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Taking on Tobacco: The Family Smoking Prevention and Tobacco Control Act

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TAKING ON TOBACCO: THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT

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I.	INTRODUCTION	539
II.	HISTORICAL BACKGROUND	541
III.	A CLOSER LOOK AT THE NEW TOBACCO LAW	543
	A. <i>Regulation Specifics</i>	543
	B. <i>A Questionable Role for the FDA</i>	544
	1. Too Much for the FDA to Handle?	545
	2. <i>FDA v. Brown & Williamson Tobacco Corp.</i>	546
IV.	FIRST AMENDMENT CONSIDERATIONS	547
	A. <i>Four-Step Analysis for Commercial Speech</i>	547
	B. <i>Total Ban on Tobacco Advertising</i>	549
	C. <i>Partial Ban on Tobacco Advertising</i>	550
	D. <i>Bans on Alcohol Advertising</i>	551
	1. <i>44 Liquormart, Inc. v. Rhode Island</i>	552
	2. <i>Anheuser-Busch, Inc. v. Schmoke</i>	553
	E. <i>Tobacco Companies File Lawsuits</i>	554
V.	THE TOBACCO LAW'S EFFECT	555
	A. <i>Effect on the Tobacco Industry</i>	555
	B. <i>Will the Legislation Actually Curb Smoking?</i>	558
	C. <i>The President's Habit</i>	559
VI.	CONCLUSION	561

I. INTRODUCTION

On June 22, 2009, President Barack Obama signed a landmark federal bill that gives the Food and Drug Administration (FDA) broad authority to

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regulate tobacco products and how those products are advertised.¹ The Family Smoking Prevention and Tobacco Control Act² is considered the most significant legislation in the last fifty years placing restrictions on the tobacco industry. The bill received overwhelming support from both parties.³ It passed in the House of Representatives by a vote of 307-97 and in the Senate by a vote of 79-17.⁴ By passing the bill, the Legislature and the President “ensured that the landscape for cigarette manufacturers will look dramatically different in just a few years: no more candy-flavored cigarettes, no more cool T-shirts or other marketing gimmicks, and no more sporting-event sponsorships.”⁵ Although the bill was received with strong support in Congress, there are still concerns regarding the broad powers granted to the FDA under the Act as well as First Amendment⁶ implications.

In general, this article will provide an overview of the Family Smoking Prevention and Tobacco Control Act. Section II provides the historical background of tobacco advertising and legislation in this country, and how the FDA did not have the power to regulate tobacco until the passage of this new tobacco law. Section III will closely examine the regulations implemented by the Act and discuss whether the FDA has a questionable role in regulating the tobacco industry. Some believe the FDA is not equipped to handle the role of regulating tobacco, while others believe the Agency is more than capable of doing so.

Section IV of this article will look at First Amendment issues that may surface in the future with FDA regulations passed under the new law. The first part of section IV will explain the four-step analysis the United States Supreme Court formulated in order to determine whether commercial speech is being violated under the First Amendment. The middle part of section IV will discuss both total and partial bans on tobacco advertising and how they relate to the new law. The latter part of Section IV will compare bans that have been made on alcohol advertising in the past by providing synopses of two important cases. Section IV will conclude with an examination of the pending litigation by the major tobacco companies against the federal gov-

1. Melissa Healy, *FDA Unfiltered; A Look at the New Tobacco Law; The Legislation Extends Oversight but Bows to Economic and Administrative Reality*, L.A. TIMES, June 29, 2009, at E3.

2. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended in scattered sections of 21 U.S.C.).

3. Stephen Dinan, *Tobacco Law Called a Loss for ‘Special Interest’; Activist Approach Cited as Obama Signs Landmark Bill*, WASH. TIMES, June 23, 2009, at A6.

4. *Id.*

5. *Id.*

6. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

ernment. Section V will begin by looking at the effects the law will have on the tobacco industry and analyze whether smoking habits will be changed as a result of the law. The latter part of section V will discuss the President's current smoking habit and how he can be an important spokesperson for the new legislation. The last section of this article will explain what kind of impact the Family Smoking Prevention and Tobacco Act will have, analyze potential First Amendment implications that may arise in the future, and suggest that other industries may be affected by similar legislation.

II. HISTORICAL BACKGROUND

The first tobacco advertisement is believed to date back to 1789, when Lorillard Tobacco Co. placed an advertisement in a newspaper.⁷ In 1909, cigarette packs began to include small trading cards.⁸ Soldiers during World Wars I and II received free cigarettes, and in the 1940s and 1950s, popular television shows were backed by cigarette manufacturers.⁹ In the 1960s, tobacco advertising began to dwindle as health risks associated with smoking became clear.¹⁰ “[I]n 1964, the U.S. surgeon general issued a report linking smoking with cancer, yet as late as 1994, tobacco executives testified before Congress that smoking neither caused cancer nor was addictive.”¹¹ Anti-smoking legislation has been a constant fight in the legislature lasting nearly half of a century.¹² Prior to the enactment of the Family Smoking Prevention and Tobacco Control Act, the FDA did not have the “authority to regulate what goes into tobacco products.”¹³ The FDA had first asserted its right to regulate tobacco products in 1996 under the Federal Food, Drug, and Cos-

7. Scott Olstad & Randy James, *A Brief History of: Cigarette Advertising*, TIME, June 29, 2009, at 14.

8. *Id.* (“The American Tobacco Co. includes small baseball cards with cigarette packs. Pittsburgh Pirate Honus Wagner’s card [was estimated to fetch] \$2.8 million at a 2007 auction.”).

9. *Id.*

10. *Id.*

11. Charles Kochakian, *Tobacco Law Makes Smoking Less Alluring: Cigarettes Will Continue to be a Major Danger to Public Health*, NEW HAVEN REG., July 10, 2009, at 4. “A [1991] study shows that nearly as many 6-year-olds recognize Joe Camel as know Mickey Mouse. The cartoon pitchman [was] retired in 1997.” Olstad & James, *supra* note 7.

12. Jim Abrams, *Tobacco Bill: Lifesaver—or Federal Intrusion?*, ORLANDO SENTINEL, June 13, 2009, at A6 (“President Barack Obama, struggling with his own nicotine habit, saluted the bill, which he [signed]. He said, ‘For over a decade, leaders of both parties have fought to prevent tobacco companies from marketing their products to children and provide the public with the information they need to understand what a dangerous habit this is.’”).

13. *Id.*

metic Act (FDCA),¹⁴ but has not been able to do so until the passage of the new bill.¹⁵

Preceding the FDA's announcement that it would regulate the tobacco industry, Congress averaged passing only one tobacco bill every five years.¹⁶ Following the FDA's claim that they could regulate tobacco, Congress averaged passing one tobacco bill every year for five years.¹⁷ "By the time the Supreme Court vacated the agency's rulemaking, Congress had enacted limited versions of most of [the] FDA's major initiatives, including programs to reduce teen smoking, prohibitions on vending machine sales, and higher excise taxes on all tobacco products and cigarette papers."¹⁸ In the 105th Congress, Senator John McCain introduced the first of six comprehensive bills "which had been proposed to end lawsuits brought by forty-one state attorneys general against the tobacco industry."¹⁹ The FDA asserting its right to regulate tobacco was found unconstitutional in the United States Supreme Court case of *FDA v. Brown & Williamson Tobacco Corp.*²⁰

Since 1971, broadcast advertising has been banned for cigarettes and little cigars.²¹ Another federal statute known as the Comprehensive Smoking Education Act placed limitations on tobacco labeling and advertising.²² Its purpose was for Congress "to establish a comprehensive Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health."²³ Congress wanted to ensure that "the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes."²⁴

14. 21 U.S.C. § 301 (2006).

15. Healy, *supra* note 1.

16. Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Noninterference (or Why Massachusetts v. EPA Got it Wrong)*, 60 ADMIN. L. REV. 593, 627 (2008).

17. *Id.*

18. *Id.*

19. *Id.* at 628 (citing C. STEPHEN REDHEAD & JOY AUSTIN-LANE, TOBACCO LEGISLATION IN THE 105TH CONGRESS: SIDE-BY-SIDE COMPARISON OF S. 1415, S. 1530, S. 1638, S. 1889, H.R. 3474, AND H.R. 3868, CRS REPORT FOR CONGRESS (Aug. 19, 1988)).

20. 529 U.S. 120 (2000).

21. 15 U.S.C. § 1335 (2006).

22. 15 U.S.C. § 1331.

23. *Id.*

24. 15 U.S.C. § 1331(1).

III. A CLOSER LOOK AT THE NEW TOBACCO LAW

A. *Regulation Specifics*

The main purpose behind the new legislation is to provide the FDA with broad authority to regulate all tobacco products and how they are marketed.²⁵ There are several critical pieces to the legislation that will create great change for the tobacco industry. Warning labels on cigarette packages will now have to cover fifty percent of the front and rear of the packages.²⁶ “The word ‘warning’ must be included in capital letters.”²⁷ Sports and entertainment events will be prevented from having tobacco-related sponsorships.²⁸ Giveaways of nontobacco items will no longer be allowed with the purchase of tobacco products.²⁹ “A federal ban will be imposed on all outdoor tobacco advertising within 1,000 feet of schools and playgrounds.”³⁰

Adult-only facilities will be the only places allowed to contain point-of-sale advertising, and tobacco vending machines will disappear in all locations except those restricted for adults.³¹ If a retailer sells tobacco products

25. See Healy, *supra* note 1. The ten purposes granted by Congress to the FDA are as follows:

(1) to provide authority to the Food and Drug Administration to regulate tobacco products . . . by recognizing it as the primary Federal regulatory authority with respect to the manufacture, marketing, and distribution of tobacco products as provided for in this division; (2) to ensure that the Food and Drug Administration has the authority to address issues of particular concern to public health officials, especially the use of tobacco by young people and dependence on tobacco; (3) to authorize the Food and Drug Administration to set national standards controlling the manufacture of tobacco products and the identity, public disclosure, and amount of ingredients used in such products; (4) to provide new and flexible enforcement authority to ensure that there is effective oversight of the tobacco industry’s efforts to develop, introduce, and promote less harmful tobacco products; (5) to vest the Food and Drug Administration with the authority to regulate the levels of tar, nicotine, and other harmful components of tobacco products; (6) in order to ensure that consumers are better informed, to require tobacco product manufacturers to disclose research which has not previously been made available, as well as research generated in the future, relating to the health and dependency effects or safety of tobacco products; (7) to continue to permit the sale of tobacco products to adults in conjunction with measures to ensure that they are not sold or accessible to underage purchasers; (8) to impose appropriate regulatory controls on the tobacco industry; (9) to promote cessation to reduce disease risk and the social costs associated with tobacco-related diseases; and (10) to strengthen legislation against illicit trade in tobacco products.

Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 3(1)–(10), 123 Stat. 1776, 1781–82 (2009) (codified as amended in scattered sections of 21 U.S.C.).

26. Abrams, *supra* note 12.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Abrams, *supra* note 12.

to minors, he or she will face possible federal enforcement and penalties.³² Cigarettes sweetened by candy flavors, “herb[s] or spices such as strawberry, grape, orange, clove, cinnamon or vanilla” will be barred from purchase.³³ These flavored tobacco products have been known to appeal to younger people.³⁴ “Light,” “mild” or “low” cigarettes that give consumers the impression that they are less harmful, will no longer be sold “unless the manufacturer can prove that [they] . . . will significantly reduce the risk of tobacco-related diseases” when the cigarettes are smoked.³⁵ However, the FDA will not have the ability to ban any class of tobacco products outright.³⁶

B. *A Questionable Role for the FDA*

Several industry experts criticized the bill and the role of the FDA in regulating tobacco.³⁷ Stanton Glantz, a professor of medicine and director of the Center for Tobacco Control Research and Education at the University of California, San Francisco stated:

“Most people in the field are not enthused about the bill. They have real problems with the bill. I think the bill is a huge missed opportunity for public health. The FDA’s scientific advisory committee will have three tobacco industry representatives on it. They are non-voting, but I don’t think that will matter. The fact that they are there at all is a problem. I think people have grossly underestimated how much trouble that will cause.”³⁸

Scott Raminger, President of the American Wholesale Marketers Association remarked, “We don’t really think it’s appropriate for [the] FDA to be regulating tobacco. We don’t think having more regulations is going to ac-

32. *Id.*

33. *Id.*

34. *See id.*

35. *Id.*; Healy, *supra* note 1.

36. Healy, *supra* note 1.

37. See Shari Roan & Shara Yurkiewicz, *FDA Unfiltered; Experts Weigh in on the Ramifications; Industry Insiders and Academics Offer Personal, Professional Insights on the Law*, L.A. TIMES, June 29, 2009, at E3.

38. *Id.* The author summarized an industry professional’s opinion:

Because the legislation allows the Food and Drug Administration to appoint a scientific advisory committee that will include representatives from the tobacco industry, Glantz says he feels the FDA will be unable to accomplish far-reaching measures to control tobacco and reduce smoking rates. Moreover, he says, the bill minimizes the adverse economic effect on the tobacco industry, when the goal, in his opinion, should be to drive such companies out of business.

Id.

comply with anything except cost the taxpayers a lot more money.”³⁹ Some members of Congress believe that by letting the FDA give “its blessing to the sale of [certain] tobacco products” and not to others, the FDA may lead people to think that the approved products are safe.⁴⁰

1. Too Much for the FDA to Handle?

Politicians who voted against the bill argued that the FDA does not have adequate resources to handle the task.⁴¹ Senate minority leader Mitch McConnell expressed his opinion on the FDA’s role by commenting, “Mandating the FDA to regulate and approve the use of tobacco would be a distortion of the agency’s mission and a tremendous misuse of its overstretched priorities. We should focus FDA resources on protecting the public health, not burdening it with an impossible assignment.”⁴² However, some of the seventeen senators who voted against the FDA regulating tobacco receive significant campaign contributions from tobacco companies.⁴³ Senator Saxby Chambliss opposed the bill because he feels that the tobacco industry would be overregulated.⁴⁴

Even without tobacco regulation, the FDA is already strained in carrying out its other responsibilities such as ensuring “the safety of the nation’s food, drugs and medical devices.”⁴⁵ Tobacco is not an item that the FDA is used to regulating such as a medical device or food.⁴⁶ The FDA does not have any demonstrable health benefits to weigh against the risks that are associated with tobacco use.⁴⁷ Major cigarette manufacturer, R.J. Reynolds, argued that instead of placing regulatory control on an already overburdened FDA, “more emphasis should be placed on educating smokers” about the dangers associated with smoking.⁴⁸ Representative Henry A. Waxman acknowledged that tobacco regulation is an unusual role for the Agency, but he believes the FDA is the only agency properly equipped to decrease the damage caused by tobacco use.⁴⁹ In an interview, Representative Waxman

39. *Id.*

40. Healy, *supra* note 1.

41. Halimah Abdullah, *Senators Who Opposed Tobacco Bill Received Top Dollar from Industry*, McCLATCHY-TRIB. BUS. NEWS (Wash., D.C.), June 12, 2009.

42. *Id.*

43. *Id.*

44. *Id.*

45. Healy, *supra* note 1.

46. *Id.*

47. *Id.*

48. Dinan, *supra* note 3.

49. Healy, *supra* note 1.

stated, “The FDA is the exact agency that should have that authority—it’s a scientific organization with regulatory powers.”⁵⁰

2. *FDA v. Brown & Williamson Tobacco Corp.*

*FDA v. Brown & Williamson Tobacco Corp.*⁵¹ was a critical United States Supreme Court case that determined whether the FDA could actually regulate tobacco. In 1996, “[t]he FDA determined that nicotine is a ‘drug’ and that cigarettes and smokeless tobacco are ‘drug delivery devices,’ and therefore [the FDA] had jurisdiction under the FDCA to regulate tobacco products as customarily marketed.”⁵² The United States Supreme Court held that “Congress has not given the FDA the authority” to regulate tobacco.⁵³ The majority looked at the FDCA as a whole and determined that Congress did not intend to include tobacco products within the FDA’s jurisdiction.⁵⁴

However, the dissent felt that Congress intended for the FDA to have the authority to regulate substances intended to affect any function or structure of the body under the FDCA.⁵⁵ Justice Breyer proceeded with the following opinion in order to reinforce his statutory interpretation of the FDCA:

In its own interpretation, the majority nowhere denies the following two salient points. First, tobacco products (including cigarettes) fall within the scope of this statutory definition, read literally. Cigarettes achieve their mood-stabilizing effects through the interaction of the chemical nicotine and the cells of the central nervous system. Both cigarette manufacturers and smokers alike know of, and desire, that chemically induced result. Hence, cigarettes are “intended to affect” the body’s “structure” and “function,” in the literal sense of these words.⁵⁶

If tobacco industry executives challenged the new Act under the holding of *Brown & Williamson*, the statute would probably be upheld. The new

50. *Id.*

51. 529 U.S. 120 (2000).

52. *Id.* at 127.

53. *Id.* at 161 (“[A]n administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.”).

54. *Id.*

55. *Brown & Williamson*, 529 U.S. at 161 (Breyer, J., dissenting) (noting that tobacco products fall under the statutory language of the FDCA).

56. *Id.* at 162 (Breyer, J., dissenting).

law, unlike the one in *Brown & Williamson*, has statutory language that provides the FDA with the power to regulate tobacco.⁵⁷

IV. FIRST AMENDMENT CONSIDERATIONS

A. *Four-Step Analysis for Commercial Speech*

The United States Supreme Court formulated a four-step test to determine whether First Amendment rights were being violated for commercial speech.⁵⁸ “The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”⁵⁹ The four-step analysis the United States Supreme Court provided is as follows:

In commercial speech cases . . . a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.⁶⁰

The new tobacco law prohibits and regulates certain forms of commercial speech for the tobacco companies.⁶¹ For example, “[a] federal ban will be imposed on all outdoor tobacco advertising within 1,000 feet of schools and playgrounds.”⁶² Utilizing the four-part analysis from *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,⁶³ the first step is to determine if tobacco use is a lawful activity.⁶⁴ Tobacco products

57. See Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 101(b), 123 Stat. 1776, 1784 (2009) (codified as amended in scattered sections of 21 U.S.C.).

58. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

59. *Id.* at 562–63 (citing *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456–457 (1978)).

60. *Id.* at 566.

61. See Family Smoking and Prevention Tobacco Control Act § 203, 123 Stat. 1846.

62. *Abrams*, *supra* note 12.

63. 447 U.S. 557 (1980).

64. *Id.* at 566.

are lawful because they are currently not banned by any law.⁶⁵ As long as the message the tobacco manufacturers provide is not misleading, then the first part of the four-part analysis is met.⁶⁶ The next step is to determine “whether the asserted governmental interest is substantial”⁶⁷ to restrict advertising “within 1,000 feet of schools and playgrounds.”⁶⁸ It can be argued that the government interest is substantial because every day, 3500 young people smoke for the first time.⁶⁹ Young people may be induced to smoke for the first time due to advertising that is displayed near their schools.

If the first two inquiries yield a positive answer, then a court must determine whether the regulation of the tobacco advertising “directly advances the governmental interest asserted,” and whether the regulation “is not more extensive than is necessary to serve that interest.”⁷⁰ Congress provided an initial list of reasons in Section 2 of the bill to explain the substantial governmental interest.⁷¹ In addition, Congress provided statistical information in Section 2 of the bill to further expand on the substantial government interest.⁷² If a court determines that the findings listed in Section 2 of the Family

65. Healy, *supra* note 1 (“The law prohibits the FDA from banning outright all tobacco products or any class of tobacco products—such as cigarettes, cigars or chew.”).

66. *Cent. Hudson*, 477 U.S. at 566.

67. *Id.*

68. Abrams, *supra* note 12.

69. Kochakian, *supra* note 11.

70. *Cent. Hudson*, 447 U.S. at 566.

71. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111–31, §§ 2(5)–(7), (10), 123 Stat. 1776, 1777 (2009) (codified as amended in scattered sections of 21 U.S.C.). Some of Congress’ reasons for restricting tobacco advertising are as follows:

(5) Tobacco advertising and marketing contribute significantly to the use of nicotine-containing tobacco products by adolescents. (6) Because past efforts to restrict advertising and marketing of tobacco products have failed adequately to curb tobacco use by adolescents, comprehensive restrictions on the sale, promotion, and distribution of such products are needed. (7) Federal and State governments have lacked the legal and regulatory authority and resources they need to address comprehensively the public health and societal problems caused by the use of tobacco products. . . . (10) The sale, distribution, marketing, advertising, and use of tobacco products are activities in and substantially affecting interstate commerce because they are sold, marketed, advertised, and distributed in interstate commerce on a nationwide basis, and have a substantial effect on the Nation’s economy.

Id.

72. Family Smoking Prevention and Tobacco Control Act §§ 2(14)–(16), (23), (24), 123 Stat. at 1777–81. Some of Congress’ reasons for restricting tobacco advertising are as follows:

(14) Reducing the use of tobacco by minors by 50 percent would prevent well over 10,000,000 of today’s children from becoming regular, daily smokers, saving over 3,000,000 of them from premature death due to tobacco-induced disease. Such a reduction in youth smoking would also result in approximately \$75,000,000,000 in savings attributable to reduced health care costs. (15) Advertising, marketing, and promotion of tobacco products have been especially directed to attract young persons to use tobacco products, and these efforts have resulted in increased use of such products by youth. Past efforts to oversee these activities have not been successful

Smoking Prevention and Tobacco Control Act are adequate to further a substantial government interest, then it will be difficult for a tobacco manufacturer claiming a First Amendment infringement to prevail. Under the existing commercial speech doctrine, however, it is unclear how the United States Supreme Court would rule on these limitations on tobacco advertising. The tobacco companies are already arguing that the regulation is more extensive than necessary because the existing ban on television and radio advertising combined with this current ban on outdoor advertising within 1000 feet of schools and playgrounds will make it “almost impossible to communicate . . . ‘reduced harm’ [tobacco] products.”⁷³ An argument could be made that a less extensive regulation would be to only ban any outdoor advertising within a 1000 feet that *faces* and *can be viewed* by schools and playgrounds. For example, if the advertisement is within 1000 feet of a school or playground, but it faces a highway, that outdoor advertisement should not be banned.

B. *Total Ban on Tobacco Advertising*

There are currently no limits that the FDA can place on tobacco advertising under the Family Smoking Prevention and Tobacco Control Act.⁷⁴ “The law gives the FDA broad authority to restrict marketing and promotion ‘to the fullest extent permissible’ under the 1st Amendment”⁷⁵ The lack of limits on what the FDA can do “is certain to be tested in future court cases.”⁷⁶ The United States Supreme Court has never been faced with a case regarding a total ban on tobacco advertising.⁷⁷ However, there are arguments for a total ban on tobacco advertising.⁷⁸

in adequately preventing such increased use. (16) In 2005, the cigarette manufacturers spent more than \$13,000,000,000 to attract new users, retain current users, increase current consumption, and generate favorable long-term attitudes toward smoking and tobacco use. . . . (23) Children are more influenced by tobacco marketing than adults: more than 80 percent of youth smoke three heavily marketed brands, while only 54 percent of adults, 26 and older, smoke these same brands. (24) Tobacco company documents indicate that young people are an important and often crucial segment of the tobacco market. Children, who tend to be more price sensitive than adults, are influenced by advertising and promotion practices that result in drastically reduced cigarette prices.

Id.

73. Duff Wilson, *Tobacco Firms Sue to Block Marketing Law*, N.Y. TIMES, Sept. 1, 2009, at B1.

74. Healy, *supra* note 1.

75. *Id.*

76. *Id.*

77. See Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 609 (1996).

78. See *id.* at 598. Some of the arguments for a total ban include:

Smoking is an addictive habit that causes severe social harm by giving rise to serious, often fatal illnesses in thousands of individuals every year. Government may exercise its regulatory

Another justification for a total ban on tobacco advertising is that citizens cannot be trusted to make their own rational judgments on the exposure to truthful advertising based on a lawful activity.⁷⁹ However, it may be argued that tobacco advertising is not truthful advertising at all. If a person cannot be trusted to make life-affecting choices based on the open marketplace of advertising, then the government is justified in censoring the tobacco advertising that could lead to harm to that person.⁸⁰ This argument is at odds with “the fundamental premises of both the First Amendment and the notions of democratic theory which underlie our system.”⁸¹

C. *Partial Ban on Tobacco Advertising*

A less controversial invasion of free speech is to place partial restrictions on forms of tobacco advertising. The Family Smoking Prevention and Tobacco Control Act spells out certain forms of tobacco advertising that are not considered a complete advertising ban.⁸² However, the broad authority given to the FDA to restrict marketing and promotion raises concerns of future total advertising bans.⁸³ Although minors do not have the same level of First Amendment rights as adults, tobacco advertising aimed at adults may be restricted because minors may be exposed to that same advertising.⁸⁴ General restrictions on advertising near schools and playgrounds is constitutional, but a complete ban on advertising simply because minors may be exposed to it is unconstitutional.⁸⁵ “To allow such restrictions would be to reduce all of society to a community of children for purposes of the First Amendment.”⁸⁶

Another alternative to a total ban is “tombstone” limitations.⁸⁷ These limitations only allow the manufacturer to include the “name, price, and tar

police powers to prevent or reduce this harm. Government possesses the power to protect the public interest by completely banning sale of tobacco products, . . . but government need not take such extreme action. Rather . . . [the] government may take the lesser step of allowing sales to continue while prohibiting all promotional advertising of tobacco products. Because . . . a reduction in advertising would reduce demand for the product, such a prohibition would largely achieve the government’s legitimate goal of curbing tobacco use indirectly by reducing the public’s demand for that product

79. *See id.* at 604.

80. *Id.* at 604–05.

81. Redish, *supra* note 77, at 605.

82. *See generally* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111–31, 123 Stat. 1776 (2009) (codified as amended in scattered sections of 21 U.S.C.).

83. Healy, *supra* note 1.

84. Redish, *supra* note 77, at 607–08.

85. *See id.*

86. *Id.*

87. *Id.* at 625.

and nicotine levels” contained in the product.⁸⁸ The Act’s requirement that warning labels on cigarette packages will now have to cover fifty percent of the front and rear of the packages may be considered a “tombstone” limitation.⁸⁹ There are two First Amendment issues associated with “tombstone” limitations: “(1) they interfere with a speaker’s choice of method of expression, and (2) they stifle the expression of particular viewpoints.”⁹⁰ First Amendment issues that will be associated with the new tobacco law are important to note:

The First Amendment interests threatened by the regulation of tobacco advertising are considerably more substantial than many have recognized. If the government is permitted to prohibit truthful advocacy of a lawful activity because of fear that citizens will make unwise choices, there is no basis on which to distinguish government’s efforts to do the same in other areas of public decisionmaking. . . . [P]rohibition of tobacco advertising constitutes a governmental exercise in mind control of its citizens—hardly a course of action consistent with the letter, spirit or tradition of the First Amendment right of free expression.⁹¹

D. *Bans on Alcohol Advertising*

The alcohol industry has also faced similar types of bans as the tobacco industry regarding certain forms of advertisement. First Amendment issues have been raised by those opposing advertising restrictions on alcohol products. The United States Supreme Court case of *44 Liquormart, Inc. v. Rhode Island*⁹² set a precedent in determining whether certain forms of prohibition on alcohol advertising were constitutional.⁹³ In *Anheuser-Busch, Inc. v. Schmoke*,⁹⁴ a city ordinance was challenged on First Amendment constitutional grounds.⁹⁵

88. *Id.*

89. Abrams, *supra* note 12.

90. Redish, *supra* note 77, at 626.

91. *Id.* at 639.

92. 517 U.S. 484 (1996).

93. *See id.* at 485.

94. 101 F.3d 325 (4th Cir. 1996).

95. *See id.* at 327.

1. *44 Liquormart, Inc. v. Rhode Island*

In *44 Liquormart*, Rhode Island banned the advertisement of liquor prices except at locations that were actually selling liquor.⁹⁶ A Rhode Island liquor retailer brought action against the State of Rhode Island, claiming that the advertisement ban violated the First Amendment of the United States Constitution.⁹⁷ The United States Supreme Court found that an outright ban on all liquor advertising throughout the State of Rhode Island was unconstitutional.⁹⁸ The history behind Rhode Island's ban on alcohol advertisement was provided in the case:

In 1956, the Rhode Island Legislature enacted two separate prohibitions against advertising the retail price of alcoholic beverages. The first applies to vendors licensed in Rhode Island as well as to out-of-state manufacturers, wholesalers, and shippers. It prohibits them from "advertising in any manner whatsoever" the price of any alcoholic beverage offered for sale in the State; the only exception is for price tags or signs displayed with the merchandise within licensed premises and not visible from the street. The second statute applies to the Rhode Island news media. It contains a categorical prohibition against the publication or broadcast of any advertisements—even those referring to sales in other States—that "make reference to the price of any alcoholic beverages."⁹⁹

The Supreme Court of Rhode Island reviewed the constitutionality of the statutes, and the court found in both cases that the statutes were not unconstitutional.¹⁰⁰ The United States Supreme Court, however, followed the four-step analysis for commercial speech from *Central Hudson* to make a determination on this particular issue.¹⁰¹ Justice Stevens, writing for the majority, opined that the Rhode Island ban was "a blanket prohibition against truthful, nonmisleading speech about a lawful product."¹⁰² When applying the four-part test, the United States Supreme Court did not find that the blanket ban on the alcohol advertising was effective in advancing the State's interest.¹⁰³

96. *44 Liquormart*, 517 U.S. at 489.

97. *Id.* at 493.

98. *Id.* at 516.

99. *Id.* at 489–90.

100. *See id.* at 490–92.

101. *See 44 Liquormart*, 517 U.S. at 500 n.9.

102. *Id.* at 504.

103. *Id.* at 505–07.

Although the Family Smoking Prevention and Tobacco Control Act does not impose a ban on all tobacco advertising, it “gives the FDA broad authority to restrict marketing and promotion” in the future as long as First Amendment rights are not being violated.¹⁰⁴ This broad authority under the Act enables the FDA to create a total ban on tobacco advertising. If the FDA were to implement such a total ban, First Amendment violations would probably be found in future court cases. The FDA would have to provide a tremendous amount of statistical data and information to explain how a total ban on tobacco advertising would be effective in advancing the government’s interest, and that the total ban is not more extensive than necessary to serve the government’s interest.¹⁰⁵

2. *Anheuser-Busch, Inc. v. Schموke*

In *Anheuser-Busch*, there was a city ordinance that prohibited the placement of outdoor advertisement featuring alcoholic advertisements “in certain areas of Baltimore City.”¹⁰⁶ Unlike the statute in *44 Liquormart*, which prohibited advertising throughout the entire state of Rhode Island, the ordinance in this case was targeted at specific areas of the city where children were either at school or in their neighborhoods.¹⁰⁷ The main difference between Baltimore City’s ordinance and Rhode Island’s regulation is that Baltimore City’s ordinance was targeted only at children who were not of a legal drinking age.¹⁰⁸ The United States Supreme Court has repeatedly emphasized that “children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media.”¹⁰⁹

The United States Court of Appeals for the Fourth Circuit utilized the same four-part test from *Central Hudson* that the United States Supreme Court utilized in *44 Liquormart*.¹¹⁰ When applying the United States Supreme Court’s four-part analysis, the United States Court of Appeals for the Fourth Circuit held that Baltimore’s city ordinance was not a violation of the

104. Healy, *supra* note 1.

105. *See generally* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557 (1980).

106. *Anheuser-Busch, Inc. v. Schموke*, 101 F.3d 325, 327–28 (4th Cir. 1996).

107. *Id.*

108. *Id.* at 329 (“Baltimore’s interest is to protect children who are not yet independently able to assess the value of the message presented.”).

109. *Id.*

110. *See id.* at 330.

First Amendment.¹¹¹ The court distinguished the holding from *44 Liquor-mart*:

Baltimore's ordinance expressly targets persons who cannot be legal users of alcoholic beverages, not legal users as in Rhode Island. More significantly, Baltimore does not ban outdoor advertising of alcoholic beverages outright but merely restricts the time, place, and manner of such advertisements. And Baltimore's ordinance does not foreclose the plethora of newspaper, magazine, radio, television, direct mail, Internet, and other media available to Anheuser-Busch and its competitors.¹¹²

The Family Smoking Prevention and Tobacco Control Act contains a section banning "outdoor tobacco advertising within 1,000 feet of schools and playgrounds."¹¹³ This section is quite similar to the ordinance passed in Baltimore City. The Act is targeting areas where children, who are not of a legal age to purchase tobacco, are likely to be present. When applying the case law from *44 Liquormart* and *Anheuser-Busch*, it is likely that if a section of the Act banned outdoor advertising where minors only happened to be collateral from the advertiser's message, a court would probably find that section of the bill to be an infringement on First Amendment rights.

E. *Tobacco Companies File Lawsuits*

On August 31, 2009, Reynolds American, Inc., Lorillard, Inc., and other tobacco companies filed a lawsuit in Kentucky to block certain provisions of the Family Smoking Prevention and Tobacco Control Act.¹¹⁴ Tobacco companies are primarily concerned that the law will prevent them from making truthful statements about health risks associated with tobacco products.¹¹⁵ Floyd Abrams, the attorney representing Lorillard Tobacco Company stated, "Tobacco is a legal product for adults, and the Supreme Court has said that the industry has an interest which the First Amendment protects to communicate information about its products, and adults have the right to receive that

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

112. *Id.* at 329.

113. Abrams, *supra* note 12.

114. David Kesmodel et al., *Tobacco Giants Challenge U.S. Law*, WALL ST. J. EUR., Sept 2, 2009, at 31.

115. *Id.*

information.”¹¹⁶ Mr. Abrams, who is a constitutional lawyer, expects the case to proceed quickly.¹¹⁷

“The 46 page complaint seeks declaratory judgments and injunctions against the federal government and officials in the Food and Drug Administration and the Department of Health and Human Services.”¹¹⁸ Mr. Abrams commented that “[t]he case will be about whether Congress has gone too far about preventing tobacco from communicating with adults.”¹¹⁹ The lawsuit is not challenging the provisions that “address tobacco sales to minors.”¹²⁰ Lorillard Tobacco believes that the United States Court of Appeals for the Sixth Circuit “has been more supportive than . . . other circuits [concerning] commercial speech issues.”¹²¹ A district court judge in Kentucky has already struck down certain provisions of the law.¹²² Judge Joseph H. McKinley, Jr. “ruled that the Food and Drug Administration can’t block tobacco companies from using color and graphics in their advertisements” and the tobacco companies cannot be prevented from implying that their products are safer because they are regulated by the FDA.¹²³ Reynolds American is considering whether to appeal the judge’s rulings that favored the government.¹²⁴

V. THE TOBACCO LAW’S EFFECT

A. *Effect on the Tobacco Industry*

Although it is too early to determine the effects the new law will have on the tobacco industry, experts have provided their opinion on the potential impact.¹²⁵ Blake Brown, an agricultural economist who provides analyses and educational programming for tobacco producers, understands factors that affect tobacco demand.¹²⁶ Mr. Brown has worked with various “tobacco industry and health advocates.”¹²⁷ Mr. Brown has provided commentary to support his insight on where the tobacco industry may be heading:

116. Wilson, *supra* note 73.

117. *Id.*

118. *Id.*

119. Kesmodel, *supra* note 114.

120. *Id.*

121. Wilson, *supra* note 73.

122. David Kesmodel & Suzanne Vranica, *Corporate News: Mixed Tobacco Ruling*, WALL ST. J., Jan. 6, 2010, at B2.

123. *Id.*

124. *Id.*

125. *See* Roan & Yurkiewicz, *supra* note 37.

126. *See id.*

127. *Id.*

“It’s very hard to quantify the impact of regulations on the demand for tobacco. But I would think there would be two effects as a result of this legislation. One is, over time, we will see a substantial decline in cigarette consumption. I think the other potential impact is that these regulations call for modified-risk tobacco products. That will change the technology of the way cigarettes are made. These technology changes would likely lead to less tobacco per cigarette. So if you have a decline in the number of cigarettes smoked, and you have a decline in the amount of tobacco used per cigarette, I think that will have a substantial impact on demand for U.S. tobacco. . . . The U.S. tobacco industry has been downsizing for many years, and continued downsizing would be no surprise. But the big question is how stringent these regulations will be. There is a lot of leeway on what can be required. We won’t really know the impact until the regulatory agencies start to work on this.”¹²⁸

Scott Ramminger, president of the American Wholesale Marketers Association, opposed the legislation due to the cost being driven up on tobacco.¹²⁹ Mr. Ramminger expressed his concerns over what may happen to the cost of tobacco:

“In Canada and other places where draconian regulations have gone in effect, it has basically driven up the cost of the product. Any regulation imposed on any point in the supply chain is going to drive up the cost of the product. You’ve seen states raise the tax on cigarettes and the federal government has too. What it does is create a great opportunity for organized crime and people interested in subverting the system to bring in bootleg products on the black market. Cigarettes are very easy to make. . . . In California, you’ve already had a problem with counterfeit cigarettes from China. I understand what the intention of [the legislation] is, and no one is going to quarrel with the idea that smoking is not really good for you. But there are a lot of things that are not good for you that adults choose to do. If an adult chooses to smoke, they are going to find a way to smoke. It would be better for everyone, including the proponents of the legislation, if cigarettes were purchased through a legitimate business. Look at what happened during Prohibition. This, in my mind, is quite similar.”¹³⁰

128. *Id.*

129. *Id.*

130. Roan & Yurkiewicz, *supra* note 37 (alteration in original).

Patrick Reynolds, grandson of the founder of R.J. Reynolds Cigarette Company, publicly speaks out against tobacco.¹³¹ His only concern with the Act is that the FDA regulation could remove the electronic cigarette from the market.¹³² An electronic cigarette delivers “vaporized propylene glycol and nicotine solution without tobacco or smoke.”¹³³ Mr. Reynolds emphasized that “the cigarette substitute was very handy to me . . . in quitting smoking. It’s something to suck on and pretend you’re smoking.”¹³⁴ Recently, the FDA tested the electronic cigarette products and found that there were toxic chemicals, including antifreeze.¹³⁵ The FDA’s Deputy Commissioner stated, “Little is known about these products, including how much nicotine is there and what other chemicals may be there.”¹³⁶ Although it is not clear whether the FDA will ban electronic cigarettes altogether under the bill, the FDA did say it is planning additional activities to address issues with the electronic cigarettes.¹³⁷

Menthol, a gateway chemical for kids and young women with smoking, will be exempt from the FDA’s regulation.¹³⁸ Jeffrey Wigand, former vice president for research and development for a major tobacco company, is concerned about the exemption of menthol because it is a cigarette that major cigarette manufacturers have targeted at African Americans for decades.¹³⁹ However, the FDA could still ban menthol under the mandate if it chose to do so.¹⁴⁰ Menthol is favored by twenty-seven percent of all smokers and seventy-five percent of African American smokers.¹⁴¹ Mr. Wigand, who was portrayed by Russell Crowe in the 1999 movie “The Insider,” has become “the tobacco industry’s highest-ranking former executive to address public health and safety.”¹⁴² Mr. Wigand was greatly opposed to Altria—formerly known as Philip Morris—helping negotiate the structure of a bill that was going to regulate them.¹⁴³ The legislation only became possible when Altria supported the law after realizing that regulation of the industry was inevita-

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Matthew Perrone, *FDA Finds Carcinogens in Electronic Cigarettes*, CHARLESTON GAZETTE (W. Va.), July 23, 2009, at A8.

136. *Id.*

137. *Id.*

138. Roan & Yurkiewicz, *supra* note 37.

139. *Id.*

140. Healy, *supra* note 1.

141. *Id.*

142. Roan & Yurkiewicz, *supra* note 37.

143. *Id.*; Kochakian, *supra* note 11.

ble.¹⁴⁴ In general, all new “tobacco products are unlikely to enter the market,” and several products that are already offered are “likely to be pulled.”¹⁴⁵

B. *Will the Legislation Actually Curb Smoking?*

“More than 43 million Americans remain addicted to nicotine in tobacco (indeed, 70% of smokers say they wish they could quit, and 40% try yearly).”¹⁴⁶ Every day, 3500 young people smoke for the first time.¹⁴⁷ Tobacco kills more Americans than AIDS, automobile accidents, cocaine, heroin, homicide, alcohol, and suicide combined.¹⁴⁸ One of the FDA’s new powers is the right to require tobacco companies to release details of research concerning the contents and health effects of their current and future products to the public.¹⁴⁹ Americans will be more aware about the four thousand toxic substances and sixty carcinogens found in tobacco products.¹⁵⁰ Health and consumer groups believe that the bill and other anti-smoking efforts “can significantly reduce the 400,000 deaths and \$100 billion in healthcare costs attributed every year to smoking in the U.S.”¹⁵¹

Smokers in Washington, D.C. were split on whether the new bill actually matters.¹⁵² Reginald Little, a forty-seven year old government researcher, thought the regulation was needed because consumers do not know what exactly is in tobacco products.¹⁵³ Lionel Richardson, a twenty-six year old electrical engineer, called the bill a good thing.¹⁵⁴ He said the tobacco companies’ advertisements “make it sexy so kids think it’s the cool thing to do.”¹⁵⁵ However, there were smokers and non-smokers who did not feel the bill was going to make a difference.¹⁵⁶ A program analyst who smokes cigarettes stated, “I already know it’s bad for me, so I don’t think knowing how much is really in one cigarette is really going to make a difference.”¹⁵⁷ A forty-two year old non-smoking, financial analyst commented that the bill

144. Kochakian, *supra* note 11.

145. Healy, *supra* note 1.

146. *Id.*

147. Kochakian, *supra* note 11.

148. George F. Will, *Burned by a Tobacco Bill*, WASH. POST, June 18, 2009, at A23.

149. Healy, *supra* note 1.

150. *Id.*

151. Abrams, *supra* note 12.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. Abrams, *supra* note 12.

157. *Id.*

would lead to “too much government control over personal lives [and] personal choices.”¹⁵⁸ Even though “the FDA will have the authority to adjust” nicotine levels, it cannot bar nicotine altogether.¹⁵⁹ “As a result, the cigarette companies [may be] gaining an even greater degree of governmental approval for the sale of an addictive and deadly product.”¹⁶⁰

C. *The President’s Habit*

President Obama has his own occasional smoking habit that he has been trying to kick since the election.¹⁶¹ The President conceded that the new legislation that is targeted at helping children stop smoking could have helped him when he was younger.¹⁶² The President’s smoking habit has been a kept secret around the White House for some time.¹⁶³ Michelle Obama made it a prerequisite for her husband to quit smoking before he entered the presidential race.¹⁶⁴ However, there is still debate as to whether President Obama has actually kicked his smoking habit.¹⁶⁵ On one hand, his wife claims that he has quit smoking.¹⁶⁶ During an interview with “60 Minutes,” Mrs. Obama claimed, “That’s why he doesn’t do it anymore, I’m proud to say . . . I’m the one who outed him on the smoking. That was one of my prerequisites for, you know, entering this race, is that he couldn’t be a smoking president.”¹⁶⁷

On the day of the bill-signing ceremony, President Obama was asked by a CNN reporter about the President’s struggle with smoking, but the President provided no response.¹⁶⁸ At a press conference that same day, the President’s Press Secretary answered, “He struggles with it every day. I don’t honestly see the need to get a whole lot more specific than the fact that it’s a continuing struggle.”¹⁶⁹ President Obama has admitted that he still struggles

158. *Id.*

159. Kochakian, *supra* note 11.

160. *Id.*

161. Jeff Zeleny, *Occasional Smoker, 47, Signs Tobacco Bill*, N.Y. TIMES, June 23, 2009, at A15 [hereinafter Zeleny, *Smoker*].

162. *Id.*

163. Jeff Zeleny, *For Obama, Tough Grip by Tobacco*, N.Y. TIMES, June 24, 2009, at A12 [hereinafter Zeleny, *Tough Grip*] (“It was, perhaps, one of the worst-kept secrets around the White House. For weeks, the president’s advisers have declined to say whether he had whipped his smoking habit.”).

164. Zeleny, *Smoker, supra* note 161.

165. *See id.*

166. *See id.*

167. *Id.*

168. *Id.*

169. Zeleny, *Smoker, supra* note 161.

with his smoking habit.¹⁷⁰ President Obama stated, “You know, I don’t know what to tell you, other than the fact that, you know, like folks who go to A.A., you know, once you’ve gone down this path, then you know it’s something you continually struggle with.”¹⁷¹

Mr. Obama has not been seen smoking publicly for years. In 2005, on his first day in Washington as a freshman senator, he rolled down the window of an SUV and lit up a cigarette as he rode from the Capitol Hill to a meeting at the White House. But now that he is living at the White House, the scrutiny is far higher. So where does he smoke? The wooded grove around the White House swimming pool and tennis court is one place, according to people with knowledge of the matter, who are not authorized to speak about it.¹⁷²

President Obama can set a strong example to the nation’s youth by ridding the habit that the bill he signed intends to destroy. Although President Obama is not “the first president to smoke cigarettes,” there is more pressure on him in an era where tobacco is “taboo.”¹⁷³ “[I]mproving health care is at the top of the president’s agenda and a tough anti-tobacco bill has just crossed his desk.”¹⁷⁴ President Obama should not be embarrassed about his smoking habit or why he keeps being asked if he continues to smoke.¹⁷⁵ The President happens to be an excellent spokesman for the new FDA regulation and should embrace the role rather than avoid it.¹⁷⁶ “Obama’s personal difficulty . . . doesn’t only reflect the formidable odds . . . in overcoming nicotine addiction. The [P]resident is living proof to the young people . . . that even the most disciplined among us can become hooked. He is the best conceivable advertisement to counter the tobacco industry’s marketing machine.”¹⁷⁷

170. Zeleny, *Tough Grip*, *supra* note 163.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. See Marie Cocco, *A Poster Addict for Tobacco Law*, SUNDAY GAZETTE—MAIL (Charleston, W. Va.), June 28, 2009, at C3.

176. *Id.*

The president should make public-service announcements describing his addiction to cigarettes, which he began smoking as a teenager, and his so-far-failed efforts to completely snuff them out. Because after all, if such a smart, smooth and incontestably successful man is having such trouble quitting, what hope is there for the average American who has no worries about a prying press or the negative aura of a nicotine-stained image?

Id.

177. *Id.*

VI. CONCLUSION

The Family Smoking Prevention and Tobacco Control Act is the most important piece of legislation in the last fifty years to place restrictions on the tobacco industry. The FDA for the first time has been given the authority to control what actually goes into tobacco products.¹⁷⁸ Although the new bill was received with tremendous support in both the House and the Senate, there is still debate as to whether the FDA is capable of handling this new mandate. The FDA is still uncertain as to how to implement its newly granted authority “over the advertising, marketing and production of all tobacco products in the U.S.”¹⁷⁹

The FDA’s outreach could validate the views of those who stated that the FDA was already overburdened and was not equipped to undertake the task of regulating the tobacco industry.¹⁸⁰ If the FDA is asking the public for their input on how to implement change under the new Act, then the FDA may not be properly staffed with the people who should be making those kinds of decisions. The FDA has reached out to the public with the following statement:

We are particularly interested in comments on the approaches and actions the agency should consider initially to increase the likelihood of reducing the incidence and prevalence of tobacco product use and protecting the public health. . . . Although the agency will not respond to specific suggestions, we will consider them in establishing the new Center for Tobacco Products and in implementing the [Act]. In the future, we intend to solicit public input on specific issues.¹⁸¹

The FDA’s role is both a blessing and a burden. On the one hand, the Agency has the opportunity to dramatically affect the number of young and older smokers that are affected by tobacco advertising and the contents of tobacco products. “More than 43 million Americans remain addicted to . . . nicotine”¹⁸² and 3500 young people smoke for the first time each day.¹⁸³

178. Abrams, *supra* note 12.

179. Aaron Krivitzky, *FDA Seeks Comment on New Tobacco Regs*, LAWYERS USA (Boston), July 1, 2009.

180. See Abdullah, *supra* note 41.

181. Krivitzky, *supra* note 179 (“Comments can address a large number of issues, including: federal, state, and local government collaboration; new product approval; product ingredient disclosure; advertising and marketing of tobacco products; label statements and warnings; sale and distribution of tobacco products; manufacturing restrictions and facilities controls; and research/testing.”).

182. Healy, *supra* note 1.

However, the Agency also has an incredible amount of pressure to reduce the millions of Americans who are addicted to nicotine, decrease the effect that advertising has on young people, and lower the staggering number of deaths associated with tobacco use. Some of the leading causes of deaths combined do not even amount to as many deaths caused by tobacco.¹⁸⁴

Furthermore, the FDA may face future litigation regarding constitutional issues with the regulations it passes. Prior tobacco and alcohol cases have held complete bans on advertising that are both lawful and truthful in nature may be found unconstitutional under the First Amendment. The law allowing the FDA “to restrict marketing and promotion ‘to the fullest extent permissible’ under the 1st Amendment—a limit that is certain to be tested in future court cases”—enables the Agency to make either complete bans or partial bans on tobacco advertising.¹⁸⁵ Complete bans on tobacco advertising pose a greater risk for a court to strike the regulation down as unconstitutional. Partial bans on advertising, such as those targeted in areas where children are known to be present, suffer a lower chance of being found as unconstitutional.¹⁸⁶

Congress could ban cigarettes; therefore it could ban tobacco advertising. Instead, tobacco advertising and promotions will be even more severely curtailed. These restrictions merit a constitutional challenge. Although commercial speech does not receive full First Amendment protection, Congress should not be allowed to effectively prohibit truthful communication about a legal product.¹⁸⁷

So far, the FDA has not passed any regulations that completely ban tobacco advertising, but the new Act does contain provisions that limit certain elements of commercial speech. If a court finds that parts of the new law or future regulations passed by the FDA do not meet the criteria under the four-step commercial speech analysis, then the provision or regulation will be found unconstitutional.¹⁸⁸ The tobacco companies have already filed lawsuits against the federal government concerning the constitutionality of the Act.

183. Kochakian, *supra* note 11.

184. *See* Will, *supra* note 148.

185. Healy, *supra* note 1.

186. *See* Redish, *supra* note 77, at 605.

187. Will, *supra* note 148.

188. *See generally* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557 (1980).

President Obama has a tremendous opportunity to be spokesperson for the new bill. President Obama needs to take more of a public stance in addressing his tobacco addiction rather than avoiding it when asked about it by the media. If young people can see how a tobacco addiction has become an incredible life struggle for someone as important as the President, they may reconsider trying tobacco altogether.¹⁸⁹ Additionally, health care reform has been at the top of the President's agenda, and he can set a great example by completely getting rid of his smoking habit.

It will certainly take time before the new law starts showing dramatic effects on tobacco use in this country. Furthermore, the Act demonstrates that politicians on Capitol Hill are willing to ignore party lines in order to pass legislation that may dramatically impact the health of American citizens. The Family Smoking Prevention and Tobacco Control Act could be foreshadowing future legislation that will be passed in Washington to curtail industries that are known to create health dangers for American citizens.

189. See Cocco, *supra* note 175.