BEER V. THE FIRST AMENDMENT: THE TROUBLING IMPLICATIONS OF THE FOURTH CIRCUIT'S DECISION IN *SWECKER*

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American universities are known both for their students' enthusiasm for alcohol and for producing popular student-run newspapers.[1] But is there a connection between alcohol consumption and student media? The Virginia Beverage Control Board ("VBCB"), an agency of the Commonwealth of Virginia, said "yes." To counter this perceived problem, the VBCB promulgated a regulation that prohibits the "advertisements of alcoholic beverages" in "college student publications unless in reference to a dining establishment."[2] The dining establishment exception is narrow, as these advertisements "shall not contain any reference to particular brands or prices."[3]

VBCB's college newspaper regulation costs the publishers of the student newspapers at Virginia Tech (*The Collegiate Times)* and the University of Virginia (*The Cavalier Daily)* a combined $60,000 a year in advertising revenue.[4] Accordingly, the two newspapers filed a lawsuit in the U.S. District Court for the Eastern District of Virginia, arguing that the law unconstitutionally violated the free speech clause of the First Amendment. In the case—*Education Media Co. at Virginia Tech, Inc. v. Swecker*("*Swecker*")—the district court granted summary judgment for the college newspapers, permanently enjoining enforcement of the regulation and holding that the law facially violated the First Amendment.[5] The U.S. Court of Appeals

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1. *See Princeton Review Names Best College Newspapers*, COLLEGE MEDIA MATTERS (Aug. 3, 2010), http://collegemediamatters.com/2010/08/03/princeton-review-names-best-college-newspapers/.

2. 3 VA. ADMIN. CODE § 5-20-40(A)(2) (2010).

3. Educ. Media Co. at Va. Tech, Inc. v. Swecker, No. 3:06CV396, 2008 U.S. Dist. LEXIS 45590, at *3 (E.D. Va. Mar. 31, 2008) (quoting 3 VA. ADMIN. CODE § 5-20-40(B)(3)).

4. *See* Educ. Media Co. at Va. Tech, Inc. Swecker, 602 F.3d 583, 587 (4th Cir. 2010), *cert. denied*, 131 S. Ct. 646 (2010).

5. *See id.* at 586.

for the Fourth Circuit, however, reversed and remanded, vacating the permanent injunction because it found the statute to be facially constitutional.[6] The Supreme Court denied the college newspapers' petition for writ of certiorari.[7]

This essay will argue the Fourth Circuit wrongly decided the case for two reasons: (1) its holding is inconsistent with Supreme Court guidance on commercial speech; and (2) it failed to determine that 5-20-40 is an unconstitutional financial regulation on a narrow sector of the media. Regulation of vice advertisements has consistently confounded courts.[8] The Fourth Circuit did little to settle the law on the subject in *Swecker*, and the Supreme Court should use its next opportunity to clarify the scope of the First Amendment's protection. If it does not, college newspapers will continually be pinched by state regulations that do little to advance their stated interests while also violating the First Amendment rights of an important segment of the press that has few resources to protect itself in courts.

I. THE FIRST AMENDMENT, COMMERCIAL SPEECH, AND VICE REGULATION

The Supreme Court first explicitly recognized First Amendment protections of truthful and non-misleading commercial speech about lawful products in the 1970s. The Court explained that the protection of commercial speech is necessary for preserving "a predominantly free enterprise economy."[9] The Supreme Court stated that it is "a matter of public interest that [private economic] decisions, in the aggregate, be intelligent and well informed."[10] The Court held that the "highly paternalistic approach" of preventing the dissemination of truthful and non-misleading speech to be inconsistent with the First Amendment. Thus, the First Amendment even protects a communication that "does no more than propose a commercial transaction."[11]

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6. *Id.* at 591.

7. Educ. Media Co. at Va. Tech, Inc. v. Swecker, 131 S. Ct. 646 (2010).

8. For example, one of the more recent Supreme Court opinions on the matter begins as follows:

> Justice STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, VII, and VIII, an opinion with respect to Parts III and V, in which Justice KENNEDY, Justice SOUTER, and Justice GINSBURG join, an opinion with respect to Part VI, in which Justice KENNEDY, Justice THOMAS, and Justice GINSBURG join, and an opinion with respect to Part IV, in which Justice KENNEDY and Justice GINSBURG join.

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 488–89 (1996).

9. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

10. *Id.*

11. *Id.* at 776.

The Supreme Court created a four-part test for determining the constitutionality of commercial speech regulations in *Central Hudson Gas & Electric Corporation v. Public Service Commission*.[12] First, the speech must concern lawful activity and not be misleading.[13] Second, the government must assert a "substantial interest" in regulating the speech.[14] If both the first two prongs are satisfied, the courts next "must determine whether the regulation directly advances the governmental interest asserted."[15] Fourth, courts are required to conclude whether the regulation is "not more extensive than is necessary to serve that interest."[16]

In *Swecker*, the Court quickly and correctly determined the regulation of alcohol advertisements in college newspapers passed the first two prongs. The Fourth Circuit, however, ran afoul of Supreme Court precedent in its analysis of the third and fourth of the *Central Hudson* factors. The Fourth Circuit found that section 5-20-40 satisfied the third prong of the *Central Hudson* test because the regulation advanced the substantial interest of curbing binge and underage drinking "directly and materially."[17] In making its determination, the court relied on the Supreme Court guidance that the advancement "need not be proven by empirical evidence; rather, it may be supported by 'history, consensus, and simple common sense.'"[18]

Judge Shedd's majority opinion explained that college students are particularly attracted to the college newspapers' publications.[19] This fact combined with the evidence that alcohol distributors merely desired to advertise in the college newspapers was enough for the court to find that the VBCB satisfied the link between advertisements and underage and binge drinking. The court wrote, "It is counterintuitive for alcohol vendors to spend their money on advertisements in newspapers with relatively limited circulation, directed primarily at college students, if they believed these ads would not increase demand by college students."[20]

The Fourth Circuit's reasoning on *Central Hudson's* third prong cannot be squared with Supreme Court precedent. The Supreme Court has explicitly held that the four-part *Central Hudson* test

12. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. Educ. Media Co. at Va. Tech, Inc. Swecker, 602 F.3d 583, 589 (4th Cir. 2010), (quoting W. Va. Ass'n of Club Owners and Fraternal Serv. Inc. v. Musgrave, 553 F.3d 292, 303 (4th Cir. 2009)), *cert. denied*, 131 S. Ct. 646 (2010).
18. *Id.* (quoting Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555 (2001) (citation omitted)).
19. *Id.* at 589–90 (Judge Shedd did not cite to any direct evidence for this finding).
20. *Id.* at 590.

comprises an intermediate level of review.[21] The Court has held "this burden [on the government] is not satisfied by mere speculation or conjecture."[22] A regulation such as section 5-20-40 "may not be sustained if it provides only ineffective or remote support for the government's purpose"[23] or if there is "little chance" the regulation will substantially advance the state's goal.[24] The Supreme Court has highlighted the importance of the third prong of *Central Hudson*, stating it "is critical; otherwise, 'a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden of commercial expression.'"[25]

No reasonable reading of the record in *Swecker* could lead to a view that section 5-20-40 directly and materially advances the Board's substantial interest in preventing binge drinking by college students. As the district court noted, no witness testified that section 5-20-40, which has been in effect for decades, has ever advanced or alleviated the problems of underage and binge drinking.[26] The VBCB additionally provided no comparison to drinking behavior at universities without advertising bans. VBCB's expert witness, Dr. Henry Saffer, opined that bans on alcohol advertising are only effective when no substitute exists for the prohibited media. Saffer testified that there are no media substitutes for the college newspapers because they uniquely target college students.[27] The district court properly called Saffer's statement "conjecture," as any visit to a modern college dorm will reveal students saturated with a plethora of media platforms in the digital age.[28]

Thus, the evidence presented by the Board was at best "ineffective or remote" in furthering the interest of curbing underage and binge drinking.[29] In effect, the Fourth Circuit failed to heed the Supreme Court's warnings about regulations "in the service of other objectives that could not themselves justify a burden of commercial expression."[30] Because it has deemed the third-prong "critical," the Supreme Court should have granted certiorari and reversed the Fourth Circuit.

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21. Florida Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995) ("[W]e engage in 'intermediate' scrutiny of restrictions on commercial speech.").

22. Edenfield v. Fane, 507 U.S. 761, 770–71 (1993).

23. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).

24. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 566 (2001); *see also* Pitt News v. Pappert, 379 F.3d 96, 107 (3d Cir. 2004).

25. Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995) (quoting *Edenfield*, 507 U.S. at 771); *see also Pitt News*, 379 F.3d at 107.

26. Educ. Media Co. at Va. Tech, Inc. v. Swecker, No. 3:06CV396, 2008 U.S. Dist. LEXIS 45590, at *42 (E.D. Va. Mar. 31, 2008).

27. *Id.* at *40.

28. *Id.* at *46.

29. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).

30. *Edenfield*, 507 U.S. at 771.

But even if the Fourth Circuit's analysis was correct under *Central Hudson*'s third prong, 5-20-40 fails the fourth prong of the Supreme Court's test because it is "more extensive than is necessary to serve" the government's interest of curbing underage drinking. The Fourth Circuit, however, erroneously ruled that section 5-20-40 was sufficiently narrowly tailored to satisfy the fourth prong. In support of its view, the court noted that the regulation is not a complete ban on alcohol advertising, as restaurants may still publicize they serve alcohol (but not brands and prices). The Fourth Circuit also pointed out that the statute does not affect all publications available on college campuses. The court additionally praised the Board for combining section 5-20-40 with education and enforcement programs. The Fourth Circuit's findings, however, are inconsistent with Supreme Court guidance on when a commercial speech law fails to adhere to the fourth prong's requirements.

The Supreme Court has held that the fourth prong of the *Central Hudson* requires that the statute be "not more extensive than is necessary to serve" a state's substantial interest.[31] The regulation of speech must be a last, and "not first," resort. The fit between the legislature's ends and means need not be "perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served."[32] Additionally, non-speech regulations "which could advance the Government's asserted interest in a manner less intrusive to . . . First Amendment rights, indicates that [a commercial speech regulation] is more extensive than necessary."[33]

The Fourth Circuit was incorrect in its decision that the regulation satisfied *Central Hudson*'s narrowly tailored requirement for two reasons: (1) section 5-20-40 is both under and over inclusive; and (2) the substantial interest of curbing underage and binge drinking can be addressed with regulations that do not infringe on speech. Section 5-20-40 is over inclusive because it applies to both those under twenty-one and over twenty-one. Both the Board and the college newspapers agreed that the majority of the readership of the college newspapers is over the age of twenty-one.[34] The regulation is under inclusive because it only applies to college newspapers and not

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31. *Cent. Hudson*, 447 U.S. at 566.

32. Florida Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995) (internal quotations omitted).

33. Rubin v. Coors Brewing Co., 514 U.S. 476, 491 (1995); *see also First Amendment—Commercial Speech—Fourth Circuit Holds That A Regulation Largely Prohibiting Alcohol Advertisements in College Newspapers Is Constitutional.*—Educational Media Co. at Virginia Tech v. Swecker, 602 F.3d 583, 124 HARV. L. REV. 843, 847 (2011); Michael Hoefges, *Protecting Tobacco Advertising Under the Commercial Speech Doctrine: The Constitutional Impact of* Lorillard Tobacco Co., 8 COMM. L. & POL'Y 267, 308 (2003).

34. Educ. Media Co. at Va. Tech, Inc. v. Swecker, 602 F.3d 583, 587 n.1 (4th Cir. 2010), *cert. denied*, 131 S. Ct. 646 (2010).

all media on campus. Additionally, numerous non-speech regulations also could better serve the Board's substantial interest. Dr. Saffer, the Board's expert witness, conceded that alcohol taxation and counter-advertising could reduce underage and bring drinking. Dr. Saffer even stated "[i]ncreased taxation is more effective than advertising bans" in combating underage and binge drinking.[35] Section 5-20-40 thus cannot survive *Central Hudson*'s narrowly tailored requirement. The Supreme Court should use its next opportunity to better articulate its narrowly tailored rule to avoid future situations like the one in *Swecker*.

II. THE FIRST AMENDMENT AND REGULATIONS ON A NARROW SECTOR OF THE MEDIA

In assessing a Pennsylvania law similar to Virginia's section 5-20-40, then Third Circuit Judge Samuel Alito held the regulation to be an unconstitutional financial restriction on a narrow sector of the media.[36] In forming his opinion, Alito looked to the holdings of three Supreme Court cases—*Grosjean v. American Press Co.*,[37] *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,[38] and *Arkansas Writers' Project, Inc. v. Ragland*[39]—that found tax penalties on publications for crossing certain circulation thresholds or for publishing certain content to be unconstitutional. Alito combined these holdings with the rule in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*—that all financial burdens, whether a tax or a regulation, on media organizations are evaluated in the same manner for the purposes of constitutional law—to find the restriction on alcohol advertising in college newspapers to be unconstitutional.[40] Alito held that a content-based financial restriction in a narrow sector of the media to be presumptively unconstitutional and to be examined with strict scrutiny.[41]

Citing *Pitt News*, the college newspapers reiterated this argument, but the Fourth Circuit declined to address it. Once again, the Fourth Circuit was in error. One of the bedrock principles of the First Amendment is that the government cannot discriminate against different media properties based on their content alone. As the Supreme Court has held, a law is presumptively unconstitutional if it "single[s] out the press" or "a small group of speakers."[42] The college

35. *Id.* at 596 n.8.
36. Pitt News v. Pappert, 379 F.3d 96, 111 (3d Cir. 2004).
37. 297 U.S. 233 (1936).
38. 460 U.S. 575 (1983).
39. 481 U.S. 221 (1987).
40. *Pitt News*, 379 F.3d at 111–12.
41. *Id.* at 110–11.
42. Leathers v. Medlock, 499 U.S. 439, 447 (1991); *see also Pitt News*, 379 F.3d at 111.

newspapers lose approximately sixty-thousand dollars a year due to section 5-20-40. Thus, Section 5-20-40 is unambiguously a financial content-based restriction. Accordingly, the Fourth Circuit should have found section 5-20-40 to be facially unconstitutional because the Board did not present evidence that the regulation serves a compelling interest.

CONCLUSION

The Fourth Circuit ought to have found Section 5-20-40 to be facially unconstitutional because the record does not show it materially advances the Board's interest to curb underage and binge drinking; the statute is not narrowly tailored to serve this interest; and the statute places a financial burden on a narrow sector of the media. The Fourth Circuit's opinion represents a paternalistic court's attempt to stealthy reduce the level of review of commercial regulations. At its next opportunity, the Supreme Court should clarify that a state must show more than cursory evidence that a regulation materially and directly advances a state's substantial interest. Otherwise, a state can "with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden of commercial expression."[43]

43. Leathers v. Medlock, 499 U.S. 439, 447 (1991); *see also Pitt News*, 379 F.3d at 111.