U.S. Supreme Court

CENTRAL HUDSON GAS & ELEC. v. PUBLIC SERV. COMM'N, 447 U.S. 557 (1980)

447 U.S. 557

CENTRAL HUDSON GAS & ELECTRIC CORP. v. PUBLIC SERVICE COMMISSION OF NEW YORK.
APPEAL FROM THE COURT OF APPEALS OF NEW YORK.
No. 79-565.

Argued March 17, 1980.
Decided June 20, 1980.
Held:

A regulation of appellee New York Public Service Commission which completely bans an electric utility from advertising to promote the use of electricity violates the First and Fourteenth Amendments. Pp. 561-572.

(a) Although the Constitution accords a lesser protection to commercial speech than to other constitutionally guaranteed expression, nevertheless the First Amendment protects commercial speech from unwarranted governmental regulation. For commercial speech to come within the First Amendment, it at least must concern lawful activity and not be misleading. Next, it must be determined whether the asserted governmental interest to be served by the restriction on commercial speech is substantial. If both inquires yield positive answers, it must then be decided whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. Pp. 561-566.

(b) In this case, it is not claimed that the expression at issue is either inaccurate or unlawful activity. Nor is appellant electrical utility's promotional advertising unprotected commercial speech merely because appellant holds a monopoly over the sale of electricity in its service area. Since monopoly over the supply of a product provides no protection from competition with substitutes for that product, advertising by utilities is just as valuable to consumers as advertising by unregulated firms, and there is no indication that appellant's decision to advertise was not based on the belief that consumers were interested in the advertising. Pp. 566-568.

(c) The State's interest in energy conservation is clearly substantial and is directly advanced by appellee's regulations. The State's further interest in preventing inequities in appellant's rates - based on the assertion that successful promotion of consumption in "off-peak" periods would create extra costs that would, because of appellant's rate structure, be borne by all consumers

through higher overall rates - is also substantial. The latter interest does not, however, provide a constitutionally adequate reason for restricting protected speech because the link between the advertising prohibition and appellant's rate structure is, at most, tenuous. Pp. 568-569. [447 U.S. 557, 558]

(d) Appellee's regulation, which reaches all promotional advertising regardless of the impact of the touted service on overall energy use, is more extensive than necessary to further the State's interest in energy conservation which, 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. Pp. 569-571.

47 N. Y. 2d 94, 390 N. E. 2d 749, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and MARSHALL, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, post, p. 572. BLACKMUN, J., post, p. 573, and STEVENS, J., post, p. 579, filed opinions concurring in the judgment, in which BRENNAN, J., joined. REHNQUIST, J., filed a dissenting opinion, post, p. 583.

Telford Taylor argued the cause for appellant. With him on the briefs were Walter A. Bossert, Jr., and Davison W. Grant.

Peter H. Schiff argued the cause for appellee. With him on the brief was Howard J. Read.*

[Footnote *] Briefs of amici curiae urging reversal were filed by Cameron F. MacRae and Robert L. Baum for the Edison Electrical Institute; by Burt Neuborne for Long Island Lighting Co.; by Edward H. Dowd and Myrna P. Field for the Mid-Atlantic legal Foundation et al.; and by Edwin P. Rome and William H. Roberts for Mobile Corp.

MR. JUSTICE POWELL delivered the opinion of the Court.

The 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, appeals here, ordered electric utilities in New York State to cease all advertising that "promot[es] the use of electricity." App. to Juris. [447 U.S. 557, 559] Statement 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 Corp., 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."1 App. to Juris. Statement 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 Commissioner'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 powerplants. Id., at 37a. And since oil dealers are not under the Commissioner's jurisdiction and [447 U.S. 557, 560] 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). Information 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,2 the Commission feared that additional power would be priced below the actual cost of generation. The 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 [447 U.S. 557, 561] 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." Consolidated Edison Co. v. Public Service Comm'n, 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, 444 U.S. 962 (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 Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976); Bates v. State Bar of Arizona 433 U.S. 350, 363-364 (1977); Friedman v. Rogers, 440 U.S. 1, 11 (1979). The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. Virginia Pharmacy Board, 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 [447 U.S. 557, 562] 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 interest 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. 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, at 374.

Nevertheless, our decisions have recognized "the `commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." Ohralik v. Ohio State Bar Assn., 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 [447 U.S. 557, 563] Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. 436 U.S., 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, supra, at 13, 15-16; Ohralik v. Ohio State Bar Assn., supra, at 464-465, or [447 U.S. 557, 564] commercial speech related to illegal activity, Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 388 (1973).6

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 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 Pharmacy Board, 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 Pharmacy Board 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. [447 U.S. 557, 565] "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 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, 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 Pharmacy Board, supra, 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 [447 U.S. 557, 566] the State could implement more carefully drawn restrictions. See id., at 712 (POWELL, J., concurring in part and in judgment); id., at 716-717 (STEVENS, J., concurring in part and in judgment).9

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" [447 U.S. 557, 567] 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.

The 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 land 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 services at all, or how much of the service he should purchase. In the absence of factors that would distort the decision to advertise, we [447 U.S. 557, 568] 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 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 utilities' 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 [447 U.S. 557, 569] 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.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 [447 U.S. 557, 570] 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 "backup" 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, 435 U.S. 765 (1978).

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 [447 U.S. 557, 571] 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, 132 U.S. App. D.C. 14, 405 F.2d 1082 (1968), cert. denied sub nom. Tobacco Institute, Inc. v. FCC, 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 alternative 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 [447 U.S. 557, 572] 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

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

Reversed.

Footnotes

[Footnote 1] The dissenting opinion attempts to construe the Policy Statement to authorize advertising that would result "in a net energy savings" even if the advertising encouraged consumption of additional electricity. Post, at 604-605. 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.

[Footnote 2] "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).

[Footnote 3] Central Hudson also alleged that the Commission's order reaches beyond the agency's statutory powers. This argument was rejected by the [447 U.S. 557, 560] New York Court of Appeals, Consolidated Edison Co. v. Public Service Comm'n, 47 N. Y. 2d 94, 102-104, 390 N. E. 2d 749, 752-754 (1979), and was not argued to this Court.

[Footnote 4] Consolidated Edison Co. v. Public Service Comm'n, 63 App. Div. 2d 364, 407 N. Y. S. 2d 735 (1978); App. to Juris. Statement 22a (N. Y. Sup. Ct., Feb. 17, 1978).

[Footnote 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 580-581. 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. Statement 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 out-law, for example, advertising that promoted electricity consumption by touting the environmental benefits of such uses. See post, at 581. [447 U.S. 557, 563] Apparently the 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." Ibid.

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, ante, p. 530, 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 Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748, 772 (1975). 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, 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 with respect to the latter kind of speech." 436 U.S., at 456.

[Footnote 6] In most other contexts, the First Amendment prohibits regulation based on the content of the message. Consolidated Edison Co. v. Public Service Comm'n, ante, at 537-540. 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. 350, 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.

[Footnote 7] In Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 95-96 (1977), 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.

[Footnote 8] This analysis is not an application of the "overbreadth" doctrine. The latter theory permits the invalidation of regulations of 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 to "commercial well-being" and therefore is not easily deterred by "overbroad regulation." Bates v. State Bar of Arizona, supra, 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.

[Footnote 9] We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy. See Virginia Pharmacy Board, 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.

[Footnote 10] Several commercial speech decision have involved enterprises subject to extensive state regulation. E. g., Friedman v. Rogers, 440 U.S. 1, 4-5 (1979) (optometrists); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (lawyers); Virginia Pharmacy Board v. Virginia Citizens Consumer Council, supra, at 750-752 (pharmacists).

[Footnote 11] 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).

[Footnote 12] See W. Jones, Regulated Industries 191-287 (2d ed. 1976).

[Footnote 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 supra, at 560. We have observed that commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it. Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S., at 771-772, 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).

[Footnote 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.

[Footnote 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 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).

MR. JUSTICE BRENNAN, concurring in the judgment.

One of the major difficulties in this case is the proper characterization of the Commission's Policy Statement. I find it impossible to determine on the present record whether the Commission's ban on all "promotional" advertising, in contrast to "institutional and informational" advertising, see ante, at 559, is intended to encompass more than "commercial speech." I am inclined to think that MR. JUSTICE STEVENS is correct that the Commission's order prohibits more than mere proposals to engage in certain kinds of commercial transactions, and therefore I agree with his conclusion that the ban surely violates the First and Fourteenth Amendments. But even on the assumption that the Court is correct that the Commission's order reaches only commercial speech, I agree with MR. JUSTICE BLACKMUN that "[n]o differences between commercial speech and other protected speech justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information." Post, at 578.

Accordingly, with the qualifications implicit in the preceding [447 U.S. 557, 573] paragraph, I join the opinions of MR. JUSTICE BLACKMUN and MR. JUSTICE STEVENS concurring in the judgment.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN joins, concurring in the judgment.

I agree with the Court that the Public Service Commission's ban on promotional advertising of electricity by public utilities is inconsistent with the First and Fourteenth Amendments. I concur only in the Court's judgment, however, because I believe the test now evolved and applied by the Court is not consistent with our prior cases and does not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech.

The Court asserts, ante, at 566, that "a four-part analysis has developed" from our decisions concerning commercial speech. Under this four-part test a restraint on commercial "communication [that] is neither misleading nor related to unlawful activity" is subject to an intermediate level of scrutiny, and suppression is permitted whenever it "directly advances" a "substantial" governmental interest and is "not more extensive than is necessary to serve that interest." Ante, at 564 and 566. I agree with the Court that this level of intermediate scrutiny is appropriate for a restraint on commercial speech designed to protect consumers from misleading or coercive speech, or a regulation related to the time, place, or manner of commercial speech. I do not agree, however, that the Court's four-part test is the proper one to be applied when a State seeks to suppress information about a product in order to manipulate a private economic decision that the State cannot or has not regulated or outlawed directly.

Since the Court, without citing empirical data or other authority, finds a "direct link" between advertising and energy consumption, it leaves open the possibility that the State may suppress advertising of electricity in order to lessen demand for electricity. I, of course, agree with the Court that, [447 U.S. 557, 574] in today's world, energy conservation is a goal of paramount national and local importance. I disagree with the Court, however, when it says that suppression of speech may be a permissible means to achieve that goal. MR. JUSTICE STEVENS appropriately notes: "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." Post, at 581.

The Court recognizes that we have never held that commercial speech may be suppressed in order to further the State's interest in discouraging purchases of the underlying product that is advertised. Ante, at 566, n. 9. Permissible restraints on commercial speech have been limited to measures designed to protect consumers from fraudulent, misleading, or coercive sales techniques.1 Those designed to deprive consumers of information about products or services that are legally offered for sale consistently have been invalidated.2

I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to "dampen" demand for or use of the product. Even though "commercial" speech is involved, such a regulatory measure strikes at the heart of the First Amendment. This is because it is a covert attempt [447 U.S. 557, 575] by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice. As the Court recognizes, the State's policy choices are insulated from the visibility and scrutiny that direct regulation would entail and the conduct of citizens is molded by the information that government chooses to give them. Ante, at 566, n. 9 ("We review with special care regulations that entirely suppress

commercial speech in order to pursue a nonspeech-related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy"). See Rotunda, The Commercial Speech Doctrine in the Supreme Court, 1976 U. Ill. Law Forum 1080, 1080-1083.

If the First Amendment guarantee means anything, it means that, absent clear and present danger, government has no power to restrict expression because of the effect its message is likely to have on the public. See generally Comment, First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine, 44 U. Chi. L. Rev. 205, 243-251 (1976). Our cases indicate that this guarantee applies even to commercial speech. In Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976), we held that Virginia could not pursue its goal of encouraging the public to patronize the "professional pharmacist" (one who provided individual attention and a stable pharmacist-customer relationship) by "keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering." Id., at 770. We noted that our decision left the State free to pursue its goal of maintaining high standards among its pharmacists by "requir[ing] whatever professional standards it wishes of its pharmacists." Ibid.

We went on in Virginia Pharmacy Board to discuss the types of regulation of commercial speech that, due to the "commonsense differences" between this form of speech and other forms, are or may be constitutionally permissible. We indicated that government may impose reasonable "time, [447 U.S. 557, 576] place, and manner" restrictions, and that it can deal with false, deceptive, and misleading commercial speech. We noted that the question of advertising of illegal transactions and the special problems of the electronic broadcast media were not presented.

Concluding with a restatement of the type of restraint that is not permitted, we said: "What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. . . . [W]e conclude that the answer to this [question] is in the negative." Id., at 773.

Virginia Pharmacy Board did not analyze the State's interests to determine, whether they were "substantial." Obviously, preventing professional dereliction and low quality health care are "substantial," legitimate, and important state goals. Nor did the opinion analyze the ban on speech to determine whether it "directly advance[d]," ante, at 566, 569, these goals. We also did not inquire whether a "more limited regulation of . . . commercial expression," ante, at 570, would adequately serve the State's interests. Rather, we held that the State "may not [pursue its goals] by keeping the public in ignorance." 425 U.S., at 770. (Emphasis supplied.)

Until today, this principle has governed. In Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977), we considered whether a town could ban "For Sale" signs on residential property to further its goal of promoting stable, racially integrated housing. We did note that the record did not establish that the ordinance was necessary to enable the State to achieve its goal. The holding of Linmark, however, was much broader.3 We stated:

"The constitutional defect in this ordinance, however, [447 U.S. 557, 577] is far more basic. The Township Council here, like the Virginia Assembly in Virginia Pharmacy Bd., acted to prevent its

residents from obtaining certain information . . . which pertains to sales activity in Willingboro. . . . The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township: they will choose to leave town. The Council's concern, then, was not with any commercial aspect of "For Sale" signs - with offerors communicating offers to offerees - but with the substance of the information communicated to Willingboro citizens." Id., at 96.

The Court in Linmark resolved beyond all doubt that a strict standard of review applies to suppression of commercial information, where the purpose of the restraint is to influence behavior by depriving citizens of information. The Court followed the strong statement above with an explicit adoption of the standard advocated by Mr. Justice Brandeis in his concurring opinion in Whitney v. California, 274 U.S. 357, 377 (1927): "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." 431 U.S., at 97.

Carey v. Population Services International, 431 U.S. 678, 700-702 (1977), also applied to content-based restraints on commercial speech the same standard of review we have applied to other varieties of speech. There the Court held that a ban on advertising of contraceptives could not be justified [447 U.S. 557, 578] by the State's interest in avoiding "`legitimation' of illicit sexual behavior" because the advertisements could not be characterized as "`directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action,'" id., at 701, quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

Our prior references to the "`commonsense differences'" between commercial speech and other speech "`suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.'" Linmark Associates, 431 U.S., at 98, quoting Virginia Pharmacy Board, 425 U.S., at 771-772, n. 24. We have not suggested that the "commonsense differences" between commercial speech and other speech justify relaxed scrutiny of restraints that suppress truthful, nondeceptive, noncoercive commercial speech. The differences articulated by the Court, See ante, at 564, n. 6, justify a more permissive approach to regulation of the manner of commercial speech for the purpose of protecting consumers from deception or coercion, and these differences explain why doctrines designed to prevent "chilling" of protected speech are inapplicable to commercial speech. No differences between commercial speech and other protected speech justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information. The Court stated in Carey v. Population Services International:

"Appellants suggest no distinction between commercial and noncommercial speech that would render these discredited arguments meritorious when offered to justify prohibitions on commercial speech. On the contrary, such arguments are clearly directed not at any commercial aspect of the prohibited advertising but at the ideas conveyed and form of expression - the core of First Amendment values." 431 U.S., at 701, n. 28 (emphasis added). [447 U.S. 557, 579]

It appears that the Court would permit the State to ban all direct advertising of air conditioning, assuming that a more limited restriction on such advertising would not effectively deter the public from cooling its homes. In my view, our cases do not support this type of suppression. If a governmental unit believes that use or overuse of air conditioning is a serious problem, it must attack that problem directly, by prohibiting air conditioning or regulating thermostat levels. Just as the Commonwealth of Virginia may promote professionalism of pharmacists directly, so too New York may not promote energy conservation "by keeping the public in ignorance." Virginia Pharmacy Board, 425 U.S., at 770.

[Footnote 1] See Friedman v. Rogers, 440 U.S. 1, 10 (1979) (Court upheld a ban on practice of optometry under a trade name as a permissible requirement that commercial information "`appear in such a form . . . as [is] necessary to prevent its being deceptive,'" quoting from Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 772, n. 24 (1976)); Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978).

[Footnote 2] See Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Carey v. Population Services International, 431 U.S. 678, 700-702 (1977); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977); Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975).

[Footnote 3] In my view, the Court today misconstrues the holding of both Virginia Pharmacy Board and Linmark Associates by implying that those decisions were based on the fact that the restraints were not closely enough [447 U.S. 557, 577] related to the governmental interest asserted. See ante, at 564-565, and n. 7. Although the Court noted the lack of substantial relationship between the restraint and the governmental interest in each of those cases, the holding of each clearly rested on a much broader principle.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN joins, concurring in the judgment.

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 inadvertently 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 561. 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 [447 U.S. 557, 580] 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 562. A saleman'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 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. [447 U.S. 557, 581] 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.4

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 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. [447 U.S. 557, 582]

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." (Footnote omitted.)5 [447 U.S. 557, 583]

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 566, adequately protects commercial speech - as properly defined - in the face of a blanket ban of the sort involved in this case.

[Footnote 1] See Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 456, quoted ante, at 563, n. 5. Cf. Smith v. United States, 431 U.S. 291, 318 (STEVENS, J., dissenting).

[Footnote 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.)

[Footnote 3] See id., at 386-387.

[Footnote 4] The utility's characterization of the Commission's ban in its complaint as involving commercial speech clearly does not bind this Court's consideration of the First Amendment issues in this new and evolving area of constitutional law.

Nor does the Commission's intention not to suppress "institutional and informational" speech insure that only "commercial speech" will be suppressed. The blurry line between the two categories of speech has the practical effect of requiring that the utilities either refrain from speech that is close to the line, or seek advice from the Public Service Commission. But the Commission does not possess the necessary expertise in dealing with these sensitive free speech questions; and, in any event, ordinarily speech entitled to maximum First Amendment protection may not be subjected to a prior clearance procedure with a government agency.

[Footnote 5] Mr. Justice Brandeis quoted Lord Justice Scrutton's comment in King v. Secretary of State for Home Affairs ex parte O'Brien, 1923. 2 K. B. 361, 382: "`You really believe in freedom of speech, if you are willing to [447 U.S. 557, 583] allow it to men whose opinions seem to you wrong and even dangerous. . . .'" 274 U.S., at 377, n. 4.

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

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 Mideastern 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 (Dec. 5, 1973), App. to Juris. Statement 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 re-examined 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 [447 U.S. 557, 584]

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 Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), however, commercial speech was afforded no protection under the First Amendment whatsoever. See, e. g., Breard v. 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 Pharmacy 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 in 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 [447 U.S. 557, 585] 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