The Burger Court Opinion Writing Database

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

457 U.S. 557 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

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,

LFP B

Mr. Justice Powell

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

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

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

From: Mr. Justice Brennan

No. 79-565 - Central Hudson Gas & Electric Company v. Public Service Commission

Circulated: JUN 12

Recirculated: _____

MR. JUSTICE BRENNAN, concurring.

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 2, 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 ___.

Accordingly, with the qualifications implicit in the proceeding paragraph, I join the concurring opinions of Mr. JUSTICE BLACKMUN and MR. JUSTICE STEVENS.

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

From: Mr. Justice Brennan

Circulated: _____

Recirculated: JUN 13 '80

printed
1st 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.

[June —-, 1980]

MR. JUSTICE BRENNAN, concurring.

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 2, 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 —.

Accordingly, with the qualifications implicit in the proceeding paragraph, I join the concurring opinion of MR. JUSTICE BLACKMUN and MR. JUSTICE STEVENS.

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 BYRON R. WHITE

March 27, 1980

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

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 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,

Byron

Mr. Justice Powell

cmc

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
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

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

From: Mr. Justice Blackmun

Circulated: JUN 11 1980

Recirculated: _____

No. 79-565 - Central Hudson Gas & Electric Company
v. Public Service Commission

MR. JUSTICE BLACKMUN, concurring.

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 7, that "a four-part analysis has developed" from our decisions concerning commercial speech. Under this four-part test a restraint on commercial

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 11, 1980

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

Dear John:

After the discussion between our respective clerks, I shall omit the last eight lines on page 11 and the first two lines on page 12 of the Wang copy of my concurrence. The third line on page 12 will be made to read "It appears that the Court."

Sincerely,

Harry

Mr. Justice Stevens

cc: The Conference

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

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: JUN 13 1980

p. 1

Printed

1st 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.

[June —, 1980]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN joins, concurring.

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 7, 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 advance[s]" a "substantial" governmental interest and is "not more extensive than is necessary to serve that interest." *Ante,* at 5 and 7. I agree with the Court that this level of intermediate scrutiny is apropriate for a restraint on commercial speech that relates to the "quality" of that speech, that is, a regulation 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

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 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,

Mr. Justice Powell

cc: The Conference

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

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: JUN 18 1980

Page references changed, & pp. 1, 2, 3, and 6

2nd 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.

[June —, 1980]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN joins, concurring.

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 9, 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 advance[s]" a "substantial" governmental interest and is "not more extensive than is necessary to serve that interest." *Ante,* at 6 and 9. 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

4-8, 10, 13

5-12-80

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

Recirculated: _____

1st 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.

5-15-80 1, 3, 4, 6, 7, 11-13

2nd 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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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.

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

take a new formulation. You ask whether the description of commercial speech as "related solely to the economic interests of the [illegible] 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 (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. 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 concerns.

Sincerely,

Lewis

Justice Stevens

lfp/dos

cc: The Conference

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

5-22-80

From: Mr. Justice Powell

Circulated: _____

3rd DRAFT

Recirculated: MAY 22 1980

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.

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

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

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

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

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 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.

L.F.P.

L.F.P., Jr.

ss

6/6/80

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

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

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

mmercial 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."

June 11, 1980

79-565 Central Hudson v. Public Service

Dear Byron:

I appreciate your continuing effort to find a way to say the cheering "three words."

Overbreadth ordinarily is a standing doctrine. It is not directly relevant to this case because Central Hudson alleges that it is denied the right to engage in advertising that is 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 invalidate the Commission's regulation only insofar as it reaches protected speech. Although this raises some doubt as to whether we properly may sever an unconstitutional part of the Policy Statement from the remainder, I do see merit in your concern.

This could be accomplished by modest revisions in the third draft. Subject to approval by Brothers who have joined me, I will change the first sentence on page 12 to read:

> "To the extent that the Commission's order suppresses speech that does not affect adversely the State's interest in energy conservation, it violates the First and Fourteenth Amendments and must be invalidated."

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. Its order stated that it would approve only "informational and institutional" advertising, excluding promotions designed to increase aggregate demand for electricity. 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 the pre-publication review would safeguard protected speech.

If the change suggested above meets with your approval, I will make it -- together with the other changes noted in my memo of June 6.

Sincerely,

Mr. Justice White

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

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

L.F.P.

L.F.P., Jr.

ss

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

FNs renumbered

2, 4-9, 13

From: Mr. Justice Powell

6-16-80

Circulated: JUN 16 1980

Recirculated: _____

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.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

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.

L.F.P., Jr.

ss

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).[9]

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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.

[9] We review with special care regulations that entirely suppress commercial speech in order to pursue a policy unrelated to the quality of the speech 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.

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"

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

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 relevant.

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

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

To: 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 1980

Recirculated: _____

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

MR. JUSTICE REHNQUST, 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 Counsel, 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).

P 3-5, 17+18

To: 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: 16 JUN 1980

Recirculated: _____

1st DRAFT Printed

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 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 (Dec. 5, 1973), App. to Juris. St., p. 13a (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]

[1] The New York Court of Appeals 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 recogni-

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 18, 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

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.

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 4 '80

Recirculated: _____

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

MR. JUSTICE STEVENS, concurring.

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).

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.

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).

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 11, 1980

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

Dear Harry:

Many thanks. The change solves the problem completely. May I add that I think you have written a fine opinion.

Respectfully,

/s/ John

Mr. Justice Blackmun

2nd 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.

[June —, 1980]

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN joins, concurring.

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).