A Collectivist/Individualist Approach to the History of Commercial Speech Regulation

“The Chickens Have Come Home to Roost: Individualism, Collectivism and Conflict in Commercial Speech Doctrine” by Elizabeth Blanks Hindman describes the role of collectivist and individualist perspectives in the continually evolving legal status of commercial speech in 20th century United States history.

Collectivism, according to Hindman, is primarily concerned with the social good and as a result, this perspective regards commercial speech as a policy-based privilege. Collectivists advocate the preservation of the Central Hudson test, at least in lieu of a commercial speech doctrine. The individualist perspective, on the other hand, considers commercial speech as a principle-based First Amendment right. Individualism, according to Hindman, supports the creation of a commercial speech doctrine to replace the problematic Central Hudson test. Some, like Justice Clarence Thomas, advocate the application of the strict scrutiny test to regulations that would suppress commercial speech.

The 1942 ruling in Valentine v. Chrestensen essentially excluded commercial speech from First Amendment protection and stood until Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council in 1976. This ruling rejected the 1942 ruling but still limited protection in very uncertain terms, beginning a period in which the Court was forced to rule on a case-by-case basis.

In 1980, the Court developed the Central Hudson test out of a case involving the limitation of commercial speech that incites the use of electricity. Once a sensible solution during electricity shortages, this legislation no longer directly served a public good and was thus thrown out. Hindman notes the real significance of the ruling was the four-prong test defining constitutionally-protected speech, including: if it serves a substantial government interest, if it
directly advances that interest, and if it is sufficiently narrow in definition and application. With only three concurring justices and many gaps in the definition of commercial speech, however, it was clear from its inception that the *Central Hudson* test left a vast grey area in future application of the rule.

*Metromedia Inc. v. City of San Diego* set the collectivist standard in its preferential treatment of noncommercial speech. *In re R.M.J.*, Hindman points out, backed *Metromedia* and is the first case to explicitly state that advertising not promoting a public good may be regulated. The next case, which concerned contraceptive pamphlets, used *In re R.M.J.* to justify protecting the commercial speech due to its educational purpose, reasoned by the court to promote the public good. The Court continued its struggle to define commercial speech, however, and application of the test remained inconsistent. Hindman groups the remaining cases into a series of rulings over professional advertising, considered by many to be a systematically misleading form of commercial speech, followed by a series concerning vice advertising.

*Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* emphasized the “free flow of commercial information” as valuable, which began a slow progression towards individualistic ideals. *Shapero v. Kentucky Bar Association* echoed *Zauderer*, while the majority opinion in *Edenfield v. Fane* explicitly states that “even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.” This calls into question the notion of a public good entirely, casting an individualist shadow of doubt on *Central Hudson* test as a whole.

Hindman classifies the following cases as vice advertising: commercial speech advocating gambling, the consumption of alcohol, or smoking cigarettes for example. The 5-4 decision in *Posadas de Puerto Rico v. Tourism Co. of Puerto Rico* demonstrated growing
dissention in commercial speech cases. *U.S. v. Edge Broadcasting Co.* upheld a federal restriction on lottery advertisements in states where lotteries are illegal. *Rubin v. Coors*, which eliminated restrictions on the information displayed on beer can labels, turned the tide slightly, according to Hindman, as truthful statements in commercial speech were now granted First Amendment protection. *44 Liquormart v. Rhode Island* furthered the individualist perspective as all 9 justices ruled a ban on price advertisement unconstitutional. In the decision, Justice Thomas first calls into question the near-indefinable line between commercial and noncommercial speech.

A period of standoff commenced with the only consensus being the necessity of change according to Hindman. *Glickman v. Wileman Brothers* marked the first time a Justice recognized the need to protect persuasive – not simply factual – commercial speech. This further moved the standard away from the collectivist value of social good. *Greater New Orleans Broadcasting Association v. United States* sidestepped the issue by using the *Central Hudson* test to overturn a ban on interstate radio ads for casinos with Justice Thomas again pushing change. *Lorillard Tobacco Co. v. Reilly*, *United States v. United Foods (2002)*, and *Thompson v. Western States Medical Center (2002)* all avoided the *Central Hudson* test entirely while essentially ruling in favor of the individualist perspective according to Hindman. In each of his concurring opinions, Justice Thomas called for the application of the strict scrutiny standard in dealing with commercial speech as well as a commercial speech doctrine, which does not exist to this day.

In her conclusion, Hindman too calls for a commercial speech doctrine on the individualist basis of principle rooted in the First Amendment. She even surpasses Thomas in her view that commercial speech should be granted the same level of protection given to ideological speech. Essentially, Hindman believes that commercial speech should be protected under the
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First Amendment unless it is libelous or creates a clear and present danger like any other form of speech.

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