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# Tobacco Talk: Why FDA Tobacco Advertising Restrictions Violate the First Amendment

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## TOBACCO TALK: WHY FDA TOBACCO ADVERTISING RESTRICTIONS VIOLATE THE FIRST AMENDMENT

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## I. INTRODUCTION

Virtually everyone knows that cigarettes are hazardous to one's health.<sup>1</sup> Yet millions of adults and young people still choose to smoke and use smokeless tobacco.<sup>2</sup> Hundreds of thousands of people die each year from illnesses related to smoking.<sup>3</sup>

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1. See Robert A. Kagan & David Vogel, *The Politics of Smoking Regulation: Canada, France, the United States*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 25 (Robert L. Rabin & Stephen D. Sugarman eds., 1993). A Gallup poll showed that 94% of Americans surveyed thought smoking was a health hazard and a potential cause of respiratory cancer and heart disease. See *id.* That should be no shock, according to R.J. Reynolds Tobacco Co. deputy general counsel Dan Donahue, who claims the public has known of the health risks of tobacco since at least 1604, when King James I of England described smoking as "harmful to the braine and dangerous to the lungs." Jill Hodges, *Tobacco Tenacious in the Courtroom: Industry Has Flourished Through Decades of Litigation*, *STAR TRIB.* (Minneapolis), Sept. 15, 1996, at A19.

2. See CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVICES, *MORBIDITY & MORTALITY WKLY. REP.*, July 12, 1996, at 588, 588-89. The report estimates that 25.5% of the adult population - 25.3 million men and 22.7 million women - currently smoke. This number signifies the first time in over a decade that smoking among adults has not decreased. See *id.* As of 1990, over three million American children between the ages of 8 and 17 were daily tobacco users, consuming 947 million packs of cigarettes and 26 million containers of smokeless tobacco yearly. See Joseph R. DiFranza & Joe B. Tye, *Who Profits from Tobacco Sales to Children?*, 263 *JAMA* 2784, 2784 (1990). These numbers increase to over five million when occasional smokers in the same age group are included. See *id.* An estimated 1.7 million boys between the ages of 12 and 18 use smokeless tobacco. See *id.* at 2785; see also U.S. DEP'T OF HEALTH & HUMAN SERVICES, *PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL 75* (1994) [hereinafter *PREVENTING TOBACCO USE AMONG YOUNG PEOPLE*] (reporting that 29% of males and 26% of females aged 17 and 18 are current smokers).

3. See CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVICES, *MORBIDITY & MORTALITY WKLY. REP.*, Aug. 27, 1993, at 645, 645-49. Over 400,000 people die each year from smoking-related illnesses, which rep-

Adolescents constitute the vast majority of all new smokers.<sup>4</sup> One million young persons per year – 3000 per day – become new smokers.<sup>5</sup> These rates have increased steadily every year since 1991.<sup>6</sup> Experts predict that if adolescent tobacco use continues at present levels, an estimated five million young people who were under the age of seventeen in 1995 will die prematurely from a smoking-related illness.<sup>7</sup> The human and economic toll of tobacco use is significant, particularly for those who begin smoking as adolescents.<sup>8</sup>

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resents approximately 20% of all deaths. *See id.* This number is greater than the total number of deaths caused by AIDS, alcohol, illegal drug use, car accidents, fires, murders, and suicides. *See id.* A World Health Organization study predicts that within 25 years, smoking will become the single largest cause of death and disability in the world. *See* COMMITTEE ON PREVENTING NICOTINE ADDICTION IN CHILDREN AND YOUTHS INSTITUTE OF MEDICINE, *GROWING UP TOBACCO FREE: PREVENTING NICOTINE ADDICTION IN CHILDREN AND YOUTHS 3-4* (Barbara S. Lynch & Richard J. Bonnie eds., 1994). According to the study, smoking caused three million deaths in 1990 from heart disease, lung cancer, and other disorders; extrapolated to the year 2020, that number will nearly triple to 8.4 million. *See* Thomas H. Maugh II, *Worldwide Study Finds Big Shift in Cause of Death*, L.A. TIMES, Sept. 16, 1996, at A1.

4. *See* PREVENTING TOBACCO USE AMONG YOUNG PEOPLE, *supra* note 2, at 67. In 1991, the average age at which smokers tried their first cigarette was 14.5; 71% of adolescent smokers become regular smokers by age 18. *See id.* About 82% of smokers who ever smoked daily began smoking before age 18, and by that age, 53% had become daily smokers. *See id.* at 65.

5. *See* John P. Pierce et al., *Trends in Cigarette Smoking in the United States: Projections to the Year 2000*, 261 JAMA 61, 64 (1989).

6. *See* Press Release, University of Michigan, *Monitoring the Future Study* (Dec. 19, 1996). From 1991 to 1996, smoking rates among eighth graders have risen from 14% to 21%; for 10th graders, rates rose from 21% to 30%; among 12th graders the increase was from 28% to 34%. *See id.*

7. *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T HEALTH & HUMAN SERVICES, MORBIDITY & MORTALITY WKLY. REP., Nov. 8, 1996, at 971, 971-72 [hereinafter PROJECTED SMOKING].

8. *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVICES, SMOKING AND HEALTH IN THE AMERICAS 110-12 (1992) [hereinafter SMOKING AND HEALTH IN THE AMERICAS]. Total lifetime smoking-related medical care costs in the United States are \$501 billion, an average of \$6239 per smoker. *See id.*; PROJECTED SMOKING, *supra* note 7, at 973. Total annual cost ranges from \$12 billion to \$35 billion, or \$214 to \$870 per smoker depending on when the person developed a smoking-related illness, whether the person has ceased or continues to smoke, and whether the person was or is a light or heavy smoker. *See* SMOKING AND HEALTH IN THE AMERICAS, *supra*, at 110-12; PROJECTED SMOKING, *supra* note 7, at 973. The health costs for those that develop smoking-related illnesses are higher even though they live shorter lives. *See* SMOKING AND HEALTH IN THE AMERICAS, *supra*, at 110-12; PROJECTED SMOKING, *supra* note 7, at 973. Total lifetime lost productivity costs due to mortality and morbidity (illnesses) range between \$24,221 to \$68,316 for men, and \$5894 to \$21,765 for women. *See* SMOKING AND HEALTH IN THE AMERICAS, *supra*, at 110-12; PROJECTED SMOKING, *supra* note 7, at 973. These estimates are based on men and women aged 40-44, including light (1-14 cigarettes per day) and heavy (at least 35 ciga-

In an effort to reduce the preventable short-term and long-term health risks of tobacco use that begin with the adolescent user, the Federal Food and Drug Administration (FDA) announced unprecedented restrictions on advertising, promotion, and youth access to tobacco products.<sup>9</sup> The tobacco and advertising industries responded quickly.<sup>10</sup> Without reaching the First Amendment issue, a federal district court in North Carolina held that the Federal Food, Drug, and Cosmetic Act (FDCA)<sup>11</sup> did not grant authority to the FDA to restrict the promotion and advertisement of tobacco products.<sup>12</sup> In a partial victory, the court also held that the FDA was empowered to impose access restrictions and labeling requirements on tobacco products.<sup>13</sup> Recognizing the gravity of the issues before it, the court certified the case for interlocutory appeal.<sup>14</sup>

Even if the Fourth Circuit ultimately determines that the FDA lacks authority to restrict tobacco advertising, the First Amendment issue remains.<sup>15</sup> This Note argues that following the Supreme Court's most recent

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rettes per day) smokers. See SMOKING AND HEALTH IN THE AMERICAS, *supra*, at 110-12; PROJECTED SMOKING, *supra* note 7, at 973. If current youth smoking trends continue, estimated future health care costs are estimated at \$200 billion – i.e., \$12,000 per smoker. See SMOKING AND HEALTH IN THE AMERICAS, *supra*, at 110-12; PROJECTED SMOKING, *supra* note 7, at 973.

9. See FDA Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (1996) (to be codified at 21 C.F.R. pts. 801, 803, 804, 807, 820, 897). President Clinton unveiled the final regulations in a Rose Garden ceremony on August 23, 1996, claiming, "Joe Camel and the Marlboro Man will be out of our children's reach forever." See David Phelps, *New Rules Take Aim at Teen Smoking: Clinton Restricts Cigarette Ads*, STAR TRIB. (Minneapolis), Aug. 24, 1996, at A1. The final regulations were published on August 28, 1996. The public comment period for the proposed regulations originally ran from publication of the proposed regulations until January 2, 1996. See 61 Fed. Reg. at 44,417. Due to an unprecedented number of responses, the comment period was reopened, resulting in more than 700,000 pieces of mail, representing the views of over 1 million individuals. See *id.* at 44,418. The FDA based its goal of protecting children and adolescents on the significant immediate and latent health risks that accompany early introductions of tobacco use. See *id.* at 44,397-98.

10. See *Coyne Beahm, Inc. v. United States Food & Drug Admin.*, 966 F. Supp. 1374 (M.D.N.C. 1997). As soon as the new FDA rules were released in proposed form in the summer of 1995, the tobacco industry filed suit in federal district court in North Carolina. Interestingly, the FDA previously had declined jurisdiction over cigarettes. See *Action on Smoking and Health v. Harris*, 655 F. 2d 236 (D.C. Cir. 1980).

11. See 21 U.S.C. § 360j(e) (1994).

12. See *Coyne Beahm, Inc.*, 966 F. Supp. at 1400 & n.33. The FDA claimed that because 21 U.S.C. § 360j(e) granted it authority over the sale, distribution, and use of tobacco products, it therefore could restrict the advertisement and promotion of tobacco products pursuant to that section. See *id.*

13. See *id.*

14. See *id.* at 1400.

15. See Sandra Torry, *Duel in a Country Courthouse, With Tobacco Regulation at*

commercial speech decision in *44 Liquormart v. Rhode Island*,<sup>16</sup> the FDA regulations on tobacco advertising are essentially “dead on arrival.”<sup>17</sup> In Part II, this Note traces the development of free speech and First Amendment values. Part III frames the context in which the FDA regulations will be analyzed by examining the evolution of the commercial speech doctrine. Part IV evaluates the FDA regulations against commercial speech standards and finds that the regulations would fail judicial scrutiny. Alternatives to regulating tobacco advertising that could reduce tobacco use and avoid constitutional challenges also are presented.

## II. HISTORICAL PERSPECTIVES OF FREE SPEECH

### A. *The History of the Free Speech Clause*

Neither the history nor the text of the First Amendment provides explicit guidance about the intended meaning or breadth of the Free Speech Clause.<sup>18</sup> Prior to the passage of the First Amendment in 1791, free speech in the colonies mirrored the traditions of England by eschewing prior restraints while allowing punishments for publication of seditious libel.<sup>19</sup> Even as prosecutions for seditious libel continued in the colo-

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*Stake*, WASH. POST, Aug. 18, 1997, at F7. University of Chicago law professor Cass Sunstein predicts that “the 4th Circuit is very skeptical and will hold against the FDA. Then we will have a real battle in the Supreme Court, and it’s not easy to predict what will happen there.” *Id.* However, the Fourth Circuit recently upheld sweeping bans on outdoor advertising of cigarettes and alcohol. See *Anheuser-Busch, Inc. v. Schموke*, 63 F.3d 1305 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 1821, *on remand*, 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997) (alcohol); *Penn Advertising, Inc. v. Mayor & City Council*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 2575, *on remand*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997) (cigarettes). For a discussion of these cases, see *infra* notes 280-288 and accompanying text.

16. 517 U.S. 484 (1996) (holding unconstitutional a state ban on liquor price advertisements). For a detailed discussion of this case, see *infra* Part III.C.2.

17. See Ann Merrill, *Lots of Money at Stake: What Do FDA Rules Mean for Advertisers?*, STAR TRIB. (Minneapolis), Aug. 24, 1996, at A17 (quoting Minneapolis advertising law attorney Stephen Bergerson).

18. See ZECHARIAH CHAFFEE, *FREE SPEECH IN THE UNITED STATES* 16 (1941) (“The framers of the First Amendment make it plain that they regarded freedom of speech as very important. . . . But they say very little about its exact meaning.”); RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 16.26, at 985 (5th ed. 1995); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971) (“The framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject.”); Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 749 (1993) (“The First Amendment poses a difficult practical problem: It is quite short and does not explain what counts as ‘speech,’ what counts as ‘freedom,’ or what counts as ‘abridging.’”).

19. See ROTUNDA & NOWAK, *supra* note 18, § 16.3, at 987. Sedition occurs

nies, popular opinion of these prosecutions waned following the prosecution and acquittal of New York publisher John Peter Zenger in 1735.<sup>20</sup> Notwithstanding its growing unpopularity, the colonial common law of seditious libel generally followed the Blackstonian theory of free speech, which posited that speech deserved protections only from prior restraint laws.<sup>21</sup>

From the colonial period until the enactment of the First Amendment, popular opinion was entirely inconsistent with Blackstone's narrow conception of speech.<sup>22</sup> The colonists favored defining free speech in a liberal manner.<sup>23</sup> Benjamin Franklin was an early champion of the belief that expression should be left largely untouched by government regulation.<sup>24</sup> Franklin wrote his most famous and influential essay on freedom of the press in defense of a handbill he printed that contained derogatory comments about Anglican ministers.<sup>25</sup> Franklin defended his actions, rely-

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when criticism is leveled at the sovereign. *See id.* English courts developed the theory that the King and his subjects were above questioning. *See id.* Anyone expressing disapproval of the sovereign or its agents was subject to criminal punishment; truth was not a defense. *See id.*

20. *See id.* § 16.4, at 988-89. The prosecution of John Peter Zenger, a New York publisher, for printing seditious material about New York's governor precipitated disgust with sedition laws. *See id.* At the time of Zenger's prosecution, colonialists were becoming resentful of English control. *See id.* Alexander Hamilton, Zenger's lawyer, capitalized on this fact. *See id.* He recognized that a jury would not convict Zenger for printing material critical of an agent of the King if the material were deemed not false. *See id.* Zenger was acquitted of the charges, but the fact that he was prosecuted for expressing opinions that were approved by many caused many colonists to distrust sedition laws. *See id.*; *see also* CHAFFEE, *supra* note 18, at 20-21 (noting that colonial disapproval of the sedition laws grew following Zenger's trial).

21. *See* ROTUNDA & NOWAK, *supra* note 18, § 16.5, at 989 n.5 (noting that from 1760 to 1776 there were 70 prosecutions and 50 convictions for seditious libel in the colonies); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151-54 (1765-69), *reprinted in* LEONARD W. LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 103-05 (1996).

22. *See* CHAFFEE, *supra* note 18, at 18. Benjamin Franklin adamantly favored prohibiting government from hindering the expression of political opinions. *See id.* The Continental Congress wrote that scrutiny of public officials was necessary to ensure they did their jobs. *See id.* Thomas Jefferson's desire to strengthen religious freedoms reflected a general trend toward a government more tolerant of divergent views. *See id.*

23. *See id.* *But see* ROTUNDA & NOWAK, *supra* note 18, § 20.4, at 1112 (noting that while many people were critical of the King and his royal governors, popularly-elected legislators routinely enacted laws that punished people for criticizing colonial policies).

24. *See* Benjamin Franklin, *An Apology for Printers*, PA. GAZETTE (Phila.), June 10, 1731, *reprinted in* LEVY, *supra* note 21, at 4-10.

25. *See* JEFFREY A. SMITH, PRINTERS AND PRESS FREEDOMS 117 (1988). Franklin's *Apology* was a response to "a bit of levity directed at Anglican clergymen [that] appeared in an advertising handbill he printed." *Id.*

ing on a “marketplace of ideas” theory wherein all opinions should be expressed, truth overcomes error, and only vicious and immoral expression warranted censorship.<sup>26</sup> Another colonial newspaperman, Daniel Fowle, echoed Franklin’s liberal attitude toward free speech by vowing to print anything that was not “divisive, immoral, or scurrilous.”<sup>27</sup> Just as Franklin’s support of free speech arose in the context of a commercial advertisement, Fowle’s praise for free speech specifically identified commercial speech as protected expression.<sup>28</sup>

The revolutionary foment against the laws of England suggests that the Framers enacted the Free Speech Clause to rid the colonies of the English common law of free speech and seditious libel.<sup>29</sup> Understandably, the enactment of the Sedition Act<sup>30</sup> was met with resentment and seen as invading the broad American notion of free speech.<sup>31</sup> James Madison, the principal author of the First Amendment, decried the Sedition law, as did Thomas Jefferson.<sup>32</sup> Although the Supreme Court never addressed the constitutionality of the Sedition Act, subsequent opinions demonstrate that it violated First Amendment principals.<sup>33</sup> In light of the attitudes and popular thinking of the time, the Framers must have leaned toward protecting a broad variety of speech from government regulation.<sup>34</sup>

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26. See Franklin, *supra* note 24, at 4-6; see also SMITH, *supra* note 25, at 117.

27. This statement appeared in the first edition of the *New Hampshire Gazette*, published by Daniel Fowle in 1756. Daniel Fowle, N.H. GAZETTE (1756), reprinted in SMITH, *supra* note 25, at 49.

28. See *id.* Fowle pledged that his *Gazette* would contain Extracts from the best Authors on Points of the most useful Knowledge, moral, religious or political Essays, and other such Speculations as may have a Tendency to improve the Mind, afford any Help to Trade, Manufactures, Husbandry, and other useful Arts, and promote the public Welfare in any respect.

*Id.*

29. See CHAFFEE, *supra* note 18, at 20 (stating that the First Amendment was written by men who, after seeing the effects of sedition laws, intended “to wipe out the common law of sedition”).

30. Act of July 14, 1798, ch. 74, 1 Stat. 596. The Act criminalized publication of false, scandalous, and malicious writings against the government, or material defending countries hostile to the United States. See *id.*

31. See CHAFFEE, *supra* note 18, at 27.

32. See SMITH, *supra* note 25, at 52, 84-85, 89-90; see also James Madison, Congressional Debates, Tuesday, August 18, 1789, reprinted in DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 239 (1990) (discussing the fact that James Madison read the First Amendment liberally).

33. See *New York Times v. Sullivan*, 376 U.S. 254, 276 (1964).

34. See CHAFFEE, *supra* note 18, at 16; see also *Near v. Minnesota*, 283 U.S. 697, 714 (1931) (observing that Blackstonian ideals of freedom from prior restraint were not the only freedoms protected by the First Amendment).



## B. First Amendment Values

The Supreme Court continues to define the reach of First Amendment protections. Some categories of speech fall outside the First Amendment's protection altogether.<sup>35</sup> Categories of speech receiving no protection include fighting words,<sup>36</sup> obscenity,<sup>37</sup> libel,<sup>38</sup> speech inciting violence,<sup>39</sup> and speech that causes a panic.<sup>40</sup> The social value of the content of these types of speech is considered negligible because the speech does nothing to further truth and is outweighed by society's interests in order and morality.<sup>41</sup> Despite its communicative characteristics, such speech is comparable to a noisy soundtrack that can be turned down.<sup>42</sup>

In other situations, speech must present a clear and present danger to be abridged.<sup>43</sup> The danger must be immediate, however, because the First Amendment seeks to facilitate a marketplace of ideas in which truth prevails.<sup>44</sup> Discussion, not suppression, is a First Amendment touchstone.<sup>45</sup>

35. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387-89 (1992) (explaining that content discrimination is authorized "when the basis for the content discrimination consists entirely of the reason the entire class of speech is proscribable at issue, but not when the content discrimination is based on viewpoints other than the proscribable content").

36. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

37. See *Miller v. California*, 413 U.S. 15, 23-24 (1973).

38. See *New York Times*, 376 U.S. at 269; see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-43 (1974).

39. See *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (per curiam).

40. See *Schenck v. United States*, 249 U.S. 47, 51-52 (1919).

41. See *Chaplinsky*, 315 U.S. at 572.

42. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387-89 (1992).

43. See *Schenck*, 249 U.S. at 52.

44. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Holmes wrote:

[T]he ultimate good desired is better reached by free trade in ideas – that the best test in truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. . . . I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

*Id.*

45. See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). In Justice Brandeis' words,

[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.

Even an exhortation to perform an illegal act must advocate and incite imminent lawless action that is likely to be realized for it to be suppressed.<sup>46</sup> Abridging speech based on its content, however offensive or repugnant the message may be, offends the values the First Amendment protects.<sup>47</sup> Free speech embraces controversy; it does not avoid it.<sup>48</sup>

The First Amendment allows government regulations to survive constitutional scrutiny when they regulate noninformative aspects of speech. These restrictions affect the time, place, and manner in which speech is made rather than the content of the speech.<sup>49</sup> Courts will uphold such restrictions if they are narrowly tailored to serve a significant or substantial government interest and allow reasonable and ample alternative avenues of communication.<sup>50</sup>

Expressive activity manifests itself in countless forms. As a result, the Supreme Court has written a number of opinions ascertaining the consti-

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*Id.*

46. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); *cf. Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting) (“[E]very idea is an incitement. It offers itself for belief, and if believed, it is acted on unless some other belief outweighs it. . . . [T]he only meaning of free speech is that they should be given their chance and have their way.”).

47. See *Texas v. Johnson*, 491 U.S. 397, 419-20 (1989) (holding that a law prohibiting flag-burning violated the First Amendment); *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988) (holding that the First Amendment protected a cartoon parody of Jerry Falwell committing incest with his mother in an outhouse); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (stating that the country has “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”); *Cohen v. California*, 403 U.S. 15, 26 (1971) (reversing a conviction for wearing a jacket bearing the words “Fuck the Draft”); *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting) (“If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom for the thought we hate.”).

48. See *Johnson*, 491 U.S. at 408. Modern contentious issues to which First Amendment protection extends include corporate political speech, *see First Nat’l Bank v. Belotti*, 434 U.S. 765 (1978); campaign expenditures, *see Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam); and publication of the names of rape victims, *see Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

49. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (upholding park department regulations that sought to limit the sound level of outdoor concerts); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986) (upholding zoning ordinances that restricted the location of establishments hosting exotic dancing because of the increased blight and criminal problems associated with such establishments); *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 62-63 & n.18 (1976) (upholding restrictions on the locations of adult movie theaters because of their detrimental effects on the surrounding neighborhoods).

50. See, e.g., *Rock Against Racism*, 491 U.S. at 791; *City of Renton*, 475 U.S. at 46-47.

tutionality of government regulations affecting speech in many forms. In a string of opinions, the Supreme Court has articulated the protections the First Amendment provides to commercial speech. The next Part of this Note tracks the development of this commercial speech jurisprudence and illustrates the analytical framework within which the Court will determine the constitutionality of the FDA regulations that limit tobacco advertising.

### III. THE DEVELOPMENT OF THE COMMERCIAL SPEECH DOCTRINE

As made clear by the text of the First Amendment and the history behind it, the Free Speech Clause is quite broad and does not exclude commercial speech from its protection.<sup>51</sup> The failure to distinguish the value of commercial speech may have been because commercial industry and advertising were far less widespread than they are today, as was the perceived need to protect the public from commercial harms.<sup>52</sup> Colonial society probably did not consider distinguishing commercial speech from other types of speech.<sup>53</sup>

Commercial speech takes many forms.<sup>54</sup> According to the Supreme Court, commercial speech is recognizable merely by using common sense.<sup>55</sup> Identifying the abridgment of commercial speech often is difficult to detect.<sup>56</sup> The subjectivity inherent in the Court's common-sense approach to identifying commercial speech warrants an examination of the origins and development of commercial speech case law.

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51. See *supra* Part II.A.

52. See Daniel L. Brenner & William L. Rivers, *Mass Media Law: An Overview, in FREE BUT REGULATED: CONFLICTING TRADITIONS IN MEDIA LAW* 3, 4 (Daniel L. Brenner & William L. Rivers eds., 1982).

53. See Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 634 (1990) ("The [F]irst [A]mendment's text and history don't provide us with any explanation of the distinction between commercial and non-commercial speech.").

54. See Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 700-19 (1993). The authors describe how advertisements have evolved from conveying information to persuading with lifestyle images that typically do not explicitly invite the consumer to buy. Examples include infomercials, documericals, commercial video news releases, product placements, and advertorials, as well as traditional ads. See *id.* at 719.

55. See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) ("There are commonsense differences between speech that does 'no more than propose a commercial transaction.'").

56. See Kozinski & Banner, *supra* note 53, at 631 (discussing the difficulty of predicting which types of commercial speech receive protection, from direct-mail contraceptive ads, which are protected, to Tupperware parties in college dorms, which may not be protected).

A. *The Origination and Early Development of Commercial Speech Jurisprudence*

1. *Valentine v. Chrestensen*

The doctrine of commercial speech first appeared in *Valentine v. Chrestensen* in 1942.<sup>57</sup> Chrestensen printed a handbill advertising tours of a decommissioned Navy submarine, which he wanted to display to the public for profit.<sup>58</sup> Upon distributing his handbill, Chrestensen was told by the New York City police that he violated the city's sanitary code, which forbade distributing commercial advertising matter in the city streets.<sup>59</sup> The code, however, did not prohibit the distribution of handbills that conveyed simple information or encouraged public protest.<sup>60</sup> To circumvent the code, Chrestensen printed a double-sided handbill with his original advertisement on one side without a fee statement, and a protest against the city dock department on the other side.<sup>61</sup> The police nevertheless arrested Chrestensen for violating the sanitary code; Chrestensen asserted that the code violated the First Amendment.<sup>62</sup>

The Supreme Court purported to recognize the First Amendment issue when analyzing the legality of the sanitary code.<sup>63</sup> Justice Roberts nevertheless reframed the Court's inquiry to determine the proper use of municipal highways while silencing Chrestensen because of his bad-faith attempt to evade the sanitary code.<sup>64</sup> Citing no authority, the *Valentine* Court concluded that it was "clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."<sup>65</sup> The

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57. 316 U.S. 920 (1942).

58. *Id.*

59. *Id.* This ordinance later was held unconstitutional in *People v. Remeny*, 355 N.E.2d 375, 377 (N.Y. 1976).

60. *Valentine*, 316 U.S. at 921.

61. *Id.*

62. *Id.*

63. *Id.* Justice Roberts stated that "[t]he question is whether the application of the ordinance to the respondent's activities was, in the circumstances, an unconstitutional abridgment of the freedom of the press and of speech." *Id.*

64. *Id.* The Court noted that the court below, which held for Chrestensen, invalidated the importance of speech no matter whether its subject concerns public interest or private profit because of the difficulty of separating the two. *Id.* The Court nonetheless refrained from discussing the First Amendment implications of the issue before it. *See id.*

65. *Id.*; see EDWIN P. ROME & WILLIAM H. ROBERTS, CORPORATE AND COMMERCIAL FREE SPEECH 12-14 (1985). The holding may have been presaged by dicta in *Schneider v. New Jersey*, which involved the distribution of religious material by a Jehovah's Witness who also solicited cash contributions. 308 U.S. 147, 165 (1939). The *Schneider* Court invalidated a New Jersey statute prohibiting such solicitations because of the religious motivation of the Jehovah's Witness. *Id.* It im-

brief, puzzling opinion may have been the result of the prevailing societal attitude that advertising was a business subject to regulation rather than a form of free expression.<sup>66</sup> Apparently without even realizing the far-reaching implications the decision would have, the Court in *Valentine* accepted commercial speech from First Amendment protection.<sup>67</sup>

## 2. *Breard v. Alexandria*

The Supreme Court next dealt with commercial speech in 1951 in *Breard v. Alexandria*.<sup>68</sup> In *Breard*, a magazine salesman selling subscriptions door-to-door was arrested for violating an Alexandria city ordinance that required commercial solicitors to get permission from homeowners before soliciting orders.<sup>69</sup> The Court upheld his conviction on the ground that a homeowner's private interest in being free from solicitors outweighed the right to solicit.<sup>70</sup> The *Breard* Court, like the *Valentine* Court, did not attempt to divine the speaker's motivation.<sup>71</sup> Instead, it acknowledged *Breard's* commercial conduct and balanced that interest against the privacy interests of homeowners.<sup>72</sup> The result of *Breard* differed little from

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plied that if the case had involved a profit motive the ordinance might have been upheld. See *id.*; ROME & ROBERTS, *supra*, at 14. The Court of Appeals acknowledged that this approach had merit, but it rejected as futile any attempt to divine the primary motivation of mixed commercial/noncommercial messages. See *Valentine v. Chrestensen*, 122 F.2d 511, 514-15 (2d Cir. 1941).

66. See Kozinski & Banner, *supra* note 18, at 758. The authors suggest that *Valentine's* language is more suggestive of the substantive due process approach typical of the Court at that time. See *id.* at 758-59 (stating that "whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of a user, are matters for legislative judgment").

67. See *id.* Attesting to the low level of attention and importance the Court gave the *Valentine* case was the short time in which it was decided (13 days) and the complete absence of documentation regarding the case in the Court's own files. See *id.*

68. 341 U.S. 622 (1951).

69. *Id.* at 623.

70. *Id.* at 644-45.

71. *Id.*; cf. *Murdock v. Pennsylvania*, 319 U.S. 105, 111-12 (1943) (reversing soliciting convictions of Jehovah's Witnesses; holding that even though conduct of selling religious books door-to-door appeared commercial, the commercial element was merely incidental to the dissemination of religious beliefs, which was protected by the Free Exercise Clause).

72. See *Breard*, 341 U.S. at 644-45. The Court distinguished *Martin v. City of Struthers*, in which free distribution of religious materials door-to-door had no commercial element deserving less rigorous First Amendment scrutiny. See 319 U.S. 141, 142 n.1 (1943), cited in *Breard*, 341 U.S. at 642-43; see also *Florida Bar v. Went For It*, 515 U.S. 618, 625 (1995) (upholding Florida bar's ban on lawyers' direct-mail solicitation of personal injury or wrongful death clients within 30 days of accident because of substantial interest in protecting the privacy interest of victims and their families).

that of *Valentine*. But because it acknowledged that solicitors maintained an interest in distributing information, even though that interest was outweighed, the *Breard* opinion foreshadowed the later disavowal of *Valentine*.<sup>73</sup>

## B. Contemporary Commercial Speech Jurisprudence

### I. Capitol Broadcasting Co. v. Mitchell

Although broadcasting cases are distinguishable from pure commercial speech cases,<sup>74</sup> *Capitol Broadcasting Co. v. Mitchell* is instructive both in its facts and its treatment of cigarette advertising.<sup>75</sup> Six radio stations sued to enjoin enforcement of a provision of the Public Health Cigarette Smoking Act of 1969, which prohibited the broadcasting of cigarette advertisements.<sup>76</sup> The district court declared cigarette advertising on radio and television to be a legitimate "evil at hand" subject to rational congressional action.<sup>77</sup> The district court pointed to evidence of television and radio advertising's detrimental persuasive effect on young people.<sup>78</sup> In upholding the statute, the court also declared that the broadcasters themselves had not lost any right to speak; they had lost only the ability to collect revenue from the tobacco ads.<sup>79</sup> The Supreme Court, without writing an opinion, upheld the complete statutory ban on radio and television cigarette advertising.<sup>80</sup>

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73. See *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring) (dismissing the *Valentine* decision as "casual, almost offhand. And it has not survived reflection"); see also *Lehman v. City of Shaker Heights*, 418 U.S. 298, 314 n.6 (1974) (Brennan, J., dissenting) (stating that there was "some doubt concerning whether the commercial speech distinction announced in *Valentine v. Christensen* . . . retains continuing constitutional validity").

74. Broadcasters are subject to the jurisdiction of the Federal Communications Commission. See Bruce M. Owen, *Different Media, Differing Treatment: Radio and Television*, in *FREE BUT REGULATED*, *supra* note 52, at 35 (discussing broadcasting's unique status in free speech discourse because broadcasters must receive FCC licensing prior to broadcasting, whereas prior restraint of speech is, in general, diametrically opposed to First Amendment values).

75. 333 F. Supp. 582, 583-86 (D.C. Cir. 1971), *aff'd sub nom.* *Capitol Broad. Co. v. Kleindienst*, 405 U.S. 1000 (1972) (mem.). The tobacco companies were notably absent from this lawsuit. See *id.*

76. 15 U.S.C. § 1335 (1970) (amended 1973) ("[I]t shall be unlawful to advertise cigarettes on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.").

77. *Capitol Broadcasting*, 333 F. Supp. at 585.

78. *Id.* at 586. The district court noted that Joseph Cullman, then chairman of Philip Morris, did not dispute the propriety of banning the cigarette ads while allowing them to remain in print where adults could access them and where children were less likely to do so. *Id.* at n.13.

79. *Id.* at 584.

80. See *Capitol Broad. Co. v. Kleindienst*, 405 U.S. 1000 (1972) (mem.), *aff'g*

The decision created controversy over the extent of government's power to abridge speech that it deemed harmful to the public.<sup>81</sup> In his dissent to the court of appeals' opinion, Judge Wright criticized the decision as affirming a "legislative coup" by the tobacco industry.<sup>82</sup> Judge Wright characterized the industry's purported altruism in acceding to the congressional ban as a ploy to further its own self-interest, because the ban extended to anti- as well as pro-cigarette ads.<sup>83</sup> Anti-smoking ads had proven very effective in reducing cigarette consumption and revenue.<sup>84</sup> Once the anti-smoking ads were gone, cigarette consumption immediately increased.<sup>85</sup> Judge Wright blamed the increase in smoking on the absence of debate fostered by allowing both pro- and anti-smoking ads on the airwaves.<sup>86</sup>

## 2. Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations

In the following years, the Supreme Court mollified concerns about government restrictions of commercial speech, starting in 1973 with *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.<sup>87</sup> *Pittsburgh Press*

*Capitol Broad. Co. v. Mitchell*, 333 F. Supp. 582 (D.C. Cir. 1971).

81. See ROTUNDA & NOWAK, *supra* note 18, § 16.31, at 1068 (characterizing the *Capitol Broadcasting* decision as "troublesome" because of the cursory treatment the court gave to First Amendment concerns).

82. *Capitol Broadcasting*, 333 F. Supp. at 589 (Wright, J., dissenting). Judge Wright coined the phrase "commercial speech" in *Business Executives Move for Vietnam Peace v. FCC*, 450 F.2d 642, 658 n.38 (D.C. Cir. 1971).

83. *Capitol Broadcasting*, 333 F. Supp. at 587-88 (Wright, J., dissenting). The cigarette companies themselves suggested the ads be pulled. In return for this "voluntary altruism," the tobacco industry received a delay in pending FTC action against tobacco advertising as well as a prohibition on state regulations of cigarette advertising and packaging that would be stricter than those established by federal law. *Id.* at 589; see also *Banzhaf v. FCC*, 405 F.2d 1082, 1092-93 (1968) (declaring cigarette advertising to be controversial speech subject to the fairness doctrine, requiring any station carrying cigarette ads to carry approximately the same number of anti-smoking ads).

84. See *Capitol Broadcasting*, 333 F. Supp. at 587 (Wright, J., dissenting).

85. See *id.* at 589; see also MICHAEL G. GARTNER, ADVERTISING AND THE FIRST AMENDMENT 30-33 (1989) (agreeing with Judge Wright's reasoning and proposing that tobacco ads be allowed back on the air with the government buying advertising time for anti-smoking ads).

86. *Capitol Broadcasting*, 333 F. Supp. at 590, 594 (Wright, J., dissenting) ("[T]he effect of this legislation was to cut off debate on the value of cigarettes just when *Banzhaf* had made such a debate a real possibility. . . . I think that when people are given both sides of the cigarette controversy, they will make the correct decision. That, after all, is what the First Amendment is all about.").

87. 413 U.S. 376 (1973); see also Kozinski & Banner, *supra* note 18, at 756 (noting that *Pittsburgh Press* acknowledged for the first time the concept of and term "commercial speech").

involved a Pittsburgh ordinance that prohibited hiring on the basis of sex.<sup>88</sup> Thousands of newspaper classified employment ads, however, were categorized on the basis of sex.<sup>89</sup> The National Organization for Women filed a complaint with the commission charged with enforcing the ordinance.<sup>90</sup>

The Court found that the advertisements at issue were “classic example[s] of commercial speech.”<sup>91</sup> It declined to strip the ads of First Amendment protection and even suggested that the interests in commercial speech could outweigh the government interest in suppressing the commercial message.<sup>92</sup> The Court held that the ads could be banned, however, because the advertisements advanced activity that was itself illegal.<sup>93</sup> The *Pittsburgh Press* Court’s holding was significant because it demonstrated that speech that is profit-driven or that merely proposes a commercial transaction is not without First Amendment protection.<sup>94</sup>

### 3. Bigelow v. Virginia

In the 1975 case of *Bigelow v. Virginia*,<sup>95</sup> the Court confirmed that advertising deserves some level of First Amendment protection, thereby continuing to distance itself from the *Valentine* holding. In *Bigelow*, a newspaper editor was prosecuted for violating a Virginia law that prohibited advertisements relating to abortion services.<sup>96</sup> Relying on the *Valentine* opinion, the Virginia Supreme Court disagreed with Bigelow’s contention that the prosecution violated the First Amendment, reasoning that commercial advertisements were not protected by the First Amendment.<sup>97</sup>

The *Bigelow* Court characterized the *Valentine* holding as distinctly limited and not designed to put commercial speech outside First Amendment protection.<sup>98</sup> It reversed the newspaper editor’s conviction after balancing various state interests in prohibiting the advertisements against the audience’s interest in receiving the message.<sup>99</sup> Specifically, the Court held

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88. *Pittsburgh Press*, 413 U.S. at 378.

89. *Id.* at 378-79. The advertisements at issue were grouped according to “Male Help Wanted,” “Female Help Wanted,” “Male-Female Help Wanted,” “Jobs – Male Interest,” and “Jobs – Female Interest.” *Id.* at 379.

90. *Id.* at 379.

91. *Id.* at 385.

92. *Id.* at 388-89.

93. *Id.* at 388.

94. *See id.* at 385.

95. 421 U.S. 809 (1975).

96. *Id.* The law stated, “If any person, by . . . advertisement, encourage[s] or prompt[s] the procurement of abortion or miscarriage, he shall be guilty of a misdemeanor.” *Id.* at 812 (quoting VA. CODE ANN. § 18.1-63 (1966)).

97. *Id.* at 818 (citing *Bigelow v. Virginia*, 191 S.E.2d 173 (Va. 1972)).

98. *Id.* at 819-20.

99. *Id.* at 826-29. The Court stressed that



that the First Amendment protected the advertisement because of its interest and value to its audience, which consisted of those needing abortion services and those interested in the development of abortion law.<sup>100</sup> Finally, the Court concluded that the advertisement deserved protection because it pertained to an activity that was not only legal but constitutional.<sup>101</sup> The decision further narrowed the *Valentine* opinion's authority. Yet, because the subject matter of the message related to abortion, a constitutionally protected activity, *Bigelow* did not squarely address the commercial speech conundrum respecting the regulations of advertisements relating to activities that are not constitutionally protected.<sup>102</sup>

#### 4. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Supreme Court addressed the issue of whether the First Amendment protects commercial speech that relates to activities the government can regulate or prohibit.<sup>103</sup> In *Virginia Pharmacy*, the Court considered the constitutionality of a law prohibiting licensed pharmacists from advertising the prices of prescription drugs.<sup>104</sup> The facts of this case are unique because the speech recipients, the consumers, rather than the speaker, brought suit.<sup>105</sup>

In considering the First Amendment implications of the law, the Court confirmed the importance of protecting the content of truthful commercial speech that relates to lawful activity because of the public interest in receiving information.<sup>106</sup> It stressed that protecting purely com-

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[t]o the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged. Advertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.

*Id.* at 826.

100. *Id.* at 822.

101. *Bigelow*, 421 U.S. at 821-22. See generally *Roe v. Wade*, 410 U.S. 113 (1973).

102. *Bigelow*, 421 U.S. at 825.

103. 425 U.S. 748 (1976).

104. *Id.* at 750-51. The statute at issue provided that a licensed pharmacist was guilty of unprofessional conduct if the pharmacist "publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription." *Id.* at 750 n.2.

105. See *id.* at 757. The pharmacists had lost a previous suit and did not appeal. See *id.* at 753.

106. *Id.* at 762-63.

mercial speech did not offend the First Amendment values that shield paid advertisements, movies, and books – all of which contribute to public debate on ideas – from unrestricted government regulation.<sup>107</sup> Further, the Court stressed that the First Amendment protects both the right to speak and the right to receive information,<sup>108</sup> and it noted that, at times, the public's interest in receiving commercial information may be greater than its interest in political speech.<sup>109</sup>

Although it found the law invalid, the *Virginia Pharmacy* Court conceded that some commercial speech may be regulated with respect to the time, place, and manner in which it is made.<sup>110</sup> The Court reasoned that commercial speech is subject to regulation because “commonsense differences” distinguish it from other forms of speech.<sup>111</sup> It cautioned that its opinion should not be read to suggest that all commercial speech could be regulated with impunity; rather, the regulation of false, deceptive, or misleading speech would be allowed to ensure the flow of truthful and legitimate commercial information.<sup>112</sup> The *Virginia Pharmacy* opinion reflected the Court's rejection of the paternalistic view that governments should decide what is best for the public in favor of “assum[ing] that . . . information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.”<sup>113</sup>

### 5. *The Central Hudson Test*

In the wake of the foregoing opinions, the Court established a test for determining the constitutionality of regulations affecting commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.<sup>114</sup> The four-prong test requires the reviewing court to consider:

107. *Id.* at 761-62.

108. *Id.* at 756-57.

109. *Id.* at 763.

110. *Virginia Pharmacy*, 425 U.S. at 771.

111. *Id.* at n.24 (noting that commercial speech was “more easily verifiable by its disseminator than . . . news reporting or political commentary” because advertising disseminators have firsthand knowledge of the facts about their product).

112. *Id.* at 771; see also *Bates v. State Bar of Ariz.*, 433 U.S. 350, 366 (1977) (holding that a state may restrict certain aggressive sales practices that could exert undue influence over consumers).

113. *Virginia Pharmacy*, 425 U.S. at 770. The Court concluded that “the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. 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.” *Id.* The notion is reminiscent of Judge Wright's dissent in *Capitol Broadcasting*. See *supra* note 86 and accompanying text.

114. 447 U.S. 557 (1980).

(1) whether the commercial speech relates to lawful activity and is not misleading; (2) whether the governmental interest is substantial; (3) whether the regulation that suppresses speech directly advances the governmental interest claimed; and (4) whether the regulation that suppresses speech is no more extensive than necessary in order to serve the governmental interest.<sup>115</sup> If the speech promotes illegal activity, or is false or misleading, it receives no First Amendment protection and the *Central Hudson* inquiry ends. If the speech promotes a legal activity and is not false or misleading, it has presumptive First Amendment protection and the remaining elements must be examined.<sup>116</sup> If the restrictions do not satisfy each of the remaining three elements, they violate the First Amendment.<sup>117</sup>

In *Central Hudson*, the New York Public Services Commission prohibited promotional advertising by a New York electrical utility company.<sup>118</sup> The commission reasoned that banning the advertising would decrease energy demand and facilitate conservation.<sup>119</sup> The Court found the advertisements to be neither misleading nor related to unlawful activity; consequently, the advertisements satisfied the first prong of *Central Hudson* and, therefore, received presumptive First Amendment protection.<sup>120</sup> Proceeding to the second prong, the Court acknowledged the substantial government interest in energy conservation.<sup>121</sup> It further found that the third prong was satisfied because the commission could show a direct relationship between advertising and the consumption of energy;<sup>122</sup> however, the prohibition failed the fourth prong because it was more extensive than necessary to further the state's interest in conserving energy.<sup>123</sup> In the Court's view, the Commission had not demonstrated that a regulation less restrictive than a complete advertising ban would not have reduced energy consumption as much as the regulation it employed – a kind of least restrictive means analysis.<sup>124</sup> The Court's opinion expressed a general scheme of analyzing commercial speech regulations to allow regulation of false and misleading speech while preventing the highly paternalistic, broad government regulation that can displace vigorous debate.<sup>125</sup>

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115. *Id.* at 566.

116. *Id.*

117. *Id.*

118. *Id.* at 559.

119. *Id.* at 559-60.

120. *Central Hudson*, 447 U.S. at 567-68.

121. *Id.* at 568-69 (1980).

122. *Id.* at 569.

123. *Id.* at 569-70.

124. *Id.* at 570-71. The Court subsequently softened the impact of the fourth prong of *Central Hudson* by adopting "something short of a least-restrictive means standard." *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989).

125. *See Central Hudson*, 447 U.S. at 566 n.9.

### C. *Recent Applications of the Central Hudson Test*

The Supreme Court's application of the *Central Hudson* test often has appeared inconsistent. For example, the Court has upheld prohibitions on gambling ads,<sup>126</sup> radio lottery ads,<sup>127</sup> and attorney direct-mail advertising.<sup>128</sup> Conversely, the Court has struck down bans on residential "For Sale" signs,<sup>129</sup> news racks dispensing commercial handbills,<sup>130</sup> and in-person soliciting by Florida accountants.<sup>131</sup> The cases upholding commercial speech bans illustrate that the Court sometimes will defer to legislative pronouncements.<sup>132</sup> The Court's recent commercial speech decisions, however, signal a shift toward the highest level of protection commercial speech ever has enjoyed.<sup>133</sup>

#### I. *Rubin v. Coors Brewing Co.*

In *Rubin v. Coors Brewing Co.*, the Coors Company sought to have declared unconstitutional a subsection of the Federal Alcohol Administration Act (FAAA) that prohibited beer labels from displaying alcohol content.<sup>134</sup> Both parties and the lower courts agreed that the information at

126. See *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 348 (1986) (upholding a Puerto Rican law prohibiting gambling advertisements despite the fact that gambling is legal in Puerto Rico).

127. See *United States v. Edge Broad. Co.*, 509 U.S. 418, 435-36 (1993) (upholding a federal statute prohibiting the broadcast of lottery advertisements in states where lotteries are illegal, while permitting such advertisements in states that do have lotteries).

128. See *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634-35 (1995) (justifying restrictions on lawyer advertising by noting that the state had a very strong interest in protecting accident victims and in salvaging the public's confidence in lawyers).

129. See *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85, 97-98 (1977) (reasoning that the municipality's interest in preventing "panic selling" could not outweigh citizens' interests in determining where they should live).

130. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430 (1993) (finding that the city could not justify prohibiting news racks devoted to commercial advertising while allowing other news racks).

131. See *Edenfield v. Fane*, 507 U.S. 761 (1993) (reasoning that accountants, unlike lawyers, were not trained in the art of persuasion and dealt with more savvy clients).

132. See, e.g., *Metromedia v. City of San Diego*, 453 U.S. 490, 507-08 (1981) (deferring to legislative judgment on traffic safety and aesthetics in upholding ban on outdoor billboards).

133. See *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996) (striking down ban on alcohol price advertising); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (striking down ban on alcohol content on beer labels); David G. Savage, *The Shifting Sands of Free Speech: As Private Interests Enlist Constitutional Protection, 'Liberal' Support Wanes*, A.B.A. J., Dec. 1996, at 42, 44 (quoting Burt Neuborne of New York University School of Law, who stated that the current Court was "the fiercest defender of the First Amendment in the Court's history").

134. 514 U.S. at 478-79 (citing 27 U.S.C. § 205(e)(2) (1994)).

issue was truthful and nonmisleading and, therefore, in compliance with the first prong of the *Central Hudson* test.<sup>135</sup> In a 1995 decision, the Supreme Court found that the regulations satisfied the second prong of *Central Hudson* because the state demonstrated that it had a substantial interest in banning alcohol content to prevent brewers from competing on the basis of alcohol content.<sup>136</sup>

In the Court's view, however, the restriction failed the necessary fit between regulation and government interest mandated by the final two prongs of the *Central Hudson* test.<sup>137</sup> The Court confirmed that the *Central Hudson* factor requiring the regulation to directly advance the government interest must accomplish a direct and material degree of advancement against actual harms rather than a speculative advancement.<sup>138</sup> The alcohol content ban prohibited the publication of alcoholic content on beer labels while concomitantly requiring such labeling on wine and liquor labels; the regulation also allowed brewers to indicate the strength of the brew by labeling their brew as malt liquor.<sup>139</sup> These inconsistencies led the Court to find that the regulation did not directly advance the government interest in curbing competition based on alcohol content, or "strength wars."<sup>140</sup>

*Rubin's* sharp focus on the regulation's inability to advance the government interest revealed that the Court was becoming increasingly reluctant to defer to legislative and executive judgments about regulating commercial speech. Justice John Paul Stevens, concurring in the judgment, urged that strict scrutiny be applied to any content-based abridgment.<sup>141</sup>

## 2. 44 Liquormart v. Rhode Island

In 1996, the Court continued the trend toward more protection for commercial speech in *44 Liquormart, Inc. v. Rhode Island*.<sup>142</sup> In *44 Liquormart*, the Court examined two Rhode Island statutes that prohibited alcoholic beverage advertisements from making any reference to price except for price tags or signs within the premises.<sup>143</sup> The plaintiff, 44 Liquormart, a licensed retailer of alcoholic beverages, placed an advertisement that did not mention the prices of its alcoholic beverages and even stated that state

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135. *See id.* at 483.

136. *Id.* at 485.

137. *Id.* at 486, 490-91.

138. *Id.* at 486-87; *see also* *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

139. *See Rubin*, 514 U.S. at 488-89.

140. *Id.*

141. *See id.* at 496-97 (Stevens, J., concurring).

142. 116 S. Ct. 1495 (1996).

143. *Id.* at 1501.

law prohibited such practice.<sup>144</sup> Complaints from competitors, however, led the state to prosecute the store because its ad purportedly suggested that 44 Liquormart had low prices.<sup>145</sup>

The 44 *Liquormart* opinion reveals a significant shift in the Court's analysis of regulations affecting commercial speech. First, the Court clarified the application of the four-prong *Central Hudson* inquiry by announcing the appropriate level of judicial scrutiny for challenged commercial speech abridgments.<sup>146</sup> Regulations that attempt to protect consumers from false, misleading, deceptive, or aggressive sales tactics or that require disclosure of additional, beneficial consumer information deserve less than strict scrutiny.<sup>147</sup> When the attempted abridgment of commercial speech is a blanket ban on truthful, nonmisleading commercial messages, then strict scrutiny applies.<sup>148</sup> Accordingly, the Court applied the *Central Hudson* test, knowing that few regulations survive this heightened scrutiny.<sup>149</sup> The Court acknowledged that deference to legislative decisions is appropriate in certain circumstances, but it suggested that such circumstances would be very limited.<sup>150</sup>

Second, 44 *Liquormart* erased any notion that there was a vice exception to First Amendment protection.<sup>151</sup> The Court stated that countless activities could be defined as vice.<sup>152</sup> Moreover, legislative bodies could justify regulations of commercial speech simply by labeling the undesirable activity being advertised as vice.<sup>153</sup> Hence, the Court repudiated the notion that simply because governments possess the potential to regulate or even prohibit an activity, they may prohibit or ban commercial speech relating to the activity.<sup>154</sup> In other words, the power to ban an activity that is unprotected by the First Amendment mean that speech concerning the activity loses First Amendment protection.<sup>155</sup>

Third, the Court rejected the idea that a common-sense link exists

144. *See id.* at 1503.

145. *See id.* The ads stated the low prices of condiments and mixers and included the word "WOW" in large print next to pictures of rum and vodka bottles, thereby insinuating low prices. *See id.*

146. *Id.* at 1507.

147. *Id.* at 1506.

148. 44 *Liquormart*, 116 S. Ct. at 1506-07; *cf.* Florida Bar v. Went For It, Inc., 515 U.S. 618, 623-24 (1995) (holding that intermediate scrutiny applies to commercial speech cases).

149. 44 *Liquormart*, 116 S. Ct. at 1508.

150. *See id.* at 1511; *see also* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08 (1981) (deferring to legislative decision to ban commercial billboards for reasons of traffic safety and aesthetics).

151. *See 44 Liquormart*, 116 S. Ct. at 1513-14.

152. *Id.* at 1513.

153. *Id.*

154. *Id.* at 1512.

155. *See id.*

between advertising and demand.<sup>156</sup> Though the Court found it entirely plausible that advertisements identifying the alcohol content of beverages might increase sales and consumption, it emphasized that the state needed to produce credible evidence establishing a significant causative link.<sup>157</sup>

Fourth, the fractured unanimity of the 44 *Liquormart* plurality, which generated four opinions, demonstrated the Court's disaffection with the *Central Hudson* test itself. Three of the four opinions focused on a separate element of the four-part *Central Hudson* test as being dispositive when considering the constitutionality of regulations limiting commercial speech. Justice Stevens posited that only false and misleading speech should be subjected to regulation.<sup>158</sup> Justice Thomas would do away with the *Central Hudson* test altogether when the government's purported interest is to manipulate consumers' choices to purchase products or services that are not illegal.<sup>159</sup> Justice O'Connor hinted that determining whether the regulations are more extensive than necessary to meet the government's purported interest is the pivotal consideration in applying the *Central Hudson* test.<sup>160</sup> Justice Scalia complained that the *Central Hudson* test is inadequate because it is based merely on policy intuitions, but he did not suggest an alternative.<sup>161</sup> The fallout from all of the opinions calls into question whether the Court will continue to use the *Central Hudson* test.<sup>162</sup> One thing is clear: The 44 *Liquormart* decision illustrates that commercial speech now enjoys more First Amendment protection than it ever has.<sup>163</sup>

156. *Id.* at 1509.

157. 44 *Liquormart*, 116 S. Ct. at 1509.

158. *Id.* at 1507. Justice Stevens based much of his opinion on ensuring a fair bargaining process between sellers and consumers. *See id.* This is consistent with his application of the *Central Hudson* test in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) (warning against underestimating the value of commercial speech by drawing bright lines to define it), and in his concurrence to *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491-98 (arguing that harm to consumers rests only in the falsity or misleading nature of the speech).

159. *See* 44 *Liquormart*, 116 S. Ct. at 1518 n.5 (Thomas, J., concurring). Justice Thomas went further than Stevens, stating that he would not have applied the *Central Hudson* test even to the facts of *Central Hudson* itself. *See id.*

160. *Id.* at 1521 (O'Connor, J., concurring).

161. *Id.* at 1515 (Scalia, J., concurring).

162. Justice Scalia's concurrence suggested that given the proper "where-withal," the Court could declare what ought to replace the test. *Id.* (Scalia, J., concurring). In addition, Justice Thomas claimed that Justices Stevens and O'Connor took a position that "go[es] a long way toward the position I take." *Id.* at 1518-19 (Thomas, J., concurring).

163. *See* David O. Stewart, *Change Brewing in Commercial Speech: Decision Signals Shift Toward Greater First Amendment Protection*, A.B.A. J., July 1996, at 44 (asserting that the 44 *Liquormart* decision "deliver[ed] a solid blow in favor of increasing First Amendment protections for commercial speech").

### 3. *Summary of Current Supreme Court Commercial Speech Jurisprudence*

Since the *Valentine* decision, the commercial nature of speech has not disqualified it from First Amendment protection.<sup>164</sup> Speech should not be restricted simply because it is made in the context of advertising.<sup>165</sup> The cases leading up to and including *44 Liquormart* reveal that speech restrictions that keep consumers “in the dark for what the government perceives to be their own good” will be met with great skepticism.<sup>166</sup> With the heightened scrutiny *44 Liquormart* prescribes, the constitutionality of regulations that amount to a complete ban on commercial speech, to a great extent turns on the simple consideration of whether such regulations relate to an illegal activity<sup>167</sup> or relate to speech that is false or misleading.<sup>168</sup> If the Supreme Court adheres to the stance it took in *44 Liquormart*, it will be very difficult for the proposed FDA regulations on tobacco advertising to withstand Court scrutiny.

## IV. FDA TOBACCO ADVERTISING REGULATIONS: FAILING THE *CENTRAL HUDSON* TEST

### A. *The Proposed Regulations*

Despite the current Court’s inclination toward reviewing commercial speech regulations with rigorous scrutiny, the FDA promulgated sweeping advertisement restrictions directed at reducing tobacco use among children and adolescents.<sup>169</sup> The regulations aim at four principal areas of to-

164. See *Bigelow v. Virginia*, 421 U.S. 809, 825 (1975).

165. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). The Supreme Court reasoned:

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.

*Id.*

166. *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1508 (1996); see also *id.* at 1518 (Thomas, J., concurring) (arguing that if government regulation attempts to keep the public in the dark under the *Central Hudson* balancing approach, that test should be abandoned in favor of strict scrutiny).

167. See *Pittsburgh Press Co. v. Pittsburgh Comm’n of Human Relations*, 413 U.S. 376, 388-89 (1973).

168. See *Virginia Pharmacy*, 425 U.S. at 771; see also *Friedman v. Rogers*, 440 U.S. 1, 13, 15-16 (1979).

169. See *FDA Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents*, 61 Fed. Reg. 44,396



bacco advertisement and distribution. First, the regulations circumscribe the conditions of manufacture, sale, and distribution of tobacco products.<sup>170</sup> Second, they require a statement of intended use and age restriction on cigarette or smokeless tobacco packages.<sup>171</sup> Third, the regulations detail the scope of permissible forms of labeling and advertising.<sup>172</sup> Fourth, they set the format and content requirements for labeling and advertising.<sup>173</sup> Finally, the regulations restrict the sale and distribution of non-tobacco items and services, gifts, and sponsorships of events.<sup>174</sup>

The rules proscribe free samples, as well as vending machines and self-service displays in facilities to which minors are admitted.<sup>175</sup> They also eliminate outdoor billboard advertising of tobacco products within 1000 feet of schools, parks, or playgrounds.<sup>176</sup> Labeling and advertising are restricted to black text on white background unless: 1) the advertising is in a publication demonstrated by the manufacturer or advertiser to be an adult publication, or 2) the advertising is in a facility where minors are not allowed and the advertisement is not visible from outside the facility.<sup>177</sup> Manufacturers also are forbidden from marketing, licensing, distributing, or selling any item, service, or gifts other than cigarettes or smokeless tobacco that bears "any . . . indicia of product identification identical or similar to, or identifiable with, those used for any brand of cigarettes or smokeless tobacco."<sup>178</sup> Similarly, tobacco companies are forbidden from sponsoring any event in the name of any tobacco product.<sup>179</sup>

In practical terms, the FDA claims that these regulations are content-neutral and merely involve restricting the time, place, and manner of advertising.<sup>180</sup>

The tobacco advertisements that the FDA seeks to restrict are profit-

(1996) (to be codified at 21 C.F.R. pts. 801, 803, 804, 807, 820, 897). The regulations affect cigarettes, cigarette tobacco, and smokeless tobacco as defined in Food and Drugs, 61 Fed. Reg. 44,616 (1996) (to be codified at 21 C.F.R. § 897.3).

170. Food and Drugs, 61 Fed. Reg. 44,616, 44,616-17 (1996) (to be codified at 21 C.F.R. § 897.16).

171. *Id.* at 44,617 (to be codified at 21 C.F.R. § 897.25).

172. *Id.* (to be codified at 21 C.F.R. § 897.30).

173. *Id.* (to be codified at 21 C.F.R. § 897.32).

174. *Id.* at 44,617-18 (to be codified at 21 C.F.R. § 897.34).

175. *Id.* at 44,617 (to be codified at 21 C.F.R. § 897.16(c)-(d)).

176. Food and Drugs, 61 Fed. Reg. 44,616, 44,617 (1996) (to be codified at 21 C.F.R. § 897.30(a)-(b)).

177. *Id.* (to be codified at 21 C.F.R. § 897.32(a)).

178. *Id.* (to be codified at 21 C.F.R. § 897.34(a)). This regulation would prohibit common forms of cigarette advertising such as hats and T-shirts bearing cigarette brand logos, and contests sponsored by cigarette companies. *Id.* at 44,617-18 (to be codified at 21 C.F.R. § 897.34(b)).

179. *Id.* at 44,618 (to be codified at 21 C.F.R. § 897.34(c)). These restrictions would affect events such as the Winston Cup Series of automobile races and the Virginia Slims tennis tournaments. *See id.*

180. *See* Food and Drugs, 61 Fed. Reg. 44,470, 44,470 (1996).

driven and propose commercial transactions.<sup>181</sup> Thus, tobacco ads are clearly a form of commercial speech and, therefore, would be reviewed under the *Central Hudson* test.<sup>182</sup> As this Note demonstrates next, these regulations restrict tobacco advertising to such an extent that they would be invalidated under a First Amendment challenge.

### B. *Applying the Central Hudson Test to FDA Tobacco Advertising Regulations*

In applying the *Central Hudson* test, the Court first will determine whether the tobacco advertisements enjoy First Amendment protection.<sup>183</sup> The ads must be truthful and nonmisleading to satisfy this prong.<sup>184</sup> Analyzing the regulations under the second prong requires that the FDA show that curtailing tobacco advertising promotes the substantial government interest of protecting children.<sup>185</sup> If the government interest in restricting such advertising is not substantial, then the analysis is over and the regulations will not stand. To satisfy the third prong, the FDA regulations must be shown to advance directly the substantial government interest.<sup>186</sup> If they do, the fourth and last prong requires that the restrictions be no more extensive than necessary to achieve the goal of protecting children.

The rigor with which the Court applies the *Central Hudson* test depends on whether the regulations amount to a blanket ban on truthful, nonmisleading commercial speech rather than constitutionally permissible time, place, and manner restrictions.<sup>187</sup> The heightened level of scrutiny that is applied in the former scenario particularly applies to the third and fourth prongs of the test, where the evaluation is whether the regulation directly advances the state's interest and is no more extensive than necessary to achieve that interest.<sup>188</sup>

#### 1. *The First Prong: Legality and Veracity*

The first prong of the *Central Hudson* test includes two elements: whether the tobacco ads relate to lawful activity and whether they are truthful and not misleading.<sup>189</sup> If the advertisements fail this prong, they

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181. See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 416 U.S. 376, 385 (1973).

182. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980); *Pittsburgh Press*, 416 U.S. at 385.

183. See *Central Hudson*, 447 U.S. at 566.

184. See *id.*

185. See *id.*

186. See *id.*

187. See *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1507-08 (1996).

188. See *id.* at 1508-09.

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

receive no First Amendment protection.<sup>190</sup> The FDA has argued that this is the case with tobacco advertisements.<sup>191</sup>

a. *Legality*

The FDA does not seriously dispute that tobacco consumption is legal for anyone over eighteen years of age. The major thrust prompting the enactment of the regulations is to reduce minors' consumption of cigarettes, which is an illegal activity in every state.<sup>192</sup> The FDA asserts that because tobacco advertisements reach minors, even if the ads are not construed to be pure proposals to sell, the ads encourage tobacco use and, thus, are sufficiently "related to illegal activity" not to be protected by the First Amendment.<sup>193</sup>

Because the 44 *Liquormart* Court rejected the notion that advertisements could be regulated simply because the activities they promote were subject to regulation,<sup>194</sup> the FDA cannot rely on the government's ostensible power to ban tobacco products outright as a basis for restricting tobacco advertisements. Indeed, the FDA explains it does not seek to ban tobacco products per se because of the harsh withdrawal effects to present smokers and the likelihood of black market sales of even more dangerous products.<sup>195</sup> The lessons of alcohol prohibition also counsel against such action. Rather, the FDA asserts that tobacco advertising's relationship to illegal underage smoking might cause it to fall outside the protection of the First Amendment.<sup>196</sup>

The fact that tobacco products are legal for adults undercuts the forcefulness of the FDA's reasoning. The FDA acknowledges that even though a type of commercial speech may relate to activity that is illegal under state law, that does not remove the constitutional protection from the advertising of an otherwise lawful product to adults.<sup>197</sup> It nevertheless

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190. See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 416 U.S. 376, 388-89 (1973).

191. See *Food and Drugs*, 61 Fed. Reg. 44,471 (1996).

192. See CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVICES, MORBIDITY & MORTALITY WKLY. REP., Nov. 3, 1995, at 16-17. In Minnesota the minimum age for tobacco consumption is 18, but three states (Alabama, Alaska, and Utah) set the minimum age at 19. *Id.*; see also Phelps, *supra* note 9, at A17. Although illegal, minors nationwide are successful in purchasing tobacco products 70% of the time, while in Minnesota, the success rate is about 40%. See *id.*

193. See *Food and Drugs*, 61 Fed. Reg. at 44,471. "[I]n a practical sense, cigarette and smokeless tobacco advertising is proposing transactions that are illegal . . . whether or not that is the advertiser's intent." *Id.*

194. See *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1512 (1996).

195. See *Food and Drugs*, 61 Fed. Reg. at 44,398.

196. See *id.* at 44,471-72.

197. See *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 73-74 (1983) (striking down a federal statute prohibiting unsolicited mailing of contraceptive ads).

seeks support from the Court's holding in *United States v. Edge Broadcasting Co.*,<sup>198</sup> which upheld a prohibition on lottery advertisements in a state that had outlawed lotteries.<sup>199</sup> The rationale underlying the *Edge Broadcasting* decision, however, does not justify tobacco advertisement restrictions. Forbidding advertising in a state where the advertisements promote an illegal activity neither prejudices neighboring states where the activity is legal nor the state where the activity is illegal.<sup>200</sup> The restriction merely regulates the conduct of advertisers pursuant to the laws of the state prohibiting the activity. Information about out-of-state activity still can be obtained by each state's citizens from advertisers based in other states.<sup>201</sup> In contrast, the tobacco restrictions prejudice adults for whom tobacco is legal nationwide. Asserting that tobacco advertisements relate to unlawful activity strains the meaning of "relating to," because tobacco products are legal for a majority of the population.<sup>202</sup> The FDA's defense of this position is less than impressive; it merely concludes that the tobacco restrictions arguably fail to satisfy the first prong of *Central Hudson*.<sup>203</sup> This argument would not persuade the courts that tobacco advertising deserves no First Amendment protection.

*b. Veracity*

The FDA does not suggest that tobacco advertising is untruthful or misleading. Instead, it focuses on the persuasiveness the ads possess by virtue of images and colors that appeal to children.<sup>204</sup> Although it is possible that tobacco advertisements influence children to smoke, the advertisements themselves do not lie. For example, the advertisements most

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Responding to the argument that the advertising will reach young children, the *Bolger* Court stated, "[T]he government may not reduce the adult population . . . to reading only what is fit for children." *Id.* at 73 (citing *Butler v. Michigan*, 352 U.S. 380, 383 (1957)); see also *Dunagin v. City of Oxford*, 718 F.2d 738, 743 (4th Cir. 1983) (acknowledging the scope of commercial speech protection but upholding a local ban on liquor advertisements, under *Central Hudson*, pursuant to a state policy of discouraging liquor consumption). The *Dunagin* court noted that "[t]he commercial speech doctrine would disappear if its protection ceased whenever the advertised product might be used illegally. Peanut butter advertising cannot be banned just because someone might someday throw a jar at the presidential motorcade." *Dunagin*, 718 F.2d at 743.

198. 509 U.S. 418 (1993).

199. See Food and Drugs, 61 Fed. Reg. at 44,472 (citing *Edge Broadcasting*, 509 U.S. at 435-36).

200. See *Edge Broadcasting*, 509 U.S. at 428.

201. See *id.*

202. See Food and Drugs, 61 Fed. Reg. at 44,471 (agreeing that although tobacco advertising relates to illegal activity with regard to sales to minors, "the advertising also relates to lawful activity – the sale of tobacco to adults").

203. See *id.* at 44,472.

204. See *id.*

popular with young people (Joe Camel, the Marlboro Man, and Newport - Alive with Pleasure)<sup>205</sup> rely mostly on images with few words aside from the product name.<sup>206</sup> Their powers of persuasion lie in their appeals to the imagination, not to logical, true-or-false informational determinations.<sup>207</sup>

Truthful, nonmisleading commercial speech is not subject to regulation merely because it is persuasive.<sup>208</sup> The Court in *44 Liquormart* described the dangers of false and misleading commercial speech, not persuasive commercial speech.<sup>209</sup> It expressed serious misgivings about complete bans on commercial speech that is truthful and does not mislead the recipient.<sup>210</sup> Further, the Court has held that truthful, nonmisleading commercial illustrations are entitled to the same First Amendment protections afforded to written and verbal commercial speech.<sup>211</sup> Absent a showing that the illustrations mislead the viewer, the mere possibility that some members of the population find the illustration inappropriate cannot justify suppressing it.<sup>212</sup>

Examining the Supreme Court's commercial speech jurisprudence shows that tobacco advertisements cannot be stripped of First Amendment protection simply because young persons find them persuasive. To fall outside the First Amendment protections, the advertisements must be false or misleading. While tobacco advertisements doubtless glamorize smoking, the images they convey are not subject to true or false distinctions. Therefore, tobacco advertisements receive First Amendment protection and the FDA's proposed regulations will be deemed unconstitu-

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205. See CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVICES, MORBIDITY & MORTALITY WKLY. REP., Aug. 19, 1994, at 577-81. These three brands received 86% of the teenage cigarette market, which represented 35% of total sales. See *id.*

206. See Collins & Skover, *supra* note 54, at 737 (stating that image, not information, is the touchstone of advertising in industries such as tobacco, alcohol, and clothing).

207. See *id.* at 738. The absence of information in advertising is the basis for the author's contention that it is inappropriate to use "false and misleading" as criteria for the constitutional boundaries of commercial speech. Indeed, "truth is irrelevant." *Id.*; see also PREVENTING TOBACCO USE AMONG YOUNG PEOPLE, *supra* note 2, at 175-78.

208. See *Dunagin v. City of Oxford*, 718 F.2d 738, 743 (4th Cir. 1983) ("Our policy is to leave it to the public to cope for themselves with Madison Avenue panache and hard sells.").

209. *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1507-08 (1996).

210. *Id.* at 1508.

211. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985).

212. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977) (holding that truthful, nonmisleading advertisements for contraceptives cannot be prohibited because they relate to legal products and do not legitimize illicit sexual behavior); *Cohen v. California*, 403 U.S. 15, 24-25 (1971) (reversing conviction of a defendant who walked through a courthouse corridor wearing a jacket bearing the words, "Fuck the Draft," in a place where women and children were present).

tional unless they survive scrutiny under the remaining three prongs of the *Central Hudson* test.<sup>215</sup>

## 2. *The Second Prong: Substantial Government Interest*

The second prong of *Central Hudson* requires that the asserted governmental interest be substantial.<sup>214</sup> The FDA's stated purpose of the advertising regulations is "to decrease young people's use of tobacco products by ensuring that the restrictions on access are not undermined by the product appeal that advertising for these products creates for young people."<sup>215</sup> A reduction in the incidence of tobacco-related illnesses and deaths purportedly would follow.<sup>216</sup> The FDA claims its interest is a critical public health issue essential to the survival of young persons at a pivotal and impressionable age, when a decision to smoke may lock them into a deadly addiction that steals from them their freedom to decide not to smoke.<sup>217</sup> The FDA deems its interest as compelling and not merely substantial.<sup>218</sup> It even uses the "p" word in embracing the fact that the regulations indeed are paternalistic toward minors.<sup>219</sup>

The Court historically has been solicitous of children because of their impressionable natures.<sup>220</sup> The FDA's interest in reducing tobacco use easily survives scrutiny under *Central Hudson's* second prong in light of statistics regarding tobacco-related deaths and health problems.<sup>221</sup> Any argu-

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

214. *Id.* at 564.

215. Food and Drugs, 61 Fed. Reg. 44,616, 44,465 (1996).

216. *Id.* at 44,472.

217. *Id.* at 44,398. The FDA notes that "[m]ost people who suffer the adverse health consequences of using cigarettes and smokeless tobacco begin their use before they reach the age of 18, an age when they are not prepared for, or equipped to, make a decision that for many, will have lifelong consequences." *Id.*

218. *Id.* at 44,472.

219. See *id.* at 44,473. "Nothing in 44 *Liquormart, Inc.*, for example, suggests in any way that government may not be paternalistic with respect to children and adolescents under the age of 18." *Id.*; see also *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 329-30 (4th Cir. 1996) (finding substantial government interest in protecting children who are unable to assess the value of advertising messages), *cert. denied*, 117 S. Ct. 1569 (1997).

220. See, e.g., *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2386 (1996) (upholding broadcast restrictions under the Cable Television Consumer Protection and Competition Act to protect children from indecent programming); *FCC v. Pacifica Found.*, 438 U.S. 726, 749-50 (1978) (upholding broadcast restrictions on indecent speech); *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968) (upholding a statute that prohibited distribution of obscene materials to minors); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (holding that government authority over children is broader than that over adults and that the state's future depends upon healthy, well-rounded upbringing of its youth).

221. See *supra* notes 2-8 and accompanying text (discussing the health costs

ment to the contrary ignores the stark reality of the hazards of tobacco use.

### 3. *The Third Prong: Direct Advancement of Government Interest*

To satisfy the third prong of the *Central Hudson* test, the advertisement restrictions must directly advance the government's interest in protecting young persons. The *Central Hudson* test commands that the limitation on expression carefully be designed to achieve the state's goal.<sup>222</sup> In *Rubin*, the Supreme Court wrote that the advancement of the government interest need be direct and material; speculation and conjecture will not suffice.<sup>223</sup> Restrictions imposed upon commercial speech must provide more than ineffective or remote support to the achievement of the government's interest.<sup>224</sup> Anecdotal evidence and educated guesses about the effectiveness of the restrictions will not be sufficient to establish a direct link between cigarette advertisements and use of tobacco by minors.<sup>225</sup> Therefore, the FDA faces a heavy factual burden in proving that the restrictions directly and to a material degree reduce smoking among minors.<sup>226</sup>

This is where the room gets smoky. The FDA admits it must provide credible evidence establishing that tobacco advertising often is a material cause in a child's decision to start or continue smoking and that its restrictions on tobacco advertising will decrease the numbers of children who start and continue to smoke.<sup>227</sup> It contends, however, that it need not provide conclusive, empirical evidence that the harms of tobacco advertising to children are real and that the restrictions it proposes in fact will do any good.<sup>228</sup> Taking such a position allows the FDA to avoid confronting the fact that the government already knows that teen tobacco use cannot be explained by any one factor alone.<sup>229</sup>

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associated with smoking).

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

223. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-87 (1995).

224. See *Central Hudson*, 447 U.S. at 564.

225. See *Rubin*, 514 U.S. at 490 (dismissing the government's evidence of a direct link between the ban on alcohol content labeling and prevention of strength wars as "various tidbits").

226. See *id.* at 486-87.

227. See Food and Drugs, 61 Fed. Reg. 44,474 (1996).

228. See *id.*

229. See PREVENTING TOBACCO USE AMONG YOUNG PEOPLE, *supra* note 2, at 123-48 (discussing such causative psychosocial factors as socioeconomic status, gender, age, accessibility, parental and peer use, and other personal factors that influence children's decision to smoke); cf. David Phelps, *Tobacco in America*, STAR TRIB. (Minneapolis), Sept. 15, 1996, at A18 (quoting Clay Steinman, a professor of communications studies at Macalester College in St. Paul, Minnesota: "It can't be said that people smoke because of advertising, because there are places in the

Communications theorists posit that the link between commercial advertising and consumer action is more complicated and tenuous than just seeing and acting.<sup>230</sup> The theorists assert that advertising generally attempts little and achieves less when trying to persuade non-smokers to smoke rather than merely attempting to persuade consumers who already are users of a product to retain brand loyalty and to persuade smokers to try a different product.<sup>231</sup> One theorist admits, however, that tobacco advertising bans would save some lives,<sup>232</sup> but he cautions that the degree to which the restrictions would reduce smoking-related deaths may be startlingly small.<sup>233</sup>

Since R.J. Reynolds introduced its hugely successful Old Joe Camel ad campaign in 1988, health professionals also have sought to link the advertisements to children's smoking.<sup>234</sup> The evidence indicates that children recognize cigarette advertisements more readily than adults.<sup>235</sup> Medical experts hypothesize that even in view of the absence of cigarette advertising from television and the fact that very young children cannot read, the ubiquity of cigarette advertising alone is the cause for such high rates of child recall of Old Joe Camel.<sup>236</sup> The Centers for Disease Control and Prevention collected data showing that the percentages of smokers aged twelve to eighteen buying Marlboro, Camel, and Newport cigarettes increased dramatically from 1989 to 1993 during the Camel campaign and widespread increases in advertising expenditures.<sup>237</sup> Even though evidence shows Old Joe is as familiar as Mickey Mouse to most children, it is still impossible to predict with absolute certainty how exposure to tobacco

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world where there is no advertising and they smoke like chimneys").

230. See ROSS D. PETTY, *THE IMPACT OF ADVERTISING LAW ON BUSINESS AND PUBLIC POLICY* 31-34 (1992). Petty asserts that most communications models of how advertising affects consumers involve four stages through which the consumer must pass before the advertising has any effect. *Id.* The consumer must 1) perceive the ad; 2) pay attention to it; 3) comprehend its message; and 4) compare the message to his or her beliefs about the product or brand. *See id.* A person's existing beliefs play a pivotal role. *See id.*

231. See, e.g., Michael Schudson, *Symbols and Smokers: Advertising, Health Messages, and Public Policy*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE*, *supra* note 1, at 208, 209.

232. *See id.* at 221.

233. *See id.* at 223.

234. See, e.g., John P. Pierce et al., *Does Tobacco Advertising Target Young People to Start Smoking?*, 266 *JAMA* 3154, 3155 (1991).

235. See, e.g., *id.*

236. See Paul M. Fischer et al., *Brand Logo Recognition by Children Aged 3 to 6 Years*, 266 *JAMA* 3145, 3148 (1991).

237. See CENTERS FOR DISEASE CONTROL AND PREVENTION, *CHANGES IN THE CIGARETTE BRAND PREFERENCES OF ADOLESCENT SMOKERS - UNITED STATES* 578 (1989-93); *PREVENTING TOBACCO USE AMONG YOUNG PEOPLE*, *supra* note 2, at 160-62, 164, 166.



advertising affects later smoking behavior.<sup>238</sup> Although it can be admitted that advertising is a factor in minors' decisions to smoke, other factors play a role, not the least of which is peer pressure.<sup>239</sup>

The rigorous standards for proving the third prong of the *Central Hudson* test call into question whether the regulations sufficiently would achieve the government's end in decreasing smoking rates among minors.<sup>240</sup> In *44 Liquormart*, the Court was not convinced that a complete ban on price advertising of alcohol directly advanced the state's interest in promoting temperance.<sup>241</sup> Likewise, in *Rubin*, a ban on alcohol content on beer labels was found not to advance directly the goal of preventing alcohol strength wars.<sup>242</sup> The FDA's challenge in satisfying this factor, then, is not that it must show that tobacco advertising regulations advance the state's interest. The challenge lies in demonstrating that the regulations do so to a material degree. Isolating a direct causal link between tobacco advertisements and child and adolescent smoking presents a substantial problem in itself. Proving that the link is material, amidst so many societal factors contributing to child and adolescent tobacco use, would be even more difficult.

In support of its argument that the restrictions would curb adolescent smoking in a direct and material way, the FDA cites studies of tobacco advertising bans in the United Kingdom, Norway, Finland, Canada, and New Zealand.<sup>243</sup> The FDA ignores the presence of other elements of

238. See Fischer et al., *supra* note 236, at 3148 (1991). But see Joseph R. DiFranza et al., *RJR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children*, 266 JAMA 3149, 3152 (1991) (finding a direct link between tobacco advertising and youth smoking).

239. See PREVENTING TOBACCO USE AMONG YOUNG PEOPLE, *supra* note 2, at 123-48; see also Josephine Marcotty & Ann Merrill, *Can FDA Regulations Keep Youths from Getting Hooked?*, STAR TRIB. (Minneapolis), Aug. 24, 1996 at A1, A16 (reporting that no evidence shows that regulations to restrict the marketing and sale of cigarettes to minors have any impact on teen smoking rates).

240. See *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1508-09 (1996).

241. *Id.* at 1509-10. The federal district court in *44 Liquormart* declined to follow *Dunagin v. City of Oxford* and other cases that assume there is a direct link between advertising and consumption. See *44 Liquor Mart v. Racine*, 829 F. Supp. 543, 554 (D.R.I. 1993). Other courts have found the link to be self-evident. See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 569 (1980) (finding an immediate connection between advertising and demand for electricity); *Capitol Broad. Co. v. Mitchell*, 333 F. Supp. 582, 586 (D.C. Cir. 1971) (finding a "close relationship" between cigarette broadcast advertising and potential influence on the young), *aff'd sub nom. Capitol Broad. Co. v. Kleindienst*, 405 U.S. 1000 (1972) (mem.); *Queensgate Inv. Co. v. Liquor Control Comm'n*, 433 N.E.2d 138, 142 (Ohio) (finding advertising of drink prices would stimulate consumption and prohibition would help prevent consumption), *appeal dismissed*, 459 U.S. 807 (1982).

242. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488-89 (1995).

243. *Food and Drugs*, 61 Fed. Reg. 44,491, 44,491-92 (1996).

anti-tobacco legislation packages – such as health warnings, health education, and sales restrictions – that contributed to decreased smoking prevalence, preferring to take stock in the researchers' conclusion that advertising was the major cause for decreased consumption rates.<sup>244</sup>

The FDA's parting shot referred to a common-sense approach.<sup>245</sup> Why would the tobacco industry spend billions of dollars a year on advertising when it did not directly and materially attract new smokers, retain present users of their brands, and convert users of other brands?<sup>246</sup> Liggett's admissions that it directed advertising at minors give some credence to these numbers,<sup>247</sup> but 44 *Liquormart* requires more than common sense – it requires hard facts.<sup>248</sup> Advertising alone simply may retain present users and convert users of other brands without attracting a significant number of young new smokers.

Under 44 *Liquormart*, there must be evidence that the restrictions will significantly reduce consumption to satisfy the third prong of the *Central Hudson* test.<sup>249</sup> Given the difficulty in establishing the extent to which advertising directly and significantly causes minors to smoke, the available evidence weighs against the FDA. Evidence that is more than anecdotal tends to show that tobacco advertising contributes to children's and adolescents' decisions to use tobacco, but drawing conclusions from this evidence necessitates a modicum of educated guesswork, against which *Rubin* warned.<sup>250</sup> Consequently, the tobacco regulations fail to satisfy the third prong of the *Central Hudson* test. This failure alone would invalidate the regulations. The discussion in the following section explores the fate of the regulations were they to survive this prong.

#### 4. *The Fourth Prong: No More Extensive Than Necessary*

The last prong of the *Central Hudson* test requires that the regulations be no more extensive than necessary to serve the government's interest in

244. *See id.*

245. *See id.* at 44,474-75; *see also* *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (holding history, consensus, and simple common sense may support a finding of direct advancement between advertising and action).

246. *See* PREVENTING TOBACCO USE AMONG YOUNG PEOPLE, *supra* note 2, at 160-62, 164, 166; *see also* *Dunagin v. City of Oxford*, 718 F.2d 738, 749 (4th Cir. 1983) ("It is beyond our ability to understand why huge sums of money would be devoted to the promotion of sales of liquor without expected results, or continue without realized results.").

247. *See* Jolie Solomon & Adam Rogers, *Turning a New Leaf: Liggett Breaks Ranks with Big Tobacco*, NEWSWEEK, Mar. 31, 1997, at 50.

248. *See* 44 *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1509 (1996).

249. *Id.*

250. *See* DiFranza et al., *supra* note 238, at 3151-52 (arguing that by ages 16 to 17 peer pressure to smoke is virtually gone and that advertisements supply the necessary instigation).

protecting children.<sup>251</sup> This element requires an acceptable, sufficient, or reasonable fit between the abridgment of speech and the government interest.<sup>252</sup> It must be remembered that regulations on the time, place, and manner of expression are permitted only when the restrictions are imposed without reference to the content of the message and leave open alternative channels for communication of the information.<sup>253</sup> As with the third prong, the Court defers somewhat to legislative judgment in evaluating the extent of governmental regulations,<sup>254</sup> but the amount of deference has been limited by *44 Liquormart*.<sup>255</sup> The following analysis presupposes that the FDA regulations in fact would satisfy the third prong of the *Central Hudson* test. It addresses each of the main advertising restrictions individually to determine whether they are no more restrictive than necessary to satisfy the government's interest in reducing underage smoking. Then the cumulative effect of the restrictions is evaluated.

*a. Format and Content Requirements for Labeling and Advertising*

First, the FDA's regulations on format and content requirements for labeling and advertising images prohibit a significant amount of commercial speech promoting cigarette brands.<sup>256</sup> The FDA asserts that its regulations "attempted to preserve the informational components of advertising and labeling which can provide useful product information for adult smokers, while eliminating the imagery and color that make advertising appealing and compelling to children and adolescents under 18 years of age."<sup>257</sup> The regulation exempts adult publications; billboards receive no exemption.<sup>258</sup> On-site advertising is exempt only if it is not visible from the street and is affixed to a wall or fixture inside a building.<sup>259</sup>

The result of these restrictions is that images and colors are elimi-

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251. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 569-70 (1980).

252. See *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1510 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 483-86 (1995).

253. See *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 633-34 (1995); *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85, 92-94 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

254. See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508 (1981).

255. *44 Liquormart*, 116 S. Ct. at 1511; see also *Rubin*, 514 U.S. at 482 n.2.

256. *Format and Content Requirements*, 61 Fed. Reg. 44,617 (1996) (to be codified at 21 C.F.R. § 897.32).

257. *Scope of Permissible Forms of Labeling and Advertising*, 61 Fed. Reg. 44,617, 44,465 (1996).

258. *Format and Content Requirements*, 61 Fed. Reg. 44,617 (1996) (to be codified at 21 C.F.R. § 897.32(a)(2)).

259. See *id.* (to be codified at 21 C.F.R. § 897.32(a)(1)).

nated from every channel of communication but adult publications and on-site ads. This is not a complete ban but, in practical terms, comes very close because the tobacco advertising's message is completely hidden from those adults who do not open the appropriate publication or enter the appropriate store. Under 44 *Liquormart's* scrutiny, which could apply to more than just blanket bans in a particular case given the Court's inclination to increase First Amendment protections for commercial speech, such a significant abridgment may not withstand application of the fourth prong of *Central Hudson*.

Further, problems could arise because the tobacco manufacturer, distributor, or retailer has the burden of proving the publication in which it advertises is an adult publication, which could create erroneous or fraudulent survey evidence for borderline publications such as *Rolling Stone*, which attract both adult and teen readers.<sup>260</sup> Aside from the practical problems of distinguishing adult and nonadult publications, the fact that a tobacco manufacturer would have to prove its worthiness to speak calls into question whether the regulation is an invalid prior restraint.<sup>261</sup>

Images and colors in contemporary advertising are themselves information about politics, religion, ideology, and customs, with "a unifying theme of consumption."<sup>262</sup> Completely stripping away the images and colors that convey information in ways that cannot be captured by black text on white background<sup>263</sup> constitutes a blanket ban on an aspect of advertising that is neither false nor misleading as required by 44 *Liquormart*.<sup>264</sup> Cigarette advertising may depict illogical associations,<sup>265</sup> yet because the FDA does not assert these ads are false or misleading, the ads cannot be completely abridged unless it is shown they do more than distort reality.<sup>266</sup> Advertising's *modus operandi* always has been to create a "Land of Oz"<sup>267</sup> without crossing the line into material falsehood.<sup>268</sup>

These true and legal format and content aspects of tobacco advertising are no less "informational" than the price advertisement restrictions in 44 *Liquormart* or the alcohol content restrictions in *Rubin* and are far more

260. See *id.*; see also Scope of Permissible Forms of Labeling and Advertising, 61 Fed. Reg. 44,617 (1996) (to be codified at 21 C.F.R. § 897.30(a)(2)) (requiring manufacturers intending to advertise in media not listed in the regulations to notify the FDA of the media and its visibility to those under age 18).

261. See *supra* Part II.A (discussing historical disfavor for prior restraints on speech).

262. Collins & Skover, *supra* note 54, at 709-10.

263. See *id.* at 710.

264. See 44 *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1508 (1996).

265. See Collins & Skover, *supra* note 54, at 711.

266. See *id.* at 709. Advertisements wrap up emotions and sell them back to us, rather than assert falsehoods about the products. See *id.*

267. See *id.* at 710.

268. See PETTY, *supra* note 230, at 22, 79. Advertising always has walked the line between sales puffery and false assertions. See *id.*

common.<sup>269</sup> Many adults would be insulated from the format and content of tobacco messages because they do not venture into those establishments or read those publications that depict the tobacco advertisements. The only way the regulations might satisfy the “no more than necessary” *Central Hudson* prong would be for a significant number of publications to be deemed adult, and hence be able to exhibit tobacco ads. This seems to be a meager and uncertain, rather than ample, alternative channel of communication. Thus the format and content requirements should fail, especially in light of the equally dramatic restriction on outdoor advertising, which is discussed next.

### b. *Outdoor Advertising*

The second major category of advertising restrictions limits outdoor advertising, prohibiting billboards, signs, placards, or displays outside a facility that sells cigarettes and restricting advertisements located inside a building if the advertisement is visible from outside the building.<sup>270</sup> The format and content restrictions apply on top of these restrictions.<sup>271</sup> To withstand a First Amendment challenge, the restrictions on cigarette advertising must create a reasonable fit between the goal and the restriction, and alternative channels of communication must exist.<sup>272</sup>

The tobacco industry’s willingness to eliminate outdoor advertising completely if the government immunizes tobacco companies from liability for the costs federal and state governments pay to provide health care for those with smoking-related diseases gives no credence to the legality of the ban.<sup>273</sup> The value of blanket immunity from smoking damage suits is well worth the advertising sacrifice.

In *Metromedia, Inc. v. City of San Diego*, which “deal[t] with the law of billboards,” the Supreme Court allowed the City of San Diego to prohibit billboards in some areas of the city for reasons of traffic, safety, and aesthetics.<sup>274</sup> The *Metromedia* Court held that cities may distinguish between the relative value of different categories of commercial speech and regulate accordingly.<sup>275</sup> In other cases, however, content-neutral, blanket bans on outdoor signs and displays generally have not been upheld by the Su-

269. See Collins & Skover, *supra* note 54, at 709-10.

270. See Scope of Permissible Forms of Labeling and Advertising, 61 Fed. Reg. 44,167 (1996) (to be codified at 21 C.F.R. §§ 897.30(b), 897.32(a)(1)).

271. See Format and Content Requirements, 61 Fed. Reg. 44,617 (1996) (to be codified at 21 C.F.R. § 897.32(a)(1)-(2)).

272. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

273. See Sandra Torry & John Schwartz, *Tobacco Firms’ Concessions Taking Shape*, WASH. POST, May 1, 1997, at A1.

274. 453 U.S. 490, 507-08 (1981).

275. *Id.* at 514.

preme Court.<sup>276</sup> The regulation in *Metromedia* was upheld as an exercise of the police power and not as a reasonable time, place, and manner regulation.<sup>277</sup> Further, *Metromedia's* facts did not involve the same extent of restriction on outdoor advertising as the FDA restrictions on tobacco advertising.<sup>278</sup> On-site advertising was not restricted.<sup>279</sup>

Two recent Fourth Circuit Court of Appeals' decisions upholding sweeping bans on outdoor advertising illustrate that the FDA's restrictions on outdoor advertising could comply with the fourth prong of the *Central Hudson* test. Significantly, this is the same circuit in which the FDA restrictions will be evaluated.<sup>280</sup> In *Anheuser-Busch, Inc. v. Schmoke*,<sup>281</sup> the Fourth Circuit Court of Appeals found a ban on outdoor alcohol advertisements constitutional.<sup>282</sup> Similarly, the court in *Penn Advertising, Inc. v. Mayor and City Council of Baltimore*<sup>283</sup> approved bans on cigarette ads.<sup>284</sup> The restrictions upheld in *Anheuser-Busch* and *Penn Advertising* banned cigarette and alcohol ads in any publicly visible location, with exceptions for industrial and commercially zoned areas as well as for signs on vehicles used to transport cigarettes and at businesses that sell cigarettes.<sup>285</sup> In each case, the court of appeals found that reasonable alternative channels for the dissemination of information regarding alcohol and tobacco products existed.<sup>286</sup> Moreover, the link between the restrictions and the goal of reducing the use of these products was especially sufficient because the restriction did not have to be the least restrictive means available.<sup>287</sup> The opinions stressed that a city must be able to use less-than-perfect means to directly advance its legitimate goal of protecting children.<sup>288</sup>

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276. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424 (1993) (striking down complete, content-based ban on commercial handbill news racks); *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85, 97 (1977) (striking down complete ban on residential "For Sale" signs).

277. *Metromedia*, 453 U.S. at 515-16.

278. *Id.* at 508, 515-16 n.20.

279. See *id.* at 494.

280. See Torry, *supra* note 15, at F7.

281. *Anheuser-Busch, Inc. v. Schmoke* ("*Anheuser-Busch I*"), 63 F.3d 1305 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 1821, *on remand*, ("*Anheuser-Busch II*"), 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997).

282. *Anheuser-Busch II*, 101 F.3d at 330.

283. *Penn Advertising, Inc. v. Mayor & City Council* ("*Penn Advertising I*"), 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 2575, *on remand*, ("*Penn Advertising II*"), 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997).

284. See *Penn Advertising II*, 101 F.3d at 332.

285. See *Anheuser-Busch I*, 63 F.3d at 1308 & n.2; *Penn Advertising I*, 63 F.3d at 1321 & n.1.

286. See *Anheuser-Busch II*, 101 F.3d at 329; *Penn Advertising II*, 101 F.3d at 332.

287. See *Anheuser-Busch I*, 63 F.3d at 1315.

288. See *id.* at 1316; *Penn Advertising I*, 63 F.3d at 1326; see also *Anheuser-Busch II*, 101 F.3d at 330 ("*Baltimore's* ordinance attempts to protect its children in a manner and with a motive distinct from those evidenced by Rhode Island in 44

The FDA's restrictions on outdoor advertising appear similar to the *Penn Advertising* and *Anheuser-Busch* restrictions. They purport to leave open alternative channels of communication. However, the FDA regulations prohibit "billboards, posters, or placards . . . within 1,000 feet of the perimeter of any public playground or playground area in a public park, elementary school, or secondary school."<sup>289</sup> Given the numbers of parks in many cities, this prohibition may be close to a complete ban on outdoor tobacco advertisements in many areas.<sup>290</sup> Nevertheless, *Anheuser-Busch* noted that the Supreme Court accepted a broad ban in the *Metromedia* case because no effective, less restrictive means existed.<sup>291</sup> As discussed above, the *Metromedia* case is distinguishable.<sup>292</sup> Further, even though no less restrictive means may exist and the least restrictive means need not be used, under *44 Liquormart*, the FDA has not proposed sufficient evidence to conclude that the advertising restrictions would be effective in preventing adolescent consumers from becoming new smokers.<sup>293</sup> Thus even if there is no less restrictive means available, the method used must be proven to be effective, which is not the case with the FDA restrictions.

The FDA restrictions reach further than the government regulations upheld in *Metromedia*, *Anheuser-Busch*, and *Penn Advertising*. Unlike the *Metromedia* regulations,<sup>294</sup> the FDA tobacco regulations require that on-site and off-site advertising disappear from view.<sup>295</sup> In addition, the general format and content requirements for labeling and advertising apply to billboards that could remain under the regulations because they are not

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*Liquormart* and in accord with an unbroken chain of Supreme Court cases which indicate its desire to ensure that children do not become lost in the marketplace of ideas.").

289. Scope of Permissible Forms of Labeling and Advertising, 61 Fed. Reg. 44,617 (1996) (to be codified at 21 C.F.R. § 897.30(b)). The FDA identified public parks containing swings, seesaws, baseball diamonds, or basketball courts as places where tobacco advertising must not be within 1000 feet. *Id.*

290. See Merrill, *supra* note 17, at A17 (quoting Kippy Burns, spokeswoman for the Outdoor Advertising Association of America, Inc., who complains, "In many urban areas if you draw a circle 1000 feet from these areas, in effect you've got a ban"). The cigarette industry has a voluntary "Cigarette Advertising and Promotion Code," which contains a similar provision concerning schools and playgrounds; the FDA concluded that this code reinforced the reasonableness of its restriction. See 61 Fed. Reg. at 44,502.

291. See *Anheuser-Busch I*, 63 F.3d at 1316.

292. See *supra* text accompanying notes 274-79.

293. See *supra* Part IV.B.3 (discussing why there is insufficient evidence under *44 Liquormart* to find that the tobacco regulations will directly advance the government's interest in preventing adolescent smoking).

294. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512 (1981).

295. See Scope of Permissible Forms of Labeling and Advertising, 61 Fed. Reg. 44,617 (1996) (to be codified at 21 C.F.R. § 897.30(b)); Format and Content Requirements for Labeling and Advertising, 61 Fed. Reg. 44,617 (1996) (to be codified at 21 C.F.R. § 897.32(a)(1)).

exempted like adult publications.<sup>296</sup> Thus, even where the regulations would allow billboards to remain, they would strip away image and color information content and effectively ban an informational component of the advertisement, which is contrary to *44 Liquormart* and *Rubin*. In effect, either the billboard is banned or the image and color content are banned; either choice is unacceptable under *44 Liquormart*.

Viewed as a whole, the FDA regulations, like the regulations in *Penn Advertising* and *Anheuser-Busch*, allow some alternatives in magazines and newspapers aimed at adults and even on the Internet.<sup>297</sup> Overall, however, these are suspect and unproven channels because they could remain hidden from a majority of the adult population. Thus, the restriction of outdoor advertising likely would fail the last prong of the *Central Hudson* test, because it is more than necessary to achieve the FDA's goal.

### c. *Sale and Promotion of Nontobacco Items*

Finally, the FDA regulations are meant to prohibit the tobacco industry's sale and advertisement of nontobacco items, services, and gifts, as well as prohibit sponsorship of events in the name of a tobacco brand or image.<sup>298</sup> The language of the regulations is absolute and implicates all media of advertising because of the ban on promotion of events with tobacco brand names.<sup>299</sup> However, it is reasonable to ban gifts, free tobacco product samples, and even sales of nontobacco products embossed with identifying logos. The messages these more recently developed advertising forms convey are easily transferred through alternative traditional forms of advertising.<sup>300</sup>

The availability of free or mail-order samples and related specialty items to children who merely must claim to be of legal age certainly constitutes a reasonable step in protecting children. Ensuring that tobacco items dispensed in this manner go to a person of legal age is very difficult.<sup>301</sup> Some specialty items that are given away, such as lighters, do more

296. See *Format and Content Requirements for Labeling and Advertising*, 61 Fed. Reg. at 44,617 (to be codified at 21 C.F.R. § 897.32(a)).

297. See *Scope of Permissible Forms of Labeling and Advertising*, 61 Fed. Reg. at 44,617 (to be codified at 21 C.F.R. § 897.30(a)(1)-(2)).

298. *Sale and Distribution of Nontobacco Items and Services, Gifts and Sponsorship of Events*, 61 Fed. Reg. 44,617, 44,617-18 (1996) (to be codified at 21 C.F.R. § 897.34(a)-(c)).

299. See *id.* The prohibition on nontobacco gifts or sponsorships reaches any tobacco product "brand name (alone or in conjunction with any other word), logo, symbol, motto, selling message, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of cigarettes or smokeless tobacco." *Id.*

300. See *PREVENTING TOBACCO USE AMONG YOUNG PEOPLE*, *supra* note 2, at 186.

301. See *id.* ("Although the cigarette manufacturers argue that samples are not intended for nonusers or minors, there is little evidence of distribution control.")



than advertise; they encourage and supply a means to use cigarette samples that may accompany the lighter.<sup>302</sup> Furthermore, specialty items such as shirts or towels, available for purchase from the manufacturer (such as those available in the Camel Cash Catalog), usually do not contain health warnings. Consequently, the advertisements fail to provide a complete picture of the hazards associated with tobacco use.<sup>303</sup> This aspect of the regulations is a reasonable step toward the goal of protecting children.

*d. FDA Regulations: Operating in Concert*

When addressed independent of each other, the FDA's proposed restrictions on format and content, outdoor advertising, and nontobacco items have a chance to survive Supreme Court review. Operating together, however, the restrictions eliminate the required ample alternative channels of communicating truthful, legal tobacco advertising. Linking the ban on colors and images with the restrictions on outdoor advertising and advertising of nontobacco items leaves few meaningful outlets for the communication of information. Those that do remain are bereft of informational content in the form of colors and images. Such complete bans on informational content contradict the Supreme Court's holdings in *44 Liquormart* and *Rubin*. This is particularly significant given the Court's willingness to apply rigorous scrutiny to restrictions on commercial speech.

Although careful to purport that the regulations were designed so tobacco messages would reach adults only, the FDA cut off most, if not all, outlets for tobacco advertising available to many adults. Such a result hinders consumer choice and obscures the tobacco issue from public debate, an outcome contrary to First Amendment values and commercial speech doctrine.

*C. The Aftermath of an Application of the Central Hudson Test to the FDA Tobacco Regulations*

Tobacco advertising relates to a legal product and is not false or misleading. Therefore, tobacco advertisements enjoy First Amendment protection, satisfying the first prong of the *Central Hudson* test. Without question, the government maintains a substantial interest in preventing children from using tobacco products. Hence, the restrictions meet the requirements of *Central Hudson's* second prong. Under the last two prongs, which require that the restrictions directly and materially advance the government's interest and abridge no more speech than necessary, the tobacco advertising regulations violate the First Amendment. The

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302. See *id.*

303. See *id.*

FDA thus far has failed to provide the level of evidence required under *44 Liquormart* to link tobacco advertising with adolescent tobacco use, and the restrictions abridge more commercial speech than necessary to achieve its goal.

The restrictions, when operating in concert, create a ban on elements of tobacco advertising that is more extensive than necessary to meet the FDA's goal of curbing teen smoking. The regulations fail to allow ample alternative channels for communicating truthful and informational messages about legal tobacco products. The regulations abridge commercial speech for the goal of protecting children, but they significantly hinder adult consumers' access to tobacco information and remove the issue of tobacco use from public debate.

When taken individually, the format and content requirements could survive because they do not eliminate images and color from adult publications and on-site ads, potentially ample alternative modes of communication, if enough are proven to be read and seen mainly by adults. While banning outdoor advertisements presents a potentially reasonable time, place, and manner regulation, the regulations reach too far by banning any visible sign and informational elements of the remaining visible displays. This is especially true when evaluated in conjunction with the format and content restrictions. The government may be able to regulate tobacco advertising on a more limited basis, but not through such a comprehensive system of commercial speech restrictions.

#### *D. Alternative Avenues for Reducing Child and Adolescent Use of Tobacco*

Since *Virginia Board of Pharmacy*, the Court explicitly has rejected paternalistic governmental regulation in favor of more consumer information, not less.<sup>304</sup> The FDA's regulations, however, do not incorporate educational programs, direct regulation, increased taxation, or counterspeech, all of which were cited by the Court in *44 Liquormart*<sup>305</sup> and recommended by the Surgeon General.<sup>306</sup> Direct taxation and anti-smoking counterspeech already are proven alternatives.<sup>307</sup> The FDA said that it believes educational programs can be effective but would not require such programs of the tobacco industry itself.<sup>308</sup> Even so, the alterna-

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304. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976); see also *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“[T]he remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.”).

305. See *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1510 (1996).

306. See PREVENTING TOBACCO USE AMONG YOUNG PEOPLE, *supra* note 2, at 209.

307. See CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVICES, MORBIDITY & MORTALITY WKLY. REP., Nov. 8, 1996, 966, 969.

308. See 61 Fed. Reg. 44,539 (1996) (to be codified at 21 C.F.R. pt. 801).

tives to speech suppression – particularly counterspeech, of which educational programs are a part – present a more favorable and more effective solution. Proponents already call anti-smoking ads aimed at children a success.<sup>309</sup> Counterspeech presents a method true to First Amendment values that can be more effective than forced silence.<sup>310</sup>

In *44 Liquormart*, the Supreme Court noted that direct regulation and increased taxation are ways to increase prices and decrease consumption.<sup>311</sup> One commentator has suggested that an increased tax on tobacco products could be used to place anti-smoking commercials back on the airwaves with pro-smoking commercials.<sup>312</sup> The newest market for nicotine, which includes gums and patches to help people quit using tobacco, is an effective competitor.<sup>313</sup> The government also could provide tax breaks and incentives for these companies to advertise. Furthermore, advice and information provided by pharmacists who provide smoking cessation products has proven very effective in smoking cessation.<sup>314</sup> In addition, state efforts to prohibit youths from purchasing tobacco should be increased to lower the high rates of successful purchases by minors. The FDA's regulations, by not adopting or incorporating these approaches, infringe on free speech and fail to maximize the FDA's goal of reduced tobacco consumption.

## V. CONCLUSION

The FDA's proposed tobacco advertising regulations fail the Supreme Court's most recent interpretation of the *Central Hudson* test as expressed in *44 Liquormart v. Rhode Island*. While the goal of protecting children from tobacco use is unassailable, the FDA failed to prove with the certainty required under *44 Liquormart* that the restrictions directly advance this interest. Moreover, the regulations are more restrictive than necessary to achieve the FDA's goal. Overall, the FDA regulations fail the third and fourth prongs of the *Central Hudson* test. By ignoring alternative ways to reduce child and adolescent tobacco use, the FDA ignores traditional First Amendment values and contemporary commercial speech pro-

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309. See, e.g., Bob Christmen, *State's Anti-Smoking Ads Called Effective with Teens*, DAILY STAR (Ariz.), Aug. 30, 1996, at 7C.

310. See Schudson, *supra* note 231, at 211-12, 219 (detailing the success of 1968-70 anti-smoking advertising and explaining the advantages of inexpensive public health, anti-smoking messages; asserting that even if the ads do not create direct decreases in present smokers, the number of people who refuse to start smoking because of the ads is worth the effort).

311. See *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1510 (1996).

312. See GARTNER, *supra* note 85, at 31.

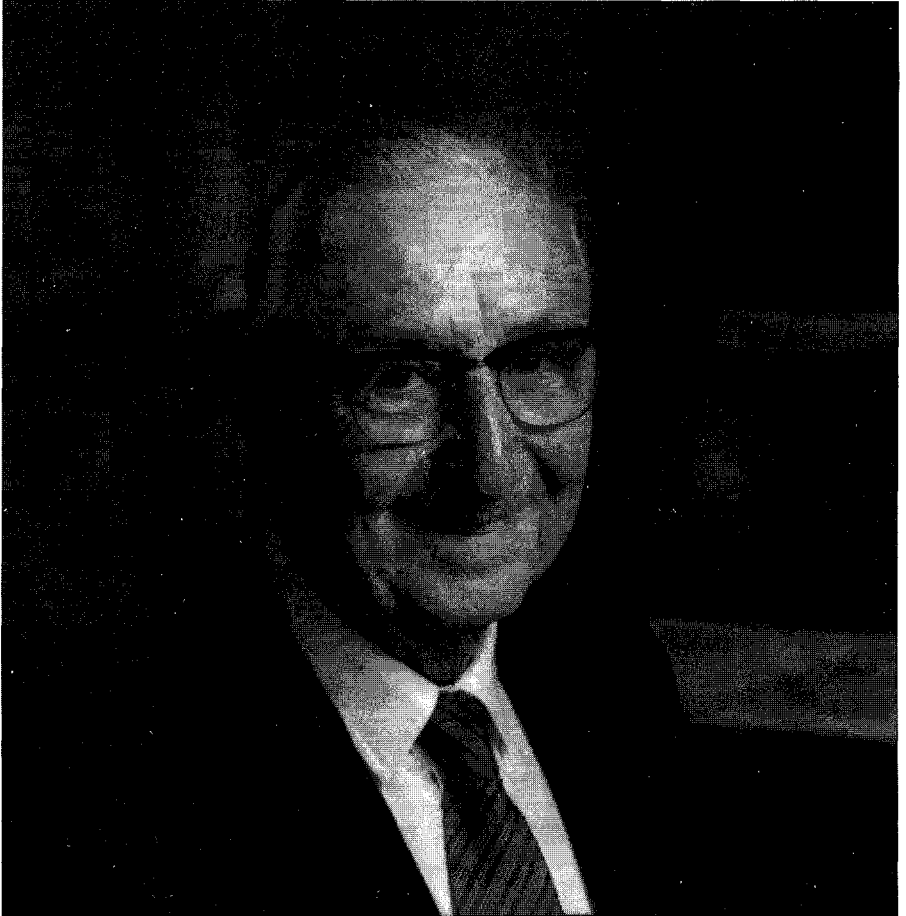
313. See Janet M. Telepchak, *Smoking Cessation: New Strategies and Opportunities for Pharmacists*, AM. DRUGGIST, Jan. 1, 1997, available in 1997 WL 10066044, at \*2.

314. See *id.* at \*2, \*5, \*9.

tections. The heightened scrutiny that the present Court gives to abridgments of true and nonmisleading speech about legal products is the death knell for such comprehensive restrictions on tobacco advertising.

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