regulated Industries 191-287 (2d ed. 2976).

portant as it is, cannot justify suppressing information about electric devices or services that would cause no not increase in total energy use. In addition, no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests

Appollant insists that but for the ban, it would advertise products and services that use energy efficiently. These include the "heat pump," which both parties acknowledge to be a major improvement in electric heating, and the use of electric heat as a "back-up" to solar and other heat sources. Although the Commission has questioned the efficiency of electric heating before this Court, neither the Commission's Policy Statement nor its order denying reheating made findings on this issue. In the absence of authoritative findings to the contrary, we must credit as within the realty of possibility the claim that electric heat can be an efficient alternative in some circumstances.

The Commission's order prevents appellant from promoting electric services that would reduce energy use by diverting demand from less efficient sources, or that would consume roughly the same amount of energy as do alternative sources. In neither situation would the utility's advertising endanger conservation or mislead the public. To the extent that the Commission's order suppresses speech that in an way impoirs the State's interest in energy conservation, the Commission's order violates the First and Fourtegath Amendments and most be invalidated. See First National Bank of Baston y, Belotti, supra.

The Commission also has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression. To further its policy of conservation, the Commission could attempt to restrict the format and content of Central Hudson's advertising. It might, for example, require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions

79-504-OPINION

14 CENTRAL HEDSON GAS v. PUBLIC SERVICE COMM'N.

and for the foresceable future. Cf. Banzhaf v. FCC, · - U. S. App. D. C. —, 405 F. 2d 1082 (1968), cert dened, 396 U. S. S42 (1969). · In the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising.

IV

Our decision today in no way disparages the national interest in energy conservation. We accept without reservation the argument that conservation, as well as the development of alternate energy sources, is an imperative national goal. Administrative bodies empowered to regulate electric utilities have the authority—and indeed the duty—to take appropriate action to further this goal. When, however, such action involves the suppression of speech, the First and Fourteenth Amendments require that the restriction lie no more extensive than is necessary to serve the state interest. In this case, the record before us fasts to show that the total ban on promotional advertising parets this requirement."

¹⁹ The Commission of a might encoder a system of previousing advertising compaigns to insure that they will not defeat conservation policy. It has instituted such a program for approving "informational" advertising under the Policy Statement challenged in this case. See p. 2, supra. We have observed that commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it. Firginia State Board of Phormacy v. Virginia Citizens Consumer Council, Inc., supra, 425 U. S., at 771, n. 24. And in other areas of speech regulation, such as observity, we have reagained that a prescreening arrangement can pass constitutional master of it includes adopted procedural safeguards. Preedman v. Maryland, 380 U. S. 51 (1965)

If he view of our conclusion that the Commission's advertising pulley violates the First and Fourteenth Amendments, we do not much appellant's claim. that the agency's order also violated the Equal Protection Claim of the Fourteenth Amendment, and that it is both overbread and yague,

First Commission order at issue Lete was not promote and an insposes to an emergency situation. Although the advertising ben initially was prompted by critical fuel shortage in 1973, the Commission makes no claim -

79-365—OPINION

CENTRAL HUDSON GAS & POBUIC SERVICE COMMIN 115

Accordingly, the judgment of the New York Court of Appeals is

Reversed.

that an emergency new exists. We do not consider the powers that the State might have over utility advertising in emergency circums times. See State v. Oklohuma Gas & Electric Co., 536 P. 2d 587, 595-596 (Oklu, 1977).

2,4-9,13

the Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marchall
Mr. Justice Blackwan
Mr. Justice Behaquist
Mr. Justice Stovens

6-18-80 /**C**

From: Mr. Justice Powell

Circulated:

JUN 16 1980

4th DRAFT

Rediroulated: .

SUPREME COURT OF THE UNITED STATES

No. 79-565

Central Hudson Gas & Electric Corporation, Appellant,

Public Service Commission of New York,

On Appeal from the Court of Appeals of New York,

[May -, 1980]

Ms. Justice Powers, delivered the opinion of the Court,

This case presents the question whether a regulation of the Public Service Commission of the State of New York violates the First and Fourteenth Amendments because it completely bans promotional advertising by an electrical utility.

I

In December 1973, the Commission, appelled here, ordered electric utilities in New York State to cease all advertising that "promot[cs] the use of electricity." App. to Juris, St., at 31a. The order was based on the Commission's finding that "the interconnected utility system in New York State does not have sufficient fuel stocks or sources of supply to continue futnishing all customer demands for the 1973-1974 winter." Id., at 26a.

Three years later, when the fuel shortage had eased, the Commission requested comments from the public on its proposal to continue the han on promotional advertising. Central Hudson Gas & Electric Corporation, the appellant in this case, apposed the han on First Amendment grounds. App. A10. After reviewing the public comments, the Commission extended the prohibition in a Policy Statement issued on February 25, 1977.

2,3,5,6, 7,14

79-565-OPINION

Z CENTRAL RUDSON GAS v. PUBLIC SERVICE COMM'N

The Policy Statement divided advertising expenses "into two broad categories; promotional- advertising intended to standate the purchase of utility services, and institutional and informational, a browlendegory inclusive of all advertising not clearly intended to promote sales ** App. to Juris, St., at 35a. The Commission declared all promotional advertising contrary to the again all policy of conserving energy. It are knowledged that the ban is not a perfect vehicle for conserving energy. For example, the Commission's order prohibits promotional advertising to develop constraption during periods when demand for electricity is low. By limiting growth in "off-peak" consumption, the ban limits the "benefical side offects" of such growth in terms of name afficient use of existing power plants. Id., at 37a. And since oil dealers are not under the Commission's jurisdiction and thus remain free to advertise, it was recognized that the ban can achieve only "picerugal <u>conserva</u>tionism." <u>Still</u>, the Commission adopted The restriction because it was deemed to fresult in some dampeging of unnecessary growth" in energy consumption. Ibid.

The Commission's order explicitly permitted "informational" advertising designed to encourage "shifts of consumption" from neak demand times to periods of low electricity demand. Ibid. (emphasis in original). Informational advertising would not seek to increase agercante consumption, but would invite a leveling of demand throughout any given 24-hour period. The agency offered to review "specific promosals by the companies for specifically described [advertising] pro-

grams that meet these criteria." Id., at 38a.

ATha disputing opinion strength to equative the Policy Statement to surfactive advertising that weads sent thin a net appear of every if the advertising that weads sent thin a net appear of electricity. Part at 17. The attempted construction had, however, since the Policy Statement is phrased only in terms of advertising that promotes this purchase of attempted to permit advertising that would enhance not energy efficiency by increasing consumption of electrical services.

likely

When it rejected requests for rebearing on the Policy Statement, the Commission supplemented its rationale for the advertisting ban. The agency observed that additional electricity probably would be more expensive to produce than existing output. Because electricity rates in New York were not then based on marginal cost "the Commission feared that additional power would be priced below the actual cost of generation. This additional electricity would be subsidized by all consumers through generally higher rates. Id., at 57a-58a. The state agency also thought that promotional advertising would give "misleading signals" to the public by appearing to encourage energy consumption at a time when conservation is needed. Id., at 59a.

Appellant challenged the order in state court, arguing that the Commission had restrained commercial speech in violation of the First and Fourteenth Amendments. The Commission's order was upheld by the trial court and at the intermediate appellate level! The New York Court of Appeals affirmed. It found little value to advertising in "the non-competitive market in which electric corporations operate," 47 N. Y. 2d 94, 110, 399 N. E. 2d 749, 757 (1979). Since consumers "have no choice regarding the source of their electric power." The court denied that "promotional advertising of electricity might contribute to society's interest in 'informed and reliable' economic decisionmaking." Ibid. The court also observed that hy encouraging consumption, promotional advertising would only exscertate the current energy situation.

163 App. 126, 2d 368 (1968) 134 Sept. 3 Appetito Division of State Supreme Court); App. to Juris, 51, at 22a (Feb. 17, 1978).

N.4. Sup. Ct.,

P"Margned et al" has been defined as the "legion or incremental end of producing an extre unit of output." P. Samuelson, Remonics 463 (10th ed. 1976) (emphasis in original).

³ Countil Studeon also allog at the Commission's artist market beyould the agency's statutory powers. This argument was rejected by the New York Court of Appeals, 47 N. Y. 2d 94, 102-104; 390 N. E. 2d 749, 782-754 (1979), and was not argued to this Court.

79-565--- OPINIÓN

4 CENTRAL HUDSON GAS v. PUBLIC SERVICE COMM'N

Id., at 110, 390 N. E. 2d. at 758. The court concluded that the governmental interest in the prohibition outweighed the limited constitutional value of the commercial speech at issue. We noted probable jurisdiction. — U. S. — (1979), and now reverse.

TI

The Commission's order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience. Virginia State Board of Pharmacq v. Virginia Citizens Communer Council, Inc., 425 U.S. 748, 762 (1975); Butes v. State Bur of Arizona, 433 U. S. 350. 363-364 (1977); Friedman v. Rogers, 436 V. S. 447, 456 The First Amendment, as applied to the States through the Fourteenth Assendances, protects commercial speech from the authorical governmental regulation. Pirginia State Board of Pharmary, 425 U.S., at 761-762. Contacterial. expression not only serves the economic interest of the speaker. but also assists consumers and furthers the societal interest in the fullest possible discensionation of information. In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. [2] P]cople will perceive their own best interests if only they are wellenough informed and . . , the last means to that end is to open the chancels of communication rather than to close them, i.e., b. Id., at 770; see Lieuwith Associates, Inc. v. Township of Willingboro, 434 U.S. 35, 92 (1977) — Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accursto information is better then no information at $x \Omega = Bates$ v. State Box of Axizona, supra, 433 U.S., at 374,

Nevertheless, our decisions have recognized "the 'communsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." Obralik v. Okio State Bar Assn., 436 U. S. 447, 455-456 (1978); see Bates v. State Bar of Arizona, supra, at 381; see also Jackson & Jeffries. Commercial Speech: Economic Due Process and the First Amendment, 65 Va. D. Rev. 1, 38-39 (1979). The

Step to opinion concurring in the judgment, Mic district Strategy sage. gosts that the Commission's arder reaches beyond continue, of speech to supplies expression that is entitled to the full processor of the First A neighborn. See post, 2.3. We high no support for this chang in the record of this case. The Compussion's Policy Statement eveloping himstitutional and informational" on sages from the advertising hard which was restricted to all advertional relianty intended to promote sales " App. to Jenes, St., at 35a. The estaplanct alleged only that the "probabilion of promotental advertising by Schröding is not reconnable regulation of B Grioner's commercial speech, 11, 2° $[B_{\mu}]$ at 70 . Moreover, the state Icoor opinion and the argeneous of the parties before this Court also viewed this attraction as involving only commercial speech. Nevertheless, the concurrag aparion of MacClistics Sussess views the Contrassingly, order as suppressing more than connects at speech because it would durlaw, for example advertising that promoted destrictly consumption by tenting the environmental benefits of such uses. See past, at 3. Amportently the concurring opinion would arrest 102 First Amendment 970feetion, to all promotornal advertising that includes chains trelating to questions tremently discussed and dehated by non-political leaders " | Post, pt 3.

"Although this approach responds to the serious bence surrounding carnational energy policy as prised in this case, we tamb it would blue fighter the line the Capit has sought to draw in commercial speech cases. At woold grant broad constitutional protection to any advertising that lanks a product to a correct proble debute. But many if not most, products may to 1991, to public concerns with the environment Lecanomic polace, or ins dayidad baafib and safety. We rise today as Conso from Bowen Co. v. Public Service Committeed New York, supers, that millings enjoy the full goropis of First Amendment protections for their direct continuous on public issues. There is no trason for proceding similar constitutional projection when such statements are made only as the context of some tauto in "thursto from a "De their enabest, for example, fin St. as no dies she prover to "mistrije" that the strepto of coursered information flow[4] durals as well as freely ". Virginia State Borrd, 425 G. S., at 772. This Chert's decisions on communicipal expression have rested on the premise that such specific, although anothing some protection is at less constructional

ENETGY.

5

79-665-OPINION

CENTRAL HUDSON GAS & PUBLIC SERVICE COMM'N

Constitution therefore arcords a lesser protection to rotunezeial speech than to other constitutionally guaranteed expression. Id., at 456, 457. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.

The First Amendment's concern for commercial speech is based on the informational function of advertising. See First National Bank of Boston v. Bellotti, 435-U. S. 765, 783:1978). Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may but forms of communication more likely to deceive the public than to inform it. Priedman v. Royers, 440 U. S. 1, 13, 15-16 (1979); Obralik v. Ohio State Bar Assn., 436 U. S., at 464-465, or commercial speech related to illegal activity, Pittsburgh Press Co. v. Pittsburgh Commin on Human Relations, 413 U. S. 376, 388 (1973).

If the communication is neither misleading nor related to unlawful setivity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on cummercial speech. Moreover, the regulatory technique must be in proportion to that interest.

material than other forms of speech. As we stated in O(nh/k), sopen, the factors to distinguish between exquered in and momentum of speech broads make addition, simply by a boxching process, of the large of the (East) Amendment's guarantee to the latter kind of speech? 4.66 ± 8 , at 4.66

'In most other energy, the East Americann' probability regulation based on the content of the message. Considiated Editor Co. v. Public Service Councils of New York, No. 79-134 (—, 1980; ship op., at 6-9. Two features of commercial speech person regulation of its content. First, contracted speeches have extensive knowledge of both the market and their products. Thus, they are well-situated to reclinite the areanacy of their products. Thus, they are well-situated to realist the areanacy of their pressures and the hardolness of the underlying activity. Hates v. State Rose of Arizona, 433 W. S. at 381 (1977). In addition commercial speech, the offspring of communic cell-intenset, is a second sarry breed of expression that is not "particularly susceptible to being crushed by overbroad regulation." Third.

The limitation on expression designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction mast directly advance the state interest involved; the regulation may not be sustained if it provides only ideffective or remote support for the governmental purpose. Second if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Under the first criterion, the Court has declined to uphold regulations that only indirectly advance the state interest involved. In both Bales and Virginia Board of Pharmacy, the Court concluded that an advertising ban could not be imposed to protect the ethical or performance standards of a profession. The Court noted in Virginia Board of Pharmacy that "[1]he advertisting ban does not directly affect professional standards one way or the other," 425 U.S., at 769. In Bales, the Court overturned an advertising prohibition that was designed to protect the "quality" of a lawyer's work. "Restraints on advertising . . . are an ineffective way of deterring shaddy work." 433 U.S., at 375."

The second criterion recognizes that the First Amendment mandates that speech restrictions be "narrowly drawn." In the Primus 436 U. S. 412, 438 (1978)." The regulatory tech-

The Larman's Associates v. Transakip of Willingham, super we observed that there was no definite connection between the township's goal of integrated housing and its ban on the use of "For Sale" signs in front of houses. 431 U.S. at 95-98.

The Later theory permits the invalid case of regulations on First Amendment erounds even when the litigant challenging the regulation has regaged in no constitutionally protected activity. E. p., Knex v. New York, 340 U. S. 390 (1951). The overbreadth dectrine derives from the rengalition that unconstitutional restriction of expression may deter protected speech by parties not before the court and thereby escape judicial review. Broadcick v. Oktoboro, 413 U. S. 601, 612-613 (1973); see Note, The First Amendment Overbreadth Dectrine, 83 Harv. I. Rev. 844, 833-858 (1970). This restraint is less likely where the expression is linked

79-565--- OPINION

8 CENTRAL HUDSON GAS v. PUBLIC SERVICE COMM'N

nique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest, see First National Bank of Boston v. Bellutti, supra, 435 U. S., at 794-795, nor can it completely suppress information when narrower restrictions on expression. would serve its interest as well. For example, in Bates the Court explicitly did not "foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required" in promotional materials, 433 U. S. at 384. See Virginia State Board of Pharmacy, supra, 425 U. S. at 773. And in Carry v. Population Services, International, 431 U. S. 678, 701-702 (1977), we held that the State's "arguments do not justify the total suppression of advertising concerning contraceptives." This holding left open the possibility that the State could implement more carefully drawn restrictions. See id., at 712 (Powers, J., concurring in part and concurring in the judgment); id., at 716-717 (Stevens, J., concurring),"

10 'commercial we library' and therefore is not easily deterred by "over-break regulation." Hatta v. State Har of Arigonal 433 U.S., 5: 381.

In this case, the Commission's prohibition acts directly against the probatical activities of Coertal Fludson, and to the extent the handat; as are united each the serve the State's attendent, then are uncalled

We to new with special care regulations, that entirely enquires commercial speech in order to parson a policy and the speech could action from public view the audictiving governmental policy. See Firgula State Heard of Phonoscop, supra, 425-5, S., at 780, p. 8. (Stewart, J., containing). Indeed, in seems years this Chart has not approved a blacket box an commercial speech tales, the expression itself was flaved in seems way, either because it was deceptive or related to unlawful acrisity.

In at opinion engaging in the pulgment, Mn Albrick Blackman urgs that the content" of commercial speech, composed to the quality of such expression parametrize regulated unless all other forms of numpered regulation are implicitly. See past at 2. The distinction is more than a inter-shaire, and its implications are analogous. Since the quality of speech wordy can be determined surface inclining its content the practical effect of the distinction could be manifold. Alternatively, if "quality"

monspeech related

CENTRAL HUDSON GAS & PUBLIC SERVICE COMMIN

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

]][(

We now apply this four-step analysis for commercial speech to the Commission's arguments in support of its ban on promotional advertising.

A

The Commission does not claim that the expression at issue either is inaccurate or relates to unlawful activity. Yet the New York Court of Appeals questioned whether Central Hudson's advertising is protected commercial speech. Because appellant holds a monopoly over the sale of electricity in its service area, the state court suggested that the Commission's order restricts no commercial speech of any worth. The court stated that advertising in a "noncompetitive market" could not improve the decisionmaking of consumers. 47 N. Y. 2d. at 110; 390 N. E. 2d. at 757. The court saw no constitutional problem with barring commercial speech that it viewed as conveying little useful information.

of speech prices to a territority defined entergory of characteristics, the result of this at least small—in more structions—abbrerate all distinction between confinetal expression and "pure" fazing of speech. Our decisions have rejected privately that people. See Friedman x, Romes 440 U. S. 1, 10, and to b (1979). Gloudd x, Char State Bar supera 456 U. S. at 453–456; Patrix x Address State Bar, supera 134 U. S. at 370 (88); Propode State Barrat of Physical State Barrat (1984).

79-565-OPINION

10 CENTRAL HUDSON GAS 0. PUBLIC SERVICE COMM'N

This reasoning falls short of establishing that appellant's advertising is not commercial speech protected by the First Amendment. Monopoly over the supply of a product provides no protection from competition with substitutes for that product. Electric attilities compete with suppliers of fuel oil and natural gas in several markets, such as those for home heating and industrial power. This Court noted the existence of interfuel competition 45 years ago, see West Ohio Gas Co. v. Public Utilities Commin, 204 U. S. 63, 72 (1935). Each energy source continues to offer peculiar advantages and disadvantages that may influence consumer choice. For consumers in those competitive markets, advertising by utilities is just as valuable as mivertising by unregulated firms.

Even in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment. The New York court's argument appears to assume that the providers of a monopoly service or product are willing to pay for wholly ineffective advertising. Most businesseseven regulated monopolies-are unlikely to underwrite promotional advertising that is of no interest or use to consumers. Indeed, a monopoly enterprise legitimately may wish to inform the public that it has developed new services or terms of doing business. A consumer may need information to aid his decision whether or not to use the monopuly service at all, or how much of the service he should purchase. In the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising." Since no such extraordinary conditions have

D'Several commercial speech decision: Lace involved enterprises subject to extensive state regulation. E. g., Friedman v. Rogers, 440 U. S. 1, 4-5 (1979) (optionalizists); Bates v. Arizona State Bur, 433 U. S. 350 (1977) (lawyets); Virginia State Bd. of Phormacy v. Virginia Citizena Consumer Council, Inc., 425 U. S. 748, 750-762 (1976) (pharmacists).

¹⁴ There may be a greater invention for a utility to advertise if it can

been identified in this case, appellant's monopoly position does not after the First Amendment's protection for its commerrial speech,

B

The Commission offers two state interests as justifications for the ban on promotional advertising. The first concerns energy conservation. Any increase in demand for electricity—during peak or off-peak periods—means greater consumption of energy. The Commission argues, and the New York court agreed, that the State's interest in conserving energy is sufficient to support suppression of advertising designed to increase consumption of electricity. In view of our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation. Plainly, therefore, the state interest asserted is substantial.

The Commission also argues that promotional advertising will aggravate inequities caused by the failure to base the utility's rates on marginal cost. The utilities argued to the Commission that if they could promote the use of electricity in periods of low demand, they would improve their utilization of generating capacity. The Commission responded that promotion of off-peak consumption also would increase consumption during peak periods. If peak demand were to rise, the absence of marginal cost rates would mean that the rates charged for the additional power would not reflect the true costs of expanding production. Instead, the extra costs would be borne by all consumers through higher overall rates. Without promotional advertising, the Commission stated, this inequitable turn of events would be less likely to occur. The choice among rate structures involves difficult and important

use presentional expenses in determining its rate of zeturn, rather than pass those costs on solely to shareholders. That practice however, hardly distorts the economic decision whether to advertise. Unregulated businesses pass on promotional costs to consumers, and this Court expressly approved the practice for utilities in West Ohio Gas Co. v. Public Visities Commin, 294 U. S. 63, 72 (1935).

79–363—OPINIÓN

12 CENTRAL HUDSON GAS 6. PUBLIC SERVICE COMMIN.

questions of economic supply and distributional fairness.¹² The State's concern that rates be fair and efficient represents a clear and substantial governmental interest.

C

Next, we focus on the relationship between the State's interests and the advertising ban. Under this criterion, the Commission's laudable concern over the equity and efficiency of appellant's rates (loss not provide a constitutionally adequate reason for restricting protected speech. The link hetween the advertising prohibition and appellant's rate structure is at most, tennous. The impact of promotional advertising on the equity of appellant's rates is highly speculative. Advertising to increase off-peak usage would have to increase peak usage, while other factors that directly affect the fairness and efficiency of appellant's rates remained constant. Such conditional and remote eventualities simply cannot justify silencing appellant's promotional advertising.

In contrast, the State's interest in energy conservation is directly advanced by the Commission order at issue here. There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.

D

We come finally to the critical inquiry in this case: whether the Commission's complete suppression of speech ordinarily protected by the First Amendment is no more extensive than necessary to further the State's interest in energy conservation. The Commission's order reaches all promotional advertising, regardless of the impact of the touted service on overall energy use. But the energy conservation rationale, as im-

¹³ See, W. Jones, Regulated Industries (91-987) [2d ed. 1976).

portant as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use. In addition, no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests.

Appellant insists that but for the ban, it would educatise products and services that use energy efficiently. These include the "heat pump," which both parties acknowledge to be a major improvement in electric heating, and the use of electric heat as a "back-up" to solar and other heat sources. Although the Commission has questioned the efficiency of electric heating before this Court, neither the Commission's Policy Statement nor its order denying reheating made findings on this issue. In the absence of authoritative findings to the contrary, we must credit as within the realm of possibility the claim that electric heat can be an efficient alternative in some circumstances,

The Commission's order prevents appellant from promoting electric services that would reduce energy use by diverting demand from less efficient sources, or that would consume roughly the same amount of energy as do alternative sources. In neither situation would the utility's advertising endanger conservation or mislead the public. In the extent that I the Commission's order suppresses speech that in no way imports the State's interest in energy conservation, the Commission's order violates the First and Fourteenth Amendments and most be invalidated. See First National Bank of Boston v. Belotti, supra.

The Commission also has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression. To further its policy of conservation, the Commission could attempt to restrict the format and content of Central Hedson's advertising. It might, for example, require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions

79-505-OPINION

14 CENTRAL HUDSON GAS 2, PUBLIC SCRAIGE COMMEN.

and for the foresceable future. Cf. Banzhaf v. FCC, — U. S. App. D. C. —, 405 F. 2d 1082 (1968), cert. deried, 396 U. S. 842 (1969)." Its the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising."

IV

Our decision today in no way disparages the national interest in energy conservation. We accept without reservation the argument that conservation, as well as the development of alternate energy sources, is an imperative national goal. Administrative bodies empowered to regulate electric utilities have the authority—and indeed the duty—to take appropriate action to further this goal. When however, such action involves the suppression of speech, the First and Fourteenth Amendments require that the restriction be no more extensive than is necessary to serve the state interest. In this case, the record before us fails to show that the total but on promotional advertising meets this requirement.

[&]quot;The Commission of a taught consider a system of previously absertising tampoigns to insure that they will not defeat conservation policy. It has instituted such a program for approving "informational" advertising under the Policy Statement challenged in this case. See p. 2, supra. We have abserved that commercial speech is such a study braind of expression that traditional print restraint doctrine may not apply to it. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, like, tupia, 425 U. S., at 771, n. 24. And in other areas of speech regulation, such as observity, we have recognized that a preserecting arrangement can pass constitutional master if it includes adequate procedural safeguards. Freedman v. Maryland, 380 U. S. 31 (1965).

Oth view of our constraint that the Commission's advertising policy modeles the First and France oth Americanests, we signate near roach appellant's claims that the agency's order also violated the Equal Protection Clause of the Forgreenth Americanest, and that it is both overbroad and vasue.

¹⁹ The Connection order of issue here need not promulgated in response to no emergency situation. Although the advertising ban initially was prompted by critical feel shortage in 1973, the Commession makes no clause:

79-365-OPINION

CENTRAL HUDSON GAS T PUBLIC SPRVICE COMM'N 15

Accordingly, the judgment of the New York Court of Appeals is

Reversed,

that an entergency now exists. We do not consider the powers that the State might have over attlity advertising in emergency circumstances. See State v. Oklahoma Gas & Electric Co., 536 P. 2d 887, 805-896 (Okla. 1977).





4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-565

Central Hudson Gas & Electrical Corporation, Appellant,

υ.

Public Service Commission of New York.

On Appeal from the Court of Appeals of New York.

[May -. 1980]

Ma, Justice Powers delivered the opinion of the Court.

This case presents the question whether a regulation of the Public Service Commission of the State of New York violates the First and Fourteenth Amendments because it completely bans promotional advertising by an electrical mility.

T

In December 1973, the Commission, appellee here, ordered electric utilities in New York State to cease all advertising that "promot[es] the use of electricity." App. to Juris St., at 31a. The order was based on the Commission's finding that "the interconnected utility system in New York State does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973-1974 winter." A 1d., at 26a.

Three years later, when the fuel shortage had eased, the Commission requested comments from the public on its proposal to continue the ban on promotional advertising. Central Hudson Gas & Electric Corporation, the appellant in this case, opposed the ban on First Amendment grounds. App. A10. After reviewing the public comments, the Commission extended the prohibition in a Policy Statement issued on February 25, 1977.

79-565--- OPINION

2 CENTRAL HUDSON GAS at PUBLIC SERVICE COMM'N

The Policy Statement divided advertising expenses "into two broad categories: promotional—advertising intended to stimulate the purchase of utility services—and institutional and informational, a broad rategory inclusive of all advertising not clearly intended to promote sales." App. to Juris. St., at 35a. The Commission declared all promotional advertising contrary to the national policy of conserving energy. It acknowledged that the han is not a perfect vehicle for conserving energy. For example, the Commission's order prohibits promotional advertising to develop consumption during periods when demand for electricity is low. By limiting growth in "off-peak" consumption the ban limits the "benefical side effects" of such growth in terms of more efficient use of existing power plants. Id., at 37s. And since oil dealers are not under the Commission's jurisdiction and thus remain free to advertise, it was recognized that the ban can achieve only "piercineal conservationism," Still, the Commission adopted the restriction because it was deemed likely to "result in some dampening of unnecessary growth" in energy consumption. Ibid.

The Commission's order explicitly permitted "informations!" advertising designed to encourage "shifts of consumption" from peak demand times to periods of low electricity demand. Ibid. (emphasis in orginal). Informational advertising would not seek to increase aggregate consumption, but would invite a leveling of demand throughout any given 24-hour period. The agency offered to review "specific proposals by the companies for specifically described [advertising] programs that meet these criteria." Id., at 38a.

The describing arithmen attempts to construct the Policy Statement to authorize advertising that would result find a net energy savings" even if the advertising encouraged consumption of additional electricity. Post, at 13. The arrespond construction fails, however, since the Policy Statement is phased only in terms of advertising that promotes "the purchase of addity services" and "cales" of electricity. Planty, the Conscission did not intend to permut advertising that would enhance not energy efficiency by increasing consumption of electrical services.

CENTRAL HUDSON GAS v. PUBLIC SERVICE COMMIN

When it rejected requests for rehearing on the Policy Statement, the Commission supplemented its rationale for the advertisting ban. The agency observed that additional electricity probably would be more expensive to produce than existing output. Because electricity rates in New York were not then hased on marginal cost, the Commission feared that additional power would be priced below the actual cost of generation. This aditional electricity would be subsidized by all consumers through generally higher rates. Id., at 57a-58a. The state agency also thought that promotional advertising would give "misleading signals" to the public by appearing to encourage energy consumption at a time when conservation is needed. Id., at 59a.

Appellant challenged the order in state court, arguing that the Commission had restrained commercial speech in violation of the First and Fourteenth Amendments.² The Commission's order was apheld by the trial court and at the intermediate appellate level.⁴ The New York Court of Appeals affirmed. It found little value to advertising in "the non-competitive market in which electric corporations operate." 47 N. Y. 2d 94, 110, 390 N. F. 2d 749, 757 (1979). Since consumers "have no choice regarding the source of their electric power," the court desied that "promotional advertising of electricity might contribute to society's interest in 'informed and reliable' economic decisionneking." Ibid. The court also observed that by encouraging consumption, promotional advertising would only exacerbate the current energy situation.

^{*&}quot;Manuscul cost" has been defined as the "extra or incremental cost of producing an extra unit of output." P. Samuelson, Economies 463 (10th ed. 1978) (emphasis in original).

² Countal Blads in also alleged that the Commission's order reaches beyond the agency's statutory powers. This argument was rejected by the New York Court of Appeals, 47 N. Y. 2d 94, 102-104; 300 N. E. 2d 749, 752-754 (1979), and was not argued to this Court.

²⁰⁶³ App. Dec. 24 364 (1978) (Appathate Division of State Segrence Court) ; App. 56 Juris, St., at 22a (N. Y. Sup. Ct., Feb. 17, 1978).

79-565---OPINION

4 CENTRAL HUDSON GAS v. PUBLIC SERVICE COMMUN

Id., at 110, 390 N. E. 2d. at 758. The court concluded that the governmental interest in the prohibition outweighed the limited constitutional value of the commercial speech at issue. We noted probable jurisdiction, — U. S. — (1979), and now reverse.

ĪΤ

The Commission's order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience. Virginia State Board of Phormacy v. Virginia Citizens Communer Council, Inc., 425 U. S. 748, 762 (1975); Bates v. State Bar of Arizona, 433 U. S. 350, 363-364 (1977); Friedman v. Rogers, 436 U. S. 447, 456 The First Amendment as applied to the States (1979). through the Fourteenth Amendment, protects commercial speech from unwattranted governmental regulation. Virginia State Board of Pharmacy, 425 U.S., at 7614762. Commercial expression not only serves the economic interest of the speaker. but also assists consumers and furthers the socieful interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the "highly paternelistic" view that government has complete power to suppress or regulate commercial speech. "[P]cople will perceive their own best interests if only they are well enough informed and . . , the best means to that end is to open the channels of communication, rather than to close them. . . . ? Id., at 770; see Lineark Associates, Inc. 'v. Township of Willingborn, 431 U.S. 85, 92 (1977). Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all. Butes v. State Bar of Arizona, supra, 433 U. S., at 374.

Nevertheless, our decisions have recognized "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." Ohro-

... 40 700

lik v. Ohio State Bar Assn., 436 U. S. 447, 455-456 (1978); see Bates v. State Bar of Arizona, supra, at 381; see also Jackson & Jeffries. Commercial Speech: Economic Due Process and the First Amendment, 65 Vs. L. Rev. 1, 38-39 (1979).* The

Fig. 85 opinion concurring in the judgment, Mr. Justice Stevens suggosts that the Commission's order market beyond commercial speech to supplies expression that is suffiled to the full projection of the Euret Ametoliment. See post of 3. We find no support for this class in the record of this case. The Commission's Policy Statement excluded hims stitutional and informational" massages from the advertising bon, which was testing that to all advertising "electry indended to proque sales." App. to June St., at 35a. The complaint alleged only that the i probletion of phonotened advections by Perinioner is not so soughly regulation of Printipper's commonal speech. . " Id. of 70a Mossover, the state munt opinions and the arguments of the posting before this Court also viewed the highton as involving only romanes, of speech. Nevertheless, the conversing opinion of Mr. Justice Stavens views the Commission's order or appuressing more than compressed speech because it would aut-Low, for example, advertising that promoted electricity consumption by training the environmental banefits of such uses. See post at 3. Apparently the concurring against would second full First Amendment protection to all premotional advertising that includes claims firebring to questions frequently discussed and debated by our publical tenders." Post, al ŝ.

Although this approach regards to the serious issues surrounding our national correct palicy as raised in this case, we think it would blur further the have the Court has sought to delay in commercial spaceh cases. It would grant broad constitutional protection to any adversing that links a prodnot to a correct public debate. But graph, if nor may, products may be tack to public concerns with the environment lenergy, en nonce policy, or individual health and safety. We ride teday in Consolidated Edison Co. Public Service Cosmics of New York, supra that arithmeting expectate full. parophy of First Assemblers protections for their disent comments on public issues. There is no reason for providing similar resistinguoual protection when such statements are made only in the context of commescial transactions. In that context, for example, the State returns the posent to Posterful that the stance of commercial information flow[s] Shootly by well by Irecly!" Virginia State Bound, 425 U. S. at 572. This Court's decisions on compreheld expression have rested on the premise that such aper b, although meriting some protection, is all less constitutional

79-565-OPINION

6 CENTRAL HUDSON GAS 6. PUBLIC SERVICE COMMIN.

Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. Id., at 456, 457. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.

The First Amendment's concern for commercial speech is based on the informational function of advertising. See First National Bank of Boston v. Bellotti, 435 U. S. 765, 783 (1978). Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lewful activity. The government may ban forms of commercialion more likely to deceive the public than to inform it. Friedman v. Bagers, 440 U. S. 1, 13, 15-16 (1970); Obratik v. Obio State Bar Assn., 436 C. S., at 464-465, or commercial speech related to illegal activity, Pittsburgh Press Co. v. Pittsburgh Commin on Human Relations, 413 U. S. 376, 388 (1973).

If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest.

moment Com other forms of speech. As we stated in *Okralib*, support the failure to distinguish between commercial and monominatrial speech "could just dilation, simply by a leveling process, of the force of the [Forst] Amendment's guarantee to the latter kind of speech." 436 U.S., at 456.

[&]quot;In most other contexts, the First Amendment prohibits regulation based on the content of the message. Consulated Edison Co. v. Public Service Commin of New York. No. 79-134 (——, 1980) slip op. at 6-9. Two features of renumerical speech permit regulation of its content. First, recommendal speakers have extensive knowledge of both the market and their products. Thus they are well-situated to evaluate the accuracy of their missages and the favolutures of the underlying activity. Belts v. State Barn of Arizona, 433 M. S., at 381 (1977). In addition, temmercial speech, the off-pring of economic self-color—1, is a hardy broad of expression that is not "particularly so-republe to being crashed by overboad regulation." Ibid

The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved: the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Under the first criterion, the Court has declined to uphold regulations that only indirectly advance the state interest involved. In both Bates and Virginia Board of Pharmacy, the Court concluded that an advertising ban could not be imposed to protect the ethical or performance standards of a profession. The Court noted in Virginia Board of Pharmacy that "[t]he advertisting ban does not directly affect professional standards one way or the other." 425 U.S., at 769. In Bates, the Court overturned an advertising prohibition that was designed to protect the "quality" of a lawyer's work. "Restraints on advertising ..., are an ineffective way of deterring shoddy work." 433 U.S., at 378."

The second criterion recognizes that the First Amendment mandates that speech restrictions be "narrowly drawn." In re Primus, 435 U.S. 412, 438 (1978)." The regulatory tech-

[&]quot;In Limnork Associates v. Touriship of Willingborn, supra we observed that there was no definite connection between the township's goal of integrated bouring and its time on the use of "For Sale" agas in front of houses. 431 U.S., at 95.98.

^{*}This enables is not an application of the "overbreadth" doctrine. The latter theory permits the invalidation of regulations in First Amendment grounds even when the litigant challenging the regulation has engaged in no constitutionally protected activity. E. g. King v. New York, 340 U. S. 200 (1951). The overbreadth doctrine derives from the recognition that unconstitutional restriction of expression may deter protected speech by parties not before the court and thereby escape judicial review. Broadrick v. Ollahoma, 413 U. S. 601, 612-613 (1973), see Note. The First Amendment Overbreadth Doctrine, \$3 Harv. L. Rev. S44, 883-858 (1970). This restraint is less likely where the expression is linked.

79-565-OPINION

8 CENTRAL HUDSON GAS 6. PUBLIC SERVICE COMM'N

highe may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the assetted state interest, see First National Bank of Boston v. Bellotti, supra. 435 U.S., at 794-795, nor can it completely. suppress information when narrower restrictions on expression would serve its interest as well. For example, in Bates the Court explicitly did not "foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required" in promotional materials. 433 U. S., at 384. See Virginia State Board of Pharmacy, supra. 425 U.S., at 773. And in Carey v. Population Services, International, 431 U.S. 678, 701-702 (1977), we held that the State's "arguments do not justify the total suppression of advertising concerning contraceptives," This holding left open the possibility that the State could implement more carefully drawn restrictions. See id., at 712 (Powers, J., concurring in part and concurring in the judgment); id., at 716-717 (Stevens, J., concering).*

to "commetrial well-being" and therefore is not easily deterred by "nuesbread regulation." Betes v. State Ber of Arasone, 433 U. S., at 381.

In this care, the Commission's probabilion acts directly against the proportional activities of Control Madaeu, and to the extent the functional architecture starty to serve the State's interest, they are invalid.

If We review with special care regulations that entirely suppress constituted I speech in order to pursue a manapas hardered coding. In those executistances a hornor speech could select freat public view the underlying governmental policy. See Virginia State Board of Pharmaca angent 425 U.S. of 750, a.S. (Staward, 1, concurring). Indeed, in record cours this Court has not approved a \$0 pket hor on complete at speech unless the expression steaf was disable to some way, either because it was desegrified or tell to industral metasty.

In an opioist concurring in the judgment, Mn Justice Describes urger that the 'content' of combineral speech, as approved to the 'quality' of such expression, cuting be regulated unless all other forms of acospecch regulation are appossible. See read, at 2. The distinction is more than a little closure and its amplications are archigonast. Since the public of speech rarely can be determined without reviewing its enatont, the practical effect of the distinction could be immedial. Alternatively, if "quality",

72

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

III

We now apply this four-step analysis for commercial speech to the Commission's arguments in support of its han on promotional advertising.

A

The Commission does not claim that the expression at issue either is inaccurate or relates to unlawful activity. Yeb the New York Court of Appeals questioned whether Central Hudson's advertising is protected commercial speech. Because appellant holds a monopoly over the sale of electricity in its service area, the state court suggested that the Commission's order restricts no commercial speech of any worth. The court stated that advertising in a "noncompetitive market" could not improve the decisionmaking of consumers. 47 N. Y. 2d. at 110; 390 N. E. 2d. at 757. The court saw no constitutional problem with barring commercial speech that it viewed as conveying little useful information.

of specific refers to a correctly distinct conjectly of characteristics, the joself of this analysis could—in many situations—objectate all distinction between confinerable expression and "pure" forms of specific. Our decisions have rejected precisely that result. See Finedmen v. Rugers, 440 U. S. 1, 10, and n. 9 (1979); Obrahk v. Ohio State Box, super, 436 U. S. n. 455-456; Bates v. Alienna State Har, super, 433 U. S., at 379-381; Virginia State Board of Pharmacy, super, 425 U. S., at 770-773.

79-565--- OPINION

10 CENTRAL HUDSON GAS v. PUBLIC SERVICE COMM'N.

This reasoning falls short of establishing that appellant's advertising is not commercial speech protected by the First Amendment. Monopoly over the supply of a product provides no protection from competition with substitutes for that product. Electric utilities compete with suppliers of fuel oil and natural gas in several markets, such as those for home heating and industrial power. This Court noted the existence of interfuel competition 45 years ago, see West Ohio Gas Co. v. Public Utilities Comm'n, 294 U. S. 63, 72 (1935), Each energy source continues to offer peculiar advantages and disadvantages that may influence consumer choice. For consumers in those competitive markets, advertising by uffities is just as valuable as advertising by unregulated firms.

Even in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment. The New York court's argument appears to assume that the providers of a monopoly service or product are willing to pay for wholly ineffective advertising. Most businesseseven regulated monopolies-are unlikely to underwrite promotional advertising that is of no interest or use to consumers. Indeed, a monopoly enterprise legitimately may wish to inform the public that it has developed new services or terms of doing business. A consumer may need information to aid his decision whether or not to use the monopoly service at ell, or how much of the service he should nurchase. In the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising.11 Since no such extraordinary conditions have

¹⁰ Several commercial sporch decisions bear involved enterpreses subject to extensive state regulation. E. g., Friedman v. Rugers, 440 U. S. 1, 4-5 (1979) (optometrists); Bates v. Arisona State Bar, 433 U. S. 350 (1977) (lawyers); Virginia State Bû of Pharmacy v. Virginia Culizena Consumer Council, Inc., 425 U. S. 748, 750-752 (1976) (pharmacists).

If There may be a greater incentive for a utility to advertise if it has

CENTRAL HUDSON GAS v. PUBLIC SERVICE COMMON I

heen identified in this case, appellant's monopoly position does not after the First Amendment's protection for its commercial speech.

B

The Commission offers two state interests as justifications for the ban on promotional advertising. The first concernsenergy conservation. Any increase in demand for electricity—during peak or off-peak periods—means greater consumption of energy. The Commission argues, and the New York court agreed, that the State's interest in conserving energy is sufficient to support suppression of edvertising designed to increase consumption of electricity. In view of our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation. Plainly, therefore, the state interest asserted is substantial.

The Commission also argues that promotional advertising will aggravate inequities caused by the failure to base the utility's rates on marginal cost. The utilities argued to the Commission that if they could promote the use of electricity in periods of low demand, they would improve their utilization of generating capacity. The Commission responded that promotion of off-peak consumption also would increase consumption during peak periods. If peak demand were to rise, the absence of marginal cost rates would mean that the rates charged for the additional power would not reflect the true costs of expanding production. Instead, the extra costs would be botne by all consumers through higher overall rates. Without promotional advertising, the Commission stated, this inequitable turn of events would be tess likely to occur. The choice among rate structures involves difficult and important

use preceditional expenses in determining its rate of return, rather than para those costs on solely to shareholders. That practice, however, hardly distorts the reasonate decision whether to advertise. Unregulated businesses pass on promotional costs to consumers, and this Court expressly approved the practice for utilities in West Ohio Gas Co. v. Public Utilities Commin, 294-17. S. 63, 72 (1935).

79-365-OPINION

12 CENTRAL BUDSON GAS v. PUBLIC SERVICE COMM'N.

questions of economic supply and distributional fairness." The State's concern that rates be fair and efficient represents a clear and substantial governmental interest.

C

Next, we focus on the relationship between the State's interests and the advertising ban. Under this criterion, the Commission's laudable concern over the equity and efficiency of appellant's rates does not provide a constitutionally adequate teason for restricting protected speech. The link between the advertising prohibition and appellant's rate structure is, at most, tenuous. The impact of promotional advertising on the equity of appellant's rates is highly speculative. Advertising to increase off-peak usage would have to increase peak usage, while other factors that directly affect the fairness and efficiency of appellant's rates remained constant. Such conditional and remote eventualities simply cannot justify silencing appellant's promotional advertising.

In contrast, the State's interest in energy conservation is directly advanced by the Commission order at issue here. There is an immediate connection between advertising and demend for electricity. Central Hudson would not contest the advertising han unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.

 \cdot D

We come finally to the critical inquiry in this case: whether the Commission's complete suppression of speech ordinarily protected by the First Amendment is no more extensive than necessary to further the State's interest in energy conservation. The Commission's order reaches all promotional advertising, regardless of the impact of the touted service on overall energy use. But the energy conservation rationale, as im-

¹³ See W. Jones, Regulated Industrial 194-287 (2d ed :1979).

Appellant insists that but for the ban, it would advertise products and services that use energy efficiently. These include the "heat pump," which both parties acknowledge to be a major improvement in electric heating, and the use of electric heat as a "back-up" to solar and other heat sources. Although the Commission has questioned the efficiency of electric heating before this Court, neither the Commission's Policy Statement nor its order denying reheating made findings on this issue. In the absence of authoritative findings to the contrary, we must credit as within the realm of possibility the claim that electric heat can be an efficient alternative in some circumstances.

The Councission's order prevents appellant from promoting electric services that would reduce energy use by diverting demand from less efficient sources, or that would consume roughly the same amount of energy as do alternative sources. In peither situation would the utility's advertising endanger conservation or mislead the public. To the extent that the Commission's order suppresses speech that in no way impairs the State's interest in energy conservation, the Commission's order violates the First and Foorteenth Amendments and most be juvalidated. See First National Bank of Boston v. Belotti, supra

The Commission also has not demonstrated that its interest in conservation cannot be protected adequately by more literized regulation of appellant's remmercial expression. To further its policy of conservation, the Commission rould attempt to restrict the format and content of Central Hudson's advertising. It might, for example, require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions

79-565-OPINION

14 CENTRAL HUDSON GAS v. PUBLIC SERVICE COMM'N.

and for the foresceable feture. Cf. Banshaf v. FCC, — U. S. App. D. C. —, 405 F. 26 1082 (1968), cert denied, 396 U. S. 842 (1969). — In the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hadson's advertising."

w

Our decision today in no way disparages the national interest in energy conservation. We accept without reservation the argument that conservation, as well as the development of alternate energy sources, is an imporative national goal. Administrative bodies empowered to regulate electric utilities have the authority—and indeed the duty—to take appropriate action to further this goal. When, however, such action involves the suppression of speech, the First and Fourteenth Amendments require that the restriction be no more extensive them is necessary to serve the state interest. In this case, the record before us fails to show that the total ban on promotional advertising meets this requirement."

¹⁹ The Countaission also might consider a system of previowing advertising campaigns to insure that they will not defeat conservation policy. It has instituted such a program for approxing "informational" advertising under the Policy Statement challenged in this case. See p. 2, supra. We have observed that commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Casacil. Inc., supra, 425 U. S., at 771, a. 24. And in other areas of speech regulation, such as observity, we have recognized that a preservening arrangement can pass constitutional master if it includes adequate procedural safeguards. Preedman v. Maryland, 380 U. S. 51 (1965)

Difference of our conclusion that the Commission's advertising policy violates the First and Fearteeath Amendments, we do not reach appellant's claims that the agency's order also violated the Equal Protection Claims of the Fourtreath Amendment, and that it is both overboad and vague.

O'The Commission order at issue here was not promulgated in response to an emergency situation. Although the advertising ban initially was prompted by critical fuel shortage in 1973, the Copunity on makes no claim.

79-555---OPINION

CENTRAL HUDSON GAS & PUBLIC SERVICE COMMON 15

Accordingly, the judgment of the New York Court of Appeals is:

Reversed..

that an emergency now exists. We do not consider the powers that the State might have over utility affecting in emergency discussioness. See State v. Oktoboma Gue & Electric Co., 536 P. 2d 587, 593-896 (Okto. 1977).