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The Target Marketing of Alcohol and Tobacco Billboards to Minority Communities

Kathryn Kelly

THE TARGET MARKETING OF ALCOHOL AND TOBACCO BILLBOARDS TO MINORITY COMMUNITIES

*Kathryn A. Kelly**

> Drive through Black or Hispanic neighborhoods in most cities and you're likely to see big billboards right next to homes and churches and across the street from schools and parks — most of them advertising cigarettes and booze.
>
> Carl Rowan
> Syndicated Columnist[1]

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*J.D., 1993, DePaul College of Law; B.A., 1990, Saint Xavier College. This article was written by the author after serving as foreperson for *People v. Pfelger*, the criminal prosecution of a Chicago priest who whitewashed alcohol and tobacco billboards targeted at the Black community. She thanks her family, Peter G. Blumberg, and DePaul Law Library Staff for their support and assistance.

1. EDWARD T. MCMAHON & PATRICIA TAYLOR, CENTER FOR SCIENCE IN THE PUBLIC INTEREST, CITIZENS' ACTION HANDBOOK ON ALCOHOL AND TOBACCO BILLBOARD ADVERTISING 1 (1990).

I. INTRODUCTION

Alcohol and tobacco products have a disproportionately negative effect on the health of minority communities. The Black community is especially plagued by alcohol and tobacco-related health problems.[2] Further, alcohol and tobacco products are more heavily advertised in minority communities than elsewhere.[3] Although the problem cannot be blamed on a single catalyst, some observers and experts believe that heavy target-marketing of these products to minorities is one of the causes.[4] Advertisers carry out this process by flooding minority communities with ads depicting well-dressed Black models enjoying life because of the use of alcohol or a tobacco product.[5]

One advertising method, the billboard, has become increasingly popular since the ban of tobacco products and voluntary removal of hard liquor ads from television and radio.[6] Billboards provide unique advertising space because of their constant presence. Billboards are almost impossible to ignore.[7] The size and number of billboards in minority communities create a most intrusive form of advertising. These communities are concerned about the medium, the message,

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2. *See also* BRUCE MAXWELL & MICHAEL JACOBSON, MARKETING DISEASE TO HISPANICS (1989) (discussing the problems of target marketing to Hispanic communities). It should be noted that this article could have focused on the Hispanic community, but recent health statistics and response from the Black community presented a more complete overview of the problem.

3. *E.g., id.*; McMahon, *supra* note 1, at 1.

4. Health organizations and church groups comprise the opponents to billboard advertising of these products. McMahon, *supra* note 1, at 3.

5. McMahon, *supra* note 1, at 5. *See infra* notes 189-209 and accompanying text.

6. *See infra* notes 167-73 and accompanying text.

7. Groups critical of billboard advertisement, like the Center for Science in the Public Interest and Scenic America, argue that this media is particularly offensive. McMahon, *supra* note 1, at 2.

and the sheer number of these alcohol and tobacco product advertisements.[8] In fact, community outrage has led to action.[9]

The goal of this article is to offer several solutions to the problem of target-marketing of alcohol and tobacco billboards to minority communities, focusing on the Black community. The article will assess the constitutionality and effectiveness of the proposed options.

The first section of this article chronologically examines commercial speech doctrine, laying out the test for determining the constitutional protection of commercial speech articulated by the Supreme Court. This section also outlines another constitutional doctrine relevant to First Amendment analysis, the Time, Place, and Manner Doctrine. The next section provides background information on alcohol and tobacco products, the advertising of these products, and the minority community's response to billboard advertisements. Finally, the article offers various solutions to the problem, analyzing the constitutionality and effectiveness of each.

II. COMMERCIAL SPEECH

The right to advertise is protected by the First Amendment.[10] This category of speech, known as commercial speech, has been treated "as either wholly outside the First Amendment or as being a variety of 'less valuable' speech not entitled to the high degree of protection afforded to 'core' speech."[11] The protection given commercial speech has been the subject of much controversy. The United States Supreme Court first addressed the constitutionality of commercial speech in 1942.

In *Valentine v. Chrestensen*,[12] the Supreme Court boldly announced that commercial speech was not protected by the First Amendment.[13] Chrestensen, the owner of a retired Navy submarine, attempted to distribute handbills soliciting paying visitors to his submarine.[14] After being advised by the Police Commissioner of New York City that the

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8. *Id.*

9. *See infra* notes 208-09 and accompanying text.

10. The First Amendment reads, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I, cl. 2.

11. GERALD GUNTHER, CONSTITUTIONAL LAW 972, 1128 (11th ed. 1985) (defining core speech as political speech, or speech critical of government policies and officials).

12. 316 U.S. 52 (1942).

13. *Id.* at 54.

14. *Id.* at 52-53.

distribution of the handbills would violate the New York City Sanitary Code, Chrestensen attempted to circumvent the statute by including political speech in the handbill. He added a statement of protest about his docking rights to the handbill.[15] He then sued to enjoin the Commissioner from interfering with the distribution of the handbills.[16]

The Supreme Court determined that while freedom of communication cannot be unduly burdened, commercial speech does not enjoy a high level of protection.[17] In distinguishing restraints on governments in the political and commercial arenas, the court noted that "the Constitution imposes no such restraint on government as respects purely commercial advertising."[18] In so holding, the Supreme Court cited no authority in the four page opinion and omitted careful reasoning regarding the advantages of unregulated commercial speech. The Court found that Chrestensen had affixed the protest against wharfing privileges simply to evade the ordinance.[19]

After *Chrestensen* (1942-1976), the Supreme Court inched farther away from the exclusion of commercial speech from First Amendment protection toward express recognition of some First Amendment protections of commercial speech. For example, in *Breard v. Alexandria*,[20] the Court held that the First and Fourteenth Amendments are not absolutes and advocated a balancing approach when analyzing commercial speech.[21] The Court balanced the homeowner's desire for privacy and the advertiser's right to solicit door-to-door.[22] Applying this balancing test, the Court said that the commercial purpose lessened the value of speech and thus lessened First Amendment protection for commercial speech.[23]

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15. *Id.* at 53. Chrestensen used one side of the handbill for his advertisement and the other for his docking protest. Because the handbill was no longer purely commercial speech, Chrestensen believed he could avoid the Sanitary Code's prohibition. *Id.*

16. *Id.* at 54. The District Court granted an interlocutory injunction, and after the trial issued a permanent injunction. The Appellate Court affirmed. *Id.*

17. *Id.* at 55.

18. *Id.* at 54.

19. *Id.* at 55. Interestingly, the ordinance allowed handbills "solely devoted to 'information or a public protest'." *Id.* at 53.

20. 341 U.S. 622 (1950). The Court upheld a conviction where defendant violated an ordinance prohibiting door-to-door solicitation of magazine subscriptions. *Id.* at 642-43.

21. *Breard*, 341 U.S. at 644.

22. *Id.*

23. *Id.* at 642-43.

In 1958, soon after *Breard*, one Justice in *Cammarano v. United States*[24] explicitly rejected the *Chrestensen* holding.[25] In *Cammarano*, the Court assessed a regulation of the Internal Revenue Code of 1939 that prohibited the deduction of contributions to promote or defeat legislation.[26] The majority held that the petitioners were not denied their First Amendment rights.[27] In a concurring opinion, Justice Douglas criticized *Chrestensen* as being a "casual, almost offhand" opinion.[28] Douglas argued that a "profit motive should make no difference" to the First Amendment analysis.[29]

In 1972, the Court in *Pittsburgh Press Co. v. Human Relations Commission* discussed First Amendment protection for gender-specific employment advertisements.[30] Although the Court found such advertisements illegal, the Court did at least theorize that First Amendment protection for commercial speech might be available.[31] "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity is illegal and the restriction on advertising is incidental to a valid limitation on economic activity."[32] The Court hinted that if legal, the advertisements would have received some First Amendment protection.[33]

In *Bigelow v. Virginia*,[34] the Supreme Court moved closer to an express recognition of commercial speech as worthy of First Amendment protection and limited the *Chrestensen* holding.[35] The Court held

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24. 358 U.S. 498 (1959).

25. *Id.* at 513 (Douglas, J., concurring).

26. *Id.* at 499.

27. *Id.* at 512-13.

28. *Id.* at 514 (Douglas, J., concurring).

29. *Id.*

30. 413 U.S. 376 (1973). The advertisements at issue were "classic examples of commercial speech." *Id.* at 385.

31. *Id.* at 388.

32. *Id.* at 389.

33. *Id.* at 388. Chief Justice Burger dissented, opining that Pittsburgh Press acted properly, and could make decisions concerning layout and organization of the newspaper. *Id.* at 373-76. (Burger, J., dissenting).

34. 421 U.S. 908 (1975).

35. *Id.* at 809. A Virginia statute made the circulation of any publication promoting abortion a misdemeanor. *Id.*

that regulation of advertising must serve a legitimate public interest.[36] However, the Court did not describe the extent of First Amendment protection for commercial speech.[37]

A. *Commercial Speech Within First Amendment Protection*

In 1976, the Supreme Court explicitly held that commercial speech was protected by the First Amendment.[38] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[39] the Supreme Court held that a Virginia statute banning licensed pharmacists from advertising the prices of prescription exceeded the proper bounds of Time, Place and Manner restrictions on commercial speech.[40] By so holding, the Court made clear that commercial speech is protected, though subject to some regulation.[41] The Court reasoned that access to information fosters enlightened decisionmaking.[42] Therefore, society benefits from the free flow of commercial information, which is indispensable to the proper allocation of resources in a free enterprise system.[43] The Court balanced individual and societal interests against the state's strong interest in maintaining the professionalism of licensed pharmacists.[44] The Court reasoned that price advertising will not adversely affect the pharmacist's expertise because pharmacists are already closely regulated by strict professional standards.[45]

Virginia Pharmacy provides guidance as to the scope of First Amendment protection of commercial speech. The Court reasoned that merely because a desire for profit motivates the speech, as in a paid

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36. *Id.* at 826.

37. *Id.* The First Amendment is applicable to the states through the due process clause of the Fourteenth Amendment. *Id.* at 811.

38. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761, 770 (1976).

39. *Id.* at 771. The Court did not indicate what level of scrutiny it employed to strike down the statute.

40. *Id.* at 770-71.

41. *Id.* at 770. For example, the Court cites Kovacs v. Cooper, 336 U.S. 77 (1949). *Virginia Pharmacy*, 425 U.S. at 711. In *Kovacs*, the Court held that an entire medium of commercial speech (sound trucks) can be banned to maintain quiet in a community. *Kovacs*, 336 U.S. at 85-88. "The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community." *Id.* at 83.

42. *Virginia Pharmacy*, 425 U.S. at 765.

43. *Id.*

44. *Id.* at 766.

45. *Id.* at 768.

advertisement, the speech does not lose its First Amendment protection.[46] The Court, however, did not claim that commercial speech is wholly undifferentiated from other forms of speech.[47] Pointing to common-sense differences between commercial speech and other varieties of speech, the Court recognized that some restriction of commercial speech is necessary to insure the flow of truthful and legitimate commercial information.[48] Commercial speech needs less First Amendment protection because it is more easily verifiable and more durable than other kinds of speech.[49] Finally, the Court suggested that untruthful or deceptive speech would not be entitled to any protection.[50]

The Court still shied away from First Amendment protection in *Bates v. State Bar of Arizona*.[51] In *Bates*, one in a series of attorney advertising cases, the Supreme Court sustained regulation of advertising, finding it unlikely that commercial speech would be crushed by an overbroad regulation.[52] Another attorney advertising case, *Ohralik v. Ohio State Bar Association*,[53] also limited First Amendment protection of commercial speech. The Court stated that "to require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process."[54] The *Ohralik* Court believed that commercial speech occupied a "subordinate position in the scale of First Amendment values."[55]

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46. *Id.* at 761.

47. *Id.* at 771, n.24.

48. *Id.; see, e.g.*, LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 894 (1988). Professor Tribe discusses the struggle in differentiating between commercial and noncommercial speech. *See also* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990) (arguing that the commercial/noncommercial distinction should be abandoned because all speech is protected equally by the First Amendment).

49. *Virginia Pharmacy*, 425 U.S. at 771, n.24.

50. *Id.* This suggestion foreshadows the first prong of the *Central Hudson* test, *see infra* note 56.

51. 433 U.S. 350 (1977).

52. *Id.* at 380-81. *But see* Bigelow v. Virginia, 421 U.S. 809 (1975) (allowing the overbreadth argument). The overbreadth argument is generally limited to First Amendment cases. Because commercial speech is not afforded full protection, the doctrine is inapplicable to such cases. Typical Supreme Court attorney advertising cases address attorney membership in professional organizations featured on letterhead, or advertisements claiming special practice areas using graphics. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)(upholding the use of illustrations in attorney advertisement upheld); *In re* R.M.J., 455 U.S. 191 (1982)(striking down a Missouri Supreme Court rule restricting attorney advertisements to ten categories).

53. 436 U.S. 447, 456 (1978). In *Ohralik*, the Court upheld sanctions against an attorney who solicited an accident victim in the hospital. *Id.*

54. *Id.* at 456.

55. *Id.*

1. *Central Hudson* Test

In 1980, in *Central Hudson Gas & Electric v. Public Service Commission*,[56] the Supreme Court refined its analysis of commercial speech. The New York Public Service Commission wanted to prevent electric utilities in New York State from distributing advertisements promoting the use of electricity.[57] Finding that the Commission's order restricted only commercial speech,[58] the Court laid out a four-part test to assess the constitutionality of any regulation of commercial speech.[59] To be protected, the commercial speech (1) must concern lawful activity and not be misleading. The government may then regulate only if: (2) the asserted governmental interest is substantial; (3) the regulation directly advances the asserted government interest; and (4) the regulation is no more extensive than necessary.[60] Commercial speech doctrine was thus restructured, and *Central Hudson* created an analytic framework for adjudicating commercial speech cases.[61] The Court cites no specific case authority for the test prongs, but said the test was a culmination of commercial speech cases.[62]

In the concurrence, however, Justice Blackmun suggested that the test was something less than a culmination of commercial speech cases.[63] Justice Blackmun believed the test was "not consistent with

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56. 447 U.S. 557 (1980).

57. *Central Hudson*, 447 U.S. at 558. The order was based on the Commission's finding that New York's utility system had insufficient fuel stock to meet customer demands for the 1973-1974 winter. *Id.* at 559. After the shortage abated, the Commission extended the prohibition. Declaring all promotional advertising contrary to the national policy of conserving energy, the Commission believed whatever benefits would be realized supported the ban. *Id.* at 559-60. The Commission explicitly permitted informational advertising. *Id.* at 560.

58. *Id.* The Court defines commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Id.* at 561.

59. *Id.* at 563-66.

60. *Id.*

61. *See* Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181 (1988) (discussing the inconsistent applications of the *Central Hudson* test).

62. *Central Hudson*, 447 U.S. at 566. The Court cites many commercial speech cases to support the test. *See* Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978); *In re* Primus, 436 U.S. 412 (1978); Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Carey v. Population Serv. Int'l, 431 U.S. 678 (1977); Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973).

63. *Central Hudson*, 447 U.S. at 573 (Blackmun, J., concurring). Justice Blackmun disagreed with an application of the four-part test when a state seeks to manipulate private economic decisions. *Id.*

our prior cases and does not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech."[64] He reasoned that absent clear and present danger, the government should not restrict expression because of the effect its message is likely to have on the public.[65]

After establishing a new test, the Court applied it to the regulation at issue in *Central Hudson*. The Court held the speech was neither misleading nor unlawful, and therefore might merit First Amendment protection.[66] Next, to satisfy the test, the state must assert a substantial governmental interest. The Commission offered two state interests justifying the ban.[67] The first state interest was in energy conservation.[68] The state asserted that the advertisements would increase the demand for electricity, thus wasting energy resources. The Court recognized the importance of energy conservation, and held that the asserted state interest was substantial.[69] The second state interest was maintaining a fair and efficient rate system.[70] The Commission argued that promotional advertising would aggravate inequities of the system and would result in an overall rate increase.[71] The Court held that the state's interest in a fair and efficient rate system was a clear and substantial governmental interest.[72]

Applying the third prong of the test, examining whether the regulation directly advances the governmental interest, the Court evaluated the relationship between the regulation and the state's interests in energy conservation and an equitable rate system. The Court found the relationship between the advertising prohibition and the Commission's rate structure to be tenuous and speculative.[73] The Court said that "such conditional and remote eventualities simply cannot justify silencing appellant's promotional advertising."[74] However,

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64. *Id.* at 575 (Blackmun, J., concurring).

65. *Id.* at 575 (Blackmun, J., concurring). The "commonsense differences" between commercial speech and other speech do not justify suppressing truthful, nondeceptive commercial speech. *Id.* at 575-76.

66. *Id.* at 566-67.

67. *Id.* at 568.

68. *Id.* at 568.

69. *Id.*

70. *Id.*

71. *Id.* at 568-69.

72. *Id.* at 569.

73. *Id.* at 569.

74. *Id.*

the Court found the state's interest in energy conservation was directly advanced by the order. Because Central Hudson would not contest the ban unless it believed that promotion would increase its sales, the Court found a direct link was established.[75]

The fourth and final part of the test examines the scope of the regulation, which must be no more extensive than necessary to further the state's interest in energy conservation.[76] Although important, the Court found the energy conservation rationale did not justify suppression of information that caused no increase in total use.[77] Important to the Court's analysis was the Commission's failure to show that a more limited restriction on content would not serve the state's interest.[78] Under this prong of the test, the Court invalidated the regulation.

In his dissent, Justice Rehnquist[79] scrutinized First Amendment and commercial speech doctrines. Justice Rehnquist disagreed with the holding that the commercial speech of a state-created monopoly is entitled to First Amendment protection.[80] His discussion of the subordinate position of commercial speech to noncommercial speech directly opposes the majority's elevation of the speech.[81] Justice Rehnquist believed that by labeling economic regulation as free speech, the Court revitalized *Lochner* era decisions,[82] opening up a Pandora's

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75. *Id.*

76. *Id.* at 569-70. The Court did not reach prong four of the test for the rate structure interest because it failed to meet prong three. *Id.*

77. *Id.* at 570.

78. *Id.* "The Commission . . . has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of [*Central Hudson*'s] commercial expression." *Id.*

79. *Id.* at 583 (Rehnquist, J., dissenting); *see also Bates*, 433 U.S. at 404 (finding the restriction did infringe on the First Amendment); *Bigelow*, 421 U.S. 809, 829 (Rehnquist, J., dissenting)(holding Virginia had a legitimate interest in the regulation); *Virginia Pharmacy*, 425 U.S. at 781.

80. *Central Hudson*, 447 U.S. at 556 (Rehnquist, J., dissenting).

81. *Id.* at 591. "The test adopted by the Court thus elevates the protection of the First Amendment to a level that is virtually indistinguishable from that of noncommercial speech." *Id.*

82. *Id.* Lochner v. New York, 198 U.S. 45 (1905) exemplifies the cases where the Court struck down state economic regulations based on its assessment of the most appropriate means of implementation. *Cf.* Nebbia v. New York, 291 U.S. 502 (1934) (discrediting *Lochner* era decisions). *See also* Thomas H. Jackson & John C. Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979) (agreeing with Justice Rehnquist that the Court was returning to economic due process under the guise of the First Amendment).

Box.[83] He asserted that the part of the test requiring that regulation should be no more extensive than necessary will "unduly impair a state legislature's ability to adopt legislation reasonably designed to promote interests that have always been rightly thought to be of great importance to the State."[84]

In *Metromedia, Inc. v. San Diego*,[85] the Court applied the *Central Hudson* test to billboard advertising. In order to eliminate traffic hazards and improve the appearance of the city, San Diego enacted an ordinance imposing substantial prohibitions on the erection of outdoor advertising displays.[86] The Court analyzed the constitutionality of the ordinance under the four-part test, quickly finding parts one, two and four satisfied. First, the commercial speech must not be misleading or promote illegal activity.[87] The Court readily agreed that there was no suggestion of such speech.[88] Second, the Court found that the two goals of the ordinance, traffic safety and the appearance of the city, were substantial governmental goals.[89] The Court then applied the fourth part of the test, holding that the most direct and perhaps only effective approach to solving the problems billboards create is to prohibit that form of advertising.[90]

The third prong of the *Central Hudson* test was problematic for the *Metromedia* Court: the ordinance must directly advance the substantial governmental interests. The Court was hesitant to disagree with the judgments of local lawmakers and the reviewing courts that billboards were real hazards to traffic safety.[91] However, the Court

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83. *Central Hudson*, 447 U.S. at 598 (Rehnquist, J. dissenting). Justice Rehnquist found the notion that more speech will expose the falsehoods to be wholly out of place in the commercial bazaar. *Id.* Further, "in a democracy, the economic is subordinate to the political." *Id.* at 599.

84. *Id.* at 584-85.

85. 453 U.S. 490 (1981); *see also* Edward H. Ziegler, Jr., *Local Control of Signs and Billboards: An Analysis of Recent Regulatory Efforts*, ZONING & PLANNING L. RPTR. 161 (1985) (discussing the regulation of commercial and noncommercial speech); R. Douglass Bond, Note, *Making Sense of Billboard Law: Justifying Prohibitions and Exemptions*, 88 MICH. L. REV. 2482 (1990); Ronald G. Aronovsky, *Metromedia Inc. v. City of San Diego: Aesthetics, the First Amendment, and the Realities of Billboard Control*, 9 ECOL. L. Q. 295 (1981) (quoting Odgen Nash: "I think that I shall never see, A billboard as lovely as a tree. Indeed, unless the billboards fall, I'll never see a tree at all").

86. *Metromedia*, 453 U.S. at 493. The ordinance excepted onsite signs, and signs falling within twelve specified categories (e.g. government signs, public bus stops, etc.). *Id.* at 494.

87. *Id.* at 507.

88. *Id.*

89. *Id.* at 507-08.

90. *Id.* at 508.

91. *Metromedia*, 453 U.S. at 509.

held that by their very nature, billboards can be perceived as an "aesthetic harm."[92]

2. Protection Retracted: *Posadas*

The most recent case molding commercial speech doctrines is *Posadas de Puerto Rico Association v. Tourism Co.*[93] A major change in the personnel of the Supreme Court propelled Chief Justice Rehnquist into a narrow majority,[94] consequently limiting First Amendment protection of commercial speech. Posadas, operating a gambling casino in Puerto Rico, was fined under Puerto Rico's Games of Chance Act of 1948 (Act).[95] The Act legalized certain forms of casino gambling in licensed places, but did not allow advertising of such activity to the residents of Puerto Rico.[96] After twice being fined for violating the advertising restriction, Posadas challenged the Act's infringement on his commercial speech rights.[97] The Superior Court upheld the regulation, after narrowing the statute to mean that the regulation prohibited local advertising addressed to Puerto Rican residents, but not local advertising addressed to tourists.[98] Finding the Act a restriction of pure commercial speech, the Court applied the *Central Hudson* test.[99]

The advertisements satisfied the first prong of the *Central Hudson* test, questioning the legality and nature of the speech.[100] Next, applying the second prong of the *Central Hudson* test, the Court summarily accepted Puerto Rico's asserted interest that excessive gambling among local residents would produce harmful effects on the safety,

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92. *Id.* at 510. While the ordinance survived all prongs of the *Central Hudson* test, it was nevertheless struck down because the ordinance favored commercial speech over noncommercial speech. *Id.*

93. 478 U.S. 328 (1986).

94. *Posadas*, 478 U.S. at 330.

95. The Games of Chance Act of 1948, Act No. 221 of May 15, 1948.

96. *Posadas*, 478 U.S. at 332. The Act authorized the playing of bingo, roulette, dice and card games, and slot machines in licensed gambling rooms. *Id.*

97. *Id.* at 334.

98. *Id.* at 334-35. The U.S. Supreme Court must abide by the narrowing constructions of the Superior Court. *Id.* at 339. Traditional kinds of gambling, horse racing, cockfighting and the lottery, presented less risks and were not included in the advertising prohibition. *Id.* at 342-43.

99. *Id.* at 340.

100. *Id.*

health, and welfare of Puerto Rico citizens.[101] The Court then turned to the last two prongs of the test, requiring the tailoring of the regulation to accomplish the legislature's ends.[102] The majority found that the restrictions directly advanced the government's asserted interest, finding reasonable the legislature's belief that an increase in gambling by Puerto Rican residents would follow such advertisements.[103]

Finally, the Court held the restriction satisfied the fourth *Central Hudson* step because the regulation was no more extensive than necessary to serve the government's interest.[104] The Court pointed out that the advertising of casino gambling aimed at tourists would be unaffected.[105] Deferring to the legislature, the Court noted that,[106] "legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, has varied from outright prohibition on the one hand, to legalization of the product or activity with restrictions on stimulation of its demand on the other hand."[107] Therefore, the Act was upheld.

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101. *Id.* at 341. The Court, quoting Appellees Brief, offered examples of such effects: disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime. *Id.* The Court further noted that these same effects triggered the majority of the 50 States to prohibit casino gambling. *Id.*

102. *Id.*

103. *Id.* at 341-42. In so holding, the Court rejected Posadas argument that the challenged restriction is underinclusive because other kinds of gambling such as horse racing may be advertised to residents of Puerto Rico. *Id.* at 342. The legislature was concerned solely with casino gambling, and the Court held this sufficient. *Id.*

104. *Id.* at 343. *See* Board of Trustees v. Fox, 492 U.S. 469 (1989) (giving the final death blow to the fourth prong of the *Central Hudson* test).

105. *Posadas*, 478 U.S. at 343.

106. *Id.* at 344. The Court noted that the legislature concluded that residents aware of the risks of casino gambling would be induced to engage in the conduct. *Id.* The Court expressed the view that the power to ban casino advertising includes the lesser power to ban advertising of casino gambling. *Id.* at 345-46. The Court expounded this view in rejecting appellant's argument that Carey v. Population Serv. Int'l, 431 U.S. 678 (1977) and Bigelow v. Virginia, 421 U.S. 809 (1975) indicate the challenged restrictions defective. *Id.*

107. *Id.* at 346-47. The Court cited to lower court cases upholding restrictions on tobacco and alcohol advertising. *Id. See e.g.*, Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.C. 1971), *aff'd*, Capital Broadcasting Co. v. Acting Attorney Gen., 405 U.S. 1000 (1972); Dunagin v. City of Oxford, Miss., 718 F.2d 738 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). *See also* Frederick Schauer, *The Aim and the Target in Free Speech Methodology*, 83 NW. U. L. REV. 562 (1989)(discussing the communicative impact of cigarette advertising as viewed in *Posadas*).

The *Posadas* Court, in failing to consider "counter-speech" theory, disregarded an important perspective on gambling advertisements. "Counter-speech" refers to the use of contradiction to correct falsehoods. As Justice Brandeis once stated, "[I]f there be time to expose through discussion the falsehood and fallacies . . . the remedy to be applied is more speech, not enforced silence."[108] The *Gertz* Court expressed a similar idea, stating that, "[H]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[109] However, in *Posadas*, counter-speech was not cited as a less restrictive means to reach the governmental interest.

Four Justices dissented from the *Posadas* majority. Justice Brennan, writing for Justice Marshall and Justice Blackmun, could not understand why the government would seek to suppress commercial speech in order to deprive consumers of accurate information concerning lawful activity.[110] In fact, Justice Brennan would have protected the speech here as extensively as noncommercial speech.[111] The dissent particularly noted the relaxed standards used to uphold the regulation,[112] and the deference accorded the Puerto Rican legislature.[113] Finally, Justice Brennan criticized the majority's neglect of the "wide range of effective alternatives to Puerto Rico."[114] Justice Brennan found that the ban discriminated impermissibly on the basis of the publication, audience, and words employed.[115]

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108. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); *see also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).

109. John Milton, in *Areopagitica*, presaged the First Amendment freedom of speech concerns. "[T]hough all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and falsehood grapple; whoever knew truth put to the worse in a free and open encounter?" JOHN MILTON, *Areopagitica: A Speech for the Liberty of Unlicensed Printing to the Parliament of England, in* MILTON'S PROSE WRITINGS 146, 181 (J.M. Dent & Sons, Ltd., *rev'd edit.* 1958) (1644); *see also* David F. McGowan & Ragesh K. Tangri, *A Libertarian Critique of University Restrictions of Offensive Speech*, 79 CAL. L. REV. 825 (1991) (discussing speech in the marketplace of ideas, then applying the theory to hate speech on University campuses).

110. *Posadas*, 478 U.S. at 350 (Brennan, J. dissenting).

111. *Id.* at 351. Justice Brennan asserted there were "no differences between commercial and other kinds of speech" justifying a divergence in protection. *Id.*

112. *Id.* Justice Brennan, in quoting Blackmun's *Central Hudson* concurrence, held that strict scrutiny should have been applied. *Id.*

113. *Id.* at 352.

114. *Id.* at 357. The burden is on the government to prove more limited means, like counteradvertising, are insufficient. *Id.*

115. *Id.* at 359.

B. *Time, Place, and Manner Regulation of Protected Speech*

While the First Amendment protects freedom of speech, the expression, be it pure speech or commercial speech, is subject to reasonable Time, Place, and Manner restrictions. Such restrictions are valid if they are justified without reference to content of the speech, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication.[116] One of the recent Supreme Court applications of Time, Place, and Manner restrictions was in *Clark v. Community for Creative Non-Violence.*[117]

In *Clark,* Community for Creative Non-Violence (CCNV) planned a demonstration in Lafayette Park and the Mall, in Washington, D.C., to call attention to the plight of the homeless.[118] The National Park Service stopped the demonstration, and CCNV challenged the action.[119]

The Supreme Court applied the Time, Place, and Manner test to the National Park regulation that permitted "camping"[120] only in designated campgrounds.[121] The Court held that the regulation was content-neutral in its restriction of the expressive conduct, thereby satisfying the first prong of the test.[122] The prohibition was not applied because of the message presented by CCNV.[123] Next, the Court found that the regulation was narrowly tailored to the government's substantial interest in maintaining the parks.[124] This finding satisfied the second prong of the test.[125] Finally, in applying the third prong assessing

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116. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); *see also* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984)(holding a city may improve its appearance by limiting campaign signs if the restriction is unrelated to the suppression of ideas); United States v. Grace, 461 U.S. 171 (1983)(holding that the Supreme Court sidewalks are public forums, and banning flags or banners does not serve the purpose of protecting the Court from outside influence); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981)(limiting distribution of religious literature to a fixed location is constitutional).

117. *Clark,* 468 U.S. at 288.

118. *Id.* at 291-92.

119. *Id.* at 292.

120. The regulation defined camping as the "use of park land for living accommodation purposes such as sleeping activities, or making preparations to sleep." *Id.* at 290-91.

121. *Id.* at 292.

122. *Id.* at 295.

123. *Id.*

124. *Id.* at 296.

125. *Id.* at 296-97 (quoting Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. at 52-53).

the alternative channels of communication, the Court found that the regulation left the homeless free to communicate their plight in other ways.[126] CCNV was free to deliver the intended message to the media and public via other means.[127] Thus, the Court upheld the regulation as a valid Time, Place and Manner regulation.[128]

III. THE PROBLEM

With the legal framework in place, the problem of target marketing alcohol and tobacco products to the Black community must be addressed. While tobacco and alcohol advertisers use many vehicles to reach consumers, the billboard has become one of the most popular.[129] The ads themselves and the locations of billboards have targeted African Americans. The ads depict young Black models glamorizing consumption of alcohol and tobacco. The number of billboards in Black areas, compared with other areas, is quite high. Additionally, Blacks suffer from more alcohol and tobacco-related diseases than other racial groups. This situation has created an advertising haven for alcohol and tobacco producers. Before addressing the possible solutions to this problem, the products, advertising, and the target community must be analyzed.

A. *Alcohol and Tobacco Products*

Both alcohol and tobacco products have roots in what was to become the United States. In colonial America, tobacco was a cash crop, laying a foundation for one of the most profitable industries today.[130] Tobacco, native to the Americas, was commonly smoked by pre-Columbian tribes in rituals.[131] It was brought to Europe by Christopher Columbus' returning ships, although the crowned heads of Europe tried to curb

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126. *Id.* at 295. The Court reasoned that the regulation permitted a symbolic city, signs, and protestors, leaving ample means of communication available. *Id.*

127. *Id.* at 295.

128. *Id.* at 298-99. The dissent would have held that the regulation failed the Time, Place, and Manner analysis. *Id.* at 301 (Marshall, J., dissenting).

129. There are three standard billboard sizes. Junior Posters, or 8-sheet posters, are only 72 square feet or less, and can mostly be found in urban areas. Poster Panels are 12 feet high and 25 feet long. Standard Painted billboards are 14 feet high by 48 feet long. McMahon, *supra* note 1, at 8.

130. *E.g.*, Anna Quindlen, *Fighting the War on Cigs*, N.Y. TIMES, Mar. 4, 1990 at 23.

131. ROBERT E. GOODIN, NO SMOKING: THE ETHICAL ISSUES 1 (1989).

this menace associated with brothels.[132] Liquor products were first manufactured in the United States on Staten Island in 1640 when Willem Kieft established a winery.[133] The British took over the winery in 1664 to make rum, and thus contributed to the slave triangle.[134] With such an early start, alcohol and tobacco products became entrenched in the American way of life.

Alcohol and tobacco products are proven health hazards. The dangers of tobacco use came to public attention in 1964 with the Surgeon General's Report on Smoking.[135] The report, for the first time, linked cigarette smoking with the diseases of lung cancer and heart disease.[136] In response, Congress enacted the Federal Cigarette Labeling and Advertising Act in 1965 (FCLA Act).[137] Among other things, the FCLA Act mandated warnings that must appear on every tobacco product or advertisement.[138] In 1964, smoking was considered habituating; in the 1989 Surgeon General's Report, cigarettes and other forms

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132. Two of Columbus' crew members, Rodrigo de Jerez and Luis de Torres, noticed that Cuban natives were igniting dry tobacco leaves and inhaling smoke. William Ecenbarger, *Tobacco's Long and Winding Road*, CHI. TRIB., Dec. 29, 1991 (magazine) at 16. French Ambassador to Portugal, Jean Nicot, introduced to France in 1558 tobacco as a remarkable American curative herb, and chemists later immortalized him by naming the poisonous liquid alkaloid of tobacco leaves nicotine. LEE A. FRITSCHLER, SMOKING AND POLITICS: POLICY MAKING AND THE FEDERAL BUREAUCRACY 7 (2d ed. 1975); Ecenbarger, *supra*, at 16. In 1611, John Rolfe obtained milder Spanish tobacco seeds and created the tobacco industry in Virginia. JANE W. SMITH, SMOKE SIGNALS: CIGARETTES, ADVERTISING AND THE AMERICAN WAY OF LIFE 10 (1990). The first African slaves brought to the southern states were brought to work in tobacco fields, like those of John Rolfe. Ironically, Black males now have the highest lung cancer rates in America. Ecenbarger, *supra*, at 16.

133. BARTON ROECHE, THE NEUTRAL SPIRIT: A PORTRAIT OF ALCOHOL 36-37 (1960).

134. *Id.* at 36-38.

135. ADVISORY COMMITTEE TO THE SURGEON GEN. OF THE PUB. HEALTH SERV., U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, SMOKING AND HEALTH (1964). In 1962, The Royal College of Physicians, in London, released a similar report on the dangers of smoking. *Id.* at 8. That same year, Surgeon General Luther Terry formed the Advisory Committee on Smoking and Health. *Id.*

136. *Id.* at 29-32. In 1955, the Federal Trade Commission banned claims of health benefits on cigarette packages. Ecenbarger, *supra* note 132, at 18.

137. 15 U.S.C. §§ 1331-1341 (1982 & Supp. 1991).

138. 15 U.S.C. § 1333. In recent amendments, the Act has established four acceptable warnings that rotate. 15 U.S.C. § 1333 lists the four: 1. Surgeon General's Warning: Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy. 2. Surgeon General's Warning: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health. 3. Surgeon General's Warning: Smoking by Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight. 4. Surgeon General's Warning: Cigarette Smoke Contains Carbon Monoxide.

of tobacco were deemed addicting.[139] Each of the last six Surgeon Generals of the United States Public Health Service has identified cigarette smoking as one of the nation's largest contributors to death and disease.[140] Additionally, unlike other hazardous products, tobacco remains legal because it has been exempted from Food and Drug Administration (FDA) regulation. The FDA does not evaluate the safety of tobacco products because the products are not a food or a medication.[141]

Similarly, alcohol has been identified as one the world's major public health concerns.[142] Excessive drinking can cause liver cirrhosis, cancer of the digestive tract, and heart disease.[143] Indeed, the increase in aggregate alcohol consumption has increased the instances of these diseases.[144] In July 1981, the Surgeon General issued the first health advisory concerning alcohol consumption.[145] By 1988, Congress had enacted Subchapter II of the Federal Alcohol Administration Act, entitled Alcoholic Beverage Labeling.[146] The subchapter mandates the warning that must appear on all alcoholic beverages[147] and prohibits state law from requiring any other statement.[148]

Although seemingly obvious, the health hazards presented by alcohol and tobacco products are unknown to or underestimated by consumers.[149] Most drinkers are only vaguely aware of the hazards

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139. REPORT OF THE SURGEON GENERAL, U.S. DEP'T OF HEALTH AND HUMAN SERV., REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS 21 (1989). [hereinafter Silver Report].

140. *Id.* at 5.

141. Goodin, *supra* note 131, at 13.

142. Marcus Grant, *Establishing Priorities for Action* 1, *compiled in* ALCOHOL POLICIES, WORLD HEALTH ORGANIZATION (WHO) (1985).

143. *Id.* at 2.

144. *Id.* at 4.

145. S. REP. NO. 596, 100th Cong., 2d Sess. (1988).

146. 27 U.S.C. §§ 213-219 (Supp. 1991) [hereinafter all U.S.C. cites refer to Supp. 1991 unless otherwise stated]. *See also* Elizabeth L. Kruger, *Mitigating Alcohol Health Hazards Through Warning Labels and Public Education*, 63 WASH. L. REV. 979 (1988)(advocating tort liability for alcohol manufacturers and the enactment of federal regulation).

147. 27 U.S.C. § 215 provides the mandated warning: "GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems." *Id.*

148. 27 U.S.C. § 216 provides: "No statement relating to alcoholic beverages and health, other than required by section 215 . . . shall be required." *Id.*

149. In fact, Black Americans are more likely than Whites to lack information about alcoholism as a disease. Frederick D. Harper, *Alcoholism and Blacks: An Overview, in* ALCOHOLISM IN MINORITY POPULATIONS 17, 19 (Thomas D. Watts, et al., eds., 1989). Few government-sponsored education and prevention strategies are targeted to the Black community.

associated with excessive or regular alcohol consumption.[150] Further complicating the problem is alcohol's addictive nature.[151] A national survey found that the public underestimates the health risks of smoking, including the possibility of addiction, compared with other health risks.[152] The Federal Trade Commission (FTC) reports that over 30% of the public is unaware of the relationship between smoking and heart disease, and 20% do not know that smoking causes cancer.[153] Even though the dangers associated with tobacco and alcohol use are known by some, people are not fully aware of the potential risks.

The lack of awareness, as well as product addiction, has led to action in the nation's courts by consumers. Consumers have alleged state causes of action, such as "failure to warn" against both cigarette and alcoholic beverage manufacturors.[154] The causes of action concerning cigarettes must overcome the FCLA Act preemption clause,[155] which mandates the warnings on cigarette packages[156] and prohibits states from interfering with them. The courts had split, however, on whether any additional warning requirement would be preempted by the FCLA Act.[157] The Supreme Court decided in *Cipollone v. Liggett Group, Inc.* that consumers could assert a tort.[158]

Frances L. Brisbane & Reginald C. Wells, *Treatment and Prevention of Alcoholism Among Blacks, in* ALCOHOLISM IN MINORITY POPULATIONS 33 (Thomas D. Watts et al., eds., 1989) (discussing other minority populations such as Hispanics, Native Americans, and Asian Americans).

150. Grant, *supra* note 142, at 5.

151. *Id.*

152. Silver Report, *supra* note 139, at 23.

153. FTC STAFF REPORT ON THE CIGARETTE INVESTIGATION 9 (1981).

154. *See, e.g.*, Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), *cert. granted*, 111 S. Ct. 1386 (1991); McGuire v. Joseph E. Seagrams & Sons, Inc., 790 S.W.2d 842 (App. 1990), *rev'd*, 814 S.W.2d 385 (Tex. 1991).

155. *See supra* notes 137-38. 15 U.S.C. §1334 provides that:

> (a) no statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No requirement of prohibition based on smoking and health shall be imposed under state law with respect to the advertising of promotion on any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

156. *See supra* note 138 and accompanying text.

157. *Compare Cipollone*, 789 F.2d at 185; Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987)(finding that a failure to warn claim would excessively disrupt the balance between health and trade set by Congress) *and* Carlisle v. Philip Morris, Inc, 805 S.W.2d 498 (Tex. App. 1991)(applying a heightened presumption against preemption, the court held the labeling Act did not reflect a clear and unambiguous congressional intent to preempt the common-law); Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239 (N.J. 1990)(holding the Act did not preempt state claims for failure to warn); Forster v. R.J. Reynolds Tobacco Co., 423 N.W.2d 691 (App. 1988) *rev'd*, 437 N.W.2d 655 (Minn. 1989)(holding the products liability claim was not impliedly

The Supreme Court, deciding *Cipollone* on June 24, 1992,[159] ruled that the 1965 FCLA Act did not preempt state law damages actions. However, the FCLA Act superseded only "positive enactments by state and federal rulemaking bodies mandating particular warnings on cigarette labels or in cigarette advertisements."[160] The Court so ruled in light of the FCLA Act's narrow prohibition and required warnings, the strong presumption against preemption, the lack of an inherent conflict between federal preemption of state warning requirements, and the FCLA Act's stated purpose and regulatory context.[161] The Court was split as to which claims were preempted by the FCLA Act. While the opinion is unclear, the Court has offered some plaintiffs viable causes of actions.

Plaintiffs have alleged similar claims against alcohol and liquor distributors.[162] In *McGuire v. Joseph E. Seagrams & Sons*, McGuire claimed to be injured by Seagrams' unreasonably dangerous product.[163] The Texas Court of Appeals held that the defendant had a duty to

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preempted by the Federal Cigarette Labeling and Advertising Act); *see also* James T. Kilpatrick, *Suit Against Cigarette Companies Shows Limits of Federalism*, CHI. SUN-TIMES, Jan. 18, 1992, at 28 (discussing the *Cipollone* case and personal choice).

158. Although various issues in the case have reached the Supreme Court, this was the first time the preemption question was before the Court. The Court ordered a new oral argument, purportedly due to a 4-4 split, indicating the need for Justice Clarence Thomas to hear oral arguments. Joan Beck, *A Court Case That Could Burn Tobacco Firms*, CHI. TRIB., Oct. 24, 1991, at 27 (predicting a flood of litigation if the Supreme Court rules against Liggett); *see also* Earl T. Holman, Note, *Constitutional Law Preemption: State Law Tort Actions Alleging Inadequacy of Cigarette Label Health Warning Not Superseded by the Federal Cigarette Labeling and Advertising Act*, 21 CUMB. L. REV. 371 (1991) (discussing the *Dewey* case in relation to the Labeling Act cases and preemption doctrine); Deborah F. Mitchell, Note, *Constitutional Law: Preemption of State Common Law Actions Against Cigarette Manufacturers by the Federal Cigarette Labeling and Advertising Act: Has Federalism Gone Up In Smoke?*, 60 TEMPLE L.Q. 789 (1987) (examining the Act and concluding state law should be left intact); Carolyn Brue-Legried, Comment, Forster v. R.J. Reynolds Tobacco Co.: *Minnesota Supreme Court Gives the Green Light to Cigarette Plaintiffs*, 74 MINN. L. REV. 839 (1990) (suggesting the case expanded the claims which could survive preemption in the Act).

159. 112 S. Ct. 2608 (1992). After deciding *Cipollone*, the Court remanded two other cases to be considered in light of the *Cipollone* decision. Papas v. Zoecon, 112 S. Ct. 3020 (1992); Kotler v. American Tobacco Co., 112 S. Ct. 3019 (1992).

160. *Cipollone*, 112 S. Ct. at 2611.

161. *Id.*

162. *See, e.g.*, Garrison v. Heublein, Inc., 673 F.2d 189 (7th Cir. 1982); Pemberton v. American Distilled Spirits Co., 664 S.W.2d 690 (Tenn. 1984); Malek v. Miller Brewing Co., 749 S.W.2d 521 (Tex. App. 1988); McGuire v. Joseph E. Seagrams & Sons, Inc., 790 S.W.2d 842 (Ct. App. 1990), *rev'd*, 814 S.W.2d 385 (Tex. 1991).

163. 790 S.W.2d 842, 846 (App. 1990), *rev'd*, 814 S.W.2d 385 (Tex. 1991).

warn and a "separate duty to provide adequate information that will enable the consumer to safely use the product."[164] The Supreme Court of Texas reversed this decision, however, holding that there is common knowledge of the dangers of alcohol consumption.[165]

The claims against alcohol and tobacco companies establish that these are hazardous products about which consumers are not fully informed or warned. Because plaintiffs in these cases sought monetary damages, activists hoped the fear of further suit would improve warnings and diminish incomplete advertisements.

B. *Advertising of Tobacco and Alcohol Products*

Tobacco and alcohol products are highly advertised in both the traditional advertising forums such as newspapers, magazines,[166] and billboards, and through promotional activities such as sports events.[167] Cigarette advertising, however, was banned from television and radio in 1969 when an attorney petitioned a television station, which showed cigarette commercials, for equal time under the FCC Fairness Doctrine.[168] The court held that broadcasters of cigarette commercials must earmark a reasonable amount of time for counter-advertising.[169] In the years following this decision, sales dropped and the tobacco industry decided to refrain from advertising on the airwaves (the only

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164. *McGuire*, 790 S.W.2d at 850-51.

165. *Id.* at 388.

166. Researchers from the University of Michigan wrote in the New England Journal of Medicine that there is a correlation between the amount of cigarette ads included in a publication and the likelihood that these publications will print unflattering articles about smoking. L.A. McKeown, *Tobacco Ads Inhibit Lung Cancer Stories: Study*, CHI. SUN-TIMES, Jan. 30, 1992, at 21. Researchers also found a decrease in the number of cigarette ads in magazines aimed at white-collar readers and an increase in ads aimed at blue-collar and minority readers. *Id.*

167. Silver Report, *supra* note 139, at 500.

168. Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968); "The Federal Communications Commission (FCC) sees its role as just issuing general guidelines for minimal standards of fairness." FORD ROWAN, BROADCAST FAIRNESS: DOCTRINE, PRACTICE, PROSPECTS 2 (1984). The problem then became what constituted unfairness. *Id.* Under the FCC Fairness Doctrine, broadcasters had to: 1) devote a reasonable percentage of time to public issues, and 2) provide reasonable opportunity for presenting contrasting views on important public issues. *Id.* at 4. After an inquiry into the continued viability of the Fairness Doctrine in 1985, the FCC found the Doctrine constitutionally suspect. In 1987, the FCC unanimously discarded the Doctrine in *FCC v. Meredith*, 809 F.2d 863 (D.D.C. 1987). HUGH C. DONAHUE, THE BATTLE TO CONTROL BROADCAST NEWS, 135, 161 (1989).

169. *Banzhaf*, 405 F.2d at 1082.

media bound by the Fairness Doctrine).[170] Cigarette manufacturers themselves lobbied for a legislative ban of cigarette advertising on television and radio, as long as they were exempt from antitrust action.[171] After the ban was in effect, the tobacco industry shifted resources to print media.[172]

In a similar attempt to remove alcohol advertising, the National Association of Broadcasters (NAB) petitioned to ban electronic broadcast advertisements of distilled spirits.[173] When the district judge struck down the ban, the broadcasters and liquor advertisers voluntarily banned hard liquor broadcast advertisements.[174] Both the tobacco and alcoholic beverage industries recognized the opposition to their advertisements and responded by avoiding broadcast media.

After the removal of this advertising on broadcast media, the popularity of the billboard grew. The tobacco industry is the largest billboard advertiser, and beer, wine, and liquor companies make up the eighth largest advertising group.[175] The *Metromedia* Court said, "[B]illboards are a well-established medium of communication, used to convey a broad range of different kinds of messages."[176] Because

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170. *See* KENNETH E. WARNER, SELLING SMOKE: CIGARETTE ADVERTISING AND PUBLIC HEALTH 46 (1986) [hereinafter Selling Smoke]; Kenneth E. Warner, *The Effects of the Anti-Smoking Campaign on Cigarette Consumption*, 67 AM. J. PUB. HEALTH 645 (July 1977).

171. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970). Ironically, the ban began on Super Bowl Sunday, one of the largest advertising sports events of the year, in January, 1971. SMITH, *supra* note 132, at 36. The largest tobacco manufacturers are American Tobacco Company, Liggett Group, R.J. Reynolds, P. Lorillard and Philip Morris. They were formed, for the most part, in 1911 when the federal government declared the American Tobacco Company an illegal trust. Ecenbarger, *supra* note 132, at 17.

172. Warner, *supra* note 170, at 645.

173. United States v. NAB, 553 F. Supp. 621 (D.D.C. 1982).

174. Project SMART (Stop Marketing Alcohol on Radio and Television), a coalition of health professionals, religious leaders, and parents, sought a complete ban or mandatory counteradvertising for alcoholic beverages advertised on television or radio. *Coalition Seeks Advertising Ban Against Alcohol: Targets TV, Radio*, L.A. DAILY J., Sept. 12, 1984, at 1.

175. Richard D. Hylton, *All About Billboards*, N.Y. TIMES, June 9, 1991, § 3, at 10. The billboard industry is made up of three giant companies, some medium-sized ventures, and 600 mom-and-pop operations. *Id.* The Outdoor Advertising Association reports that tobacco advertising has been declining while healthcare advertising is increasing. OUTDOOR ADVERTISING ASSOCIATION OF AMERICAN, INC., BILLBOARD REVENUES UP AS CATEGORY SPENDING DIVERSIFIES 1 (June 1, 1990). The advertisers representing the second through seventh largest outdoor advertisers are: retail; business and consumer services; automotive; travel and hotels; publishing media; and entertainment and amusements. *Id.*

176. *Metromedia*, 453 U.S. at 501.

billboards can carry commercial, political, social, and religious messages, the Court said they may warrant First Amendment protection.[177] However, they have been regulated to promote the health and safety of the public since early in the twentieth century.[178]

In response to the increase of billboard advertising, some states have enacted their own legislation regulating numbers and locations of billboards.[179] Congress is even considering banning billboards along the 350,000 miles of federal interstates and primary roads.[180] Senator John Chafee introduced a bill to reduce billboard intrusion, amending the 1965 Highway Beautification Act.[181] The bill would restore to the states the option of using amortization to enforce zoning restrictions on billboards, and would place a moratorium on the construction of new billboards on the federal-aid interstate and primary highway system.[182]

The primary role of advertising in our economic system is to inform consumers about the availability of goods and their terms of sale.[183] Advertising combines information and persuasion to appeal to consumers.[184] Because of skyrocketing advertising costs, mass marketing is

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177. *Id.* at 524, 533-34. *See supra* notes 85-92 and accompanying text for discussion of satisfactory billboard regulation based on esthetics and traffic safety.

178. *See* Thomas Cusack Co. v. Chicago, 242 U.S. 526 (1917)(holding that a city exercising its police power may prohibit the erection of billboards in the interest of safety, morality, health and decency).

179. Utah has prohibited tobacco advertising on billboards, streetcars, buses and placards. Silver Report, *supra* note 139, at 513. Mississippi prohibits all billboard and local newspaper advertising of hard liquor and wine. Dunagin v. City of Oxford, Miss., 718 F.2d 738, 740 (1983). The state has ruled that ads must originate in Mississippi to be subject to the regulation. The Court relied heavily on the 21st amendment to uphold the statute, because individual states are afforded control over alcohol. *Id.* As of 1982, 47 countries have legislation or voluntary agreements restricting advertising of tobacco products in some way. *See* RUTH ROEMER, LEGISLATIVE ACTION TO COMBAT THE WORLD SMOKING EPIDEMIC 23-24 (1982). Vermont, Maine, Alaska and Hawaii totally ban billboards of any kind. McMahon, *supra* note 1, at 9. The Illinois General Assembly has passed legislation requiring cities and villages to pay "just compensation" to owners of billboards if local ordinances force the demolition or modification of a legal sign. Philip Franchine, *Suburbs Press Billboards Fight*, CHI. SUN-TIMES, Aug. 18, 1992, at 3. Illinois Governor James Edgar has been asked to veto the bill by local authorities. *Id.*

180. *S.* 2500, 101st Cong., 2d Sess. (1990). Senator Chafee was a primary sponsor of the bill.

181. Carol Matlack, *Lobbyists Signing Up For New Battle*, NAT'L J., May 5, 1990, at 1093.

182. S. REP. NO. 532, 101st Cong., 2d Sess., at 1 (1990). The bill died in the 101st Congress, but was reintroduced in the 102d Congress on March 7, 1991. *S.* 593, 102d Cong., 1st Sess. (1991).

183. *See* FREDERIC M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 324-29 (1970).

184. DOUGLAS F. GREER, INDUSTRIAL ORGANIZATION AND PUBLIC POLICY 134-37 (3d ed., 1992).

a relic.[185] Advertisers now target their products to certain demographic groups.[186] The strategy has been called "target marketing," or "narrowcasting."[187] A target market is identified by means of market segmentation.[188] Market segmentation is "the strategic concept and technique which act as a pivot for the marketing concept and for the practice of marketing."[189]

As a result of target marketing, tobacco and alcohol products are advertised to specific population groups, including minorities and youths.[190] The Black community specifically has been a target of two recent campaigns. In 1990, R.J. Reynolds Company developed a new menthol cigarette called "Uptown."[191] The company expected the cigarette to appeal "most strongly" to Blacks. R.J. Reynolds Company denied the name "Uptown" was chosen because of the connotation to New York City's Harlem community, but rather because it was a classy name.[192] The marketing plan called for ads suggesting glamour, high fashion, and nightlife.[193] Sixty-nine percent of Black smokers prefer menthol cigarettes, so Blacks were the target audience for the product.[194] Dr. Louis Sullivan denounced the campaign as "slick and

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185. Thomas Palmer, A Target-Marketing Ploy Backfires, BOSTON GLOBE, July 14, 1991, at 71.

186. Palmer, *supra* note 203, at 71.

187. Robert E. Smith, *Target Marketing: Turning Birds of a Feather into Sitting Ducks*, 76 BUS. & SOC'Y REV. 33 (1991).

188. MACMILLAN DICTIONARY OF MARKETING & ADVERTISING (Michael J. Baker ed., 1984). Market segmentation refers to the subdivision of a total market into useful component parts. David Tonks, *Market Segmentation* 573, *in* Marketing Handbook (Michael J. Thomas ed.) (1989).

189. TONKS, *supra* note 188, at 573.

190. Although companies deny targeting youth, three studies verify the high recognition rate of Old Joe Camel among children. Geoffrey Cowley, *I'd Toddle a Mile for a Camel*, Dec. 23, 1991, at 70 (documenting the AMA study, and California and Massachusetts research). The Journal of the American Medical Association reported that in the three years R.J. Reynolds has used Old Joe to promote Camel Cigarette, smokers under 18 who smoke Camels rose from .5% to 32.8%. Angela Bradbery, *Joe Camel's Foes Turn Up the Heat on Billboard Ads*, CHI. TRIB., May 4, 1992, at News, 1.

191. Anthony Ramirez, *A Cigarette Campaign Under Fire*, N.Y. TIMES, Jan. 12, 1990, at D1.

192. *Id.*

193. Philip J. Hilts, *Health Chief Assails A Tobacco Producer for Aiming at Blacks*, N.Y. TIMES, Jan. 19, 1990, at A1. Unlike the images on billboards, smoking is most common among the middle-aged, divorced, unemployed, lower income and less educated segments of the population. Stuart Wasserman, *Biggest Threat*, CHI. TRIB., Apr. 12, 1992, § 5 (magazine), at 9.

194. *Id.* Uptown cigarettes were to be packaged with their filters facing down because Black smokers open other cigarettes from the bottom. Ramirez, *supra* note 191.

sinister advertising" and "deliberately and cynically targeted" toward Black Americans.[195] Because of the pressure of public outrage, R.J. Reynolds Company canceled the test marketing of Uptown.[196]

The National Association for the Advancement of Colored People (NAACP) stated that the targeting of Blacks is unethical because of the poor health in the Black community.[197] The National Center for Health Statistics reported that the gap between life expectancy for Whites and Blacks has widened.[198] In 1988, Whites could expect to live 75.6 years while Blacks could expect to live 69.2 years.[199] Part of the disparity in life expectancy between the races is explained by the disproportionate effects of alcohol and tobacco use in the Black community. Thirty-four percent of Black adults smoke, compared to twenty-eight percent of White adults.[200] Lung cancer, heart disease, and emphysema exact a greater toll in the Black community.[201] Similarly, Blacks suffer high rates of alcoholic fatty liver, hepatitis, cirrhosis of the liver, and other acute and chronic alcohol-related diseases. These findings demonstrate the widespread use of alcohol and tobacco in the Black community.[202]

Another campaign, this one by the alcohol industry, targeted Black consumers.[203] In 1991, G. Heileman Brewing Company planned to mar-

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195. *Id.*

196. Anthony Ramirez, *Reynolds, After Protests, Cancels Cigarette Aimed at Black Smokers*, N.Y. TIMES, Jan. 20, 1990, §1, at 1.

197. Ramirez, *supra* note 191. The American Cancer Society expressed the belief that the campaign exploited blacks, especially the ghetto poor. *Id.* However, the NAACP's Executive Director Benjamin Hooks believes the whitewashing campaign is too paternalistic. Ben Wildavsky, *Tilting at Billboards*, THE NEW REPUB., Aug. 20, 1990, at 19. Secretary Sullivan soundly responded "bullshit." *Id.*

198. Philip J. Hilts, *Life Expectancy For Blacks in U.S. Shows Sharp Drop*, N.Y. TIMES, Nov. 29, 1990, at A1.

199. *Id.*

200. Mireya Navarro, *Tobacco Companies Find Harlem Wary*, N.Y. TIMES, Aug. 8, 1990, at B1. A 1989 study by Simmons Market Research Bureau reported the statistics. Id.

201. *Dr. Sullivan's Unfiltered Anger*, N.Y. TIMES, Jan. 21, 1990, §4, at 20. New lung cancer cases among White men have dropped to 80.3 per 100,000 and risen for black men to 128.1 per 100,000. *Id.* "Compared to whites, black alcohol use appears to influence or be associated with a large percentage of problems and negative consequences of blacks such as homicides, accidents, illnesses, family disruption, police arrest, violent attacks and gambling." Harper, *supra* note 149, at 18.

202. Freida Brown & Joan Tooley, *Alcoholism in the Black Community*, *in* ALCOHOLISM & SUBSTANCE ABUSE IN SPECIAL POPULATION 115 (Gary W. Lawson et al., eds., 1989).

203. Historical and social factors that have contributed to alcoholism and alcohol problems among Blacks include (a) historical drinking patterns developed during

ket a new malt liquor called "Power Master."[204] The beer had an alcohol content of 5.9%, which is thirty-one percent above that of other malt liquors.[205] Malt liquors are very popular among Black males, explaining the targeting of the group.[206] The ads for Power Master showed a Black model next to a bottle of beer larger than his head.[207] Surgeon General Antonia Novella called the targeting of Power Master "socially irresponsible."[208] After the public uproar about the marketing of Power Master, G. Heileman Brewing Company scrapped the plan to market the malt liquor.[209]

Although Power Master was pulled from the market after protests, G. Heileman Brewing Company later introduced a similar product called "Colt 45 Premium."[210] The slogan used with the new Colt 45 Premium is "Be a Player." It is charged that the term "player" is related to inner-city slang for "gangs, power, and sexual success."[211] Premium malt liquors, like St. Ides and Schiltz Red, contain 7-8 %

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slavery and racial segregation, (b) the high prevalence of liquor stores in black residential communities, (c) peer pressure and social expectations to drink and to drink heavily at times, and (d) numerous psychological/social pressures including unemployment, racial discrimination, and stressful urban residency.

Harper, *supra* note 149, at 19.

204. *Priests Call For Boycott of G. Heileman Products*,UPI, June 21, 1991, *available in* LEXIS, Nexis Library, UPI File. [Hereinafter Priests].

205. *Id.* Federal law, however, prohibits brewers from citing alcohol content on products in ads or on labels. *Heileman Told It Can't Use the Power Master Name*, N.Y. TIMES, July 2, 1991, § D, at 6.

206. John Gilardi, *Heileman to Discontinue Power Master Beer*, REUTER BUS. REP., July 3, 1991.

207. *Two Chicago Ministers Arrested at Brewery*, UPI, June 26, 1991, *available in* LEXIS, Nexis Library, UPI File.

208. *New Criticism for Heileman,*, N.Y. TIMES, June 27, 1991, § D, at 20. The Surgeon General also has spoken out against the alcohol industry's ads that use cartoon characters and bikini-clad women. Dr. Novella requested voluntary action, but suggested definite steps would be taken by the government if necessary. Deborah Mesce, *Surgeon General Aims at Alcohol Ads of TV*, CHI. SUN-TIMES, Nov. 5, 1991, at 1.

209. Gilardi, *supra* note 206. Contributing to the decision was the reversal of approval by the Bureau of Alcohol, Tobacco and Firearms. Because of the reversal, shares still could be sold for four months. Priests, *supra* note 219. Other ads have been targeting to the black community by hiring rap artists to promote products. Rapper Ice Cube has recorded radio and TV spots for St. Ides malt liquor, comparing a bottle to a Smith & Wesson handgun. Annetta Miller, *Do Gang Ads Deserve a Rap?*, NEWSWEEK, Oct. 21, 1991 at 55.

210. Greg Burns, *Malt Liquor Back with New Name, Old Controversy*, CHI. SUN-TIMES, May 12, 1992 at 1.

211. *Id.*

212. *Id.* Another plan, this one by a Chicago beer distributor, has received mixed reaction from the community. Mount Everest Wholesale is recruiting minorities for positions from share-

alcohol, compared with 5-6 % for ordinary malt liquors and 4-5 % for beer.[212]

The plans to market alcohol and tobacco products such as Uptown and Power Master to the Black community have not gone unnoticed. Leaders in the Black community have taken action by whitewashing billboards targeting liquor and tobacco ads at Blacks.[213] The leaders feel that the billboard is the most intrusive advertisement in their community. Unlike newspapers or magazines, the billboard is an inescapable resident of the community.[214]

The Chicago Lung Association recently released a study documenting that certain segments of the community were inordinately targeted by tobacco and alcohol companies.[215] In a count of all billboards in

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holder to salesman, and will donate $1 million per year in profits to job training, substance abuse and child development programs. Ninety five percent of Chicago's $100 million annual malt liquor sales come from black customers, and the distributor finds the arrangement mutually beneficial. Rick Bryant, *Malt Liquor Debate Brewing*, SOUTHTOWN ECON., June 24, 1992, at A3.

213. Rev. Calvin Butts, pastor of Abyssinian Baptist Church in New York City, and Rev. Michael Pfleger, pastor of St. Sabina Catholic Church in Chicago, have whitewashed billboards aiming liquor and tobacco advertisements at blacks. Stephanie Strom, *Billboard Owners Switching, Not Fighting*, N.Y. TIMES, April 4, 1990, § B, at 1. Rev. Butts says he is conforming to a "higher moral law-and that's the law of God." Wildavsky, *supra* note 197. Some observers find the use of civil disobedience situation overkill. *Id.* Fr. Pfleger was acquitted of criminal damage to property charges on July 2, 1991. Alf Siewers, *Priest Freed in Billboard Attack*, CHI. SUN-TIMES, July 3, 1991, at 5. The author of this article was foreperson of the jury, at which time the idea for this article was born. A Dallas County Commissioner, John Wiley Price, was also charged with criminal mischief for whitewashing Dallas billboards showing Blacks or Hispanics in alcohol or tobacco ads. Price demanded a 50% reduction in cigarette and alcohol signs in minority communities, but also a substantial advertising discount to Black and Hispanic businesses. *Dallas Official Is Held in a Billboard Protest*, N.Y. TIMES, Mar. 20, 1990, at A18; *see also* Wildavsky, *supra* note 197.

214. Siewers, *supra* note 223; Terry Wilson, *Prayers for Acquittal Answered*, CHI. TRIB., July 3, 1991, at 5. Consumer groups have also reacted to advertising purportedly focusing on children. Joe Camel, Mr. Smooth in Camel cigarette ads, received a "lemon" award for deceptive advertising. Nancy Millman, *Consumer Groups Slap 'Badvertising'*, CHI. SUN-TIMES, Dec. 4, 1991, at 55.

215. Diana Hackbarth, et al, Chicago Lung Association, Booze and Butts in Fifty Chicago Neighborhoods: Market Segmentation to Promote Dangerous Products to the Poor (1991) (unpublished manuscript of paper presented before a meeting of the American Public Health Association, on file with the Chicago Lung Association). This study was conducted in Chicago's wards (the unit of city government). A minority ward was defined as a population of 50% or more minority residents. The data for the study was collected over a period of nine months, August 1990 to April 1991. The count of billboards was based on sitings of freestanding outdoor signs, signs attached to buildings, advertisements painted on buildings, placards, posters and devices which are used to advertise on any public way, street or alley. *Id.*

Chicago, not just alcohol and tobacco billboards, it was discovered that minority wards had twenty-seven percent more billboards than White wards.[216] Interestingly, tobacco billboards constituted 24.5% of all billboards, alcohol billboards totaled 23.9%; and thus 48.4% of billboards in Chicago advertised alcohol and tobacco products.[217] The Chicago Lung Association study concluded that there was a "significant positive correlation between the percent of minority residents in a ward and placement of alcohol and tobacco billboards, confirming that minority neighborhoods are more likely to have billboards hawking dangerous products than white areas of the city."[218]

In a recent survey conducted by *Advertising Age*, respondents were questioned about the role of ads in racial tensions.[219] Respondents said that cigarette and alcohol ads are harmful to the Black community,[220] perhaps even worsening racial tensions.[221] The survey also questioned respondents about the targeting of these products specifically to Black consumers. While 37.8% of the respondents approve of such marketing generally, 33.8% approve of targeting to Black consumers.[222] However, 43.4% of respondents disapproved of targeting alcohol and cigarettes to Black consumers.[223]

The remainder of this article proposes possible solutions for the documented problem in the Black community of being targeted by alcohol and tobacco billboards. Each solution will be analyzed for its constitutionality and its effectiveness. Ultimately, a combination of constitutional and effective solutions will be proposed.

IV. ANALYSIS

The options presented in this section extend from active to passive solutions, with varying degrees in between. The first option is a total ban on the advertising of alcohol and tobacco products. Next, an in-

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216. *Id.*

217. *Id.* The total number of tobacco billboards in white wards is 214, while there are 1240 such billboards in minority communities (averaging three times as many). Similarly, the total number of alcohol billboards in white wards is 115, and 1300 in minority wards (averaging five times as many).

218. *Id.*

219. Adrienne Ward, *What Role Do Ads Play in Racial Tensions?*, ADVERTISING AGE, Aug. 10, 1992, at 1.

220. Although the survey also found that Blacks were under-represented in print ads and television commericials, respondents disapproved of targeting alcohol and cigarette ads to Blacks. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

novative advertising style called "tombstone advertising" will be discussed. The third option is an exploration of a content-neutral Time, Place and Manner regulation. Finally, "counter-speech" and voluntary actions by product manufacturers will be proposed as a solution to the target marketing of alcohol and tobacco billboards.

A. *A Total Ban of Alcohol and Tobacco Product Advertising*

One way to handle the problem of target marketing of tobacco and alcohol products is to ban completely all advertising of the products. This ban would be all-encompassing, prohibiting advertising of alcohol and tobacco products in print, broadcast, and outdoor advertising. The American Medical Association and the Surgeon General proposed such a ban on cigarette products.[224] However, the resistance posed by the Tobacco Institute, the American Association of Advertising Agencies, and the American Civil Liberties Union (ACLU), among others, was too strong.[225] Nonetheless, the Rehnquist Court and the *Posadas* decision left this possibility open.[226]

1. Constitutionality

In order to assess the constitutionality of this option, the *Central Hudson* test must be applied. The first prong of the test asks whether the speech at issue is illegal or misleading.[227] Tobacco and alcohol products are legal to those of age, and the advertisements are not misleading. While Congress has the power to find these products illegal, especially because they affect the health and welfare of citizens, it has chosen not to do so.[228]

The second inquiry of the first prong is a bit more challenging. The FTC decides what is misleading based on whether the commercial speech sufficiently tends to deceive.[229] Additionally, the FTC has a

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224. Irvin Molotsky, *A.M.A Due to Seek Cigarette Ad Ban*, N.Y. TIMES, Dec. 5, 1985, at A24; *see also* Kenneth E. Warner, et al., *Promotion of Tobacco Products: Issues and Policy Options*, 11 J. HEALTH POL., POL'Y & L. 367 (1986) (focusing on promotional advertising of tobacco products and discussing the A.M.A.'s decision to advocate an advertising ban).

225. Molotsky, *supra* note 224, at A24.

226. *See supra* notes 93-115 and accompanying text.

227. *See supra* note 60 and accompanying text.

228. *See infra* note 229 and accompanying text.

229. FTC, STAFF REPORT ON THE CIGARETTE ADVERTISING INVESTIGATION 2-2 (1981) [Hereinafter FTC Staff Report]; *see* Kenneth L. Polin, Comment, *Argument for the Ban of Tobacco Advertising: A First Amendment Analysis*, 17 HOFSTRA L. REV. 99 (1988) (arguing that tobacco advertising is misleading, and thus should be held unconstitutional).

heightened requirement for products that affect consumer health and safety: the ads must be accurate and complete.[230] It is doubtful that any court would find the ads misleading, because the finder of fact would have to conclude that all ads, and all future ads, are deceptive in order to enact a total ban. Further, no court has accepted the argument that the advertising of the products is inherently misleading. The Supreme Court has rejected such a highly paternalistic approach.[231]

The second prong of the *Central Hudson* test requires the government to have a substantial interest in restricting the speech.[232] Congress maintains broad power in regulating interstate commerce and in promoting public health.[233] Both federal and state governments have a substantial interest in the health and welfare of citizens, as well as in monetary issues.[234] If government can manipulate consumption through taxes, it should be able to regulate consumption through ordinances.[235]

In terms of alcohol products, the Twenty-First Amendment has been held to create a substantial governmental interest for alcohol regulation because section 2 of the amendment declares that "transportation or importation into any state [of alcohol] . . . in violation of laws thereof, is prohibited."[236] The Supreme Court has stated, "[T]he broad sweep of the Twenty-First Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals."[237]

The third prong of the *Central Hudson* test requires that the regulation directly advance the substantial governmental interest.[238] The government must show a causal link between advertising and the

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230. FTC Staff Report, *supra* note 229, at 4-33. The FTC noted that the ads for cigarettes are rich in dramatic imagery associating smoking with outdoor activities, athletics and achievement, and depict rugged, vigorous, attractive people. *Id.* at 2-2.

231. *See Virginia Pharmacy*, 425 U.S. 748 (1976); *Central Hudson*, 447 U.S. 557 (1980). *See also* Dunagin v. City of Oxford, Miss., 718 F.2d 738 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

232. *See supra* notes 60, 67-72 and accompanying text.

233. *E.g.*, Hipolite Egg Co. v. United States, 220 U.S. 45 (1911).

234. *Id.*

235. BUREAU ECON. STAFF REPORT, FED. TRADE COMM'N, CONSUMER RESPONSE TO CIGARETTE HEALTH INFORMATION 1 (1979).

236. *Dunagin*, 718 F.2d at 743.

237. *Id* at 744 (quoting California v. LaRue, 409 U.S. 109, 114 (1972)).

238. *See supra* notes 60, 73-75 and accompanying text.

health risks associated with alcohol and tobacco use. In the *Central Hudson* case, the Court found an immediate connection between advertising and the demand for electricity.[239] The problem here is that the liquor and tobacco industries claim that advertising is solely used to differentiate products among current users rather than solicit new customers.[240] The opposite argument is that liquor and tobacco industries would not spend a billion dollars on advertising just to acquire an added market share.[241] However, economic studies say that advertising does not influence consumption. Proving the link between advertising and consumption, then results in a battle of the experts.[242] In fact, the failure-to-warn cases recently adjudicated assert that product advertising did influence consumption.[243] This prong likely would be satisfied under *Posadas*, although evidence of a causal link arguably is lacking.

The final prong of *Central Hudson* requires that the regulation be no more restrictive than necessary to advance the substantial governmental interest.[244] Used to achieve selective deference to the legislation in *Posadas* and *Fox*, this part of the test is now merely a reasonableness standard.[245] Thus, if the Court continues such lenience toward regulation of advertising, a total ban of billboard advertising could satisfy this part of the test. For example, the *Metromedia* Court held that if the city had a sufficient basis for believing that billboards are traffic hazards and are unattractive, the most direct and perhaps only effective solution is to prohibit them.[246] Similarly, because health is such a substantial governmental interest, a city could assert that these billboards are health hazards as well as unsightly and dangerous, thereby satisfying the test.

Although a complete advertising ban might pass the *Central Hudson* test as narrowed by *Posadas* and the current Supreme Court, a

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239. *See supra* note 75 and accompanying text.

240. Warner, *supra* note 170, at 370.

241. Selling Smoke, *supra* note 170, at 50, 59. Although the Tobacco Institute's official position is that they "recognize the risks associated with smoking; at the same time there is virtual universal awareness by the public of those risks." Anna Quindlen, *Dissolving the Unholy Marriage of Tobacco and Politics*, CHI. TRIB., Aug. 25, 1992, at 19.

242. *See, e.g.*, Lamar Outdoor Advertising v. Mississippi State Tax Comm'n, 539 F. Supp. 817 (S.D. Miss. 1982), *aff'd in part and rev'd in part*, 701 F.2d 314 (5th Cir. 1983).

243. *See supra* notes 154-57 and accompanying text; McGuire v. Joseph E. Seagrams & Sons, Inc., 790 S.W.2d 842 (Tex. App. 1990), *rev'd*, 814 S.W.2d 385 (1991).

244. *See supra* note 69 and accompanying text.

245. *See supra* note 120 and accompanying text.

246. Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981).

total ban interferes too greatly with First Amendment rights.[247] A "highly paternalistic approach," whereby the government decides what influences should be available to consumers in their best interest, seems offensive to the spirit of the First Amendment.[248] The *Taxpayers for Vincent* Court, after all, held that favoring some viewpoints over others is prohibited.[249]

If the 1971 ban of cigarette ads from broadcast media is any indication, another reason to avoid a total ban is that a decrease in advertising costs may lower prices and thereby increase consumption.[250] Also, a total ban would limit the consumer's access to useful information. Some smokers prefer low nicotine cigarettes, as indicated on ads, and others may learn of hazards only by reading the warning printed in ads. In terms of the *Central Hudson* test, if there is no link between smoking and advertising, a ban would not serve a state interest. Finally, a ban would remove an entire class of speakers from the forum of public debate. As noted above, the *Vincent* Court stated that the First Amendment forbids the regulation of speech favoring one viewpoint over another.[251] The argument that the Supreme Court should not ban tobacco and alcohol advertising, although admittedly hopeful, falls on deaf ears in the current Supreme Court.

2. Effectiveness

Although offensive to the First Amendment, this option certainly would solve the problem of target marketing of harmful products to the Black community. If all advertising of tobacco and alcohol products were prohibited, then billboards as well as all the other media, traditional and promotional, would be eliminated. The *Posadas* decision opens the door for such a strict regulation, but it may be unlikely that Congress would enact such a measure. A total ban would require a federal statute to provide some uniformity, and too many elected officials rely on support from the industries as well as on jobs provided

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247. *See* Krista L. Edwards, Comment, *First Amendment Values and the Constitutional Protection of Tobacco Advertising*, 82 NW. U. L. REV. 145 (1988) (analyzing the constitutionality of the Health Protection Act of 1987, concluding that *Posadas* should not control this inquiry).

248. *Virginia Pharmacy*, 425 U.S. at 770.

249. 466 U.S. 789 (1984); *see also* Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 65, 72 (1983); Carey v. Brown, 447 U.S. 455, 462-63 (1980).

250. The 1971 broadcast ban forced an advertising shift to print media, increasing the cost of producing cigarettes, thereby decreasing consumption. *See, e.g.*, Michael J. Garrison, *Should All Cigarette Advertising Be Banned? A First Amendment and Public Policy Issue*, 25 AM. BUS. L.J. 169 (1987).

251. *Taxpayers for Vincent*, 466 U.S. at 804 (1984).

by the industries.[252] Undoubtedly, the use of these products is ingrained in society. Therefore, while effective and even marginally constitutional, total abolition of alcohol and tobacco advertising is unlikely. Further, this author argues that such a ban would violate the fundamental underpinnings of the First Amendment.

B. *Tombstone Advertising*

The next way to eradicate target marketing to Blacks is "tombstone advertising," so called because of its bleak appearance. Tombstone advertising replaces glamorous advertising with informative advertising, regulating the imagery and graphics allowed in a visual display and prohibiting models, slogans, scenes, and colors.[253] Representative Maxine Waxman (D-Calif.) had introduced the Tobacco Control & Health Protection Act.[254] This bill prohibited the tobacco industry from sponsoring sporting events and thereby displaying tobacco products on TV. The bill mandated enlarged labels and a list of ingredients on packages.[255] Advertising of tobacco products would not be allowed within 1000 feet of any school, church, or hospital. Ultimately, HR 5041 became a compromise bill.[256] Rotating warnings on packages were included in this bill, as were enlarged labels, but the bill failed to mention the format of advertising at all.[257]

1. Constitutionality

The constitutionality of tombstone advertising can be assessed under the *Central Hudson* test. If the total abolition of alcohol and cigarette advertising is marginally constitutional under this test, as

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252. *See supra* note 130 and accompanying text.

253. Silver Report, *supra* note 139, at 515. Advertising and public relations firm Albert Frank-Guenther Law, specializing in financial advertising, is said to have invented the tombstone ad. Philip Maker, *The Whitney Group Purchases Albert Frank*, INVEST. DEALERS' DIG., Nov. 25, 1991, at 10. Stock offerings in financial newspapers are required to be advertised in a tombstone format. Andrew Leigh, *Debate Over Protected Speech Heats Up in Advertising*, INVEST. DAILY, Nov. 20, 1991, at 10; *Ad Rule for Equity Derivatives Should be Broadened*, SEC. WEEK, July 29, 1991, at 8. The U.S.S.R., before becoming the Commonwealth of Soviet States, had reversed a ban on tobacco advertising by allowing tombstone advertising. Robyn Griggs, *To Russia, With Tar*, MEDIAWEEK, Jan. 18, 1991, at 7.

254. H.R. 5041, 101st Cong., 2d Sess. (1990); *Tobacco Bill Unconstitutional, Opponents Tell House Subcommittee*, DAILY REP. FOR EXEC., July 13, 1990 at A-7 [hereinafter Tobacco Bill].

255. Tobacco Bill, *supra* note 254, at A-7.

256. *House Subcommittee Approves Restrictions on Tobacco Sales, Promotions, Advertising*, DAILY REP. FOR EXEC., Sept. 13, 1990, at A-23.

257. *Id.*

discussed above, then the lesser measure of tombstone advertising would probably pass constitutional muster. Although some critics find this type of restriction "a ban in sheep's clothing, providing potential consumers with virtually nothing to alert them to the existence of lawful tobacco products,"[258] tombstone advertising does not make tobacco products unlawful. Tombstone advertising only points to the health risks posed by the products eliminating glamorous advertising and replacing it with informative advertising. This proposal is clearly constitutional, even if critics are correct in finding tombstone advertising to be equivalent to a total ban.

2. Effectiveness

Tombstone advertising is a workable solution to the problem of target advertising. While completely banning advertising of tobacco and alcohol may violate the First Amendment, this form of regulation would allow advertisers to market their products, but would not glamorize the products or mislead the public. If billboards were to display only this type of advertising, they would be less offensive to the public. For example, the use of Black models to glamorize the products would be greatly reduced, and primarily factual information would be communicated.

Thus, by allowing advertising but limiting its form, tombstone advertising may provide a workable compromise between proponents of a total ban of target advertising and proponents of unregulated advertising. Tombstone advertising would still allow unglamorous advertising of alcohol and tobacco products. Yet, because a list of ingredients would be required, and imagery and scenery would be prohibited, tombstone advertising would inform the public better than a total ban of alcohol and cigarette advertising would.[259] Thus, tombstone advertising is probably a constitutional, effective alternative to a complete abolition of alcohol and tobacco advertising.

C. *Content-Neutral Time, Place, and Manner Regulation*

A third way to deal with the billboards targeted to Blacks would be for a governmental unit to institute a content-neutral Time, Place,

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258. Barry W. Lynn, Washington Legal Foundation, *A Ban in Sheep's Clothing*, LEGAL BACKGROUNDER (Mar. 31, 1989).

259. Advertisers claim that beer companies would not spend money on TV ads if they were limited to tombstone advertising. Richard Brunelli, *Novello Salvo Could Flatten Alcohol Ads*, MEDIAWEEK, Nov. 18, 1991, at 2.

and Manner restriction on *all* billboards. Instead of a *Central Hudson* commercial speech test, billboard regulations would be analyzed under Time, Place, and Manner law as applied in *Clark* and other cases.[260]

1. Constitutionality

To trigger the Time, Place, and Manner test, the regulation must first be content-neutral. This requirement could be satisfied if *all* billboards in a municipal, state, or federal arena were affected, not simply alcohol and tobacco billboards. The regulation would thus affect only the manner, not the content, of speech.

Next the test specifies the regulation must be narrowly tailored to serve a substantial governmental interest.[261] A government could assert aesthetics or traffic safety as a substantial governmental interest, as in *Metromedia.*[262] The health and welfare of citizens is a recognized governmental interest because many billboards advocate harmful products, a government could argue it has power to ban all billboards.[263]

Finally, the test applied in *Clark* specifies that the regulation must leave open ample alternative means of expression.[264] Since this regulation would affect only billboards, ample alternative means are available such as newspapers, magazines, and flyers. It would be possible to find such a Time, Place, and Manner regulation constitutional.

2. Effectiveness

This option would be effective in alleviating the saturation of target-marketing to minorities. Besides ridding the community of tobacco and alcohol billboards, the community would, in effect, be billboard-free.[265] This option thus restrains the further targeting of some other harmful product to an audience through intrusive billboards. Although this proposal may shift advertising money to print media and flyers, inundating readers, little harm would be done because print ads can

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260. *See supra* notes 116-28 and accompanying text.

261. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

262. Metromedia, Inc. v. San Diego, 453 U.S. 490, 507-08 (1981).

263. The requirement that the regulation be narrowly tailored to the government interest may be satisfied because the only way to meet the asserted interest is to eliminate its intrusive presence by a complete prohibition.

264. *Clark*, 468 U.S. at 193.

265. Some cities have banned or regulated all billboards in the municipality. Opponents of the alcohol and tobacco billboards believe this action is too sweeping, and would like to see educational billboards instead. Wildavsky, *supra* note 197.

be easily discarded and are less intrusive than billboards. However, billboards inform as well as advertise. In the final analysis, a community must determine if *all* billboards or just alcohol and tobacco billboards are offensive. If a community wishes to retain public service billboards, for example, then the Time, Place and Manner plan would be of little help.

D. *Counter-Speech and Voluntary Action*

Another option for alleviating the saturation of the Black community would be to allow voluntary action and "counter-speech" to combat the advertising of these harmful products. In this spirit, several associations, such as the Beer Institute and the Outdoor Advertising Association, proffer voluntary codes.[266] The Brewing Industry Guidelines suggest that advertisers should not encourage over indulgence or drunk driving. These guidelines are silent as to target marketing to poor, minority or already saturated communities. Counter-campaigns have proven to be a strong force, using billboards and broadcast media to send their message about the harms of smoking and drinking.[267]

1. Constitutionality

Counter-speech has been cited as a major force in preserving First Amendment rights.[268] The exercise of this option poses no threat to the Constitution because no government action would be taken. Instead the exercise of free speech would instead settle the dispute.

2. Effectiveness

The effectiveness of this option depends on the results of counter-campaigns and voluntary measures taken by alcohol and tobacco billboard advertisers.[269] The lack of enforceability means that nothing is assured and the measures are temporary, at best.

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266. *E.g.*, UNITED STATES BREWERS ASSOCIATION, INC., BREWING INDUSTRY ADVERTISING GUIDELINES (1984); OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, CODE OF ADVERTISING PRACTICES (1990). In 1964, in conjunction with the Surgeon General's Report, a voluntary advertising code was adopted. The code suggested that "'cigarette advertising shall not represent that cigarette smoking is essential to social prominence, distinction, success or sexual attraction,' and that it not be associated with vigorous physical activity." Selling Smoke, *supra* note 170, at 46. However, the code was never adhered to, and was essentially ignored.

267. *See supra* notes 189-209 and accompanying text.

268. *See* Gunther, *supra* note 11.

269. *See also* William DeJong & Jay A. Winsten, Harvard University, Center for Health Communication, *The Use of Mass Media in Substance Abuse Prevention*, 9 HEALTH AFF. 30

One example of counter-speech is warning labels already required by all tobacco and alcohol products. These measures, mandated on the FCLA Act and the Alcoholic Beverage Labeling Act, have been in effect for some time.[270] However, the effectiveness of such labels over time has been called into question. Consumers can suffer from "wear-out" where they no longer read the labels.[271] For this reason, the FCLA Act was amended to include four rotating warnings, and perhaps the Alcoholic Beverage Labeling Act should be similarly amended to avoid consumer wearout. It is possible that counter-speech itself could drive the billboard ads to extinction, as the counter-advertising ads did under the Fairness Doctrine.

The problem with such a campaign is its high cost. However, the funding problem can be handled in two ways.[272] First, the funding for such ads could be acquired by requiring advertisers to pay for an equivalent amount of space for the counter-speech. In essence, this solution is already at work because warning labels are required on product advertisements.

Another option is to designate some amount of the federal cigarette excise taxes to fund the counter-speech measures. California instituted an extensive counter-speech program funded by the state cigarette taxes, investing an unprecedented amount of money in the campaign.[273] One of the counter-speech ads mentions the "selective exploitation of minorities, the seduction of the young, the selling of suicide." It is possible that these efforts, though rare, may reduce the amount of tobacco and alcohol advertising.

Voluntary agreements are another way to reduce the targeting of cigarette and alcohol products to minorities. However, voluntary agreements in other countries have proven unenforceable and are typ-

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(1990) (discussing the implementation of long-term strategic plans to disseminate health messages through mass media).

270. *See supra* note 138 and accompanying text.

271. Allan Greenburg & Charles Sutton, *Television Commercial Wearout*, 13 J. ADVERTISING RES. 47 (1973); Herbert E. Krugman, *Why Three Exposures May be Enough*, 12 J. ADVERTISING RES. 11 (1972); Craig et al, *Advertising Wearout: An Experimental Analysis*, 13 J. MARKETING RES. 365 (1976).

272. Warner, *supra* note 170, at 385.

273. Richard W. Stevenson, *Tough Anti-Smoking Effort Aims at Cigarette Marketers*, N.Y. TIMES, Apr. 26, 1990, at D1. The state estimated the program would cost $28.6 million. *Id.* Additionally, the federal Office of Substance Abuse Policy began a nation-wide 7,000 billboard campaign against drug and alcohol abuse. Wildavsky, *supra* note 197.

ically ignored.[274] In the United States, Dr. Louis Sullivan has asked advertising agencies to drop tobacco clients, and has asked sports fans and promoters to boycott sports events sponsored by the tobacco companies,[275] which spend $500 million per year on sports promotion. Because the Black community relies on tobacco and alcohol industry support to underwrite community events, this approach might result in the loss of community activities.

Voluntary guidelines have had mixed effectiveness.[276] The Brewing Industry Advertising Guidelines and the Outdoor Advertising Association of America's Code of Advertising Practices are examples. While these measures are commendable, neither code addresses the issues of target audiences or saturation. The Outdoor Advertising Association established an exclusionary zone that prohibits billboards advertising products illegal for sale to minors within 500 feet of schools, hospitals, and houses of worship. However, the American Cancer Society has pointed out that this is the perfect distance to see the ad clearly without being able to discern the warning.[277]

Counter-speech campaigns and voluntary measures certainly can only help to solve the saturation problem. Unfortunately, alone they may not make enough of a difference. Counter-speech will educate, but the funds available are not enough to compete with the promotional dollars spent by advertisers and distributors of the products. Voluntary campaigns are not exceptionally effective because alcohol and tobacco advertisers will not advertise if restricted in any meaningful way.[278] Perhaps in conjunction with other measures articulated in this article this solution will be effective.

V. CONCLUSION

No perfect solution exists to the problem of target marketing of alcohol and tobacco billboards to minority communities. This article

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274. *See, e.g.*, Rebecca Arbogast, *A Proposal to Regulate the Manner of Tobacco Advertising*, 11 J. HEALTH POL., POL'Y & L. 393, 395 (1986) (discussing the failure of voluntary agreements in Norway and France).

275. Philip J. Hilts, *Sullivan Would End Tie of Sports and Tobacco*, N.Y. TIMES, Apr. 11, 1991, at B13; Michael Lev, *Sullivan Urges Agencies to Drop Tobacco Clients*, N.Y. TIMES, Oct. 12, 1990, at D4.

276. *See also* Wildavsky, *supra* note 212. However, other troublesome products have replaced the tobacco and alcohol billboards. For example, beepers are associated with drug dealing and wearing expensive sneakers has led to murders and violent attacks by other jealous youths. This is noted only to show that the problem addressed in this article is not discrete.

277. *See* McMahon, *supra* note 1.

278. *Id.*

analyzed just a few of the ways to deal with the dilemma. Because the products are legal and will remain so, it seems unlikely that a total ban would be enacted. Tombstone advertising is another solution. It is a seemingly workable solution that allows the communities and advertisers to compromise. A Time, Place, and Manner restriction also could be an answer to the problem, although informational billboards would be unfairly burdened by this method. The counter-speech method seems least intrusive on the First Amendment, but ineffective by itself. Ultimately, a combination of counter-speech campaigns and tombstone advertising might be an effective compromise for the Black community in its efforts to combat target advertising.