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# First Amendment Tests From the Burger Court: Will They Be Flipped?

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**FIRST AMENDMENT TESTS FROM THE BURGER  
COURT: WILL THEY BE FLIPPED?**

David L. Hudson, Jr.<sup>†</sup> and Emily H. Harvey<sup>††</sup>

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I. INTRODUCTION

When scholars speak of the Burger Court, they often mention the curtailing of individual rights in the criminal justice arena,<sup>1</sup> federalism decisions,<sup>2</sup> its “rootless activism,”<sup>3</sup> a failure in equal

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1. See Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 14, 44 (1995); Steven D. Clymer, Note, *Warrantless Vehicle Searches and the Fourth Amendment: The Burger Court Attacks the Exclusionary Rule*, 68 CORNELL L. REV. 105, 129, 141, 144–45 (1982).

2. See David Scott Louk, Note, *Repairing the Irreparable: Revisiting the Federalism Decisions of the Burger Court*, 125 YALE L.J. 682, 686–87, 694, 710, 724–25 (2016); Lea Brilmayer & Ronald D. Lee, *State Sovereignty and the Two Faces of Federalism: A Comparative Study of Federal Jurisdiction and the Conflict of Laws*, 60 NOTRE DAME L. REV. 833, 836, 839–40 (1985).

3. See generally Vincent Blasi, *The Rootless Activism of the Burger Court*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 198–217 (Vincent Blasi ed., 1983) (discussing the development of the judicial activism employed by the Burger Court via various case law examples).

protection analysis,<sup>4</sup> significant developments in sex discrimination law,<sup>5</sup> or even a general lack of direction.<sup>6</sup>

Whatever its successes or failures in other areas, the Burger Court impacted First Amendment law in a meaningful way. This impact is best shown by the creation of three legal tests in distinct areas of First Amendment law: the Establishment Clause, obscenity, and commercial speech.<sup>7</sup> These three tests are the *Lemon* test, the *Miller* test, and the *Central Hudson* test.<sup>8</sup> Despite criticism, all three tests remain leading standards in their respective areas of First Amendment jurisprudence.<sup>9</sup> This article provides an overview of each of these seminal tests, assesses how they fared in subsequent years, and offers thoughts on their continuing vitality.<sup>10</sup>

## II. THE LEMON TEST

The *Lemon* test comes from the Burger Court's 1971 decision in *Lemon v. Kurtzman*.<sup>11</sup> The case involved a challenge to a Pennsylvania law that provided financial support to nonpublic schools, including parochial schools, in the form of teacher salaries, textbooks, and other instructional materials.<sup>12</sup> Alton Lemon, a member of the American Civil Liberties Union, agreed to be the plaintiff challenging the constitutionality of the law.<sup>13</sup> At the Supreme Court

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4. See Erwin Chemerinsky, *Lost Opportunity: The Burger Court and the Failure to Achieve Equal Educational Opportunity*, 45 MERCER L. REV. 999, 1000, 1015 (1994).

5. See generally Ruth Bader Ginsburg, *The Burger Court's Grappling with Sex Discrimination*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T, *supra* note 3, at 132–56 (highlighting the influence of changing social and economic conditions in the 1970s as factors affecting the Burger Court's developed body of law regarding sex discrimination).

6. Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1437 (1987).

7. David L. Hudson, Jr., *Will Roberts Court Flip Burger Precedents?*, NEWSEUM INST. (May 9, 2008), <http://www.newseuminstitute.org/2008/05/09/will-roberts-court-flip-burger-precedents/> [https://perma.cc/L9V7-SXDJ] [hereinafter Hudson, Jr., *Roberts Court*].

8. *Id.*

9. *Id.*

10. Specifically, this article first analyzes the *Lemon* test, *see infra* Part II, next addresses the *Miller* test, *see infra* Part III, and finally discusses the *Central Hudson* test, *see infra* Part IV.

11. 403 U.S. 602 (1971).

12. *Id.* at 610–11.

13. David L. Hudson, Jr., *Lemon Plaintiff, Out of Limelight, Still Tracks Church-State Issues*, FIRST AMENDMENT CENTER (May 19, 2004), <http://www.firstamendmentcenter.org/life-and-death-of-the-lemontest>.

level, Lemon's case was consolidated with another case, *Disenso v. Robinson*,<sup>14</sup> from Rhode Island.<sup>15</sup> In *Disenso*, the plaintiff challenged the constitutionality of the state supplementing the salaries of nonpublic elementary school teachers.<sup>16</sup>

In examining the statutes, Chief Justice Warren Burger acknowledged that the language of the Establishment Clause was "at best opaque."<sup>17</sup> He identified what he called "cumulative criteria" gleaned from previous cases.<sup>18</sup> These "cumulative criteria," or three tests, collectively became known as the *Lemon* test.<sup>19</sup> Chief Justice Burger explained:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."<sup>20</sup>

In its original iteration, the *Lemon* test had three prongs: purpose, effect, and entanglement.<sup>21</sup> Thus, for a governmental program or regulation to be constitutional under the *Lemon* test, it must have a secular purpose, a primary effect that does not advance or inhibit religion, and not foster an excessive entanglement between church and state.<sup>22</sup> Chief Justice Burger pulled the first two prongs from *Board of Education v. Allen*,<sup>23</sup> the decision on loaning textbooks to students attending parochial schools.<sup>24</sup> *Walz v. Tax*

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[www.firstamendmentcenter.org/lemon-plaintiff-out-of-limelight-still-tracks-church-state-issues/](http://www.firstamendmentcenter.org/lemon-plaintiff-out-of-limelight-still-tracks-church-state-issues/) [<https://perma.cc/2DXJ-FTWC>] [hereinafter Hudson, Jr., *Lemon Plaintiff*].

14. 316 F. Supp. 112 (D.R.I. 1970).

15. *Lemon*, 403 U.S. at 606–07.

16. *Id.* at 607.

17. *Id.* at 612.

18. *Id.*

19. Hudson, Jr., *Lemon Plaintiff*, *supra* note 13.

20. *Lemon*, 403 U.S. at 612–13 (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

21. Hudson, Jr., *Lemon Plaintiff*, *supra* note 13.

22. *Lemon*, 403 U.S. at 612 (first citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 242 (1968)); then citing *Walz*, 397 U.S. at 674 (1970)).

23. 392 U.S. 236.

24. *Lemon*, 403 U.S. at 612.

*Commission*,<sup>25</sup> the church property tax exemption decision, formed the basis for the last prong.<sup>26</sup>

Chief Justice Burger determined that both the Pennsylvania and Rhode Island laws passed the purpose prong as the state legislatures had the secular purpose of improving education.<sup>27</sup> However, he held that both statutes involved excessive entanglement between church and state.<sup>28</sup> The state laws provided that government officials would ensure that state aid would fund only secular education.<sup>29</sup> However, the Court reasoned that state officials would have to engage in comprehensive surveillance to ensure that the money was not being used to fund religious instruction: “[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected.”<sup>30</sup>

The U.S. Supreme Court has used the *Lemon* test in many Establishment Clause cases through the years.<sup>31</sup> In fact, the *Lemon* test was the dominant test for more than a decade.<sup>32</sup> Despite its widespread use, the Court has not been consistent in using the *Lemon*

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25. 397 U.S. 664.

26. *Lemon*, 403 U.S. at 613.

27. *Id.* (“[T]he statutes . . . are intended to enhance the quality of the secular education in all schools . . .”).

28. *Id.* at 613–14.

29. *See id.* at 616.

30. *Id.* at 619.

31. *See, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) (using the *Lemon* test to invalidate a Louisiana law requiring balanced treatment of creationism and evolution in science classes); *Wallace v. Jaffree*, 472 U.S. 38, 55 (1985) (using the *Lemon* test to invalidate an Alabama moment of silence law that sought to return prayer to the public schools); *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 123 (1982) (using the *Lemon* test to invalidate a Massachusetts law that gave churches the power to veto liquor licenses); *New York v. Cathedral Acad.*, 434 U.S. 125, 128 (1977) (using the *Lemon* test to invalidate a New York law allowing private schools to recover money from the state); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 744–45 (1976) (using the *Lemon* test to uphold a Maryland law that provided aid to private religious schools).

32. *Cf.* Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665, 673 (2008) (“[T]he dominant test for constitutionality under the Establishment Clause was the . . . test set forth in *Lemon v. Kurtzman*.”).

test.<sup>33</sup> One example is *Marsh v. Chambers*.<sup>34</sup> In *Marsh*, the Eighth Circuit used the *Lemon* test to invalidate the Nebraska legislature's practice of having chaplain-led prayer before sessions.<sup>35</sup> But the Supreme Court upheld the practice and ignored the *Lemon* test.<sup>36</sup> Instead, the Supreme Court focused on the history and tradition of opening legislative sessions with prayer.<sup>37</sup> In response, Justice William Brennan authored a dissenting opinion and criticized the majority opinion for failing to apply *Lemon*, which he called "the most commonly cited formulation of prevailing Establishment Clause doctrine."<sup>38</sup>

*Marsh* was only the beginning of the Court's inconsistent use of the *Lemon* test.<sup>39</sup> For example, in examining the constitutionality of a Ten Commandments monument in a Texas public park, Chief Justice William Rehnquist wrote in 2005: "Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds."<sup>40</sup>

While some justices have defended the *Lemon* test,<sup>41</sup> several Justices have also criticized it. Most colorfully, Justice Antonin Scalia referred to it as a "ghoul in a late-night horror movie" that "stalks our Establishment Clause jurisprudence."<sup>42</sup> He voted to grant

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33. See Amy J. Alexander, *When Life Gives You the Lemon Test: An Overview of the Lemon Test and Its Application*, 3 PHOENIX L. REV. 641, 649 (2010) (discussing the inconsistent application of the *Lemon* test).

34. 463 U.S. 783, 783 (1983).

35. *Chambers v. Marsh*, 675 F.2d 228, 233–35 (8th Cir. 1982), *rev'd*, 463 U.S. 783 (1983); see also Kathrik Ravinshankar, *The Establishment Clause's Hydra: The Lemon Test in the Circuit Courts*, 41 DAYTON L. REV. 261, 274 (2016) ("Perhaps illustrating problems with the *Lemon* test in the legislative prayer setting, the Eighth Circuit reached opposite conclusions in *Chambers v. Marsh* and *Bogen v. Doty* despite applying *Lemon* to seemingly similar facts.").

36. *Marsh*, 464 U.S. 783, 783 (1983).

37. *Id.* at 786.

38. *Id.* at 796 (Brennan, J., dissenting).

39. See Alexander, *supra* note 33, at 642 ("The Court has continued to use [the *Lemon*] test erratically, at times revising and at others despising it . . .").

40. *Van Orden v. Perry*, 545 U.S. 677, 686 (2005).

41. For example, Justice Lewis Powell defended the *Lemon* test as "the only coherent test a majority of the Court has ever adopted." *Wallace v. Jaffree*, 472 U.S. 38, 62 (1985) (Powell, J., concurring).

42. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

certiorari in a case simply to “inter” the *Lemon* test.<sup>43</sup> Justice Clarence Thomas has blasted the test as “utterly indeterminate.”<sup>44</sup> In 1985, then Associate Justice William Rehnquist said the test “has simply not provided adequate standards for deciding Establishment Clause cases.”<sup>45</sup> Justice Byron White wrote in 1976: “I am no more reconciled now to *Lemon* than when it was decided.”<sup>46</sup>

Numerous legal commentators have also criticized the *Lemon* test on a variety of grounds. Professor Jesse Choper criticized the test for helping create a “conceptual disaster area” in aid to religious education cases.<sup>47</sup> Another leading commentator explained that the test has led to inconsistent results.<sup>48</sup> Some have attacked the purpose prong specifically.<sup>49</sup> Others have focused their attention on the entanglement prong, contending that it is unnecessary or should merely be a part of the effects prong.<sup>50</sup>

The Court has created a variety of other tests for Establishment Clause cases. For example, as mentioned earlier, the Court used a history and tradition analysis to uphold a state practice of having prayer before legislative sessions.<sup>51</sup> In another case, Justice Sandra Day O’Connor offered “a clarification” of *Lemon* called the

43. *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1253 (2000) (Scalia, J., dissenting from denial of cert.) (“I would grant certiorari in this case if only to take the opportunity to inter *Lemon* test once for all.”).

44. *Utah Highway Patrol Ass’n v. Am. Atheists*, 565 U.S. 994, 1001 (2011) (Thomas, J., dissenting from denial of cert.).

45. *Jaffree*, 472 U.S. at 109 (Rehnquist, J., dissenting).

46. *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 768 (1976) (White, J., concurring).

47. Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools*, 75 CAL. L. REV. 5, 6 (1987).

48. William P. Marshall, “*We Know It When We See It*”—*The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 498 (1986).

49. Josh Blackman, *This Lemon Comes as a Lemon: The Lemon Test and the Pursuit of a Secular Legislative Purpose*, 20 GEO. MASON U. CIV. RIGHTS. L.J. 351, 407–10 (2010); Jay Alan Sekulow & Erik Michael Zimmerman, *Posting the Ten Commandments is a “Law Respecting an Establishment of Religion?”: How McCreary County v. ACLU Illustrates the Need to Reexamine the Lemon Test and Its Purpose Prong*, 23 T.M. COOLEY L. REV. 25 (2006); Jeffrey S. Theuer, *The Lemon Test and Subjective Intent in Establishment Clause Analysis: The Case for Abandoning the Purpose Prong*, 76 KY. L.J. 1061 (1988).

50. See Heather S. Savage, Note, *The School Voucher Debate: Recasting the Third Prong of the Lemon Test*, 45 HOW. L.J. 465, 483 (2002) (“The decisions prove that excessive entanglement should not stand on its own, but rather should be directly linked with the primary effect of advancing or inhibiting religion.”).

51. *Marsh v. Chambers*, 463 U.S. 783, 788 (1983).

“endorsement test.”<sup>52</sup> In yet another case, Justice Anthony Kennedy offered forth a coercion analysis.<sup>53</sup>

In 1997, the Court seemingly modified the *Lemon* test by folding the entanglement prong into the effects prong.<sup>54</sup> However, many lower courts still apply all three prongs of the *Lemon* test.<sup>55</sup> A federal district court judge recently referred to the *Lemon* test as the “benchmark” in granting preliminary injunctive relief against President Donald Trump’s travel ban.<sup>56</sup>

In fact, while it has faced a litany of criticism, the *Lemon* test survives and even thrives, particularly in the lower courts.<sup>57</sup> As attorney Karthik Ravishankar wrote in 2016: “The funeral procession has arrived too early. Despite the Court’s clear ambivalence about *Lemon*, the circuits continue to employ the test in the vast majority of Establishment Clause cases.”<sup>58</sup> One commentator claimed that *Lemon* was the best test for Establishment Clause cases, particularly in evaluating the constitutionality of graduation prayer.<sup>59</sup>

### III. THE *MILLER* TEST

The *Miller* test comes from the Supreme Court’s 1973 decision in *Miller v. California*.<sup>60</sup> The test deals with obscenity, an unprotected category of speech that has confounded numerous Supreme Court Justices through the years.<sup>61</sup> Justice John Marshall Harlan II famously

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52. *Lynch v. Donnelly*, 465 U.S. 668, 687–94 (1984) (O’Connor, J., concurring).

53. *County of Allegheny v. ACLU*, 492 U.S. 573, 655–79 (1989) (Kennedy, J., concurring in part and dissenting in part).

54. *Agostini v. Felton*, 521 U.S. 203, 232–34 (1997).

55. *See Felix v. City of Bloomfield*, 841 F.3d 848, 856 (10th Cir. 2016) (emphasizing that the Tenth Circuit applies all three prongs of the *Lemon* test); *Am. Atheists, Inc. v. Port Auth. of N.Y. and N.J.*, 760 F.3d 227, 238 (2d Cir. 2014) (stating that panels of this court are “required to follow this precedent”).

56. *Hawaii v. Trump*, 245 F. Supp. 3d 1227, 1235 (D. Haw. 2017) (“*Lemon* . . . provides the benchmark for evaluating whether governmental action is consistent with or at odds with the Establishment Clause.” (citations omitted)).

57. Alexander, *supra* note 33, at 641 (describing the *Lemon* test as the “leading method” to determine whether there is an Establishment Clause violation).

58. Ravishankar, *supra* note 35 at 263.

59. Penny J. Meyers, *Lemon is Alive and Kicking: Using the Lemon Test to Determine the Constitutionality of Prayer at High School Graduation Ceremonies*, 34 VAL. U. L. REV. 231, 233 (1999).

60. 413 U.S. 15 (1973).

61. John Fee, *Obscenity and the World Wide Web*, 2007 B.Y.U. L. REV. 1691, 1691 (2007) (“Whereas the Supreme Court has held that obscenity is defined by



referred to it as the “intractable obscenity problem.”<sup>62</sup> More famously, Justice Potter Stewart once wrote that he perhaps could not intelligibly define obscenity but claimed, “I know when I see it . . . .”<sup>63</sup>

Prior to *Miller*, some American courts adopted an obscenity test from a nineteenth century English case, *Regina v. Hicklin*,<sup>64</sup> known as the *Hicklin* test.<sup>65</sup> That test allowed for obscenity prosecutions based on the impact of isolated passages on the most susceptible of persons.<sup>66</sup> The U.S. Supreme Court rejected the *Hicklin* test in *Roth v. United States*, and instead adopted the test used by several lower courts: “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”<sup>67</sup>

In the next decade, three Justices adopted a three-part test, sometimes called the *Memoirs* test, that required: “(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.”<sup>68</sup>

However, as indicated, only three Justices agreed with the *Memoirs* formulation.<sup>69</sup> This eventually caused the Supreme Court to review obscenity cases on an ad hoc, case-by-case basis in a process known as “Redruping”<sup>70</sup>—after the Court’s decision in *Redrup v. New*

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reference to ‘contemporary community standards,’ it is not clear whose community standard applies . . . .”).

62. *Miller*, 413 U.S. at 16 (citing *Interstate Cir., Inc. v. City of Dall.*, 390 U.S. 676, 704 (1968) (Harlan, J., concurring in part and dissenting in part)).

63. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

64. [1868] 3 QB 360 (Eng.).

65. See RODNEY A. SMOLLA, § 13:2. *The Standard Established in Regina v. Hicklin*, in *RIGHTS & LIABILITIES IN MEDIA CONTENT: INTERNET, BROADCAST, AND PRINT* (2d ed. 2017) (citing *Hicklin*, [1868] 3 QB 360 at 363–64).

66. *Id.*

67. 354 U.S. 476, 489 (1957).

68. *A Book Named ‘John Cleland’s Memoirs of a Woman of Pleasure’ v. Att’y Gen. of Mass.*, 383 U.S. 413, 418 (1966).

69. See *id.*

70. Henry Louis Gates, Jr., *To ‘Deprave and Corrupt,’* 38 N.Y. L. SCH. L. REV. 401, 416 (1993) (reviewing EDWARD DE GRAZIA, *GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS* (1992)) (“Summary reversals of lower-court obscenity convictions soon became routine in a process known as ‘Redrupping’ . . . .”).

*York*.<sup>71</sup> Under this process, if five Justices agreed under different legal tests that the material was not obscene, the court would reverse convictions summarily<sup>72</sup> during a process known as “Movie Day.”<sup>73</sup>

The Burger Court revisited obscenity in *Miller v. California*<sup>74</sup> and created what is still known today as the *Miller* test.<sup>75</sup> In *Miller*, Melvin Miller mailed five unsolicited brochures to the manager of a restaurant and his mother containing explicit pictures and drawings of men and women engaged in a variety of sexual activities.<sup>76</sup> The State of California convicted Mr. Miller of violating a state statute that made it a misdemeanor to knowingly distribute obscene material.<sup>77</sup>

The Court initially noted that the First Amendment did not protect obscenity, while recognizing that the Court had struggled in previous cases to define it.<sup>78</sup> Then, the Court outlined a three-pronged test to guide the trier-of-fact in distinguishing obscenity from other, protected speech:

- (a) whether the average person applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.<sup>79</sup>

Thereafter, federal and state governments enacted obscenity statutes that adopted the language of the three-pronged test from

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71. See 386 U.S. 767, 770 (1967).

72. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 82 (1973) (“In the face of this divergence of opinion the Court began the practice in *Redrup v. New York*, of per curiam reversals of convictions for the dissemination of materials that, at least five members of the Court, applying their separate tests, deemed not to be obscene.”).

73. See Phyllis Schlafly, *The Morality of First Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL’Y 95, 99 (2008) (“The court held ‘movie day[s]’ where the Justices and their clerks would watch the films at issue in pornography cases.”) (citing BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 198 (1979)).

74. 413 U.S. 15 (1973).

75. *Ashcroft v. ACLU*, 535 U.S. 564, 612 n.7 (2002) (citing *Miller*, 413 U.S. at 16–18).

76. *Miller*, 413 U.S. at 16–18.

77. *Id.* at 16.

78. *Id.* at 23.

79. *Id.* at 24 (citations omitted).

*Miller*.<sup>80</sup> In a subsequent case, *Pope v. Illinois*, the Court held that the trier of fact should apply local community standards to the first two prongs and a national standard to the third prong.<sup>81</sup>

In the ensuing decades, the *Miller* test would face its greatest challenge with the invention and proliferation of the Internet. The Supreme Court threw down the gauntlet in *Ashcroft v. ACLU*, when several members of the Court questioned the constitutionality of applying aspects of the *Miller* test to Internet speech.<sup>82</sup> In his concurring opinion, Justice Anthony Kennedy opined that applying local community standards might lead to the substantial suppression of protected speech, writing:

A Web publisher in a community where avant garde culture is the norm may have no desire to reach a national market; he may wish only to speak to his neighbors; nevertheless, if an eavesdropper in a more traditional, rural community chooses to listen in, there is nothing the publisher can do.<sup>83</sup>

Justice Kennedy also questioned what it would mean to evaluate Internet speech “as a whole,” when content on a webpage often connects to other websites.<sup>84</sup> The lower courts wrestled with these questions when the Department of Justice, under President George W. Bush, initiated a series of high-profile Internet obscenity prosecutions.<sup>85</sup> In *United States v. Kilbride*, for example, the U.S. Court of Appeals for the Ninth Circuit held that courts should apply a national community standard when the obscenity prosecution involved Internet speech.<sup>86</sup> However, in *United States v. Stagliano*, a federal district court found that the local standard was constitutional.<sup>87</sup> That court also addressed the “as a whole” requirement in the context of a movie trailer posted on a pornographic website.<sup>88</sup> The court ruled that the trailer would not be judged in isolation but in a broader context that would

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80. See, e.g., ALA. CODE § 13A-12-200.1 (2017); A.C.A. § 5-68302(5) (2017); CAL. PENAL CODE § 311 (2017).

81. 481 U.S. 497, 500–01 (1987).

82. 535 U.S. 564 (2002).

83. *Id.* at 595–96 (Kennedy, J., concurring).

84. *Id.* at 600 (quoting U.S.C. §§ 231(e)(6)(A), (C) (2017)).

85. See Robert D. Richards & Clay Calvert, *Obscenity Prosecutions and the Bush Administration: The Inside Perspective of the Adult Entertainment Industry & Defense Attorney Louis Sirkin*, 14 VILL. SPORTS & ENT. L.J. 233, 235 (2007).

86. 584 F.3d 1240, 1254 (9th Cir. 2009).

87. 693 F. Supp. 2d 25, 31–32 (D.D.C. 2010).

88. *Id.* at 33–35.

encompass, at a minimum, the web page on which the trailer was posted.<sup>89</sup> In contrast, in *United States v. Little*, the U.S. Court of Appeals for the Eleventh Circuit held that five video trailers posted on a pornographic website were properly viewed as five separate works.<sup>90</sup>

In *United States v. Extreme Associates*, the defendant, a purveyor of Internet pornography, avoided the *Miller* test altogether and argued that the obscenity statutes violated substantive due process.<sup>91</sup> The federal district court in Pennsylvania agreed and held that the defendant had third-party standing under *Craig v. Boren*<sup>92</sup> to assert the rights of its customers.<sup>93</sup> The court contended that, under *Stanley v. Georgia*,<sup>94</sup> the customers of the defendant had a fundamental right to view whatever material they wanted in the privacy of their own homes, and that the federal obscenity statutes placed an impermissible burden on that right.<sup>95</sup> The defendant's argument lost traction, however, when the U.S. Court of Appeals for the Third Circuit considered the case,<sup>96</sup> reversed the district court's decision, and returned to the *Miller* test.<sup>97</sup>

The Justice Department's focus on obscenity prosecutions under George W. Bush slowed during the Obama administration,<sup>98</sup> but there is some indication that Attorney General Jeff Sessions will revive it.<sup>99</sup> In 2010, when District Court Judge Richard J. Leon dismissed the obscenity charges against the defendant in *United States v. Stagliano*, he expressed concern over the "difficult, challenging

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89. *Id.* at 36–37.

90. 365 Fed. Appx. 159, 165 (11th Cir. 2010).

91. *United States v. Extreme Assocs., Inc.*, 352 F. Supp. 2d 578, 580 (W.D. Pa. 2005), *rev'd*, 431 F.3d 150 (3d Cir. 2005).

92. 429 U.S. 190 (1976).

93. *Extreme Assocs. Inc.*, 352 F. Supp. 2d at 588.

94. 394 U.S. 557, 560 (1969).

95. *Extreme Assocs. Inc.*, 352 F. Supp. 2d at 592.

96. *Extreme Assocs. Inc.*, 431 F.3d at 156.

97. *Id.* at 162.

98. See George Weaver, *Obama Administration Fails Obscenity Test*, WORLD NEWS GROUP (Apr. 24, 2013, 9:45 AM), [https://world.wng.org/2013/04/obama\\_administration\\_fails\\_obscurity\\_test#](https://world.wng.org/2013/04/obama_administration_fails_obscurity_test#) [<https://perma.cc/3DE9-2HQJ>] (noting that in 2013, "[g]overnment prosecutors ha[d] tried only two adult obscenity cases since 2009").

99. See *Sessions Hearing: Obscenity*, C-SPAN (Jan. 11, 2017), [www.c-span.org/video/?c4644425/sessions-hearing-obscenity](http://www.c-span.org/video/?c4644425/sessions-hearing-obscenity) [<https://perma.cc/5KYE-75W2>].

and novel questions” the case raised for obscenity law.<sup>100</sup> He stated, “I hope that [higher] courts and Congress will give greater guidance to judges in whose courtrooms these cases will be tried.”<sup>101</sup> Thus, the *Miller* test is still intact, but questions remain.

#### IV. THE *CENTRAL HUDSON* TEST

The Burger Court also created the leading test for evaluating whether a regulation of purely commercial advertising violates the First Amendment. Known as the *Central Hudson* test, it comes from the decision bearing its name—*Central Hudson Gas & Electric Co. v. Public Service Commission of N.Y.*<sup>102</sup>

In the past, commercial speech received no free speech protection. The Court declared in 1942 that “the Constitution imposes no such restraint on government as respects purely commercial advertising.”<sup>103</sup> This rule reigned for three decades until the Court finally recognized the value of commercial speech in the mid-1970s.<sup>104</sup> In 1976, the Court declared that the old rule was of “doubtful validity”<sup>105</sup> and declared that “the free flow of commercial information is indispensable.”<sup>106</sup>

While the Court recognized that commercial speech received free speech protection, it did not create a test for evaluating such restrictions.<sup>107</sup> The Court did so in *Central Hudson*, which involved the constitutionality of a New York rule banning “promotional advertising” by electrical utilities.<sup>108</sup> In the decision, Justice Lewis Powell crafted the *Central Hudson* test, writing:

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

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100. Spencer S. Hsu, *U.S. District Judge Drops Porn Charges Against Video Producer John A. Stagliano*, WASH. POST (July 17, 2010), [www.washingtonpost.com/wp-dyn/content/article/2010/07/16/AR2010071605750.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/07/16/AR2010071605750.html) [<https://perma.cc/GH4Z-4CQU>].

101. *Id.*

102. 447 U.S. 557 (1980).

103. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

104. DAVID L. HUDSON, JR., LEGAL ALMANAC SERIES: THE FIRST AMENDMENT: FREEDOM OF SPEECH § 6.2 (2012) [hereinafter HUDSON, JR., LEGAL ALMANAC SERIES].

105. *Va. State Bd. Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 759 (1976).

106. *Id.* at 765.

107. HUDSON, JR., LEGAL ALMANAC SERIES, *supra* note 104, § 6.5.

108. *Id.*

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.<sup>109</sup>

Under the *Central Hudson* test the first prong—the threshold prong—asks: does the speech “concern lawful activity” and is it non-misleading?<sup>110</sup> If the speech at issue meets this prong, then the *Central Hudson* test involves analysis of three additional prongs: (1) the government must have a substantial interest; (2) the regulation must directly and materially advance the government’s substantial interest; and (3) the regulation must be narrowly tailored.<sup>111</sup> The *Central Hudson* test is a form of intermediate scrutiny,<sup>112</sup> as the government only has to put forth a *substantial* governmental interest, rather than a *compelling* governmental interest in a strict scrutiny analysis.<sup>113</sup> Furthermore, the government does not have to justify its restriction as the least restrictive means.<sup>114</sup>

The *Central Hudson* test remains the dominant test in commercial speech jurisprudence.<sup>115</sup> However, several Justices have criticized it. Justice Clarence Thomas called for its abdication in his concurring opinion in *44 Liquormart v. Rhode Island*, writing:

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109. *Central Hudson Gas & Elec. Co. v. Pub. Serv. Comm. of N.Y.*, 447 U.S. 557, 566 (1980).

110. *Id.* at 564 (stating that under such circumstances, “the government’s power is more circumscribed”).

111. *Id.* at 566; HUDSON, JR., LEGAL ALMANAC SERIES, *supra* note 104, § 6.5.

112. Allen Rostron, *Pragmatism, Paternalism, and the Constitutional Protection of Commercial Speech*, 37 VT. L. REV. 527, 537 (2013).

113. *Central Hudson*, 447 U.S. at 566 (requiring only a substantial government interest to restrict commercial speech); Rostron, *supra* note 112, at 537 (“The Court has emphasized that [the *Central Hudson* test] is a ‘lesser’ level of protection than that afforded to other types of speech.”). *But cf.* *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (“[T]o pass constitutional muster” under the Fourteenth Amendment, governmental actions “must be justified by a compelling governmental interest . . . .”); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (introducing the concept of “strict scrutiny” in reviewing the constitutionality of a government action under the Fourteenth Amendment for the first time in a Supreme Court case).

114. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989) (“We . . . conclude that the reason of the matter requires something short of a least-restrictive-means standard.”).

115. HUDSON, JR., LEGAL ALMANAC SERIES, *supra* note 104, § 6.5 (“[T]he so-called *Central Hudson* test . . . still predominates in commercial speech jurisprudence.”).

In my view, the *Central Hudson* test asks the courts to weigh incommensurables—the value of knowledge versus the value of ignorance—and to apply contradictory premises—that informed adults are the best judges of their own interests, and that they are not. Rather than continuing to apply a test that makes no sense to me when the asserted state interest is of the type involved here, I would return to the reasoning and holding of *Virginia Bd. of Pharmacy*.<sup>116</sup>

In the same decision, Justice Antonin Scalia wrote that he “share[d] Justice Thomas’s discomfort with the *Central Hudson* test, which seems to have nothing more than policy intuition to support it.”<sup>117</sup> Additionally, numerous legal commentators have criticized the commercial speech doctrine and the *Central Hudson* test. Judge Alex Kozinski and Stuart Banner famously critiqued the doctrine in their oft-cited article *Who’s Afraid of Commercial Speech?*<sup>118</sup> In their article, the authors disagreed with the notion that it is easier to identify the truth or falsity of commercial speech than it is of other forms of speech.<sup>119</sup> They also questioned whether commercial speech was more durable than other forms of speech.<sup>120</sup> Additionally, the authors demonstrated the difficulty in determining whether speech should be classified as commercial speech, noncommercial speech, or some mixture.<sup>121</sup> Another leading commentator has referred to the current protection of commercial speech as “half-hearted.”<sup>122</sup>

116. 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 528 (1996) (J., Thomas concurring). *But see* *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (holding that commercial speech may not be restricted at the expense of public knowledge about lawful competitive pricing terms).

117. 44 *Liquormart*, 517 U.S. at 517 (Scalia, J., concurring).

118. Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990).

119. *Id.* at 635.

120. *Id.* at 637–38 (challenging the oft-held “durability” justification by juxtaposing commercial speech against other major profit generating—yet fully protected—forms of speech like films, music recordings, and books).

121. *Id.* at 639–41 (illustrating the difficulty in speech classification by analyzing an early 1990s Diet Pepsi commercial and concluding that little—in form or substance—separates a “theatrical” commercial, merely telling a story involving the product, and a “not much more thought-out” film).

122. Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. KY. L. REV. 553, 554 (1997).

Still another commentator has referred to the *Central Hudson* test as a “malleable standard that has resulted in inconsistent outcomes.”<sup>123</sup>

The Court edged closer to applying more than intermediate scrutiny in *Sorrell v. IMS Health Inc.*<sup>124</sup> Here, while faced with a First Amendment challenge to state regulation of prescriber-related information, the Court held that content based restrictions on commercial speech should receive “heightened judicial scrutiny.”<sup>125</sup> However, the Court proceeded to apply the *Central Hudson* test.<sup>126</sup> This prompted one commentator to refer to the test as “the *Central Hudson* Zombie.”<sup>127</sup>

The U.S. Supreme Court has moved closer to applying more than intermediate scrutiny to at least some forms of commercial speech regulation.<sup>128</sup> However, the *Central Hudson* test has proven “oddly resilient.”<sup>129</sup> It remains the dominant test used by lower courts in commercial speech cases.<sup>130</sup>

## V. CONCLUSION

The Burger Court impacted First Amendment jurisprudence, primarily through the creation of leading tests and standards for

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123. See Kayla R. Burns, Note, *Reducing the Inherent Malleability of Mid-Level Scrutiny in Commercial Speech: A Proposed Change to the Second, Third, and Fourth Prongs of the Central Hudson Test*, 44 LOY. L.A. L. REV. 1579, 1584 (2011); see also Brian J. Waters, Comment, *A Doctrine in Disarray: Why the First Amendment Demands Abandonment of the Central Hudson Test for Commercial Speech*, 27 SETON HALL L. REV. 1626, 1628 (1997) (“[T]he [*Central Hudson*] test has often been applied inconsistently, resulting in uncertain First Amendment protection for commercial speech.”).

124. 564 U.S. 552 (2011).

125. *Id.* at 557, 565.

126. *Id.* at 577–80.

127. See generally Oleg Shik, Note, *The Central Hudson Zombie: For Better or Worse, Intermediate Tier Review Survives Sorrell v. IMS Health*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 561 (2015).

128. Rostron, *supra* note 112, at 551 (noting that in *Sorrell* the Supreme Court “held that Vermont had no legitimate interest” in restricting pharmaceutical representatives’ communication with physicians); see also *Sorrell*, 564 U.S. at 579–80.

129. Rostron, *supra* note 112, at 546.

130. See, e.g., *Ocheese Creamery LLC v. Putnam*, 851 F.3d 1228 (11th Cir. 2017); *Kiser v. Kamdar*, 831 F.3d 784 (6th Cir. 2016); *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518 (D.C. Cir. 2015).



lower courts to apply.<sup>131</sup> Three of those tests—the *Lemon* test,<sup>132</sup> the *Miller* test,<sup>133</sup> and the *Central Hudson* test<sup>134</sup>—remain governing law decades later.<sup>135</sup> Future First Amendment cases will demonstrate if the Roberts Court will flip these Burger Court precedents.<sup>136</sup>

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131. Hudson, Jr., *Roberts Court*, *supra* note 7.

132. *See supra* Part II.

133. *See supra* Part III.

134. *See supra* Part IV.

135. Hudson, Jr., *Roberts Court*, *supra* note 7.

136. *Id.*