10-1979

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

Lewis F. Powell Jr.

Vole
Q unsubstantial

U. S. Pub. Service Comm. banned utility advertising that promoted use of electricity. Purpose was to conserve energy.

Our commercial speech cases were distinguished on ground that the speech benefited the public (e.g. Va Pharmacy) or educated public (Bellotti). Here, it was held neither purpose was served.

PRELIMINARY MEMORANDUM

November 21, 1979 Conference
List 3, Sheet 1

No. 79-565-ASX — Appeal from NY Ct.App. (Cooke)

CENTRAL HUDSON GAS & ELEC. CORP.

v.

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

1. SUMMARY. Whether an order of the Public Service Comm'n prohibiting electric utilities from promoting the use of electricity through advertising violates the First Amendment or the Equal Protection Clause.

2. 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 be affected by No. 79-134, Con Ed. v. Public Svc Comm of N.Y., because that case deals with public affairs messages [corp].

utilities from "promoting the use of electricity through the 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 proscription of promotion of electric sales will result in some dampening of unnecessary 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 BELOW. The New York Court of Appeals affirmed. After determining that the Comm'n'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 increased use of electricity. Its content might be affirmatively detrimental to society.

4. CONTENTIONS. 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 ban promotion of electric lighting, which uses far less energy that heating and cooling, and involves safety. It would also ban 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 First 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 urges 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 petn.

5. DISCUSSION. This is a proper appeal. The Court of Appeals opinion makes clear that the order was attacked as invalid under the First 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 Petn.

November 21, 1979

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 79-565

CENTRAL HUDSON GAS & ELECTRIC CORP.

vs.

PUBLIC SERVICE COMMN. OF NEW YORK

Also motion to dismiss or affirm.

Noted
&
set with
Consolated
Ed - 79-134

	HOLD FOR	CERT G	CERT D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	MERITS DIS	MERITS AFF	MOTION REV	MOTION AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J				✓									
Brennan, J				✓									
Stewart, J	✓			for Consolidated									
White, J	✓												
Marshall, J				✓									
Blackmun, J				✓									
Powell, J				✓									
Rehnquist, J					✓								
Stevens, J	✓												

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 Ed case. Because this case presents a close question in an uncharted area of the First Amendment, you may be aided by further discussion.

This Court's commercial speech cases support three governing principles: (1) Prohibition on advertising in a free market is unconstitutional, Virginia State Board, Bates, and Linmark Associates. (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. Ohralik; Friedman.

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 imperfect 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 competition

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.

The State interest seems more substantial than the state interest in Virginia State Board. In that case, the State feared that consumers would not use information widely, 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 arguements can be made, however, the support the application of Virginia 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, nonetheless 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 argued that the State's interest is like the interest in Virginia State Board. 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 Virginia State Board, 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.

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 speech 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 Friedman v. Rogers also offers insight into the showing of governmental interest needed

to uphold 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 U.S., 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 Virginia State Board), 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.

79-565 CENTRAL HUDSON v. PUBLIC SERVICE

Argued 3/17/80

Telford Taylor (for Petr)

79-[...] ~~CENTRAL HUDSON~~ ... ~~PUBLIC~~ SERVICE Argued 3/17/80

promotional ban on bill

Supreme Court of the United States

Memorandum

................................, 19......

facts:

[...]ional adv. in fed. for Fed Energy Comm. requires [...] is lawful. No govt [...]tion.

[...] was ordered in '73. Then [...] of oil today, tho we are foreign oil

[...]ld prevent adv. promoting on ground ~~that~~ this would

Sally - I mistakenly used this sheet for Telford's argument.

— [...]mp.

See Brief p 15 - quote from op. of N Y C/Appls - overlooks fact that CO's share of space heating is ~~com~~ minor. ~~[...]~~ - house heating oil dominates market - 16.

See J. Pratt's op. in DC in Long Island Lighting Case - 16

Facts as to relative merits of competing sources of energy are imp. to public - as in Va Pharmacy & Bates

Telford Taylor (Petr) – Cont.

~~Opposition is commercial speech~~

Argues this is stronger case for 1st Amend. than Bellotti because speech here in advertising to protect business of CO.

This ban doesn't involve possibility of false impressions or over-reaching (as in Ohralik). The factors weighed vs commercial speech in Ohralik & Friedman v Rogers

Order in over-broad ~~sense~~ applies in this case (what did Ct say in Bates?). Note that heat-pumps conserve electricity, & yet adv. is banned.

No other state except Oklahoma has imposed such a ban, & state court invalidated it

Schiff (Resp)

Validity of ban depends on fact that Petr. is a regulated monopoly.

Commercial speech case

79-565 Central Hudson

(Pre Conference memo).

Subject to Cf. discussion, I'm inclined to Reverse - this case is close for me because of State's authority over utilities.

Bellotti emphasized the public interest in being informed; not the Bank's Commercial interest

Court must weigh all three interests: Pet'r's, State's, and public.

As this is commercial - not political - speech, State interest need not be compelling. It must be substantial.

Its interest is "conservation" - but record doesn't make clear how this is served - Public needs to know comparative merits.

after hearing - OK

Public is allowed
to ~~choose~~ make choices
between competing
fuels for space heating
— but would be denied
~~the~~ truthful information
helpful in make
the choice.

Reverse 6 7
Affirm 2
B.R.W. passed

79-565 Central Hudson v. Public Service Conf: 3/19/80

The Chief Justice Reverse

Utility should be free as to how to conserve energy as it sees it. May require some information - but it is different to say what can't say. Va Pharmacy held truthful info can't be restrained. (C.J. cited "Live Free or Die Case in way I did it understand).

Mr. Justice Brennan Affirm

Much to say here case than Con. Ed.
Comm. can limit production. The issue is one way of bringing about less production
A "supposedly compelling state interest has been shown".

Mr. Justice Stewart Reverse

Another extremely different case. Comm. can limit customers, etc., but none of these involve 1st Amend. Then it's down.
There is not much different in principle from Con Ed case

Mr. Justice White Pass - Not at Rest

Reverse.
Letter 7/27/60

Mr. Justice Marshall Reverse

Agree with P.S.

Mr. Justice Blackmun Reverse

Baker & Ohralick provide the relevant principles. The latter does not control Wholly d

Not vague.

Mr. Justice Powell Reverse

Mr. Justice Rehnquist Affirm (tentative)

Here this ban is not limited to bulletin. It is a flat out prohibition of dissemination of information. "People ought to know" is a slogan of the media - not the people.

Mr. Justice Stevens Reverse

Even tho a state may ban, it can't prohibit discussion.

JS 3/19/80

SECOND SUPPLEMENTAL MEMORANDUM

To: Mr. Justice Powell

Re: 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 Virginia State Board 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 First National Bank v.

Bellotti may tip the balance.

In Bellotti your opinion for the Court rejected the Massachusett Supreme Judicial Court's focus on the right of a corporation to speak. Rather, you stated that the question 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 informing 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 Bellotti. 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 them 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 force governments to reveal information. The First Amendment does not incoporate a Freedom 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 weigh the petr's interest, the consumers' interest, and the state's interest. As you stated in Bellotti, the commercial speech cases "illustrate that the First Amendment goes beyond the protection of the press and the self-expression of individuals to prohibit 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 least 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 costumers using eletrical space heating.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 27, 1980

Sally — Note 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

DOS

BENCH MEMORANDUM

TO: Mr. Justice Powell

FROM: David

DATE: April 25, 1980

RE: No. 79-565, Central Hudson Gas & Electric 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 effort is not without problems. In particular, the test as I have articulated seems a bit elaborate and academic. Some might say it borders on self-parody. The reason 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

most outlandish of governmental acts. But your opinion in Friedman v. Rogers 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 precise than balancing, by using some of the analytical tools of other First Amendment doctrines. Although I remain uncertain of the workability 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 case. Part III of the opinion involves fairly elaborate analysis of the substantive arguments put forth by the Commission. This sort of analysis is uncommon in First Amendment cases, but becomes necessary when applying a middle-level standard like the commercial speech doctrine. As Jackson and Jeffries argue in their Virginia Law Review 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 Spencer's Social Statics," to paraphrase Holmes in Lochner. Perhaps there is a stronger argument 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 begin to cross and overlap. 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 point 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 ban to be overinclusive turns on the existence of energy-saving (or 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 outrageous dicta about possible courses of action for the Commission in the future. As we have discussed, the Court has tended to indulge 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.

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 "bombshell". Despite your thoughtful and careful draft, I am not yet entirely 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

From: L.F.P., Jr.

No. 79-565 Central Hudson 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 government 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 ths issue.

L.F.P., Jr.

DOS

MEMORANDUM

TO: Mr. Justice Powell

FROM: David

DATE: May 4, 1980

RE: No. 79-565, Central Hudson Gas & Electric Corp. v. Public Service Comm'n 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 nonspeech policy goals. The Court has approved complete prohibitions on forms of commercial speech when the expression itself was flawed. In Pittsburgh Press, the expression related to unlawful activity; in Ohralik, it was presented in a coercive and overbearing setting; in Friedman v. Rogers, it was both deceptive and without substantive content. But the Court has not approved outright bans on commercial speech 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 regulation. 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 regulation 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
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. 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,

Mr. Justice Powell

Copies to the Conference

cmc

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 14, 1980

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

Dear Lewis:

Please join me.

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE 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.

Sincerely,

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 15, 1980

Re: 79-565 - Central Hudson Gas v. Public Service Comm'n

Dear Lewis:

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 16, 1980

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

JPS

Mr. Justice Powell

Copies to the Conference

P.S. I should add that at the moment I 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.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 16, 1980

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

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We might try to focus these issues sharply. Exactly how have our cases defined it? John Jeffries?

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

Respectfully,

JPS

Mr. Justice Powell

Copies to the Conference

John says there is more than commercial speech involved. How would he identify the "pure" from the "commercial"?

P.S. I should add that at the moment I 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 Comm'n

Because I cannot quite figure out Justice Stevens' concerns in this case, I thought a background memorandum might best lay 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 surprisingly, I find his concerns inapt.

1) Definition of Commercial Speech: 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 Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973), your opinion described speech that does "no more than propose a commercial transaction." Virginia State Board of Pharmacy v. Virginia Consumer

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 sentences: "[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 joined 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 both 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); NLRB 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) "Other" kinds of speech at issue: 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 claim was made by Prof. Telford Taylor, whose [illegible] was involved.

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 Lenin's) that all of man's acts are political, but I can see no defensible distinction between the advertising of drugs by regulated pharmacists and the advertising of electricity by regulated power companies. If he wishes to go off on this point, I would recommend bidding him a puzzled farewell. Amen

enough to say

3) 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 four-part 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 goes on to note the "lesser protection accorded" to commercial speech, a lesser protection that is not justified only by the additional reasons offered in footnote 4. Nevertheless, I would be willing to add (perhaps in a footnote) the further observations of that passage in Ohralik: "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 guarantee with respect to the latter kind of speech."

OK

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.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 17, 1980

Re: No. 79-565, Central Hudson Gas & Electric Corp. v. Public Service Comm'n

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 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. Pittsburgh Press Co. v. Human Relations Comm'n, 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 decision protecting "pure" commercial speech, Virginia State Board of Pharmacy v. Virginia Consumer 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 formulations in consecutive sentences: "[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), 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."

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 hesitate

to undertake 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 labor 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, 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, 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 ('969); NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 477 (194'); 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. 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 footnote 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 I agree) 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 speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee 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 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 advertising of electricity by regulated power companies.

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

Sincerely,

Justice Stevens

lfp/dos

cc: The Conference

JPS suggests no dissent.

Blanket ban - 3, 5

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: JUN 6 '80

Recirculated: _____

79-565 - Central Hudson Gas v. Public Service Comm'n

MR. JUSTICE STEVENS, concurring. in judg. only.

Because "commercial speech" is afforded less constitutional protection than other forms of speech, 1/ it is important that the commercial speech concept not be defined too broadly lest 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 addressing 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." Ante, at 3. Although it is

1/ See Ohralik v. Ohio State Bar, 436 U.S. 447, 456, quoted ante, at 4 n.4. Cf. Smith v. United States, 431 U.S., 291, 318 (STEVENS, J., dissenting).

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 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 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 unquestionably too broad.2/

The Court's second definition refers to "speech proposing a commercial transaction." Ante, 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.3/ Presumably, 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

2/See Farber, Commercial Speech and First Amendment Theory, 74 Nw. U. L. Rev. 372, 382-383 (1979): "Economic motivation could not be made a disqualifying factor [from maximum protection] without enormous damage to the first amendment. Little purpose would be served by a first amendment which failed to protect newspapers, paid public speakers, political candidates with partially economic motives and professional authors." (Footnotes omitted).

3/ See id., at 386-387.

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 regulation that completely bans promotional advertising by an electric utility. This ban encompasses a great deal more than mere proposals to engage 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 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, as opposed to wood-burning 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 commercial speech concept, however that concept may be defined.

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

deception, or misinformation, truthful communication may persuade some citizens 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 reaction to the prohibition against advocacy involved in this case:

> "But even advocacy of violation, however reprehensible morally, is not a justification for denying 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 furnished reason to believe that such advocacy was then contemplated.
>
> "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. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, 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 Brandeis quoted Lord Justice Scrutton's comment in Rex v. Secretary of Home Affairs, Ex parte O'Brien, [1923] 2 K.B. 361, 382: "'You really believe in freedom of speech, if you are willing to allow it to men 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 STEVENS, J.).

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: JUN 6 '80

Recirculated: _____

79-565 - Central Hudson Gas v. Public Service Comm'n

MR. JUSTICE STEVENS, concurring.

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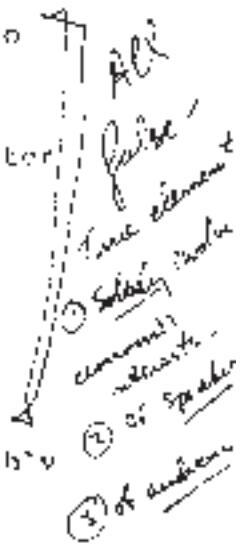

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CHAMBERS OF
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May 17, 1980

Re: No. 79-565, Central Hudson Gas & Electric Corp. v. Public Service Comm'n

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

Sincerely,

Lewis

Justice Stevens

lfp/dos

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 4, 1980
PERSONAL

RE: 79-565 - Central Hudson 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.

Regards,

WEB

Mr. Justice Powell

DOS

note just in [illegible]?

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.

Are we sure this is his view? I suppose answer is "yes," as he says so finally

If we accept Justice Stevens' view that he simply does not think this is a commercial speech case, our response plainly should be directed to 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 3: "The Commission's order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience." I would propose two substantive additions to buttress this assertion. First, I would add to the statement of facts in Part I a passage from the Commission's Policy Statement.

Where in this?

any departure of "promotional" + "institutional"?

The passage details the Commission's definition of "promotional" advertising. (1) I would insert it as the first sentence of the first paragraph on page 2, and (2) revise the ~~following~~ remainder of the 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 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 Commission'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.

"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 found ~~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 35a. 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 ~~merely~~ only commercial speech. ~~Nevertheless,~~ The concurring opinion ~~of MR. JUSTICE STEVENS~~ ~~insists that~~ views the Commission's order ~~would~~ as suppressing ~~suppress~~ more than commercial speech because it would outlaw, for example, advertising that promoted electricity consumption by touting the environmental benefits of such uses. See post, at 3. Apparently the concurring opinion would accord full First Amendment protection to all promotional advertising that includes claims "relating to . . . questions

David: Stet entire line

Stet

tend to blur further the line the Court has sought to draw ?

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

"Although this approach responds to the serious issues surrounding our national energy policy as raised in this case, we think it would create an unjustified exception to the commercial speech doctrine. The concurring opinion of 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 First 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 may retain the power to "insur[e] that the stream of commercial information flow[s] cleanly as well as freely." Virginia State Board, 425 U.S., at 772. This Court's decisions on commercial expression have rested on the promise that such speech, although meriting some protection, 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 guarantee 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 sealed off that particular argument. He could conceivably argue that the state may regulate 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 undercuts the commercial speech doctrine, we must accomodate ourselves to it because it is mandated by the First 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 regret any discomfiture my error may have caused for you.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 5, 1980

79-565 Central Hudson v. Electric 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.

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 latter 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 speech 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.

L.F.P., Jr.

ss

DOS

BENCH MEMORANDUM

TO: Mr. Justice Powell

FROM: David

DATE: June 5, 1980

RE: 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/ Because Central Hudson challenges restrictions on its own expression, we have no occasion to consider the relevance for commercial speech of "overbreadth" 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." Broadrick v. Oklahoma, supra, 413 U.S., at 612. See n. 6 supra."

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

June 5, 1980

79-565 Central Hudson 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 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." Broadrick v. Oklahoma, supra, 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

lfp/ss

DOS

Central

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 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 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 predicton 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, supra, 413 U.S., at 612. See n. 7 supra."

(7)

~~I hope this is responsive to your concerns.~~

If you think it would be helpful, I'd be glad to add the above to the opinion. I would welcome any suggestions.

Sincerely

June 5, 1980

79-565 Central Hudson 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 finds "too narrow" the description quoted on page 4, infra, from Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 455-456 (1978). When dealing with a subject as complex as commercial speech, no abstract definition is likely to satisfy all valid concerns. But this Court

can develop an ~~accurate and meaningful~~ adequate workable 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 only apparent definition of commercial speech offered~~ The difficulty of this approach is illustrated by MR. JUSTICE STEVENS' suggestion that commercial speech be limited ~~is that it involves~~ issues ~~that are~~ not "frequently discussed and debated by our political leaders." Post, at 3. This ~~definition~~ formulation would ~~fundamentally~~ recast ~~the~~ established commercial speech doctrine, for most of our decisions in this area have involved advertising on subjects ~~that were certainly the~~ frequently discussed subject[5] 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."

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 "served 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.

DOS

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

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 rumblings 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 matter matters, Justice

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

1) Justice Stevens argues that our two definitions of 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.

Following our previous memo in response to his earlier letter, we could insert citations 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. I would note, however, that WJB's clerk suggested previously that they preferred the second definition -- "speech proposing a commercial transaction."

2) Having "disposed" of our definitions of commercial speech, 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 ban on lawyer 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 generally -- which you noted in Ohralik -- by failing to distinguish between commercial and noncommercial messages.

Finally, Justice Stevens dives all the way through the Looking Glass and applies "clear and present danger" analysis to this case. I haven't the foggiest 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

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

lfp/ss 6/6/80

79-565 Central Hudson v. Public Service

MEMORANDUM TO THE CONFERENCE:

I "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 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:

I "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.F.P., Jr.

ss

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 Commission'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. Nevertheless, the concurring opinion of MR. JUSTICE STEVENS views the Commission's order as suppressing more than commercial speech because it would outlaw, for example, advertising that

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

"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 First 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, 425 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 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 guarantee to the latter kind of speech." 436 U.S., at 456."

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2, 3

From: Mr. Justice Stevens

Circulated: _____

1st PRINTED DRAFT

Recirculated: JUN 10 '80

SUPREME COURT OF THE UNITED STATES

No. 79–565

Central Hudson Gas & Electric Corporation, Appellant, v. Public Service Commission of New York. | On Appeal from the Court of Appeals of New York.

[June —, 1980]

MR. JUSTICE STEVENS, concurring.

only in result - & saying no need to consider any 4 Part analysis

Because "commercial speech" is afforded less constitutional protection than other forms of speech,[1] it is important that the commercial speech concept not be defined too broadly lest 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 addressing 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." *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 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 mat-

[1] See *Ohralik v. Ohio State Bar*, 436 U. S. 447, 456 quoted *ante* at 4, n. 4. Cf. *Smith v. United States*, 431 U. S. 291, 318 (STEVENS, J., dissenting).

ter 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 unquestionably too broad.[3]

The Court's second definition refers to "speech proposing a commercial transaction." *Ante*, 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.[4] Presumably, 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 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 embraced within the term "promotional advertising."

This case involves a governmental regulation that completely bans promotional advertising by an electric utility. This ban encompasses a great deal more than mere proposals to engage 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

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[3] See Farber, Commercial Speech and First Amendment Theory, 74 Nw. U. L. Rev. 372, 382–383 (1979):

"Economic motivation could not be made a disqualifying factor [from maximum protection] without enormous damage to the first amendment. Little purpose would be served by a free speech clause which failed to protect newspapers, paid public speakers, political candidates with partially economic motives, and professional authors." (Footnote omitted.)

[4] See *id.*, at 386–387.

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, as opposed to wood-burning 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 commercial speech concept, however that concept may be defined.[1]

The justification for the regulation is nothing more than the supposed fear that the audience may find the utility's message persuasive. Without the aid of any coercion, deception, or misinformation, truthful communication may persuade some citizens 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 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 Brandeis in his concurring opinion in *Whitney* v. *California*, 274 U. S. 357, 376-377, explain my

---

[1] The utility's characterization of the Commission's bar in its complaint as not being commercial speech clearly does not bind the Court to consideration of the First Amendment issue in the new and evolving area of constitutional law.

Nor does the Commission's intention not to suppress "institutional and informational" speech mean that only "commercial speech" will be suppressed. The failure to distinguish the two categories of speech has the practical effect of requiring that the utilities refrain from speech that is clearly outside of the Public Service Commission's jurisdiction. But the Commission does not possess the necessary expertise in dealing with these sensitive free speech questions and in any event, substantive speech entitled to maximum First Amendment protection may not be subjected to a prior clearance procedure with a governmental agency.

reaction to the prohibition against advocacy involved in this case:

> "But even advocacy of violation, however reprehensible morally, is not a justification for denying 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 furnished reason to believe that such advocacy was then contemplated.
>
> "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. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, 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 of authority if free speech is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution." 274 U. S. 357, 376–377 (footnote omitted).[1]

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[1] Justice Brandeis quoted Lord Justice Scrutton's comment in *Rex v. Secretary of State for Affairs, Ex parte O'Brien* [1923] 2 K. B. 361, 382: "You may believe in freedom of speech if you are willing to allow it to men whose opinions seem to you wrong and even dangerous; . . ." *Id.*, at 377 n. 1.

See also *Young v. American Mini Theatres*, 427 U. S. 50, 63 (opinion of Stevens, J.).

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.

DOS

BENCH MEMORANDUM

TO: Mr. Justice Powell

FROM: 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 energy-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 n.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 basis for treating the Policy Statement as severable, since it would seem both that "standing alone, legal effect can be given" to the Statement's ban with respect to non-efficient advertising, and that the Commission intended to reach such advertising if it could not reach

energy efficient advertising. Dorchy v. Kansas, 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 ibid.; Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942), but the Court has turned a blind eye to that rule when it wished to. E.g., Berea College v. Kentucky 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 Byron,

I appreciate your letter outlining your concerns on this case. "I have viewed overbreadth analysis as a standing doctrine, and it is not directly relevant to this case because Central Hudson alleges that it wishes 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 unconstitutional part of the Policy Statement from the remainder, there seems to be some basis for that approach.

Subject to approval by Brethren who have joined me, I will change

~~"Consequently, I am interested in your suggestion to confine the ruling 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~~ to read: "To the extent that the Commission's order suppresses some speech that ~~in no way~~ does not ~~impairs~~ adversely affect the State's interest in energy conservation, it violates the First and Fourteenth Amendments and must be invalidated."

Indent #55

["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 Hudson'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 suggests that the Commission would approve advertising of energy efficient services that might be submitted to it for prepublication review. ~~The Commission's~~ Its order stated that it would approve only "informational and institutional" advertising, excluding promotions ~~that would be~~ designed to increase aggregate demand for electricity. ~~Since I believe that~~ Apparently this policy would suppress advertising of energy efficient services, as is explained on page 11 of the draft opinion, I Therefore do not think ~~we can rely on~~ the pre-publication review ~~to~~ would safeguard protected speech.

If the change suggested above meets with

~~"In sum, I would be willing to pursue your suggestion to~~ restrict the ruling on the Commission's energy conservation

your approval, I will make it — together with the other changes noted in my memo. JP

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."

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 United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 10, 1980

Re: 79-565 - Central Hudson Gas & Electric Corp.
v. Public Service Comm'n 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 Bates and your Ohralik. 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.

Given 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? (1) Why not invalidate only insofar as it goes too far, that is, only insofar as it bans the advertising of energy efficient improvements? (2) And if it were reliably evident from the record that the Commission would approve such ads if submitted in advance, (3) why "strike down" anything at this time?

Sincerely yours,

Mr. Justice Powell

cmc

Cc: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 11 JUN 1979

Recirculated: _____

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

Possible merits a footnote or two in response to Lee Dunn's memo

MR. JUSTICE REHNQUIST, dissenting.

The Court today invalidates an order issued by the New York Public Service Commission designed to promote a policy that has been declared to be of critical national concern. The order was issued by the Commission in 1973 in response to the mid-eastern oil embargo crisis. It prohibits electric corporations "from promoting the use of electricity through the use of advertising, subsidy payments . . . 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 crisis 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 in energy conservation justified its retention.[1/]

The Court's asserted justification for invalidating the New York law is the public interest discerned by the Court to underlie the First Amendment in the free flow of commercial information. Prior to this Court's recent decision in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), however, commercial speech was afforded no protection under the First Amendment whatsoever. See, e.g., Breard v. City of Alexandria, 341 U.S. 622 (1951); Valentine v. Chrestensen, 316 U.S. 52 (1942).

Given what seems to me full recognition of the holding of Virginia Board 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 advertising in light of pressing national and State energy needs.

The Court's analysis is my view is wrong in several respects. Initially, I disagree with the Court's conclusion that the speech of a State-created monopoly, which is the subject of a comprehensive regulatory scheme, is entitled to protection under the First Amendment. I also think that the Court errs here in failing 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 First Amendment at all) occupies a significantly more subordinate position in the hierarchy of First Amendment values than the Court gives it today. Finally, the Court in reaching its decision improperly substitutes its 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.

I.

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 burdens.

While this Court has stated that the "capacity [of speech] for informing the public does not depend upon the identity of its source," First National Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978), the source of the speech nevertheless may be relevant in determining whether a given message is protected under the First Amendment.[2/] When the source of the speech is a State-created monopoly such as this, traditional First Amendment concerns, if they come into play at all, certainly do not justify the broad interventionist role adopted by the Court today. In Consolidated Edison Co. v. Public Service Co., ___ U.S. ___, Slip Op., p. ___ (1980), MR. JUSTICE BLACKMUN observed:

> "A public utility is a state-created monopoly. See, e.g., N.Y. Pub. Serv. Law § 68 (McKinney 1955); Jones, Origins of the Certificate of Public Convenience and Necessity: Developments in the States 1870-1920, 79 Columbia L. Rev. 426, 458-461 (1979); Comment, Utility Rates, Consumers, and the New York State Public Service Commission, 39 Albany L. Rev. 707-709, 714 (1975). Although monopolies generally are against the public policies of the United States and of the State of New York, see e.g., N.Y. Gen. Bus. Law § 340 (McKinney 1968), . . . 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 Economics 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 monopoly power through excessive rates and other forms of overreaching. . . . New York law gives its Public Service Commission plenary supervisory powers over all property, real and personal, '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. Pub. Serv. Law § § 2.12 and 66.1 (McKinney 1955)."

Thus, although First National Bank of Boston v. Bellotti, 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 Edison Co., 428 U.S. 579, 595-596 (1976), "public utility regulation typically assumes that the private firm is a natural monopoly 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 First Amendment than this Court held in Bellotti to be permissible with regard to ordinary corporations. Corporate status is generally conferred as a result of a State's determination that the corporate characteristics "enhance its efficiency as an economic entity." First National Bank of Boston v. Bellotti, 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 monopoly 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 those types of services 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.[4/]

II.

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

protection is not as extensive as that accorded to the advocacy of ideas. Thus, we stated in Ohralik v. Ohio State Bar Association, 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 Pharmacy, supra, at 761, we were careful not to hold 'that it is wholly undifferentiable from other forms' of speech. 425 U.S., at 771 n. 24. We have not discarded 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. Ibid. To require a parity 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 guarantee 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 in so doing returns to the bygone era of Lochner v. New York, 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 Nebbia v. New York, 291 U.S. 502, 537 (1934),

> "[C]here can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects . . . . [S]o 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 legislation 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 _functus officio_. . . . [I]t does not lie with the courts to determine that the rule is unwise."

And Mr. Justice 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 economic 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 1972, 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 so 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 elevates the protection accorded commercial speech that falls 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 Ohralik. I think it has also by labelling economic regulation of business conduct as a restraint on "free speech" gone far to resurrect the discredited doctrine of cases such as Lochner and Tyson & Brother v. Banton, 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.

I doubt there would be any question as to the constitutionality 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. 381 (1940), Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936), to condition its sale on specified terms, see, e.g., Nebbia v. New York, 291 U.S. 502, 527-528 (1934), or to restrict its production, see, e.g., Wickard v. Filburn, 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 ban on promotional advertising is that this Court "has previously rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial 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 laissez faire policy would lead to

optimum economic decisionmaking under the guidance of the "invisible hand." See, e.g., Adam Smith, Wealth of Nations (1909). This notion was expressed by Mr. Justice Holmes in his dissenting opinion in Abrams 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., Consolidated Edison v. Public Service Commission, __ U.S. __, ___ (1980), Slip Op. p. 3; Mill, On Liberty (1952); Milton, Areopagitica, A Speech for the Liberty of Unlicensed Printing (1909).

While it is true that an important objective of the First Amendment is to foster the free flow of information, identification of speech that falls within its protection is not aided by the metaphorical reference to a "marketplace of ideas." There is no reason for believing that the marketplace of ideas is free from market imperfections 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 UCLA L. Rev. 964, 967-981 (1978). Indeed, 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. See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)(fighting words); Beauharnais v. Illinois, 343 U.S. 250 (1952)(group libel); Roth v. United States, 354 U.S. 476 (1956)(obscenity). It also has been held that the government has a greater interest in regulating some types of protected speech than others. See, e.g., FCC v. Pacifica Foundation, 438 U.S. 726 (1978)(indecent speech); Virginia State Board of Supervisors v. Virginia Citizens Consumer Council, 425 U.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, an opportunity for rebuttal seldom suffices to undo [the] harm of a defamatory falsehood. Indeed the law of defamation is rooted in our experience that the truth rarely catches up with a lie." The Court similarly has recognized that false and misleading commercial speech is not entitled to any First Amendment protection. See, e.g., ante, p. 7.

The above examples illustrate that in a number of instances government may constitutionally decide that societal interests 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 substantial 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 utilities; indeed, in the case of a regulated monopoly, it is difficult for me to distinguish "society" from the state legislature 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 conservation to the extent the government deems appropriate, if only the channels of communication are left open.[5/] Rather, I would hold 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 citizens.

III.

The Court concedes that the State interest in energy conservation is plainly substantial, ante, p. 2, as is the State's concern that its rates be fair and efficient. Ante, 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. Ante, 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-part test, that its regulation is no more than necessary to serve the State's interest. Ante, pp. 11-12. In reaching this conclusion, the Court conjures 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 construed 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.[6/] 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 MR. JUSTICE BLACKMUN observed in Illinois State Board of Elections v. Socialist Workers' Party, 440 U.S. 173, 188-189 (1979), (concurring opinion:)

> "A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' 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 ban on promotional advertising. In its statement of the facts, the Court observes that the Commission's ban 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 'off-peak' consumption, the ban limits the 'beneficial 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 misguided because it fails 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 off-peak consumption would impair conservation efforts.[7/] The Commission stated:

> "Increased off-peak generation, . . . while conferring some beneficial side effects, also consumes valuable energy resources, and, if it is the result of increased sales, necessarily creates incremental air pollution and thermal discharges to waterways. More important, any increase in off-peak generation from most of the major companies producing electricity in this State would not, at this time, be produced from coal or nuclear resources, but would require the use of oil-fired generating facilities. The increased requirement for fuel oil to serve the incremental off-peak load created by promotional advertising would aggravate the nation's already unacceptably high level of dependence on foreign sources of supply and would, in addition, frustrate rather than encourage conservation efforts." App. to Juris. St., p. 37a.[6/]

The Court also observes, as the Commission acknowledged, that the ban on promotional advertising can achieve only "piecemeal conservationism" 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 toward 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 cause no net increase in total energy use. The Court's reasoning in this regard, however, is highly speculative. 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 ban the utilities would advertise this type of "energy

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

> "[I]nstallation 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 reserve generating capacity requirements for the State.

The Court next asserts 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 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." 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 net 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 construe its law in a

manner consistent with the Federal Constitution. As stated in Borrows v. Jackson, 346 U.S. 249, 256 (1953):

> "It would indeed be undesirable for this Court to consider every conceivable consideration which might possibly arise in the application of complex and comprehensive legislation. Nor are we so ready to frustrate the expressed will of Congress or that of the State legislatures. Cf. Southern Pacific Co. v. Gallager, 306 U.S. 167, 172."

I think the Court would do well to heed the admonition in Borrows here. The terms of the order of the New York Public Service Commission in my view indicate that advertising designed to promote net savings in energy use does not fall within the scope of the ban. The order prohibits electric corporations "from promoting the use of electricity through the use of advertising, subsidy payments . . . or employee incentives." App. to Juris. St., p. 31a (emphasis added). It is not clear to me that advertising that is likely to result in net savings of energy is advertising that "promot(es) the use of electricity," nor 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 net savings in energy as consistent with the objectives of its order and therefore permissible.[12/] The Commission, for example, has authorized the dissemination of information that would result in shifts in electrical demand, thereby creating net savings in energy by reducing peak demand. App. to Juris. St., p. 37a.[13/] It has also indicated a willingness to consider at least some other types of "specific proposals" submitted by utilities. Id., pp. 37a-38a. And it clearly permits informational as opposed to promotional dissemination of information. Id., pp. 43a-46a. Even if the Commission were ultimately to reject the view that its ban on promotional advertising does not include advertising that results in

net energy savings, I think the Commission should at least be given an opportunity to consider it.

It is in my view inappropriate 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 Parker v. Levy, 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 statute . . . covers a whole range of easily identifiable and constitutionally permissible . . . conduct . . . .' CSC v. Letter Carriers, 413 U.S. 548, 580-581 (1973)." This is clearly the case here.

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

1/

The New York Court of Appeal stated:

"In light of current exigencies, one of the policies of any public service legislation 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 corporations . . . to formulate and carry out long-range programs . . . [for] the preservation of environmental values and the conservation of natural resources.' (Public Service Law, § 5(subd. 2). Implicit in this amendment is a legislative recognition of the serious situation which confronts our State and Nation. More important, conservation of resources has become an avowed 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 661, 673-674)." App. to Juris. St. pp. 4A-5A.

2/

In Brown v. Glines, ___ U.S.___, 48 U.S.L.W. 4093 (1980), for example, we recently upheld Air Force Regulations that imposed restrictions on the free speech and petition rights of Air Force personnel. See also, e.g., Parker v. Levy, 417 U.S. 733 (1974) (commissioned officer may be prohibited from publicly urging enlisted personnel to obey orders that might send them into combat; Snepp v. United States, __U.S.__ (1979) (employees of intelligence agency may be require to submit publications relating to agency activity for prepublication review by the agency).

3/

In this regard the New York Court of Appeals stated:

"Public utilities, from the earliest days in this State, have been regulated and franchised 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 utilities which are well nigh necessities' (People ex rel. New York Edison Co. v. Willcox, 207 N.Y. 86, 99; Matter of New York Electric Lines Co., 301 N.Y. 322). 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. Squire, 307 N.Y. 593, 603-605). To protect against abuse of this superior economic position extensive governmental regulation has been deemed a necessary coordinate (see People ex rel. New York Edison Co. v. Willcox, supra, at pp. 93-94)." App. to Juris. St., p. 13a.

4/

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. Pub. Serv. Law, § 65(1). The Commission, under state law, is required to set reasonable rates. N.Y. Pub. Serv. Law § § 66(2) and (12); 72. The Commission has also been authorized by the Legislature to prescribe "such reasonable improvements [in electric utilities' 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, individually or cooperatively, for the performance of their public service 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. Law § 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 -- an interest that could reasonably be found to be inconsistent with the promotion of greater profits for utilities.

3/

Although the Constitution attaches great importance to freedom of speech under the First Amendment so that individuals will be better informed and their thoughts and ideas will be uninhibited, 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 immediate tangible benefits and the success of which depends on incremental 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 own short-run advantage to not act 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 Townsend v. Yeomans, 301 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.

6/

Indeed appellee in its brief states:

> "[N]either Central Hudson 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 resolve it by invalidating the State regulation.

7/

In making this finding, the Commission distinguished "between promotional advertising designed to shift existing consumption from peak 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.

6/

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

> "While promotion of off-peak usage, particularly electric space heating, is touted by some as desirable because it might increase off-peak usage and thereby improve a summer-peaking company's load factor, we are convinced that off-peak promotion, especially in the context of imperfectly 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, requires the burning of scarce oil resources. This increased requirement for fuel oil aggravates the nation's already high level of dependence on foreign sources of supply." App. to Juris. St., p. 58a.

9/

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 pump, counsel for appellees stated at oral argument that "Central Hudson says 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 carr[ies] 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 Sargasso Sea of difficult non-legal 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.

11/

Even assuming the Court's speculation is correct, it has 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 conjunction with the more efficient one.

11/

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

> "[P]romotional 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.

12/

At oral argument counsel for appellants conceded that the ban would not apply to utility advertising promoting the conservation 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 ban is defined as 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 showing 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 our ban, we're not interested in banning 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.

13/

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

DOS

BENCH MEMORANDUM

TO: Mr. Justice Powell

FROM: David

DATE: June 12, 1980

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

Although our forces were caught in a crossfire yesterday, I do not believe we have suffered any unanticipated losses. I have reviewed again the assault from the 'left' (HAB'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 articulates would provide commercial expression with the same protections that political and "pure" speech now enjoy. (1) Yes. But cases have not gone this far.

Not surprisingly, the attack from the 'right' was a bit stronger. Section I of WHR's dissent argues simply that Central Hudson 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

battle.

WHR's Part III, however, scores a few points. By focusing on the absence of facts in this litigation, he poo-poos the "presumptions" we draw from the arguments. (I particularly like his reference in footnote 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, WHR 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, WHR 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.

DOS

BENCH MEMORANDUM

TO: Mr. Justice Powell

FROM: David

DATE: June 12, 1980

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

In response to Justice Blackmun's opinion, I would append the following paragraph to footnote 8 in the current draft:

"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. 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, ~~I believe~~ the result of that analysis ~~would be to accord commercial speech the same protection as political and other~~ and "pure" forms of speech. Our decisions have rejected precisely that ~~outcome~~ result. See n. 4 supra."

could - in many situations - obliterate all distinction between

In response to Justice Rehnquist'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 Rehnquist 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. Plainly, 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 CONFERENCE:

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

Add to footnote 8:

> "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 Friedman v. Rogers, 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 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

advertising encouraged 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.

ss

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN 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,

Bill

Mr. Justice Blackmun

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS 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

cc: The Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 16, 1980

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

Dear Lewis,

Please join me.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference

cmc

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

CHAMBERS OF
THE CHIEF JUSTICE

June 17, 1980

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

Dear Lewis:

This will confirm my tentative "join."

Regards,

WEB

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.F.P., Jr.

ss

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 18, 1980

Re: No. 79-565 - Central Hudson 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

David - Lady Luck has frowned upon us! See my HAB's clerk will show you the "recasting". If it is not extensive, I may talk to Connie.

Mr. Justice Powell

cc: The Conference

June 18, 1980

79-565 Central Hudson v. Public Service Comm'n

MEMORANDUM TO CONFERENCE:

In light of the changes that Harry 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 relevent.

Lou Cornio advises that this deletion will not prevent this case from being ready for Friday.

L.F.P., Jr.

ss

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 16, 1980

MEMORANDUM TO THE CONFERENCE

Re: 79-565 Central Hudson Gas & Electric 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,

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 First 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 BLACKMUN, 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." Ante, 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 Brandeis 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 enforced silence. Only an emergency can justify repression." Whitney v. California, 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 hawking 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 Buckley v. Valeo, 424 U.S. 1, 14 (1976):

> "Discussion of public issues 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 broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"

And in Garrison v. Louisiana, 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 First 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 issues, see, e.g., Winters v. New York, 333 U.S. 507, 510 (1948) -- both because the line between the informing and the entertaining is elusive 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.g., 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. Pacifica, 438 U.S. 726 (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. 1, 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 these 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 Holmes 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, noncoercive" speech. See ante, p. 1 (BLACKMUN, 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 soon to avoid harm 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.

Unfortunately, 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 Breard v. Alexandria, 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 Valentine 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 poltical speech by according it first amendment protection in Virginia State Board of Pharmacy v. Virginia Citizens Consumer 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 imprimatur 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 "truth," 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 bazaar, 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 common law notions of fraud that are separated by a world of difference from the realm of politics and government. What time, legal decisions, and common sense have so widely severed, I declined 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 poltical, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to re-learn many years hence."

lfp/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 a decision of the New York Court of Appeals.

Our reasons are set forth in full in the opinion filed today. I therefore ~~summarize~~ indicate 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 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 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.

Accordingly, we ~~We therefore~~ 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.

2 copies to the Court 6/14/80

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					2nd draft 6/18/80	4th draft 6/16/80	1st printed draft 6/16/80	

79-565 Central Hudson v. Public Service

Master

Received
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DOS, 4/25/80

No. 79-565, Central Hudson Electric Corp. 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 banned "promotional" advertising by an electric utility.

I

In December 1973, the Commission, appellee here, ordered that electric utilities in New York State cease all advertising that "promot[es] 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 Hudson Gas & Electric Corporation, the appellee in this case, submitted a letter to the Commission opposing 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. But

other energy sources are not regulated by the Commission, they remain free to advertise. Consequently, the Commission stated, its ban could achieve only "piecemeal conservationism." Still, the agency defended ~~the ban~~ its action here as likely to "result in some dampening of unnecessary growth" in energy consumption. Id., at 37a. The Commission 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 seek to increase aggregate consumption, 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 rehearing on

existing output, and that electricity rates in New York were not calculated on the basis of marginal cost. 1/ Without rates reflecting 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 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 during a period of rising energy costs.

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." Ibid. The court also observed that by encouraging consumption, promotional advertising of electric power would only exacerbate the "present energy crisis." 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 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 Hudson argues that promotional advertising would be useful to

The First Amendment, as applied to the states through the Fourteenth 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]eople 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 if advertising communicates only an

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 Ass'n, 436 U.S. 447, 455-456 (1978). 4/ Following 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 it, Friedman 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.

Under the first criterion, the Court has overturned regulations that are asserted to serve state interests relatively remote from the expression at issue. 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

770; See Ohralik v. Ohio State Bar Ass'n, 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 goal 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 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 (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. Rogers, 440 U.S. 1

speech of Texas optometrists," 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 speech, 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.

III

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.2d, 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. 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. Monopoly over the supply of a product provides no protection from competition with substitutes for

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 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 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 evaluation of ~~defeats the core of the~~ First Amendment goals. 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

to aid his decision whether or not to use the 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 advertise, 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.

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 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 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 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 consumers through higher overall rates.

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

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 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 suppression of petitioner's advertising.

In contrast, the Commission's laudable

between the advertising prohibition and appellant's 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 interests. On the record before us, any concern is simply too remote from the speech at issue here to justify the Commission's order.

D

Finally, we consider whether the Commission's suppression of commercial speech is limited to advertising that would affect adversely 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. But the energy

use.

Appellant insists that but for the ban, it would advertise products and services that are efficient and would consume energy. 11/ But the Commission's order prevents petitioner from 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 First Amendment and must be invalidated. See First National Bank of Boston v. Bellotti, supra. 12/

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

No. 79-565, Central Hudson Gas & Electric Corp. v. Public Service Comm'n of State of New York

FOOTNOTES

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 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~~

David - why

St., at 22a (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. L. Rev. 1, 38-39 (1979).

5/ See generally Note, First 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.,

David - A deftly written & helpful 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 Hudson. Thus, we apply standards derived from less-restrictive-means analysis to judge the actual speech restriction on appellant, not the hypothetical impact on third parties. See p. infra. This approach follows 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 (Okl. 1977).

8/ 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 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. Although the Commission has questioned the efficiency of those devices and services before this Court, neither the Commission's Policy Statement nor its order denying rehearing addressed this issue. In the absence of

13/

12/ In view of our conclusion that the 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 overbroad and vague.

Key Hein holding sentence

We invalidate the Commission's order because it restricts advertising with a positive or neutral impact on energy conservation. In addition response, the Commission might consider a system of previewing advertising campaigns to assure that they will not defeat conservation policy. It ~~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 doctrine may not apply

David - Add to text the FN or to authority & duty of Comm' to take appropriate energy conservation measures. See my marginal note on p 18 of Text. These changes

muster so long as it includes adequate procedural safeguards. Freedman v. Maryland, 380 U.S. 51 (1968).

AFFIRM

DOS, 5/4/80

No. 79-565, Central Hudson Electric Corp. 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 banned "promotional" advertising by an electric utility.

I

In December 1973, the Commission, appellee 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. 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

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 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 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 power," the court denied that "promotional

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.

The Commission's order restricts only commercial speech, that is, expression related solely 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. "[P]eople 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 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

speech." Ohralik v. Ohio State Bar Ass'n, 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. The 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 government 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 Human Relations, 413 U.S. 376, 388 (1973).

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 goal. 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.

Under the first criterion, the Court has 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 houses. 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 inherent 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 "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 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 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. Rogers, 440 U.S. 1 (1979), when we sustained a regulation prohibiting the use of trade names by optometrists. We stressed that the restriction

"has 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 if the expression is within the category category of commercial speech. Next, we ask whether the asserted governmental 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.

III

We now apply this four-step analysis for

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 First 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. For 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 how 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 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.

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 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 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 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 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.

D

Finally, we consider whether the Commission's suppression of commercial speech is limited to advertising that would affect adversely the substantial state interest in energy conservation. Central Hudson 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. 11/

When the State regulates commercial speech to advance directly a substantial state interest, the challenging party must 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

is "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. 601, 612-613. The theory derives from the recognition that overbroad regulation of expression may deter protected speech of parties not before the court and thereby escape judicial review. But overbreadth analysis, which is disfavored 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 good 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.,

IV

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 vague. 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 vagueness 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 guidance to appellant in understanding the precise reach of the Commission's order. See CSC v. Letter Carriers, 413 U.S. 548, 580 (1973). [13]

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

Affirmed

Affirm

No. 79-565, Central Hudson Gas & Electric Corp. v. Public Service Comm'n of State of New York

FOOTNOTES

DOS, 5/14/80

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

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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.,

court and thereby escape judicial review. Broadrick v. Oklahoma, 413 U.S. 601, 612-613 (1973); see Note, The First Amendment Overbreadth 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 promulgated 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.2d 887, 895-896 (Okl. 1977).

8/ 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).

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 purposes of" the Public Service Law. Id., § 4, subd. 1. The Legislature also has instructed the agency "to encourage all persons and corporations . . . to formulate and carry out long-range programs . . . [for] the preservation of environmental values and the conservation of natural resources." Id., § 5, subd. 2. These grants of authority raise no constitutional difficulties.

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REVERSE

DOS, 5/ /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 York violated the First Amendment when it completely banned "promotional" advertising by an electric utility.

A

I

In December 1973, the Commission, appellee here, ordered that electric utilities in New York State cease all advertising that "promotes[s] the

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.

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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 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 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

cost of providing that extra power. This 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 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.

The Commission's order restricts only commercial speech, that is, expression related [redacted] 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

commercial speech from unwarranted governmental regulation. Virginia State Board of Pharmacy v. Virginia 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 ~~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. "[P]eople 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 if advertising communicates only an incomplete version of the relevant facts, the First

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." Onralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-456 (1978). 4/ ~~[illegible] distinction.~~ We have accorded 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 to be served by its regulation.

The First Amendment's concern for commercial speech is based on the informational function of such 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

Rogers, 440 U.S. 1, 13, 15-16 (1979); Ohralik 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 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. 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. 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 an indirect relationship to the state interest involved. In both Bates and Virginia Board of Pharmacy, the Court concluded that an advertising ban 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 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 deterring shoddy work." 433 U.S., at 378. 6/

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

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 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. 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 (POWELL, J., concurring in part and concurring in the judgment); see id., at 716-717 (STEVENS, J., concurring). 8/

circumstances, there is a danger that a ban on speech will partly screen from public view the underlying governmental policy. See Virginia State Board of Pharmacy, supra, 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.

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 ~~be accurate~~ and not be misleading, and concern lawful activity. Next, we ask 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

III

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 speech 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 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~~ The court stated that advertising in such a "noncompetitive market" could not improve the decisionmaking of consumers. 47 N.Y.2d, at

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 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 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. For 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 advertising reduces the information available

~~[illegible] to pay for~~ wholly ineffective advertising. Most 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 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 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. 10/ 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.

Dissent - I enjoy his sentiment, but it would not please me if I were on the Ct

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.

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 structures involves difficult questions of economic supply and distributional fairness, 11/ 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

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 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.

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.

~~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. But the energy conservation rationale, as important as it is, cannot justify suppressing information about electrical devices or services that would result in a net saving of energy, or even that would cause no net increase in energy use. In addition, ~~there has been~~ no showing has been made that a more limited restriction on the content of promotional advertising regulatory technique, such as a requirement that advertising carry reminders of the need for overall conservation, would not serve adequately the State's interest as well. Doesn't this example undermine our position?

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 pump," which both parties acknowledge to be a major improvement in electric heating, and the

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 the same amount of energy as do alternative sources. In either 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 invalidated. See First National Bank of Boston v. Bellotti, supra. 12/

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, such as the New York Commission, 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 Amendment requires that the restriction 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 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 future. Cf. Banzhaf v. FCC, 405 F.2d 1082 (CADC 1968), cert. denied, 396 U.S. 842 (1969). In the absence of a compelling showing that more limited speech regulation would be ineffective, we cannot approve the complete ~~silencing~~ suppression 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 techniques that still permit the widest possible dissemination of information.

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

Reversed.

REVERSE

No. 79-565, Central Hudson Gas & Electric Corp. v. Public Service Comm'n of State of New York

REVERSE, VERSION II

FOOTNOTES

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, Economics 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..

3/ 63 App. Div. 2d 364 (1978) (Appellate

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

5/ 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 have 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 self-interest, is a particularly hardy breed of expression that is not "particularly susceptible to

David - Is this compatible with your "

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 95-96.

7/ 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., Kunz v. New York, 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 court and thereby escape judicial review. Broadrick v. Oklahoma, 413 U.S. 601, 612-613 (1973); see Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 853-858 (1970).

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. Consequently, overbreadth analysis is not relevant to this decision.

8/ 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 shortages in 1973, those same conditions did not prevail when the present order was approved. See App. to Juris. St., at 84a. 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 (Ok), 1977).

David - Would it not be better to move this note to our final Part IV? I think it would

state regulation. E.g., Friedman v. Rogers, 440 U.S. 1, 4-5 (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, 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 return 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 Comm'n, 294 U.S. 63, 72 (1935).

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 safeguards. Freedman 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.

5-7-80

CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-565

Central Hudson Gas & Electric Corporation, Appellant. v. 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 electric utility.

I

In December 1973, the Commission, appellee here, ordered that electric utilities 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 fuel 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. 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.

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 remain free to advertise, the agency recognized 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.* (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 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 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 York were not then calculated on the basis of marginal cost,[1] 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-

[1] "Marginal cost" has been defined as the "cost of incremental unit of producing an *extra* unit of output." P. Samuelson, Economics 493 (10th ed. 1976) (emphasis in original).

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 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 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 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

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

[2] Central Hudson also alleged that the Commission's order reaches beyond the agency's statutory power. 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.

[3] 63 App. Div. 2d 391 (1978) (Appellate Division of State Supreme Court). App. to Juris. St., at 22a (Feb. 17, 1978) (State Supreme Court).

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 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 government has complete power to suppress or regulate commercial speech. "[P]eople 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 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 '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.*, 436 U. S. 447, 455–456 (1978).[1] We therefore have accorded 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 to be served by its regulation.

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[1] 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. L. Rev. 1, 35–39 (1979).

The First Amendment's concern for commercial speech is based on the informational function of such 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 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).[5]

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. 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. 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

[5] 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. 78-134 (—, 1980) slip op., at —. Two features 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 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 self-interest, is a particularly hardy breed of expression that is not "particularly susceptible to being crushed by overbroad regulation." *Ibid.*

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 *Bates* and *Virginia Board of Pharmacy*, the Court concluded that an advertising ban 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 U. S., at 760. 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 deterring shoddy work." 433 U. S., at 378.[6]

The second criterion recognizes that the First Amendment mandates that speech restrictions be "narrowly drawn." *In re Primus*, 436 U. S. 412, 438 (1978).[7] The regulatory technique may extend only as far as the interest to be served.

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[6] In *United Automobile v. Township of Willingboro*, supra, we observed that there was no "direct connection between the township's goal of integrated housing and its ban on the use of 'For Sale' signs in front of homes." 431 U. S., at 95–96.

[7] It is important to distinguish the analysis [illegible] from the "overbreadth" doctrine. The latter doctrine permits the invalidation of regulations on First Amendment grounds even when the litigant challenging the regulation has engaged in no conduct protected by the First Amendment. *E. g., Kunz v. New York*, 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 Court and thereby escape judicial review. *Broadrick v. Oklahoma*, 413 U. S. 601, 612–613 (1973); see Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 865–868 (1970). The [illegible] is less [illegible] when the expression is linked to commercial well-being and therefore is not likely to be deterred by even a flatly prohibitory regulation. *Bates v. State Bar of Arizona*, 433 U. S., at 381 (1977).

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

The State cannot regulate speech ~~unrelated to the~~ asserted state interests, 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* 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. 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 (POWELL, J., concurring in part and concurring in the judgment); see *id.*, at 716–717 (STEVENS, J., concurring).[4]

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 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 no more extensive than is necessary to serve that interest.

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[4] We review with special care those regulations that entirely suppress commercial speech in order to pursue a policy unrelated to the problems of the commercial speech itself. In those circumstances, there is a danger that a ban on speech will partly screen from public view the underlying governmental policy. See *Virginia State Board of Pharmacy*, *supra*, 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.

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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 in *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. For consumers in those competitive markets, advertising by utilities is just as valuable as advertising by unregulated firms.[5]

[5] Several commercial speech decisions have involved enterprises subject to extensive state regulation. *E. g., Friedman v. Rogers*, 440 U. S. 1, 4–5 (1979) (optometrists); *Bates v. Arizona State Bar*, 433 U. S. 350 (1977)

~~ties is just as valuable as advertising by unregulated firms.~~[9]

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 court's argument appears to assume that the providers of a monopoly service or product may be willing to pay for wholly ineffective advertising. Most 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 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 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.[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 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 Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 770–772 (1976) (photographs).

[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 distorts the consumer 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 Comm'n*, 294 U. S. 63, 72 (1935).

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 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 structures involves difficult questions of economic supply and distributional fairness,[11] 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

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 constitutionally adequate reason for restricting speech protected ~~by the First Amendment~~. The link between the advertising prohibition and appellant's rate structure is ~~at most~~,

[11] See W. Jones, Regulated Industries 191–237 (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 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 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 justify suppressing information about electrical devices or services that could result in a net saving of energy or 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 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 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-

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 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 the same amount of energy as do alternative sources. In either 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 invalidated. See *First National Bank of Boston* v. *Bellotti*, *supra*.[15]

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 future. Cf. *Banzhaf* v. *FCC*, — U. S. App. D. C. —, 405 F. 2d 1082 (1968), cert. denied, 396 U. S. 842 (1969). In the absence of a showing that more limited

[15] The Commission also might consider a 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 form 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 prior-restraint scheme can pass constitutional muster so long as it includes adequate procedural safeguards. *Freedman* v. *Maryland*, 380 U. S. 51 (1965).

speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising.[12]

IV

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, however, 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 requirement.[13]

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

Reversed.

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[12] In view of our conclusion that the Commission's advertising policy violates the First Amendment, we do not reach appellant's claims that the agency's order also violated [illegible] protection [illegible] and that it is both overbroad and vague.

[13] 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 shortages in 1973, those conditions did not prevail when the present order was approved. *See* App. to Juris. St., at 84a. 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 (Okla. 1977).

5-7-80

CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-565

Central Hudson Gas & Electric Corporation, Appellant, v. 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 utility.

I

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." *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.

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 remain free to advertise, the agency recognized 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.* (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 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 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,[1] the Commission feared that additional output would be priced below the actual cost of providing that extra output. This additional electricity thus would be subsidized by all con-

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

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 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 noncompetative 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 'informed and reliable' economic decisionmaking." *Ibid.* The court also 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

The Commission's order restricts only commercial speech, that is, expression related solely 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

[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, 102–103; 390 N. E. 2d 749, 752–754 (1979), and was not argued to this Court.

[3] 63 App. Div. 2d 364 (1978) (Appellate Division of State Supreme Court); App. to Juris. St., at 22a (Feb. 17, 1978) (State Supreme Court).

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 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 government has complete power to suppress or regulate commercial speech. "[P]eople 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 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 'common-sense' 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.*, 436 U. S. 447, 455–456 (1978).[*] We therefore have afforded 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.

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[*] *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. L. Rev. 1, 38–40 (1979).

The First Amendment's concern for commercial speech is based on the informational function [illegible]. 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 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).[1]

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. [illegible] The limitation on First Amendment [illegible] cannot survive unless the method of regulation is carefully designed to achieve the State's goal. [illegible] may be measured by two criteria. First, the restriction must directly advance the state interest involved; [illegible] 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 [illegible]

[1] In most other contexts, the First Amendment prohibits [illegible] regulation that is based on the content of the message. *Consolidated Edison Co.* v. *Public Service Comm'n of New York*, No. 79-181 [illegible], 1980 Slip Op., at 5. Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the markets 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 self-interest, is a particularly durable breed of expression that is not "particularly susceptible to being crushed by overbroad regulation." *Ibid.*

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 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* "[t]he advertising ban 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 deterring shoddy work." 433 U. S., at 379.[5]

The second criterion recognizes that the First Amendment mandates that speech restrictions be "narrowly drawn." *In re Primus*, 436 U. S. 412, 438 (1978).[7] The regulatory technique may extend only as far as the interest served.

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[5] In *Lanmark Associates v. Township of Willingboro*, *supra*, 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 95–96.

[7] It is important to distinguish this analysis from the "overbreadth" doctrine. The "strict" 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. Kunz v. New York*, 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 court and thereby escape judicial review. *Broadrick v. Oklahoma*, 413 U. S. 601, 612–613 (1973); see Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 853–856 (1970). The likelihood of this restraint is less [illegible] where the expression is linked to commercial well-being" and therefore is not deterred 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. Consequently, overbreadth analysis is not relevant.

The State cannot regulate speech [illegible] the [illegible] 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* 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. 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 (POWELL, J., concurring in part and concurring in the judgment); *id.*, at 716–717 (STEVENS, J., concurring).[5]

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine [illegible] 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 [illegible] the regulation directly advances the governmental interest asserted, and [illegible] it is no more extensive than is necessary to serve that interest.

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[5] We review with special care regulations that entirely suppress commercial speech in order to pursue a policy unrelated to the quality of the expression itself. In those circumstances, [illegible] a ban on speech [illegible] screen from public view the underlying governmental policy. *See Virginia State Board of Pharmacy*, *supra*, 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.

III

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 [illegible] 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 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. The 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. Because 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 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. For consumers in those competitive markets, advertising by utilities is just as valuable as advertising by unregulated firms.[5]

[5] Several commercial speech decisions have involved enterprises subject to extensive state regulation. *E. g., Friedman v. Rogers*, 440 U. S. 1, 4–5 (1979) (optometrists); *Bates v. Arizona State Bar*, 433 U. S. 350 (1977)

~~use is in turn 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 purposes 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 monopolies, hesitate 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 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 the advertising is in fact [10] consumers and interested in. 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 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 Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 759–770 (1976) (pharmacists).

[10] There may be a greater incentive for a utility to advertise if it can promotional expenses in determining its rate of return, rather than pass these costs directly to shareholders. This practice, however, hardly distorts the economic decision whether to advertise. Unregulated businesses pass on promotional costs to consumers, and the Court expressly approved the practice for utilities in *West Ohio Gas Co.* v. *Public Utilities Comm'n*, 294 U. S. 63, 72 (1935).

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 ~~costs of expanding production will 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 structures involves difficult questions of economic supply and distributional fairness[11] ~~a choice properly confided to the regulatory bodies that oversee utilities. We recognize, of course, the~~ the State's ~~clear and substantial interest in fair and effective ratemaking.~~

C

Next, we focus on the ~~direct nexus~~ 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 speech protected ~~by the First Amendment~~. The link between the advertising prohibition and appellant's rate structure is, at most,

[11] See W. Jones, Regulated Industries 191–257 (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 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 [illegible] 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 justify suppressing information about electric devices or services that [illegible] would cause no net increase in 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 advertise products and services that [illegible] 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-

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The Commission's order prevents petitioner 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 either 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 invalidated. See *First National Bank of Boston v. Bellotti*, *supra*.[12]

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 future. Cf. *Banzhaf v. FCC*, — U. S. App. D. C. —, 405 F. 2d 1082 (1968), cert. denied, 396 U. S. 842 (1969). In the absence of a showing that more limited

[12] The Commission also might consider a system of pre-existing advertising campaign to insure that they will not defeat conservation policy. It is instructive such a program for screening "informational" advertising under the Policy Statement challenged in this case. See n. 7, *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 system of prior restraint may pass constitutional muster if it includes adequate procedural safeguards. *Freedman v. Maryland*, 380 U. S. 51 (1965).

speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising.[13]

IV

We do not underrate 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 foster this goal. When, however, 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 requirement.[14]

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

Reversed.

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[13] In view of our conclusion that the 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 overbroad and vague.

[14] 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 shortages in 1973, [illegible] The Commission makes no claim that an emergency now exists. Our decision today does not address the powers that the State may have over utility advertising in emergency circumstances. *See State* v. *Oklahoma Gas & Electric Co.*, 556 P. 2d 887, 895 896 (Okla. 1977).

5-8-80

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CHAMBERS DRAFT

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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 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 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 York were not then calculated on the basis of marginal cost,[1] 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-

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

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 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 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 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

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

[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 in this Court.

[3] 63 App. Div. 2d 304 (1978) (Appellate Division of State Supreme Court); App. to Juris. St., at 22a (Feb. 17, 1978) (State Supreme Court).

~~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 U. S. 748, 761–762 (1976). Commercial expression not only serves the economic interest of the speaker, but also ~~assists~~ informs 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]eople 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 ~~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~~ recognize[4] "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.*, 436 U. S. 447, 455–456 (1978).[4] We therefore ~~have~~ accorded ~~a~~ less 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 ~~to be~~ served by its regulation.

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[4] *See Bates* v. *State Bar of Arizona*, 433 U. S. 350, 381 (1977); Jackson & Jaffee, Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1, 38–39 (1979).

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 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).[5]

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. 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. 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 it extends

[5] In most other contexts, the First Amendment prohibits regulation when it 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 have 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 off-spring of economic self-interest, is a particularly hardy breed of expression that is not "particularly susceptible to being snuffed out by overbroad regulation." *Ibid.*

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 *Bates* and *Virginia Board of Pharmacy*, the Court concluded that an advertising ban could not be imposed simply to protect the ethical or performance standards of a profession. The Court noted in *Virginia Board of Pharmacy* that "[t]he advertising ban 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 deterring shoddy work." 433 U. S., at 378.[5]

The second criterion recognizes that the First Amendment mandates that speech restrictions be "narrowly drawn." *In re Primus*, 436 U. S. 412, 438 (1978).[6] The regulatory technique may extend only as far as the interest to be served.

[5] In *Linmark Associates* v. *Township of Willingboro*, *supra*, 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 95-96.

[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.*, *Kunz* v. *New York*, 340 U. S. 290 (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. *Oklahoma*, 413 U. S. 601, 612-613 (1973); see Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 853-858 (1970). The likelihood of this deterrent is less in the commercial speech context where the expression is linked to commercial well-being and therefore is not likely to be deterred 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. Consequently, overbreadth analysis is not relevant to this decision.

The State cannot regulate speech unrelated 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 information when narrower restrictions on expression would serve its interest as well. For example 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. *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 (POWELL, J., concurring in part and concurring in the judgment); *see id.* at 716–717 (STEVENS, J., concurring).[5]

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 activity and not be misleading. Next, we ask 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 not more extensive than is necessary to serve that interest.

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[5] We review with special care those regulations that entirely suppress commercial speech in order to pursue a policy unrelated to the quality of the expression itself. In such circumstances there is a danger that a ban on speech will merely prevent free public view of the underlying governmental policy. *See Virginia State Board of Pharmacy*, *supra*, 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.

III

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 speech 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 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. The 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. Consequently the court saw no constitutional problem with barring commercial speech that is 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 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. For consumers in those competitive markets, advertising by utilities is just as valuable as advertising by unregulated firms.[3]

[3] Several commercial speech decisions have involved enterprises subject to extensive state regulation. E. g., *Friedman* v. *Rogers*, 440 U. S. 1, 4–5 (1979) (optometrists); *Bates* v. *Arizona State Bar*, 433 U. S. 350 (1977)

~~ties is just as valuable as advertising by unregulated firms.~~[9]

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 court's argument appears to assume that ~~the providers of a monopoly service or product may be willing to~~ pay for wholly ineffective advertising. Most 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 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 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.~~[10] 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 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

(footnote 9): *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 770–772 (1976) (plurality view).

[10] There may be a greater incentive for a utility to advertise if it can include promotional expenses in ~~determining its rates~~ ~~instead of~~ 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 Comm'n*, 294 U. S. 63, 72 (1935).

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 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 structures involves difficult questions of economic supply and distributional fairness,[11] 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

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 constitutionally adequate reason for restricting speech protected by the First Amendment. The link between the advertising prohibition and appellant's rate structure is, at most,

[11] See W. Jones, Regulated Industries 191–257 (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 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 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 justify suppressing information about electrical devices or services that could result in a net saving of energy or 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 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 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-

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 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 increase 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 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 invalidated. See *First National Bank of Boston* v. *Bellotti*, *supra*.[12]

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 services both under current conditions and for the foreseeable future. Cf. *Banzhaf* v. *FCC*, — U. S. App. D. C. —, 405 F. 2d 1082 (1968), cert. denied, 396 U. S. 842 (1969). In the absence of a showing that more limited

[12] The Commission also might consider a 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 safeguards. *Freedman* v. *Maryland*, 380 U. S. 51 (1965).

speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising.[12]

IV

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, however, 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 requirement.[13]

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

Reversed.

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[12] In view of our resolution that the Commission's advertising policy violates the First Amendment, we do not reach appellant's claim that the Commission's order also violates the Equal Protection Clause of the Fourteenth Amendment, and that it is both overbroad and vague.

[13] The Commission's order was not promulgated in response to an energy emergency. Although the advertising ban was initially prompted by natural fuel shortages in 1973, these conditions did not prevail when the permanent order was approved. *See* App. to Juris. St'mt 84a. The Commission makes no claim that an emergency now exists. Our decision today does not address the powers that the State may have over utility advertising in emergency circumstances. *See State v. Oklahoma Gas & Electric Co.*, 536 P. 2d 887, 895 896 (Okla. 1977).

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: MAY 12 1980

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SUPREME COURT OF THE UNITED STATES

No. 79-565

Central Hudson Gas & Electric Corporation, Appellant, v. 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 utility.

I

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." *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.

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 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.* (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 meet those criteria." *Id.*, 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 electricity probably would be more expensive to produce than existing output. Because electricity rates in New York were not then based on marginal cost,[1] 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.

[1] "Marginal cost" has been defined as the "extra or incremental cost of producing an extra unit of output." P. Samuelson, Economics 483 (10th ed. 1976) (emphasis in original).

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.[4] 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 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 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 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. 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] Central Hudson also alleged that the Commission's order reaches beyond the agency's statutory power. 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.

[4] 63 App. Div. 2d 364 (1978); 1 N. Y. Sup. Ct. Appellate Division of State Supreme Court; App. to Juris. St., at 22a (Feb. 17, 1978).

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 government has complete power to suppress or regulate commercial speech. "[P]eople 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." *Ohralik v. Ohio State Bar Assn.*, 436 U. S. 447, 455–456 (1978); see *Bates v. State Bar of Arizona*, [illegible] 381 (1977); see also Jackson & Jeffries, Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1, 38–39 (1979). We therefore accord 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. *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 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).[4]

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.

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

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[4] In most other contexts, the First Amendment prohibits regulation based on the content of the message. *Consolidated Edison Co.* v. *Public Service Comm'n of New York*, No. 79-564 (—, 1980) (slip op., at 8–9). Two features 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 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 self-interest, is a particularly hardy breed of expression that is not "particularly susceptible to being crushed by overbroad regulation." *Ibid.*

imposed to protect the ethical or performance standards of a profession. The Court noted in *Virginia Board of Pharmacy* that "[t]he advertising ban does not directly affect professional standards one way or the other." 425 U. S., at 760. 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 deterring shoddy work." 433 U. S., at 378.[5]

The second criterion recognizes that the First Amendment mandates that speech restrictions be "narrowly drawn." *In re Primus*, 436 U. S. 412, 438 (1978).[6] 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 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 "foreclose the possibility that some limited

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[6] This analysis should be distinguished 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.*, *Kunz* v. *New York*, 340 U. S. 290 (1951). The overbreadth doctrine derives from the recognition that unconstitutional restrictions of expression may deter protected speech by parties not before the court and thereby escape judicial review. *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612–613 (1973); see Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 853–858 (1970). This restriction is less likely where the expression is linked to "commercial well-being" and therefore is not easily deterred 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. Consequently, overbreadth analysis is not relevant here.

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 (POWELL, J., concurring in part and concurring in the judgment); *id.*, at 716–717 (STEVENS, J., concurring).[7]

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 ban on promotional advertising.

A

The Commission does not claim that the expression at issue here either is inherently or relates to unlawful activity. Yet

[7] We review with special care regulations that entirely suppress commercial speech in order to pursue a policy unrelated to the quality of the expression itself. In many circumstances, a ban on speech could serve both public view the underlying governmental policy. *See Virginia State Board of Pharmacy*, *supra*, 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,

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 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 utilities is just as valuable as advertising by unregulated firms.[4]

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 businesses—even regulated monopolies—are unlikely to underwrite pro-

[4] Several commercial speech decisions have involved enterprises subject to extensive state regulation. *E. g., Friedman v. Rogers*, 440 U. S. 1, 4–5 (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, 756–752 (1976) (pharmacists).

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 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 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 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

* There may be a greater incentive for a utility to advertise if it can use promotional expenses in determining its rate of return, 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 Utilities Comm'n*, 294 U. S. 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 train of events would be less likely to occur. The choice among rate structures involves difficult and important questions of economic supply and distributional fairness.[9] 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 ban unless it believed that promotion would

[9] See W. Jones, Regulated Industries 191–257 (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 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 adequately serve the State's interests.

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 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 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. 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 invalidated. See *First National Bank of Boston* 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 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*, — U. S. App. D. C. —, 405 F. 2d 1082 (1968), cert. denied 396 U. S. 842 (1969).[13] 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.[14]

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

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[13] The Commission also might consider a 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 n. 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 Council, Inc.*, *supra*, 425 U. S., at 771, n. 24. And in other areas of speech regulation, such as obscenity, we have recognized that a prescreening arrangement can pass constitutional muster if it includes adequate procedural safeguards. *Freedman* v. *Maryland*, 380 U. S. 51 (1965).

[14] In view of our conclusion that the Commission's advertising policy violates the First Amendment, we do not reach petitioner's claims that the agency's order also violates the Equal Protection Clause of the Fourteenth Amendment, and that it is both overbroad and vague.

have the authority—and indeed the duty—to take appropriate action to further this goal. However, 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 requirement."

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

Reversed.

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[1] 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 shortages in 1973, the Commission makes no claim that an energy crisis exists. Moreover, under the power that the State might have over utility advertising in an emergency situation, *see Squire v. Oklahoma Gas & Electric Co.*, 586 P. 2d 887, 891–893 (Okla. 1977),

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

1,3,4,6,7,11-13

3-13-80

From: Mr. Justice Powell

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SUPREME COURT OF THE UNITED STATES

(5)

No. 78-565

Central Hudson Gas & Electric Corporation, Appellant, v. 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.

I

In December 1973, the Commission, appellee here, ordered electric utilities in New York State to cease all advertising that "promote[s] 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 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.

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 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.* (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 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 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,[1] 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.

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

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 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 upheld by the trial court and at the intermediate appellate level.[3] 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. 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 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 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. 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*

NEW INSERT + FOOTNOTE

[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.

[3] 64 App. Div. 2d 363 (1978); 4 N. Y. Sup. Ct. Appellate Division of State Supreme Court; App. to Juris. St., at 22a (Feb. 17, 1978).

FOOTNOTE 3a

Citizens Consumer Council, Inc., [redacted] 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 government has complete power to suppress or regulate commercial speech. "[P]eople 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 prescription 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." *Ohralik 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 Va. L. Rev. 1, 38–39 (1979). The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. [redacted] 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, 783–784, n. 18. 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 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).[4]

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.

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

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[4] In most other contexts, the First Amendment prohibits regulation based on the content of the message. *Consolidated Edison Co.* v. *Public Service Comm'n of New York*, No. 79-181 (post, —, 1980); *ante*, at 5–6. Two features 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 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 self-interest, is a form of expression not "particularly susceptible to being chilled by overbroad regulation." *Ibid.*

imposed to protect the ethical or performance standards of a profession. The Court noted in *Virginia Board of Pharmacy* that "[t]he advertising 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.[5]

The second criterion recognizes that the First Amendment mandates that speech restrictions be "narrowly drawn." *In re Primus*, 436 U. S. 412, 438 (1978).[6] 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 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

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[5] In *Linmark Associates* v. *Township of Willingboro*, *supra*, 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 95–96.

[6] This analysis should be distinguished 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.*, *Kunz* v. *New York*, 340 U. S. 290 (1951). The overbreadth doctrine derives from the recognition that unconstitutional restriction of expression may deter protected speech by parties not before the court and therefore escape judicial review. *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612–613 (1973); see Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 851–858 (1970). The restraint is less likely where the expression is linked to "commercial well-being" and therefore is not easily deterred by "overbroad regulation." *Bates* v. *State Bar of Arizona*, 433 U. S., at 381.

In this case, the Commission's prohibition acts directly against the promotional activities of Central Hudson. Consequently, overbreadth analysis is not relevant here.

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 (POWELL, J., concurring in part and concurring in the judgment); *id.*, at 716-717 (STEVENS, J., concurring).[7]

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 ban on promotional advertising.

A

The Commission does not claim that the expression at issue either is inaccurate or relates to unlawful activity. Yet

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[7] We review with special care regulations that entirely suppress commercial speech in order to pursue a policy unrelated to the quality of the expression itself. In those circumstances, a ban on speech could screen from public view the underlying governmental policy. *See Virginia State Board of Pharmacy*, *supra*, 425 U. S., at 780, n. 5 (STEWART, J., concurring). Indeed, in recent years this Court has not upheld 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.

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 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 customers in these competitive markets, advertising by utilities is just as valuable as advertising by unregulated firms.[7]

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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.

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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 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 remained constant. Such conditional and remote eventualities simply cannot justify silencing appellant's promotional advertising.

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[11] See W. Jones, Regulated Industries 201–257 (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 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 ban, it would advertise products and services that use energy efficiently. Those 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 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 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. [redacted] in no way impairs the State's interest in energy conservation. The Commission's order violates the First and

(12) Therefore,

The Commission's order thus suppresses speech by Central Hudson that would

12/ Because Central Hudson challenges restrictions on its own expression, we have no occasion to consider the relevance for commercial speech of "overbreadth" doctrine. Cf. [illegible]

Fourteenth Amendments and must be invalidated. See *First National Bank of Boston* 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 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*, — U. S. App. D. C. —, 405 F. 2d 1082 (1968), cert. denied, 396 U. S. 842 (1969).[13] 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.[14]

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 important national goal. Ad-

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[13] The Commission also might consider a system of previewing advertising campaigns to insure that they will not defeat conservation policy. It has instituted such a program for approving "information" 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 Council, Inc.*, *supra*, 425 U. S., at 771, n. 24. And in other areas of speech regulation, such as obscenity, we have recognized that a procedure requirement can pass constitutional muster if it includes adequate procedural safeguards. *Freedman* v. *Maryland*, 380 U. S. 51 (1965).

[14] In view of our conclusion that the Commission's advertising policy violates the First and Fourteenth Amendments, we do not reach appellant's claims that the agency's action also violated the Equal Protection Clause of the Fourteenth Amendment and that it is beyond the statutory authority delegated to it by the State.

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 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.[14]

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

Reversed.

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[14] The Commission's order at issue here was not promulgated in response to an emergency situation. Although the advertising ban initially was prompted by a critical fuel shortage in 1973, the Commission makes no claim that an emergency now exists. We do not consider the powers that the State might have over utility advertising in emergency circumstances. See *State v. Oklahoma Gas & Electric Co.*, 536 P. 2d 887, 895–896 (Okla. 1975).

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I

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." *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.

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 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.* (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 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 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,[1] 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.

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[1] "Marginal cost" has been defined as the "extra or incremental cost of producing an extra unit of output." P. Samuelson, Economics 788 (10th ed. 1976) (emphasis in original).

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.[4] The Commission's order was upheld by the trial court and at the intermediate appellate level.[5] 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. 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 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 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. 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*

[4] 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.

[5] 65 App. Div. 2d 364 (1978) (N. Y. Sup. Ct., Appellate Division—of State Supreme Court); App. to Juris. St., at 22a (Feb. 17, 1978).

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 government has complete power to suppress or regulate commercial speech. "[P]eople 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." *Ohralik 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 Va. L. Rev. 1, 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.

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

4/ The opinion in Ohralik added, "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 guarantee with respect to the latter kind of speech." Ohralik v. Ohio State Bar, 436 U.S. 447, 456 (1978).

4 / RENUMBER SUBSEQUENT FOOTNOTES

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 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 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.

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

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In most other contexts, the First Amendment prohibits regulation 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 4-9). Two features 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 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 self-interest, is a particularly hardy breed of expression that is not "particularly susceptible to being crushed by overbroad regulation." *Ibid.*

imposed to protect the ethical or performance standards of a profession. The Court noted in *Virginia Board of Pharmacy* that "[t]he advertising 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.[6]

The second criterion recognizes that the First Amendment mandates that speech restrictions be "narrowly drawn." *In re Primus*, 436 U. S. 412, 438 (1978).[7] 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 794–796, 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

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[6] In *Lusardi Associates* v. *Township of Willingboro*, *supra*, 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 95–96.

[7] The analysis should be distinguished 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.*, *Kunz* v. *New York*, 340 U. S. 290 (1951). The overbreadth doctrine derives from the recognition that unconstitutional restriction of expression may deter protected speech by parties not before the court and therefore escape judicial review. *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612–613 (1973); see Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 854–858 (1970). This re-striction is less likely where the expression is linked to "commercial well-being" and therefore is not easily deterred by "overbroad regulation." *Bates* v. *State Bar of Arizona*, 433 U. S., at 381.

In this case, the Commission's prohibition acts directly against the promotional activities of Central Hudson. Consequently, overbreadth analysis is not relevant here.

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 (POWELL, J., concurring in part and concurring in the judgment); *id.*, at 716–717 (STEVENS, J., concurring).[8]

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 ban on promotional advertising.

A

The Commission does not claim that the expression at issue either is inaccurate or relates to unlawful activity. Yet

[8] We review with special care regulations that entirely suppress commercial speech in order to purvey information bearing on a decision dependent on the quality of the expression itself. In those circumstances, a ban on speech could screen from public view the underlying governmental policy. *See Virginia State Board of Pharmacy*, *supra*, 425 U. S., at 780, n. 8 (STEVENS, 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.

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 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 utilities is just as valuable as advertising by unregulated firms.[6]

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 businesses—even regulated monopolies—are unlikely to underwrite pro-

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[6] Several commercial speech decisions have involved enterprises subject to extensive state regulation. *E. g., Friedman v. Rogers*, 440 U. S. 1, 4–5 (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, 750–752 (1976) (pharmacists).

national 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 forms 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.[10] 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 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

[10] "There may be a greater incentive for a utility to advertise at a certain promotional expense in determining its rate of return, 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 Utilities Comm'n*, 294 U. S. 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 among rate structures involves difficult and important questions of economic supply and distributional fairness.[11] 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 ban unless it believed that promotion would

[11] See W. Jones, Regulated Industries 281-287 (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 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 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 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.

appellant

The Commission's order prevents ~~petitioner~~ 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. By suppressing some speech that in no way injures the State's interest in energy conservation, the Commission's order violates the First and

Fourteenth Amendments and must be invalidated. See *First National Bank of Boston* 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 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*, — U. S. App. D. C. —, 405 F. 2d 1082 (1968), cert. denied, 396 U. S. 842 (1969).[12] 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.[13]

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. Ad-

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[12] The Commission also might consider a system of previewing advertising campaigns to insure that they will not defeat conservation policy. It is reported that a program for promoting "informational" advertising under the Policy Statement challenged in the case. See p. 2, *supra*. We have observed that commercial speech is such a sturdy brand of expression that qualities of prior restraint do not apply to it. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, *supra*, 425 U. S., at 771, n. 24. And in other areas of speech regulation, such as obscenity, we have recognized that a preservice arrangement can pass constitutional muster if it includes adequate procedural safeguards. *Freedman* v. *Maryland*, 380 U. S. 51 (1965).

[13] In view of our conclusion that the Commission's advertising policy violates the First and Fourteenth Amendments, we do not reach appellant's claims that the agency's order goes beyond the limits imposed by the First Amendment and that it is both overbroad and vague.

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 ban on promotional advertising meets this requirement.[14]

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

Reversed.

[14] 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 shortages in 1973, the Commission makes no claim that an emergency now exists. We do not consider the powers that the State might have over utility advertising in emergency circumstances. *See State ex. Oklahoma Gas & Electric Co.*, 530 P. 2d 487, 495–496 (Okla. 1977).

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

4, 11, 12

Footnotes Renumbered

From: Mr. Justice Powell

5-22-80

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-565

Central Hudson Gas & Electric Corporation, Appellant, v. 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.

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I

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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 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.

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[7] This analysis should be distinguished 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., Kunz v. New York*, 340 U. S. 290 (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. Oklahoma*, 413 U. S. 601, 612 (1973); *see* Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 853–858 (1970). This restraint is less likely where the expression is linked to "commercial well-being" and therefore is not easily deterred by "overbroad regulation." *Bates v. State Bar of Arizona*, 433 U. S., at 381.

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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 (POWELL, J., concurring in part and concurring in the judgment); *id.*, at 716–717 (STEVENS, J., concurring).[4]

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 ban on promotional advertising.

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[4] We review with special care regulations that entirely suppress commercial speech in order to pursue a policy unrelated to the quality of the expression itself. In those circumstances, a ban on speech could screen from public view the underlying governmental policy. See *Virginia State Board of Pharmacy*, *supra*, 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,

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 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 utilities is just as valuable as advertising by unregulated firms.[5]

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

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providers of a monopoly service or product are willing to pay for wholly ineffective advertising. Most businesses—even 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.[7] 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 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

[7] There may be a greater incentive for a utility to advertise if it can use promotional expenses in determining its rate of return, 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 Utilities Comm'n*, 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 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 questions of economic supply and distributional fairness.[11] 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.

[11] See W. Jones, Regulated Industries 191–287 (2d ed. 1976).

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 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 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 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 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 endan-

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 must be invalidated. See *First National Bank of Boston* 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 advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future. Cf. *Bauzhof* v. *FCC*, — U. S. App. D. C. —, 405 F. 2d 1082 (1968), cert. denied, 396 U. S. 842 (1969).[12] 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.[13]

IV

Our decision today in no way disparages the national interest in energy conservation. We accept without reservation the

[12] The Commission also might consider a 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. 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 Council, Inc.*, *supra*, 425 U. S., at 771, n. 24. And in other areas of speech regulation, such as obscenity, we have recognized that a prescreening arrangement can pass constitutional muster if it includes adequate procedural safeguards. *Freedman* v. *Maryland*, 380 U. S. 51 (1965).

[13] In view of our conclusion that the Commission's advertising policy violates the First and Fourteenth Amendments, we do not reach appellant's claim that the agency's order also violated the Equal Protection Clause of the Fourteenth Amendment, and that it is both overbroad and vague.

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 ban on promotional advertising meets this requirement.[7]

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

Reversed.

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[7] 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 Commission makes no claim that an emergency now exists. We do not consider the powers that the State might have over utility advertising in emergency circumstances. *See State v. Oklahoma Gas & Electric Co.*, 556 P. 2d 887, 895–896 (Okla. 1977).

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

FN's renumbered

6-16-80 2, 4-9, 13

From: Mr. Justice Powell

Circulated: JUN 16 1980

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-565

Central Hudson Gas & Electric Corporation, Appellant, v. 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.

I

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." *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.

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. It acknowledged that the 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 Commission's jurisdiction and thus remain free to advertise, it was recognized that the ban can achieve only "piecemeal conservationism." Still, the Commission adopted the restriction because it was deemed to "result in some dampening of unnecessary growth" in energy consumption. *Ibid.*

likely

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 meet these criteria." *Id.*, at 38a.

[FN] Appellant appears to construe the Policy Statement to authorize advertising that would result "in the saving of energy" even if the advertising spurs total consumption of utilities' electricity. *Post*, at 13. The attempted construction fails, however, since the Policy Statement is phrased solely in terms of advertising that promotes the purchase of utility services" and "sales" of electricity. Rightly, the Commission did not intend to permit advertising that would enhance net energy efficiency by increasing consumption of electrical services.

When it rejected requests for rehearing on the Policy Statement, the Commission supplemented its rationale for the advertising 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,[2] 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.[3] The Commission's order was upheld 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. 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 consumption, promotional advertising would only exacerbate the current energy situation.

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[2] "Marginal cost" has been defined as the "cost of the increment of cost of producing an *extra* unit of output." P. Samuelson, Economics 463 (10th ed. 1976) (emphasis in original).

[3] Central Hudson also argued 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.

[4] 73 App. Div. 2d 202 (1979) (N. Y. Sup. Ct., Appellate Division of State Supreme Court); App. to Juris. St., at 22a (Feb. 17, 1978).

Id., at 110, 398 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.

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 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* 440 U. S. 447, 456 (1979). The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. *Virginia State Board of Pharmacy*, 425 U. S., at 761–762. Commercial expression not only serves the economic interests 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 government has complete power to suppress or regulate commercial speech. "[P]eople 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*, *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." *Ohra-*

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 Va. L. Rev. 1, 38–39 (1979).[5] The

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[5] 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 statement opinions and the arguments of the parties before this Court also viewed this litigation as involving only commercial speech. Nevertheless, the concurring opinion of MR. JUSTICE STEVENS views the Commission's order as suppressing more than commercial speech because it would outlaw, for example, advertising that promoted electricity consumption by touting the environmental benefits of such uses. See *post*, at 3. Apparently the concurring opinion would accord full First Amendment protection to all promotional advertising that includes claims "relating to . . . questions frequently discussed and debated by our political leaders." *Post*, at 3.

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, 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 First 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*, 425 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

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 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 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).[3]

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.

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[3] ... other forms of speech. As we stated in *Ohralik*, supra, the failure to draw the line between commercial and noncommercial speech would invite dilution, simply by a lawyer's process, of the force of the First Amendment's guarantee to the latter kind of speech. 436 U. S., at 456.

[4] We must also consider the First Amendine to prohibit regulation 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 6-9. Two features 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 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 self-interest, is a particularly hardy breed of expression that is not "particularly susceptible to being crushed by overbroad 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 advertising 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.[7]

The second criterion recognizes that the First Amendment mandates that speech restrictions be "narrowly drawn." *In re Primus*, 436 U. S. 412, 438 (1978).[8] The regulatory tech-

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[7] In *Linmark Associates v. Township of Willingboro*, *supra*, 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.

[8] This analysis is not an application of 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., Kunz v. New York*, 340 U. S. 290 (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. Oklahoma*, 413 U. S. 601, 612–613 (1973); see Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 853–858 (1970). This restraint is less likely where the expression is linked

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. 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 (POWELL, J., concurring in part and concurring in the judgment); *id.*, at 716–717 (STEVENS, J., concurring).[1]

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In an opinion concurring in the judgment, MR. JUSTICE BLACKMUN urges that the "content" of commercial speech, as opposed to the "quality" of that 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 assessing its content, the practical effect of the distinction could be immense. Alternatively, if "quality"

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of speech refers to a narrowly defined category of characteristics, the result of the analysis could—in many situations—obliterate the distinction between commercial expression and "pure" forms of speech. Our decisions have rejected precisely that result. *See Friedman* v. *Rogers*, 440 U. S. 1, 10, and 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.

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 utilities is just as valuable as advertising by unregulated firms.[9]

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 businesses—even 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.[10] Since no such extraordinary conditions have

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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 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 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 in-

[12] See W. Jones, Regulated Industries 701-287 (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 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 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 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 no way impairs the State's interest in energy conservation, the Commission's order violates the First and Fourteenth Amendments and must be invalidated. *See First National Bank of Boston 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 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*, — U. S. App. D. C. —, 405 F. 2d 1082 (1968), cert. denied, 396 U. S. 842 (1969).[9] 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.[10]

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 ban on promotional advertising meets this requirement.[11]

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[9] The Commission also might consider a 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. 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 Council, Inc.*, *supra*, 425 U. S., at 771, n. 24. And in other areas of speech regulation, such as obscenity, we have recognized that a precensoring arrangement can pass constitutional muster if it includes adequate procedural safeguards. *Freedman* v. *Maryland*, 380 U. S. 51 (1965).

[10] In view of our conclusion that the Commission's advertising policy violates the First and Fourteenth Amendments, we do not reach appellant's claim that the agency's order also violated the Equal Protection Clause of the Fourteenth Amendment, and that it is both overbroad and vague.

[11] 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 Commission makes no claim

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

Reversed.

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that an emergency now exists. We do not consider the powers that the State might have over utility advertising in emergency circumstances. See *State v. Oklahoma Gas & Electric Co.*, 530 P. 2d 537, 595–596 (Okla. 1975).

FN's renumbered

(IX) 2,4-9,13

Mr. The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

6-18-80
IX

From: Mr. Justice Powell

Circulated: _____

4th DRAFT

Recirculated: JUN 16 1980

SUPREME COURT OF THE UNITED STATES

No. 79-565

2,3,5,6,
7,14

Central Hudson Gas & Electric Corporation, Appellant, v. 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.

I

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." *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.

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. It acknowledged that the 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 Commission's jurisdiction and thus remain free to advertise, it was recognized that the ban can achieve only "piecemeal conservationism." Still, the Commission adopted the restriction because it was deemed to "result in some dampening of unnecessary growth" in energy consumption. *Ibid.*

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 meet these criteria." *Id.*, at 38a.

The dissenting opinion attempts to construe the Policy Statement to authorize advertising that would result "in a net [illegible] energy" even if the advertising encouraged consumption of additional electricity. *Post*, at 17. 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 service.

When it rejected requests for rehearing on the Policy Statement, the Commission supplemented its rationale for the advertising 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[2] 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.[3] The Commission's order was upheld 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. 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 consumption, promotional advertising would only exacerbate the current energy situation,

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[2] "Marginal cost" has been defined as "the added or incremental cost of producing an extra unit of output." P. Samuelson, Economics 463 (10th ed. 1976) (emphasis in original).

[3] 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.

[4] 71 App. Div. 2d 362 (1979) (Appellate Division of State Supreme Court); App. to Juris. St., at 22a (Feb. 17, 1978).

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.

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 Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 762 (1976); *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 363–364 (1977); *Friedman* v. *Rogers*, 436 U. S. 447, 456 (1979). The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. *Virginia State Board of Pharmacy*, 425 U. S., at 761–762. 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 government has complete power to suppress or regulate commercial speech. "[P]eople 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*, *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." *Ohra-*

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 Va. L. Rev. 1, 38–39 (1979).[5] The

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[5] 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 50a. Moreover, the state court opinions and the arguments of the parties before this Court also viewed the litigation as involving only commercial speech. Nevertheless, the concurring opinion of MR. JUSTICE STEVENS views the Commission's order as suppressing more than commercial speech because it would outlaw, for example, advertising that promoted electricity consumption by touting the environmental benefits of such uses. See *post* at 3. Apparently the concurring opinion would accord full First Amendment protection to all promotional advertising that includes claims "relating to . . . questions frequently discussed and debated by our political leaders." *Post*, at 3.

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, 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 First 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*, 425 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

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 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 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 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.

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ment than to other forms of speech. As we stated in *Ohralik*, *supra*, the failure to distinguish between commercial and noncommercial speech "could only result, simply by a leveling process, in the loss of the [First] Amendment's guarantee to the latter kind of speech." 436 U. S., at 456.

In most other contexts, the First Amendment prohibits regulation 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 6–9. Two features 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 messages and the lawfulness of the underlying activity. *Bates v. State Bar of Arizona*, 433 U. S. ___, 381 (1977). In addition, commercial speech, the offspring of economic self-interest, is a [redacted] hardy breed of expression that is not "particularly susceptible to being crushed by overbroad regulation." *Ibid.*

must be

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 advertising ban does not directly affect professional standards one way or the other." 425 U. S., at 760. 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.[7]

The second criterion recognizes that the First Amendment mandates that speech restrictions be "narrowly drawn." *In re Primus*, 436 U. S. 412, 438 (1978).[8] The regulatory tech-

[7] In *Linmark Associates* v. *Township of Willingboro*, supra, 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 95–96.

[8] This analysis is not an application of 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.*, *Kunz* v. *New York*, 340 U. S. 290 (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. *Oklahoma*, 413 U. S. 601, 612–613 (1973); see Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 853–858 (1970). This restraint is less likely where the expression is linked

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. *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 (POWELL, J., concurring in part and concurring in the judgment); *id.*, at 716–717 (STEVENS, J., concurring).

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to 'commercial well-being" and therefore is not easily deterred by "overbroad regulation." *Bates* v. *State Bar of Arizona*, 433 U. S., at 381.

In this case, the Commission's prohibition acts directly against the protected speech of Central Hudson, and to the extent the limited ads are allowed can in no way serve the State's interest, they are invalid.

We begin with special care regarding that entirely orthodox commercial speech in order to pursue a policy [illegible]. In those circumstances, a ban on speech could screen from public view the underlying governmental policy. See *Virginia State Board of Pharmacy*, *supra*, 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.

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 inadequate. *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"

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 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.

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of speech prior to a narrowly defined category of characteristics. The result of this approach would—in many situations—obliterate all distinction between commercial expression and "pure" forms of speech. Our decisions have rejected precisely that result. *See Pittsburgh v. Regan*, 430 U. S. 1, 10, and n. 9 (1976); *Ohralik v. Ohio State Bar Assn.*, 436 U. S., at 455–456; *Bates v. Arizona State Bar*, *supra*, 433 U. S., at 370–381; *Virginia State Board of Pharmacy*, *supra*, 425 U. S., at 770–771.

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 utilities is just as valuable as advertising by unregulated firms.[10]

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 businesses—even 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.[11] Since no such extraordinary conditions have

[10] Several commercial speech decisions have involved enterprises subject to extensive state regulation. *E. g., Friedman v. Rogers*, 440 U. S. 1, 4–5 (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, 750–752 (1976) (pharmacists).

[11] There may be a greater incentive for a utility to advertise if it can

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 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 promotional expenses in determining its rate of return, 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 Utilities Comm'n*, 294 U. S. 63, 72 (1935).

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 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.

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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 ita-

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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 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.

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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 future. Cf. *Banzhaf* v. *FCC*, — U. S. App. D. C. —, 405 F. 2d 1082 (1968), cert. denied, 396 U. S. 842 (1969).[11] 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.[12]

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 ban on promotional advertising meets this requirement.[13]

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[11] The Commission also might consider a system of prescreening 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. 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 Council, Inc.*, *supra*, 425 U. S., at 771, n. 24. And in other areas of speech regulation, such as obscenity, we have recognized that a prescreening arrangement can pass constitutional muster if it includes adequate procedural safeguards. *Freedman* v. *Maryland*, 380 U. S. 51 (1965).

[12] In view of our conclusion that the Commission's advertising policy violates the First and Fourteenth Amendments, we do not reach appellant's claims that the agency's order also violated the Equal Protection Clause of the Fourteenth Amendment, and that it is both overbroad and vague.

[13] 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 Commission makes no claim

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

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that an emergency now exists. We do not consider the powers that the State might have over utility advertising in emergency circumstances. See *State v. Oklahoma Gas & Electric Co.*, 536 P. 2d 887, 895–896 (Okla. 1977).

5-18-80

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-565

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[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.

I

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." *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.

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."[3] App. to Juris. St., at 35a. The Commission declared all promotional advertising contrary to the national policy of conserving energy. It acknowledged that the 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 Commission's jurisdiction and thus remain free to advertise, it was recognized that the ban can achieve only "piecemeal 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 "informational" 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.

[3] The dissenting opinion attempts to construe the Policy Statement to authorize advertising that would result "in a net energy saving," even if the advertising encouraged 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.

When it rejected requests for rehearing on the Policy Statement, the Commission supplemented its rationale for the advertising 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,[1] 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.[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 to advertising in "the non-competitive 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 consumption, promotional advertising would only exacerbate the current energy situation.

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

[2] Central Hudson also argued 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.

[3] 63 App. Div. 2d 304 (1978) (Appellate Division of State Supreme Court); App. to Juris. St., at 22a (N. Y. Sup. Ct., Feb. 17, 1978).

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.

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 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 (1979). The First Amendment as applied to the States through the Fourteenth Amendment protects commercial speech from unwarranted governmental regulation. *Virginia State Board of Pharmacy*, 425 U. S., at 761–762. 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 government has complete power to suppress or regulate commercial speech. "[P]eople 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*, *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." *Ohra-*

Ibl 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 Va. L. Rev. 1, 38–39 (1979).[5] The

[5] 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 a possible 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 the litigation as involving only commercial speech. Nevertheless, the concurring opinion of MR. JUSTICE STEVENS views the Commission's order as suppressing more than commercial speech because it would outlaw, for example, advertising that promoted electricity consumption by touting the environmental benefits of such use. See *post*, at 3. Apparently the concurring opinion would accord full First Amendment protection to all promotional advertising that includes claims "relating to . . . questions properly discussed and debated by our political leaders." *Post*, at 3.

Although this approach may make 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 surely, 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 First Amendment protection 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*, 425 U. S., at 772. This Court's decisions on commercial expression have turned on the premise that such speech, although meriting some protection, is of less constitutional

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 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 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).[4]

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.

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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 guarantee to the latter kind of speech." 436 U. S., at 456.

[4] In most other contexts, the First Amendment prohibits regulation 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 6–9. Two features 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 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 self-interest, is a hardy breed of expression that is not "particularly susceptible to being crushed by overbroad 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 advertising 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.[5]

The second criterion recognizes that the First Amendment mandates that speech restrictions be "narrowly drawn." *In re Primus*, 436 U. S. 412, 438 (1978).[6] The regulatory tech-

[5] In *Linmark Associates* v. *Township of Willingboro*, *supra*, 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 95–96.

[6] This analysis is not an application of 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. Kunz* v. *New York*, 340 U. S. 290 (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. *Oklahoma*, 413 U. S. 601, 612–613 (1973); see Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 852–858 (1970). This restraint is less likely where the expression is linked

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. *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 (POWELL, J., concurring in part and concurring in the judgment); *id.*, at 716–717 (STEVENS, J., concurring).[5]

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to "commercial well-being" and therefore is not easily deterred by "overbroad regulation." *Bates* v. *State Bar of Arizona*, 433 U. S., at 381.

In this case, the Commission's prohibition acts directly against the promotional activities of Central Hudson, and to the extent the limitations are unnecessary to serve the State's interest, they are invalid.

[5] We review with special care regulations that entirely suppress commercial speech in order to pursue a nonpaternalistic end. In those circumstances a ban on speech could screen from public view the underlying governmental policy. See *Virginia State Board of Pharmacy*, *supra*, 425 U. S., at 769, 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.

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 obscure, 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"

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 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.

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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 *Friedman v. Rogers*, 440 U. S. 1, 10, and 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.

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 utilities is just as valuable as advertising by unregulated firms.[15]

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 businesses—even 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.[16] Since no such extraordinary conditions have

[15] Several commercial speech decisions have involved enterprise subject to extensive state regulation. *E. g., Friedman v. Rogers*, 440 U. S. 1, 4–5 (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, 750–752 (1976) (pharmacists).

[16] There may be a greater incentive for a utility to advertise if it can

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 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 promotional expenses in determining its rate of return, 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 Utilities Comm'n*, 294 U. S. 63, 72 (1935).

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 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 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-

[12] See W. Jones, Regulated Industries 191–237 (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 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 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 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 no way impairs the State's interest in energy conservation, the Commission's order violates the First and Fourteenth Amendments and must be invalidated. *See First National Bank of Boston 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 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*, — U. S. App. D. C. —, 405 F. 2d 1082 (1968), cert. denied, 396 U. S. 842 (1969).[13] 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.[14]

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 ban on promotional advertising meets this requirement.[15]

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[13] The Commission also might consider a 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. 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 Council, Inc.*, *supra*, 425 U. S., at 771, n. 24. And in other areas of speech regulation, such as obscenity, we have recognized that a prescreening arrangement can pass constitutional muster if it includes adequate procedural safeguards. *Freedman* v. *Maryland*, 380 U. S. 51 (1965).

[14] In view of our conclusion that the Commission's advertising policy violates the First and Fourteenth Amendments, we do not reach appellant's claims that the agency's order also violated the Equal Protection Clause of the Fourteenth Amendment, and that it is both overbroad and vague.

[15] 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 Commission makes no claim

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

Reversed.

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that an emergency now exists. We do not consider the powers that the State might have over utility advertising in extraordinary circumstances. See *State* v. *Oklahoma Gas & Electric Co.*, 536 P. 2d 357, 393–396 (Okla. 1977).