TELLING THE TRUTH AND PAYING FOR IT: A COMPARISON OF TWO CASES—RESTRICTIONS ON POLITICAL SPEECH IN AUSTRALIA AND COMMERCIAL SPEECH IN THE UNITED STATES

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Two cases decided last year appear to provide a stark contrast in philosophy toward the basic human right of freedom of speech. In Australia, the High Court held that the Commonwealth could punish a citizen who encouraged voters to fill out the ballot in a manner that the government wished to discourage, even though the method of voting was lawful.[1] In the United States, the Supreme Court found that the State could not suppress truthful information about a product in an attempt to reduce the demand for its sale.[2] In other words, truthful statements encouraging lawful activity were protected from a regulation of commercial speech in the United States but not from a regulation of political speech in Australia.

Both countries have constitutional protections for speech. The First Amendment secures freedom of speech from abridgment in the United States.[3] In Australia, the High Court has implied freedom of political discussion from constitutional provisions for representative government.[4] An analysis of the two recent cases reveals similarities in the way each court approaches the constitutional protection of freedom of speech, but a fundamental difference in emphasis with respect to the status of the citizen.

I. *Langer v. Commonwealth*

Australia is the home of the "Australian ballot"—the secret ballot which has gained wide acceptance throughout the world. In other respects its voting system follows more controversial political theories. Australia has instituted compulsory voting and requires the voters to rank all candidates in order of preference from the most preferred to the least preferred.

A. *The Compulsory Ballot*

It is a criminal offense for a qualified voter to fail to vote in an election

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1. Langer v. Commonwealth, 134 A.L.R. 400 (1996).

2. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996).

3. U.S. CONST. amend. I.

4. A.C.T.V. v. Commonwealth, 108 A.L.R. 577 (1992); Nationwide News Pty. Ltd. v. Wills, 108 A.L.R. 681 (1992).

for Commonwealth office in Australia without a valid and sufficient reason.[5] Citizens have a duty to participate in government. Compulsory voting assures that elected officials are the preference of a majority of the electorate, not just a majority of those who choose to vote.

The Australian system of compulsory voting could not be adopted in the United States. It violates the commonly accepted understanding of the First Amendment that government may not compel an affirmation of support. The United States Supreme Court struck down a compulsory flag salute in *West Virginia State Bd. of Educ. v. Barnette*,[6] saying, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[7] Compulsory voting appears to force the citizen to speak and act in support of political candidates in the election. This contradicts a basic premise of United States free speech doctrine. As the Court said in *Wooley v. Maynard*,[8] "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."[9]

The American view runs counter to the Australian vision of appropriate protections for political choice. Although the Australian Constitution does not specifically guarantee freedom of speech, it does provide for voter choice. Members of the Commonwealth Parliament must be "directly chosen by the people."[10] Voters must have an opportunity to be informed to make that choice. Thus the Australian High Court found an implied freedom of political discussion in the Australian Constitution.[11] Even before this implied freedom was recognized, Australian citizens used the electoral provisions of the Constitution to challenge the compulsory voting laws.

Ernest Edward Judd, a Socialist Labour party member, contended that the Commonwealth could not constitutionally deny him the ability to choose not to support any candidate at all. Judd was convicted of violating the compulsory voting requirement by failing to vote in a 1925 Commonwealth senate election.[12] On appeal to the High Court he argued that the power for Parliament "to make laws prescribing the method of choosing senators"[13] did

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5. Commonwealth Electoral Act § 245 (1918).

6. 319 U.S. 624, 642 (1943).

7. *Id.*

8. 430 U.S. 705 (1977).

9. *Id.* at 714.

10. AUSTL. CONST. §§ 7 (senators), 24 (members of the House).

11. Nationwide News Pty. Ltd. v. Wills, 108 A.L.R. 681 (1992); A.C.T.V. v. Commonwealth, 108 A.L.R. 577, 596-97 (1992).

12. At that time the requirement was found in Section 128A of the Commonwealth Electoral Act of 1918-1925.

13. AUSTL. CONST. § 9. The provisions for election to the House of Representatives

not extend to compulsory voting. Noting that his party did not participate in the federal election because of the costs to get its candidates on the ballot, Judd complained that all the candidates on the ballot supported capitalism. It would betray his principles and those of his party to vote for any of them. Forcing him to vote, he said, denied him his choice.

In *Judd v. McKeon*,[14] the Australian High Court upheld the compulsory voting law. As long as choice exists, a voter's dislike of the choices or how they are to be made does not matter. The joint opinion of three justices interpreted "choosing" to refer to a selection between available options. The requirement of a choice would be satisfied even if all the alternatives were undesirable.[15] Two other justices agreed. One of them, Justice Isaac Isaacs said, "[t]he compulsory performance of a public duty is entirely consistent with freedom of action in the course of performing it."[16] Justice Isaacs noted that the compulsory system would be undermined if dislike of the candidates served as an excuse for not going to the polls.[17]

The compulsory ballot does not prevent Australians like Judd from arguing against the system of compulsory voting or stating that all the candidates are abominable. The requirement prevents elections from going by default to the candidate with the most intense supporters (i.e., those motivated to come to the polls) rather than with the most supporters. It makes the vote not just a right, but also a duty which the citizen owes to the Commonwealth. As in the case of the military draft, the law exempts religious conscientious objectors, but not persons simply opposed to the current political situation.

Only Justice Henry Bournes Higgins dissented from the decision in *Judd*. He did not question the constitutional power of Parliament to require compulsory voting, but reasoned that scruples of opposition were a "valid and sufficient reason" under the provisions of the statute for refusing to vote.[18]

B. *The Voting Preference System*

Australian elections use a preference system of voting in which the voter casts a vote for all the candidates in order of preference. With respect to Commonwealth elections, Section 240 of the Commonwealth Electoral Act of 1918 provides:

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do not specifically refer to choice. *Id.* §§ 31, 51(xxxvi) (members of the House).

14. 38 C.L.R. 380 (1926).

15. *Id.* at 383 (Knox, C.J., Gavan Duffy & Starke, JJ.).

16. *Id.* at 385 (Isaacs, J.).

17. *Id.* at 386 (Isaacs, J.).

18. *Id.* at 387-89 (Higgins, J.).

> In a House of Representatives election a person shall mark his or her vote on the ballot-paper by:
> (a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her first preference,
> (b) writing the numbers 2, 3, 4 (and so on, as the case requires) in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference for them.[19]

The underlying rationale for this method of voting is to assure that the winning candidate is the preference of the majority of the voters. That does not always happen where voters vote for a single candidate. For example, when third party candidates run, the voting system in the United States can result in a candidate being elected with a plurality although most of the voters preferred another candidate. This might have occurred if most of those who voted for the candidate with the least votes (e.g., Independent Ross Perot) preferred a second candidate (e.g., Republican George Bush) over the candidate who received the most votes (e.g., Democrat Bill Clinton).

The Australian system avoids the plurality election problem. The winning candidate must receive a majority of the preferences of the voters. To achieve this when no single candidate has a majority of the first preferences, a process of exclusion and recalculation is used. The candidate with the fewest first place votes is excluded, and the second place candidate on those ballots is treated as the preference of the voter. This process of exclusion and ballot recalculation is continued until there are only two candidates left or one candidate has a majority.[20]

The voting preference system was the focus of Jurgen Henry Faderson's challenge to his conviction for failure to vote in a senate election. He tried a variant on the statutory route suggested by Justice Higgins in *Judd*. Faderson contended that he had a valid and sufficient reason for not voting within the meaning of the statute because he had no preference among the candidates. Unlike Judd who opposed voting for any of the candidates, Faderson argued that he not only opposed them but also that he could not distinguish among them.

The statutory argument failed in the 1971 case of *Faderson v. Bridger*.[21] The Court denied the premise that the voter could not distinguish between candidates. Chief Justice Sir Geoffrey Barwick said, "[t]o face the

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19. Commonwealth Electoral Act § 240 (1918).
20. *Id.* § 274.
21. 126 C.L.R. 271 (1971).

voter with a list of names of persons, none of whom he may like or really want to represent him and ask him to indicate a preference among them does not present him with a task that he cannot perform."[22] Everyone is different. Even a candidate list that consists of Hitler, Jack the Ripper, Pol Pot, and Satan can be ranked in order of preference.[23] Relying on *Judd*, and particularly relying on Justice Isaacs' opinion in that case, Chief Justice Barwick upheld the conviction. If inability to distinguish among the candidates were accepted as grounds to refuse to vote, he contended, it would undermine the entire compulsory voting system.

Judd and *Faderson* made it clear that compulsory voting was consistent with the Australian Constitution. But the criminal law only required the voter to come to the polling place, take a ballot into the booth, and deposit it in the ballot box. "Of course there is no offense committed by not marking the ballot paper in such a fashion that the elector's vote is in law a valid vote."[24]

The secret ballot enabled the voter opposed to the system to turn in a blank ballot without being punished. Indeed, that is just what some government critics urged—and that set the stage for the case decided by the High Court of Australia this past term.

C. *Ballot Provisions—The Prohibition Against Encouraging Voters to Disregard Instructions*

There is no criminal penalty for failing to vote in the manner prescribed by Section 240. There couldn't be, because the ballot is secret. The primary sanction for failure to follow instructions is that the ballot will be invalid or, as it is popularly termed in Australia, "informal." Not every ballot that fails to follow Section 240 is informal. The Electoral Act enables election officials to count ballots where a voter neglected to fill in a space or mistakenly ranked two candidates alike. Under Section 268(1), a single blank space will be deemed the voter's last preference.[25] Under Section 270(2), a ballot will be counted if it identifies a candidate as the first preference and has numbers in the squares next to the other candidates or all the other candidates but one.[26]

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22. *Id.* at 273.

23. My current preferences, subject to change with further information, are: (1) Jack the Ripper, (2) Pol Pot, (3) Hitler, and (4) Satan.

24. *Faderson*, 126 C.L.R. at 272.

25. Commonwealth Electoral Act § 268(1) (1918).

26. *Id.* § 270(2). Under the Commonwealth Electoral Act:

> (2) Where a ballot paper in a House of Representatives election in which there are 3 or more candidates:
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> (a) has the number 1 in the square opposite to the name of a candidate;

These provisions enable voters to avoid the expression of any preference for secondary candidates by marking a "1" for the candidate of choice and "2" for all others, since a repeated number is disregarded. Although a ballot which voted for a single candidate would be invalid in an election with more than two candidates, a voter can effectively cast a ballot for one candidate and ignore all others by giving the others the same preference number.

Thus, the attempt to save the vote of the voter who made a mistake created a potential loophole for a single candidate voting procedure. In the long run, this could prevent any candidate from getting a majority of the preference votes. The Australian Electoral Commission commented on the difficulty of retaining the safety valve for people who make a genuine mistake while avoiding de facto optional preferential voting. They suggested that one method for dealing with this was to penalize individuals who induce people to fill out the ballot paper other than in accord with instructions. The Commonwealth Parliament responded in 1992 by enacting a new provision, Section 329A, which imposed a penalty of six months in prison for its violation:

> A person must not, during the relevant period in relation to a House of Representatives election under this Act, print, publish or distribute, or cause, permit or authorise to be printed, published or distributed, any matter or thing with the intention of encouraging persons voting at the election to fill in a ballot paper otherwise than in accordance with section 240.[27]

(b) has other numbers in all the other squares opposite to the names of candidates or in all those other squares except one square that is left blank; and
(c) but for this subsection, would be informal by virtue of paragraph 268(1)(c);

then:

(d) the ballot-paper shall not be informal by virtue of that paragraph;
(e) the number 1 shall be taken to express the voter's first preference;
(f) where numbers in squares opposite to the names of candidates are in a sequence of consecutive numbers commencing with the number 1—the voter shall be taken to have expressed a preference by the other number, or to have expressed preferences by the other numbers, in that sequence; and
(g) the voter shall not be taken to have expressed any other preference.

(3) In considering for the purposes of subsection (1) or (2), whether numbers are in a sequence of consecutive numbers, any number that is repeated shall be disregarded.

Id. §§ 270(2)-270(3).

27. *Id.* § 329A(1). Section 27 of the Electoral and Referendum Amendment Act of 1992 inserted Section 329A in the Commonwealth Electoral Act of 1918.

D. *The Decision of the Australian High Court*

The constitutionality of Section 329A came before the High Court in *Langer v. Commonwealth*.[28] Albert Langer regarded the existing political system as fundamentally wrong. He acknowledged that *Judd* and *Faderson* precluded him from urging voters not to go to the polls. Instead, he urged voters to oppose the system by turning in a blank or informal ballot.

Langer argued that voters must be free to exercise their "choice" for members of the House of Representatives under Section 24 of the Constitution by turning in blank ballots to show that the voter does not choose any of the candidates. Since the voter must be free to fill out the ballot in a manner different from the instructions in Section 240, Langer argued he should be free to encourage them to do so. Therefore, he contended, Section 329A was unconstitutional.

Langer's basic argument ran contrary to the reasoning of the Court in the earlier cases. The High Court had stated in those decisions that the constitutional requirements of choice were satisfied by alternative candidates on the ballot and that voting is a civic duty that can be compelled. All the justices in *Langer* agreed that the mandatory language of Section 240 was constitutional.

Langer stressed the argument on the constitutionality of Section 240 because his underlying concern was to encourage voters to oppose the electoral system, and he realized that he had no chance of persuading the Court to strike down a law that forbade encouraging persons to violate another valid law. But Section 329A applied even if the defendant had urged something lawful. Unlike Section 240, Section 329A punished speech. That suggested the possibility that it would violate the implied freedom of political communication. The High Court had found Commonwealth laws unconstitutional where they prohibited the criticism of government bodies[29] or restricted political advertising.[30] The implied freedom even affected defamation actions brought by high public officials under the common law or state statutes.[31] Thus, while Langer did not press the implied freedom argument, it was relevant to his case.

One Justice thought that the Commonwealth could not constitutionally punish persons who encouraged voters to cast valid ballots that did not

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28. 134 A.L.R. 400 (1996). Justice Deane reserved the question of the constitutionality of Section 329A for decision by the High Court. Deane was elevated to the position of Governor-General of the Commonwealth of Australia before the decision in the case. The new justice, Michael Kirby, took his seat after argument in Langer's case. Thus, only six judges gave their opinions in this case.

29. Nationwide News Pty. Ltd. v. Wills, 108 A.L.R. 681 (1992).

30. A.C.T.V. v. Commonwealth, 108 A.L.R. 577 (1992).

31. Theophanous v. Harold & Weekly Times Ltd., 124 A.L.R. 1 (1994).

follow statutory directions. Although Justice Sir Darryl Dawson had dissented in the cases which found an implied right of freedom of political discussion, he found that Section 329A violated Section 24 of the Commonwealth Constitution. He said the provision for members of the House of Representatives to be chosen by the people required that voters have a genuine choice. "[T]hose eligible to vote must have available to them the information necessary to exercise such a choice."[32]

Justice Dawson indicated that government could legitimately punish persons who encourage others to cast an informal vote "because the casting of a formal, and therefore, effective, vote is in the interests of representative government."[33] However, the savings provisions in Sections 268 and 270 made it possible to cast a valid ballot that does not conform to the directions of Section 240. Taken together, these provisions make available optional or selective preferential voting as opposed to full preferential voting.

> To prohibit communication of this fact (or at any rate communication in the form of encouragement) is to restrict the access of voters to information essential to the formation of the choice required by s 24 of the Constitution. Thus, s 329A has the intended effect of keeping from voters an alternative method of casting a formal vote which they are entitled to choose under the Act.[34]

Justice Dawson concluded that Section 329A was not reasonably and appropriately adapted to provide for members directly chosen by the people.[35]

> It is a law which is designed to keep from voters information which is required by them to enable them to exercise an informed choice. It can hardly be said that a choice is an informed choice if it is made in ignorance of a means of making the choice which is available and which a voter, if he or she knows of it, may wish to use in order to achieve a particular result.[36]

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32. Langer v. Commonwealth, 134 A.L.R. 400, 411 (1996) (Dawson, J.).

33. *Id.* at 412 (Dawson, J.). In a related case, Dawson voted to sustain a South Australian law that prohibited encouraging voters to mark their ballots in state elections other than as directed. Muldowney v. South Australia, 70 A.L.J.R. 515 (1996). "Unlike the situation in *Langer*, s 126(1) does not have the aim of discouraging electors from exercising an option which is available to them in the casting of a formal vote but is designed to ensure that electors are not encouraged to cast an ineffective vote." *Id.* at 521 (Dawson, J.).

34. *Langer*, 134 A.L.R. at 411 (Dawson, J.).

35. *Id.*

36. *Id.*

Despite the force of Dawson's arguments, the remaining five justices held the law constitutional. According to the majority, the savings provisions were designed to minimize the exclusion of ballots, not to provide an alternative method of voting. Encouraging people to fill out a ballot in a different manner undermined the operation of the preferential system. The wisdom and propriety of such a system remain open to full discussion; it is the encouragement to act in a way that impairs its desired operation that the statute forbids.

Chief Justice Sir Gerard Brennan wrote that "the savings provisions do not detract from the power to enact s 329A in order to protect what the parliament intends to be the primary method of choosing members of the House of Representatives."[37] He argued that the savings provisions did not prescribe an alternative method of voting but merely saved from invalidity some ballot papers which deviated from the prescribed method. "The restriction on freedom of speech imposed by s 329A is not imposed with a view to repressing freedom of political discussion; it is imposed as an incident to the protection of the s 240 method of voting."[38]

Justices John Toohey and Mary Gaudron recognized that the purpose of the law appeared to be to limit the possibility of voters deliberately taking advantage of the savings provisions so as to express a preference for only some of the candidates. This "assists in the maintenance of a system of full preferential voting."[39] The law, they concluded, was valid because it furthered the democratic process.

> Although the provisos operate to give effect to a ballot paper which might otherwise be informal, the democratic process is enhanced if a voter's actual intention is capable of ascertainment from the ballot paper and effect is given to that intention rather than an intention which he or she is deemed to have expressed. In relation to ballot papers which fall within the provisos to s 268(1)(c), s 329A operates to proscribe conduct which might encourage voters to fill in their ballot papers in a way that does not make their intentions manifest. Because it operates in this way, it is reasonably capable of being viewed as appropriate and adapted to the enhancement of the democratic process.[40]

Justice Michael McHugh read Section 240 as giving directions to voters on how they are to discharge the statutory duty to vote, but not

37. *Id.* at 405 (Brennan, C.J.).
38. *Id.* at 406 (Brennan, C.J.).
39. *Id.* at 415 (Toohey & Gaudron, JJ.).
40. *Id.* at 419 (Toohey & Gaudron, JJ.).

imposing a legal duty on the voter to vote in that manner. Nevertheless, failure to follow those directions threatened the preferential system of voting. "The system is as effectively undermined by filling in a ballot paper in a way that does not indicate the voter's complete order of preferences as it is by a vote that is wholly informal."[41] Although there were savings clauses for particular ballots, there was only one way to vote according to the legislature's direction. Promoting that method did not violate the freedom of discussion implied by Section 24 of the Constitution. "There is a world of difference between prohibiting advocacy that is put forward with the intention of encouraging breaches of statutory directions and prohibiting advocacy that criticises or calls for the repeal of such directions."[42]

Finally, Justice William Gummow said that the savings provisions of Sections 268 and 270 were ancillary to the primary objective of the legislation "and do not evince any legislative intent to make optional or selective preferential voting available as an alternative to full preferential voting."[43] He found no violation of an implied freedom of discussion derived from the system of representative government. "Section 329A does not impose any restriction upon political discussion generally nor, more particularly, upon discussion as to the suitability or disadvantages in the voting system. Rather, it is directed at the particular processes or mechanism by which the franchise is exercised and the vote is cast."[44] He concluded that the law was valid because the primary objective of the system established by the legislation involved observance of the constitutionally proper directions of Section 240. "It cannot be inimical to representative government to forbid intentional conduct comprising advocacy of the casting of a vote in such a way as may be an ineffective exercise of the franchise."[45]

In summary, a majority of the High Court held that the Commonwealth could discourage people from voting in a manner that was lawful but undesirable by punishing anyone who encouraged voters to act in that manner. The law served the legitimate purpose of supporting the system of full preference voting.

II. *44 Liquormart, Inc. v. Rhode Island*

Unlike Australia where the protection for speech is implied from the political process and limited to speech concerning political matters,[46] in the

41. *Id.* at 422 (McHugh, J.).
42. *Id.* at 423 (McHugh, J.).
43. *Id.* at 430 (Gummow, J.).
44. *Id.* at 431 (Gummow, J.).
45. *Id.* at 431-32 (Gummow, J.).
46. "[S]peech which is simply aimed at selling goods and services and enhancing profit-making activities will ordinarily fall outside the area of constitutional protection."

United States, the Supreme Court has found that the First Amendment guarantee of freedom of speech applies to commercial speech.[47] Only a few months after the Australian High Court upheld the prohibition against encouraging voters to disregard election voting instructions, the U.S. Supreme Court invalidated a state prohibition on advertising liquor prices.

A. *The Problem of Alcohol*

The immoderate consumption of alcohol creates major social problems—from drunk driving to domestic abuse to health problems. Taken in moderation, however, alcohol may have some benefits. In any event, most people want to be able to consume alcohol, and its prohibition creates significant social problems. Thus, the Eighteenth Amendment,[48] which prohibited the sale of alcohol, was repealed fourteen years later by the Twenty First Amendment.[49]

State governments have the power to ban the sale of alcohol or limit the amount which may be sold, but the former directly contradicts the desires of the political majority, and the latter imposes a costly bureaucratic scheme that the average voter would likely find intrusive. An alternative method for reducing alcohol consumption is to make it expensive—by increasing taxes or fixing prices. Higher taxes, however, are usually unpopular, and both higher taxes and fixed prices may harm a small state economically by diverting purchasers to lower priced liquor stores in neighboring states.

Rhode Island took a different route. It prohibited the publication or broadcast of any advertisements that made reference to the price of any alcoholic beverages, including advertisements for stores outside the State. The statute declared that the ban was for "the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages."[50] The theory was that the advertising ban would reduce price competition and that the resulting higher prices for alcohol would reduce the purchases, and thus, the consumption.

Theophanous v. Harold & Weekly Times, 124 A.L.R. 1, 14 (1994) (Mason, C.J., Toohey & Gaudron, JJ.).

47. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1505 (1996). Although the Court has found commercial speech protected by the First Amendment, Justice Scalia said he followed precedent only because the parties failed to thoroughly brief the underlying issue of whether commercial speech is protected. *Id.* at 1515 (Scalia, J., concurring). Justice Scalia appears to be the only current Justice who questions the application of the First Amendment to commercial speech.

48. U.S. CONST. amend. XVIII.

49. U.S. CONST. amend. XXI.

50. R.I. GEN. LAWS § 3-1-5 (1987).

B. *The Legal Background for Regulation of Commercial Speech*

Despite earlier indications that commercial speech (i.e., proposals or encouragement to enter a commercial transaction) was not constitutionally protected, the Supreme Court held in 1975 that commercial speech was entitled to First Amendment protection.[51] The following year, in *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*,[52] the Court struck down a ban on advertising the prices for prescription drugs as abridging the freedom of speech. The Court developed a framework for analyzing the constitutionality of restrictions on commercial speech in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*[53] In that case, the Court said that for commercial speech to come within the First Amendment, "it at least must concern lawful activity and not be misleading."[54] Where the commercial speech does come within the First Amendment, the Court must determine whether the asserted governmental interest is substantial.[55] If so, the court "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."[56]

The Court struck a deferential stance toward the decision of the legislature to regulate commercial speech in *Posadas de P.R. Associates v. Tourism Co. of P.R.*[57] There the Court upheld a prohibition on a gambling room advertising or offering such gambling facilities to the public of Puerto Rico. Puerto Rico wanted the revenues from operating casinos for tourists but feared the social costs of allowing its own residents to gamble. The Supreme Court said that the reduction of demand for casino gambling by the residents of Puerto Rico was a substantial state interest which was directly advanced by the advertising prohibition and that the legislature of Puerto Rico could determine that a restriction on advertising was more effective in reducing demand than was the "counterspeech" of anti-gambling commercials.[58] The Court suggested that the greater power to completely ban casino gambling necessarily included the lesser power to ban casino advertising:

> It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a

51. Bigelow v. Virginia, 421 U.S. 809 (1975).
52. 425 U.S. 748 (1976).
53. 447 U.S. 557 (1980).
54. *Id.* at 566.
55. *Id.*
56. *Id.*
57. 478 U.S. 328 (1986).
58. *Id.* at 344.

> product or activity, but deny to the legislature the authority to forbid the stimulation of demand . . . through advertising on behalf of those who would profit from such increased demand.[59]

Rhode Island reasoned that this case supported its ban on advertising liquor prices.

C. *The Decision of the United States Supreme Court*

Rhode Island statutes prohibiting the advertisement of liquor prices,[60] and the State's implementing regulations, were challenged in a lawsuit brought by People's Super Liquor Stores, Inc., a Massachusetts liquor retailer which sold to Rhode Island customers, and 44 Liquor Mart, Inc., a Rhode Island liquor store.[61] The District Court judge found as a fact that "Rhode Island's off-premises liquor price advertising ban has no significant impact on levels of alcohol consumption in Rhode Island."[62] He concluded that the ban was unconstitutional because the State did not meet its burden of demonstrating a reasonable fit between its policy objectives and its chosen means.[63] The United States Court of Appeals reversed the District Court on the grounds that the State could reasonably determine that competitive price advertising would lower prices and result in more sales.[64] In *44 Liquormart, Inc. v. Rhode Island*,[65] the Supreme Court reversed the Court of Appeals decision and unanimously invalidated the Rhode Island statutes. The decision was not surprising because the ban reeked of liquor store lobbying to secure noncompetitive profit levels rather than concern for the social interest in limiting alcohol sales. But the justices went further by effectively repudiating *Posadas*. Yet within this unanimous holding, the opinions were fractured.

In holding the statute unconstitutional, Justice John Paul Stevens said, "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."[66] Acknowledging the propriety of protecting consumers from deceptive or misleading commercial speech, Justice Stevens nevertheless observed that "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the

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59. *Id.* at 346.
60. R.I. GEN. LAWS §§ 3-8-7, 3-8-8.1 (1987).
61. 44 Liquor Mart, Inc. v. Racine, 829 F. Supp. 543 (D.R.I. 1993).
62. *Id.* at 549.
63. *Id.* at 555.
64. 44 Liquormart, Inc. v. Rhode Island, 39 F.3d 5, 7 (1st Cir. 1994).
65. 116 S. Ct. 1495 (1996).
66. *Id.* at 1508 (Stevens, J., joined by Kennedy & Ginsburg, JJ.).

preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands."[67] He said that the State failed to meet its burden to show that the regulation would advance its interest in promoting temperance by significantly reducing alcohol consumption.[68] Citing alternatives such as higher taxes and direct regulation of sales as well as educational campaigns, he added that the State could not satisfy the requirement that the restriction on speech be no more extensive than necessary.[69] Stevens concluded that the State failed to establish a "reasonable fit" between its abridgment of speech and its temperance goal "even under the less than strict standard that generally applies in commercial speech cases."[70] He then referred to "the more stringent constitutional review that *Central Hudson* itself concluded was appropriate for the complete suppression of truthful, nonmisleading commercial speech."[71]

Justice Sandra Day O'Connor wrote a separate concurrence in which she was joined by Chief Justice William Rehnquist and Justices David Souter and Steven Breyer. She insisted that the Court should apply the *Central Hudson* test, implying that the reference in Justice Stevens' opinion to "the more rigorous review that the First Amendment generally demands" was inappropriate.[72] She argued that the Rhode Island law failed the fourth prong—"that is, its ban is more extensive than necessary to serve the State's interest."[73] Justice O'Connor said this element of the *Central Hudson* test required that the law be proportionate: "There must be a fit between the legislature's goal and method, 'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.'"[74]

Justice O'Connor's opinion elaborated on the proportionality test used for commercial speech. The fit between means and end must be narrowly tailored, and the state must reasonably target the scope of the restriction on speech to address the harm the state intends to regulate. In its regulation, the state must carefully calculate the costs and benefits associated with the burden on speech imposed by its prohibition. Less burdensome alternatives to reach the stated goal indicate that the fit between means and ends may be

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67. *Id.* at 1507 (Stevens, J., joined by Kennedy & Ginsburg, JJ.).

68. *Id.* at 1509 (Stevens, J., joined by Kennedy & Ginsburg, JJ.).

69. *Id.* at 1510 (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.).

70. *Id.* (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.).

71. *Id.* (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.).

72. *Id.* at 1521-23 (O'Connor, J., joined by Rehnquist, C.J., Souter & Breyer, JJ., concurring).

73. *Id.* at 1521 (O'Connor, J., joined by Rehnquist, C.J., Souter & Breyer, JJ., concurring).

74. *Id.* (O'Connor, J., joined by Rehnquist, C.J., Souter & Breyer, JJ., concurring) (quoting Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)).

too imprecise. On the other hand, if alternative channels permit communication of the restrictive speech, the regulation is more likely to be considered reasonable.[75]

Justice O'Connor saw no reasonable fit between Rhode Island's goal of reduced consumption and the method of banning price advertising. The Rhode Island law totally barred communication of price information outside the store. If Rhode Island wanted to discourage consumption by higher prices, higher taxes or minimum prices would more directly accomplish this goal without burdening speech.[76]

Rhode Island relied on the deference to legislative decisions that the Court had shown in *Posadas*, but both Stevens' and O'Connor's opinions repudiated that deference. Justice Stevens, joined by Justices Anthony Kennedy, Clarence Thomas, and Ruth Bader Ginsburg, concluded that *Posadas* was wrong:

> The casino advertising ban was designed to keep truthful, nonmisleading speech from members of the public for fear that they would be more likely to gamble if they received it. As a result, the advertising ban served to shield the State's antigambling policy from the public scrutiny that more direct, nonspeech regulation would draw. . . .
>
> . . . *Posadas* clearly erred in concluding that it was "up to the legislature" to choose suppression over a less speech-restrictive policy. . . .
>
> . . . .
>
> Instead, . . . we conclude that a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate.[77]

The Court denied that government could ban commercial speech simply because government could prohibit the underlying conduct. Where the conduct is lawful, truthful, and nonmisleading, speech encouraging that conduct is protected by the First Amendment.

Justice O'Connor, joined by Chief Justice Rehnquist and Justices Souter and Breyer, also repudiated the degree of deference in *Posadas*. She said that the Court had subsequently engaged in more searching examination of the fit between means and end: "The closer look that we have required since *Posadas* comports better with the purpose of the analysis set out in

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75. *Id.* (O'Connor, J., joined by Rehnquist, C.J., Souter & Breyer, JJ., concurring).
76. *Id.* at 1521-22.
77. *Id.* at 1511 (Stevens, J., joined by Kennedy, Thomas & Ginsburg, JJ.).

Central Hudson, by requiring the State to show that the speech restriction directly advances its interest and is narrowly tailored."[78]

Justice Thomas wrote a separate concurring opinion in which he said that the government has no legitimate interest in keeping "users of a product or service ignorant in order to manipulate their choices in the marketplace."[79] He objected to Stevens' opinion on the grounds that the advancement of state interest test suggested that the restriction would have been upheld if the State had been more successful in keeping consumers ignorant and thus more effective in manipulating their decisions.[80] But Thomas said that the majority of the justices would effectively reach his position as a result of the way in which both the Stevens and the O'Connor opinions applied the fourth element of the *Central Hudson* test—whether the restriction of speech is more extensive than necessary to serve the government interest:

> The opinions would appear to commit the courts to striking down restrictions on speech whenever a direct regulation (i.e., a regulation involving no restriction on speech regarding lawful activity at all) would be an equally effective method of dampening demand by legal users. But it would seem that directly banning a product (or rationing it, taxing it, controlling its price, or otherwise restricting its sale in specific ways) would virtually always be at least as effective in discouraging consumption as merely restricting advertising regarding the product would be, and thus virtually all restrictions with such a purpose would fail the fourth prong of the *Central Hudson* test.[81]

The justices seem to have wilfully blinded themselves to the economic impact of the alternatives they suggested. Either higher taxes or minimum prices could seriously impair the economic viability of Rhode Island liquor stores. Residents could easily cross the state lines of the nation's tiniest State and buy cheaper booze in Massachusetts at stores like People's. If the state cannot consider the undesirable side effects of alternative measures of reducing consumption, Thomas might be right in suggesting that the effect of this case forbids states from banning truthful nonmisleading speech in an attempt to dampen demand for lawful commercial transactions.

On the other hand, the Rhode Island law left sellers free to advertise liquor as insistently and seductively as possible to stoke demand for the

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78. *Id.* at 1522 (O'Connor, J., joined by Rehnquist, C.J., Souter & Breyer, JJ., concurring).

79. *Id.* at 1515-16 (Thomas, J., concurring).

80. *Id.* at 1518 (Thomas, J., concurring).

81. *Id.* at 1519 (Thomas, J., concurring).

product. Banning price advertisements benefits liquor sellers that charge noncompetitive high prices, and this direct effect suggests that enhancing these sellers' profits was the law's objective. The existence of alternative means to obtain high prices may have been simply makeweights in the justices' calculations which helped them to realize that the objective of the law was private gain, not public health.

III. *Comparing the Cases*

Despite the differences in result, the courts' analyses exhibit substantial similarities. For example, both required a speech restriction to be justified by a narrowly tailored law that serves an important government interest.

The United States Supreme Court, like the Australian High Court, apparently permits speech restriction as a way to diminish the incidence of a lawful activity encouraged by that speech. The Court in *Liquormart* did not deny the legitimacy of restricting speech to discourage certain lawful activities, despite the Court's substantial skepticism about whether the restriction was necessary. Justice Thomas concurred separately to disavow the other justices' acceptance of *Central Hudson*'s proposition that reducing consumption could be an important interest that would justify speech restrictions. The state's interest, however, must be in reducing consumption and not in affecting views on whether consumption should be reduced.

Australian courts, like those of the United States, judge the validity of the statute in light of the availability of alternatives to achieve the state interest without affecting speech. The United States Supreme Court struck down the Rhode Island law because the justices found that the State could have pursued its legitimate interests with other alternatives. The prohibition of liquor price advertising was an unreasonable means of reducing overconsumption of alcohol because the State could have regulated prices or consumption directly. But *Langer* involved a policy that the state could not implement by direct regulation without violating a fundamental premise of the political system. The justices in *Langer* were careful to determine that the restriction was "not imposed with a view toward repressing freedom of political discussion,"[82] that the primary objective was to obtain observance of the voting system,[83] and that the law was "reasonably capable of being viewed as appropriate and adapted"[84] to that purpose. These comments suggest that the Australian Court might have viewed the case differently if there had existed viable alternatives with which to save the validity of ballots filled out negligently while maintaining a full preferential balloting system.

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82. Langer v. Commonwealth, 134 A.L.R. 400, 406 (1996) (Brennan, C.J.).
83. *Id.* at 432 (Gummow, J.).
84. *Id.* at 419 (Toohey & Gaudron, JJ.).

The two cases differ on the deference to be shown the legislature. The renunciation of *Posadas* demonstrated that the United States Supreme Court would reach its own decision with respect to whether the law was appropriate to accomplish a legitimate end. The Australian judges asked whether the law was "reasonably capable of being viewed as appropriate and adapted to the enhancement of the democratic process,"[85] deferring to the legislative judgment that it was so appropriate and adapted.

But the different standard may be less significant than it appears. Given the remoteness of the relationship between high prices and temperance, a court could determine that the Rhode Island law was not even reasonably capable of being viewed as appropriate and adapted to the problem of overconsumption of alcohol. Similarly, even a court applying a strict standard might conclude that the Australian law was necessary to accomplish its objective, since direct regulation would violate the secret ballot.

The core difference between these cases is their view of the legitimate interests for government. The philosophical gap over the nature of citizenship is as broad as the Nullarbor Plain and as deep as the Grand Canyon. The United States begins with the individual while Australia starts with the community. Of course, U.S. citizens have duties toward their government (jury service, tax payment, military service, etc.), and Australians have individual rights (common law, statutory, and constitutional).[86] Nevertheless, the initial premises for government differ in each nation.

The U.S. Constitution bristles with individual rights that reflect a deep suspicion of abusive government power.[87] Voting is one of those rights—protected against government interference by various Constitutional provisions.[88] But politics is only one area for individual choice. Freedom

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85. *Id.* (Toohey & Gaudron, JJ.).

86. *E.g.*, AUSTL. CONST. §§ 41 (right to vote in Commonwealth election of persons having right to vote in state elections), 100 (right of state residents to reasonable use of the waters of rivers for conservation or irrigation), 117 (right of residents in states not to be discriminated against in other states by reason of residence). Several other specific prohibitions appear to confer individual rights. *E.g.*, §§ 80 (trial by jury), 92 (trade and commerce to be free), and 116 (free exercise of religion).

87. The word "right," referring to individual rights, is found throughout the document. *E.g.*, U.S. CONST. amends. I, II, IV, VI, VII, IX, XV, XIX, XXIV, and XXVI. In addition, numerous specific limitations on government power effectively confer individual rights. *E.g.*, *id.* art. I, §§ 9, 10; *id.* art. IV, § 2; *id.* amends. I, III, V, VIII, XIII, and XIV).

88. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude[,]" U.S. CONST. amend. XV, or "on account of sex[,]" *id.* amend. XIX, or "by reason of failure to pay any poll tax or other tax[,]" *id.* amend. XXIV; and "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age . . . ." *Id.* amend.

of speech is important to individual choice in all realms of life—in the market and in social relationships as well as in the political realm. *44 Liquormart* illustrates the broad scope for freedom of speech under the First Amendment's guarantee. And choice includes refusal to partake. The nation's history demonstrates that the government can operate without compelling individuals to participate in the political process, and thus compulsory voting could never be an appropriate justification for restrictions on speech in the United States.

In Australia, self-government is not an opportunity but an obligation of the citizen. There is freedom to discuss all political ideas, but every citizen has an obligation to vote. A government produced by the vote of only a fraction of the electorate cannot legitimately be the government of all. On the other hand, if every individual participates in the creation of the community, the community can be trusted to protect the rights of the individual.[89] *Langer* demonstrates the differences between the two nations' views of the citizen in the political process. The Australian High Court protects choice only as an incident of representative government, so obtaining a fully representative government has to be the highest value. Protecting a voting system so fundamental to the nation's political theory is a compelling justification for government action.

The American identity was forged in a revolution against the existing government. Internal frictions in the United States led to the suppression of antislavery speech in the South and brought about a civil war. Fears of communism led to a variety of speech-repressive measures after both World Wars that subsequently were repudiated to a large extent. Protest movements against racial discrimination and the war in Vietnam ultimately succeeded, but that success itself suggested that government had not acted before in a trustworthy manner. In short, the history and experience of the United States has reinforced a deep suspicion of the government. Politicians find it useful to run against insiders—Presidents Reagan, Carter, and Clinton all succeeded in promoting variations on this theme.

Australia enacted its Constitution through British parliamentary processes. It never broke apart in civil war. The national identity of Australia was forged in the World War I and II battles against other nations rather than in internal revolution. Although Australians differ fiercely over a variety of issues and historically had racially oppressive policies on immigration and aboriginal rights, Australia does not seem to have developed the same degree of fear of government as has the United States. The new

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XXVI.

89. "Responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights." SIR ROBERT MENZIES, CENTRAL POWER IN THE AUSTRALIAN COMMONWEALTH 54 (1967).

free speech protections reflect a recognition of the need to protect freedom within the political process, but those protections exist within a community united by a very different vision of the citizen's place.

In the end, it may be possible for Australians and Americans to discuss the principles of freedom of speech in a democracy, but, at least for now, the two countries begin their discussions from significantly different starting positions. It is hoped that, in calling attention to those differences, this article will contribute to the dialogue.