

PROPOSED GOVERNMENT REGULATION OF TOBACCO ADVERTISING USES TEENS TO DISGUISE FIRST AMENDMENT VIOLATIONS

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The battle lines between Big Brother¹ and Joe Camel² have been drawn³ and a victory by either side is likely to result in a controversy similar to that following the verdict from the O.J. Simpson trial. The outcome of the tobacco advertising war turns on a choice between the lesser of two evils; either the advertising of a potentially harmful product will be permitted or an advertiser's freedom of speech will be restricted. The reviewing courts should rule in favor of preserving the constitutional principle of free speech as guaranteed by the First Amendment.⁴ Even if such a decision appears to defend actions that most Americans oppose, it would, in the long run, provide a greater benefit to the American public.

This Comment evaluates the constitutionality of the recently proposed tobacco advertising restrictions. Part I reviews the course of governmental regulation of tobacco from its introduction in America to present day. Part II examines the evolution of commercial speech jurisprudence. Part III argues that the recently proposed restrictions, which seek to limit tobacco advertising, do not comply with the established standards governing commercial speech. Although a substantial government interest exists, the regulations fall short of furthering this interest because

they are over-inclusive and because less intrusive alternatives are available. This Comment concludes, in Part IV, that the reviewing courts should dismiss the proposed regulations for their failure to satisfy the existing standards for commercial speech analysis.

I. HISTORY OF TOBACCO REGULATION

Government regulation of tobacco is barely a century old. Tobacco itself was introduced to the Western World in 1492 by Christopher Columbus during his first voyage to the New World.⁵ By the middle of the sixteenth century tobacco had become popular in Europe and, while the colonies settled, it became the most desired American crop.⁶

Although the recently proposed regulations are the most comprehensive, the government has been restricting tobacco advertising and methods of sale for over a century.⁷ As early as 1890, when cigarettes began increasing in popularity among the American public, twenty-six states passed regulations banning sales to minors.⁸ By 1909, with an anti-smoking lobby growing in strength, over a dozen states completely banned the manufacture, sale, and possession of cigarettes.⁹

¹ In the novel, Big Brother is an omnipotent and authoritarian governmental entity which monitors all the behavior of its citizens. GEORGE ORWELL, 1984 (1949).

² Joe Camel is the star of a cigarette advertising campaign which features "a cartoon character who at times [gives] out dating and social advice." *Kids Mustn't Smoke; Clinton's Right To Regulate Nicotine As a Drug, Although His Limits On Ads Go Too Far*, NEWSDAY, Aug. 14, 1995, at A18 [hereinafter *Kids Mustn't Smoke*].

³ President William T. Clinton, Press Conference in the East Room of White House (Aug. 10, 1995) [hereinafter *Clinton Transcript*] (on file with COMMLAW CONSPECTUS). On August 10, 1995, President Clinton announced by Executive Authority, that he was instructing the Food and Drug Administration to "initiate a broad series of steps all designed to stop sales and marketing of cigarettes and smokeless tobacco to children." *Id.*

⁴ U.S. CONST. amend. I.

⁵ Kenneth L. Polin, *Argument For The Ban of Tobacco Advertising: A First Amendment Analysis*, 17 HOFSTRA L. REV. 99, 100 n.11 (1988) (citing J. BROOKS, *THE MIGHTY LEAF: TOBACCO THROUGH THE CENTURIES* 11-12 (1952)).

⁶ *Id.*

⁷ *Clinton Proposes Youth Antismoking Plan*; FACTS ON FILE WORLD NEWS DIGEST, Aug. 17, 1995, at 594. [hereinafter *FACTS ON FILE*].

⁸ Jacob Sullum, *The War On Tobacco; Smoking Regulations Go Way Too Far*, SAN DIEGO UNION-TRIBUNE, Aug. 20, 1995, at G1. Then, much as now, these regulations were half-hearted enforced and children continued to buy cigarettes even in jurisdictions which prohibited sales to minors. *Id.*

⁹ *Id.*

Federal regulation of tobacco advertising officially began in 1964 with the Surgeon General's report on the health hazards of smoking,¹⁰ which motivated Congress to pass the Federal Cigarette Labeling and Advertising Act in 1965.¹¹ In 1970, Congress continued to regulate the tobacco industry by enacting the Public Health Cigarette Smoking Act of 1969, which took away the ability of tobacco producers to advertise on television and radio.¹²

Analysts and experts argued that the ban on television advertising actually increased the sale of cigarettes because it allowed the tobacco industry to stop making the previously required anti-smoking ads.¹³ Subsequently, additional regulations were imposed following further investigation of the consequences of smoking on health.¹⁴ Federal legislation in 1984 instituted requirements for stronger warning labels on all methods of cigarette advertising.¹⁵ These warnings were extended to smokeless tobacco products and print advertisements in the Comprehensive Smokeless Tobacco Health Education Act of 1986.¹⁶

Despite these legislative measures, the use of tobacco products by teenagers increased, while use by adults decreased.¹⁷ Although research data shows that teenage smoking actually declined by about one percent per annum during the 1980's, teenage smoking rose dramatically beginning in 1986.¹⁸ Due to

the ban on electronic media, tobacco companies altered their advertising methods and adopted the use of popular sporting events and magazines as attractive promotional media.¹⁹ Although it is currently legal, this method of tobacco advertising has drawn criticism.

With intensified regulation and progressively declining sales of their products, tobacco companies aggressively promote their goods through unrestricted media, particularly sporting events. Skeptics argue that while most adults are able to recognize the apparent contradiction between tobacco use and athletic performance, teenagers are more likely to find a false sense of compatibility between the two activities.²⁰

II. COMMERCIAL SPEECH JURISPRUDENCE

Despite the apparent goals of the First Amendment, its guarantee of free speech has not been afforded unlimited protection from regulation. In *O'Brien v. United States*,²¹ the Supreme Court demonstrated that it was unwilling to accept the "view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."²² The Court stated that a limitation imposed

¹⁰ UNITED STATES DEP'T OF HEALTH, EDUC. & WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL PUBLIC HEALTH SERVICE 28-29 (1964).

¹¹ 15 U.S.C. §§ 1331-1341 (1994). The Act requires all cigarette advertising products to include the warning: "Caution: Cigarette Smoking May Be Hazardous to your Health." *Id.*

¹² 15 U.S.C. § 1335 (1994). The Act prohibits the advertising of "cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." *Id.* The tobacco companies actually supported these regulations at the time because, corporate officials considered the regulations to be a preferable alternative to the anti-smoking commercials required by the FCC. See Polin, *supra* note 5, at 102.

¹³ Jay Nelson, an analyst with Brown Bros., Harriman & Co. in New York explained that "[t]here is a school of thought, that says when the ads were pulled from TV, the cigarette companies actually came out ahead, because they also pulled their anti-smoking ads." Ira Teinowitz & Andrea Sachs, *Clinton Comes Out Smokin' Against Cigs*, ADVERTISING AGE, Aug. 14, 1995, at 1. Cigarette sales volume actually increased in the years following the ban. *Id.*

¹⁴ See 15 U.S.C. § 1333 (1994).

¹⁵ The Federal Cigarette Labeling and Advertising Act was amended to require the following rotation of warnings:

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risk to Your Health.

SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

15 U.S.C. § 1333 (c) (1994).

¹⁶ 15 U.S.C. § 4401 (1986).

¹⁷ Elizabeth Gleick, *Out of Mouths of Babes*, TIME, Aug. 21, 1995, at 33. Among eighth graders, the percentage of those who smoked in the past 30 days increased 30% between 1991 and 1994. *Id.*

¹⁸ David A. Locke, *Counter Speech as an Alternative to Prohibition: Proposed Federal Regulation of Tobacco Promotion in American Motorsport*, 70 IND. L.J. 217, 226 (1994).

¹⁹ *Id.* at 218. Tobacco advertisers have cleverly circumvented the ban on active promotion of their products on television by advertising at widely publicized and watched sporting events such as motor racing. *Id.* The tobacco industry sponsors racing and in exchange is allowed to display its logos on the cars and billboards surrounding the track. *Id.*

²⁰ *Id.* at 220. The racing community overlooks the seemingly contradictory marriage of tobacco and motor sports because the tobacco industry has been a very charitable sponsor. *Id.*

²¹ 391 U.S. 367 (1967).

²² *Id.* at 376.

on First Amendment freedoms by the government may be justified if it is borne out of a "sufficiently important governmental interest."²³ Therefore, assuming that a given conduct constitutes speech, the courts may find that its protection under the First Amendment is limited. However, the government cannot simply restrict speech because it disagrees with its message or content matter.²⁴ The government must meet strict standards if it seeks to restrict a method of expression.²⁵

Commercial speech has been defined as speech which does "no more than propose a commercial transaction."²⁶ Traditionally, commercial speech was considered to be an aspect of a free market economy and was subject to government regulation.²⁷ It did not receive protection under the First Amendment until two decades ago.²⁸ In the early 1970's, the courts began to recognize that an open, competitive, and informative marketplace should be afforded protection under the First Amendment.²⁹ The informational function of commercial speech was first recognized by the Supreme Court in two cases, *Bigelow v. Virginia*³⁰ and *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*.³¹

Although the Court recognized that the First Amendment guarantees the freedom of commercial speech, it refused to extend the same amount of protection that protects political speech. Laws infringing upon political speech, for example, are analyzed by

the courts under the rubric of strict scrutiny.³² The Court in *Widmar v. Vincent*³³ stated that the most exacting scrutiny is applied to cases "in which a State undertakes to regulate speech on the basis of its content."³⁴ The Supreme Court distinguished commercial speech because of its economic content and set a lesser standard of protection than that afforded to non commercial speech.³⁵ Thus, commercial speech is afforded intermediate scrutiny.³⁶ The reasoning stems from the Court's determination that such a standard is consistent with the "subordinate position [of commercial speech] in the scale of First Amendment values."³⁷

Review of commercial speech regulation under the standard of intermediate scrutiny is conducted under the four-prong test developed in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n.*³⁸ Under the scheme, set forth in *Central Hudson* the commercial speech must first concern a lawful activity and must not be misleading.³⁹ Should the commercial speech in question pass this threshold prong, the burden shifts to the government to: (1) assert a substantial interest in support of its regulation; (2) demonstrate that the regulation directly advances the governmental interest asserted; and (3) show that the regulation is narrowly tailored and is "not more extensive than is necessary" to serve the asserted governmental interest.⁴⁰

The basis for affording First Amendment protec-

²³ *Id.*

²⁴ *Texas v. Johnson*, 491 U.S. 397 (1989). Justice Brennan stated: "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 414.

²⁵ See *Consolidated Edison Co. v. Public Serv. Comm'n.*, 447 U.S. 530, 538-39 (1980).

²⁶ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976); see also *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n.*, 447 U.S. 557, 561 (1980)(stating that commercial speech is "related solely to the economic interests of the speaker and its audience").

²⁷ *Consolidated Edison*, 447 U.S. at 561.

²⁸ Historically, courts have imposed restrictions on commercial speech and have not been willing to include it under First Amendment protection. See, e.g., *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955); see also *Valentine v. Chrestenson*, 316 U.S. 52 (1942)(upholding a statute that prohibited the advertising of handbills because it found a lack of constitutional limits on governmental restriction of commercial advertising).

²⁹ See *Virginia State Bd. of Pharmacy*, 425 U.S. 748; see also *Bigelow v. Virginia*, 421 U.S. 809 (1975).

³⁰ 421 U.S. 809 (1975).

³¹ 425 U.S. 748 (1976).

³² *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1313 (4th Cir. 1995)(petition for cert. filed) (citing *Metromedia, Inc.*

v. San Diego, 453 U.S. 490, 505-507 (1981)(plurality opinion).

³³ 454 U.S. 263, 276 (1981). The Court examined restrictions placed by the University of Missouri, Kansas City upon the ability of student religious groups to conduct meetings on campus. It held that the University exclusionary policy was not content-neutral and, therefore, violated the First Amendment. *Id.*

³⁴ See, e.g., *Carey v. Brown*, 447 U.S. 455 (1980).

³⁵ See *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977)(restricting advertising of contraceptives).

³⁶ See *Florida Bar v. Went For It, Inc.*, 115 S.Ct. 2371 (1995). The Court applied the intermediary scrutiny standard when examining the effects of lawyer advertising in light of the state's substantial interest of preserving the integrity of the legal profession. *Id.*

³⁷ *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). Commercial speech, which is afforded protection under the First Amendment, may be subjected to greater governmental regulation than, for example, political expression. See *Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Comm'n.*, 701 F.2d 314, 319 (5th Cir. 1983).

³⁸ 447 U.S. 557 (1980). The key in determining whether protection should be granted stems from the Court's balance of the "expression and of the governmental interests served by its regulation." *Id.* at 563.

³⁹ *Id.*

⁴⁰ *Id.*

tion to commercial speech stems from its informational function.⁴¹ Courts have recognized the value of commercial speakers because they "have extensive knowledge of both the market and their products" and "are well-situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity."⁴² At the same time, the Supreme Court has not hesitated in upholding governmental restrictions on speech which initiate or evidence illegal conduct.⁴³ The courts permitted regulation in such instances as the exchange of information regarding securities,⁴⁴ direct lawyer solicitation,⁴⁵ and the exchange of price and production information.⁴⁶

Generally, the right to engage in commercial speech has been asserted by those seeking to use it to market their products or services.⁴⁷ The recipients of the commercial speech have also asserted their right to benefit from such speech.⁴⁸ The Supreme Court extended this right to those who relay commercial

speech from a speaker for a fee (i.e., advertisers).⁴⁹

The Food and Drug Administration's ("FDA" or "Administration") recently proposed ban on tobacco advertising⁵⁰ raises significant constitutional concerns regarding the protection of commercial speech under the First Amendment. The government attempts to justify these restrictions by declaring nicotine an addictive drug that warrants regulation.⁵¹ The FDA's ammunition for the ban stems from indications that the tobacco companies deliberately focused their advertising on children and teens.⁵² The Administration claims that the current laws prohibiting sales to minors fail to prevent them from smoking.⁵³ It argues that a ban on the marketing of tobacco products would eliminate the temptation for many teens to smoke.⁵⁴

The tobacco industry quickly attacked the proposed advertising restrictions because it has a very high financial stake at risk. Tobacco remains one of

⁴¹ See, e.g., *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d at 1312-13 (4th Cir. 1995).

⁴² *Bates v. State Bar*, 433 U.S. 350, 381, (1977).

⁴³ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1984). "It has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.*

⁴⁴ See, e.g., *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968).

⁴⁵ See, e.g., *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

⁴⁶ See, e.g., *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921).

⁴⁷ See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). See also *Friedman v. Rogers*, 440 U.S. 1 (1979); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

⁴⁸ See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976); see also *United States Postal Serv. v. Athena Products, Ltd.*, 654 F.2d 362 (5th Cir. 1981).

⁴⁹ See *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981)(plurality opinion) (upholding the right to disseminate commercial speech to outdoor advertisers who challenged a billboard ban).

⁵⁰ The proposed FDA regulations supported by the President are to allow tobacco sales only to people aged over 18 and older, requiring vendors to verify proof of age by checking identification (all states already had similar laws);

Prohibit cigarette sales from vending machines and by mail order, allowing only 'face-to-face' sales;

Prohibit free tobacco samples and ban the sale of individual cigarettes or packs of fewer than 20;

Ban brand-name tobacco advertising at sporting events and on products not related to tobacco use, such as clothing, instead allowing only company names;

Ban outdoor tobacco advertising within 1,000 yards (900m) of schools and playgrounds, permitting only black

and white text in other outdoor and in-store tobacco ads; Limit tobacco advertising in publications with a significant amount of young readers to black and white text only; and

Require tobacco industry to institute an annual \$150 million advertising campaign to prevent youth smoking.

FACTS ON FILE, *supra* note 7, at 595. The regulations also require tobacco producers to submit sample labels and advertising to the FDA for inspection. Debra Gersh Hernandez, *Restrictions On Cigarette Advertising*, EDITOR & PUBLISHER, Aug. 19, 1995, at 12.

⁵¹ Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed. Reg. 41346 (1995) (to be codified at 21 C.F.R. pts. 801, 803, 804 and 897). The FDA claimed that smokeless tobacco and cigarettes fall under the jurisdiction of the Federal Food, Drug and Cosmetic Act because the nicotine they deliver is "intended to affect the structure or function of the body and it achieves its intended effects through chemical action within the human body." *Id.* One commentator strongly disapproved of the FDA's announcement, remarking that declaring the cigarette as a "nicotine-delivery-device" was analogous to "saying that Scotch is an 'ethanol-delivery-device' or that coffee is a 'caffeine-delivery-device. Such simplistic pseudoscientific terminology reduces smoking to a pharmacological compulsion." Sullum, *supra* note 8, at G1.

⁵² See *Kids Mustn't Smoke*, *supra* note 2, at A18. It has been estimated that children illegally purchase approximately 250 million packs of cigarettes a year which accounts for \$962 million in revenue. Jennifer Bojorquez, *Why Do Kids Smoke?*, SACRAMENTO BEE, Aug. 25, 1995, at SC1.

⁵³ Currently all 50 states have laws prohibiting the sales of cigarettes to persons under 18 years old. Sullum, *supra* note 8, at G1.

⁵⁴ Joseph Perkins, *Kids Are Just a Smoke Screen*, ATLANTA J. & CONSTITUTION, Aug. 23, 1995, at A11. Health and Human Services Secretary Donna Shalala has claimed that children are pressured into smoking by the images which portray the activity as being "cool." *Id.*

the largest crops in the United States.⁶⁵ It is estimated that if the ban goes into effect, tobacco companies risk losing "\$256 million the first year and \$1.2 billion over 10 years."⁶⁶

Opponents of the proposed FDA advertising ban claim that the Administration lacks the appropriate jurisdiction because only Congress has the power to regulate tobacco.⁶⁷ Nevertheless, the chief objection raised by critics of the proposed restrictions is the alleged First Amendment violation. A coalition of tobacco companies, publishers, and advertisers argue that a ban on tobacco advertising would violate their right of free speech protected by the First Amendment.⁶⁸ Although the dispute over the extent of protection granted to advertising under the First Amendment is not a new one, it is likely that the Supreme Court will be the final arbiter in what is almost certain to be a painstaking legal battle.

III. CONSTITUTIONALITY OF THE PROPOSED ADVERTISING REGULATIONS

Tobacco companies challenged the FDA's jurisdiction in proposing restrictions on tobacco advertising, asserting that only Congress has the power to regulate tobacco.⁶⁹ But governmental censorship of traditionally protected commercial speech for the purpose of controlling lawful behavior that the government determines to be harmful remains the key issue. If promulgated, such regulatory measures might start society down a slippery slope of governmental parenting through the use of speech controls. In or-

der to successfully impose the ban on tobacco advertising, the government must satisfy the four part *Central Hudson* standard for evaluating commercial speech protection under the First Amendment.

A. The Commercial Speech in Question Must Concern a Lawful Activity and Must Not be Misleading

The commercial speech in question must concern a lawful activity⁶⁰ and must not be misleading.⁶¹ Tobacco advertising has been limited to certain media such as magazines, newspapers, billboards, and sponsorship labels at sporting events. The government ignored these methods of promotion after it imposed regulations in the 1970's eliminating tobacco advertising from electronic media. In the form in which it exists today, tobacco advertising is a lawful activity.⁶²

In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*,⁶³ the Court struck down a ban that restricted the advertising of prescription drug prices in newspapers on the basis that the sale of prescription drugs was an "entirely lawful activity."⁶⁴ However, supporters of the proposed ban argue that the tobacco advertising in its present state is misleading because it portrays an inaccurate, glorified image of smoking to the nation's young people.⁶⁵ They claim that such advertising is illusory because it attempts to make a harmful product appear desirable.⁶⁶ Furthermore, they assert that unlike the ordinary embellishment often associated with product

⁶⁵ See Glenn Collins, *Judge Who Ruled Pro-Tobacco Named to Hear Companies' Suit*, N.Y. TIMES, Aug. 15, 1995, at D1. Tobacco has been called a "Southern institution." *Id.*

⁶⁶ Sean Cronin, *Clinton Wants To Save Youth From Cigarettes*, IRISH TIMES, Aug. 26, 1995, at 11.

⁶⁷ *President's Anti-Smoking Initiative Faces Formidable Challenges*, BALTIMORE SUN, Aug. 11, 1995, at 14A.

⁶⁸ *Cigarette Manufacturers Sue FDA, Saying Agency Cannot Regulate Tobacco*, BNA HEALTH CARE DAILY, Aug. 14, 1995. Tobacco companies including Phillip Morris Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Co., Liggett Group Inc., and Lorillard Tobacco Co. all filed suit claiming that only Congress, not the FDA, has jurisdiction to propose tobacco advertising regulations. *Id.* The advertising company Coyne-Beahm Inc. has focused its argument on the First Amendment ramifications resulting from the proposed restrictions. *Id.*

⁶⁹ *Id.* The tobacco producers point to 80 years of legal precedent indicating that only Congress has the jurisdiction to regulate tobacco. *Id.* They add, that on 20 different occasions, Congress considered and rejected legislation which would give the FDA control over tobacco regulation. *Id.*

⁶⁰ Advertising and promotion of an illegal activity is not af-

forded First Amendment protection. See, e.g., *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973) (prohibiting a newspaper from publishing advertisements promoting illegal products or services).

⁶¹ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980). Restrictions on false and misleading commercial speech are permissible. See *Friedman v. Rogers*, 440 U.S. 1, 9 (1979).

⁶² The actual sale of tobacco products is a separate issue. Just as it is illegal to sell alcohol to teenagers, the same applies to tobacco products. Eighteen years old is the legal age to purchase cigarettes. Perkins, *supra* note 54, at A11.

⁶³ 425 U.S. 748 (1976).

⁶⁴ *Id.* at 773.

⁶⁵ See Clinton Transcript, *supra* note 3. In his address authorizing the ban, President Clinton stated that "[w]hen Joe Camel tells young children that smoking is cool, when billboards tell teens that cigarettes will lead to true romance, when Virginia Slims tells adolescents that cigarettes may make them thin and glamorous, then our children need our wisdom, our guidance and our experience." *Id.*

⁶⁶ Polin, *supra* note 5, at 113.

promotion, tobacco advertising actually deceives consumers about the harmful consequences of tobacco use.⁶⁷

In response to this contention proponents of unfettered tobacco advertising point out that a great number of advertised products do not disclose their potentially harmful effects.⁶⁸ Makers of fried foods or those high in sodium are not forced to state in promotions that their products may lead to heart disease and clogged arteries, and that they may cause high blood pressure. As required by law, the producers list only the ingredients and nutritional value of the products and rely on the consumer to make an educated purchase. However, many products intended for adults are attractive to teenagers, who because of their age, may lack the full understanding of the benefits or detriments which stem from using the products. This does not justify an outright ban on such advertising because, consequently, the informative value of the advertisements will be kept from adults.⁶⁹ A comprehensive regulatory ban, such as the one proposed, will institute a de facto ban on outdoor tobacco advertising in many urban areas due to restrictions based on proximity of schools within city limits.⁷⁰

There is little merit in asserting that First Amendment protection should not be accorded commercial speech that advertises a legal but harmful product. In *Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Comm'n*,⁷¹ the Court refused to impose a ban on advertising alcoholic beverages in Mississippi based on the State's assertion that alcohol is a product which is considered "hazardous beyond controversy."⁷² The Court determined that there is no "hazardous exception" to the First Amendment and that such an exception could not exist without "destroying the commercial speech doctrine."⁷³

What next potentially harmful product will incite a purist reaction banning its promotion because young people may misunderstand its effects? Will it be caffeine, or foods heavy in fat or sugar? If the

restrictions are implemented, will the simple appearance of cigarettes in movies or on television thereafter be banned because celebrities smoking may negatively influence children? It is not improbable to suspect that a ban on tobacco advertising will lead to gags on manufacturers of other products that at any given time may be considered politically incorrect. If the public develops a negative sentiment towards certain products, market mechanisms, not the government, should decide whether these products survive.

Tobacco manufacturers are not advocating through their advertisements that their products perform a specific function or achieve a specific result. Instead, at least one commentator concluded that deceptive advertising exists where products claim results, but in reality fail to perform.⁷⁴ Comparison of goods such as medicines,⁷⁵ or tires⁷⁶ to tobacco fails to recognize that tobacco advertising is not based on any specific utility. The utility function of a product can be objectively determined by the public. On the other hand, a claim of a product to be tasty or pleasurable is purely subjective and, thus, it would be difficult, if not impossible, to determine whether such a claim is deceptive.

The First Amendment can be a double edged sword. Advertisements can portray smoking as hip, individualistic, and vigorous. But the same can be done with fast-food. Yet the Federal Trade Commission ("FTC")⁷⁷ is not ready to ban advertisements of cheeseburgers and fries loaded with cholesterol simply because a percentage of the public is "conned" by advertisements using thin models to depict that fast food is healthy. Even if it could be shown that a percentage of teens smoke because of the glamorous image and attractive characters in the ads, that fact does not demonstrate that the reason for cigarette consumption is to make smokers look and feel like the individuals in the commercials.

Unlike the manufacturers of other "unhealthy" products, the tobacco industry has been compelled to dispel any misunderstandings that may involve the health risks related to tobacco use. Recently, Massa-

⁶⁷ *Id.* at 114.

⁶⁸ See Sullum, *supra* note 8, at G1.

⁶⁹ See Hernandez, *supra* note 50 at 12. The proposed regulations directed at children will blanket virtually all tobacco advertising in large cities, which often carry several school districts. Under the regulations, tobacco advertisements would be prohibited within 1,000 feet of a schools and playgrounds. *Id.*

⁷⁰ *Id.*

⁷¹ 701 F.2d 314 (5th Cir. 1983).

⁷² *Id.* at 324.

⁷³ *Id.*

⁷⁴ Polin, *supra* note 5, at 114.

⁷⁵ See Rhodes Pharmaceutical Co. v. FTC, 208 F.2d. 382 (7th Cir. 1953), *modified*, 348 U.S. 940 (1955)(holding that an advertisement was deceptive even if as little as nine percent of the public interpreted its mention of a "cure" for arthritis to mean that the product actually cured the disease).

⁷⁶ See Firestone Tire & Rubber Co. v. FTC, 481 F.2d 246 (6th Cir. 1973).

⁷⁷ FEDERAL TRADE COMMISSION, STAFF REPORT ON THE CIGARETTE ADVERTISING INVESTIGATION 2-2 (1981). The FTC is responsible for detecting deception in advertising. The standard is whether a substantial portion of the public is deceived by the advertising. *Id.*

chusetts introduced a bill that, if adopted, would make it the first state to require tobacco companies to disclose the amounts of "toxic chemicals" in their products.⁷⁸ Warning labels, which the tobacco industry has been required to place on its products since the 1960s, inform the public about potential health risks that may arise from use of tobacco products.⁷⁹ These labels serve to counterbalance the public's misunderstandings about the effects of tobacco use.⁸⁰ The public is very aware of the dangers of smoking.⁸¹ Americans have been conditioned by Surgeon General warnings about the dangers of smoking for three decades.⁸² The existence of clear, black and white warnings on tobacco packaging subdues the argument that the tobacco industry's expensive promotions are able to completely drown out information about the potential health hazards of its products.⁸³

Therefore, the government would likely fail to meet the burden of showing that tobacco advertising is intended to mislead young people. The criteria to be used to determine whether an advertisement is aimed at a seventeen year old, and is thus illegal, or at an eighteen or nineteen year old, and is thus legal, are difficult to identify.⁸⁴ Advocates of the ban point to advertisers' clever use of a cartoon icon, Joe Camel, in the sale of cigarettes to youngsters.⁸⁵ But, the use of cartoons in advertising is not rare, and at times, it targets adults by promoting an activity or business that is specifically adult oriented.⁸⁶ Moreover, many other popular tobacco advertisements include adults engaging in various activities.⁸⁷ How does the woman in Virginia Slims advertisements specifically target adolescents by telling them that cigarettes will make them thin and attractive?⁸⁸ It would take a substantial stretch to make the case that these advertisements also specifically intend to mislead children.

⁷⁸ *Tobacco: Companies Face Setbacks In Two Court Fights*, HEALTH LINE, Sept. 5, 1995. "Specifically, the proposal would require tobacco firms 'to disclose the ratio of nicotine, ingredients and additives-such as arsenic, ammonia and hydrogen cyanide-in their products to the state Department of Health.'" *Id.*

⁷⁹ See Bojorquez, *supra* note 52, at SC1. Warning labels appear on the tobacco products and advertisements but are not displayed on promotional gear. *Id.*

⁸⁰ See *supra* note 15 and accompanying text. The warning labels have been rotated to provide a broader informative base for the public about the effects of tobacco use.

⁸¹ CROSSFIRE, CNN, Aug. 9, 1995 (Transcript #1424) (statement of Sam Kazman, General Counsel, Competitive Enterprise Institute). One commentator noted that "[p]oll after poll shows that the American public ranks smoking among the four most dangerous activities, up there with alcohol, up there with firearms . . . Study after study shows even kids know the risks of

In its present state, tobacco advertising satisfies the legality requirement of *Central Hudson*. Tobacco advertising should remain lawful until clear evidence demonstrates that it specifically targets children and incites them to violate the prohibition on sale of cigarettes to minors. Also, tobacco advertising has not been shown to be clearly deceptive. The existing cautionary measures, such as the requirement of warning labels on packages specifically counter and eliminate any misleading effects of tobacco advertising. Moreover, it appears that the proposed regulations are themselves deceptive. The public should be weary of a paternalistic campaign run under the guise of protecting young people, but which in essence seeks to eliminate a product from the market. Prohibition should not be sought at the expense of speech. If at all necessary, it should be overt.

In light of these considerations, reviewing courts would likely determine that tobacco advertising is entitled to limited First Amendment protection because it satisfies the first requirement of the *Central Hudson* commercial speech test.

B. Can the Government Demonstrate a Substantial Interest in Support of Its Proposed Regulation?

Once it is determined that the commercial speech, which the government seeks to regulate, involves legal products or activities and is not misleading, the state will need to assert a substantial interest as a basis for its restrictions pursuant to the second prong of *Central Hudson*.⁸⁹ According to the recent announcements by the President, the government intends to protect the youths of America from the ill effects of smoking by restricting the advertising of tobacco.⁹⁰ The inherent governmental interest is to

smoking." *Id.*

⁸³ See *supra* note 10.

⁸⁴ *Id.*

⁸⁵ See Sullum, *supra* note 8, at G1.

⁸⁶ See Clinton Transcript, *supra* note 3.

⁸⁷ One commentator gave the example of Snoopy and Peanuts characters which are used by Metropolitan Life, to sell insurance. *This Week With David Brinkley*, ABC NEWS, Aug. 13, 1995 (Transcript #720) [hereinafter *Brinkley*].

⁸⁸ Marlboro ads, for example, often feature adult males working or relaxing in an outdoor ranch setting.

⁸⁹ The President has blamed Virginia Slims for telling "adolescents that cigarettes may make them thin and glamorous." *Brinkley*, *supra* note 86.

⁹⁰ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980).

⁹¹ See Clinton Transcript, *supra*, note 3.

preserve the health and safety of young people.⁹¹ The government asserts that its interest in restricting tobacco advertising furthers the public policy associated with the prohibition of cigarette sales to minors.⁹²

In his announcement of the ban, President Clinton referred to the health risks of smoking and its influence on the young.⁹³ Approximately 3,000 young people begin to smoke each day and 1,000 will die as a result of a smoking related illness.⁹⁴

Because sale of cigarettes to minors is illegal in the United States, the government has an obvious interest in and seeks to restrict tobacco advertising based on the notion that it contributes to these illegal sales.⁹⁵ The government asserts its interest in limiting the exposure of minors to stimuli which encourage them to purchase cigarettes, with the objective of reducing the number of minors buying cigarettes and, thereby, decreasing the number of illegal transactions.⁹⁶ However, by purchasing cigarettes, minors themselves do not expressly violate prohibitive ordinances in most states.⁹⁷ These ordinances focus their restrictions on those who actually sell the cigarettes to young people.⁹⁸ Therefore, if the number of minors who seek to purchase cigarettes decreases, the number of illegal transactions will also decline.⁹⁹

The Supreme Court has generally been lenient in recognizing a substantial governmental interest when applying the second prong of the *Central Hudson* test to proposed advertising bans. For example, in *Posadas de Puerto Rico Assoc. v. Tourism Co. of*

Puerto Rico,¹⁰⁰ the Supreme Court determined that in restricting casino gambling advertisements, the Puerto Rican government had a substantial interest in decreasing the demand for casino gambling by its citizens.¹⁰¹ Also, in *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore*,¹⁰² the United States District Court for the District of Maryland concluded that, by seeking to restrict tobacco advertising on billboards within the city, the City of Baltimore demonstrated a substantial interest in furthering the prohibition of cigarette sales to minors.¹⁰³ Based on these considerations, it is reasonable to assume that the government's asserted interests in restricting tobacco advertising would satisfy the second prong of the *Central Hudson* test.

C. Do the Proposed Restrictions Directly Advance the Governmental Interest?

The third prong of the *Central Hudson* test requires the government to demonstrate a precise connection between its proposed commercial speech restrictions and the interest it seeks to accomplish through their enforcement.¹⁰⁴ In applying this standard to the recently proposed tobacco advertising ban, the reviewing courts need to evaluate the purpose for the regulations. Accordingly, the government would need to demonstrate a *direct* connection between the tobacco advertising and reduction in tobacco consumption by minors.

As with the second *Central Hudson* prong, courts

⁹¹ *Id.* The President announced a "broad executive action to protect the young people of the United States from the awful dangers of tobacco." *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See Hernandez, *supra* note 50, at 12. President Clinton and White House counsel, Abner Mikva both advocated that the tobacco advertisements are targeting children and therefore promote an unlawful activity. In the defense of the First Amendment, the President has said "[i]t cannot be a violation of the freedom of speech in this country to say that you cannot advertise to entice people to do something which they cannot legally do. So I just don't buy the First Amendment argument. It's just not true." *Id.*

⁹⁶ *Id.*

⁹⁷ See, e.g., MD CODE ANN. CRIM. LAW § 404 (1992). The Maryland Code declares that it is unlawful for any person engaged in the manufacture or sale of cigarettes to sell, barter, or give cigarettes to any individual under the age of 18 years. *Id.*

⁹⁸ *Id.*

⁹⁹ *Penn Advertising of Baltimore, Inc., v. Mayor of Baltimore*, 862 F. Supp. 1402, 1406 (D. MD. 1994). The Baltimore City Council asserted that Ordinance 307, which prohibits ciga-

rette advertising on billboards located in certain designated zones within the city of Baltimore, furthered the public policy behind Section 404 and thus prevented the purchase, and consumption of cigarettes by minors. *Id.* The United States District Court found that the "City [had] a substantial interest both in promoting compliance with § 404 and in advancing the public policy which underlies § 404." This interest satisfies the second prong of the *Central Hudson* test. *Id.*

¹⁰⁰ 478 U.S. 328 (1986).

¹⁰¹ *Id.* at 343. The Court limited its deliberations on this issue and declared only that it has "no difficulty in concluding that the Puerto Rico Legislature's interest in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest." *Id.*

¹⁰² 862 F. Supp. 1402 (D. MD. 1994). This was the first ruling of its kind in the country. Marcia Myers & Lyle Denniston, *Court Upholds City Ban On Tobacco, Alcohol Signs*, BALTIMORE SUN, Sept. 1, 1995, at 1A.

¹⁰³ See *Penn Advertising*, 862 F. Supp. at 1406. The City's aim to "prevent the purchase, and thus consumption, of cigarettes by minors" demonstrated "certainly a sufficiently substantial interest for the purposes of the *Central Hudson* test." *Id.*

¹⁰⁴ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

have generally been lenient in their application of the third standard which requires a direct link between the proposed restrictions and the governmental interest.¹⁰⁵ However, in *Edenfield v. Fane*,¹⁰⁶ the Supreme Court appeared to tighten the "intermediate level" of scrutiny which previously had been applied to challenges on the restraints on commercial speech. The Supreme Court stated that the proposed restrictions must alleviate the alleged harms to a material degree.¹⁰⁷ Based upon this statement, the plaintiff advertising company in *Penn Advertising* argued that the *Edenfield* Court introduced a higher burden of proof on the government, which required a "fact-intensive inquiry" and not simply an assertion of legislative judgment.¹⁰⁸ However, the District Court in *Penn Advertising of Baltimore Inc. v. Mayor of Baltimore* was not ready to recognize an increased level of scrutiny for commercial speech analysis and reverted to the traditional intermediary standard.¹⁰⁹ In relying on this hardly persuasive interpretation of *Edenfield*, the FDA would seek to show only that the proposed ban directly advances the government's interest in preserving the health of young people. But, the District Court in *Penn Advertising* appears to have ignored the intent of the *Edenfield* opinion. By increasing the scrutiny for commercial speech in *Edenfield*, the Supreme Court seemed to be setting a

tone solidifying the constitutional protection afforded to commercial speech.

The courts have given deference to the legislative judgment that the purpose of advertising is to increase consumption.¹¹⁰ In response, Tobacco advertisers asserted that the purpose of cigarette advertising is not to increase overall consumption but rather to increase market share by winning over smokers consuming competing brands.¹¹¹ Failing to see the reason why so much energy and expense¹¹² is devoted to promotion of tobacco products solely to increase market share at the expense of competitors, the courts have not been persuaded by this argument.¹¹³ The FTC claims that tobacco advertising is not aimed at brand promotion, as the industry maintains, but rather to increase tobacco consumption.¹¹⁴ In 1989, Surgeon General C. Everett Koop conceded that no study has yet indicated a link between advertising and tobacco consumption.¹¹⁵

Whether or not tobacco advertising intends or actually causes increased consumption, a problem remains in establishing the nexus between advertising and consumption of tobacco products by minors, particularly because minors are prohibited by law from purchasing tobacco products. Assuming arguendo that tobacco advertising seeks to increase sales and consumption by adults, it may be more difficult to

¹⁰⁵ See *Dunagin v. Oxford*, 718 F.2d 738 (5th Cir. 1983)(finding it necessary to examine any scientific evidence as to whether a link existed between alcohol advertising and consumption); see also *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 341 (1986)(accepting without examining evidence, Puerto Rico Legislature's assertion that casino advertising would increase gambling); *Central Hudson*, 447 U.S. at 569 (finding an immediate connection between advertising and demand for electricity). "Central Hudson Gas & Electric would not contest the advertising ban unless it believed that promotion would increase its sales." *Id.*

¹⁰⁶ 113 S. Ct. 1792 (1993) (cautioning that the governmental burden is not met by mere speculation but rather that the declared harms must be real and the imposed restrictions must alleviate them to a material degree).

¹⁰⁷ *Penn Advertising*, 862 F. Supp. 1402, 1406 (D. MD. 1994) (citing *Edenfield*, 113 S. Ct. at 1800).

¹⁰⁸ *Id.* at 1407-08. Penn argued that *Edenfield* increased the level of scrutiny for commercial speech restrictions and that it is "inappropriate for the Courts to defer to a legislative judgment that advertising increases consumption" of alcohol. *Id.*

¹⁰⁹ *Id.* at 1408-09 (stating that it was unable to find language specifying in *Edenfield* the precise level of scrutiny with which this Court must review the Ordinance). The government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* The Court allowed room for legislative judgments and found that the link cited by the government in the case at hand was "more immediately apparent." *Id.*

¹¹⁰ See *Anheuser-Busch v. Mayor of Baltimore City*, 855 F. Supp. 811, 818, *aff'd*, 63 F. 3d 1305 (4th Cir. 1995); see also *Penn Advertising*, 862 F. Supp. 1402, 1410 (D. MD. 1994).

¹¹¹ *Penn Advertising*, 862 F. Supp. at 1409.

¹¹² The tobacco industry spends approximately \$6.2 billion on marketing and advertising. David G. Savage, *Tobacco Ad Curbs Face Uphill Fight, Experts Say*, L.A. TIMES, Aug. 14, 1995, at A4.

¹¹³ See *Penn Advertising*, 862 F. Supp. at 1410. "It is total sales, profits, that pay the advertiser; and dollars go into advertising only if they produce sales. Money talks: it talks to the young and the old about what counts in the marketplace of our society." *Id.* (quoting *Dunagin v. Oxford*, 718 F.2d 738, 749 (5th Cir. 1983)).

¹¹⁴ Clara Sue Ross, *Pushing Puffin Post-Posadas*, 56 U. CIN. L. REV. 1461, 1478 (1988).

¹¹⁵ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS; A REPORT OF THE SURGEON GENERAL* 516-17 (1989):

There is no scientifically rigorous study available to the public that provides a definitive answer to the basic question of whether advertising and promotion increase the level of tobacco consumption. Given the complexity of the issue, none is likely to be forthcoming in the foreseeable future. . . . [The analysis cited by the Surgeon General] also concluded that the extent of influence of advertising and promotion on the level of consumption is unknown and possibly unknowable.

Id.

demonstrate that the same advertising also targets minors. In light of the existing prohibition of tobacco sales to minors, a link between tobacco advertising and consumption by young people is presumably less apparent. If tobacco advertising is generally considered a lawful activity, how can it seek to advance consumption by minors, a clearly unlawful transaction? Although young people may easily be able to recall cigarette ads, this correlation does not necessarily indicate that minors are likely to smoke because of the advertising.

Arguably, advertising is more likely to affect those who can relate to it because of the products being promoted. Consequently, cigarette advertisements may have a stronger impact on those teens who already smoke. Although recently gathered data indicates that a link to consumption by minors may exist, it is uncertain.¹¹⁶ The number of teens who smoke has increased in recent years,¹¹⁷ but teenagers still account for just \$1.26 billion of total sales or only 2.7 percent.¹¹⁸ Moreover, research has shown that when it comes to smoking, teenagers are more influenced by their peers, their perceptions of relevant risks and benefits, and the presence of smokers in the home, rather than by advertising.¹¹⁹

Considering the judicially-recognized proposition that tobacco advertising increases consumption and the lack of substantial empirical evidence to prove it, the direct advancement of the government's interest in restricting tobacco advertising to protect the health of minors can only be surmised at best. Therefore, the third prong of the *Central Hudson* test would not be fulfilled.

D. Are the Proposed Restrictions on Tobacco Advertising Narrowly Tailored to Meet the Government's Interest?

The fourth and final prong of the *Central Hudson* analysis requires that the proposed governmental restrictions be narrowly tailored and serve as the least restrictive means of accomplishing the government's interest.¹²⁰ In *Central Hudson*, Justice Brennan expressed his concern "whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to 'dampen' demand for or use of the product."¹²¹ First Amendment protection of commercial speech serves as an "alternative" to paternalistic government regulations because it allows people to make a free choice about a product based on the information provided to them.¹²² It is because of the informational value offered by advertising that regulations seeking to limit it must be narrowly drawn.

Recently, the Supreme Court has appeared to relax the fourth prong of the *Central Hudson* test by requiring only a reasonable link between the government's restrictions on commercial speech and the interest involved.¹²³ The Court explained that the means used by the government need not be the least restrictive but must be narrowly tailored.¹²⁴ Advertising restrictions, which establish a *de facto* ban on advertising of tobacco altogether, can reasonably be found to constitute a sweeping measure that is too broad to pass this test. The significance of the government's inherent encroachment may be further exacerbated when considering that, having chosen to legalize the sale of tobacco, it now seeks to reduce demand for this product by censoring commercial speech. It should be noted that in order to avoid the First Amendment challenge, the government may seek the most drastic measure in its arsenal, which is a complete prohibition on the sale of tobacco. The

¹¹⁶ *Kids Mustn't Smoke*, *supra* note 2, at A18. Ever since the "Joe Camel" advertising campaign came into effect, the "share of teens who smoke Camels jumped from 3 to 13 percent; the proportion of adults choosing Camels stayed stable." *Id.* The percentage of eight graders who have smoked in the past 30 days increased 30 percent between 1991 and 1994. See Gleick, *supra* note 17, at 33. It has been estimated that of all adult smokers, 90 percent started smoking before the age of 20. *Id.*

¹¹⁷ Tony Jackson, *Too Soon To Stub Out Big Tobacco: Clinton's Campaign Is Unlikely To Lead To a Sharp Decline In Smoking In the U.S.*, FIN. TIMES, Aug. 12, 1995, at 9. Last year, consumption of cigarettes in the U.S. at 485bn units, was 21 percent lower than the peak in 1977. This was the first time in 10 years that it has remained consistent with the previous year. Since 1990, the proportion of the U.S. population smoking has been consistently around 25 percent. *Id.*

¹¹⁸ Robert T. Garret, *Tobacco Plan a Free-Speech Issue? Don't Kid Yourself*, COURIER-JOURNAL, Aug. 13, 1995, at 1D.

¹¹⁹ See Sullum, *supra* note 8, at G1.

¹²⁰ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 570 (1980).

¹²¹ 447 U.S. at 574 (Blackmun, J., concurring).

¹²² *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976).

¹²³ *Board of Trustees of State Univ. v. Fox*, 492 U.S. 469 (1989).

¹²⁴ *Id.* at 480. The Court explained that the required link is "not necessarily perfect, but reasonable; [it] represents not necessarily the single best disposition but one whose scope is in 'proportion to the interest served'; [one] that employs not necessarily the least restrictive means but, . . . a means narrowly tailored to achieve the desired objective." *Id.*

greater power to completely ban tobacco sales necessarily includes the lesser power to ban tobacco advertising.¹²⁵ Although outright prohibition on the sale of tobacco would not specifically implicate the First Amendment, it would, nonetheless, provide only a "Pyrrhic victory" for tobacco advertisers considering they would be out of business.¹²⁶

In choosing to evaluate potentially less restrictive alternatives, as per the fourth prong of the *Central Hudson* test, the courts preserve the integrity of First Amendment commercial speech protection. Strict application of this standard to the proposed tobacco advertising restrictions demonstrates that they are not the least restrictive means of accomplishing the government's interest. The reviewing courts should carefully evaluate less restrictive options.

As it now stands, the proposed ban is over inclusive in its coverage, because in attempting to keep cigarettes away from minors, it also severely infringes on the freedoms of adults to smoke. The ban on cigarette vending machines¹²⁷ exemplifies governmental overkill.¹²⁸ Although sales through vending machines do not directly implicate the First Amendment, the ban is slipped under the general blanket theme of tobacco advertising limitations. Children may be able to easily buy cigarettes from vending machines, which are often unattended, but they would not be able to obtain them from places which prevent underage access (e.g., bars, nightclubs).¹²⁹

The same argument applies to the proposed magazine advertising restrictions. Tobacco advertising in magazines is already low and has fallen drastically during the last decade.¹³⁰ By restricting tobacco advertising in publications that have a fifteen percent or more youth readership, the government is effectively restricting the up to eighty-five percent adult readers of those magazines from receiving the

information.¹³¹

The proposed restrictions also prohibit tobacco advertising within 1,000 feet of any school.¹³² This provision appears to be more reasonable because its application, in many instances, is not overly restrictive. In *Penn Advertising*,¹³³ the U.S. District Court determined that Baltimore's restrictions on billboard advertising were directly related to the City's interest in the health of minors.¹³⁴ A distinction should be recognized between the *Penn Advertising*¹³⁵ ruling and the issues raised by the proposed FDA restrictions. Baltimore sought only to ban outdoor billboard advertising in certain areas of the city.¹³⁶ Its restrictions did not affect any other types of tobacco advertising, and as a result, they were not overly restrictive.¹³⁷ The Baltimore ban still allowed for tobacco advertisements in other areas of the city. Contrarily the FDA's proposed restrictions sweep more broadly by infringing on other means and methods of advertising tobacco instead of limiting the restriction to just billboards.

Potential problems also exist with the "1,000 feet" billboard restriction when it is to be applied within city limits. Many urban areas contain schools, which are located near each other, and as a result, it would be difficult, if not impossible, for advertisers to find zoned areas where they could legally display their ads.

President Clinton stated that "[a]dults make their own decisions about whether or not to smoke".¹³⁸ However, can they if so much of the informational value they receive from advertising may be effectively wiped out? Under the guise of protecting teenagers, the government seems to be making this decision for them.

A ban on promotional brand name tobacco advertising carries some validity. Although, because pro-

¹²⁵ See *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 345 (1986). The Court applied this analysis to the wholesale prohibition of casino gambling in Puerto Rico. *Id.*

¹²⁶ *Id.* "It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand." *Id.*

¹²⁷ Research shows that cigarette vending machines are the most common means through which the youngest teens obtain cigarettes. *Kids Mustn't Smoke*, *supra* note 2, at A18.

¹²⁸ Sullum, *supra* note 8, at G1.

¹²⁹ *Id.*

¹³⁰ See Hernandez, *supra* note 50, at 12. According to Magazine Publishers of America, by mid 1995, tobacco advertising in 200 consumer magazines (about 85 percent of the industry)

made up less than three percent of all advertising. Eight years ago it constituted about seven percent to eight percent. *Id.*

¹³¹ *Id.*

¹³² See discussion, *supra* note 101 and accompanying text.

¹³³ *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore*, 862 F. Supp. 1402 (D. MD. 1994).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 1404.

¹³⁷ *Id.* at 1414. "Billboards [in the city] are conspicuously absent from more affluent communities. They present a stark contrast to adolescents between the lifestyle depicted in the advertisement and the actual neighborhood surrounding them thereby enhancing the attractiveness of the advertised product." *Id.* at 1411 (citing *Anheuser-Busch v. Mayor of Baltimore City*, 855 F. Supp. 811, 818, *aff'd*, 63 F.3d 1305 (4th Cir. 1995)).

¹³⁸ See Clinton Transcript, *supra* note 3.

motional items do not display warning labels they can, arguably, be misleading.¹³⁹ A prohibition on promotional merchandise also raises other red flags. Because it infringes on commercial speech rights of advertisers, the ban may implicate due process issues.¹⁴⁰ By prohibiting the use of trademarks or copyrighted material without statutory authorization, the FDA would likely deprive tobacco manufacturers of their property rights without due process of law, taking their property without just compensation.¹⁴¹ Moreover, proposed restrictions such as the ban on mail-orders of tobacco products are limitations on commerce which can only be regulated by Congress.¹⁴²

Several less restrictive alternatives to the advertising ban should be considered. Perhaps the strongest argument can be summed up in favor of a more effective anti-smoking campaign. The FDA proposal would require the tobacco industry to spend \$150 million a year on an anti-smoking campaign.¹⁴³ As it is, the tobacco industry currently spends approximately \$6 billion on advertising.¹⁴⁴ Perhaps a compromise could be reached in which the industry would agree to pay a higher premium on the anti-smoking campaign in exchange for retaining their advertising rights. Such an arrangement might ultimately be less expensive than the inevitable long litigation. After all, anti-smoking advertising is not new to the tobacco industry. It was required to pay for broadcast anti-smoking advertisements prior to 1971.¹⁴⁵

An anti-smoking campaign could also be subsidized with a government imposed "sin tax" on tobacco products. Although the consumer would share the burden of higher prices with tobacco producers,

such a sacrifice would be warranted if it could place the price of cigarettes and other tobacco items out of reach of most children. Doing so would accomplish the government's interest in promoting better health.¹⁴⁶

Anti-smoking campaigns have demonstrated promising results among the youth population. It has been estimated that eight out of ten youngsters reach the age of majority without becoming habitual smokers.¹⁴⁷ For example, African-American anti-smoking groups have enlisted churches, parents and school groups to help discourage underage smoking.¹⁴⁸ Their efforts appear to be paying off because only 4.4 percent of black teens smoke compared with nearly 23 percent of white teens.¹⁴⁹

In San Jose, California, an anti-smoking group was able to convince the local law enforcement authorities to conduct sting operations on vendors who sell to children.¹⁵⁰ A stricter enforcement of the prohibition law could make any potentially enticing tobacco advertising irrelevant, if such enforcement accomplishes a decline in teen smoking.

In Massachusetts, tobacco-control officials persuaded 200 businesses to give discounts to children who would be willing to sign a smoke-free pledge.¹⁵¹ The state contributed to this effort with extensive anti-smoking advertisement campaigns. The result was a forty percent reduction in cigarette sales to teens since 1994.¹⁵² In addition to the anti-smoking advertisement campaigns aimed at children, there should be a more expansive effort to involve parents in the campaign. Arguably, even with countless modern-day distractions, parents still have the greatest influence over their children's behavior.¹⁵³

The proposed tobacco advertising restrictions fail

¹³⁹ Teenagers can legally purchase promotional tobacco merchandise such as hats, key chains, and T-shirts. Bojorquez, *supra* note 52, at SC1. Cigarette expenditures for promotional items quadrupled from \$184 million to \$756 million between 1991 and 1993. *Id.*

¹⁴⁰ Hernandez, *supra* note 50, at 12; see also U.S. CONST. amend. V.

¹⁴¹ *Id.*

¹⁴² U.S. CONST. art. 1, § 8(3).

¹⁴³ See *Kids Mustn't Smoke*, *supra* note 52, at A18.

¹⁴⁴ *Id.* According to Competitive Media Reporting, in 1994 tobacco companies spent \$443 million on measured advertising, \$276 million on magazine ads, and \$121 million on outdoor promotions. See Teinowitz & Sachs, *supra* note 13, at 1.

¹⁴⁵ See *supra* notes 10-15 and accompanying text.

¹⁴⁶ *Let Congress Act On Smoking Curbs*, GREENSBORO NEWS & RECORD, Aug. 12, 1995, at A8. With the \$5 cigarette pack, Canada has demonstrated that there seems to be a point of "diminishing returns in punitive tobacco" taxation because black markets begin to thrive. *Id.* Nevertheless, the transition into a

black market system takes a long time and smoking among young people may be sufficiently curbed by that point. *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Gleick, *supra* note 17, at 33.

¹⁴⁹ *Id.* In fact, smoking amongst African-American teenagers fell from 26 percent to about 4.4 percent in the past 20 years. Bojorquez, *supra* note 52, at SC1.

¹⁵⁰ Gleick, *supra* note 17 at 33. The results of the sting operations were encouraging. In a three year period sales to minors dropped by 60 percent. Seattle, Washington which has used similar measures, had a 45 percent reduction rate over the same time span. *Id.*

¹⁵¹ *Id.* The group of businesses included fast food operations popular amongst teens, such as McDonald's. *Id.*

¹⁵² More than 25,000 children took the Massachusetts anti-smoking pledge and the State added \$14 million to the anti-smoking advertisement campaign. *Id.*

¹⁵³ Bob Garfield, *Joe Camel Lights Fire Under Clinton, Constitution*, ADVERTISING AGE, Aug. 14, 1995, at 3. Although one commentator has expressed concern with excessive "demon-

to establish a significant link to the government's interest in protecting the health of children. They are, for the most part, over-inclusive in that they virtually eliminate adults' access to the information presented in the advertisements. Moreover, several less restrictive means of accomplishing the government's purpose exist and should not be ignored at the expense of a major setback to First Amendment commercial speech protection.

IV. CONCLUSION

The President and the FDA hope to achieve the laudable goal of protecting the health of America's youth from the harmful effects of tobacco. The means intended to achieve this objective are the recently proposed tobacco advertising restrictions. As a result of their commercial speech infringements, the regulations raise valid First Amendment objections. Reviewing courts would likely determine that the proposed restrictions should not be upheld because

ization of cigarettes" claiming that doing so would make smoking so taboo "only enhanc[ing] the mystique of the forbidden to-

they fail to satisfy the established constitutional standards protecting commercial speech. There is a lack of solid evidence demonstrating that tobacco advertising targets and induces children to consume tobacco products. Although, the government's interest is valid, it can not be directly advanced by the proposed restrictions without being overly inclusive. Moreover, several less constitutionally intrusive alternatives could be utilized to eliminate tobacco consumption by children. The proposed advertising ban is paternalistic and condescending in its application because it manipulates the behavior of the public by restricting its exposure to a legally sold product. One does not need to be a teenager or a smoker to be concerned about the potential for subsequent government infringements founded upon a precedent upholding the present regulations. The First Amendment was established to guard against government sponsored truth, even in the realm of commercial speech.

bacco fruit." *Id.*

