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Jef I. Richards

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## ARTICLES

### POLITICIZING CIGARETTE ADVERTISING

*Jef I. Richards\**

The tobacco industry has battled the fires of public opinion since the 1500s,<sup>1</sup> but the heat has never been so intense as now. Although no serious efforts have been made to prohibit the sale of cigarettes and other tobacco products, public pressure and legislative initiatives aimed at manufacturers and users have reached an all-time high. In 1994 alone, tobacco executives were grilled in congressional hearings<sup>2</sup> and threatened with criminal investigation.<sup>3</sup> The Food and Drug Administration (FDA) made overtures toward regulating tobacco as a drug,<sup>4</sup> the Department of

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\* Associate Professor of Advertising, The University of Texas at Austin; Indiana University, J.D., 1981; University of Wisconsin, Ph.D., 1988. Dr. Richards is a member of the Colorado and Indiana Bars. The author would like to thank students in his graduate Advertising & Law seminar for their valuable comments on an earlier draft of this Article. A very early version of this Article was presented at the annual conference of the American Academy of Advertising, in Vancouver, British Columbia, in March 1996.

1. French Ambassador Jean Nicot introduced tobacco to Europeans in 1560. A. LEE FRITSCHLER, *SMOKING AND POLITICS: POLICYMAKING AND THE FEDERAL BUREAUCRACY* 7 (2d ed. 1975). It quickly experienced official condemnation by the King of England, who called it “[a] Custome loathsome to the eye, hatefull to the Lungs, and in the blacke stinking fume thereof, neerest resembling the horrible Stigian smoak of the pit that is bottomeless.” RUTH BRECHER ET AL., *THE CONSUMERS UNION REPORT ON SMOKING AND THE PUBLIC INTEREST* 123 (1963).

2. *Regulations of Tobacco Products (Part 1): Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 103 Cong., 2d Sess. 542-628, 640-767, 791-844 (1994) (testimony of tobacco executive); see Steven W. Colford, *Tobacco Chiefs Feel Lash on Hill*, *ADVERTISING AGE*, Apr. 18, 1994, at 4 (noting the Committee’s hostility toward tobacco company executives).

3. Seven congressional members opposed to tobacco use sought a criminal investigation into whether tobacco manufacturers, and possibly their advertising and public relations agencies, trade associations, and lobbyists knowingly deceived Congress and the public about the negative health consequences of tobacco use. Steven W. Colford, *Nicotine Fit: Feds Mull Criminal Charges Against Cig Firms, Agencies*, *ADVERTISING AGE*, June 27, 1994, at 1.

4. Steven W. Colford, *FDA Could Snuff Out Cig Ads: Federal Agency Takes New Interest in Regulating Tobacco*, *ADVERTISING AGE*, Mar. 7, 1994, at 4. Dr. David Kessler, FDA Commissioner, announced that he was considering regulating tobacco by categorizing nicotine as a drug. Lauran Neergaard, *Nicotine Fit Symptomatic of Kessler Dogma, Critics Say*, *AUSTIN AM.-STATESMAN*, Apr. 23, 1994, at A15. Dr. Kessler suggested that “today’s

Defense banned smoking in its facilities worldwide, and several major restaurant chains banned smoking in their company-owned restaurants.<sup>5</sup> In addition, the State of Minnesota filed suit against cigarette makers for conspiring to hide information about the dangers and addictive characteristics of cigarettes,<sup>6</sup> and the State of Maryland banned smoking in virtually all workplaces.<sup>7</sup> Current pressure to diminish tobacco use is unprecedented.

Many of those involved in this anti-smoking crusade believe one effective tactic is to remove or limit tobacco advertising and other marketing promotions. Although tobacco advertising already was restricted in some

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cigarettes may in fact qualify as high-technology nicotine delivery systems," and that if nicotine were declared a drug, he would be forced to ban most tobacco products. *Id.* The following year the FDA did, in fact, declare nicotine to be a drug, and proposed some initial steps for regulating tobacco products, including limitations on tobacco advertising. Philip J. Hilts, *Tobacco Held to be Drug that Must be Regulated, Political Handoff to Clinton from F.D.A.*, N.Y. TIMES, July 13, 1995, at A18. One month later, President Clinton endorsed the idea of turning jurisdiction over tobacco to the FDA, and proposed specific regulations on tobacco advertising. Anita Manning, *Industry Sues Over Teen Smoking Effort*, USA TODAY, Aug. 11-13, 1995 at A1; J. Jennings Moss, *President Attacks Teen Use of Tobacco: Rules Affect Advertising and Sales in Machines*, WASH. TIMES, Aug. 11, 1995, at A1; Frank J. Murray, *Clinton Faces First Amendment Challenge on Cigarettes*, WASH. TIMES, Aug. 11, 1995, at A1. Tobacco companies and others immediately filed suit to stop the regulations. See Manning, *supra*; Moss, *supra*; Murray, *supra*. The FDA's resulting proposed rule incorporated the President's recommendations. See 60 FED. REG. 41,313 (1995) (to be codified at 21 C.F.R. pts. 801, 803, 804, 897) (proposed Aug. 11, 1995).

The final version of the rules was announced on August 23, 1996. Stephen Bar & Martha M. Hamilton, *Curbs Placed On Tobacco Ads, Sales*, AUSTIN AM.-STATESMAN, August 24, 1996, at A1. Aside from restricting cigarette sales, the rules would require tobacco ads in magazines read by significant numbers of teens to be black and white, text-only. 61 Fed. Reg. 44,396, 44,617 (to be codified at 21 C.F.R. § 897.32). The same restriction would apply to all tobacco billboards, none of which could be placed within 1000 feet of schools or playgrounds. *Id.* (to be codified at § 897.30). Also, they would prohibit brand name sponsorship of sporting events, and ban the use of brand names on promotional products like hats and shirts. *Id.* at 44,617-18 (to be codified at § 897.34).

5. McDonalds announced that its 1,400 company-owned restaurants would be smoke-free, as did Taco Bell with its 3,300 company-owned restaurants, and Jack-in-the-Box with its 758 restaurants. Ronald A. Taylor, *Signs of the Times: Under Increasing Pressure to Quit, Smokers Strike Back to Save Rights*, WASH. TIMES, Mar. 21, 1994, at A10. Arby's also banned smoking in its company-owned stores, and Dairy Queen prohibited smoking in its new franchises. Leah Rickard, *Burger Lovers Show Distaste for Smokers*, ADVERTISING AGE, July 4, 1994, at 34.

6. Although tobacco sellers are constantly bombarded by lawsuits, this was the first suit of its kind. Barry Meier, *Minnesota, Blue Cross Sue Cigarette Makers*, AUSTIN AM.-STATESMAN, Aug. 18, 1994, at A8. Minnesota Attorney General Hubert Humphrey III explained, "The bottom line is that they promised in all their advertisements to tell the truth and they lied. . . . And the result is thousands of deaths and millions in costs." *Id.*

7. Christopher J. Farley, *The Butt Stops Here: Threatening to Snuff Out Smoking For Good, the Crusade Against Tobacco Shifts Into Higher Gear*, TIME, Apr. 18, 1994, at 58.

sports stadiums<sup>8</sup> and transit system facilities,<sup>9</sup> in 1994 the tobacco industry received a series of successive blows. Though not exhaustive, the following list represents most of the major events affecting tobacco advertising during that year: the American Medical Association (AMA) published a study purporting to link cigarette ads to smoking by teen-age girls<sup>10</sup> and also asked Major League baseball teams to ban tobacco ads in ballparks;<sup>11</sup> a Gallup poll found that sixty-eight percent of Americans want government to impose greater restrictions on cigarette advertising;<sup>12</sup> former Surgeon General Joycelyn Elders called for the "Joe Camel" cartoon character to be banned from cigarette ads;<sup>13</sup> the Federal Trade Commission (FTC) concluded its three-year investigation of the infamous Joe Camel cartoon;<sup>14</sup> the National Academy of Sciences Institute of Medicine published a report advocating that all tobacco ads be prohibited from using pictures by the year 2000;<sup>15</sup> and the California Supreme Court declared that federal law did not preempt an unfair advertising suit concerning the Joe Camel campaign.<sup>16</sup> In 1995, the onslaught continued with, for

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8. New Jersey's Meadowlands Sports Complex was the subject of a recent bill to ban tobacco ads, as were Houston's Astrodome, Seattle's Kingdome, and Boston's Fenway Park. Randy Diamond, *State Senate OKs Cigarette-Ad Ban Bill Aimed at Sports Complex*, THE RECORD, May 24, 1994, at A01.

9. In New York state alone, New York City, Buffalo, and Rochester transit authorities have banned tobacco ads. Laura Rich, *Put That Out*, INSIDE MEDIA, May 11, 1994, at 53.

10. John P. Pierce et al., *Smoking Initiation by Adolescent Girls, 1944 through 1988: An Association with Targeted Advertising*, 271 JAMA 608 (1994). Anti-smoking activists acclaimed the AMA study as the first real proof that cigarette advertising causes underage smoking. Steven W. Colford & Ira Teinowitz, *Teen Smoking and Ads Linked: All Tobacco Advertising Could be at Risk*, ADVERTISING AGE, Feb. 21, 1994, at 1.

11. Ira Teinowitz & Jeff Jensen, *Colo. City May Expel Joe Camel*, ADVERTISING AGE, Apr. 11, 1994, at 46.

12. Colford & Teinowitz, *supra* note 10. The poll was based on a random sample of 602 adults over age 18 in the continental United States. *Id.* A total ban on cigarette advertising was supported by 53%. *Id.* at 36.

13. Sandy Grady, *Elders' Attack on Joe Camel May Add Smoke to Fire*, ORLANDO SENTINEL, Feb. 28, 1994, at A9. Upon releasing a 314 page report on teenage smoking, Dr. Elders remarked, "I feel we shouldn't advertise something we know to be a poison and a killer." *Id.* In particular, she criticized tobacco ads for creating an image that smoking makes people popular and attractive, noting that "[t]he teen-ager gets an image. Tobacco gets an addict." *Id.*

14. *FTC Closes Investigation of R.J. Reynolds Tobacco Company*, NEWS RELEASE (Fed. Trade Comm'n, Wash., D.C.), June 7, 1994, at 1 [hereinafter Federal Trade Commission]; *see also* Steven W. Colford & Ira Teinowitz, *Joe Camel Gets Reprieve, for Now*, ADVERTISING AGE, June 6, 1994, at 52 (noting that the issue is long from being settled).

15. Steven W. Colford, *Fed Report Fuels Blaze over Tobacco*, ADVERTISING AGE, Sept. 19, 1994, at 42. The report also proposed banning the use of all tobacco brand names, logos, and trademarks in sporting and cultural events, movies and television. *Id.*

16. *Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73, 83 (Cal.), *cert. denied*, 115 S. Ct. 577 (1994). Tobacco companies have long argued that part of the Federal Cigarette

example, the U.S. Justice Department suing Madison Square Garden for allowing a Marlboro sign to be positioned where it could be seen on television broadcasts.<sup>17</sup> And in a particularly notable move in the summer of 1995, President Clinton decided to pass jurisdiction over tobacco to the FDA, and recommended, among other things, regulations that would forbid brand-name advertising at sporting events and on products such as t-shirts and hats.<sup>18</sup>

The visibility of tobacco ads, along with concerns about their impact on consumption, make them popular targets for critics.<sup>19</sup> In the world of commercial speech, tobacco advertising bears the earmarks of an endangered species. Given this recent climate, the passage of one or more laws banning or severely restricting such promotion seems imminent. The success of any such law, however, will depend upon whether it withstands First Amendment scrutiny. While anti-tobacco proponents undoubtedly believe the laws will withstand such scrutiny, their own actions have created a potential obstacle to finding the laws constitutional.

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Labeling and Advertising Act, 15 U.S.C. § 1334 (1994), places advertising and labeling of cigarette products exclusively under the jurisdiction of the federal government. *Accord* Cipollone v. Liggett Group, Inc., 789 F.2d 181, 185 (3d Cir. 1986) (holding that the Federal Cigarette Labeling and Advertising Act preempts state law actions regarding adequacy of consumer warnings), *cert. denied*, 479 U.S. 1043 (1987); *Palmer v. Liggett Group, Inc.*, 633 F. Supp. 1171, 1179 (D. Mass. 1986), *rev'd*, 825 F.2d 620 (1st Cir. 1987) (holding Congress did not intend to preempt state common law tort actions involving injuries based on inadequate cigarette warnings in labeling and advertising), *cert. denied sub nom.* Liggett Group, Inc. v. Public Citizen, 488 U.S. 1030 (1989); *Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F. Supp. 1189 (E.D. Tenn. 1985) (finding federal law on cigarette labeling preempted state common law action), *aff'd*, 849 F.2d 230 (6th Cir. 1988); *see also* Francisco Hernandez, Jr. & Jordan M. Parker, *Federal Preemption of State Tort Actions Under the Federal Cigarette Labeling and Advertising Act*, 27 TORT & INS. L.J. 1 (1991) (analyzing Congress's intent regarding preemption of cigarette labeling and advertising).

17. Ira Teinowitz & Jeff Jensen, *Gov't Takes Swing at Cig Signs in Sports*, ADVERTISING AGE, Apr. 10, 1995, at 34. The Justice Department (DOJ) claimed this violated the Cigarette Labeling and Advertising Act which prohibits tobacco advertising on broadcast media. *Id.* A Justice official stated DOJ had begun examining signs in a variety of sports. *Id.*

18. *See supra* note 4 and accompanying text.

19. A cynic might contend that politicians turn to this option, rather than banning the sale of tobacco, because it appeals to voters who generally hold negative attitudes toward advertising. Commercial advertising, regardless of the product or service being sold, is criticized as causing countless societal ills. It has been suggested that "[m]any of these allegations exist . . . because advertising serves as a convenient scapegoat for those aspects of our society, such as greed, vanity, competitiveness, and power struggles which are displeasing and yet so prevalent." Geoffrey P. Lantos, *Advertising: Looking Glass or Molder of the Masses?*, 6 J. PUB. POL'Y & MARKETING 104, 125 (1987); *see also* Richard W. Pollay, *The Distorted Mirror: Reflections on the Unintended Consequences of Advertising*, 50 J. MARKETING, Apr. 1986 at 18 (reviewing academic analyses regarding advertising's effect on society).

The thesis of this Article is that the tactics anti-smoking advocates use have included marshalling political allies, including government officials, in the struggle against tobacco forces. And in so doing, they have made tobacco advertising into a major political issue, effectively transforming it into "political speech." The result is that tobacco advertising, thereby, deserves far greater protection than conventional commercial advertising receives. To place this analysis in perspective, this Article first discusses how regulations aimed at tobacco advertising—particularly cigarette advertising—would fare under the Supreme Court's approach to *commercial* speech.

### I. CIGARETTE ADVERTISING AS "COMMERCIAL" SPEECH

For nearly 200 years commercial advertising was assumed to be outside the protective sphere of the First Amendment. The Supreme Court made this same assumption in its 1942 *Valentine v. Chrestensen*<sup>20</sup> decision, the first Supreme Court case to specifically address that question. Without benefit of evidence or theory, the Court simply declared that commercial advertising was "clearly" unprotected speech.<sup>21</sup> Over the next few decades, however, the Court's view shifted,<sup>22</sup> and in 1976 the Court finally decided that "commercial speech" does fall within our First Amendment

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20. 316 U.S. 52 (1942).

21. *Id.* at 54. In what is, by today's standards, an exceptionally brief opinion, the Court remarked:

This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.

*Id.* For a thorough review of that case, see R. H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 3 (1977) (noting that the courts now tend to offer First Amendment protections to advertising).

22. Several years after *Valentine*, Justice Douglas characterized that decision as "casual, almost offhand." *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring). However, the real shift in the Court's thinking probably began with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), involving a paid advertisement containing content indistinguishable from constitutionally protected speech. *Sullivan*, 376 U.S. at 256-58. The Court's dilemma over this gray area was resolved by declaring that the ad was not truly "commercial," but "editorial" in nature. *Id.* at 266. In *Bigelow v. Virginia*, 421 U.S. 809 (1975), however, the Court discovered yet another gray area. *Bigelow*, 421 U.S. at 811-13. That case concerned an admittedly "commercial advertisement" implicating a major political issue because the ad was for an abortion clinic. *Id.* at 812. The Court responded by protecting the ad, basing its decision on the "public interest" in that content. *Id.* at 822. By the time of the *Bigelow* decision, the line between protected speech and unprotected commercial speech had blurred such that it was becoming very difficult to separate the two types of speech, and a reversal of *Valentine* was not unimaginable.

liberties.<sup>23</sup> Four years later, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>24</sup> the Court established a four-part test to determine whether a particular government infringement on such commercial speech was permissible.<sup>25</sup> The *Central Hudson* test erected a series of hurdles over which government authorities must pass before a regulation will be upheld. That test continues to be the Court's litmus for commercial speech regulations, though it has been subject to some interpretive modification over the years.

The test's first step permits regulation if the speech is misleading or promotes an illegal activity.<sup>26</sup> For most tobacco ads, this step offers no solace for potential regulators. Tobacco is a legal product, and it is difficult to deceive consumers about a product with well-known attributes. If the first step does not support regulation, then the restriction must survive all three remaining steps to be held constitutional.

By contrast, the second step does not pose a problem for regulators. It asks whether there is a "substantial governmental interest" that supports the law.<sup>27</sup> For tobacco, that interest is to save many lives and tremendous health-care costs. Few would argue that this interest is insubstantial.

It is the third step that presents an immense barrier to tobacco ad restrictions. The regulation must "directly advance" the government's interest.<sup>28</sup> This is a question of causation: whether a ban or restriction of tobacco advertising will save lives or health-care costs. In other words, does tobacco advertising cause people to smoke?

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23. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762-65 (1976). The Court based its holding, authored by Justice Blackmun, on what is essentially a utilitarian economic argument:

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

*Id.* at 765 (footnotes omitted).

24. 447 U.S. 557 (1980).

25. *Id.* at 566.

26. *Id.*

27. *Id.*

28. *Id.*

Although numerous studies have examined this question, none have found a direct causal connection.<sup>29</sup> With all of the anti-smoking activists who seek to regulate tobacco advertising, there is little doubt that many have tried to find such proof. Indeed, any researcher who discovered scientifically valid evidence of causation would realize instant fame. Even a recent Surgeon General report admits the existence of uncertainty:

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. . . . [T]he extent of influence of advertising and promotion on the level of consumption is unknown and possibly unknowable . . . .<sup>30</sup>

To the contrary, studies tend to show that peer pressure and family influence, rather than tobacco advertising, are the primary determinants of smoking behavior.<sup>31</sup> These findings are robust. Studies—experiments and surveys alike—consistently reach this same conclusion, even when

29. Jef I. Richards, *Clearing the Air About Cigarettes: Will Advertisers' Rights Go Up in Smoke?*, 19 PAC. L.J. 1, 44-47 (1987) (citing studies that do not support a causal link between tobacco advertising and consumption); Michael J. Garrison, *Should All Cigarette Advertising Be Banned? A First Amendment and Public Policy Issue*, 25 AM. BUS. L.J. 169, 205 (1987) (concluding there is no clear connection between advertising and tobacco consumption); Claude R. Martin, Jr., *Pollay's Pertinent and Impertinent Opinions: "Good" Versus "Bad" Research*, 23 J. ADVERTISING 117, 118 (1994) (arguing cigarette advertising has minimal or no effect on tobacco use and noting lack of evidentiary evidence to the contrary).

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

31. "The literature has tended to underscore the role of parental example and influence for initiation of smoking by young children and adolescents, and the primacy of peer influences among older youth." *Id.* at 337. As Chief Executive Officer of R.J. Reynolds Tobacco, James W. Johnston probably suffers a lack of impartiality, but he cites the results of a recent Gallup survey that asked smokers why they started smoking. According to Johnston, "[o]nly 1% cited advertising. The largest reasons the survey specifically cited were peer pressure (48%) and family influence (15%)." James W. Johnston, *For Old Joe: Free Speech is the Issue*, ADVERTISING AGE, Jan. 27, 1992, at 22. Professor Claude Martin has drawn similar conclusions:

I did, and do, claim that cigarette advertising has little or no effect on smoking initiation and usage rates, *but rather on brand-switching*. . . . In preparation for formulating my opinion I reviewed more than 300 studies, most of which were *not* tobacco industry supported, which find smoking initiation and usage rates are the function of three factors: (1) peer pressure, (2) older sibling behavior, and (3) parental smoking. There is not the same research-based, evidentiary data to link smoking initiation and usage rates with advertising . . . .

Martin, *supra* note 29, at 118; *see also* Jean J. Boddewyn, *Cigarette Advertising Bans and Smoking: The Flawed Policy Connection*, 13 INT'L J. OF ADVERTISING 311, 312 (1994) (challenging bans on tobacco products as an effective means in reducing tobacco use); Richards, *supra* note 29, at 47 (noting studies that show the central role parents, siblings, and peer groups play in adoption of tobacco use).



analyzing smokers of different ages, sex, or ethnic groups.<sup>32</sup> Evidence available *at this time* simply does not support the notion that regulation of tobacco advertising will “directly advance” the government’s interest in reducing health costs and mortality. Consequently, unless the Supreme Court is willing to ignore the available evidence, a total ban or restriction on ads directed at the general public would be held unconstitutional.

Although earlier proposals sought to abolish all tobacco advertising and related marketing promotions,<sup>33</sup> many recent efforts have had the narrower agenda of protecting children and other “vulnerable” groups from tobacco ad effects. The political obstacles to passing a blanket prohibition undoubtedly led to these new tactics. After all, what legislator could vote against a “protects our children” act?<sup>34</sup> While this might be politically more palatable, and may even increase the government’s interest in regulation vis-a-vis *Central Hudson’s* second step, it does not alter the evidentiary requirement of the third step.<sup>35</sup> The evidence still points to peer and family influence, rather than advertising, as the catalyst for smoking, regardless of whether the regulation is intended to protect adults, children, or some other population.

Nonetheless, there are some highly-publicized studies that many people may accept as proof that tobacco ads cause children to smoke. These studies, however, suffer some serious weaknesses. For example, one highly publicized study found that Joe Camel is as familiar as Mickey Mouse to six-year-olds.<sup>36</sup> Some anti-smoking advocates, including a re-

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32. See, e.g., Lorne D. Bertrand & Thomas J. Abernathy, *Predicting Cigarette Smoking Among Adolescents Using Cross-Sectional and Longitudinal Approaches*, 63 J. SCH. HEALTH 98 (1993); Anthony Biglan & Edward Lichtenstein, *A Behavior - Analytic Approach to Smoking Acquisition: Some Recent Findings*, 14 J. APPLIED SOC. PSYCHOL. 207, 208 (1984); G.S. Don Morris et al., *Prevalence and Sociobehavioral Correlates of Tobacco Use Among Hispanic Children: The Tobacco Resistance Activity Program*, 63 J. SCH. HEALTH 391 (1993). Even the Director of the National Institute of Child Health and Human Development admitted that “[t]he most forceful determinants of smoking are parents, peers, and older siblings.” *Smoking Prevention Education Act: Hearings Before the Subcomm. on Health and the Env’t of the Comm. on Energy and Commerce on H.R. 1824*, 98th Cong., 1st Sess. 53 (1983).

33. See Health Protection Act of 1986, H.R. 4972, 99th Cong., 2d Sess. (1986).

34. See Protect our Children from Cigarettes Act of 1989, H.R. 1250, 101st Cong., 1st Sess. (1989).

35. However, this could create other problems. The government is constitutionally prohibited from reducing “the adult population . . . to reading only what is fit for children.” *Butler v. Michigan*, 352 U.S. 380, 383 (1957); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72-73 (1983) (citing *Butler*).

36. A survey of 229 children, ages three to six years old, found that the Disney Channel logo was significantly more recognizable (86.1%) than Joe Camel (30.4%). Paul M. Fischer et al., *Brand Logo Recognition by Children Aged 3 to 6 Years*, 266 JAMA 3145 (1991). However, by age six there was no statistically significant difference between recognition of the Disney Channel logo (100%) and the Joe Camel logo (91.3%). *Id.* at 3147.

cent Surgeon General, have cited that research, as proof that children are being “seduced by glitzy advertising” into becoming smokers.<sup>37</sup> That study—like most highly publicized studies that suggest a link between tobacco advertising and tobacco consumption—was conducted by medical researchers, rather than marketing or advertising researchers.

Anyone with marketing expertise, however, knows there is a big difference between recognition and consumption behavior. Indeed, consumers can hate a product and still recognize its ad theme. In a more recent Roper poll, seventy-three percent of children ages ten to seventeen recognized Joe Camel, but only three percent of those who recognized the cartoon figure had a positive attitude toward smoking.<sup>38</sup> Indeed, other cartoon figures like Little Caesar, Ronald McDonald, and the Energizer Bunny were far more recognized than Joe Camel.<sup>39</sup> Consequently, no study has proven that ads *cause* children to smoke, even though more research has been conducted regarding the effects of tobacco advertising on children than on any other “vulnerable” group.<sup>40</sup>

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Two other articles appeared in that issue of the JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, also claiming to provide some evidence that cigarette advertising causes children to smoke. One study compared high school students to adults, and found 97.7% of high school students able to identify Joe Camel as compared with 72.2% of adults over age 21. Joseph R. DiFranza et al., *RJR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children*, 266 JAMA 3149 (1991). The study also reported that sales of Camel cigarettes to children had increased substantially since the cartoon campaign began. *Id.* A third study, consisting of 5040 high school students, found that Camel's market share decreased substantially with age. John P. Pierce et al., *Does Tobacco Advertising Target Young People to Start Smoking?*, 266 JAMA 3154 (1991). These researchers found approximately 22% of girls and 25% of boys who smoked chose Camel over other brands. *Id.*

These studies received tremendous coverage by the popular press. See, e.g., Jane E. Brody, *Smoking Among Children Is Linked to Cartoon Camel in Advertisements*, N.Y. TIMES, Dec. 11, 1991, at D22.

37. Surgeon General Dr. Antonia Novello wrote that “[a]ccording to recent studies, Old Joe is now as familiar as Mickey Mouse to American youngsters. As a physician and as surgeon general, I will not stand by and watch another generation be unknowingly seduced by glitzy advertising and big-bucks events.” Antonia Novello, *Cigarette Ads: A Matter of Life and Death*, USA TODAY, Mar. 25, 1992, at 11A.

38. Of those teens who were aware of cigarette ads, far more remembered Marlboro advertising (47%) than remembered Joe Camel (26%). Ira Teinowitz, *Joe Camel is No Tony Tiger to Kids*, ADVERTISING AGE, Feb. 21, 1994, at 36.

39. Unaided awareness of Joe Camel was 73%, while the other characters generated awareness figures of more than 90%. Patricia Winters, *Anti-Smoking Group Rips Pro-Joe Camel Survey*, N.Y. DAILY NEWS, Feb. 22, 1994, at 44. Elsie the Cow, with 27% awareness, was the only character that was less familiar to these respondents than Joe Camel. *Id.* The survey of 1,100 youths, conducted in November 1993, was statistically generalizable.

40. Just as this article was completed, yet another study from a group of medical researchers gained widespread attention by the press. See Nicola Evans et al., *Influence of Tobacco Marketing and Exposure to Smokers on Adolescent Susceptibility to Smoking*, 87 J. NAT'L CANCER INST. 1538 (1995). The media reports claimed that “[t]obacco advertising is a stronger factor than peer pressure in encouraging children under 18 to smoke, a study

This lack of causal connection is what led three of five FTC Commissioners to decide against regulating Joe Camel advertising. In a published statement the Commissioners declared:

Although it may seem intuitive to some that the Joe Camel ad campaign would lead more children to smoke or lead children to smoke more, the evidence to support that intuition is not there. Our responsibility as commissioners is not to make decisions based on intuition but to evaluate the evidence and determine whether there is reason to believe that a proposed respondent violated the law. The Commission has spent a great deal of time and effort reviewing the difficult factual and legal questions raised by this case, including a comprehensive review of relevant studies and statistics. Because the evidence in the record does not provide reason to believe that the law has been violated, we cannot issue a complaint.

If intuition and concern for children's health were a sufficient basis under the law for bringing a case, we have no doubt that a unanimous Commission would have taken that action long ago. The dispositive issue here, however, was whether the record showed a link between the Joe Camel advertising campaign and increased smoking among children, not whether smoking has an effect on children or whether the health of children is important. Indeed, our concern about the health of children led us to consider every possible avenue to a lawsuit before reaching today's decision.<sup>41</sup>

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released today has found." Philip J. Hiltz, *Ads Linked To Smoking By Children*, N.Y. TIMES, Oct. 18, 1995, at B9. However, upon examining the study, one can find numerous shortcomings. Though far too complex to completely review here, the study's major weaknesses include the assumptions researchers make about the validity of two indexes they create, the assumptions they make about the susceptibility of certain children to smoking, and the fact that they compare unequal circumstances (i.e., comparing receptivity to ads with exposure to smokers, which is roughly equivalent to asking children whether actors they like or neighbors they have seen have more of an influence on them). An editorial in *Advertising Age* magazine made the following observation:

[S]upposition was piled on supposition to postulate that cigarette advertising and promotions are even more important than peer pressure in getting children to begin smoking.

The study, drawn from a 1993 survey of adolescents, was published long after – coincidentally, just as President Clinton strives to give the Food & Drug Administration power to restrict tobacco advertising. That gives its findings an aura of advocacy rather than reliability.

*The Power of Advertising?*, ADVERTISING AGE, Nov. 6, 1995, at 16.

41. Commissioners Mary L. Azcuenaga, Deborah K. Owen, and Roscoe B. Starek, III, supported the Commission's decision to take no action against the Camel advertising. Federal Trade Commission, *supra* note 14; see Steven W. Colford & Ira Teinowitz, *Congressman Douses Threat to Joe Camel*, ADVERTISING AGE, June 13, 1994, at 8 (discussing Congress's decision not to challenge the FTC's decision).

One of the two dissenting Commissioners even admitted that the evidence was only circumstantial.<sup>42</sup> This same causation obstacle would create problems under the third step of the *Central Hudson* test. Therefore, a restriction aimed at protecting children, or any other "vulnerable" group, will fail the *Central Hudson* test unless more substantial evidence is found, or unless the Court is willing to accept intuition as adequate proof of causation.<sup>43</sup>

This is not to suggest that there is a consensus regarding the sufficiency of currently existing evidence. Many people feel that there is sufficient proof to take action. Indeed, there is even significant disagreement among advertising and marketing experts.<sup>44</sup> The point here is that there

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42. Commissioner Dennis A. Yao stated:

I support bringing an administrative complaint against R.J. Reynolds Tobacco Company. I have reason to believe that its use of a cartoon character, Joe Camel, as the centerpiece of a cigarette advertising and marketing campaign, has increased the consumption of cigarettes among those least able to understand the heavy costs involved in smoking: minors under 18. By refusing to bring such a case, the majority has implicitly downplayed strong circumstantial evidence of an effect on minors, evidence that I believe warrants full fact-finding in an administrative trial. There is evidence that the cartoon character has appeal to minors and that Camel has increased its market share among minors. There is also evidence that the decade and a half decrease in smoking among minors has slowed down in the time since the Joe Camel campaign began.

Admittedly, the evidence is circumstantial — it is not surprising that it would be difficult to produce direct evidence that Joe Camel was the decisive factor in increasing smoking among minors. In my view, however, given the tremendous potential for the loss of human life, the issues presented in this case are central to the agency's consumer protection mission. I am most disappointed that the majority is not willing to bring this matter to trial.

Federal Trade Commission, *supra* note 14, at 1.

43. In fairness, it should be noted that the Court has found intuition a sufficient basis for regulation in at least one case. See *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). In *Posadas*, Justice Rehnquist, writing for the Court, accepted as sufficient to meet *Central Hudson's* third step, the Puerto Rico Legislature's unsupported belief that gambling casino advertising would result in increased gambling. *Id.* at 342-43.

44. Disagreement is most clearly seen in the heated debate that resulted from the 1991 medical researchers' articles discussed above. See *supra* note 36. Researchers from university marketing and advertising programs voiced highly disparate opinions regarding the validity of those studies and their sufficiency as a basis for public policy measures. See Jean J. Boddewyn, *Where Should Articles on the Link Between Tobacco Advertising and Consumption Be Published?*, 22 J. ADVERTISING 105 (1993); Lawrence C. Soley, *Smoke-filled Rooms and Research: A Response to Jean J. Boddewyn's Commentary*, 22 J. ADVERTISING 108 (1993).

In discussing these studies, Richard Pollay, an academic who has actively campaigned against tobacco advertising and who frequently serves as an expert witness testifying against the tobacco industry, stated that "[t]he more I have learned from my own research and trial evidence, the more certain I am that cigarette advertising is far from innocuous in either intent or effect." Richard W. Pollay, *Pertinent Research and Impertinent Opinions:*

is no proof of a *causal* link between cigarette advertising and cigarette consumption. Those who believe that sufficient evidence exists must overlook this missing link and draw inferences of ad effects from things like consumer *recognition*, as in the Mickey Mouse study,<sup>45</sup> or from tobacco companies' motives, such as their *intent* to show their products only in the best possible light<sup>46</sup> or to target children.<sup>47</sup> Opposing studies that find *no* causal connection must, likewise, be overlooked.<sup>48</sup>

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*Our Contributions to the Cigarette Advertising Policy Debate*, 22 J. ADVERTISING 110, 110 (1993). But Professor Pollay stopped short of claiming that the studies constituted proof of causation, saying:

While no research may be perfect at creating absolute proof of the causal linkages between these observations, readers should examine these articles for themselves to see if their samples and measurements are unreasonable, insufficient to support the offered conclusions . . . or, most critically, clearly inferior to the research advanced in support of the cigarette industry. I do not find them so.

*Id.* at 111. Contrast Professor Pollay's opinion in opposition with that of Claude Martin, an academic who has testified on behalf of tobacco interests. See Martin, *supra* note 29, at 118.

45. See Fischer et al., *supra* note 36.

46. See Richard W. Pollay, *Filter, Flavor . . . Flim-Flam, Too!: Cigarette Advertising Content and Its Regulation*, 8 J. PUB. POL'Y & MARKETING 30 (1989); Richard W. Pollay, *Propaganda, Puffing and the Public Interest*, 16 PUB. REL. REV. 39, 40-41 (1990). These and other studies offer evidence that cigarette manufacturers portray healthy people engaged in physical activities to associate pictures of health with smoking, and that they have used public relations methods to sow seeds of doubt about the dangers of cigarette smoking. Most marketers, of course, tend to show products in their best light and minimize their deficiencies. Marketers who emphasize their products' weaknesses seldom stay in business very long.

47. Professor Pollay has compiled significant proof that, despite their denials, tobacco companies have a long history of marketing practices clearly aimed at recruiting new smokers. Richard W. Pollay, *Targeting Tactics in Selling Smoke: Youthful Aspects of 20th Century Cigarette Advertising*, 3(1) J. OF MARKETING THEORY PRAC. 1 (1995); Richard W. Pollay & Anne M. Lavack, *The Targeting of Youths by Cigarette Marketers: Archival Evidence on Trial*, 20 ADVANCES IN CONSUMER RES. 266 (1992). While all of this casts serious doubts on the industry's motives and honesty, it does not provide evidence that these ads successfully caused children to smoke. Indeed, the reason for targeting children may have been to ensure that those children who already had started to smoke would become accustomed to smoking the advertiser's brand, given that brand loyalty is probably developed early in the smoking habit.

48. In addition to the studies that point to peer and family influence as primary determinants of smoking behavior, see *supra* note 31, there are several other studies that suggest a lack of causal relationship between advertising and tobacco consumption. See, e.g., Avery M. Abernethy & Jesse E. Teel, *Advertising Regulation's Effect Upon Demand for Cigarettes*, 15 J. ADVERTISING 51 (1986); George R. Franke, *U.S. Cigarette Demand, 1961-1990: Econometric Issues, Evidence, and Implications*, 30 J. OF BUS. RES. 33 (1994); Gary B. Wilcox et al., *Cigarette Advertising and Consumption in South Korea, 1988-1992*, 13 INT'L J. ADVERTISING 333 (1994); Gary B. Wilcox & Barry Vacker, *Cigarette Advertising and Consumption in the United States: 1961-1990*, 11 INT'L J. OF ADVERTISING 269 (1992); see also M.J. Waterson, *ADVERTISING AND CIGARETTE CONSUMPTION* (1984); Boddewyn, *supra* note 31, at 311; Garrison, *supra* note 29, at 175-85; Martin, *supra* note 29, at 118; Richards, *supra* note 29, at 43.

Some commentators feel that causation is an unreasonably difficult standard to meet,<sup>49</sup> but to require anything less would decimate the First Amendment protections accorded commercial speech, nearly reducing it to the low level of scrutiny applied to unprotected speech.<sup>50</sup> Indeed, a lesser standard effectively would vitiate the third step of the *Central Hudson* test.

There is no question that causation is a difficult standard to meet. Tobacco advertising's impact, if any, occurs within a complex environment, with consumers receiving information from a wide variety of sources such as friends, family, news, and entertainment. Isolating the effect of advertising from that of multiple sources is a daunting task; even correlational

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49. See Vincent Blasi & Henry P. Monaghan, *The First Amendment and Cigarette Advertising*, 256 JAMA 502 (1986) (discussing constitutional issues involved in Federal legislation banning promotional advertising for cigarettes). It should be noted that the American Medical Association hired Blasi and Monaghan to write the article as a counterpoint to the tobacco industry's legal arguments. The Supreme Court has accepted something less than causation as sufficient proof, in the context of nudity-as-expression, that a public indecency law advanced a substantial government interest in maintaining societal disapproval of nudity in public and among strangers. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 571-72 (1991) (upholding a law requiring nude dancers to wear panties, in spite of its effect on the dancers' expressive rights). In his concurrence, Justice Souter admitted that there was no proof of causation, but that correlation was sufficient:

To say that pernicious secondary effects are associated with nude dancing establishments is not necessarily to say that such effects result from the persuasive effect of the expression inherent in nude dancing. It is to say, rather, only that the effects are correlated with the existence of establishments offering such dancing, without deciding what the precise causes of the correlation actually are.

*Id.* at 585-86 (Souter, J., concurring).

50. The Court has explained the minimal protection afforded unprotected speech: "Although the First Amendment does not apply to categories of unprotected speech, such as fighting words, the Equal Protection Clause requires that the regulation of unprotected speech be rationally related to a legitimate government interest." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 406 (1992) (White, J., concurring). Such regulations need only be rationally related to the government's interest, rather than directly advancing it. *Id.* at 407. If that difference were removed, then the only difference between the standard of scrutiny for unprotected speech and that applied to commercial speech would be that the former requires a legitimate government interest while the latter requires a substantial interest. The Court is clear that commercial speech deserves more than this rationally related approach. *Id.* at 422, 427. In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), the Court announced that "while we have rejected the 'least-restrictive-means' test for judging restrictions on commercial speech, so too have we rejected mere rational basis review." *Discovery Network*, 507 U.S. at 417 n.13.

evidence<sup>51</sup> remains elusive.<sup>52</sup> Although the Court never has specified the precise type or quantity of evidence necessary to prove that a law “directly advances” a governmental interest, the burden of proof is on the government and it clearly requires more than “mere speculation or conjecture.”<sup>53</sup>

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51. A correlation is evidence that two variables occur simultaneously, thereby suggesting some relationship. If a cigarette’s sales increase and a cigarette’s advertising increase are coterminous, then we generally can conclude that a relationship may exist between the two. It is not conclusive evidence, but it certainly is persuasive, especially if the correlation is strong. However, the primary weakness of such evidence is that a correlation does not unearth the nature of that relationship. It may be that the advertising caused increased sales or, conversely, that increased sales caused a company to invest additional money in advertising. As Professor Plutchik pointed out several years ago:

[A] correlational study does not imply causation, whereas an experimental one does. The fact that cigarette smoking is correlated with frequency of lung cancer does not necessarily mean that it causes it. For example, it may be that people who smoke the most also live in the larger cities where smog and exhaust fumes exist in great concentrations, which in turn increase the chances of lung cancer. Perhaps heavy cigarette smokers have a diet which is different from that of non-smokers again affecting the probability of illness. Because a large number of hypotheses are possible, any correlation does not enable a direct statement of cause. In a good experiment, it is possible to say that the conditions manipulated by the experimenter caused the reactions which were obtained.

ROBERT PLUTCHIK, FOUNDATIONS OF EXPERIMENTAL RESEARCH 29 (2d ed. 1974).

52. In fact, studies that look at the correlation between advertising and sales over time consistently find little or no relationship between the two. For example, two researchers, looking at quarterly data from 1961 to 1990, found advertising expenditures had no significant relationship with aggregate cigarette consumption in the United States. See Wilcox & Vacker, *supra* note 48, at 269. Other researchers conducted several studies with consistent results covering other time periods and geographic areas. See Lester W. Johnson, *Cigarette Advertising and Public Policy*, 7 INT’L J. OF SOC. ECON. 76, 80 (1988) (noting studies in the United States and in other countries examining the effects of bans on cigarette advertising). A few studies have found a statistically significant relationship, but even in those studies the relationship tends to be minimal. See Abernethy & Teel, *supra* note 48, at 51.

53. “This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). In *Ibanez v. Florida Department of Business & Professional Regulation*, 114 S. Ct. 2084 (1994), the Court repeated that standard, stating, “Commercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest.” *Ibanez*, 114 S. Ct. at 2088. But, this standard is not new. In considering a ban on an electric utility’s promotional advertising, the Court declared that the “impact of promotional advertising on the equity of appellant’s rates is highly speculative. . . . Such conditional and remote eventualities simply cannot justify silencing appellant’s promotional advertising.” *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 569 (1980).

During the October 1995 term the Court further clarified the standard. See 44 *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996). In 44 *Liquormart*, the plaintiffs challenged a local regulation that prohibited advertising the prices of alcoholic beverages,

There is a large body of evidence that points to peer and family influence as a causal factor in smoking. If tobacco ads were a major determinant of smoking, it seems logical that a similar body of evidence would exist to support the allegation that advertising contributes to that habit. But if the effect is very small, then we may never be able to detect it. The lack of evidence regarding tobacco advertising's impact on smoking suggests that the effect of such advertising, if any, is *de minimus*. If the effect is so small, it is unclear how restrictions on tobacco advertising will "directly advance" the government's interest in any meaningful way. Perhaps the most substantial obstacle to finding adequate proof is the difficulty in finding reasonably objective researchers to conduct research in this area.<sup>54</sup> Nonetheless, the third step of the *Central Hudson* test can-

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except in one's store, and sought a declaration that the regulation was unconstitutional. *Id.* at 1502-03. The defendant argued that the 21st Amendment effectively modifies the third step of *Central Hudson* to require only that the regulatory scheme be reasonably related to the government's interest, thereby reducing the government's burden of proof. *Id.* at 1503. The district court disagreed, and remarked that the State had failed to carry its burden of proof to show a direct "correlation between the price advertising ban and reduced consumption" of alcohol. 44 *Liquor Mart, Inc. v. Racine*, 829 F. Supp. 543, 555 (1993), *rev'd sub nom.* 44 *Liquormart v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994), *rev'd*, 116 S. Ct. 1495 (1996). The First Circuit took a different view, determining that whether the government's interest is directly advanced is not so strict a burden of proof:

The district court held that it was an issue for it to decide, unfettered, between competing witnesses, and since, on its weighing the evidence, the court was not persuaded that the State was correct, it failed. We do not think the burden that strict. It is not correctness, it is reasonableness.

44 *Liquormart*, 39 F.3d at 7.

The Supreme Court, however, reversed the circuit court's holding and ruled that the advertising ban was unconstitutional. 44 *Liquormart*, 116 S. Ct. at 1501. Writing for the Court, Justice Stevens denounced the State's lack of evidence to support its allegation that alcoholic beverage advertising causes alcohol consumption, since:

[A]ny conclusion that elimination of the ban would significantly increase alcohol consumption would require us to engage in the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest. Such speculation certainly does not suffice when the State takes aim at accurate commercial information for paternalistic ends.

*Id.* at 1510 (citation omitted).

54. For example, subsequent to publication of the DiFranza study, *supra* note 36, evidence was unearthed that strongly implicates Dr. DiFranza in predetermining the results of his study. Claude R. Martin, Jr., *Ethical Advertising Research Standards: Three Case Studies*, 23 J. ADVERTISING 17, 26 (1994). Such predetermination violates several principles of scientific research. *Id.* It should also be noted that Dr. DiFranza is the vice president of Stop Teenage Addiction to Tobacco. See Dr. J. R. DiFranza, *Many Ad Restrictions*, ADVERTISING AGE, Oct. 23, 1995, at 22. The fact that almost all of the research tying tobacco advertising to smoking behavior comes from medical researchers, rather than researchers with advertising or marketing expertise, also raises questions of objectivity because the medical profession has so actively campaigned for regulation of tobacco promotions. It appears as though some of the research used by anti-smoking advocates may lack objectiv-



not be overcome without additional evidence, unless the Court either creates a new loophole in the causation requirement or simply ignores it.

The final step of the *Central Hudson* test, whether the regulation is "narrowly tailored" to serve the stated government interest,<sup>55</sup> presents yet another barrier to a broad-based restriction or ban of cigarette advertising. Unless the Court finds the means to support or circumvent the third step, however, the fourth step is moot.

If the *Central Hudson* test is so formidable, why do anti-smoking proponents believe that a ban or restriction on advertising will survive? Some, of course, are unfamiliar with the test, but others may believe that the Supreme Court is prepared to uphold such regulation in spite of the deficient evidence.

## II. SUPREME DISDAIN FOR CIGARETTE ADVERTISING

In general, the Court has shown a relatively low regard for commercial speech. Although the First Amendment makes no explicit distinction between one form of speech and another, the Court has created a hierarchy in the protection afforded different types of speech. As Justice Stevens explains, "[P]olitical speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all."<sup>56</sup> At least one Justice has evidenced a particular distaste for advertising: Chief Justice Rehnquist.

Chief Justice Rehnquist has become "the great dissenter" in Supreme Court decisions that favor First Amendment protection for commercial speech. He dissented in *Bigelow v. Virginia*,<sup>57</sup> the case that provided the first hint that the Court might be leaning toward recognizing such protection of commercial speech.<sup>58</sup> Then, he wrote the sole dissent in *Virginia*

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ity. Of course, it is equally probable that some or much of the research used to defend tobacco advertising is similarly tainted. Indeed, some of the research is funded by the tobacco industry, and some of the researchers earn significant incomes by testifying for the industry in lawsuits. Regardless, however, of whether one has a preset agenda, this is a subject about which it is difficult for anyone, including scientists, to be objective.

55. "What our decisions require is . . . a means narrowly tailored to achieve the desired objective." *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989). The *Fox* decision represents a more recent interpretation of the fourth step. The original language of the test asked whether or not the regulation in question was "more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566.

56. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992).

57. 421 U.S. 809 (1975).

58. This hint can be seen in one of the Court's remarks, where it stated that the "fact that the particular advertisement in appellant's newspaper had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees. The State was not free of constitutional restraint merely because the advertisement

*State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*,<sup>59</sup> the case which finally endowed commercial speech with First Amendment protection.<sup>60</sup> In that dissent he revealed disdain for commercial speech, specifically mentioning cigarette promotions:

The logical consequences of the Court's decision in this case, a decision which elevates commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas, are far reaching indeed. Under the Court's opinion the way will be open not only for dissemination of price information but for active promotion of prescription drugs, liquor, cigarettes, and other products the use of which it has previously been thought desirable to discourage.<sup>61</sup>

Since that decision, Chief Justice Rehnquist has dissented in most cases that favored commercial speech in any way,<sup>62</sup> and he has consistently joined the Court's decision where commercial speech was held regulable.<sup>63</sup> In fact, he authored the Court's opinion in *Posadas de Puerto Rico Associates v. Tourism Co.*,<sup>64</sup> which frequently is noted as the decision most damaging to commercial speech rights since the *Virginia State Board of Pharmacy* decision.<sup>65</sup>

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involved sales or 'solicitations' . . . or because appellant was paid for printing it. . . ." *Id.* at 818.

59. 425 U.S. 748 (1976).

60. *Id.* at 781 (Rehnquist, J., dissenting).

61. *Id.* Justice Rehnquist stated further:

Both Congress and state legislatures have by law sharply limited the permissible dissemination of information about some commodities because of the potential harm resulting from those commodities, even though they were not thought to be sufficiently demonstrably harmful to warrant outright prohibition of their sale. Current prohibitions on television advertising of liquor and *cigarettes* are prominent in this category, but apparently under the Court's holding so long as the advertisements are not deceptive they may no longer be prohibited.

*Id.* at 789 (emphasis added).

62. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91 (1990); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *Bates v. Arizona*, 433 U.S. 350 (1977); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977).

63. *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993); *Friedman v. Rogers*, 440 U.S. 1, 2 (1979); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 477 (1978) (Rehnquist, J., concurring).

64. 478 U.S. 328 (1986).

65. One observer stated that "*Posadas* struck at the very foundation of support for commercial speech within the first amendment." David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359, 376 (1990). Another remarked, "Perhaps the best way to destroy a doctrine is from the inside. Justice Rehnquist did just

In *Posadas*, gambling casinos were forbidden to advertise their facilities to Puerto Rico residents, even though gambling was legal and ads directed at non-residents were permitted. Then Associate Justice Rehnquist purported to apply the *Central Hudson* test, but did little more than pay it lip-service.<sup>66</sup> The law's stated purpose was to protect citizens from the crime, corruption, and prostitution that gambling caused. With no evidence that gambling caused these evils and with no evidence that advertising caused gambling, Justice Rehnquist stated that the legislature obviously believed the ads would increase gambling and that "the legislature's belief [was] a reasonable one."<sup>67</sup> He likewise glossed over the test's fourth step, declaring "it is up to the legislature to decide whether or not" a less restrictive approach would satisfy the legislature's goals.<sup>68</sup> In other words, while the test was designed to be a series of barriers to government action, the Court allowed the government to decide whether or not it had passed that test.

While that decision ostensibly was based upon the *Central Hudson* test, Justice Rehnquist went on to add that because the legislature had the

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that in [*Posadas*]." Albert P. Mauro, Jr., Comment, *Commercial Speech After Posadas and Fox: A Rational Basis Wolf in Intermediate Sheep's Clothing*, 66 TUL. L. REV. 1931, 1944 (1992). But perhaps no critic of the impact of *Posadas* put it more pointedly than Professor Philip B. Kurland:

If the *Posadas* opinion had done no more than patently to misapply its own established commercial speech doctrine to what is concededly an idiosyncratic set of facts, it would simply be another example of the Court's frequently cavalier treatment of precedents in the service of desire. We have become more or less acclimated over recent years to these kinds of judicial machinations. . . . [H]owever, the Court seemed to create a novel principle that is violative of every notion of what the Free Speech Clause has stood for, from the limited Blackstonian notion of "prior restraint" through Mr. Justice Black's "absolutism."

Philip B. Kurland, *Posadas de Puerto Rico v. Tourism Company: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful,"* 1986 SUP. CT. REV. 1, 12 (1986) (footnote omitted).

66. See generally Kurland, *supra* note 65, at 12. There seems to be a virtual consensus on this point among legal scholars. See, e.g., Garrison, *supra* note 29, at 194; Barbara M. Mack, *Commercial Speech: A Historical Overview of Its First Amendment Protections and An Analysis of Its Future Constitutional Safeguards*, 38 DRAKE L. REV. 59, 66-67 (1988-89); Mauro, *supra* note 65, at 1946-48; McGowan, *supra* note 65, at 375-76; Richards, *supra* note 29, at 24-31; Ronald D. Rotunda, *The Constitutional Future of the Bill of Rights: A Closer Look at Commercial Speech and State Aid to Religiously Affiliated Schools*, 65 N.C. L. REV. 917, 925-26 (1987); Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1182 n.1 (1988). An editorial in an advertising trade magazine stated, "Although Justice Rehnquist uses the *Central Hudson* tests in arriving at this decision, he dispatches them with ease in an opinion so lacking in logic it must be an embarrassment to the other justices who joined him in the 5-4 opinion." *Prohibition Again?*, ADVERTISING AGE, July 14, 1986, at 17.

67. *Posadas*, 478 U.S. at 342.

68. *Id.* at 344.

power to ban casino gambling, it held the lesser power to ban casino advertising.<sup>69</sup> Again he specifically mentioned cigarettes:

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. Legislative regulation of products or activities deemed harmful, such as *cigarettes*, alcoholic beverages, and prostitution, has varied from outright prohibition on the one hand . . . to legalization of the product or activity with restrictions on stimulation of its demand on the other hand . . . .<sup>70</sup>

Because Justice Rehnquist's *Central Hudson* analysis already had concluded that the regulation was permissible, his gratuitous mention of a "lesser power" seemed to make no sense.<sup>71</sup> The *Posadas* decision was announced seventeen days before a congressional subcommittee began hearings on a proposed ban of cigarette advertising.<sup>72</sup> It was almost as if Justice Rehnquist were sending a signal of approval to Congress.

A few years later Justice Scalia, who frequently joins Chief Justice Rehnquist in decisions, wrote the opinion in *Board of Trustees v. Fox*.<sup>73</sup> That case, too, has been cited as lowering the protection for commercial speech. The *Central Hudson* test's fourth step originally required the regulation to be "no more extensive than necessary."<sup>74</sup> Most observers assumed this interpretation required a regulation to be the least restrictive alternative. If an alternative law would abridge less speech, the tested regulation should be rejected. Justice Scalia's decision, however, declared that the regulation need not be the least restrictive, so long as it

69. "In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling . . ." *Id.* at 345-46.

70. *Id.* at 346 (emphasis added).

71. *Id.* In fact, Justice Rehnquist distinguished this situation from cases involving advertising for contraceptive devices and abortion services, noting that the distinguishing factor is that the underlying activities in those two instances are specifically protected under the Constitution. *Id.* at 345. This implies that advertising for any product or service the Constitution does not specifically protect could be banned. Because very few products and services hold such status, this declaration would permit banning virtually all advertising, thereby effectively reversing *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976) (holding that commercial speech should be afforded some First Amendment protection).

72. *Advertising of Tobacco Products: Hearings Before the Subcomm. on Health and the Environment of the Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 167 (1986).

73. *Board of Trustees v. Fox*, 492 U.S. 469 (1989).

74. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1986).

was narrowly tailored.<sup>75</sup> This appears to allow government more discretion in its choice of regulations, permitting broader restrictions on commercial speech. Like *Posadas*, the *Fox* decision signaled anti-tobacco advertising forces to proceed with more stringent restrictions.<sup>76</sup>

Although *Posadas* and *Fox* seem to diminish the protections of *Central Hudson*, the decision most damaging to the tobacco industry could have been *United States v. Edge Broadcasting Co.*<sup>77</sup> In a seven-to-two decision, with Chief Justice Rehnquist and Justice Scalia in the majority, the Court upheld a law prohibiting advertising for lotteries, except state-run lotteries within the sponsoring state.<sup>78</sup> The Court essentially picked up the thread Chief Justice Rehnquist left in *Posadas*, again isolating cigarette ads:

As in *Posadas* . . . the activity underlying the relevant advertising — gambling — implicates no constitutionally protected right; rather, it falls into a category of ‘vice’ activity that could be, and frequently has been, banned altogether. . . . Congress has, for example, altogether banned the broadcast *advertising of cigarettes*, even though it could hardly have believed that this

75. *Fox*, 492 U.S. at 480.

76. Congressman Mike Synar noted:

Banning, and certainly the intermediate step of restricting, tobacco advertising is constitutional. The Supreme Court has long distinguished commercial speech from political speech, with the former afforded less protection.

A case decided by the Supreme Court last summer, *SUNY vs. Fox*, [sic] is widely held as easing the burden of proof the government has to show to defend actions limiting commercial speech.

Mike Synar, *Snuff Out Advertising of Smoking Products*, USA TODAY, Feb. 23, 1990, at 10A. At least one legal commentator saw this same potential in that case, and argued:

At a time of increasing health awareness, concerns about the effects of tobacco and liquor advertising on the young, and the multi-billion dollar toll that tobacco products and alcoholic beverages impose upon American society, it becomes not only desirable, but imperative that the government secure the right to limit the damage caused by these products.

With its easing of the burden of proof, *Fox* gives the legislature the right to take action. If Congress and the President accept the challenge to stop or limit Madison Avenue from hustling such harmful wares, *Fox* will help safeguard these measures from constitutional attack.

Mark A. Conrad, Board of Trustees of the State University of New York v. *Fox* — *The Dawn of a New Age of Commercial Speech Regulation of Tobacco and Alcohol*, 9 CARDOZO ARTS & ENT. L.J. 61, 105-06 (1990). It should be noted, however, the author assumes that “[e]nough data exists to establish the link between advertising and smoking” to directly advance the government’s interest. *Id.* at 96. This requires accepting mere correlational data as sufficient proof of causal connection. It is well known that scientists do not view correlation as a good indicator of causation. Indeed, there is a correlation between increases in computer usage and increases in the number of women in the workforce, but it would be silly to suggest that either has been the cause of the other.

77. 509 U.S. 418 (1993).

78. *Id.* at 436.

regulation would keep the public wholly ignorant of the availability of cigarettes.<sup>79</sup>

Once more, the Court claimed to follow the *Central Hudson* test. But the implication is that where a product or service arguably can be called a vice, the government has the greater power to ban the product, and therefore has the lesser included power of banning only the ads. In effect, this would modify the first step of the *Central Hudson* test to permit regulation of advertising that is (1) misleading, (2) for an illegal product or service, or (3) for a vice product or service. While the Court did not explicitly modify the test, there was little doubt that this was the direction the Court was taking. The signal was clear: cigarettes are vice products, and thus, cigarette ads can be restricted with impunity.<sup>80</sup>

Given the Court's recent trend, along with its low regard for commercial speech and the signals anti-smoking factions have received, it is no surprise that the fervor to regulate cigarette ads has piqued. However, the recent *44 Liquormart v. Rhode Island*<sup>81</sup> decision may thwart their expectations. That decision could prove to be a watershed commercial speech case.

In *44 Liquormart*, the Court declared unconstitutional a law prohibiting liquor stores from advertising the prices of alcoholic beverages. The decision, penned by Justice Stevens, appears to narrow the commercial speech doctrine. It draws a line between laws aimed at preserving a fair bargaining process, such as restrictions on deceptive claims, and laws that have purposes unrelated to fair dealing. States, this decision suggests, have significant leeway in regulating the former, but the latter are subject to the same high level of scrutiny used for fully-protected noncommercial speech.<sup>82</sup> Restrictions on tobacco advertising appear to fall into the latter category.

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79. *Id.* at 426, 434 (citations omitted and emphasis added).

80. The Court did not bother to define the term "vice." *Edge Broadcasting*, 509 U.S. at 426. As law enforcement officials use the term vice, gambling surely would be a vice, but cigarettes would not. On the other hand, the colloquial definition of vice would encompass cigarettes and a broad range of other products and activities. Undoubtedly, many people would consider alcohol to be a vice; still others would even call candy and desserts vices. The Court's approach conceivably could be so extensible as to include almost any commercial product or service. For a more thorough treatment of this case, see Tara L. Lavery, Note, *Commercial Speech Suffers A First Amendment Blow in United States v. Edge Broadcasting Co.*, 14 N. ILL. U. L. REV. 549, 583 (1994) (concluding that *Edge Broadcasting* "left the level of judicial protection accorded commercial speech in a state of confusion").

81. 116 S. Ct. 1495 (1996).

82. The decision states:

When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of benefi-

One statement by the Court may provide some insight into the prospects for proposed tobacco advertising regulations:

Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond “irrationally” to the truth. The 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.<sup>83</sup>

This seems to represent a notable change in the Court’s attitude toward commercial speech, as compared to *Posadas*, *Fox*, and *Edge Broadcasting*. In fact, the decision went on to virtually decimate *Posadas*, declaring that *Posadas* granted too much deference to the legislature<sup>84</sup> and that its “greater-includes-the-lesser” reasoning was constitutionally indefensible.<sup>85</sup> It likewise announced that, contrary to the implication in *Edge Broadcasting*, there is no “vice” exception to First Amendment protection for commercial speech.<sup>86</sup>

Consequently, the Court’s trend toward reducing protections for commercial speech appears to be in retreat, and the barriers to tobacco advertising regulations seem to have suddenly elevated. If such regulations are judged under the current commercial speech standards, there is a very real chance that they will be deemed unconstitutional. Through their

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cial consumer information, the purpose of its regulation is consistent with the reasons for accordng constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.

*Id.* at 1507.

83. *Id.* at 1508 (citation omitted).

84. The State argued that it was exercising appropriate legislative judgment in its price advertising ban. The Court, however, rejected that argument, stating, “Given our long-standing hostility to commercial speech regulation of this type, *Posadas* clearly erred in concluding that it was ‘up to the legislature’ to choose suppression over a less speech-restrictive policy.” *Id.* at 1511.

85. The State picked up Justice Rehnquist’s *Posadas* logic, and argued that because it had the power to ban alcohol sales, it necessarily held the power to take the “lesser” measure of banning only the advertising. The Court found no merit in that argument, saying, “Further consideration persuades us that the ‘greater-includes-the-lesser’ argument should be rejected for the . . . reason that it is inconsistent with both logic and well-settled doctrine.” *Id.* at 1512.

86. The Court explained the difficulty in acknowledging such an exception, and added, “The recognition of such an exception would also have the unfortunate consequence of either allowing state legislatures to justify censorship by the simple expedient of placing the ‘vice’ label on selected lawful activities, or requiring federal courts to establish a federal common law of vice.” *Id.* at 1513.

own actions, however, anti-smoking activists may have created yet another barrier to successful regulation of cigarette ads.

### III. CIGARETTE ADVERTISING AS POLITICAL SPEECH

Unlike commercial speech, "political" speech is considered to be at the core of the First Amendment.<sup>87</sup> Such speech includes not only discussions of politicians and political campaigns, but also the interchange of ideas concerning *issues of great public interest and concern*.<sup>88</sup> As the Court remarked in *Thornhill v. Alabama*:<sup>89</sup>

The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which in-

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87. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (asserting that the 5th and 14th Amendments "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government"); see also, *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989) (referring to political speech as a core protection of the First Amendment); *Boos v. Barry*, 485 U.S. 312, 318 (1988) (noting that courts have "consistently commented on the central importance of protecting speech on public issues"); *Federal Elections Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986) (holding § 316 of the Federal Election Campaign Act unconstitutional as applied to a nonprofit, nonstock corporation because independent expenditures constitute expression that is fundamental to First Amendment freedoms); *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985) (asserting the First Amendment "affords the broadest protection" to political expression); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (noting that truthful reporting concerning public officials is always protected under the First Amendment).

88. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) ("It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection'") (citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978)); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983) (noting that advertisements for contraceptives implies "substantial individual and societal interests" in the free flow of commercial information as well as protection from unwarranted state involvement); *Connick v. Myers*, 461 U.S. 138, 145 (1983) (noting that "the Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values" and is entitled to special protection.") (quoting *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 913 (1982)); *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (accordng First Amendment protection for an advertisement that communicated factual material of public interest); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (noting that the First Amendment reflects a "profound national commitment" to protecting debate on public issues).

89. 310 U.S. 88 (1940).



formation is needed or appropriate to enable the members of society to cope with the exigencies of their period.<sup>90</sup>

The focus on public concerns is central to much of First Amendment jurisprudence. For example, the justification for subjecting broadcast media to regulations that would be flagrantly unconstitutional if applied to newspapers or magazines is, at least in part, “to secure the public’s First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern.”<sup>91</sup>

Even before advertising was deemed to fall within the First Amendment’s sphere of influence, in *New York Times Co. v. Sullivan*<sup>92</sup> the Court construed the Constitution to protect an ad that addressed issues of public concern.<sup>93</sup> When a full-page ad protesting alleged civil rights abuses ran in the *New York Times*, the Supreme Court refused to exempt the ad from First Amendment coverage merely because it was a paid advertisement.<sup>94</sup> Distinguishing this ad from the unprotected variety, the Court labeled the ad an editorial advertisement, rather than a commercial ad, because it “communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.”<sup>95</sup> Because the case was decided in 1964, at the height of a national civil rights movement, the content of the ad implicated matters of public interest and consequence.

A few years later, yet another ad involving a matter of public concern, abortion, appeared before the Court in *Bigelow v. Virginia*.<sup>96</sup> Unlike *New York Times*, this ad was clearly commercial, and at that time commercial speech remained entirely outside the meaning of “speech” within the First Amendment. Nonetheless, the presence of this issue of public concern allowed the Court to require constitutional recognition. The Court found that the “advertisement published in appellant’s newspaper

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90. *Id.* at 101-02. This primacy is not limited to issues of political import, as the Court made clear in that opinion:

The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread *political and economic truth*.

*Id.* at 95 (emphasis added).

91. *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984).

92. 376 U.S. 254 (1964).

93. *Id.* at 265-66.

94. *Id.* at 266.

95. *Id.*

96. 421 U.S. 809 (1975).

did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.'"<sup>97</sup>

Thus, even speech that normally would be unprotected has been accorded full refuge under the First Amendment when it addressed a topic of great public interest. This does not mean that simply by including references to public issues, one can elevate lesser speech to "core" speech status.<sup>98</sup> Nonetheless, where the primary subject matter is of significant public interest, the Court repeatedly has made it clear that such speech merits the highest level of First Amendment protection.

It is the issue, and not the message, that must be important to the public. In fact, it is not necessary that anyone want to hear the message, because "a function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."<sup>99</sup> The message is protected even where it is offensive or disagreeable to a large segment of society.<sup>100</sup>

Although many people find tobacco use and tobacco advertising offensive, there are few issues today that are more political or of greater public concern. Because both the subject matter of the advertising and the advertising itself are matters of public concern, this certainly is not a case of simply including references to public issues. Tobacco use and advertising have garnered some degree of public concern for many years, but over the past decade this concern has piqued, largely because political officials have set that agenda.

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97. *Id.* at 822. The Court also remarked:

Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience — not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia.

*Id.*

98. *See generally* *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983) (reiterating that advertising that "'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech") (citations omitted); *Bigelow*, 421 U.S. at 819 (noting that *Chrestensen* disallowed the distribution of commercial handbills that asserted a message of public interest on their reverse side merely to evade the ordinance prohibiting the distribution of commercial handbills on the streets); *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942) (upholding city ordinance prohibiting the distribution of handbills concerning purely commercial business advertising).

99. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

100. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If 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.").

### A. Politics and Tobacco

Marketing professor Joel Dubow of St. Joseph's University recently commented that the FTC investigation of Joe Camel is "as much a political issue as a scientific issue and this will bring it into the political arena."<sup>101</sup> There is little question that tobacco advertising already is in the political arena. Numerous officials in the Reagan, Bush, and Clinton administrations have campaigned to ban or restrict it. Indeed, the current wave of activism against cigarette ads began in December 1985 when then U.S. Surgeon General C. Everett Koop recommended that cigarette advertising be banned.<sup>102</sup>

In recent years Dr. Koop's successors, Antonia Novello<sup>103</sup> and Joycelyn Elders,<sup>104</sup> have continued Dr. Koop's activism. Stepping well outside the traditional Surgeon General role, Dr. Novello even encouraged magazines to reject Camel ads.<sup>105</sup> In 1990, Health and Human Services (HHS) Secretary Louis Sullivan urged athletes to boycott events that tobacco companies sponsored.<sup>106</sup> Likewise, the Centers for Disease Control (CDC) also joined the crusade.<sup>107</sup> In 1993, the Clinton

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101. Stella M. Eisele, *Trade Commission May Smoke Camel's Old Joe*, AUSTIN AM.-STATESMAN, Aug. 14, 1993, at C1.

102. *Surgeon General Calls Smoking an Addiction*, N.Y. TIMES, Dec. 2, 1985, at B10. Over the years, Surgeon General Koop became even more vociferous in his efforts to curb tobacco advertising. See Irvin Molotsky, *Surgeon General Rebukes Tobacco Industry Over Combative Ads*, N.Y. TIMES, Jan. 12, 1989, at A16 (quoting the Surgeon General's attitude toward tobacco advertisements as "enough is enough!"). Toward the end of his tenure Dr. Koop expanded this effort to include restrictions on alcoholic beverage advertising. James Cox, *Industry Could Face Big Changes*, USA TODAY, May 31, 1989, at 1B-2B.

103. Like her predecessor, Novello was quite vocal in her condemnation of tobacco ads, especially Joe Camel. See Novello, *supra* note 37, at 11A; Joanne Lipman, *Surgeon General Says It's High Time Joe Camel Quit*, WALL ST. J., Mar. 10, 1992 at B1. Just one example of her public campaign was her participation in a Chicago march protesting the cartoon character. Paul A. Driscoll, *Surgeon General Marches to Protest Cigarette-smoking Joe Camel Cartoon*, AUSTIN AM.-STATESMAN, June 22, 1992, at A5.

104. See *supra* note 13. In 1994, Elders issued a new Surgeon General's report on smoking that encouraged the FTC to prohibit use of Joe Camel in cigarette advertising. Christopher Connell, *Elders Accuses Tobacco Companies of Targeting Teens to Keep Sales Up*, AUSTIN AM.-STATESMAN, Feb. 25, 1994, at A4.

105. Joanne Lipman, *Surgeon General Hasn't Slowed Joe Camel*, WALL ST. J., Apr. 14, 1992, at B11.

106. Charles Green, *Boycott Tobacco-Sponsored Events, Sullivan Urges Athletes*, AUSTIN AM.-STATESMAN, Feb. 24, 1990, at A10. Sullivan argued, "This blood money should not be used to foster a misleading impression that smoking is compatible with good health." *Id.* He asked tobacco companies to stop sponsoring these events and encouraged athletic organizations to refuse such support. *Id.*

107. *Advertising Has CDC Smoking*, INDIANAPOLIS STAR, Apr. 27, 1990, at A9. Based upon a study that found tobacco companies spent \$3.27 billion in 1988 to promote cigarettes, officials at the CDC stated that cigarette advertising diminishes the effectiveness of government health warnings. *Id.* The study stated that the ads "may contribute to the

administration endorsed an anti-tobacco bill that would ban several promotional efforts of tobacco companies.<sup>108</sup> In 1994, Attorney General Janet Reno announced she was investigating the advertising and public relations efforts of tobacco advertisers.<sup>109</sup> Then, in 1995, the Justice Department threatened to file suit against Philip Morris,<sup>110</sup> contending that the company's cigarette ads were placed in baseball, basketball, football, and hockey stadiums and arenas in violation of the twenty-four-year-old ban on broadcast advertising for those products.<sup>111</sup>

Of course, the federal government did not focus solely on the tobacco companies' promotional efforts. The underlying activity—tobacco use—was under constant bombardment, and the federal officials mentioned above also aggressively attacked cigarettes and smoking. Bolstering such efforts to diminish tobacco use, the Occupational Safety and Health Administration (OSHA) proposed to ban nearly all smoking in the workplace,<sup>112</sup> and the Department of Defense banned smoking in all military workplaces.<sup>113</sup> Each of these federal officials, agencies, and departments has played a role in limiting the freedom of smokers and has actively advanced the popularity of anti-smoking attitudes.

Two federal initiatives are particularly illustrative of the political underpinnings involved in these actions. The first, which involved the Environmental Protection Agency (EPA), provided what is perhaps the Clinton administration's most influential catalyst of public anti-smoking

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perception that smoking is less hazardous, more prevalent and more socially acceptable than it is." *Id.*

108. Steven W. Colford, *Clinton Supports Anti-Tobacco Bill*, *ADVERTISING AGE*, Nov. 29, 1993, at 4. The bill would have prohibited product placement in films, and tobacco ads in video and audio tapes, in video games, and in sports stadiums within 2,000 feet of elementary or junior high schools. *Id.* It would also have banned sponsorship of athletic, musical, and artistic events without federal government approval. *Id.* In addition, the bill would have introduced nine rotating health warnings, including one stating, "Cigarettes can kill you." *Id.* See generally H.R. 3614, 103d Cong., 1st Sess. (1993).

109. See *supra* note 3, and accompanying text.

110. See *supra* note 17. The Justice Department later filed a civil complaint against Philip Morris simultaneously with a consent agreement whereby the tobacco maker promised to remove all signs that could be seen regularly on televised football, basketball, baseball, or hockey games. Ted Kulfan, *Marlboro Is Ordered to Butt Out*, *DETROIT NEWS*, June 7, 1995, at B1; Neil A. Lewis, *Philip Morris Agrees to Keep Ads at Ball Parks off TV*, *N.Y. TIMES*, June 7, 1995, at D3.

111. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 2, 84 Stat. 89, as amended by Pub. L. No. 93-109, § 3, 87 Stat. 352 (codified as amended at 15 U.S.C. § 1335 (1994)). The Act states "After January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." *Id.*

112. See Farley, *supra* note 7, at 58.

113. Richard Tomkins, *In US, 'No Smoking' Is the Sign of the Times*, *IRISH TIMES*, May 2, 1994, at 12 (discussing the increase in U.S. restrictions on where Americans can smoke).

sentiments. That catalyst was an EPA report that ostensibly proved environmental tobacco smoke (ETS), so-called "secondhand smoke," causes an estimated 3,000 lung cancer deaths each year.<sup>114</sup>

Politics featured prominently in the controversy surrounding the EPA report. Tobacco companies, as well as some independent scientists, attacked the report as being fundamentally flawed.<sup>115</sup> Further, alleging misrepresentation of the data, tobacco sellers filed suit against the EPA.<sup>116</sup> One medical researcher even argued publicly that the EPA manipulated inconclusive statistical data to support a political crusade against smoking.<sup>117</sup> A cover story in the *National Review* claimed the Agency played fast-and-loose with the data to promote a political agenda:

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114. OFFICE OF HEALTH AND ENVIRONMENTAL ASSESSMENT, U.S. ENVIRONMENTAL PROTECTION AGENCY, *RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS*, Pub. No. EPA/600/6-90/006F (Dec. 1992). The release of this report was widely covered in the popular press worldwide. See Farley, *supra* note 7, at 58; Tomkins, *supra* note 113, at 12. The report clearly had some impact on the anti-smoking trend. For example, when Arby's and Dairy Queen converted to a no-smoking policy in their restaurants, they both pointed to the EPA's determination of ETS as harmful as a basis for their new policies. Rickard, *supra* note 5, at 34.

115. Jonathan Bor, *Debate Continues over EPA's Report on the Effects of Secondhand Smoke*, BALTIMORE SUN, Dec. 4, 1994, at 20C (noting the tobacco industry's criticism of the EPA report); Sheryl Stolberg, *Researchers Try to Separate Smoking Fact from Fiction*, L.A. TIMES, May 28, 1994, at A1, A28 (noting the tobacco industry's criticism of the EPA study as flawed with the industry contending people tend to overestimate the amount of their smoke exposure); Anastasia Toufexis, *A Health Debate That Won't Die*, TIME, Apr. 18, 1994, at 61 (noting that those in the tobacco industry challenged the study as being fundamentally flawed).

As California attorney John C. Fox points out:

EPA simply ignored the available data on workplace exposure to ETS, all of which were contained in the very same studies to spousal smoking it did consider. Of fourteen studies with workplace data, twelve report no statistically significant overall lung cancer risk to nonsmokers from exposure to ETS. Even the data considered by EPA fail[s] to support the Group A classification of ETS. . . . Of the eleven studies from the United States considered by EPA, not a single one reported a statistically significant overall increased lung cancer risk. EPA also refused to consider data from two major ETS epidemiological studies published in 1992 that are inconsistent with EPA's conclusions about ETS and lung cancer. . . .

EPA's use of a relaxed standard for statistical evaluation has triggered further criticism of its risk assessment on ETS. EPA failed to follow accepted scientific methods and its own procedural guidelines in reaching its conclusion about ETS and lung cancer.

John C. Fox, *An Assessment of the Current Legal Climate Concerning Smoking in the Workplace*, 13 ST. LOUIS U. PUB. L. REV. 591, 629 (1994).

116. Derrick Z. Jackson, *If You Can't Stand the Smoke . . .*, BOSTON GLOBE, June 27, 1993, at 73; Michael Janofsky, *Tobacco Groups Sue to Void Rule on Danger in Secondhand Smoke*, N.Y. TIMES, June 23, 1993, at A1.

117. Dr. Gary Huber, professor of medicine at the University of Texas, claims to support bans on public smoking, but is concerned that science has been corrupted to support

Most supporters of such measures probably believe that the EPA's report presents definitive scientific evidence that 'second-hand smoke kills.' But a closer look shows that the EPA manipulated data and finessed important points to arrive at a predetermined conclusion. The agency compromised science *to support the political crusade against smoking* . . . .

Even after the EPA massaged the data, the vast majority of the studies still did not show a significant association between ETS and lung cancer . . . .

If your main goal is improving 'the public health,' you may be inclined to shade the truth a bit if it helps to make smoking less acceptable and more inconvenient.<sup>118</sup>

The EPA report also sparked a bonfire of newspaper editorials condemning the Agency's methods.<sup>119</sup> In spite of this dispute, a recent survey

this political cause. He argues that secondhand smoke is "so highly diluted that it is not even appropriate to call it smoke." Dick Stanley, *Texas Professor Questions Secondhand Smoke Claims*, AUSTIN AM.-STATESMAN, July 18, 1994, at A1. He notes that, of 30 statistical studies on the relationship between secondhand smoke and lung cancer, "six reported a statistically significant association . . . and 24 . . . reported no statistically significant effect," but the EPA report concluded nonetheless that 24 of the studies found an increased risk of cancer. *Id.*

Upon hearing of Huber's remarks another researcher, Alvan Feinstein of Yale University, admitted that, "Yes, it's rotten science, but it's in a worthy cause. It will help us to get rid of cigarettes and to become a smoke-free society." Dave Shiftlett, *Odor of Rotten Science Fills the Air*, ROCKY MOUNTAIN NEWS, Mar. 28, 1994, at 37A. Other allegations include that, while 32 published studies of the effect of ETS on non-smoking spouses existed at the time of the EPA analysis, the agency nevertheless ignored all of those studies conducted outside the United States. Further, though *none* of the remaining 13 studies demonstrated a significant relationship between spousal smoking and lung cancer in non-smokers, the agency was able to side-step that problem by dismissing two of the studies (leaving only 11 of the original 32 studies for the EPA to consider), expanding the definition of what constitutes a health risk, and then re-analyzing the results. *Id.* Science writer Michael Fumento commented that the "11 studies together actually reflected 10 studies that showed no statistically significant increases in cancer and only one that did. When the EPA says that the weight of 11 studies showed harm from passive smoking, it really meant one positive combined with 10 neutrals." *Id.*

118. Jacob Sullum, *Just How Bad Is Secondhand Smoke?*, NAT'L REV., May 16, 1994, at 51-52, 54 (emphasis added). A couple of years ago marketing professor, Jean Boddewyn, discussing tobacco advertising research, observed, "[w]e should not be surprised that science becomes politicized when major issues, such as health, and 'the establishment' that champion and administer the resulting policies are at stake." Boddewyn, *supra* note 44, at 107.

119. An editorial in THE WASHINGTON TIMES stated that "[o]nly by giving more weight to studies that link ETS to lung cancer than to those that do not has EPA been able to portray it as the aforementioned serious public health impact." *Politically Correct Health Risks*, WASH. TIMES, Nov. 4, 1994, at A20. Another editorial declared: "Some of the world's most barbarous acts, from slavery to genocide, have been facilitated by bogus science. The Food and Drug Administration's Dr. David Kessler, along with Rep. Henry Waxman and Environmental Protection Agency head Carol Browner, are modern-day leaders of that ugly scheme." Walter Williams, *Bogus Science Breeding Ground for Totali-*

found that approximately eight out of ten Americans believe secondhand smoke is a health risk.<sup>120</sup> Thus, it appears that the EPA may be winning in the court of public opinion.

The second instance of visible political involvement entailed the FDA. In 1994, FDA Commissioner David Kessler tried to secure jurisdiction over tobacco so that the Agency might regulate tobacco and its ads.<sup>121</sup> Later, in mid-1995, the Agency formally concluded that nicotine was a drug, and that it should be regulated.<sup>122</sup> Rather than push forward with regulatory plans, however, the Agency passed the ultimate decision regarding tobacco regulation to the President. One news report attributed the Agency's decision to politics:

But in a sign of the delicacy of the issue — and of the opposition in the Republican Congress to new restraints on smoking — the agency is not using the authority it has to act on its own. Instead, it has thrown the issue to the President, by submitting proposed regulations to the White House. The proposals themselves are modest, involving only new limits on tobacco advertising and measures to curtail sales to young people.<sup>123</sup>

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*tarianism*, STATE J.-REG., Nov. 3, 1994, at 6. One scientist stated bluntly that the "EPA practiced every known trick in the bad-science book to bend, sort and prostitute data to arrive at an erroneous conclusion that secondhand smoke is a class A carcinogen." Paul E. Grindrod, *EPA Twisted Data in Secondhand Smoke Report*, CAPITAL TIMES, Aug. 11, 1994, at 12A; see also Robert Scheer, *EPA Blows Smoke on Risk of Breathing It*, L.A. TIMES, May 29, 1994, at M5 (criticizing ETS linking secondhand smoke to lung cancer). Some observers have pointed to the EPA report as an additional example of government misusing science to support a variety of political objectives, from environmental protection on the left to abortion prevention on the right:

Most Americans, including many smokers, no doubt agree that public policy should, within reasonable limits, discourage the use of tobacco. After all, it is widely accepted that cigarette smoking in particular is the single greatest cause of premature disease and death in the United States.

Most Americans, however, just as surely would condemn the distortion of scientific data to advance the anti-tobacco movement, or any other political objective. But that is exactly what the U.S. Environmental Protection Agency has done. . . . [O]bjective analysis of the data isn't keeping the EPA and its congressional allies from pushing their overkill war on secondhand smoke. . . .

The misuse or politicization of science is becoming almost commonplace as justification for extending government regulation, especially on environmental and health issues. A series of articles last year in *The New York Times* chronicled a long list of the resulting excesses.

Robert J. Caldwell, *Lost in the Smoke Screen: Bad Science Makes Bad Law*, SAN DIEGO UNION-TRIB., May 22, 1994, at G-4.

120. ABC News conducted the poll. John Brennan, *Polls Find U.S. Is Unwilling to Force Tobacco's Last Gasp*, L.A. TIMES, Apr. 27, 1994, at A5.

121. See *supra* note 4 and accompanying text.

122. Philip J. Hilts, *Tobacco Held to Be Drug That Must Be Regulated*, N.Y. TIMES, July 13, 1995, at A18.

123. *Id.*

The reluctance of FDA officials to proceed with Kessler's earlier effort, along with the "modesty" of the proposals, are clear signals that tobacco is a political "hot potato." The division of opinion on this issue seems to fall roughly along party lines.<sup>124</sup> This division is obvious from the enormous sums of money that tobacco companies have contributed to Republican campaign coffers.<sup>125</sup> At least one Democrat, Senator Wendell Ford of Kentucky, assailed Kessler as a "headline-grabbing extremist," and charged that "Kessler's latest move has nothing to do with children and everything to do with expanding FDA's reach into the private lives of Americans."<sup>126</sup>

A short time later, predicting that President Clinton would condone FDA jurisdiction over tobacco, as Kessler had requested, a news story in *Newsweek* concluded that "it could be a boon for Clinton. Democratic consultants have argued that a hard line against an unpopular industry may be even more beneficial than his recent attacks on the NRA."<sup>127</sup> Two weeks later, after the President did as predicted, the same magazine noted:

Clinton believes that a war against tobacco will be a political winner — not just in his family but in millions of households. . . . As a political venture, Clinton's move won't be hazardous to his health. Anti-smoking sentiment is now squarely in the cultural mainstream. . . . And aides know bashing tobacco will play well in health-conscious, vote-rich California. . . . In the end, the administration can gain points for picking a fight with an unpopular industry, but it may not do much to stop kids from smoking.<sup>128</sup>

It appeared as though jurisdiction over tobacco promotions had been moved from the FTC to the FDA simply because the latter seemed more

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124. The American Bar Association recognized the division in a recent article in its main publication, stating, "With Republicans controlling Congress, an onslaught of federal legislation and regulation aimed at cigarette smoking appears unlikely, at least for now." James Podgers, *Where There's Smoke*, A.B.A. J., July 1995, at 50. Reacting to this apparent division along party lines, 42 Republican scientists and doctors joined in writing a letter urging House Speaker Newt Gingrich to "[d]isassociate yourself, and encourage your fellow Republicans to disassociate themselves, from the tobacco industry." Mike Feinsilber, *GOP Stance Piques Anti-smokers*, AUSTIN AM.-STATESMAN, July 23, 1995, at A8.

125. Jane Fritsch, *Tobacco Companies Pump Cash into Republican Party's Coffers*, N.Y. TIMES, Sept. 13, 1995, at A1. In the first half of 1995, the tobacco industry invested five times as much in the Republican Party as the industry did in the same period during 1994. *Id.*

126. Doug Levy, *Hot Debate Over Regulating Teen Smoking*, USA TODAY, July 14, 1995, at 10D.

127. John Leland et al., *A Whiff of Smoking Guns*, NEWSWEEK, Aug. 7, 1995, at 66, 67.

128. Bob Cohn & Bill Turque, *Firing Up the Politics of Teen Smoking*, NEWSWEEK, Aug. 21, 1995, at 25-26.



willing to regulate those marketing efforts without regard to whether they actually cause people to smoke.<sup>129</sup> Congressman Scotty Baesler, a Democrat from Kentucky, responded to the President's proposal, stating, "This is the most political thing I have ever seen."<sup>130</sup> Like the EPA's report, politics seem to be at the root of executive and administrative maneuvering that would draw tobacco within the FDA's sphere of influence.

But members of Congress too, have campaigned actively against tobacco ads. In 1986 Congressman Mike Synar introduced a bill to ban tobacco promotions,<sup>131</sup> and bills to regulate tobacco ads have been introduced every year since then. The bills range in scope, and include measures to ban all forms of tobacco advertising;<sup>132</sup> prohibit the use of certain media or forums to promote tobacco;<sup>133</sup> restrict certain elements of the ads, such as pictures and color;<sup>134</sup> withdraw tax deductibility of tobacco promotions;<sup>135</sup> add warning labels about the addictive nature of smoking;<sup>136</sup> amend the Federal Food, Drug, and Cosmetic Act to allow for the

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129. The FTC recently had found insufficient evidence to support regulation of Camel's advertising. See *supra* note 41. Kessler, however, campaigned aggressively for jurisdiction over this material with the implicit promise to regulate it. The FDA has a tradition of being more willing than the FTC to restrict information to consumers. As marketing professor Howard Beales explained in the context of food advertising, "Rather than attempting to dictate market outcomes, the FTC has sought to ensure that the information provided by advertising and other forms of marketing communication is accurate and not misleading," while by contrast, "[r]ather than simply providing information and allowing consumers to choose, the FDA's regulatory approach seeks to restrict the availability of information on food that the regulators believe consumers should choose." J. Howard Beales, *Regulatory Consistency and Common Sense: FTC Policy Toward Food Advertising Under Revised Labeling Regulations*, 14 J. PUBLIC POLICY & MKTG. 154, 155 (1995).

130. Ira Teinowitz & Keith J. Kelly, *Tobacco Plan Sparks Action by Legislators*, ADVERTISING AGE, Aug. 21, 1995, at 3, 6.

131. See H.R. 4972, 99th Cong., 2d Sess. (1986).

132. See *id.*

133. See H.R. 3614, 103d Cong., 1st Sess. (1993).

134. See, e.g., H.R. 5041, 101st Cong., 2d Sess. (1990); H.R. 1493, 101st Cong., 1st Sess. (1989); H.R. 1250, 101st Cong., 1st Sess. (1989).

135. See, e.g., H.R. 2534, 103d Cong., 1st Sess. (1993); H.R. 1969, 103d Cong., 1st Sess. (1993); H.R. 1230, 103d Cong., 1st Sess. (1993); H.R. 5499, 102d Cong., 2d Sess. (1992); S. 557, 102d Cong., 1st Sess. (1991); H.R. 440, 102d Cong., 1st Sess. (1991); S. 776, 101st Cong., 1st Sess. (1989); H.R. 412, 101st Cong., 1st Sess. (1989); H.R. 3503, 100th Cong., 1st Sess. (1987); see also S. 609, 103d Cong., 1st Sess. (1993) (limiting tax deductions for expenses relating to advertising).

136. H.R. 2147, 103d Cong., 1st Sess. (1993); H.R. 1966, 103d Cong., 1st Sess. (1993); S. 556, 102d Cong., 1st Sess. (1991); S. 777, 101st Cong., 1st Sess. (1989); S. 2402, 100th Cong., 2d Sess. (1988); H.R. 4793, 100th Cong. 2d Sess. (1988).

regulation of tobacco advertising,<sup>137</sup> and require the FTC to conduct studies of tobacco ads.<sup>138</sup>

In addition to tobacco advertising, bills have been aimed at tobacco use. For example, current law permits the federal government to withhold substance abuse prevention funds from states that fail to prohibit tobacco sales to minors.<sup>139</sup> Similarly, a recent bill would ban smoking in buildings visited regularly by ten or more people each week.<sup>140</sup> As one news story exclaimed, "President Clinton and a growing congressional contingent have declared all-out war on tobacco."<sup>141</sup>

This war is not limited to federal actions, however. At least forty-six states and five hundred local governments have placed restrictions on smoking in malls, restaurants, workplaces, and other public places.<sup>142</sup> The New Jersey State Senate, for instance, recently approved legislation banning cigarette ads in the Meadowlands Sports Complex.<sup>143</sup> Similarly, former New York Governor Mario Cuomo proposed a bill to eliminate outdoor tobacco advertising.<sup>144</sup> Bills also have been introduced in California and Vermont to stop displays of Joe Camel,<sup>145</sup> and a city official in Allentown, Pennsylvania, asked the town's daily newspaper to refuse cigarette ads.<sup>146</sup> Maryland adopted statewide restrictions that ban smoking in virtually all workplaces,<sup>147</sup> and, in California, local governments passed approximately two hundred anti-smoking ordinances between 1992 and 1994.<sup>148</sup>

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137. S. 672, 103d Cong., 1st Sess. (1993); S. 2298, 102d Cong., 2d Sess. (1992); H.R. 4350, 102d Cong., 2d Sess. (1992); H.R. 1494, 101st Cong., 1st Sess. (1989); S. 769, 101st Cong. 1st Sess. (1989).

138. H.R. 4279, 103d Cong., 2d Sess. (1994). The focus of this bill is to determine the nature and effects of ads targeted at women and minorities.

139. 42 U.S.C. § 300x-26 (1994).

140. H.R. 3434, 103d Cong., 2d Sess. (1993).

141. Wayne Hearn & Laurie Jones, *Kicking Butts: Anti-Smoking Troops Relish Victories, but the War Isn't Over Yet*, AM. MED. NEWS, Apr. 25, 1994, at 3.

142. *Id.* In fact, in 1970, only 14 states had laws restricting smoking in public places, but by 1993, that number had risen to 45. Peter D. Jacobson et al., *The Politics of Antismoking Legislation*, 18 J. HEALTH POL. POL'Y. & L. 787, 788 (1993). As recently as 1985, only about 90 local communities had such restrictions, but within five years that number exceeded 480. *Id.*

143. Diamond, *supra* note 8, at A01.

144. Riccardo A. Davis, *Cuomo Seeks Cig Ad Ban*, ADVERTISING AGE, Apr. 19, 1993, at 4.

145. See Teinowitz & Jensen, *supra* note 11, at 46.

146. Patrick Reilly, *Ad Bans Go Local: City Official Asks Paper to Drop Tobacco*, ADVERTISING AGE, Jan. 9, 1989, at 42.

147. See Farley, *supra* note 7, at 58.

148. Linda Himelstein et al., *Tobacco: Does It Have a Future?*, BUS. WK., July 4, 1994, at 28.

Even the courts have become a part of this fray. In 1994, the California Supreme Court announced that the Federal Cigarette Labeling and Advertising Act does not preempt states from regulating Joe Camel advertising,<sup>149</sup> and the New Jersey Supreme Court ruled that local governments have the authority to ban cigarette vending machines.<sup>150</sup> In 1995, the Second Circuit permitted a suit seeking a ban in two fast-food chains to proceed under the Americans with Disabilities Act,<sup>151</sup> and the Florida Supreme Court declared that a city policy against hiring smokers does not invade job applicants' privacy rights.<sup>152</sup> In each of these cases the courts are breaking new ground, allowing suits or regulations where none previously had been permitted, all in the name of curtailing tobacco use.

This list represents only a portion of the government actions being taken to eliminate or restrict tobacco use and advertising. A recent article in the *Journal of Health Politics, Policy and Law*, entitled "The Politics of Antismoking Legislation," details some of the political maneuvering that has occurred outside of the public spotlight.<sup>153</sup> In light of all these facts, any argument that tobacco advertising and tobacco are not *political* issues strains credibility. It is probably safe to conclude that there are few other issues that have so dominated the attentions of federal, state, and local officials, and have generated so much *interest and controversy* among the citizenry in the 1990s.

### B. A Public Controversy

One agency of the federal government already has declared smoking a public controversy. In 1967, responding to a filed complaint, the Federal Communications Commission (FCC) ordered in accordance with its "Fairness Doctrine," a broadcast station airing cigarette ads should allot free time to the anti-smoking viewpoint.<sup>154</sup> The FCC premised its finding explicitly on the public interest and controversy concerning tobacco use. The Commission believed that "a station which presents such advertisements has the duty of informing its audience of the other side of *this controversial issue of public importance* — that, however enjoyable, such

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149. *Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73, 78 (Cal.), *cert. denied*, 115 S. Ct. 577 (1994).

150. *C.I.C. Corp. v. Township of E. Brunswick*, 638 A.2d 812 (N.J. 1994) (affirming lower court's finding).

151. *Staron v. McDonald's Corp.*, 51 F.3d 353, 357-58 (2d Cir. 1995).

152. *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1028-29 (Fla. 1995), *cert. denied*, 116 S. Ct. 701 (1996).

153. *See generally* Jacobson et al., *supra* note 142, at 789.

154. *In re Compliant Directed to Station WCBS-TV, New York, N.Y., concerning Fairness Doctrine, Action on Compliant*, 8 F.C.C.2d 381, 382, *aff'd and clarified by memorandum opinion and order*, 9 F.C.C.2d 921, 949 (1967).

smoking may be a hazard to the smoker's health."<sup>155</sup> The United States Court of Appeals for the District of Columbia Circuit expressly affirmed the Commission's conclusion.<sup>156</sup> This treatment spurred Judge J. Skelly Wright, in a later case concerning the ban of cigarette advertising from broadcast airwaves, to remark:

It would be difficult to argue that there are many who mourn for the Marlboro Man or miss the ungrammatical Winston jingles. Most television viewers no doubt agree that cigarette advertising represents the carping hucksterism of Madison Avenue at its very worst. Moreover, overwhelming scientific evidence makes plain that the Salem girl was in fact a seductive merchant of

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155. *Id.* (emphasis added). For a review of that decision, see Robert D. Lynd, *Banzhaf v. FCC: Public Interest and the Fairness Doctrine*, 23 *FED. COMM. B.J.* 39, 49-53 (1969); Norman P. Leventhal, *Caution: Cigarette Commercials May Be Hazardous to Your License — The New Aspect of Fairness*, 22 *FED. COMM. B.J.* 55, 92-121 (1968). The FCC's decision led to a heavy barrage of anti-smoking commercials during the next two years, eventually contributing to the prohibition of broadcast cigarette commercials. See 15 U.S.C. § 1335 (1994) (making it "unlawful to advertise cigarettes . . . on any medium of electronic communication"); see also *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 587-89 (D.D.C. 1971) (Wright, J., dissenting) (discussing the history of 15 U.S.C. § 1335), *aff'd*, 405 U.S. 1000 (1972).

Eventually this application of the Fairness Doctrine became a problem because it mandated free air time for the anti-smoking advertisements. That made it attractive for advocates of various issues, such as environmental protection groups, to assert that advertisements for products other than cigarettes also concerned controversial issues of public importance. For example, a few years later, the United States Court of Appeals for the District of Columbia Circuit held that ads for automobiles with large engines involved controversial issues related to air pollution. *Friends of the Earth v. FCC*, 449 F.2d 1164 (D.C. Cir. 1971). As an apparent result, in 1974, the FCC reversed its earlier position regarding product commercials, stating that "[w]e believe that standard product commercials, such as the old cigarette ads, make no meaningful contribution toward informing the public on any side of any issue." *In re The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Fairness Report*, 48 F.C.C.2d 1, 24 (1974); see Gregory T. Wuliger, *The Constitutional Rights of Puffery: Commercial Speech and the Cigarette Broadcast Advertising Ban*, 36 *FED. COMM. L.J.* 1 (1984) (attacking the constitutionality of the Public Health Cigarette Smoking Act of 1969 as violation of the First Amendment). Eventually, under Reagan Administration pressure to deregulate, the FCC abolished the Fairness Doctrine altogether. *In re Complaint of Syracuse Peace Council against Television Station WTVH*, 2 F.C.C.R. 5043, 5057 (1987); see Mark A. Conrad, *The Demise of the Fairness Doctrine: A Blow for Citizen Access*, 41 *FED. COMM. L.J.* 161, 163 (1989) (arguing that *Syracuse Peace Council* was decided incorrectly).

156. *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied sub nom. Tobacco Inst., Inc. v. FCC*, 396 U.S. 842 (1969). In *Banzhaf* the Court declared:

[W]here, as here, one party to a debate has a financial clout and a compelling economic interest in the presentation of one side unmatched by its opponent, and where the public stake in the argument is no less than life itself — we think the purpose of rugged debate is served, not hindered, by an attempt to redress the balance.

*Id.* at 1103.

death — that the real ‘Marlboro Country’ is the graveyard. But the First Amendment does not protect only speech that is healthy or harmless. The Court of Appeals in this circuit has approved the view that ‘cigarette advertising implicitly states a position on a matter of public controversy’. . . . For me, *that finding is enough to place such advertising within the core protection of the First Amendment*.<sup>157</sup>

Yet, the public interest and controversy surrounding this issue a quarter century ago was far less intense than today.

Over the past few years private organizations associated with the health industry have taken an active lead in the anti-smoking and anti-tobacco advertising crusades. In 1986, the AMA joined Surgeon General Koop in his call for a ban on tobacco advertising.<sup>158</sup> Since then, the American Heart Association, American Cancer Society, and American Lung Association have joined the battle, combining forces to condemn the Joe Camel ad campaign.<sup>159</sup>

Some activist groups have formed with the specific objective of combatting the tobacco industry. These groups include Stop Teenage Addiction to Tobacco,<sup>160</sup> the Coalition on Smoking OR Health, Action on Smoking and Health, the Tobacco Products Liability Project,<sup>161</sup> and the Group Against Smoking Pollution.<sup>162</sup> Broader interest organizations, including the Advocacy Institute and Ralph Nader’s Public Citizen Litigation Group, have joined these anti-smoking groups.<sup>163</sup>

While not all efforts are as organized as those mentioned above, many other groups and individuals have taken up the anti-tobacco banner. Reverend Butts, of the Abyssinian Church of Harlem, and his supporters started a movement when they began whitewashing tobacco billboards in Harlem.<sup>164</sup> Similar actions quickly followed in several other metropolitan

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157. *Capital Broadcasting*, 333 F. Supp. at 587 (Wright, J., dissenting) (emphasis added) (footnote omitted).

158. The AMA’s House of Delegates was nearly unanimous in its support of a resolution to call for a federal law banning all tobacco advertising. George E. Curry, *AMA’s Proposed Tobacco-Ad Ban Lights Legal Fire*, CHI. TRIB., Dec. 15, 1985, § 3 at 21.

159. These three groups petitioned the FTC to “take immediate action against RJR’s cartoon camel.” Judann Dagnoli, ‘JAMA’ Lights New Fire Under Camel’s Ads, ADVERTISING AGE, Dec. 16, 1991, at 3.

160. See Rich, *supra* note 9, at 54.

161. Claudia MacLachlan, *In the Trenches: Activists Call It a Movement*, NAT’L L.J., May 2, 1994, at A21.

162. Frederic M. Biddle, *Storekeepers Caught in a Cloud of Smoke*, BOSTON GLOBE, Aug. 29, 1993, at 75.

163. See MacLachlan, *supra* note 161.

164. Bob Groves, *Smoke and Brimstone; Harlem Pastor Trumpets Sins of Advertising*, THE RECORD, Oct. 14, 1990, at LO1.

areas.<sup>165</sup> In addition, many businesses have acquiesced to anti-smoking sentiments. McDonald's, Taco Bell, and Jack-in-the-Box all have declared their company-owned restaurants, totalling over five thousand, to be smoke-free.<sup>166</sup> Public pressure to end smoking is at a fever pitch.

Not everyone supports the crusade to end smoking. Approximately fifty-two million Americans continue to smoke, and many of them are fighting back. Activist organizations, including the National Smokers Alliance,<sup>167</sup> the United Smokers Association,<sup>168</sup> and the American Puffer Alliance, have sprung up to fight for smokers' rights.<sup>169</sup> When one town considered a ban on two-for-one cigarette promotions, a local radio talk show host encouraged listeners to call the responsible government agency and protest.<sup>170</sup> Likewise, popular radio and television personality Rush Limbaugh frequently ridicules the anti-smoking crusade.<sup>171</sup> When OSHA proposed regulations to restrict smoking in virtually every workplace, the Agency received about fifty thousand letters, most of which opposed the action.<sup>172</sup>

Numerous commentators have argued against limiting tobacco ads, pointing out that it would severely harm the media that relies on such advertising,<sup>173</sup> it would unfairly deprive companies of hundreds of millions of dollars already invested in advertising campaigns,<sup>174</sup> and it is paternalistic.<sup>175</sup> Focusing on the product, others argue that banning

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165. Alison Fahey and Judann Dagnoli, *PM Ready to Deal with Outdoor Ad Foes*, ADVERTISING AGE, June 18, 1990, at 3. This approach has been used in Houston, Baltimore, and Chicago, among others. *Id.*

166. See Taylor, *supra* note 5, at A10.

167. See *id.* (quoting one smoker who said, "'At this point it has nothing to do with whether I like to smoke or not. It has to do with resenting being told what I can and can't do.'")

168. Kenton Robinson, *Where There's Smoke, There's Fight: Fuming For Freedom*, HARTFORD COURANT, Jan. 11, 1994, at A7 (describing the effects of the United Smokers Association).

169. *Id.*

170. Biddle, *supra* note 162, at 75.

171. Jan Glidewell, *They're All Blowing Smoke*, ST. PETERSBURG TIMES, May 28, 1994, at 8 (discussing how the anti-smoking debate emerged as a political issue).

172. Kara Swisher, *OSHA Flooded with Angry Mail Opposing Workplace Smoking Ban*, WASH. POST, Aug. 13, 1994, at B1. The Agency also has received almost a dozen death threats. *Id.*

173. See *supra* notes 8-18 and accompanying text (discussing the restrictions on tobacco advertising).

174. See Brett Shevack, *Ban Joe Camel Campaign? That's Unfair*, ADVERTISING AGE, Sept. 20, 1993, at 28 (arguing that the issue of cigarette marketing must be addressed decisively and not on a case-by-case basis).

175. James J. Kilpatrick, *A Cigarette Ad Smoke Screen*, NATION'S BUS., Feb. 1986, at 6 (contending that "in a free society, the people must be free to do foolish things").

cigarettes would create illegal trafficking and crime,<sup>176</sup> and that smoking bans already have cost restaurants significant losses in sales.<sup>177</sup> To many of those who are now fighting back, this is simply a matter of civil rights.<sup>178</sup> Smokers are seeing their freedoms evaporate as quickly as the smoke they exhale.

There is evidence that even those who do not actively fight the anti-smoking pressures, including some *non*-smokers, may rebel against these efforts in other ways. One marketing consultant suggests some adults are tired of the "politically correct" healthy life and have started smoking as a form of revolt.<sup>179</sup> One study found that efforts to discourage cigarette sales to children actually encourage underage smoking,<sup>180</sup> and some marketing executives believe that the negative publicity surrounding Joe Camel actually could be increasing the brand's market share.<sup>181</sup> In at least one case a smoker reacted violently to the anti-smoking pressure: after a group of people in a restaurant complained about her smoking, Daphnye Luster left the restaurant, returned with a shotgun, and killed one of the women who complained.<sup>182</sup>

This "boomerang effect" of anti-smoking activism is apparent in the upsurge in popularity of cigar smoking. Between 1989 and 1993, cigar sales rose twenty-four percent, cigar clubs sprung up in cities across the

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176. James Flanigan, *Cigarette Fight Is Really About Money*, AUSTIN AM.-STATESMAN, Apr. 17, 1994, at H4 (arguing that a ban on cigarettes would create a \$100 billion a year U.S. illegal market).

177. R. Michelle Breyer, *Eateries Say Profits Going Up in Smoke*, AUSTIN AM.-STATESMAN, Apr. 17, 1994, at H1 (reporting a Southern California Business Association finding that a smoking ban caused an average decline of 24% in restaurant sales).

178. See Robinson, *supra* note 168. David Brenton, founder of the Smokers' Rights Alliance, believes the government has gone too far in forcing us to adopt what it determines to be a healthy lifestyle:

If in fact it's my duty as a citizen of the United States to live as long as I can, and to produce as much wealth as I possibly can so I can pay as many taxes as I possibly can, then I don't live in a free state. I live in a fascist society.

*Id.*

179. See Tomkins, *supra* note 113. Faith Popcorn, a New York marketing consultant, refers to this as a "pleasure revenge." *Id.*

180. Paul Raeburn, *Tobacco Industry Fails in Efforts to Curb Youth Market, Studies Find*, INDIANAPOLIS STAR, Sept. 1, 1992, at A3. Dr. Joseph R. DiFranza conducted a study of a tobacco industry campaign ostensibly designed to discourage children from smoking. *Id.* However, because smoking was depicted as an adult activity, Dr. DiFranza concluded that smoking is presented as a "forbidden fruit." *Id.*

181. See Joanne Lipman, *Joe Camel's Bad Press Could Be Boosting Brand*, WALL ST. J., May 14, 1992, at B1. Between December 1991 and May 1992, more than 500 newspaper and magazine articles mentioned Joe Camel, and virtually all of them did so in a negative context. *Id.* Some observers caution that this invites teens and pre-teens to smoke as an act of rebellion. *Id.*

182. *Woman Convicted in Slaying over Dispute About Smoking*, L.A. TIMES, May 7, 1994, at A22.

country, special cigar dinners (termed "cigar smokers") became popular at high-priced hotels, and even cigar clubs for women, who traditionally were not considered cigar smokers, became popular.<sup>183</sup> The Cigar Association of America states that sales in the first five months of 1995 were just over forty-five percent higher than during the same period in 1994.<sup>184</sup>

President Clinton's recent proposal to curtail cigarette manufacturers' sponsorship of sporting events<sup>185</sup> has the potential to pull large numbers of sports enthusiasts into the debate. Automobile racing, for example, is heavily dependent on tobacco company sponsors. A decrease in tobacco sponsorship could hurt the sport and, ultimately, the spectators.<sup>186</sup> The impact on spectators may explain why an Associated Press poll found that fifty-eight percent of Americans disagreed with the President's call to ban tobacco brand names on t-shirts and sporting events,<sup>187</sup> even though fewer than half of that group smokes,<sup>188</sup> and even though two-thirds of Americans support increased government restrictions on cigarette advertising.<sup>189</sup>

This is not a one-sided issue. Indeed, the smoking debate is one of the most controversial issues of our time. And, because the debate encompasses serious health concerns, it undoubtedly is one of the most important issues. Because the smoking debate is such a major public issue,

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183. William G. Flanagan & Toddi Gutner, *Cigar Power*, FORBES, Aug. 1, 1994, at 100. These authors attribute the rise of cigar smoking to anti-smoking pressures, stating:

Nowadays, lighting up a lonsdale is rebelling against political correctness. It's a way of telling the antismoking crusaders and other busybodies to go to hell. And cigar smokers are joining together in defiance to enjoy their forbidden fruit. Cigar clubs are popping up from Cincinnati to Norfolk, from Milwaukee to Tokyo.

*Id.*

184. Todd Pruzan, *Stogies for Fogies? Puffing Now Upscale*, ADVERTISING AGE, Aug. 21, 1995, at 1.

185. Bruce Horowitz et al., *Clinton Lights a Fire Under Smokes and Sports*, USA TODAY, Aug. 11, 1995, at B1 (reporting that President Clinton proposed a ban on cigarette brand names in sports sponsorship).

186. *Id.* Andy Hall, a spokesman for NASCAR, the sanctioning body for stock car racing, stated that "[i]t could create additional financial hardships for sports fans." *Id.*; see also Kate Fitzgerald, *Tobacco Plan Aims to Choke Sports Sponsorship*, ADVERTISING AGE, Aug. 14, 1995, at 33 (discussing the impact of Clinton's ban on women's tennis and stock car racing in particular); Roger Thurow et al., *Ban on Tobacco Ads Might Stall Auto Racing*, WALL ST. J., Aug. 14, 1995, at B1 (describing the close ties between auto racing and tobacco companies).

187. See Howard Goldberg, *Poll: Americans Want Clinton to Back Off Tobacco Ad Attack*, AUSTIN AM.-STATESMAN, Aug. 23, 1995, at A10 (discussing a poll in which 1,007 adults were surveyed between August 16 and 20, just a few days after President Clinton announced his proposal).

188. See Farley, *supra* note 7, at 61. The segment of the population that smokes is reported to be about 26%. *Id.*

189. See Colford & Teinowitz, *supra* note 10, at 1.



speech regarding this topic deserves “uninhibited, robust, and wide-open” debate.<sup>190</sup> The government, however, endorses only one viewpoint.

### C. *The Official View*

Efforts to ban tobacco advertising began with Surgeon General Koop’s call-to-arms, which Congress quickly followed with a bill that died in committee. Although a few members fought vociferously, year after year, to pass a tobacco bill, Congress has never been able to agree on the terms of a bill. As a result, those representatives and government officials whose efforts were defeated in Congress have engaged in a campaign to sway public opinion, thereby convincing individuals, private industries, state and local governments, and Congress to take action. Officials have even used advertising to spread the anti-tobacco-advertising message.<sup>191</sup>

As then FTC Chairman Daniel Oliver remarked a few years ago:

The American marketplace for ideas is decentralized and occurs in numerous arenas: in Congress, in academia, in books and pamphlets, in newspapers, over the airways, over backyard fences, at the workplace, door-to-door. Seldom does the government step in to crown a victor or promulgate an official version of the truth. In the debate over public policies regarding smoking . . . the government has not only based its policies on an official version of the truth, it has compelled private citizens to propagandize in favor of that version of the truth.<sup>192</sup>

Clearly, there is an “official” view of tobacco and associated promotional messages that are endorsed implicitly by those officials, who have used their positions to promote an anti-tobacco-advertising agenda:

1. Tobacco advertising causes people to smoke.
2. Smoking causes death.
3. It is the government’s responsibility to protect its citizens from death.

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190. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

191. See *Ads Blow Smoke on Cigarette Advertising*, AUSTIN AM.-STATESMAN, Sept. 5, 1992, at A7. The Minnesota Department of Public Health spent \$321,000 on an advertising initiative to discourage smoking among women. *Id.* The initiation was aimed at convincing women that tobacco companies have been manipulating them. *Id.* In addition, Surgeon General Antonia Novello made a series of public service announcements criticizing tobacco advertising and marketing practices. Fara Warner, *Novello Throws Down the Gauntlet*, ADWEEK’S MARKETING WK., Mar. 16, 1992, at 4.

192. *In re R. J. Reynolds Tobacco Co.*, 111 F.T.C. 539, 551-52 (1988) (Oliver, Chairman, dissenting) (footnote omitted) (arguing that a tobacco company’s publication deserved full First Amendment protection).

4. Therefore, government should do everything in its power to abolish tobacco and anything that promotes it.

Even if one accepts that smoking kills, the other points remain debatable.<sup>193</sup> Legislation restricting tobacco ads would limit the voices of those who disagree with that official stance.

An effort to silence one side of the debate constitutes viewpoint discrimination, and thus, runs afoul of the First Amendment.<sup>194</sup> In *First National Bank of Boston v. Bellotti*,<sup>195</sup> several corporations sought to publish their views regarding a state referendum concerning a personal income tax, but a state law prohibited corporations from spending money to influence such a vote.<sup>196</sup> Indeed, the law singled out individual taxation as a subject corporations could not address publicly.<sup>197</sup> The Supreme Court announced that, because this speech otherwise would be protected, it does not lose its protection simply because the speaker is a corporation. The Court added, “[e]specially where, as here, the legislature’s suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.”<sup>198</sup>

*Bolger v. Youngs Drug Products Corp.*<sup>199</sup> involved a federal statute that prohibited mailing unsolicited advertisements for contraceptive devices.<sup>200</sup> Because the advertisements contained “truthful information rel-

193. See Jacobsen et al., *supra* note 142, at 800. In addition to the continuing question about whether advertising causes tobacco consumption, the extent of government responsibility and authority are subject to serious disagreement. For example, one group of researchers noted:

The tension between individual liberties and governmental intervention to protect public health remains the fundamental point of contention in determining the need for and extent of antismoking legislation. That the state has the right to regulate smoking to secure the public’s health is beyond question. The policy debate is about when, how, and under what circumstances the state should exercise that power.

*Id.* However, their assertion that the state’s right to protect the public health is beyond question remains arguable. As we have seen with the recent public debates about Dr. Kervorkian and physician-assisted suicide, there is a significant segment of the public that disputes the government’s authority to protect its citizens from death under all circumstances. See Albert R. Jonsen, *Physician-Assisted Suicide*, 18 PUGET SOUND L. REV. 459 (1995); Susan Machler, *People With Pipes: A Question of Euthanasia*, 16 PUGET SOUND L. REV. 781 (1993).

194. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting) (“Viewpoint discrimination is censorship in its purest form. . .”).

195. 435 U.S. 765 (1978).

196. *Id.* at 767-68.

197. *Id.* at 768.

198. *Id.* at 785-86.

199. 463 U.S. 60 (1983).

200. *Id.* at 61.

evant to important social issues such as family planning and the prevention of venereal disease," the Court declared the law unconstitutional.<sup>201</sup> In his concurrence, Justice Stevens noted that the law did not prohibit advertisements for devices intended to *facilitate* conception, thereby excluding only "one advocate from a forum to which adversaries have unlimited access."<sup>202</sup> He noted that "[g]overnmental suppression of a specific point of view strikes at the core of First Amendment values."<sup>203</sup>

More recently, the Court reaffirmed its stance against viewpoint discrimination in *R.A.V. v. City of St. Paul*.<sup>204</sup> In *R.A.V.* a teenager was charged with violating the St. Paul Bias-Motivated Crime Ordinance after burning a cross on the lawn of a black family.<sup>205</sup> The ordinance prohibited displaying symbols, such as a Nazi swastika or a burning cross, in such a way that would anger others on the basis of race, color, creed, religion, or gender.<sup>206</sup> The Court found this to be a clear case of viewpoint discrimination.<sup>207</sup> Justice Scalia, writing for the Court, declared:

In fact the only interest distinctly served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility — but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.<sup>208</sup>

The *R.A.V.* decision expanded the concept of viewpoint discrimination, applying it to fighting words, which previously had been considered wholly outside protections afforded by the First Amendment.<sup>209</sup>

201. *Id.* at 69. The Court determined that the First Amendment protected Youngs's proposed commercial speech. *Id.*

202. *Id.* at 84 (Stevens, J., concurring).

203. *Id.* (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63 (1976)).

204. 505 U.S. 377 (1992).

205. *Id.* at 379-80.

206. *Id.* at 380.

207. *Id.* at 391. The opinion stated:

In its practical operation . . . the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words — odious racial epithets, for example — would be prohibited to proponents of all views. But 'fighting words' that do not themselves invoke race, color, creed, religion, or gender — aspersions upon a person's mother, for example — would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents.

*Id.*

208. *Id.* at 396.

209. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (stressing that fighting words constitute "no essential part of any exposition of ideas," and therefore, are accorded no First Amendment protection).

Consequently, even if we reject tobacco advertising as political speech, *R.A.V.* suggests that commercial speech, which resides above fighting words on the First Amendment hierarchy, is likewise protected from viewpoint discrimination.<sup>210</sup> If, for example, cigarette ads were banned or restricted to non-pictorial matter, anti-smoking forces could use images of Joe Camel or the Marlboro Man while tobacco manufacturers could not. If a law prohibited claims that smoking makes you slim, sexy, sociable, sophisticated, and successful, then nothing would prevent opponents from alleging that, for example, smoking will make you unattractive and a social pariah.

The purpose of the *R.A.V.* ordinance—reducing hate crimes—was commendable, as is the goal of reducing tobacco-related health problems. In spite of that auspicious goal, the Court refused to permit the government to silence a politically disfavored viewpoint.<sup>211</sup> Though *R.A.V.* did not *explicitly* elevate cross burning to the level of political expression,<sup>212</sup> it seemingly turned on the political correctness of the government's position.<sup>213</sup> The fact that certain speech is considered politically correct necessarily implies that it is a politically-charged issue, and that a major political faction supports a given viewpoint. Whether *R.A.V.* can be read as elevating unprotected speech to a parity with political speech, it clearly stands for the proposition that government must not exercise its powers to favor an officially-endorsed viewpoint on a politically-charged topic, even if that speech takes a form that *normally* resides low on the hierarchy of First Amendment values.<sup>214</sup>

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210. See Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 790 (1993) ("The rules making content-based and viewpoint-based discrimination presumptively invalid apply to all government regulation of speech, even when it falls within a category such as fighting words or obscenity that normally receives little or no First Amendment protection. This principle applies to all speech, including commercial speech.").

211. *R.A.V.*, 505 U.S. at 396.

212. Justice White, however, felt the majority's opinion implicitly equated cross-burning with political speech: "By placing fighting words, which the Court has long held to be valueless, on at least equal constitutional footing with political discourse and other forms of speech that we have deemed to have the greatest social value, the majority devalues the latter category." *Id.* at 403 (White, J., concurring). Justice Stevens gave it a similar reading: "Assuming that the Court is correct that this last class of speech is not wholly 'unprotected,' it certainly does not follow that fighting words and obscenity receive the *same* sort of protection afforded core political speech. . . . Perversely, this gives fighting words *greater* protection than is afforded commercial speech." *Id.* at 422-23 (Stevens, J., concurring).

213. Justice Blackmun recognized this thread running through the opinion: "I fear that the Court has been distracted from its proper mission by the temptation to decide the issue over 'politically correct speech' and 'cultural diversity,' neither of which is presented here." *Id.* at 415-16 (Blackmun, J., concurring).

214. See *supra* text accompanying note 210.

Of course, a large portion of the population agrees with the official view of tobacco and tobacco advertising. The First Amendment, however, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many that is, and always will be, folly; but we have staked upon it our all."<sup>215</sup> Indeed, the absence of proof that tobacco advertising increases aggregate consumption demonstrates that at least a part of the official view might be wrong. This danger of an erroneous official view is what Justice Brandeis referred to as "the occasional tyrannies of governing majorities,"<sup>216</sup> and this threat of tyranny is the very reason why political speech is protected with such vigilance. It is the fallibility of government officials that necessitates protecting the voice of dissent.

Involvement of government officials and agencies in the active promotion of an official view on tobacco advertising, toward the end of silencing the opposition, is a textbook example of viewpoint discrimination. By favoring a single perspective, the "government is not only attempting to control the individual's awareness of an option he may pursue . . . but also to control what the individual *believes* about this option."<sup>217</sup> As Justice Brennan once argued, "no differences between commercial and other kinds of speech justify protecting commercial speech less extensively where . . . the government seeks to manipulate private behavior by depriving citizens of truthful information concerning lawful activities."<sup>218</sup> One need not be a First Amendment absolutist to recognize that government-induced thought-control is antithetical to any viable construct of freedom.

In all respects but one, tobacco advertising fits squarely within the traditional political speech construct. Few issues have reaped as much, let alone more, political attention or public controversy during the first half of this decade. Homosexuals in the military, abortion, and health care are topics that have gained a similar level of public attention, and speech concerning any of those topics would clearly garner First Amendment protection as political speech. Only its commercial aspects make tobacco advertising seem alien in the company of civil rights marches and war protests. In fact, if this controversy concerned a potentially dangerous method of teaching, such as extolling the benefits of fascism, instead of a

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215. *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

216. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

217. Matthew L. Miller, Note, *The First Amendment and Legislative Bans of Liquor and Cigarette Advertisements*, 85 COLUM. L. REV. 632, 651 (1985).

218. *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 351 (1986) (Brennan, J., dissenting).

potentially dangerous commercial message, then there is little doubt that the Supreme Court would place it in the realm of political speech. But to place commercial advertising, especially tobacco advertising, at that same high level of concern is, to many, offensive in the extreme.

#### D. Drawing the Line on Political Speech

Because tobacco advertising promotes a product, it might seem easy to label it commercial speech, and relegate it low on the hierarchy of First Amendment values. No other product or its advertising, however, has been the subject of so much political activity, popular concern, and controversy. In addition, no other product or its advertising has been subjected to a similar concerted governmental effort to sway public opinion to an official viewpoint. In those respects, tobacco advertising bears little resemblance to ads for soap or furniture.

In reality, tobacco ads are *both* commercial and political speech. Because the two classifications are subject to different levels of First Amendment scrutiny, there is no choice but to categorize tobacco advertising as one or the other. Unfortunately, the Supreme Court has neither established a bright line test to distinguish between commercial and fully protected speech<sup>219</sup> nor articulated a principled justification for this bifurcation of speech protections.<sup>220</sup> How much commercial content is sufficient to disqualify otherwise political speech from fully-protected status? Conversely, how much political content is required to elevate an otherwise commercial message to be fully embraced by the First Amendment? With neither a test nor guiding principles it is virtually impossible to draw any defensible conclusions as to how this mixed speech should be categorized.

Several legal scholars have attempted to retro-fit a theory into the commercial/noncommercial dichotomy. They argue that commercial speech is an integral part of economic activity over which government has clear

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219. *In re R.J. Reynolds Tobacco Co.*, 111 F.T.C. 539, 543-44 (1988); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 536 (1981) (Brennan, J., concurring).

220. See McGowan, *supra* note 65, at 360 (The Court has neither articulated a coherent theory explaining why commercial speech should or should not be protected, nor defined commercial speech in a way that predictably classifies different types of speech."). Several other commentators have recognized this same weakness in the Court's hierarchy-of-speech approach. C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 1 (1976) (noting that the commercial speech exception has been ill defined); see Mack, *supra* note 66, at 72; Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 Nw. U. L. REV. 1212, 1223 (1983); Todd F. Simon, *Defining Commercial Speech: A Focus on Process Rather Than Content*, 20 NEW ENG. L. REV. 215, 216 (1984-85).

authority,<sup>221</sup> or that profit-motivated speech “lacks the crucial connections with individual liberty and self-realization which exist for speech generally,”<sup>222</sup> or even that commercial speech is co-opting the ideals which historically drove our society with “commercial-dependent self-determination.”<sup>223</sup> These authors appear unified in one respect: they have little regard for commercial advertising and perhaps capitalism.<sup>224</sup>

At the same time, several authors have suggested that the Court’s failure to provide either an operable definition or viable theory to clarify the commercial speech doctrine results from the fact that commercial speech is indistinguishable from fully protected forms of speech.<sup>225</sup> The major

221. See Thomas H. Jackson & John C. Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 18 (1979) (“Advertising is neither more nor less significant than a host of other market activities that legislatures concededly may regulate.”)

222. Baker, *supra* note 220, at 3. Baker believes that because profit orientation is a coercive force, capitalist enterprise externally imposes forces that strip both buyers and sellers of free will. *Id.* at 14. Free speech, he posits, exists only in the absence of such coercion. *Id.* at 7. Therefore, he asserts that “*domination of profit, a structurally required standard, breaks the connection between speech and any vision, or attitude, or value of the individual or group engaged in advocacy.*” *Id.* at 17.

223. Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 735 (1993). The essence of their argument is that commercial culture, created largely by advertising, has become so ingrained in our society that it is now impossible to separate commerce from communication. *Id.* at 698-99. The consequence is that we are forced to protect commercial speech in order to protect our culture, and thus, traditional speech values, such as self-realization and rational decision-making, have no currency in the debate over commercial speech. See *id.* at 699.

224. Professors Collins and Skover, for example, characterize advertising as follows:

There is something of a parasitic quality about . . . [commercial] advertising. It feeds on the organisms of noncommercial culture — the culture’s past and present, ideology and myths, politics and customs, art and architecture, literature and music, and even its religions. . . . For example, women are commodified to sell everything from cars to colognes. . . . Advertising thus pimps its products.

*Id.* at 709-10. Professors Jackson and Jeffries state that “[m]easured in terms of traditional first amendment principles, commercial speech is remarkable for its insignificance.” See Jackson & Jeffries, *supra* note 221, at 14. Evidence of Professor Baker’s attitude toward advertising becomes more obvious when his other works aside from his 1976 piece, *supra* note 220, are considered. For example, in a later article, he argues that advertising is responsible for censoring the news we receive from journalistic news sources, and therefore, should be regulated. C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2099 (1992).

225. See Coase, *supra* note 21 at 32-33; Alex Kozinski and Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 628 (1990) (arguing that the commercial noncommercial distinction makes no sense); Donald E. Lively, *The Supreme Court and Commercial Speech: New Words and an Old Message*, 72 MINN. L. REV. 289, 292 (1987) (recommending the least restrictive regulatory alternative for commercial speech); Mack, *supra* note 66, at 72 (recognizing the superficiality of classifying speech as either commercial or noncommercial); McGowan, *supra* note 65, at 360 (noting that the Court failed to define commercial speech so that classifying different types of speech becomes predictable); Burt Neuborne, *A Rationale for Protecting and Regulating Commercial*

thrust of their arguments is that, no matter what dimension is used, any attempt to draw a definitive boundary around commercial speech will necessarily sweep within that perimeter other, more honorable, speech.

The notion of "profit motive" demonstrates the difficulty encountered in attempting to distinguish commercial from noncommercial speech. Profit motive is an insufficient basis for identifying speech as commercial because even great works of art and literature are usually created with an eye toward earning money.<sup>226</sup> Even newspapers are sold for profit. Further, neither "sales" nor "solicitation" is adequate because many political and religious organizations engage in these activities.<sup>227</sup> Turning speech protection upon whether the speech concerns a "commercial product or service" is equally problematic because news reports about such products would receive diminished protection under such a definition.<sup>228</sup> Even if one could find an adequate dimension by which to distinguish the commercial from the noncommercial, there still would be the problem of explaining why speech on that dimension is less deserving of protection.

Although the Court repeatedly has stated that "there are 'commonsense differences' between commercial speech and other varieties,"<sup>229</sup> those supposed differences continue to elude both legal scholars and the Court. Each time the Court alludes to those commonsense differences, it points to a footnote in *Virginia State Board of Pharmacy* that suggests commercial speech *may* be more easily verifiable and *may* be more able

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*Speech*, 46 BROOK. L. REV. 437, 462 (1980) (stating commercial speech should be protected under the First Amendment because of its value in disseminating information); Shiffrin, *supra* note 220, at 1216 (rejecting the premises that commercial speech is not political and does not involve self-expression); Smolla, *supra* note 210, at 790. This point is illustrated in a remark Justice Brennan made a few years ago: "If anything, our cases recognize the difficulty in making a determination that speech is either 'commercial' or 'noncommercial.'" *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 539 (1981) (Brennan, J., concurring).

226. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976) (noting that speech does not lose constitutional protection merely because it is a paid advertisement); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) (stating that profit motive is not a valid basis for regulatory speech); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (rejecting the argument that because an ad is paid for it is not constitutionally protected).

227. See *Sullivan*, 376 U.S. at 266; *Virginia State Bd. of Pharmacy*, 425 U.S. at 761.

228. *Virginia State Bd. of Pharmacy*, 425 U.S. at 761-62.

229. *Bates v. State Bar of Ariz.* 433 U.S. 350, 381 (1977); see also *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978) (noting there are "commonsense" differences in First Amendment protection of commercial speech). For cases quoting *Ohralik*, see *United States v. Edge Broadcasting Co.* 509 U.S. 418, 426 (1993); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64 (1983); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562 (1980).



to survive legal restrictions than other speech.<sup>230</sup> While the reference to commonsense differences has been repeated so often that it has achieved a sheen of fact and has served as the basis for several restrictions on commercial expression, no evidence of superior verifiability or durability ever has surfaced, and scholars have pointed out fallacies of those justifications.<sup>231</sup>

In fact, the verifiability of any speech depends upon whether it entails fact or opinion. Factual statements, whether by politicians or product manufacturers, frequently can be verified, while opinion statements by those same parties will defy such proof. The Supreme Court acknowledged the distinction between fact and opinion many years ago.<sup>232</sup> The durability of speech depends upon the dedication of the speaker. Because some speakers who voice political positions are willing to risk death or imprisonment to voice their grievances or ideologies, the conclusion that commercial speech is more durable seems to trivialize the convictions of those who put their lives on the line to express their political or religious beliefs. Indeed, it seems unlikely that a speaker would risk extreme penalties to deliver a commercial message. Thus, the only two justifications the Court has proffered, in twenty years of treating commercial speech as an inferior genus, lack facial validity. Therefore, speech cannot

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230. That footnote declares:

In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does 'no more than propose a commercial transaction,' . . . and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.

*Virginia State Bd. of Pharmacy*, 425 U.S. at 771-72 n.24 (citations omitted).

231. See Kozinski & Banner, *supra* note 225, at 634-38 (arguing the justification of verifiability and durability, as reason for giving commercial speech less protection than non-commercial speech, are unsupported); McGowan, *supra* note 65, at 408-10 (concluding that commercial speech doctrine is threatening constitutional principles without good reason).

232. When a school promoted its philosophy that the mind alone was capable of healing many human ills, its mail was alleged to be fraudulent. See *American Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 103 (1902). The Supreme Court, however, announced that unless the question of the mind's power could be reduced to an issue of *fact*, rather than mere *opinion*, it could not be proved fraudulent. *Id.* at 104.

be classified as either commercial or noncommercial based upon the degree to which it meets the verifiability and durability criteria.

The Court has defined commercial speech as that which does "no more than propose a commercial transaction."<sup>233</sup> Unfortunately, this definition does nothing to illuminate the reason behind diminished protection for such speech. Presumably, the Court believes that a commercial proposal is less important than political speech, though the relative worth of any form of speech is subject to debate. More important for the present issue is that this definition is open to varied interpretations.

Judge Alex Kozinski and Stuart Banner recently questioned the Court's definition of commercial speech, noting that few advertisements for products or services explicitly propose a commercial transaction, especially those that consist primarily of image.<sup>234</sup> They further noted that most ads do far more than propose a commercial transaction, offering the reader, listener, or viewer a form of art and/or entertainment.<sup>235</sup> In addition, the definition of commercial speech is somewhat circular because it fails to define "commercial transaction." Of course, some ads blur these lines more than others. A recent advertising campaign for Benetton clothing, for example, displays nothing but controversial photographs, such as those that portray couples of mixed genders and races kissing, or nuns kissing priests.<sup>236</sup> The Court's definition makes these ads, which are obviously intended to sell clothes, appear to be noncommercial. By contrast, a Christian Children's Fund ad that asks for a commitment of twenty-one dollars per month to support an underprivileged child might easily fall within that definition of "commercial speech," even though the purpose underlying the ad is charity and not commercial.

The only case, to date, where the Court specifically deliberated on the commercial/noncommercial distinction is *Bolger v. Youngs Drug Products Corp.*<sup>237</sup> In that case, the Court acknowledged the difficulties inherent in

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233. For a discussion of the Court's preference for this definition, see *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 412 (1993); *Edge Broadcasting*, 509 U.S. at 426; *Board of Trustees v. Fox*, 492 U.S. 469, 473 (1989); *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340 (1986); *Zauderer*, 471 U.S. at 637; *Bolger*, 463 U.S. at 66; *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 (1981); *Central Hudson*, 447 U.S. at 562; *Ohralik*, 436 U.S. at 455-56; *Virginia State Bd. of Pharmacy*, 425 U.S. at 762; *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

234. See Kozinski & Banner, *supra* note 225, at 638-40 (focusing on examples found in television and record video advertisements).

235. *Id.*

236. Genevieve Buck, *There's Controversy at Benetton - and It's Not Over Clothes*, CHI. TRIB., Aug. 14, 1991, at 6; Philip Kennicott, *In the Age of AIDS: Arts & Agony*, DETROIT NEWS, Aug. 8, 1995, at E1.

237. 463 U.S. 60 (1983).

drawing a line between the two forms of speech.<sup>238</sup> Youngs Drug Products mailed unsolicited contraceptive advertisements to consumers.<sup>239</sup> Some of the ads in question were more than proposals to engage in a commercial transaction because they were informational pamphlets that discussed the general desirability and availability of prophylactics.<sup>240</sup> The Court admitted that while these were advertisements that named a specific product and were motivated by clear economic interests, none of those individual factors was sufficient to make the pamphlets commercial speech.<sup>241</sup> The Court, however, concluded that “[t]he combination of *all* these characteristics . . . provides strong support for the . . . conclusion that the informational pamphlets are properly characterized as commercial speech,” despite the fact that “they contain discussions of important public issues such as venereal disease and family planning.”<sup>242</sup>

One might read that decision as a direct parallel to cigarette advertising, thereby making it commercial. Such a reading, however, would ignore the fact that the Court interpreted the Youngs’s ads as merely linking the product to a current public debate.<sup>243</sup> If the simple addition of information about a public debate could effectively elevate a commercial ad to the level of fully protected speech, all advertisers would insert such information in their ads. Because cigarette advertising is itself the subject of public debate, it does not fall into that same category.

The Court in *Bolger* ultimately protected Youngs’s ads, while purporting to apply the relaxed standards for commercial speech, because the regulation denied “to parents truthful information bearing on their ability to discuss birth control and to make informed decisions in this area.”<sup>244</sup> In other words, because the ads contained material of public importance (fully protected speech), they were protected. It seems that the Court declared this speech commercial, but then protected it as if it were *noncommercial*.<sup>245</sup> In the end, in spite of being labeled commercial, these ads were treated as fully protected because of the important public

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238. *Id.* at 66.

239. *Id.* at 62.

240. *Id.*

241. *Id.* at 66-67.

242. *Id.* at 67-68.

243. The Court stated, “We have made clear that advertising which ‘links a product to a current public debate’ is not thereby entitled to the constitutional protection afforded non-commercial speech.” *Id.* at 68.

244. *Id.* at 74.

245. Applying the *Central Hudson* test, the Court addressed the question of whether there was a substantial government interest. The Court concluded, “The second interest asserted by appellants . . . is undoubtedly substantial. . . . Because the proscribed information ‘may bear on one of the most important decisions’ parents have a right to make, the restriction of ‘the free flow of truthful information’ constitutes a ‘basic’ constitutional de-

information contained therein.<sup>246</sup> Indeed, *Bolger* can be read as supporting the notion that material of public importance can elevate an otherwise commercial advertisement to a parity with political speech. Consequently, that decision, rather than providing clarification, further blurs the commercial/noncommercial dividing line.

My point is simply this: given the current confusion and problems inherent in the commercial speech doctrine, it is very difficult to classify speech that clearly has *both* commercial and political aspects as either one or the other. When speech crosses both dimensions, courts might default to the commercial speech categorization, the lowest common denominator, thereby lending greater deference to legislative prerogatives.<sup>247</sup> The current commercial speech doctrine neither requires nor advises such a deferential approach. The danger is that this enables government officials—whether legislative, executive, or judicial—to regulate speech that they find objectionable, simply by finding some ostensibly commercial element attached to that speech.<sup>248</sup>

The deference to government officials is especially easy when a corporation initiates the speech. Though the Supreme Court has declared that corporate speakers have First Amendment rights,<sup>249</sup> even corporations that engage in pure political speech—like that in *First National Bank of Boston v. Bellotti*<sup>250</sup>—usually (1) purchase advertising space, (2) identify the speaker, often by naming a particular “brand” or product, and (3) act with some underlying economic motivation. Under the *Bolger* decision, this would provide strong support for the conclusion that the speech was commercial. As a result, virtually all corporate speech easily could be

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fect regardless of the strength of the government’s interest.” *Id.* at 73-75. Thus, this effectively negates the Court’s *Central Hudson* analysis.

246. *Id.* at 68.

247. Lively, *supra* note 225, at 295-96; Todd J. Locher, Comment, Board of Trustees of the State University of New York v. Fox: *Cutting Back on Commercial Speech Standards*, 75 IOWA L. REV. 1335, 1348 (1990) (stating the characterization of commercial may apply even if the majority of the material is noncommercial).

248. Judge Kozinski and Stuart Banner argue that the application of commercial speech classification “provides a convenient avenue for denying protection to speakers who may have had something unpopular to say. The more things we find to be commercial speech, the more expression we can suppress under the cover of economic regulation.” Kozinski & Banner, *supra* note 225, at 649-50; see also Mack, *supra* note 66, at 73 (arguing convenient labeling as commercial speech enables the Court to “engage in [a] charade” of First Amendment protection); McGowan, *supra* note 65, at 404 (expressing concern that the Court need only find a link between speech and profit to classify the speech as commercial deserving less protection).

249. See *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (“The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”).

250. *Id.*

labeled commercial, regardless of the topic and irrespective of the First Amendment rights of corporate speakers.

This scenario is precisely what happened when R.J. Reynolds ran an ad entitled "Of Cigarettes and Science," which discussed a scientific study and suggested that the study cast doubts on allegations that cigarette smoking caused heart disease.<sup>251</sup> The FTC charged R.J. Reynolds with deceptive advertising, alleging that the ad failed to disclose certain facts about the study.<sup>252</sup> The tobacco company argued that the Agency had no jurisdiction because the ad was not commercial speech, and moved to dismiss.<sup>253</sup> The Administrative Law Judge hearing the case agreed, and granted the motion.<sup>254</sup> The FTC reversed, and remanded the case, declaring that this was a clear case of commercial speech within its jurisdiction.<sup>255</sup> The FTC noted that R.J. Reynolds purchased the ad, and that the ad referred to a specific product (cigarettes), discussed an important product attribute (the connection between smoking and heart disease), and seemed to involve a sales-related motive on the part of the speaker.<sup>256</sup>

I would suggest that the FTC's position is indefensible, because any report of the same or similar study clearly would be protected if reported by the AMA or any party other than a tobacco company. Many of the studies discussed earlier, like the Mickey Mouse study and the EPA report, were reported without disclosing some important information, yet no attempt was made to regulate the ads for deception. This speech did not propose a commercial transaction, but spoke on an issue of clear public interest. Under the FTC's decision in *R.J. Reynolds*, virtually any tobacco company speech, at least any speech that the company would be motivated to express, would be labelled commercial. The only aspects of this speech that distinguish it from speech that definitely would be protected in a newspaper article or editorial are the nature of the corporate speaker and the fact that it appeared in purchased ad space. *First National Bank of Boston v. Bellotti*,<sup>257</sup> along with numerous other deci-

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251. *In re R.J. Reynolds Tobacco Co.*, 111 F.T.C. 539 (1988) (interlocutory order).

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at 547. Not all of the Commissioners agreed. Chairman Oliver felt the ad was a "patently direct comment on a public issue" that deserved constitutional protection. *Id.* at 568.

257. 435 U.S. 765 (1978).

sions,<sup>258</sup> makes it clear that neither of those aspects is a justifiable basis for diminishing speech protection.

Even speakers who have no corporate ties, such as those fighting for religious or environmental causes, might be vacuumed into the commercial speech category under the FTC's approach if they engage in fundraising activities for their cause. Moreover, newspapers generally have their price printed at the top of the first page. This would seem to constitute a proposal for a commercial transaction. Although the paper also contains political information, it could fall victim to any policy that lowers mixed speech to the inferior First Amendment position. Much of the speech we value as a society is a blend of both the commercial and non-commercial. The more readily courts label mixed speech as "commercial," the less protection is afforded to political and other noncommercial expression. The commercial speech doctrine, therefore, represents a hazardous pothole in our freeway of expression. Courts should take great pains to steer around it whenever possible, rather than aiming for that hole at every opportunity. Avoiding this pothole, however, remains problematic.

Professor Ross Petty recently suggested that one way to draw the line between commercial and fully-protected speech is to use an audience-oriented balancing approach that asks whether the audience is more "influenced or potentially interested in the speech in their capacity as consumers or as members of the electorate."<sup>259</sup> Professor Petty argues that this method is consonant with Supreme Court precedent and provides a more objective basis than is possible with the Court's vague guidance to date.<sup>260</sup> Professor Petty approaches the problem from a somewhat different angle than conventional Court analyses because the "question is not so much what the speech says as how it is likely to interest people, influence their beliefs, and motivate them to take action."<sup>261</sup> The audience-oriented balancing approach seeks to determine the relative balance of commercial and noncommercial aspects based upon the receivers', rather than the senders', interests. While this approach, like the Court's, lacks sufficient specificity and guidance to be a terribly useful tool for determining which speech deserves full protection and which is less deserving,

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258. See *Bigelow v. Virginia*, 421 U.S. 809 (1975); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

259. Ross D. Petty, *Advertising and the First Amendment: A Practical Test for Distinguishing Commercial Speech from Fully Protected Speech*, 12 J. PUB. POL'Y & MARKETING, 170, 172 (1993).

260. *Id.* at 172-73.

261. *Id.* at 173.

it does provide an interesting framework by which to view the commercial/noncommercial question with regard to tobacco advertising.

In the United States today only about twenty-six percent of the population smokes,<sup>262</sup> while sixty-eight percent supports stronger regulation of tobacco advertising.<sup>263</sup> If you consider that the latter figure does not include people with strong anti-regulation sentiments, then the numbers clearly suggest that tobacco advertising is more likely to affect audience members in their political capacity (more than sixty-eight percent) than as consumers of the product (twenty-six percent). More people have a political interest in tobacco advertising than have a commercial interest. The commercial aspect of tobacco advertising has been subjugated to the political. Again, this puts tobacco ads in a unique position within the realm of commercial speech. Probably no other commercial advertising ever has piqued such political interest in the community-at-large.

Nevertheless, suppose one concedes that government regulatory efforts are political, that significant public interest in this topic exists, and the political impact is greater than the commercial impact. One might still believe the content of the typical tobacco ad contributes nothing to the political debate and, therefore, deserves no protection. For example, it may seem ludicrous to argue that a picture of a man riding a horse has any political value in public discourse. One may feel that regulation of these ads will not damage our freedom of speech, as encompassed by the First Amendment.

#### *E. It is Only Tobacco Advertising*

One might argue, for instance, that tobacco ads contribute nothing to the exposition of ideas,<sup>264</sup> because they convey no substantive message. But if there is no message being conveyed, then there is likewise no argument for regulation. In its Staff Report on cigarette advertising<sup>265</sup> several years ago, the FTC declared, "Pictures are better remembered than words. . . . Therefore, the current warning is much less likely to be remembered than the other messages communicated in cigarette advertising."<sup>266</sup> Congressman Mike Synar, who led congressional efforts to cur-

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262. See Farley, *supra* note 7, at 61.

263. See Colford & Teinowitz, *supra* note 10, at 1.

264. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (noting that certain categories of speech, including obscenity, profanity, libelous utterances and fighting words contribute "no essential part of any exposition of ideas"); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (noting that the categorical approach espoused in *Chaplinsky* remains a limited but important role in First Amendment jurisprudence).

265. MATTHEW L. MYERS ET AL., FEDERAL TRADE COMMISSION, STAFF REPORT ON THE CIGARETTE ADVERTISING INVESTIGATION (1981).

266. *Id.* at 4-13, 4-14 (emphasis added). The report also stated:

tail cigarette advertising, remarked that “[T]he implicit message is: Smoking is OK; it will make you popular and enhance your quality of life. Nothing could be further from the truth.”<sup>267</sup> Former Surgeon General Elders recently announced that cigarette ads send a message that “[s]moking makes you slim, sexy, sociable, sophisticated and successful,”<sup>268</sup> and former HHS Secretary Louis Sullivan accused tobacco companies of sending a “dangerous mixed message” by sponsoring athletic events.<sup>269</sup> Even back in the late 1960s the federal government ordered free counter-advertising for anti-smoking messages because of the one-sided nature of the information cigarette advertising conveyed on a controversial issue.<sup>270</sup> In other words, cigarette ads convey messages, and, they are messages that officials want to squelch.

Cigarette ads are predominantly pictorial in nature, but that does not negate the potential for them to communicate messages. Visual imagery can speak volumes.<sup>271</sup> Evidence of this principle is frequently encoun-

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The ads are rich in thematic imagery associating smoking with warmth, friendliness, outdoor activities, athletics, and individualism. They are filled with vigorous, attractive, healthy-looking people living energetic lives full of social acceptance, success, and athletic achievement, free from any smoking hazards. Individuals seeing these cigarette ads are much more likely, therefore, to use the concrete positive images of smoking in deciding whether or not to smoke than they are the abstract general health warning.

*Id.* at 4-15.

267. Synar, *supra* note 76, at 10A.

268. See Grady, *supra* note 13, at A9.

269. Charles Green, *Boycott Tobacco-Sponsored Events, Sullivan Urges Athletes*, *AUSTIN AM.-STATESMAN*, Feb. 24, 1990, at A10.

270. *In re WCBS-TV*, 8 F.C.C.2d 381, 382 (letter from Ben F. Waple, FCC Secretary, to television station WCBS-TV), *aff'd on reh'g*, 9 F.C.C.2d 921 (1967). It would be ironic, at best, for the government to now regulate the cigarette advertising industry by concluding that cigarette advertising conveys no information. At worst, it would suggest that the government is willing to bend the facts in any direction necessary to justify regulating these miscreants.

271. It is a truism that a picture is worth a thousand words. As one psychologist noted many years ago:

As a means of communication, pictures speak a universal language. One can peruse a magazine in a language with which he is unfamiliar and glean something from the pictures. . . .

Another valuable aspect of the picture is its ability to present at a glance what it might take a whole paragraph to describe in words. Sometimes an unlimited verbal account will never approach a picture.

HAROLD E. BURTT, *PSYCHOLOGY OF ADVERTISING* 267 (1938). The communicative value of pictures frequently has legal import outside the field of advertising. See Jef I. Richards & R. Bruce Easter, *Televising Executions: The High-Tech Alternative to Public Hangings*, 40 U.C.L.A. L. REV. 381, 402-06 (1992) (discussing the importance of photographic access to executions and concluding that televised executions implicate First and Eight Amendment rights); Jef I. Richards, *Obscenity and Film: An Empirical Dilemma*, 6 *LOY. ENT. L.J.*



tered when dealing with advertising.<sup>272</sup> For example, the FTC has found advertising pictures of models wearing white coats to deceptively communicate that they have medical training.<sup>273</sup> A federal court of appeals declared that an ad depicting a clear balloon filled with apparently clear automobile exhaust deceptively communicated that the exhaust was low in polluting agents.<sup>274</sup> And the Supreme Court held as deceptive an ad-

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7, 23 (1986) (noting that "film is subject to a lower standard of [First Amendment] protection than books").

272. See Jef I. Richards & Richard D. Zakia, *Pictures: An Advertiser's Expressway Through FTC Regulation*, 16 GA. L. REV. 77, 78 (1981) (asserting that the visual advertising message is more persuasive than the verbal message, and arguing that regulation of the visual message is therefore more important). Former Deputy Director of the FTC's Bureau of Consumer Protection, Tracy Westen, has stated:

The verbal portions of the ad seem to be trivial throw-aways. I'd be surprised if one person in 1,000 even stopped to read them. (Indeed, my "conspiratorial" instincts sometimes tell me that the text is merely a "cover" or pretext designed to hide the fact that 100% of the ad's communicative value lies in the photograph or art work.)

Tracy Westen, *Malfunction in the Marketplace — Advertising "Versus" Consumer Information*, AM. MARKETING ASS'N CONF. IN CHICAGO, ILL., Aug. 7, 1978. See also Albert H. Kramer, *Marconian Problems, Gutenbergian Remedies: Evaluating the Multiple-Sensory Experience Ad on the Double-Spaced, Typewritten Page*, 30 FED. COMM. L.J. 35, 35-36 (1977) (noting that the advertisers have "created a new environment of multiple-sensory experience of which the written word is a minor part").

The importance of pictures and other visual imagery to the efficacy of advertisements has led marketing researchers to devote increasing attention to the study of visual communication over the past two decades. And these researchers have explicitly or implicitly recognized the communicative abilities of pictures. Business professors Julie Edell and Richard Staelin have remarked that "pictures are used extensively to convey information about the brand, to show its users and uses, and/or to create an image or personality for the brand." Julie A. Edell & Richard Staelin, *The Information Processing of Pictures in Print Advertisements*, 10 J. CONSUMER RES. 45, 45 (1983) (emphasis added). An early overview of this area of study can be found in John R. Rossiter & Larry Percy, *Visual Communication in Advertising*, in INFORMATION PROCESSING RESEARCH IN ADVERTISING, 83, 85-88 (Richard J. Harris ed. 1983). Examples of more recent works include Charles S. Areni & K. Chris Cox, *The Persuasive Effects of Evaluation, Expectancy and Relevancy Dimensions of Incongruent Visual and Verbal Information*, 21 ADVANCES CONSUMER RES. 337 (1994); Wendy J. Bryce & Richard F. Yalch, *Hearing Versus Seeing: A Comparison of Consumer Learning of Spoken and Pictorial Information in Television Advertising*, 15 J. CURRENT ISSUES & RES. ADVERTISING 1 (1993).

273. *In re Mather Hearing Aid Distribs., Inc.*, 78 F.T.C. 709, 723 (1971); *In re Loesch Hair Experts*, 54 F.T.C. 575, 595 (1957); cf. *In re Keele Hair & Scalp Specialists, Inc.*, 55 F.T.C. 1840, 1849 (1959).

274. *Standard Oil Co. v. FTC*, 577 F.2d 653, 659 (9th Cir. 1978). Standard Oil of California advertised a fuel additive by showing before-and-after pictures of a clear balloon inflated with vehicle exhaust. *Id.* at 655-56. The "before" picture depicted a balloon filled with black smoke while the "after" picture displayed a clear balloon. *Id.* The Ninth Circuit Court of Appeals believed that the ad conveyed the message to viewers that the additive removed many or most of the pollutants from the exhaust. *Id.* at 657. Although the product did in fact reduce pollutants, the court stated that these pictures conveyed to consumers a greater degree of pollutant reduction than was true. *Id.* at 658-59.

vertising “mock-up” that substituted a picture of sand-covered plexiglas for a piece of sandpaper.<sup>275</sup> In each case the court found that the pictures at issue communicated a deceptive message. Justice White, writing for the Court in *Zauderer v. Office of Disciplinary Counsel*,<sup>276</sup> acknowledged the communicative value of pictorial representations, and stated that “the use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser’s message, and it may also serve to impart information directly. Accordingly, commercial illustrations are entitled to the First Amendment protections afforded verbal commercial speech . . . .”<sup>277</sup>

Yet another argument is that the quality of information cigarette advertising conveys is not the sort of information the First Amendment recognizes. After all, not only are most cigarette ads little more than pictures, they are also pictures that tell the consumer nothing about the product. They are merely fantasies—images of a lifestyle, showing people having fun. In fact, sometimes there is not even a cigarette in the picture. These image ads are largely emotive, rather than cognitive in nature, providing no hard facts about the product. Consequently, so the argument goes, cigarette ads convey no information deserving of First Amendment protection.<sup>278</sup>

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275. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 376, 390 (1965). In order to sell shaving cream, Colgate-Palmolive illustrated the super-moisturizing qualities of the cream by supposedly shaving sandpaper. *Id.* at 376. The commercial depicted the cream being applied to the sandpaper, it was allowed to soak for a few seconds, then a razor completely removed the sand. *Id.* Although the cream actually could shave sandpaper, the required soaking time was more than an hour, so a plexiglas mock-up was used. *Id.* However, the audience was not informed of this substitution, so the FTC determined the commercial to be deceptive. *Id.* That finding was upheld by the Supreme Court. *Id.* at 390.

276. 471 U.S. 626 (1985)

277. *Id.* at 647.

278. Scholars outside the fields of advertising and marketing, and the general public, frequently condemn advertising as being devoid of information. See Richard W. Pollay, *The Distorted Mirror: Reflections on the Unintended Consequences of Advertising*, 50 J. MARKETING 18, 25-6 (1986) (noting that many social science scholars find advertising inherently irrational). Criticisms of image-type advertising are among the most common. The popular press undoubtedly has contributed significantly to this suspicion of image advertising. See WILSON B. KEY, *SUBLIMINAL SEDUCTION: AD MEDIA’S MANIPULATION OF A NOT SO INNOCENT AMERICA* 1-10 (1973) (asserting that advertisers manipulate consumers through ads targeted at subliminal perception); VANCE PACKARD, *THE HIDDEN PERSUADERS* 46-56 (1957) (providing examples and portraying image-centered advertising schemes as attempts to create illogical brand loyalties). In those works image advertising is likened to hypnosis and brain-washing. It seems, however, that much of the criticism results from ignorance about how advertising is used and how it is made. MICHAEL SCHUDSON, *ADVERTISING, THE UNEASY PERSUASION: ITS DUBIOUS IMPACT ON AMERICAN SOCIETY* 45 (1984) (“Most criticism of advertising is written in ignorance of what actually happens inside these [advertising] agencies.”).

Professor Lowenstein makes this point at some length.<sup>279</sup> He suggests there are two categories of advertising: informational and noninformational. He defines "information" as that which "is likely to provide assistance to a consumer in making a rational purchasing decision,"<sup>280</sup> and "noninformation" as that which "appeals subtly to emotions or to subconscious associations and motivations."<sup>281</sup> An example of the former is prescription drug price claims, while the latter might be a picture of an attractive woman accompanied by the headline, "Light my Lucky."<sup>282</sup> Aside from the obvious point that such a distinction is inherently content-based and judgmental—placing more value on some forms of information than others—it reflects a superficial understanding of advertising and, more generally, communication.<sup>283</sup>

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Nonetheless, this criticism has crept into First Amendment analyses of advertising-as-speech. Collins and Skover, denouncing commercial speech and Court policies that further its protection, base their argument on this principle:

Entire categories of commercial communication are essentially bereft of any real informational content. For cosmetics, fragrances, alcohol, tobacco, clothes, and other products, billions of advertising dollars say much about image and little about information. The mass advertiser all too often strives to create a lifestyle environment with "minimal 'logical' connection with the product."

Collins & Skover, *supra* note 223, at 737. Collins is co-founder of the Center for the Study of Commercialism, an organization that exposes and opposes commercialism. Not surprisingly, he has written other works criticizing advertising. See RONALD K.L. COLLINS, DICTATING CONTENT: HOW ADVERTISING PRESSURE CAN CORRUPT A FREE PRESS 6 (1992) (asserting that the press often hesitates to report on controversial topics for fear of alienating advertisers). Collins and others seem to invest image advertising with some sinister covert purpose and effect, which logically leads to the conclusion that the societal good demands this form of speech be severely regulated. See also Sut Jhally, *Commercial Culture, Collective Values, and the Future*, 71 TEX. L. REV. 805, 814 (1993) (concluding that the notion of "advertising as a form of information" is "ideologically inspired idiocy" that exacerbates global problems).

279. Daniel H. Lowenstein, *"Too Much Puff": Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1224-37 (1988). Lowenstein is a law professor and, like most commentators who favor more liberal regulatory policies toward advertising, he apparently has no formal training or expertise in the field of advertising. See *id.* at 1205.

280. *Id.* at 1235.

281. *Id.* at 1231.

282. See *id.* at 1232.

283. Legal scholars have stated that:

For years economists struggled to distinguish 'informative' from 'persuasive' advertising, on the theory that only the former truly benefitted consumers. Most economists now realize, however, that the distinction is mere 'metaphysics' . . . and that the controversy is simply 'a red herring'. . . . Every advertisement supplies some information, if only a reminder of the firm's existence and the product the firm sells.

Fred S. McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. PA. L. REV. 45, 69 n.124 (1985) (citations omitted). Professor Lowenstein attempts to counter this assertion by arguing that the informational/noninformational distinction "is commonly employed by economists." Low-

The two types of ad claims that Professor Lowenstein identifies are frequently recognized by advertising and marketing researchers, and have been labeled with a variety of names.<sup>284</sup> Personally, I believe the most descriptive terminology is “factual” and “evaluative,” respectively.<sup>285</sup> The factual ads deal with objective product attributes such as size, shape, and performance, while the evaluative ads entail subjective attributes, such as the claim that a particular cologne “will make you sexy.”<sup>286</sup> Factual attributes are intrinsic to the product, while evaluative are extrinsic or experiential. The latter attributes are called evaluative because consumers must evaluate for themselves whether they experience that attri-

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enstein, *supra* note 279, at 1234. However, Professor Lowenstein cites articles that were published 18 years earlier as his authority. *See id.* at 1234 n.107. He fails to recognize that this time period encompasses a significant shift in paradigms in the field of economics, with the so-called “Chicago School” largely supplanting the traditional influence of “Harvard School” economists. Economists who adhere to the Harvard view tend to equate advertising with persuasion. *See* WILLIAM S. COMANOR & THOMAS A. WILSON, *ADVERTISING AND MARKET POWER* (1974) (providing an in-depth study of former Harvard University faculty members’ research on the impact of advertising on the American economy). By contrast, the Chicago view conceptualizes advertising as being informative. *See* Lester G. Telser, *Advertising and Competition*, 72 J. POL. ECON. 537 (1964). Professors Albion and Farris note this distinction between the perception of advertising’s role in the economy:

[T]he traditional doctrine maintains that advertising is a form of persuasion that creates product differentiation and allows firms to exercise market power at the consumer’s expense. The more recent approach views advertising as information — an inexpensive means for communicating with large numbers of potential buyers — which stimulates competition and diminishes market power.

MARK S. ALBION & PAUL W. FARRIS, *THE ADVERTISING CONTROVERSY: EVIDENCE ON THE ECONOMIC EFFECTS OF ADVERTISING* 25 (1981) (providing a framework for two distinct schools of thought on the economic impact of advertising). In reality, economists do not embrace either model as fully describing advertising’s effects. *See* KIM B. ROTZOLL ET AL., *ADVERTISING IN CONTEMPORARY SOCIETY: PERSPECTIVES TOWARD UNDERSTANDING* 86-7 (1976).

284. Professor Lowenstein’s noninformational category has been called “arbitrary,” Ivan L. Preston, *Theories of Behavior and the Concept of Rationality in Advertising*, 17 J. COMM. 211, 213 (1967), “evaluative,” Morris B. Holbrook, *Beyond Attitude Structure: Toward the Informational Determinants of Attitude*, 15 J. MARKETING 545, 545 (1978), “social-psychological,” Terence A. Shimp, *Social Psychological (Mis)Representations in Television Advertising*, 13 J. CONSUMER AFFS. 28, 29-31 (1979), “social reality,” Richard W. Mizerski & Robert B. Settle, *The Influence of Social Character on Preference for Social Versus Objective Information in Advertising*, 16 J. MARKETING RES. 552, 552 (1979) and “feeling,” Linda L. Golden & Keren A. Johnson, *The Impact of Sensory Preference and Thinking Versus Feeling Appeals in Advertising Effectiveness*, 10 ADVANCES IN CONSUMER RES. 203, 203 (1983).

285. I have used this terminology in the past while discussing the application of this distinction to deceptive advertising. For a further discussion on the factual versus evaluative terminology and their distinctions among behavioral researchers see JEF. I. RICHARDS, *DECEPTIVE ADVERTISING: BEHAVIORAL STUDY OF A LEGAL CONCEPT* 48-52 (1990).

286. *Id.* at 51.

bute. For example, some consumers probably will feel "sexy" after using a given cologne, whereas others will not.

Most ads provide little factual information<sup>287</sup> because consumers seldom have the motivation to suffer through a long list of a product's intrinsic features and benefits.<sup>288</sup> In some cases there is minimal factual information because there is little of value that one can say about the product being promoted. After all, how much can one say about tobacco stuffed in a paper tube (It Tastes Good!)? One could, of course, mention the cultivation and processing of the tobacco, but who would want to read it? The same problem is inherent in many products, like cologne (It smells good), laundry detergent (It cleans well), toilet paper (It's soft). For such products, the message is necessarily simple. Evaluative information is common in advertising because it is used to create distinctive brand identities. It also makes an otherwise boring message, such as "it tastes good," more interesting and more likely to attract a consumer's attention.

But what is important to recognize is that most communication involves evaluative information. Suppose I look at an abstract painting and say that "to me this is a statement about freedom in our society." I am drawing my own evaluation of meaning. Certainly, freedom is not an intrinsic attribute of that painting. As children our parents told us, "this is bad," or "this is how you succeed in life," but most of what we learn about such things is through evaluation of the behavior of others. This, too, is evaluative information. If one chooses to wear certain clothes, and

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287. See, e.g., Richard W. Pollay et al., *Regulation Hasn't Changed TV Ads Much!*, JOURNALISM Q., Spring 1980, at 438, 445; Alan Resnick & Bruce L. Stern, *An Analysis of Information Content in Television Advertising*, J. MARKETING, Jan. 1977, at 50, 50-53.

288. This is called product involvement. Only when consumers consider a product relatively important will they take the time to read or digest more than a few pieces of factual information. See Meryl P. Gardner et al., *Low Involvement Strategies for Processing Advertisements*, 14 J. ADVERTISING 4, 5-6 (1985) (discussing varying levels of consumer involvement in advertisement processing); Robert E. Smith & William R. Swinyard, *Information Response Models: An Integrated Approach*, J. MARKETING, Winter 1982, at 81, 85. Professor Rodney Smolla points out that not all advertising is of the image variety, remarking that "Old-fashioned product-information advertising, for example, has not gone entirely out of fashion. The advertisements for 'new technology' equipment, such as personal computers, fax machines, or stereo components, are heavily product-information oriented." Smolla, *supra* note 210, at 789-99 (footnotes omitted). Professor Smolla's examples are products that typically are considered high involvement. Their expense motivates most consumers to desire, and therefore digest, more facts about these products compared with low involvement products, such as dish detergent, chewing gum, and of course, cigarettes. This distinction between high and low involvement products is fundamental to effective commercial advertising. Unfortunately, Professor Lowenstein and some other critics of modern advertising seem to misunderstand this principle, and hence, the motives behind "noninformational" advertising.

a particular haircut, to convey a preferred image or style to others, one is engaged in the kind of evaluative communication cigarette advertisers use.

Stated differently, what Professor Lowenstein and others find so unpalatable is, in reality, the *art* of advertising.<sup>289</sup> Surely they do not intend to suggest that artistic expression is undeserving of constitutional protection.<sup>290</sup> This same art is applied to political advertising, which is fully protected speech.<sup>291</sup>

Consequently, if we accept Professor Lowenstein's argument that such noninformation falls outside the meaning of the First Amendment, then we effectively abolish the protections afforded *most* expression.<sup>292</sup> In-

289. Advertising has always used the work of artists, but in recent years, advertising itself is being appreciated as an art form. See, e.g., Paul Goldberger, *Signs of Lost Times: Age Gives a Faded Glory to Old Advertisements Painted on the Sides of Buildings*, N.Y. TIMES, May 14, 1994, at 23 (noting how long standing signs on an apartment building have become "artifacts"); Andrew Lecky, *Prices Off the Wall for Vintage Posters*, CHI. TRIB., May 14, 1992, § 3, at 3 (noting increased monetary value of advertising posters); Melissa Morrison, *Line Between Art and Ads Blurring*, GAZETTE (Montreal), Nov. 30, 1991, at J5 (noting the distinction between art and advertisement is diminishing).

290. To the contrary, the Court has declared that the "First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent." *Miller v. California*, 413 U.S. 15, 34 (1973) (emphasis added).

291. For an explanation of how emotive political commercials contribute to logic in political dialogue, see generally ELIZABETH M.B.G. HUGHES, *THE LOGICAL CHOICE: HOW POLITICAL COMMERCIALS USE LOGIC TO WIN VOTES* (1994). One of the major criticisms of political advertising is that it relies too heavily on imagery. See Gene R. Laczniak & Clarke L. Caywood, *The Case For and Against Televised Political Advertising: Implications for Research and Public Policy*, 6 J. PUB. POL'Y & MARKETING 16, 19-20 (1987). In fact, another author used Professor Lowenstein's argument regarding noninformative tobacco advertising to argue for the regulation of political advertising:

[C]ampaign speech has never been distinguished for its intellectual cogency or analytic rigor. But, even granting that much political rhetoric is relatively meaningless anyway, the fact remains that television ads that rely primarily on imagery and 'mood advertising' have a unique potential for being *absolutely* uninformative. . . .

The fact that so many political ads do not even *purport* to convey information assumes greater importance in light of the recognition that, in many races, television commercials do not so much supplement the contest as define it.

Jack Winsboro, Comment, *Misrepresentation in Political Advertising: The Role of Legal Sanctions*, 36 EMORY L.J. 853, 909-11 (1987) (emphasis in original).

292. In comparing commercial speech to core speech, Professor Smolla makes essentially the same point, stating, "Vast quantities of the speech in the modern American marketplace consist of symbol, image, and fantasy. . . . Similarly, a great deal of our political discourse is vacuous and fantastical. Politics is now often reduced to slogan and sound bite." Smolla, *supra* note 210, at 793. Elsewhere, Professor Smolla recounts the Court's consistent defense of emotional content in other forms of expression, stating, "Speech does not forfeit the protection that it would otherwise enjoy merely because it is laced with passion or vulgarity. The emotion principle is one of the cardinal tenets of modern First

deed, the Supreme Court also has recognized that many forms of expression can have both cognitive and emotive impact worthy of protection:

[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.<sup>293</sup>

Therefore, contrary to the opinions of those who attempt to minimize the worth of advertising images, so-called noninformational appeals like those found in cigarette ads are not only speech; they also are constitutionally valuable speech.<sup>294</sup> Ironically, one reason modern cigarette ads are predominantly image oriented is that, over the years, their factual claims have been so heavily regulated.<sup>295</sup>

Some anti-smoking advocates undoubtedly believe the contribution of a cigarette ad's message, such as images promising to make the smoker slimmer or sexier, to the exposition of ideas is negligible because it is

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Amendment jurisprudence. Without that tenet, much of the First Amendment as we know it would unravel." RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 46 (1992).

293. *Cohen v. California*, 403 U.S. 15, 26 (1971). A few years later, Justice Brennan added his thoughts regarding emotive value:

A given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image. Indeed, for those of us who place an appropriately high value on our cherished First Amendment rights, the word 'censor' is such a word. . . . Moreover, even if an alternative phrasing may communicate a speaker's abstract ideas as effectively as those words he is forbidden to use, it is doubtful that the sterilized message will convey *the emotion that is an essential part of so many communications*.

*FCC v. Pacifica Found.*, 438 U.S. 726, 773 (1978) (Brennan, J., dissenting) (emphasis added).

294. Professor Smolla has noted:

The baggage carried by commercial speech is the bias of the intelligentsia. . . .

To the intellectual or the academic, speech that is rational, analytic, and contemplative will usually receive higher marks than speech that appeals to passion and prejudice. . . . But when the passion is attached only to a product . . . the academic is likely to be intolerant. . . .

This judgement, however, itself reflects a bias that is undemocratic and intellectually elitist.

Smolla, *supra* note 210, at 783.

295. John E. Calfee, *Cigarette Advertising Regulation Today: Unintended Consequences and Missed Opportunities*, 14 *ADVANCES IN CONSUMER RES.* 264, 264-65 (1987) (describing cigarette advertising regulation's potential harm to smokers).

false. On the contrary, it is not false.<sup>296</sup> Some smokers probably do experience the benefits cigarette ads extol. Indeed, in some groups smoking does promote popularity, and some people are able to curtail their appetite to attain a slimmer physique by smoking. This is a classic example of opinion statements. If the First Amendment protects anything, it is the right to express an opinion.<sup>297</sup> Regulation may not be used to keep citizens ignorant of that opinion, even if it is feared that they might make bad decisions as a result of hearing it.<sup>298</sup>

Cigarette ads also transmit a more clearly political message. Barry Lynn of the American Civil Liberties Union noted that people who choose to smoke have a "right to learn through advertisements that others support their decisions."<sup>299</sup> The mere existence of these ads now represents a message of rebellion against the anti-smoking forces. It

296. Regarding image advertising, David McGowan correctly concludes that "[s]uch advertising conveys ideas that . . . are not susceptible of government determinations of falsity." McGowan, *supra* note 65, at 444-45.

297. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) (footnotes omitted).

More recently, an appeals court interpreted that declaration, stating that "*Gertz's* implicit command thus imposes upon both state and federal courts the duty as a matter of constitutional adjudication to distinguish facts from opinions in order to provide opinions with the requisite, absolute First Amendment protection." *Ollman v. Evans*, 750 F.2d 970, 975 (D.C. Cir. 1984) (footnote omitted), *cert. denied*, 471 U.S. 1127 (1985).

298. In *Bates v. State Bar of Arizona*, Justice Blackmun, stated that the government's argument in favor of prohibiting attorney advertising "assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. . . . In any event, we view as dubious any justification that is based on the benefits of public ignorance." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 374-75 (1977). In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, when the Court was confronted with a similar prohibition on advertising prescription drug prices, the Court declared:

It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists. . . . But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is.

*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976); *see also* *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) (holding that the First Amendment protects fundamentally the free exchange of ideas with the public in the political process); *Bigelow v. Virginia*, 421 U.S. 809, 827 (1975).

299. *Advertising of Tobacco Products: Hearing Before the Subcomm. on Health and the Environment of the Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 456, 457 (1986) (statement of Barry W. Lynn, legislative Counsel for American Civil Liberties Union).



stands as a counterpoint to political correctness and a protest against government regulation. The political message implicit in cigarette advertising distinguishes it from normative commercial speech. To abolish tobacco ads would substantially diminish the expression of that political viewpoint, which is, of course, the intent.

Finally, one might argue that the current FDA plan to limit the use of cigarette brand names on clothing or sponsorship of sporting events is innocuous because no real message is being prohibited. However, it is clear that one purpose for regulating tobacco promotions, particularly when asserting the goal of protecting children, is to remove them from public view so that smoking is not seen as normative behavior. Therefore, even the brand name "Marlboro" on a t-shirt or the side of a race car, with no other explicit message, is speech vital to countering the political message that smoking is not normal or socially acceptable behavior. Consequently, even the simplest tobacco promotion contains important communicative value.

Tobacco ads and related promotions differ from other commercial speech on several dimensions, and they definitely involve subject matter of the highest public interest and concern. Although many will balk at the idea of awarding such status to marketing communications of any kind—let alone tobacco products—cigarette advertising appears to meet the necessary conditions for protection as fully protected speech.

#### IV. CONCLUSION

The most direct and effective way to curtail smoking-related deaths is to ban the sale of tobacco products. A ban, however, is the one option that federal officials have yet to discuss openly. Undoubtedly, this results from both the enormous political obstacles that would be encountered<sup>300</sup> and the likelihood that such a move would create a criminal market like the one experienced during Prohibition. Consequently, a multitude of alternative steps have been taken to diminish tobacco-related health problems. These steps, however, can be interpreted in at least two different ways.

The first interpretation places those *actions* in a very positive light:

- To compensate for the inability to regulate tobacco sales, other steps are necessary.

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300. Professor Cass suggests that the "reason for suggesting restraints on advertising cigarettes manifestly is rooted in realpolitik. . . . Those who believe that cigarette smoking is harmful for the primary and secondary smoker also believe that, however desirable, a ban on smoking is politically impractical." Ronald A. Cass, *Commercial Speech, Constitutionalism, Collective Choice*, 56 U. CIN. L. REV. 1317, 1379 (1988).

- Therefore, to protect the health of nonsmokers, government officials have passed laws and regulations to prevent smoking in many workplaces and public buildings.
- In addition, to provide the information that tobacco companies omit, officials are informing the public of the dangers inherent in smoking.
- Finally, to prevent tobacco companies from manipulating citizens into adopting the smoking habit, officials are attempting to regulate or ban tobacco advertising.

Undoubtedly, this is an accurate interpretation of events. From this perspective it may be difficult to perceive the actions of officials as political or controversial in nature. Those goals are clearly laudable and in the interest of the public welfare.

If one focuses on the *effects* of those actions rather than the goals, it is possible to develop a somewhat less positive viewpoint:

- Instead of controlling the harmful substance, government officials are attempting to control consumers.
- Accordingly, government officials are progressively eliminating places where people can smoke.
- In addition, government officials are engaged in a persuasive campaign, using their positions of influence to turn the tide of public opinion against smoking and smokers.
- Finally, government officials are trying to eliminate pro-smoking messages or at least make them impotent, thereby keeping people ignorant about a legal product.

This alternate view, too, may be an accurate interpretation of the facts, but it highlights the potential incompatibility of these actions with our democratic ideals, because it smacks of behavior control, paternalism, and the stifling of free choice. Even if one admits to the inherent dangers of tobacco—and most do—it still is possible to interpret this situation as an abuse of government authority.

While both viewpoints are legitimate, politically they are miles apart. The commercial nature of this product is virtually irrelevant to a debate between the two positions. It is a dispute about political methods, rather than products. It is about the propriety of government controlling consumers as a means of regulating the use of harmful substances, and cigarette advertising is integral to that dialogue.

Over the past decade the Supreme Court has created an atmosphere conducive to legislative limitations on tobacco advertising. Ironically, those who have fought so diligently to eliminate tobacco advertising may have opened the door to enhanced protections for that advertising by turning it into political speech. Under this higher standard, cigarette ad-

vertising might still be regulated. However, any regulation would be evaluated using the exacting scrutiny<sup>301</sup> reserved for speech at the top of the First Amendment hierarchy, making it much less likely that the law will be deemed constitutional.

This is not intended to suggest that the Supreme Court will adopt a political speech approach. To date, the Court has been unwilling to accord such status to commercial messages. While the political nature of cigarette advertising makes it quite unlike other commercial messages, individual Justices undoubtedly would find it difficult to reconcile any policy that grants more protection to tobacco ads than to ads for baseball and apple pie. As Justice Blackmun noted recently, “[t]he simple reality is that the Court will never provide child pornography or cigarette advertising the level of protection customarily granted political speech.”<sup>302</sup>

Tobacco manufacturers have not yet argued the political nature of cigarette advertising, and there is no doubt that it is controversial. However, it is viable in light of previous decisions and the Court should not dismiss it easily. It highlights the difficulty inherent in delineating a hierarchy of First Amendment values. Most commercial speech, like most other forms of speech, is fairly mundane and plays no significant role in public debate. But, as with other speech, there are times when commercial messages can take center stage in a critical social dialogue. The Court has yet to fully explicate a basis for treating commercial speech as a second class form of expression under the Constitution. For twenty years the Court has relied upon common sense, rather than fact or ideological principles, as its sole basis for according commercial speech limited protection. It is time for the Court either to provide a principled distinction, or abolish that distinction altogether.

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301. See *Elrod v. Burns*, 427 U.S. 347, 360 (1976) (discussing political association as protected by the First Amendment).

302. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 445 (1992) (Blackmun, J., concurring).