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The Food and Drug Administration's Final Rule on Tobacco Advertising Is All Butt Final: Commercial Speech Doctrine Will Be Tested Once More under a Stricter Central Hudson Analysis in the Aftermath of 44 Liquormart, Inc. v. Rhode Island Comment.

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THE FOOD AND DRUG ADMINISTRATION'S FINAL RULE ON TOBACCO ADVERTISING IS ALL BUTT FINAL: COMMERCIAL SPEECH DOCTRINE WILL BE TESTED ONCE MORE UNDER A STRICTER *CENTRAL HUDSON* ANALYSIS IN THE AFTERMATH OF *44 LIQUORMART, INC. V. RHODE ISLAND*

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I. INTRODUCTION

The tobacco industry was pummeled in 1996 by an onslaught of litigation and investigations aimed at cigarette and smokeless tobacco manufacturers.[1] Compounding these problems were the promulgated Food

1. *See Jury Awards Former Smoker $750,000 in Liability Suit*, SAN ANTONIO EXPRESS-NEWS, Aug. 10, 1996, at A1 (announcing historic verdict against tobacco company for product liability of smoke-related illness); Richard Lacayo et al., *Put out the Butt, Junior: Will Tough New Regulations Aimed at Teen Smoking Stand Up? Not If the Tobacco Industry Can Help It*, TIME, Sept. 2, 1996, at 51 (discussing tobacco industry's unprecedented problems); James F. Peltz, *Tobacco Industry Fears Lawsuits More Than Clinton*, L.A. TIMES, Aug. 24, 1996, at A1 (explaining that tobacco companies may be crippled by cost of defense litigation). The recent $750,000 jury award to a Florida man for smoke-related injuries and the multitude of other lawsuits filed by states to recover Medicaid expenses are evidence of this swelling tide of legal costs. James F. Peltz, *Tobacco Industry Fears Lawsuits More Than Clinton*, L.A. TIMES, Aug. 24, 1996, at A1; *see* Pierre Thomas & John Schwartz, *Justice Department Gets Tough with Tobacco Officials*, ALBANY TIMES UNION, Sept. 8, 1996, at B7 (reporting recent Department of Justice probe into possible perjury charges against tobacco company executives regarding false statements allegedly made to Congress about nicotine addiction); Sandra Ward, *Kessler's Victory: Battling Teen Smoking, FDA to Regulate Cigarettes*, BARRON'S, Aug. 26, 1996, at 13 (speculating on long-term problems facing tobacco industry which will affect market value of tobacco companies' stocks); Henry Weinstein, *Court Case Details Tobacco Firm's Use of German Lab Smoking: Philip Morris Had Plans to Conceal Negative Findings, Destroy Data, Papers in Minnesota Suit Suggest*, L.A. TIMES, Sept. 18, 1996, at A1 (alluding that tobacco industry executives have used third parties to destroy evidence to cover up knowledge of nicotine addiction from cigarettes); *cf.* Andrew Blum, *Plaintiffs Hope for More Cracks in the Tobacco Wall: Historic Settlement a First, But Some Caution That It May Not Affect Other Cases*, NAT'L L.J., Mar. 25, 1996, at A7 (indicating tobacco companies' vulnerability in Medicaid reimbursement litigation by states for smoke-related illnesses due to states' settlement with Liggett Group, Inc.). *But see* Elsa F. Kramer, *Waiting to Exhale: Tobacco Lawyers Are Getting Burned by Damaging Industry Revelations—Can They Rise From the Ashes?*, 39 RES GESTAE 20, 20 (1996) (comparing harsh criticism of tobacco industry in public arena with favorable treatment of industry by courts); Nancy Rivera Brooks, *Tobacco Firms Not Culpable for Death, Jury Rules*, L.A. TIMES, Aug. 24, 1996, at D1 (showing that cigarette companies are not entirely vulnerable to liability for smoke-related diseases). An Indiana jury found that one plaintiff's husband, who died as a result of lung cancer, willingly smoked and knew of the potential dangers of such activities. Nancy Rivera Brooks, *Tobacco Firms Not Culpable for Death, Jury Rules*, L.A. TIMES, Aug. 24, 1996, at D1. Thus, the jury did not find the tobacco companies negligent in contributing to the death of plaintiff's husband. *Id.* However, unlike the recent Florida case in which tobacco companies were found liable on similar claims, the plaintiff's lawyers were not allowed to introduce tobacco company documents showing that the company knew of the link between nicotine and addiction. *Id.*

and Drug Administration (FDA) regulations[2] affecting the advertising, sale, and promotion of tobacco.[3] President Clinton supported the FDA's claim that it has the power to regulate cigarettes and smokeless tobacco, not as drugs, but as medical delivery devices of nicotine.[4] As a result,

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2. "Regulations," "rules," and "restrictions" are used interchangeably throughout this Comment.

3. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,396 (1996) (to be codified at 21 C.F.R. pt. 801, 803, 804, 807, 820, 897). *But see* Floyd Norris, *Clinton Acts and Tobacco Profits*, N.Y. TIMES, Aug. 25, 1996, at F1 (describing recent regulatory rules as benefit not burden to tobacco industry in light of history). Norris argues that the real impact of the rules, as when tobacco advertisements were banned from radio and television, will be that "cigarette companies will spend less on advertising," yet continue to sell cigarettes. *Id.* Consequently, by spending less on promotion, tobacco companies will profit more and retain their market share since other companies cannot enter the market. *Id.* As a result, Norris predicts that the losers will be billboard and other advertising companies, not the tobacco industry. *Id.*

4. President's Remarks Announcing the Final Rule to Protect Youth from Tobacco, 32 WEEKLY COMP. PRES. DOC. 1490 (Aug. 23, 1996); Regulations Restricting the Sale and Distribution of Cigarette and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,396. The FDA relies on evidence showing that tobacco products are intended to deliver the addictive drug of nicotine which affects the structure and function of the body. *Id.* The regulations have been predicated on the FDA's jurisdiction over medical devices under the Federal Food, Drug and Cosmetic Act. *Id.*; Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–95 (1994). Whether the FDA's jurisdiction extends to tobacco regulation is beyond the scope of this Comment. However, it is important to note that as this Comment is printed, a federal judge in North Carolina ruled in a summary judgment proceeding that the FDA has authority to regulate tobacco under the FDCA. *See* Coyne Beahm, Inc. v. United States FDA, No. 2:95CV00591, 1997 WL 200007, at *2 (M.D.N.C. Apr. 25, 1997) (holding that tobacco fits within the FDCA's definition of "drug" and "device," while passing on constitutional question of whether tobacco advertisements are protected under the First Amendment by concluding that FDCA does not provide FDA with such broad regulating authority to limit and/or restrict tobacco ads). The tobacco industry argued that Congress never intended for the FDA to wield such power over tobacco. *Coyne Beahm*, 1997 WL 200007, at *3. The court found this argument unpersuasive and noted that "legislative history's silence regarding tobacco products does not indicate that Congress clearly intended to exempt such [tobacco] products from the [FDCA] Act." *Id.* at *3. Furthermore, the court did not consider a prior stance held by the FDA which subscribed to the notion that it did not have any regulatory power over tobacco detrimental to the FDA's new interpretation of its power over tobacco. *Id.* at *3–4. In fact, the court reasoned that the FDA has a right to change and adapt its position in light of new evidence about tobacco. *See id.* at *6 (citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 863–64 (1984)). Immediately following this decision, the tobacco industry plaintiffs filed an appeal to the 4th U.S. Circuit Court of Appeals. *See* Lauran Neerguard, *Cigarette Makers Appeal Judge's Ruling on FDA Regulation*, ASSOC. PRESS, Apr. 30, 1997 (reporting on "notice of appeal" by tobacco industry), *available in* 1997 WL 4864404. The public debate on jurisdiction has also been comprehensively analyzed in both scholarship and commentary in favor of FDA regulation. *See, e.g.*, Regulations Restricting the Sale and Distribution of Cigarette and Smokeless Tobacco to

tobacco retailers, distributors, and manufacturers would be subject to strict rules concerning how and where tobacco products may be advertised, distributed, and promoted.[5] This novel and unprecedented move by the FDA has been hailed by some for its boldness and inventiveness, while others claim it is a product of mere political posturing,[6] doing little,

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Protect Children and Adolescents: Annex: Nicotine in Cigarettes and Smokeless Tobacco Is a Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination, 61 Fed. Reg. 44,396–44,619 *passim* (1996) (chronicling reasons why FDA has jurisdiction under FDCA); Charles J. Harder, *Is It Curtains for Joe Camel? A Critical Analysis of the 1995 FDA Proposed Rule to Restrict Tobacco Advertising, Promotion, and Sales Protect Children and Adolescents*, 16 LOY. L.A. ENT. L.J. 399, 423 (1995) (claiming proposed FDA regulations are legally sound under jurisdictional analysis); Claudia MacLachlan, *FDA Draws First in Tobacco Wars*, NAT'L L.J., Aug. 28, 1995, at A1 (finding opposing views in legal community on question of regulating cigarettes as medical device); *Focus: U.S. FDA/Tobacco Regulations*, AFX NEWS, July 17, 1996 (reporting law professor's assertion that tobacco industry will argue data classifying nicotine drug is faulty). *But see* Ann Mileur Boeckman, *An Exercise in Administrative Creativity: The FDA's Assertion of Jurisdiction over Tobacco*, 45 CATH. U. L. REV. 991, 1025 (1996) (questioning logic, precedent, as well as objective intent of FDA to establish regulations); Peter Bynum, *A Stare Decisis Barrier to Regulating Cigarettes As Drugs*, 12 J.L. & POL. 365, 379–80 (1996) (contending that Congress's repeated denial of FDA jurisdiction over cigarettes will be decisive to determination of jurisdiction issue); Susan H. Carchman, *Should the FDA Regulate Nicotine-Containing Cigarettes? Has the Agency Established a Legal Basis and, If Not, Should Congress Grant It?*, 51 FOOD & DRUG L.J. 85, 120 (1996) (finding no jurisdictional basis to regulate nicotine-containing tobacco products without manufacturers' therapeutic claims); *see also* Lars Noah & Barbara A. Noah, *Nicotine Withdrawal: Assessing the FDA's Effort to Regulate Tobacco Products*, 48 ALA. L. REV. 1, 21 (1996) (opining that Congressional silence on whether FDA may exercise authority over tobacco "undermines rather than buttresses FDA's current attempt to restrict [tobacco] advertising and distribution"); Michael Whatley, Note, *The FDA v. Joe Camel: An Analysis of the FDA's Attempt to Regulate Tobacco and Tobacco Products Under the Federal Food, Drug, and Cosmetic Act*, 22 J. LEGIS. 121, 135–36 (1996) (concluding that congressional intent will be dispositive to courts' disposition while opining that no intent is apparent); Claudia MacLachlan, *Tobacco's Road Is Smooth: FDA Regs Face Legal Fight*, NAT'L L.J., Sept. 9, 1996, at B1 (noting low probability of rules passing both jurisdictional and constitutional challenges).

5. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,396 (explaining stringent limitations on tobacco advertising).

6. *See 1996 Presidential Campaign: Dole's Tobacco Remarks Ignite Debate*, FACTS ON FILE WORLD NEWS DIGEST, July 11, 1996, at *1 (reporting Senator Bob Dole's opposition to any effort by FDA to regulate tobacco because he believes tobacco is not particularly addicting and that FDA has no regulatory power over cigarettes), *available in* 1996 WL 8621359. Politics played a role in shaping the rule's fate, particularly in the 1996 presidential election. *See* Editorial, *Crackdown on Teen Smoking*, N.Y. TIMES, Aug. 24, 1996, at 22 (observing that Clinton administration used tobacco to grab family values issue away from Republicans). President Clinton promoted himself during the 1996 presidential campaign as the anti-tobacco candidate and painted Bob Dole as a friend of the tobacco lobby because of his apologist remarks about tobacco. *Id. But see 60 Minutes: The View from the*

if anything, toward achieving the FDA's goal of preventing children from smoking.[7]

Despite the FDA's contention that the regulations are simply a means of tailoring tobacco advertising to adults by making tobacco less appealing to children, many fear that this is only the first step in curbing tobacco advertising, and will inevitably lead to a complete ban.[8] Moreover, opponents of the FDA regulations claim that these advertising restrictions constitute a blatant infringement of commercial speech because tobacco advertising promotes a legal product in a non-misleading way.[9]

Dole Camp; Republican Presidential Nominee Bob Dole Discusses the Democratic Convention and President Clinton (CBS television broadcast, Sept. 1, 1996) (questioning Dole on statement that tobacco was not addictive). Dole qualified his statement by saying he was not a doctor but opined that smoking is a bad habit which may be compared to an addiction. *Id.*

7. *Compare* Claudia MacLachlan, *FDA Draws First in Tobacco Wars*, NAT'L L.J., Aug. 28, 1995, at A1 (characterizing FDA's move to regulate cigarettes as medical devices as very creative), *and FDA Gets Sweeping New Powers to Regulate Tobacco Products*, SAN ANTONIO EXPRESS-NEWS, Aug. 24, 1996, at A1 (quoting several public health officials equating regulations protecting children to polio vaccine), *with* Richard Blatt, *A Look at Selling Tobacco: Curbing Ads Won't Work and It's Unconstitutional; Madison Avenue Isn't the Reason That Kids Smoke*, WASH. POST, Sept. 8, 1996, at C3 (claiming that tobacco advertising is designed to strengthen brand loyalty or persuade adults to switch brands, not to entice non-smokers), *and* Clarence Page, *Clearing the Air: Politicians Should Place a Moratorium on Who to Blame on Upsurge of Teens Who Smoke and Use Drugs*, CHI. TRIB., Aug. 25, 1996 (arguing that political motivation of recent FDA rule was to shift argument away from dramatic increase in teen drug use), *available in* 1996 WL 2702376.

8. *See* Freedom to Advertise Coalition, News Conference on President Clinton's Expected Announcement to Allow FDA Regulations of Tobacco Products (Aug. 23, 1996) (discussing regulations as having chilling effect on commercial speech), *available in* LEXIS, News Library, Script File. The Coalition speculates that the regulations will not work and are an omen of worse things to come. *Id.*; *see All Things Considered: Clinton Strengthens FDA's Anti-Cigarette Hand* (NPR radio broadcast, Aug. 23, 1996) (reporting tobacco industry's fear that more regulations will arise if rules are promulgated).

9. *See* Freedom to Advertise Coalition, News Conference on President Clinton's Expected Announcement to Allow FDA Regulations of Tobacco Products (Aug. 23, 1996) (examining threshold barrier of protecting commercial speech), *available in* LEXIS, News Library, Script File. A further contention is that adult consumers will be deprived of valuable information about tobacco products. *Id.* Additionally, it has been asserted that there is no empirical evidence that directly links tobacco advertising to picking up the smoking habit. *See* Jef I. Richards, *Politicizing Cigarette Advertising*, 45 CATH. U. L. REV. 1147, 1153 (1996) (finding no concrete evidence linking advertising to tobacco use). Indeed, peer pressure, sibling and parental use, and the glamorization of smoking in film and on television are possibly the most likely causes for tobacco use by minors. *See id.* (citing to studies that prove family influence and peer pressure are "primary determinants of smoking behavior"). *But see* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,473–95, 44,513 (pointing to numerous reports by experts in fields of psychology, social science and

The FDA argues that although advertising is protected speech under the First Amendment to the United States Constitution, advertising that promotes the use of tobacco by minors should not be afforded constitutional protection because it is illegal for minors to purchase such products.[10] Moreover, the FDA asserts that even if tobacco advertisements require some level of constitutional protection, the regulations are within the permissible limitations allowed under the commercial speech doctrine.[11]

Despite the debate surrounding the FDA's claim that it has the power to regulate the tobacco industry, it is obvious that these new advertising restrictions are paternalistic in the sense that the federal government is attempting to protect a certain segment of society, namely children, from choices that it deems destructive. While it is commendable to prevent unsuspecting, innocent individuals from acquiring a habit that may have fatal consequences,[12] the manner that is being used by the FDA to prevent this so called "pediatric disease"[13] may be unconstitutional under the First Amendment.[14]

According to many legal scholars and commentators, the FDA's tobacco advertising regulations are constitutionally infirm in the aftermath of *44 Liquormart, Inc. v. Rhode Island*.[15] In *44 Liquormart*, which was

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medicine which established that tobacco advertising targeted at children results in higher incidence of tobacco use among them).

10. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,471–72. *But see* Kathleen M. Sullivan, *Muzzle Joe Camel? It Might Be Illegal*, NEWSDAY, May 30, 1996, at A51 (finding argument in support of new regulations without merit because advertisements directed at adults are unavoidably seen by children).

11. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,469–70 (recognizing "important societal interests served by this type of speech," yet, arguing that First Amendment protection for commercial speech is subject to regulation unlike non-commercial speech). The FDA predicted that using the four-prong test first enunciated in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), would allow the regulations to pass constitutional muster. *Id.* at 44,470.

12. *See id.* at 44,398 (documenting that tobacco-related illnesses account for over 400,000 deaths annually). The FDA stresses that this "single leading cause of preventable death in the United States" claims more lives each year than "acquired immunodeficiency syndrome (AIDS), car accidents, alcohol, homicides, illegal drugs, suicides, and fires combined." *Id.* (citations omitted).

13. *See* John Carey, *Clinton's Antismoking Plan Won't Exactly Kick Butt*, BUS. WEEK, Sept. 9, 1996, at 42 (referring to "pediatric disease" as forceful term David A. Kessler, FDA Commissioner, uses to describe tobacco addiction by America's youth).

14. *See* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1495 (1996) (striking down prohibition on advertising of liquor prices under First Amendment).

15. *See, e.g.*, *Commercial Speech Given Added Protection By Court*, 215 N.Y. L.J. 1, 1 (1996) (stressing that *44 Liquormart* may "undermine Clinton Administration's efforts to

decided a little over three months before the FDA's promulgation of the tobacco advertising restrictions,[16] the United States Supreme Court declared unconstitutional a forty-year-old Rhode Island statute banning the advertising of liquor prices.[17] Moreover, while the *44 Liquormart* opinion did not explicitly create an expansive interpretation of commercial speech rights, the strong language of the unanimous, albeit splintered, decision signifies a move toward a more stringent analysis of limitations on commercial speech and therefore calls into question the constitutionality of the new FDA regulations of tobacco advertising.[18] The *44 Liquormart* decision is remarkable because it is a stark retreat from the Supreme Court's prior acquiescence to limitations on commercial speech

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limit cigarette advertising"); Max Boot, *Rule of Law: Even Tobacco Companies Have the Right to Advertise*, WALL ST. J., Sept. 11, 1996, at A19 (arguing that, in light of *44 Liquormart*, FDA will fail reasonable-fit test under fourth prong of *Central Hudson* and quoting Professor Lawrence Tribe as indicating that regulations are too broad to pass constitutional muster); Arron Epstein, *Court Strikes Down Bans on Liquor Price Ads*, HOUS. CHRON., May 14, 1996, at 4 (noting that fragmented opinion fails to provide clear guidance to lower courts in applying law, while speculating that language contained therein may protect tobacco industry); Kathleen M. Sullivan, *Muzzle Joe Camel? It May Be Illegal*, NEWSDAY, May 30, 1996, at A51 (explaining that *44 Liquormart* hurts FDA's regulations because Court disavowed vice exception to commercial speech). *But see* Peter T. Kilborn, *Clinton Approves a Series of Curbs on Cigarette Ads*, N.Y. TIMES, Aug. 24, 1996, at 1, 8 (citing to legal experts who believe final rules have chance of "surviving a court challenge"); William D. Novelli, *Must Protect Kids*, ADVER. AGE, May 27, 1996, at 30 (opining that rules are consistent with United States Supreme Court commercial speech holdings and will be upheld). William D. Novelli is the president of Tobacco-Free Kids, a recently established organization whose only goal is to protect kids from the dangers of smoking. *See NBC Nightly News: A New Group with Heavy Financial Support Begins Campaign Against Teen Smoking* (NBC television broadcast, Feb. 12, 1996) (announcing unprecedented $30-million campaign against tobacco products by privately financed "Tobacco-Free Kids" organization).

16. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,396 (promulgating FDA's restriction on August 28, 1996). The FDA has acknowledged the recent *44 Liquormart* decision, but nonetheless asserts that if the rules are to be evaluated, they will be done so under the long-enduring *Central Hudson* analysis. *See id.* at 44,470 (enumerating three prong test to include substantial government interest in support of regulation, demonstration that restriction "directly and materially" advances that interest, and that regulations are "narrowly drawn" to fit same). Consequently, the FDA apparently does not believe that the *44 Liquormart* decision adversely affects their regulations. *Id.*

17. *44 Liquormart*, 116 S. Ct. at 1515. The purpose of the statute was to promote temperance by eliminating the possibility of price wars between liquor stores, which would allegedly foster a buyers' market and lead to greater consumption. *Id.* at 1509.

18. *See id.* at 1518–19 (Thomas, J., concurring in part and concurring in judgment) (observing that Justice Stevens's plurality opinion and Justice O'Connor's concurrence will consequently lead, indirectly, to position that "all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible").

where the product regulated was either considered a "vice" or "harmful," and thus could be banned completely at the will of the state.[19]

The FDA's tobacco advertising regulations are not effective until August 1997,[20] yet legal challenges to the regulations by segments of both the tobacco and advertising industries, may impede the implementation of the FDA rules.[21] In addition to these legal challenges, the two largest cigarette manufacturers, Philip Morris and R.J. Reynolds, have proposed, without explanation, their own respective compromises on advertising regulations without any input from the advertising industry.[22] These proposals may signify that the tobacco industry is less concerned about com-

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19. *See* Posadas de Puerto Rico Assoc. v. Tourism of Puerto Rico, 478 U.S. 328, 344 (1986) (holding that legislature can choose between suppression of commercial speech or less speech-restrictive means of advancing state interest in deterring local residents from activity such as gambling).

20. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,396. The regulations are effective August 28, 1997, excluding section 897.14(a) and (b), which will be effective February 28, 1997, and section 897.34(c), which will be effective February 28, 1998. *Id.* The specific rules are discussed in Part II of this Comment.

21. *See Coyne Beahm*, 1997 WL 200007, at *22 (finding that although FDA has authority under FDCA to restrict access and impose labeling requirements, it does not have the power to regulate tobacco promotion or advertising). Consequently, the court in *Coyne-Beahm* never reached the issue of whether the FDA's regulations violated the tobacco industry's First Amendment right to advertise. *Id.* at *22 n.33. The court noted that Congress has provided only limited authority to the FDA over promotion and advertising of drugs and devices; therefore, in order to find such regulatory authority, congressional intent had to be clear on the face of provision relied upon. *Id.* at *21. In this case, however, the court reasoned that the provision could not be construed to include such authority over tobacco advertising. *Id.* Thus, the court ordered the FDA to refrain from implementing the advertising restrictions set to go into effect on August 28, 1997. *Id.* at *22. Following this ruling, the Department of Justice filed an expedited appeal because, according to President Clinton, "every day of delay matters to our children's health." *President Clinton Statement on Tobacco*, U.S. NEWSWIRE, May 2, 1997, *available in* 1997 WL 5712552.

22. *See* Alicia Mundy, *High-Stakes Showdown: Playing a Shrewd Smoke-Free-Kids Hand, Philip Morris Has the Media Right Where It Wants It*, MEDIAWEEK, May 27, 1996 (quoting senior Clinton administration official as saying Philip Morris "sold out" advertising community), *available in* 1996 WL 8523292; *Philip Morris'[s] Proposal*, NAT'L L.J., May 27, 1996, at A8 (proposing significant self-imposed legislation curbs in tobacco advertising in return for no FDA regulation); *see also Review & Outlook: Free Speech Flaps*, WALL ST. J., June 24, 1996, at A14 (opining that recent Philip Morris proposal sacrifices too much freedom of speech); Ira Teinowitz, *RJR Tobacco Proposes Voluntary Ad Restrictions: Talks in North Carolina Aim to Fend Off New FDA Rules*, ADVER. AGE, Sept. 9, 1996, at 1 (proposing voluntary-only tobacco advertising limits by R.J. Reynolds Tobacco Company). Obviously, such a proposal implies that some members of the tobacco industry will go to any extreme to be free from governmental regulation.

mercial speech than it is about being regulated by a governmental agency.[23]

This Comment examines the FDA's final ruling on tobacco advertising restrictions, including a discussion of the FDA's role in protecting the American public as well as the provisions being used to establish regulatory power over tobacco advertising. Part II reviews relevant United States Supreme Court decisions regarding commercial speech leading to the recent decision of *44 Liquormart v. Rhode Island*. Part III analyzes the impact of *44 Liquormart* on tobacco advertising, and in particular, the Court's stricter interpretation of the constitutionality of commercial speech restrictions as set forth in *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*.[24] It also concludes that, in light of this interpretation, the promulgated FDA restrictions on tobacco advertising are unconstitutional. Part IV evaluates the various legislative proposals, voluntary regulations, and informal compromises that have been offered by the government and the tobacco industry, determining what measures, if any, would most likely survive a constitutional challenge. Finally, this Comment proposes an expedient,[25] amenable solution to the issue of tobacco advertising restrictions that is both practical and, most importantly, constitutional.

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23. One congressman opined that the tobacco industry is only interested in stopping the FDA from regulating tobacco. Representative Henry Waxman & Dr. David Kessler, FDA Commissioner, News Conference on Comments by GOP Presidential Candidate Bob Dole Regarding Tobacco (June 14, 1996), *available in* LEXIS, News Library, Script File. Even R.J. Reynolds's spokesman, David Fishell, concedes that the "core" objective is to prevent the FDA from obtaining jurisdiction over tobacco. *See All Things Considered: Clinton Strengthens FDA's Anti-Cigarette Hand* (NPR radio broadcast, Aug. 23, 1996) (interviewing Mr. Fishell immediately after FDA regulations were announced by President).

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

25. *See* Barnaby J. Feder, *Long Legal Fight Expected over New Curbs on Tobacco*, N.Y. TIMES, Aug. 24, 1996, at 8 (expecting tobacco litigation to "drag on for years"). Arguably, the tobacco industry will use tactical delays to pressure Congress into passing favorable legislation or prevent FDA regulation. *Id.* As a result, the taxpayers may ultimately foot the bill not only for this prolonged litigation, but for all the costs associated with promulgating these regulations in the first place. *Cf.* Dominic Bencivenga, *Groups Cry 'Censorship,' but Regulation Is Expected*, 214 N.Y. L.J. 5, 5 (1995) (quoting advertising attorney as saying that challenges to FDA jurisdiction over tobacco were initiated before final ruling because "it does help to save money on part of government and companies to stop proceedings rather than spending millions of dollars and then finding out agency lacks jurisdiction").

II. The FDA's Role in Protecting the American Public

A. *Restrictive Medical Devices and the FDA's Regulation of Tobacco*

The FDA was created by Congress for the sole purpose of protecting consumers' health and safety[26] and the FDA has the power to promulgate regulations for the protection of public health.[27] Accordingly, the FDA has general authority to oversee the promotion of medical devices[28] through regulation of labeling, advertising, and other forms of medical device promotion.[29] Furthermore, the Medical Device Amendments of 1976 to the Food, Drug, and Cosmetic Act granted the FDA specific power to regulate advertising of restricted medical devices.[30] A medical device may be deemed restricted "because of its potentiality for harmful effect" to the consumer or when "there cannot otherwise be reasonable assurance of its safety and effectiveness."[31]

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26. United States Department of Health and Human Services, Pub. No. 2, Requirements of Laws and Regulations Enforced by the U.S. Food and Drug Administration (1989). As per FDA publication, the laws include the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. §§ 301–392 (1994); Fair Packaging and Labeling Act (FPLA), 15 U.S.C. §§ 1451–61 (1994); Public Health Service Act (PHSA), 42 U.S.C. §§ 262–64 (1994); and the Radiation Control for Health and Safety Act (RCHSA), 42 U.S.C. §§ 263b–n (1994). *Id.* The FDCA is the "basic food and drug law of the United States." *Id.*

27. *Id.*

28. 21 U.S.C. § 360i (1994).

29. 21 U.S.C. §§ 301–393 (1994); *see also* Sandra J.P. Dennis, *Promotion of Devices: An Extension of FDA Drug Regulation or a New Frontier?*, 48 Food & Drug L.J. 87, 88 (1993) (explaining regulatory powers of FDA in regards to medical device promotion).

30. 21 U.S.C. § 352(q)–(r) (1994).

31. 21 U.S.C. § 360j(e)(1) (1994). The rule grants the FDA authority to restrict access from potential dangerous devices "only upon the written or oral authorization of a practitioner licensed by law to administer or use such a device." *Id.* However, it also allows for certain restrictions by "such other conditions as [the FDA] may prescribe in such regulation." *Id.*; *see* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,403–44,405 (reiterating same). Interestingly, the FDA's use of this provision has been quite limited. *See* Sandra J.P. Dennis, *Promotion of Devices: An Extension of FDA Drug Regulation or a New Frontier?*, 48 Food & Drug L.J. 87, 91 (1993) (noting FDA's unsuccessful exercise of authority over restricted medical devices). Ms. Dennis cites to *Becton, Dickinson & Co. v. FDA*, 589 F.2d 1175, 1181 (2d Cir. 1978), which affirmed a lower court judgment overruling the FDA's classification of a medical device because the participants did not have a full opportunity to comment on the proposed restrictive device regulation. *Id.* at 92; *see* Claudia MacLachlan, *FDA Draws First in Tobacco Wars: Agency Uses Obscure Section of 1976 Law to Declare Cigarettes Are "Medical Devices,"* Nat'l L.J., Aug. 28, 1995, at A1 (eliciting comment from professor Lars Noah who claimed at that time that FDA had not yet been able to define "restricted medical devices"; therefore, courts have been reluctant to interpret provision as granting FDA power over such devices). Further, although the FDA classifies hearing aids as restricted medical devices, it has yet to issue regulations using this obscure provision. *Id.*; *see* Lars Noah & Barbara A. Noah, *Nicotine Withdrawal: Assessing*

The FDA asserts that cigarettes and smokeless tobacco are "combination products consisting of the drug nicotine and device components intended to deliver nicotine to the body."[32] Accordingly, the FDA contends that it has the authority to regulate such products as drugs, devices, or both.[33] According to the FDA, regulating tobacco products as restricted medical devices provides for flexibility and effective public health protection.[34] The FDA also claims that such regulation allows tobacco products to be marketed to adults, who have the requisite mental capacity to understand the consequences of smoking, while proscribing accessibility to minors, who do not completely understand the highly addictive qualities of tobacco and the severe health risks accompanying its use.[35]

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the FDA's Effort to Regulate Tobacco Products, 48 ALA. L. REV. 1, 30–31 (1996) (giving detailed analysis and history of restrictive medical devise provision used by FDA in regulating hearing aids).

32. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,397.

33. *Id.* at 44,400.

34. *Id.* at 44,414. In fact, the FDA states that if it classified tobacco as a drug it could no longer be marketed to adults in the same manner and would have to be dispensed by prescription. *Id.* at 44,415–16. Obviously, the FDA would never approve pharmaceutically-dispensed cigarettes, since the agency would first have to allow tobacco to be marketed and/or distributed as a safe and effective drug for its intended purpose. *See* Lars Noah & Barbara A. Noah, *Nicotine Withdrawal: Assessing the FDA's Effort to Regulate Tobacco Products*, 48 ALA. L. REV. 1, 22 & n.85 (1996) (explaining that well-documented "health hazards of smoking" would preclude FDA from approving tobacco as safe and effective drug under 21 U.S.C. § 355); *see also* Claudia MacLachlan, *Agency Uses Obscure Section of 1976 Law to Declare Cigarettes Are 'Medical Devices'*, NAT'L L.J., Aug. 28, 1995, at A1 (explaining unrealistic possibility of FDA determining tobacco to be safe and effective drug as required by FDCA provisions). Further, although a ban would probably be the easiest way to prevent marketing of the product, the FDA recognizes, as does President Clinton, that millions of Americans are currently addicted to or use tobacco; thus, prohibition would pose tremendous ancillary problems. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,398, 44,419; *see* Richard Harwood, *Taking on Tobacco, Cautiously*, WASH. POST, Sept. 14, 1996, at A25 (quoting source from Agriculture Department that "'prohibition of a product worth $49 billion, used by one-fourth of the adult population, grown on 124,000 farms and contributing $13 billion in excise taxes would create numerous economic and law enforcement problems'"; thus, "'banning all tobacco use would not appear to be feasible'"). Therefore, the FDA has concentrated its rules on preventing children from smoking to ameliorate "future generations of Americans from becoming addicted" to nicotine. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,397.

35. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,397. The FDA asserts that under 520(e) (21 U.S.C. 360j(e)) of the FDCA, it is authorized to "adopt regulations that ensure that children and adolescents, who by State law are not competent to use cigarettes and smokeless tobacco, will not be able to obtain them." *Id.* at 44,405. The FDA argues

Acknowledging that it is already illegal to sell tobacco products to minors in all fifty states,[36] the FDA contends its new advertising restrictions complement existing laws as well as other regulations[37] already in place that comport with the FDA's "mission to protect the public health."[38] Opponents of the FDA regulations, however, argue that the FDA's assertion of regulatory power over the tobacco industry is outside the scope of the FDA's purpose.[39]

B. *Snuffing out Tobacco's Grip on American Children*

In accordance with the FDA's power to regulate restricted medical devices, the Clinton administration prompted the FDA in 1995 to promulgate rules which would restrict the advertising of cigarettes and smokeless tobacco to minors.[40] Subsequently, the FDA formulated and published proposed rules in order to solicit public comment on the issue of to-

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that "without these restrictions 'there cannot otherwise be reasonable assurance of safety.'" *Id.*

36. *Id.* at 44,397.

37. *See* Tobacco Regulation for Substance Abuse Prevention and Treatment Block Grants, 61 Fed. Reg. 1492 (1996) (to be codified at 45 C.F.R. pt. 96) (promulgating rules by Department of Health and Human Services that encourage states to adhere to strict policies prohibiting sale and distribution of tobacco to minors by threatening loss of federal substance-abuse block grants).

38. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,398. In addition to the limitations on tobacco advertising, the rule prohibits "the sale of nicotine-containing cigarettes and smokeless tobacco to individuals under the age of 18." *Id.* at 44,396. The rule further requires retailers to verify the age of purchasers by photo identification and also prohibits dissemination of free samples (more commonly referred to as "kiddie" packs). *Id.* Finally, the sale of tobacco products by vending machine and self-service displays may only occur in areas not accessible to individuals under 18 years of age. *Id.*

39. *See* Ann Mileur Boeckman, Comment, *An Exercise in Administrative Creativity: The FDA's Assertion of Jurisdiction over Tobacco*, 45 CATH. U. L. REV. 991, 991, 1025 (1996) (finding no congressional intent to give FDA jurisdiction over tobacco industry). *But see* Charles J. Harder, *Is It Curtains for Joe Camel? A Critical Analysis of the 1995 FDA Proposed Rule to Restrict Tobacco Advertising, Promotion, and Sales to Protect Children and Adolescents*, 16 LOY. L.A. ENT. L.J. 399, 430–31 (1995) (arguing that Congress's inaction to preclude authority when presented with opportunity may prove persuasive in allowing FDA to regulate tobacco). Nonetheless, the FDA admits that regulation of tobacco in this manner raises many other legal issues as well. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,416–17, 44,550–56 (addressing potential violations including separation of powers, non-delegation doctrine, Fifth Amendment takings clause, substantive due process, equal protection and restriction on use of trade names, all in attempt to legally justify position).

40. *See Clinton Announces Action to Combat Teen Smoking*, CONG. Q. WKLY. REP., Aug. 15, 1995, at 2460 (explaining that rules will be imposed on advertising, distribution, and marketing to reduce appeal to children because studies show that cigarettes and

bacco's effect on the general welfare of the American public.[41] The FDA received an overwhelming number of comments from interested parties, the public, and government officials.[42] In consideration of these comments, the FDA presented President Clinton with a modified version of the rules in the fall of 1996 for endorsement. On August, 23, 1996, President Clinton made history by agreeing to enforce the FDA's new rules pertaining to tobacco advertising restrictions.[43]

Steadfast in attempting to prevent American children from smoking, President Clinton had previously asked Congress to consider and pass similar provisions to those found in the recently promulgated FDA restrictions in order to prevent the necessity of FDA regulation.[44] This request was denied, however, because the Republican-led 104th Congress

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smokeless tobacco are "harmful, highly addictive and aggressively marketed to our young people").

41. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed. Reg. 41,314, 41,314 (1995) (to be codified at 21 C.F.R. pts. 801, 803, 804, 897) (1995) (proposed Aug. 11, 1995). The text of the proposed rule reads:

> Specifically, the proposed rule would establish 18 years of age as the Federal minimum age of purchase and would prohibit cigarette vending machines, free samples, mail-order sales, and self-service displays. It would also require that retailers comply with certain conditions regarding sales of tobacco, especially verification that the purchaser is at least 18 years of age before a tobacco sale is made. Finally, the proposed rule would limit advertising and ban the sale or distribution of branded non-tobacco items such as hats and [T-shirts]; restrict sponsorship of events to the corporate name only; and require manufacturers to establish and maintain a national public education campaign aimed at children and adolescents to counter the pervasive imagery and reduce the appeal created by decades of pro-tobacco messages and thus to help reduce young people's use of tobacco products.

Id.

42. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,418 (noting that FDA received more comments in response to tobacco rules than any other time in FDA's history). The most notable responses were a 45,000-page response from an industry trade association and 35,000 individual letters from children who supported the proposed tobacco measures. *Id.*

43. *See FDA Gets Sweeping New Powers to Regulate Tobacco Products*, SAN ANTONIO EXPRESS-NEWS, Aug. 24, 1996, at A1 (reporting on "watershed moment in America's long-running love-hate relationship with cigarettes").

44. *See* Colette Fraley, *Legal Issues Likely to Impede Clinton Plan on Teen Smoking*, CONG. Q. WKLY. REP., Aug. 12, 1995, at 2446 (reporting President Clinton's request to Congress asking for similar regulations to combat teen smoking); *see also Clinton Announces Action to Combat Teen Smoking*, CONG. Q. WKLY. REP., Aug. 12, 1995, at 2460 (stating that FDA rules would be unnecessary if Congress "were to write restrictions into law").

adjourned without passing any laws pertaining to tobacco regulation.[45]

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45. *See* Colette Fraley, *Legal Issues Likely to Impede Clinton Plan on Teen Smoking*, CONG. Q. WKLY. REP., Aug. 12, 1995, at 2446 (indicating that senior congressmen would prefer judicial settlement to impasse). Congressman Bliley, a Republican from Virginia with a history of supporting tobacco interests as House Commerce Committee Chairman, thought it best that the courts settle the matter rather than initiate any congressional action. *Id.* The tobacco lobby is one of the most powerful and influential special interest groups on Capitol Hill. *See id.* (describing tobacco lobby as wielding tremendous power because of its "deep pockets"). For example, in just the first six months of 1996, the tobacco industry spent $15 million lobbying Congress. *See* Jim Drinkard, *Tobacco Row Paves D.C. with Gold; Industry Spent $15 Million in Early '96 Fighting Regulation, Taxes*, WASH. POST, Sept. 10, 1996, at A13 (reporting monetary contributions to Congress by tobacco lobby). Tobacco companies recently contributed $4.75 million in "soft money" to both major parties, with Republicans receiving approximately $4 million. *Id.* This is not counting the aggregate amount of money the tobacco industry spends on individual campaign donations and litigation. *See id.* (noting multiple contributions and costs of tobacco lobby). Congress's record of regulating the tobacco industry is by no means limited. After the negative effects of cigarette smoking were determined by the Surgeon General in 1964, Congress enacted the Federal Cigarette Labeling and Advertising Act ("the Cigarette Act"). *See* Federal Cigarette Labelling and Advertising Act of 1965, Pub. L. 89–92, § 2, 79 Stat. 282 (codified at 15 U.S.C. § 1331–41 (1994)); *see also* U.S. Surgeon General, Smoking and Health: Report of the Advisory Committee to the Surgeon General, U.S. Public Health Service (1964) (on file with the *St. Mary's Law Journal*) (finding smoking hazardous to health). The Cigarette Act requires that cigarette packaging and advertisements carry rotating labels warning smokers of tobacco's hazards such as: "Surgeon General's Warning: Smoking by Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight." *See* 15 U.S.C. § 1333(a)(1)–(3) (Supp. 1997) (requiring rotated labels for cigarette packaging and advertising). In addition, Congress has banned cigarette advertising "on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission," through amendment of the Cigarette Act (enacted as the Public Health Cigarette Smoking Act of 1969). *Id.* § 1335. This ban effectively prohibited tobacco product advertising on television and radio after January 1, 1971. *Id.* Further, in 1986, Congress passed legislation to regulate smokeless tobacco promotion and sales. *Id.* §§ 4401–08. The Smokeless Act, like the Cigarette Act, prohibits advertising on any electronic media and requires warning labels on advertisements and packaging. *Id.* § 4401. Other ancillary statutes regulating the tobacco industry pervade the Code. *See, e.g.*, 15 U.S.C. §§ 1335, 1339 (1994) (vesting Department of Justice (DOJ) along with Federal Communications Commission (FCC) with power to enforce Cigarette Act's advertising ban in electronic media); 15 U.S.C. § 1337(b) (1994) (giving Federal Trade Commission (FTC) authority to review cigarette advertising for possible violations of Cigarette Act); 15 U.S.C. § 45 (1994) (reviewing authority under Federal Trade Commission Act to determine deceptive advertising of cigarettes); 15 U.S.C. §§ 1341, 4407(a) (1994) (directing Secretary of Health and Human Services (HHS) to educate public on risks of tobacco products). The HHS must also make regular reports to Congress regarding the ill effects of tobacco on health and make any recommendations either through legislation or administrative rule. 15 U.S.C. §§ 1337(a), 4407(a) (1994). However, despite the vast number of statutes regulating tobacco, many believe that tobacco companies have been able to essentially regulate themselves. *See* RICHARD KLUGER, ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS 284–92 (1996) (revealing tobacco industry's influence over key congressional players dur-

Notwithstanding this indifference, proposed legislation aimed at limiting accessibility of tobacco advertising to children, with or without FDA involvement, materialized in various forms.[46]

President Clinton's endorsement of the FDA's regulations on tobacco before the 1996 presidential election was labeled a shrewd political move.[47] The President's approval of the measures protecting children

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ing period of Cigarette Act enactment). Kluger notes that tobacco makers were able to avoid stricter language on warning labels required by the FTC and keep the FTC at bay through its influence over Congress. *Id.* at 286–87. Interestingly, the tobacco industry welcomed the labels because "it came close to providing the industry with an ironclad defense" of assumption of the risk. *Id.* at 290. Other regulations worked to the tobacco industry's advantage including the advertising ban of tobacco on TV and radio. *Id.* at 333–34. The tobacco industry decided to go along with an advertising ban because it prevented many new competitors from entering the cigarette market, thereby freezing "company market shares within the industry." *Id.* at 333.

46. *See* Tobacco Products Control Act of 1995, S. 1262, 104th Cong. (1995) (denying FDA authority over tobacco advertising while imposing some softer restrictions on tobacco industry). Senator Wendell Ford, a Democrat from Kentucky, proposed less restrictive measures including a ban on billboard advertising of cigarettes and smokeless tobacco within 500 feet of any public or private elementary school, prohibition of cigarette and smokeless tobacco advertisements in publications with more than 15% youth subscribers, and restrictions on the use of tobacco brand logos on video games or within amusement parks. *Id.*; *see* Tobacco-Free Children's Internet Act of 1996, S. 2184, 104th Cong. (1996) (increasing FDA authority over tobacco advertising on Internet). Senator Lautenberg stated that since "minors comprise a large percentage of Internet users," it behooves the government to curtail tobacco ads on the Internet that reach these children. *Id.*; *see* Youth Protection from Tobacco Addiction Act, H.R. 3821, 104th Cong. (1996) (introducing measures similar to FDA rules that also attempt to prevent children from smoking). Congressman Hansen alleged that since thousands of smokers die yearly, the tobacco industry supplants these consumers by addicting children to tobacco. *Id. But see* 141 CONG. REC. E1736 (1995) (proposing bill with sole purpose of blocking FDA from regulating tobacco); Youth Smoking Prevention Act of 1995, H.R. 2414, 104th Cong. (1995) (eliminating FDA restrictions and criminalizing cigarette smoking by teens); Motor Sports Protection Act, H.R. 2265, 104th Cong. (1995) (blocking FDA rules on use of brand identified logos in Motor-Sport). One of the more controversial proposals, which played out in the media without formal congressional hearings, would have halted the FDA regulations and in turn granted the tobacco industry special immunity from state law claims. David Greising, *The Race Around the FDA: How Cigarette Companies Aim to Bypass New Federal Regs on Promotion and Ads*, BUS. WEEK, Sept. 9, 1996, at 38. Under this proposal, the tobacco industry would have to pay millions over 15 years to receive such favorable treatment. *Id.* Many concerns have been expressed over such a sweeping proposal. One state attorney general, in particular, voiced his skepticism of the rumored deal at an *ad hoc* Senate hearing. *See* 142th CONG. REC. S11444 (1996) (testifying against deal because this type of settlement was not equitable). *Id.* This extraordinary proposition will be addressed in Part IV.

47. *See* Clarence Page, *Clearing the Air: Politicians Should Place a Moratorium on Who to Blame on Upsurge of Teens Who Smoke and Use Drugs*, CHI. TRIB., Aug. 25, 1996, at 15 (classifying President Clinton's move to protect children from tobacco as "strategic response to reports that drug use among teens has surged upwards during his four years in

from tobacco coincided with reports revealing the dramatic increase in drug use among teenagers.[48] One commentator noted that this move enabled President Clinton to shift the debate from his own administration's alleged failure in enforcing the policies first set out under the Reagan administration's war on drugs to his own proactive measures attempting to combat the rising rate of teenage smoking.[49]

Aside from alienating tobacco–producing states,[50] the Clinton administration's calculated move against the tobacco industry resulted in a positive political move. For instance, a majority of Americans agreed with the President that the tobacco industry should be heavily regulated and that children should not be exposed to tobacco advertising.[51] In accord-

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office"); Editorial, *Not Just Smoke: Declaration of Nicotine As Addictive Opens New Front in the Tobacco Wars*, HARRISBURG PATRIOT-NEWS, Aug. 25, 1996, at B8 (analyzing announcement of FDA rules as "good politics"); *cf.* Sandra Ward, *Kessler's Victory: Battling Teen Smoking, FDA to Regulate Cigarettes*, BARRON'S, Aug. 26, 1996, at 13 (noting that upsurge in teenage drug use was catalyst for President Clinton's decision to endorse FDA rules).

48. Clarence Page, *Clearing the Air: Politicians Should Place a Moratorium on Who to Blame on Upsurge of Teens Who Smoke and Use Drugs*, CHI. TRIB., Aug. 25, 1996, at 15.

49. *See id.* (suggesting that Clinton's approval of new tobacco regulations was political ploy to shift focus away from increase in teenage drug use and his 75% staff reduction of Office of National Drug Policy). The Department of Health and Human Services National Household Survey on Drug Abuse revealed that drug use by teenagers had risen 11% for those between the ages of 12 and 17 since 1992. *Id.*

50. Colette Fraley, *Legal Issues Likely to Impede Clinton Plan on Teen Smoking*, CONG. Q. WKLY RPT., Aug. 12, 1995, at 2446 (reporting that Clinton's support of tobacco regulation "would antagonize voters in a number of southern states"). *But see* National Center for Tobacco-Free Kids, News Release, Tobacco Plays Important Role in Races Around the Country (1996) (examining post-election results in major tobacco-growing states to show that President Clinton was not hurt by anti-tobacco stance in 1996 presidential election), *available in* 1996 WL 12124328. In fact, President Clinton won Kentucky and Tennessee, which are major tobacco-producing states. *Id.* Many other candidates were able to capitalize politically on being pro-health and anti-tobacco even in tobacco-producing states. *Id.*

51. *Cf.* Campaign for Tobacco-Free Kids, News Conference on FDA Regulations Involving the Tobacco Industry (Aug. 7, 1996) (revealing survey results by independent research firm indicating that "nearly eighty percent of public agree with statement that federal government should be involved in effort to reduce tobacco use among children"), *available in* 1996 WL 10828216; Colette Fraley, *Legal Issues Likely to Impede Clinton Plan on Teen Smoking*, CONG. Q. WKLY. RPT., Aug. 12, 1995, at 2446 (indicating strong support for tobacco curbs by populace nationwide). Additionally, President Clinton's stance on tobacco allowed him in the 1996 presidential race to draw a stark difference between himself and Bob Dole. See *1996 Presidential Campaign: Dole's Tobacco Remarks Ignite Debate*, FACTS ON FILE WORLD NEWS DIGEST, July 11, 1996, at *1 (comparing Clinton's and Dole's positions on tobacco regulation issue), *available in* 1996 WL 8621359. As part of the leadership in the Republican party, Bob Dole had benefitted from thousands of dollars in tobacco interest money while appearing to be the benefactor of the tobacco industry. *See* Jim Drinkard, *Tobacco Row Paves D.C. with Gold: Industry Spent 15 Million in Early*

ance with the administration's position, the overriding goal of the FDA regulations, as stated earlier, was to prevent children from picking up the tobacco habit[52] by imposing tough restrictions on tobacco advertising, as well as distribution and sale.[53] Thus, this goal coincided with the views of

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'96 Fighting Regulation, Taxes, WASH. POST, Sept. 10, 1996, at A13 (finding recent contributions of $4 million to Republican party and $750,000 to Democrats); *1996 Presidential Campaign: Dole's Tobacco Remarks Ignite Debate*, FACTS ON FILE WORLD NEWS DIGEST, July 11, 1996, at *1 (reporting on President Clinton's campaign remarks referring to Dole's acceptance of $383,350 in contributions from tobacco industry), *available in* 1996 WL 8621359; Spencer Rich, *Clinton Calls Dole a Parrot of Tobacco PR Campaign Contributions Listed*, NEW ORLEANS TIMES-PICAYNE, June 16, 1996, at A3 (explaining that Clinton attempted to "portray Dole as a legislative ally of tobacco industry"); *Today: Interview, Bob Dole Answers Questions Concerning his Relationship with the Tobacco Industry* (NBC television broadcast, July 2, 1996) (revealing that Senator Dole had received $477,550 from tobacco lobby over course of his career), *available in* 1996 WL 10304841. Moreover, Dole had been very vulnerable to the tobacco issue ever since he commented that tobacco may not be addictive and tobacco was just one of many things harmful in society for kids. *See 1996 Presidential Campaign: Dole's Tobacco Remarks Ignite Debate*, FACTS ON FILE WORLD NEWS DIGEST, July 11, 1996, at *1 (quoting Dole on tobacco as saying "we know it's not good for kids, but a lot of other things aren't good; drinking's not good; some would say milk's not good."), *available in* 1996 WL 8621359. Although Dole somewhat recanted his statement about tobacco and addiction before election day, the lingering effects of his unfortunate comments proved harmful to his campaign. *See* National Center for Tobacco-Free Kids, News Release, *Tobacco Plays Important Role in Races Around the Country* (1996) (attributing Senator Dole's unsuccessful bid for White House partially on account of tobacco affiliation), *available in* 1996 WL 12124328.

52. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,396, 44,397–99. According to one report, at least three million youths in America currently smoke cigarettes and one million males use smokeless tobacco. *Id.* at 44,398 (citations omitted). It is estimated that 82% of adult smokers started smoking before reaching 18 years of age. *Id.* Moreover, the FDA reports that children are starting to smoke earlier and more often, thereby increasing chances of becoming heavily addicted and suffering from higher risks of diseases related to smoking. *Id.* at 44,398–99 (citations omitted).

53. *Id.* at 44,465. Preceding the FDA's analysis on advertising restrictions, the FDA discusses the particulars of the rule regarding sale and distribution under subpart B of title 21, section 897, and labeling under subpart C of title 21, section 897. *Id.* at 44,426–27. Although this Comment only addresses the FDA's regulations as they pertain to advertising, it is important to note that these two sections have dramatically changed since first proposed. For example, certain modes of tobacco sales banned in the proposed rule, such as vending machines and self-service displays, are allowed only if they are not accessible to children (*i.e.*, they must be in locations such as nightclubs and bars). *Id.* at 44,427. In addition, mail order sales that were previously prohibited would be permissible absent distribution of free samples or redemption coupons for products. *Id.* The FDA also deleted a controversial provision under subpart C that would have compelled tobacco manufacturers to establish and maintain an educational program to discourage youth smoking. *Id.* at 44,462. Instead, the FDA has required that, in accordance with section 518(a) of the Federal Food, Drug and Cosmetic Act, which gives the FDA power to compel medical device manufacturers to warn potential consumers about any "unreasonable risk[s] of sub-

many within the voting public. Nevertheless, it is clear that the FDA anticipated that its authority over tobacco regulation would be challenged, because the final regulations contain an expansive discussion of the FDA's authority to regulate the tobacco industry.[54] The debate over the FDA's authority, however, is beyond the scope of this Comment.

Despite slight modification of the original proposals on tobacco advertisement restrictions,[55] most of the notable restrictions remained part of the FDA's final regulations. Advertising restrictions[56] included under the FDA regulations provide:

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stantial harm" the device may cause tobacco manufacturers must notify young people of the unreasonable risk of smoking. *Id.* at 44,462, 44,538; *see* 21 U.S.C. § 360h(a) (1994).

54. *Id.* at 44,400–17. However, its companion "Supplementary Information" encompasses one and one-half books numbering a total of 922 pages setting forth provisions explaining the reasons and reaches of the final ruling. *Id.* at 44,396–45,318.

55. *See* Peter T. Kilborn, *Clinton Approves a Series of Curbs on Cigarette Ads*, N.Y. TIMES, Aug. 24, 1996, at 1 (commenting that minor changes were made to rules from those proposed); *see also* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,465 (explaining various differences between proposed and final rules). The FDA notes that public comment on the proposed advertisement restrictions of the rule elicited some of the "most passionate comments from both supporters and opponents of the proposed restrictions" during the comment period. *Id.* According to the FDA, some modifications were made to the regulations based on these comments. *Id.* The more significant changes as reported by the FDA include:

> 1. a new requirement placing the onus on the purchaser of tobacco advertisements in publications to make sure the ads meet the criteria for advertising in an adult-oriented publication as defined under the rule; and
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> 2. allowing unrestricted advertising as to color and imagery in areas not accessible to minors so long as the ads cannot be seen from "outside the facility and are affixed to a wall or fixture in the facility," whereas the previous rule required that all advertisements be in black text on white background except for exempted publications;
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> 3. deleting a ban that would have prohibited manufacturers from promoting cigarettes and smokeless tobacco brands through contests and games; however, brand-identified, non-tobacco items are still banned and any transactions using proof of purchase credits to purchase cigarettes is impermissible;
>
> 4. deleting the proposed requirement of a brief statement on all advertising such as "1 out of 3 Kids Who Become Smokers Will Die From Their Smoking." All that is necessary is the Surgeon General's warning and the statement "Nicotine Delivery Device for Persons 18 or Older";
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> 5. deleting a provision that defined what can be considered a false or misleading statement for purposes of tobacco advertising since the FDA believed that this provision was unnecessarily duplicative.

Id. at 44,465–66.

56. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,465–538. Subpart D is comprised of numbered sections 897.30(a), 897.30(b), 897.32(a), 897.32(b), 897.32(c) and 897.34 (a)-(c).

1. limitations on advertising and labeling to black-and-white, text-only ("tombstone advertising") format in locations that are visible to children and adolescents;
2. a bar on advertising (as well distribution) of promotional non-tobacco brand items such as caps and [T]-shirts;
3. precluding the sponsorship of sporting and other events, teams, and entries through brand promotion, while allowing corporate sponsorship;[57] and
4. requirements that manufacturers provide intended use information on all tobacco products affected by this rule.[58]

Assuming, arguendo, that the FDA does have the statutory authority to regulate the tobacco industry, a larger constitutional question still looms. The FDA regulations purport to limit the form and manner in which tobacco companies advertise their products, thus necessarily raising First Amendment issues related to commercial speech.

III. Jurisprudential History of Commercial Speech

A. *Summary of the Commercial Speech Doctrine*

The commercial speech doctrine has had a brief and convoluted history in American constitutional jurisprudence.[59] Initially, the United States Supreme Court held that commercial speech fell entirely outside the scope of protected speech under the First Amendment.[60] As a result, once a court classified speech as "commercial,"[61] no constitutional ques-

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57. *Id.* at 44,527. Rules barring the use of brand sponsorship of events, such as the Winston Cup and Virginia Slims Tennis Tournament, are addressed in this section. *See id.* at 44,527–36 (discussing tobacco industry's relationship with NASCAR and other sporting events). The rule imposes bans on sponsorship by brand identification of "athletic, musical, artistic or other social or cultural event[s]." *Id.* at 44,527.

58. *Id.* at 44,519. This provision requires the statement: "Tobacco (or the appropriate identifying label for the regulated product)-A Nicotine Delivery Device" to accompany the Surgeon General's warning on each product. *Id.*

59. *See* Jerome A. Barron & C. Thomas Dienes, Handbook of Free Speech and Free Press 166–67 (1979) (indicating that language of commercial speech decisions and numerous caveats therein make future of commercial speech doctrine uncertain).

60. *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (holding ordinance which prohibited dissemination of purely commercial handbills as constitutional). There has been debate over whether this case actually stood for the proposition that commercial speech garnered no First Amendment protection or if it was simply relegated "to a lesser degree of First Amendment Protection." *See* Jerome A. Barron & C. Thomas Dienes, Handbook of Free Speech and Free Press 156–57 (1979) (discussing implications of *Chrestensen* holding).

61. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (categorizing speech into two tiers). *Chaplinsky* was decided the same year that *Chrestensen* was handed

tions remained.[62] According to the Court, protected speech included political and other socially redeeming speech[63] of which commercial speech did not qualify, or so it seemed. Commercial speech was eventually afforded First Amendment protection,[64] however, but its protection was somewhat limited as compared to other forms of "core" speech.[65]

The first Supreme Court case to address the issue of commercial speech was *Valentine v. Chrestensen*.[66] In *Chrestensen*, the Court found an ordinance prohibiting the dissemination of commercial handbills on the streets of New York to be constitutional.[67] The Court recognized that government could not restrict an individual from airing his views in public; however, the Court drew a distinction between commercial and non-commercial speech by stating that the "Constitution impose[d] no such restraint on government as respects to purely commercial advertising."[68] Consequently, this decision kept commercial speech from garnering any meaningful First Amendment protection for over thirty years.[69]

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down and held that certain classes of speech, such as lewd, obscene, profane, and libelous speech, as well as "fighting words," were not protected by the First Amendment. *Id.*

62. *See* JEROME A. BARRON & C. THOMAS DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS 158–60 (1979) (discussing federal court treatment of commercial speech doctrine).

63. See *Chaplinsky*, 315 U.S. 568, 572 (1942) (emphasizing that in order for speech to be protected it must have "social value" and must form "essential part of any exposition of ideas").

64. *See* Bigelow v. Virginia, 421 U.S. 809, 821 (1975) (opining that, under prior case law, advertisements would have received "*some* degree of First Amendment protection" when product or service advertised is legal) (emphasis added).

65. *See* Board of Trustees v. Fox, 492 U.S. 469, 477 (1989) (describing political speech as type of core speech in order to differentiate types of speech); *see also* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 381–82 (1973) (opining "that freedoms of speech and of the press rank among our most cherished liberties" in which "our system of self-government hinges upon [their] preservation" (citing New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) (speaking on vital importance of free press to democratic society)).

66. *Chrestensen*, 316 U.S. at 52.

67. *Id.* at 54.

68. *Id.*

69. *See Pittsburgh Press Co.*, 413 U.S. at 391 (applying commercial speech doctrine to sustain municipal ordinance prohibiting newspaper from publishing clearly discriminatory sex-designated want ads by characterizing ads as "purely commercial"). The *Pittsburgh Press* Court restated the proposition first set out in *Chrestensen* that speech which "did no more than propose a commercial transaction" could be regulated without infringing the First Amendment. *Id.* at 385, 391. However, the Court did limit its ruling to the facts of the case, which concerned promotion of an illegal activity. *Id.* at 388. *But see* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 773 (1976) (holding unconstitutional statute which prohibited advertising of purely commercial speech). The most important and pertinent federal case decided during the time commercial speech was treated unfavorably dealt with the regulation of tobacco. *See* Capital

In 1975, the Court, in *Bigelow v. Virginia*,[70] held that commercial speech should receive some degree of First Amendment protection. In *Bigelow*, the Court expanded on the *Chrestensen* decision to hold that government could regulate commercial advertising in a reasonable manner, but stated that *Chrestensen* did not stand for the "sweeping proposition that advertising is unprotected per se."[71]

Broad. Co. v. Mitchell, 333 F. Supp. 582, 586 (D.D.C. 1971) (ruling that broadcast ban of cigarette advertising was constitutional), *aff'd*, 405 U.S. 1000 (1972). In 1971, Congress amended the Public Health Cigarette Smoking Act of 1969 to prohibit cigarette advertising "on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." *Id.* at 584 (citing 15 U.S.C. § 1335 (1970)). Public broadcasters filed suit to enjoin the Act, claiming that it violated the First Amendment. *Id.* at 583. In a 2-1 decision, the District Court for the District of Columbia ruled that the federally-imposed ban on cigarette advertising over electronic media did not violate the First Amendment. *Id.* Although the majority reasoned that Congress "ha[d] the power to prohibit the advertising of cigarettes in any media," the court prefaced its ruling by noting that product advertising is not as "vigorously protected" as are "other forms of speech." *Id.* The dissenting opinion chided the majority for its complicity in allowing the government to eviscerate the guarantees of the First Amendment. *See id.* at 592 (Wright, J., dissenting) (reasoning that commercial speech doctrine should not be invoked to "automatically decide cases without the benefit of further thought"). Moreover, the dissent found it contradictory for the federal courts to place cigarette advertising in the context of "controversial speech," yet not afford it the same type of First Amendment protection core speech received. *Id.* at 587. Judge Wright referred to the famous case of *Banzhaf v. FCC*, which held that tobacco advertisements were controversial speech; therefore, in the public interest they should be countered with anti-tobacco speech, under the then valid Fairness Doctrine. *See id.* (citing Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied sub nom.*, Tobacco Institute v. FCC, 396 U.S. 842 (1969)). The dissent thus found it illogical to raise the level of protection afforded cigarette advertisements to counter them with anti-tobacco messages on the one hand and on the other hand summarily castigate tobacco advertising as worthless speech. *Id.* at 587, 592. A better understanding, according to the dissenting judge, would be to afford commercial speech higher protection when it involves matters of "public controversy" or "artistic expression." *Id.* at 592.

70. 421 U.S. 809 (1975). The *Bigelow* decision concerned the conviction of a newspaper editor under a Virginia law which prohibited the promotion or encouragement of legal abortions through publication. *Id.* at 811. In reversing the conviction, the Court held that the "advertisement published in appellant's newspaper did more than simply propose a commercial transaction." *Id.* at 822. The Court further noted that the ad "contained factual material of clear 'public interest,'" unlike that involved in *Chrestensen*. *Id.* Still, the Court did not refute the prior holding in *Pittsburgh Press*, which drew a clear distinction between pure commercial speech garnering less protection than non-commercial speech. *Id.* at 826. The Court did not attempt to answer whether the state could regulate commercial speech which promoted products or services that the state could regulate or prohibit. *Id.* at 827. Finally, the Court did not find it necessary to comment on the legislative ban of tobacco ads on electronic media because of the "'unique characteristics' of this form of communication." *Id.* at 825 n.10. Thus, even at this juncture it was not readily apparent how far, and to what extent, "pure commercial speech" could be regulated.

71. *Bigelow*, 421 U.S. at 820.

One year later, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[72] the Court held that pure commercial speech, as opposed to that type of commercial speech that "did more than simply propose a commercial transaction,"[73] was to be afforded protection under the First Amendment.[74] The Court reasoned that commercial speech was not "so removed from any 'exposition of ideas' and from 'truth, science, morality, and the arts in general, in its diffusion of liberal sentiments on the administration of Government' that it lack[ed] all protection."[75]

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72. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 757 (1976) (finding that advertiser has right to speak and consumer has right to hear). *Virginia Pharmacy Board* dealt with a law that made it illegal to advertise prescription drug prices. *Id.* at 752. The rationale of the law, *inter alia*, was to encourage professionalism among pharmacists. *Id.* at 766. Justice Blackmun delivered the opinion of the Court and held that the "free flow of commercial information is indispensable" to a "free enterprise economy," therefore, the law infringed upon consumers' rights to receive important information, as well as pharmacists' rights to provide this service. *Id.* at 757, 765. However, Justice Blackmun did note that some forms of commercial speech can be regulated. *Id.* at 770. He identified restrictions on time, place, and manner as permissible restrictions as long as the restrictions were content neutral and left open alternative ways to inform consumers. *Id.* at 770–72. Justice Blackmun also recognized permissible bans on untruthful and illegal forms of commercial speech. *Id.*

73. *See Virginia Pharmacy Bd.*, 425 U.S. at 760 (citing *Bigelow*).

74. *See id.* (rejecting contention that publication was unprotected because it was commercial).

75. *Id.* at 762. The Court quoted various decisions in making this statement, including *Chaplinsky* and *Roth v. United States*, 354 U.S. 476, 484 (1957). *Id.* The Court further noted that even if the interest to speak is merely economic, that alone does not foreclose protection under the First Amendment. *Id.* In his dissent, Justice Rehnquist found it unspeakable to protect commercial speech to the same degree as other forms of speech that provided for a "free marketplace of ideas." *See id.* at 781 (Rehnquist, J., dissenting) (explaining that Court's ruling elevates "commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas"). Justice Rehnquist apparently believed that commercial speech did not fit in with those ideas that are important to self government brought about through the so-called marketplace of ideas. *Id.* (Rehnquist, J., dissenting). Making a textual argument, Justice Rehnquist also argued that there was nothing in our Constitution which required "to hew to the teachings of Adam Smith." *Id.* at 784 (Rehnquist, J., dissenting). Justice Rehnquist, by analogy, made the assertion that the Constitution does not contain tenets directing society to be capitalistic, socialistic, or communistic; therefore, courts should not impose their own social and economical beliefs in lieu of legislative enactment. *Id.* (Rehnquist, J., dissenting). Further, Justice Rehnquist noted that, although consumers may affix great importance to commercial information, this alone cannot cloak such a message with the impervious shield of the First Amendment. *See id.* at 787 (Rehnquist, J., dissenting) (answering majority's argument that although informed consumer choice is important, it "does not automatically bring information about competing [products] within the protection of the First Amendment"). Finally, Justice Rehnquist warned of an "open door policy" to the active promotion of products such as liquor and cigarettes, which society has attempted to discourage. *Id.* at 781 (Rehnquist, J., dissenting).

B. *The* Central Hudson *Test*

After *Virginia Board of Pharmacy*, the Court attempted to condense its previous commercial speech decisions into a formula that could be used on a case-by-case basis in *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*.[76] In *Central Hudson*, the Court articulated a four-prong test to determine whether First Amendment protection should be afforded to commercial speech:

1. as a threshold matter, the commercial speech at issue must promote a legal product and cannot be misleading;
2. if legal and non-misleading, the regulation of such speech must assert a substantial governmental interest;
3. the regulation sought must directly advance the stated governmental interest; and
4. the regulation must not be more extensive than necessary in furthering the governmental interest.[77]

If all four parts are met, a permissible regulation of commercial speech is found.

In applying the newly-constructed test, the *Central Hudson* Court held that a regulation prohibiting the promotion of electricity through advertising met all of the above-stated factors except the critical fourth prong.[78] The Court found that the ban was more extensive than neces-

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76. 447 U.S. 557 (1980). In *Central Hudson*, the Court faced the question of whether the New York Public Service Commission could legally ban all promotional advertising of electricity for the good of energy conservation without violating the First Amendment. *Id.* at 558.

77. *Central Hudson*, 447 U.S. at 562. The majority prefaced its review of precedent by explaining that when applying the First Amendment in the context of commercial speech, the Court has rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech. *Id.* The Court further reiterated that "people will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them." *See id.* (citing *Virginia Pharmacy Board*).

78. *Id.* at 566–71. Under the first prong, the Court found that Central Hudson overcame the threshold since electricity was a legal product and there was no contention that the speech at issue was inaccurate. *Id.* at 566. The Court also agreed that an interest in energy conservation and fair, efficient electric rates were substantial interests. *Id.* at 569. Finally, the Court focused on the question of whether the ban on advertising electricity would directly achieve the interest sought. *Id.* The Court held that "[t]he impact of promotional advertising on the equity of appellant's rates is highly speculative"; however, "the state's interest in energy conservation is directly advanced by [prohibiting commercial advertising by Central Hudson]." *Id.*

sary because the regulation also prevented the electric company from advertising energy conservation.[79]

While this new test protected the commercial speech of Central Hudson Gas and Electric Company, some members of the Court who concurred in the judgment were reluctant to assent to its use, fearing that the test could be used to covertly manipulate the choices of consumers.[80] In his dissent, Justice Rehnquist reasoned that the Court, in failing to give deference to the state legislature, was returning "to the bygone era of *Lochner*."[81] Rejecting the majority's insistence of comparing commercial speech with the marketplace of ideas,[82] Justice Rehnquist admonished the Court for unleashing a "Pandora's box" by "elevating" commercial speech to a higher level of protection first in *Virginia Board of Pharmacy*, and later "reaping the seed that [the Court] there sowed."[83]

The fears of those concurring members of the Court in *Central Hudson* materialized in *Posadas de Puerto Rico Associates v. Tourism Company of*

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79. *See id.* at 570 (concluding that ban would prevent electric company "from promoting electric services that would reduce energy use by diverting demand from less efficient sources").

80. *See id.* at 573 (Blackmun, J., concurring) (agreeing with majority that intermediate scrutiny must be used to evaluate restrictions on commercial speech, but disagreeing with contention that states may suppress speech in order to "influence public conduct through manipulation of the availability of information"); *see also id.* at 572 (Brennan, J., concurring) (assenting to view held by Justice Blackmun but assuming however that decision only concerned commercial speech). Alternatively, Justice Stevens found it unnecessary to comment on the test since definitions of commercial speech used by the majority that "expression related solely to the economic interests of the speaker and its audience" or "speech that proposes a commercial transaction" were too narrow and over-inclusive respectively. *Id.* at 579–85 (Stevens, J., concurring).

81. *Central Hudson*, 447 U.S. at 589 (Rehnquist, J., dissenting). Justice Rehnquist believed that the issue presented to the Court was merely one of economic regulation, thus, the "speech involved occupies a significantly more subordinate position in the hierarchy of First Amendment values," if it occupies any position at all. *Id.* at 584 (Rehnquist, J., dissenting). Justice Rehnquist compared the Court's decision to those cases which followed *Lochner v. New York*, 198 U.S. 45 (1905), where economic regulations were struck down under the Equal Protection Clause by substituting the "Court's own notions of the most appropriate means for the State to implement its considered policies." *Id.* (Rehnquist, J., dissenting). Justice Rehnquist also reasoned that, by requiring states to show a substantial governmental interest in regulating the speech at issue, the majority elevated commercial speech to a level "virtually indistinguishable from that of non-commercial speech." *Id.* at 591 (Rehnquist, J., dissenting). By doing so, the majority was ignoring the warning that "[t]o require a parity of constitutional protection for commercial and non-commercial speech alike could invite dilution." *See id.* at 588–89 (Rehnquist, J., dissenting) (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978)).

82. *See id.* at 597 (Rehnquist, J., dissenting) (concluding that although "'marketplace of ideas' has a historically and sensibly defined context in the world of political speech, it has virtually none in the realm of business transactions").

83. *Id.* at 598–99 (Rehnquist, J., dissenting).

Puerto Rico.[84] In a 5-4 decision, the Court employed the *Central Hudson* test to find a Puerto Rican law prohibiting the advertisement of gambling to its local residents constitutional under the First Amendment.[85] Since the activity (gambling) was lawful and the advertising of such activity was non-misleading, the first prong of *Central Hudson* was satisfied and it was presumed to be protected by the First Amendment. Satisfied that all remaining prongs of the test were met, Justice Rehnquist, writing for the majority, reasoned that it was for the legislature to decide which policies were most effective to achieve the goal of reducing the harm gambling posed to the local residents.[86] In an attempt to distinguish previous decisions which gave constitutional protection to commercial speech promoting legal activities,[87] the Court asserted that "the greater power to completely ban casino gambling necessarily include[d] the lesser power to ban advertising of casino gambling."[88]

Justice Brennan, writing for the dissent, responded to the majority by stating that when government attempts to suppress commercial speech that is lawful and accurate, it should be required to withstand strict scrutiny analysis.[89] Justice Brennan asserted that the law would have nonetheless failed, however, even under a less-than-strict standard.[90] Moreover, Justice Brennan noted that it was not up to the legislature to decide what course to take in furthering their interest; "[r]ather, it was incumbent upon the government to prove that more limited means are not sufficient to protect its [stated] interest and whether or not the government has sustained this burden."[91]

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84. *See* Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 363 (1986) (Stevens, J., dissenting) (characterizing majority's rationale "as unpredictable and haphazardous as the roll of dice in a casino").

85. *Posadas*, 478 U.S. at 330, 348.

86. *See id.* at 343–44 (concluding that it is within legislative province to "decide whether or not such a 'counterspeech' policy would be as effective in reducing the demand for casino gambling as a restriction on advertising").

87. *Id.* at 345. The appellant contended that previous decisions which forbade restrictions on contraceptives and abortion advertisements prevented the Court from restricting the speech in the present case. *Id.* Justice Rehnquist responded by reasoning that those examples of impermissible speech restrictions dealt with conduct that was "constitutionally protected and could not have been prohibited by the State." *Id.* Thus, it was permissible to restrict that type of commercial speech where the underlying conduct could be altogether banned by the state. *Id.* at 345–46.

88. *Id.* at 345–46.

89. *Id.* at 350–51 (Brennan, J., dissenting).

90. *Posadas*, 478 U.S. at 351–52 (Brennan, J., dissenting).

91. *Id.* at 356 (Brennan, J., dissenting).

After *Posadas*, the level of protection afforded certain types of commercial speech appeared to be waning.[92] Commentators criticized the Court for its departure from prior precedent and its disingenuous use of the *Central Hudson* test.[93] Although the Court tinkered with the *Central Hudson* test over the years,[94] the deferential approach to restrictions on the promotion of harmful products in *Posadas* was not refuted by the Court until *Rubin v. Coors Brewing Company*,[95] when the Court struck down a federal statute prohibiting alcohol-content labeling of beers. The unanimous decision appeared to reaffirm and rehabilitate the *Central Hudson* test from the highly deferential application the *Posadas* Court employed when evaluating so-called harmful or "vice" promotion regulations.[96]

C. 44 Liquormart, Inc. v. Rhode Island

If the *Rubin* holding can be characterized as the reaffirmation of the *Central Hudson* test, the recent Supreme Court decision in *44 Li-*

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92. *See* Terrence Leahy, *A Game of Chance: Commercial Speech After* Posadas, A.B.A. J., Sept. 1, 1988, at 58, 58 (asserting that, after *Posadas*, all that is needed to suppress commercial speech is legislative determination that such regulation is necessary).

93. *See* Philip B. Kurland, Posadas de Puerto Rico v. Tourism Company: *"Twas Strange, 'Twas Passing Strange': 'Twas Pitiful, 'Twas Wondrous Pitiful'"*, 1986 SUP. CT. REV. 1, 12–16 (opining that "majority of the Justices in *Posadas* pretended" to apply *Central Hudson* test to commercial speech regulation at issue); *see also* Terrence Leahy, *A Game of Chance Commercial Speech After* Posadas, 74 A.B.A. J. 58, 58–61 (1988) (commenting on loose application of *Central Hudson* test); Gary Weeks, Note, Posadas De Puerto Rico Assoc. v. Tourism Co. of Puerto Rico: *Promising Precedent for Proponents of Tobacco Advertising Prohibition?*, 40 ARK. L. REV. 877, 888–89 (1987) (indicating that *Posadas* deviated greatly from previous applications of *Central Hudson* by Supreme Court).

94. *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n.1 (1993) (finding that courts must consider "numerous and obvious less-burdensome alternatives" to determine whether there is reasonable fit between ends and means under fourth prong); Edenfield v. Fane, 507 U.S. 761, 770–71 (1993) (pronouncing that government bears heavy burden of showing restriction on commercial speech that directly advances substantial interest to "material degree" under third prong). The Court in *Edenfield* warned that restrictions on commercial speech will not pass constitutional muster if their beneficial effects are merely speculative. *Edenfield*, 507 U.S. at 770–71; *see also* Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (modifying scope of fourth prong to require only "reasonable fit" between ends and means, as opposed to least-restrictive means approach).

95. 115 S. Ct. 1585 (1995).

96. *Rubin*, 115 S. Ct. at 1589–90 n.2. Justice Thomas laid to rest the argument that legislatures "have broader latitude to regulate speech that promotes socially harmful activities . . . than they have to regulate other types of speech." *Id.* As a result, Justice Thomas officially relegated the "vice" exception found in the *Posadas* decision to dicta by noting that "the Court reached this argument only after it already had found that the state regulation survived the *Central Hudson* test." *Id.*

quormart, Inc. v. Rhode Island[97] must be the resurrection of the commercial speech doctrine, because it extends constitutional protection to that afforded other forms of "core" speech.[98]

In *44 Liquormart, Inc. v. Rhode Island*, the Court held that the State of Rhode Island impermissibly regulated the commercial speech of liquor retailers by forbidding them from advertising alcoholic beverage prices.[99] Although the Court unanimously held that the advertising ban violated the First Amendment, the members of the Court disagreed on how to analyze the commercial speech issue.[100] Considering the significance of this ruling, evaluation of the various facets of the entire opinion is neces-

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97. 116 S. Ct. 1495 (1996).

98. *But see* Anheuser-Busch, Inc. v. Schmoke, 101 F.3d 325, 327, 330 (4th Cir. 1996) (holding constitutional, in light of *44 Liquormart*, ordinances which call for prohibition of outdoor advertisements of both alcoholic beverages and cigarettes in areas where children walk to school and play), 117 S. Ct. 1569 (1997); Penn Adver. of Baltimore, Inc. v. Mayor of Baltimore, 101 F.3d 332, 332 (4th Cir. 1996) (affirming decision despite *44 Liquormart*), *cert. denied*, 117 S. Ct. 1569 (1997). Originally, the Supreme Court vacated and remanded these cases back to the Fourth Circuit for further consideration in light of its *44 Liquormart* decision. *Anheuser-Busch*, 101 F.3d at 327; *Penn Advertising*, 101 F.3d at 333. Both ordinances were promulgated with the aim of eradicating consumption of alcohol and cigarettes by minors. *Anheuser-Busch*, 101 F.3d at 327. Thus, outdoor advertisements of such products were banned in areas frequented by minors. *Id.* The United States Court of Appeals for the Fourth Circuit found that this was proper under the First Amendment since the ordinances "merely restricted time, place and manner" of the advertisements. *Id.* at 329. In applying the stricter *Central Hudson* analysis as pronounced by some members of the *44 Liquormart* Court, the Fourth Circuit still deferred to legislative findings after their own "independent assessment" that linked advertising with consumption; therefore, the ordinances directly advanced the goal of preventing children from drinking and smoking. *Id.* The court also reiterated that the fourth prong was met by exclaiming that "[a]lthough no ordinance of this kind could be so perfectly tailored as to all and only those areas to which children are daily exposed, Baltimore's efforts . . . renders [the ordinances] not more extensive than is necessary to serve the governmental interest under consideration." *Id.* at 328. In an attempt to distinguish the *44 Liquormart* decision from the Baltimore cases, the court emphasized that *44 Liquormart* dealt with a blanket ban on commercial speech, whereas the Baltimore ordinances allowed for other alternative channels of communication for such advertisements. *Id.* at 327–28. The recent refusal to hear these cases by the Supreme Court, thereby leaving the 4th Circuit ruling intact, has surprised some. *See* Steve Hirsh, *Baltimore Cigarette Billboard Ban Untouched*, WASH. TIMES, Apr. 29, 1997, at B6 (presenting opposing views as to significance of Supreme Court's decision not to hear case and possible effects pending appellate decision by Fourth Circuit on FDA advertising regulations).

99. *44 Liquormart*, 116 S. Ct. at 1515. A second issue presented was whether the Twenty-First Amendment to the United States Constitution provided the State of Rhode Island the power to overcome commercial speech rights to advertise liquor prices. *Id.* The Court answered this question in the negative. *Id.*

100. *See id.* (Scalia, J., concurring in part and concurring in judgment) (questioning *Central Hudson* analysis).

sary to understand the differences and similarities of the Justices' views on this issue.[101]

Citing *Virginia Board of Pharmacy* and *Central Hudson*, Justice Stevens acknowledged the vulnerability commercial speech has to regulation.[102] Justice Stevens asserted, however, that "special care" should be given when reviewing regulations that ban commercial speech completely absent claims of deception or illegal activity.[103] "When a state entirely prohibits the dissemination of truthful, non-misleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands."[104] Justice Stevens found a total ban on commercial speech to be a dangerous affront to the First Amendment because it forecloses all alternative means of providing specific information.[105] Moreover, he reasoned that the "First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."[106]

Although parts of Justice Stevens's opinion encompass strong language criticizing wholesale bans on commercial speech "not related to consumer protection," he did not go so far as to eliminate the use of the *Central Hudson* test in such situations.[107] In fact, he applied the *Central Hudson*

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101. *See id.* at 1500–01 (listing separate opinions of *44 Liquormart*). There were eight separate opinions, with Justice Stevens announcing the decision of the Court. *Id.* Justice Stevens delivered the Court's judgment in Parts I, II, VII, and VIII. *Id.* at 1500–01. Justices Kennedy and Souter joined in Parts III and V; Justices Kennedy, Thomas, and Ginsburg joined Part VI; and Justices Kennedy and Ginsburg joined Part IV. *Id.* Chief Justice Rehnquist concurred in the judgment along with Justices O'Connor and Breyer, while Justices Scalia and Thomas wrote separate opinions concurring in the judgment. *Id.* at 1515, 1520.

102. *Id.* at 1506. Reiterating the rationale in *Virginia Pharmacy Board*, Justice Stevens noted that commercial speech may readily be regulated to prevent false advertising, because there is greater objectivity in commercial speech than in other types of speech. *Id.* Additionally, since commercial speech is profit-driven, it entails a greater "hardiness," thus curtailing "the chilling effect that may attend its regulation." *Id.* Justice Stevens added, however, that commercial speech has played a historical role in American culture from "town criers call[ing] out [market] prices in public squares" to Benjamin Franklin's defense of free press by printing advertisements for voyages to Barbados. *Id.* at 1504 (citations omitted).

103. *Id.* at 1509.

104. *44 Liquormart*, 116 S. Ct. at 1507.

105. *Id.* at 1506.

106. *Id.* at 1508. Justices Kennedy and Ginsburg joined Justice Stevens in this part of the opinion. *Id.*

107. *See id.* at 1510 (referring to *Central Hudson* in striking down Rhode Island's prohibition of alcohol price advertising).

analysis to the facts of *44 Liquormart*, concluding that the regulation in question failed to materially advance the state's interest of promoting temperance in consuming alcoholic spirits,[108] and found that the proffered means of banning liquor ads did not reasonably fit the ends sought by the regulation.[109] Thus, for Justice Stevens, the commercial speech regulation was unconstitutional because it could not pass muster even under a less-than-strict analysis under the First Amendment.

Recognizing Rhode Island's reliance on *Posadas*, Justice Stevens disavowed the *Posadas* decision as being decided erroneously. He explained that "*Posadas* clearly erred in concluding that it was 'up to the legislature' to choose suppression over a less speech-restrictive policy."[110] Further, Justice Stevens reasoned that the *Posadas* decision was a deviation from prior Court precedent and should be discarded.[111] Finally, Justice Stevens stated unequivocally that prior Court rulings should not be read to include a so-called "vice" exception to the commercial speech doctrine.[112]

Although concurring in the judgment, Justice Scalia expressed reservations with the formulaic use of the *Central Hudson* test and agreed that paternalistic governmental policies should not be used to prevent consumers from receiving information that may be deemed harmful.[113] He reasoned, however, that the Court, too, appears to be paternalistic when it decides to override governmental policies "unless [the Court has] good reason to believe that the Constitution itself forbids them."[114] The Court, instead, must look to history and consensus to make that determination under the First Amendment.[115]

Justice Thomas also concurred in the judgment, but was critical of the Court's application of *Central Hudson*.[116] Echoing Justice Rehnquist's dissent in *Central Hudson*, Thomas found it improper to use a balancing test to manipulate consumer choice in the marketplace.[117] He stated that any interest that is used to keep people in the dark is "per se illegitimate," regardless of whether the speech is commercial or non-commercial.[118] He found it ironic that to comport with the *Central Hudson* test,

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108. *Id.* at 1509.
109. *44 Liquormart*, 116 S. Ct. at 1510.
110. *Id.* at 1511.
111. *Id.*
112. *Id.* at 1513.
113. *Id.* at 1515 (Scalia, J., concurring in part and concurring in judgment).
114. *44 Liquormart*, 116 S. Ct. at 1515 (Scalia, J., concurring in part and concurring in judgment).
115. *Id.*
116. *Id.* at 1515–16 (Thomas, J., concurring in part and concurring in judgment).
117. *Id.* at 1516.
118. *Id.* at 1516–17.

as applied by Justice Stevens, the state had to prove that it would be more successful in tempering alcohol consumption by "keeping consumers ignorant."[119]

Finally, Justice O'Connor, joined by Chief Justice Rehnquist and Justices Breyer and Souter, concentrated on the last prong of the *Central Hudson* test. Noting the various permutations the Court had developed regarding this part of the test,[120] Justice O'Connor reasoned that the state's ban on liquor prices did not reasonably fit its goal of temperance.[121] Justice O'Connor contended that evidence of other "less burdensome alternatives . . . signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny."[122] However, if there appear to be "alternative channels" to disseminate the regulated speech, it may be found reasonable.[123]

Although concurring in the judgment, Justice O'Connor agreed with the plurality's rejection of the lax application of *Central Hudson* in *Posadas* in light of subsequent decisions which have "examined more searchingly the [s]tate's professed goal, and the speech restriction put into place to further it, before accepting a [s]tate's claim that the speech restriction satisfies First Amendment scrutiny."[124] Finally, Justice O'Connor noted that since the regulation at hand failed under a less stringent standard than required under *Central Hudson*, there was no need to formulate a new rule regarding the regulation of commercial speech.[125]

Although the *44 Liquormart* Court did strike down Rhode Island's ban on liquor price advertising, the Court failed to announce the appropriate level of protection to be applied to commercial speech under the First Amendment. This decision has, however, changed the *Central Hudson* analysis significantly, which may lead to greater protection for commercial speech.[126] Moreover, the disavowing of *Posadas* by a majority of the

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119. *44 Liquormart*, 116 S. Ct. at 1518.
120. *Id.* at 1521 (O'Connor, J., concurring in judgment).
121. *Id.* at 1521–23.
122. *Id.* at 1521.
123. *Id.*
124. *44 Liquormart*, 116 S. Ct. at 1522.
125. *Id.*
126. *See id.* at 1519 (Thomas, J., concurring in part and concurring in judgment) (opining that virtually all restrictions would fail using strict analysis of fourth prong). Another obvious development bolstering this interpretation includes the retreat from *Posadas*. *See id.* at 1513 (Stevens, J., concurring) (finding entire Court agreeing that legislative deference given in *Posadas* is "no longer persuasive"). In addition, the heightened scrutiny that Justices Stevens, Kennedy and Ginsburg would require when evaluating wholesale bans on commercial speech, "unrelated to the preservation of a fair bargaining process," clearly

Court eliminates a strong precedent-based argument for a constitutional restriction of tobacco advertisements.

The ultimate question is whether the recent gloss of *44 Liquormart* on the *Central Hudson* analysis invalidates the recent FDA rule on tobacco advertising. This Comment asserts that it does. Many of the provisions in the FDA regulations could potentially result in an advertising ban, which would trigger a stricter analysis by some members of the Court.[127] At the very least, the tone of *44 Liquormart* lends itself to the determination that the FDA regulations do not directly advance the government's interest and are too broad to pass the reasonable fit test under the fourth prong of *Central Hudson.*

IV. FDA v. MOD (MERCHANTS OF DEATH): APPLICATION OF FDA REGULATIONS AFTER *44 LIQUORMART*

A. *Are Tobacco Advertisements Protected Commercial Speech?*

Unquestionably, tobacco advertising is commercial speech.[128] Tobacco advertisements clearly provide product information that consumers may

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elevates commercial speech protection. *Id.* at 1507. Moreover, Justices Scalia's and Thomas's repudiation of the *Central Hudson* test would apparently remove much discretion from reviewing courts in commercial speech cases. *Id.* at 1515, 1518. It also appears that Justice O'Connor's stricter approach to the fourth prong of *Central Hudson*, which garnered support from Chief Justice Rehnquist and Justices Breyer and Souter, may be harder to overcome. *Id.* at 1522–23 (O'Connor, J., concurring in judgment). Injecting these recent pronouncements into the constitutional analysis of commercial speech regulation may prove to be an insurmountable barrier for some forms of restrictions.

127. *See id.* at 1507 (explaining that not all commercial speech regulations are subject to *Central Hudson* analysis but some may require strict review). It is important to note that only Justices Ginsburg and Kennedy joined this part of the opinion. *Id.* Regardless, tobacco defenders have argued that most of the FDA provisions do not provide for alternative means of dissemination; thus, they fail the heightened standard of review articulated by some members of the Court. *See id.* (finding it justifiable to require higher standard when regulations "all but foreclose alternative means of disseminating certain information"). The argument against the restrictions is that they do not leave "satisfactory alternative channels of communication" because some of the provisions effectively create a ban on certain outdoor advertisements, cause the advertisements to become practically invisible because of tombstone restrictions, or worse, the provisions will lead indirectly to a complete ban since most tobacco companies will not advertise. *Cf. id.* (determining liquor pricing ban precludes other channels of communication).

128. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562 (1980) (defining commercial speech as nothing more than proposing commercial transaction). Presumably, this type of speech can be categorized as controversial, thereby affording it heightened protection. *See* Capital Broad. Co. v. Mitchell, 333 F. Supp. 582, 587, 592 (D.D.C. 1971) (Wright, J., dissenting) (finding higher standard possible for controversial speech), *aff'd*, 405 U.S. 1000 (1972); Jef I. Richards, *Politicizing Cigarette Advertising*, 45 CATH. U. L. REV. 1147, 1151–52 (1996) (examining current political climate of anti-tobacco sentiment which has effectively transformed tobacco advertising into political speech).

use to make brand decisions. Thus, once it is determined that commercial speech is at issue, the threshold question is whether the speech promotes a legal product in a non-misleading way.[129]

1. Smoking: Quasi-Illegal or Entirely Legal Activity?

Although the FDA stipulates that tobacco advertisements are commercial speech, it contends that tobacco ads are nonetheless unprotected because the commercial transaction proposed is quasi-illegal;[130] that is, it is illegal as to minors who are unable to purchase tobacco products because of their age.[131] Because these commercial messages are not related to activity that is entirely illegal, however, the FDA asserts that it is possible

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Professor Richards contends that the debate over tobacco advertising requires a higher standard of protection under the First Amendment since tobacco is a hotly contested matter of public concern. Jef I. Richards, *Politicizing Cigarette Advertising*, 45 CATH. U. L. REV. 1147, 1171 (1996). He also asserts that, "because the smoking debate is such a major public issue, speech regarding this topic deserves 'uninhibited, robust, and wide-open' debate." *See id.* at 1185–86 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). Government should not be allowed to quell such debate through viewpoint discrimination by endorsing anti-tobacco rhetoric, including any curbs on tobacco advertisements. *Id.* at 1187. Arguments for giving tobacco advertising special categorization may be unrealistic, however, considering that tobacco product advertisements communicate and propose a commercial transaction and nothing more. *See* Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 475 (1989) (emphasizing that "advertising which 'links a product to a current public debate' is not thereby entitled to constitutional protection afforded noncommercial speech") (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67–68 (1983)).

129. *Compare* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1506 n.9 (1996) (reiterating *Central Hudson* four prong analysis), *with* Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2376 (1995) (describing *Central Hudson* as "test consisting of three related prongs" and threshold question of whether speech concerns lawful and non-misleading activity). The analysis in this Comment uses the latter approach.

130. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,470–72. Although it has been alleged that tobacco ads are misleading, the FDA does not appear to be challenging their constitutionality in such a manner. *Id.* at 44,470–71. On the other hand, the FDA apparently believes that there is no First Amendment protection for tobacco ads because they are "'related to' unlawful activity." *See id.* at 44,471 (citing to *44 Liquormart*, 116 S. Ct. at 1505 n.7).

131. *Id.* at 44,471. The FDA contends that intent is immaterial because the ads still relate to an illegal transaction because it promotes an illegal activity, namely underage smoking. *Id.* Thus, the fact that promotion of tobacco through various forms of media does not differentiate between whether the receiver of the message is an adult or child, if the latter perceives the message to be directed at them, it proposes an illegal transaction. *Id.*

to allow those messages to be received by adults while suppressing those that are seen by minors.[132]

At first blush, this novel argument appears well-grounded in many respects. Indeed, illegal products do not garner any protection under the First Amendment.[133] Further, commercial messages which promote partially-legal activities have been regulated to suppress that portion of the message found to be unprotected.[134] However, this form of regulation purports to establish an unworkable proposition that appears to have no logical stopping point.[135] For example, there are numerous products, such as alcohol, lotteries, and guns, that are marketed in the United States that are legal for adults only; yet, many children are exposed to commercial advertisements of these products on a daily basis.[136] Likewise, in tobacco advertising, the legal and the illegal transaction are inexorably intertwined.[137] Extraordinary measures like banning all such ads

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132. *Id.* at 44,471–72. Analyzing this claim, the FDA cites to United States v. Edge Broad. Co., 509 U.S. 418 (1993), in order to make a somewhat broad comparison between tobacco ads and commercial messages promoting an out-of-state lottery in a state that does not permit gambling. *Id.* The *Edge* Court accommodated the anti-gambling policies of one state with the gambling policies of a neighboring state. *See Edge*, 509 U.S. at 431–35 (finding that government had substantial interest in preventing gambling messages from reaching citizens of non-gambling state and restriction was in proportion to goal, fulfilling fourth prong of *Central Hudson*). However, it is possible to readily distinguish tobacco ads from commercial messages which are forbidden altogether in a jurisdiction like those found in *Edge*. In *Edge*, the government prevented dissemination of commercial messages by non-lotto state broadcasters because the messages promoted an entirely illegal activity (gambling) within the anti-gambling state, whereas tobacco ads promote a quasi-legal activity (tobacco use by adults) within every state. *Id.* Following the FDA's level of generality to its logical conclusion, it can be argued that any commercial message which promotes an adult product relating to an illegal activity, as in underage smoking, could conceivably be restricted or suppressed to a certain degree.

133. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 436 n.4 (1993) (Blackmun, J., concurring) (agreeing with proposition "that government may suppress [illegal commercial] speech altogether") (citing to Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973) & Bates v. State Bar of Arizona, 433 U.S. 350, 384 (1977)).

134. *Edge*, 509 U.S. at 431–35.

135. *See* Freedom to Advertise Coalition, News Conference on President Clinton's Expected Announcement to Allow FDA Regulations of Tobacco Products (Aug. 23, 1996) (reasoning that "every controversial product that is seen by children would be affected if this [FDA's] rule-making were to go through and be supported in court"), *available in* LEXIS, News Library, Script File.

136. *See Advertising Beer to Kids*, ARIZONA DAILY STAR, Jan. 13, 1997, at 10A (finding recent survey showing that children are viewing beer commercials more than adults to be troubling).

137. *Cf.* Kathleen M. Sullivan, *Muzzle Joe Camel? It May Be Illegal*, NEWSDAY, May 30, 1996, at A51 (commenting on difficulty of regulating who receives commercial messages).

would create uncertainty in our laws regarding commercial transactions. It also appears that a simple solution requiring tobacco manufacturers to provide statements to the effect that consumers must be eighteen years old to purchase would render a great portion of this argument moot.

Although the FDA has argued against affording tobacco advertising constitutional protection, the application of the stricter *Central Hudson* test, as announced in *44 Liquormart*, to the recently promulgated FDA regulations is probable. Consequently, the burden of proof will necessarily fall on the FDA to satisfy the *Central Hudson* elements in order to sustain the tobacco advertising regulations.[138]

2. Is There a Substantial Governmental Interest and Do the FDA Regulations Materially Advance That Interest?

The FDA argues unequivocally yes. Children should be protected from the vice of tobacco use.[139] Statistics prove that an overwhelming number of American children smoke, and their well-being is important to our future.[140] An estimated 3,000 young people start smoking each day, and a third of those will ultimately die from smoking.[141] Although the tobacco industry finds the increased use of tobacco by youth profitable, it has voiced its concern about this use and has attempted to hamper this growing trend through self-regulation of advertising and distribution.[142] Some commentators have expressed concern, however, that freedom of choice

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138. *See* Edenfield v. Fane, 507 U.S. 761, 770–71 (1993) (reiterating that burden requires party who seeks to impose restriction to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree") (citations omitted).

139. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,399 (concluding that by reducing number of children and adolescents addicted to cigarettes, FDA is serving its "public health obligations").

140. Id. at 44,472; *see also* John Schwartz, *5 Million Young Smokers Risk Early Death, CDC Report Says*, WASH. POST, Nov. 8, 1996, at A3 (revealing harsh statistics concerning tobacco use by underage smokers). The high incidence of tobacco use by children has prompted some politicians to take note of the severe consequences to the public health. *See* Youth Protection from Tobacco Addiction Act of 1996, H.R. 3821, 104th Cong. (1996) (finding that "cigarette smoking accounts for approximately $65,000,000,000 each year in lost productivity and health care costs"); *CBS Evening News: New Study on Cigarette Smoking Among Teen-Agers Finds Girls at the Highest Risk* (CBS television broadcast, Sept. 25, 1996) (reporting on how smoking stunts lung growth, especially in young girls who appear to be "fastest growing group of new smokers").

141. *See* John Schwartz, *5 Million Young Smokers Risk Early Death, CDC Report Says*, WASH. POST, Nov. 8, 1996 at A3 (emphasizing rate of smoking amongst children).

142. *See* Editorial, *Tobacco Faces the Future: Role Models*, ADVER. AGE, Sept. 16, 1996, at 24 (commending tobacco giants, R.J. Reynolds and Philip Morris, for their attempt to curtail youth from smoking through state legislation and other marketing compromises).

is paramount in American society, and it is not the government's job to prevent individuals from making allegedly bad choices in life.[143] Yet, the obvious vulnerability children face in making such choices compels and permits our society to be paternalistic to a certain degree.[144] Nonetheless, since the Supreme Court has typically by-passed this prong of the *Central Hudson* test which determines whether there is a substantial governmental interest, and focused more on the last two prongs dealing with material advancement of a governmental interest and alternative means of regulation,[145] the FDA's substantial interest in curbing minors from using tobacco will likely be stipulated by the tobacco industry.[146]

The FDA has documented literally thousands of pages of studies, reports, and other ancillary information which, according to the FDA,

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143. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,472 (disagreeing with notion that FDA should not meddle in peoples lives). There is a consensus that the government does have a strong interest in the nation's public health, especially the welfare of its youth. *Id.*

144. *See id.* (explaining that children may start smoking cigarettes without fully understanding how it may damage their lives until it is too late). To bolster the contention that children deserve special treatment, the FDA cites to court decisions protecting a child's physical and psychological well-being from electronic media that permeates the privacy of the home, and the regulation of otherwise protected freedom of expression. *See id.* (noting that United States Supreme Court has compelling interest in protecting well-being of children and that this interest, along with parents' authority over their children, justifies regulation of normally protected expression) (citations omitted); Action for Children's Television v. FCC, 58 F.3d 654, 661 (D.C. Cir. 1995) (commenting on Court's repeated emphasis of government's interest in aiding parents in promotion of their children's well-being). The FDA also attempts to distinguish the self-professed paternalism these regulations pose for children by characterizing the restrictions as only to preclude imagery, not information. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,472. Hence, the FDA concludes that these restrictions are not paternalistic toward adults because they do not "keep people in the dark for what the government perceives to be their own good." *See id.* (citing *44 Liquormart*, 116 S. Ct. at 1508).

145. *See 44 Liquormart*, 116 S. Ct. at 1518 (Thomas, J., concurring in part and concurring in judgment) (alluding that Judge Stevens's opinion bypasses first prong of *Central Hudson* by explaining that opinion "seems to imply that if the State had been more successful at keeping consumers ignorant and thereby decreasing their consumption, then [speech] restriction might have been upheld"); *see also* Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 341 (1986) (finding protection of Puerto Ricans from evils of gambling to be substantial governmental interest); *Central Hudson*, 447 U.S. at 568–69 (indicating that energy conservation is substantial governmental interest).

146. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,472 (noting that most commentators agree that FDA meets substantial interest prong). The FDA notes that there has been little resistance to its assertion that this prong of the *Central Hudson* test is met. *Id.*

proves that advertising influences children's consumption of cigarettes and smokeless tobacco.[147] The FDA also contends that it need not prove empirically that advertising is directly linked to tobacco consumption by minors.[148] Thus, the FDA concludes that the overwhelming weight of evidence, coupled with ordinary common sense, is enough to conclude that its regulations materially advance the government's substantial interest in curbing children's consumption of tobacco.[149]

Arguably, advertising may affect consumption; if not, why would manufacturers promote any product in this fashion? On the other hand, some commentators argue that many causal factors contribute to the incidence of tobacco use among minors and that it is impossible to conclude that advertising alone facilitates this "habit."[150] As the FDA concedes, the use of tobacco by parents, peers, and role models significantly influences a child's decision to smoke.[151] The FDA counters, however, that a bombardment of images play on the psyche of children, creating the belief that everyone smokes and that they should also.[152] The FDA also contends that ads depicting people smoking while socializing augments this belief.[153] Moreover, the FDA, as well as many other commentators, harshly criticize tobacco advertisers' use of cartoons to promote their

147. *See id.* at 44,475–88 (citing multitude of sources to support proposition that advertising influences children's tobacco consumption).

148. *See id.* at 44,474 (citing United States v. Edge Broadcasting Co., 509 U.S. 418, 434–35 (1993)).

149. *See id.* at 44,474–75 (citing Metromedia Inc. v. City of San Diego, 453 U.S. 490, 509 (1981)).

150. *See* Richard Blatt, *A Look at Selling Tobacco: Curbing Ads Won't Work And It's Unconstitutional, Madison Avenue Isn't the Reason That Kids Smoke*, WASH. POST, Sept. 8, 1996, at C3 (listing many other factors including easy access and parental use of tobacco to conclude that there "is no persuasive evidence that advertising is a significant cause of teenage smoking"); Jeff McDonald & Miguel Bustillo, *Peer Pressure a Habit Hard to Kick, Say Local Youths Smoking: As Clinton Mounts an Offensive Against Underage Tobacco Use, Teens Report That It Wasn't Advertising That Got Them Started*, L.A. TIMES, Aug. 24, 1996, at B1 (interviewing kids who feel ads pale in comparison to peer pressure when it comes to influencing one to smoke); Editorial, *Smoke and Piety*, NAT'L L.J., July 4, 1994, at A18 (pointing to peer pressure as one of many factors responsible for tobacco use by minors).

151. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,488 (contending that "proper question is not: 'Is advertising the most important cause of youth initiation?' but rather, 'does FDA have a solid body of evidence establishing that advertising encourages tobacco use among adolescents such that FDA could rationally restrict that advertising?'").

152. *See id.* at 44,485–86 (arguing that messages reinforce social pressures to smoke). Moreover, some argue that although cigarette ads are banned from television and radio, they still permeate society and foster a "friendly familiarity," encouraging youngsters to smoke. *Id.* at 44,475.

153. *Id.* at 44,485.

products because they are appealing to naïve children who are ignorant to the dangers associated with tobacco use.[154] Opponents of the FDA restrictions, however, refute this contention by pointing to other countries which have initiated similar bans on advertising that may have actually contributed to increased usage by minors and adults alike.[155]

The tobacco industry and its supporters claim that ads are used to garner consumer loyalty and to facilitate brand recognition among the adult market.[156] Advertisers argue that since imagery plays a predominant role in the promotion of tobacco products to adults, tobacco companies subject to such stringent restrictions will lose an important tool allowing for differentiation of product and market share.[157] The FDA acknowledges

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154. *Id.* at 44,480. The most damaging evidence against the tobacco industry to date is the surfacing of confidential documents depicting marketing strategies that target 'pre-smokers' and 'learners' (presumably ages 14-18) for the Camel campaign. *Id.*; *see CBS Morning News: Memo Shows Tobacco Industry Knew Effects Advertising Had on Children* (CBS television broadcast, Apr. 23, 1996) (reporting on newly discovered evidence that helps anti-tobacco advocates). Anti-tobacco proponents argue that it is not a coincidence that 85% of children who smoke buy the most advertised brands. *CBS Morning News: Memo Shows Tobacco Industry Knew Effects Advertising Had on Children* (CBS television broadcast, Apr. 23, 1996). Coincidentally, the FDA argues that although there is no conclusive proof that certain cartoon ads, like Joe Camel, cause children to pick up the smoking habit, there is data showing positive effects on youth's recognition and association with such characters. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,479 (citing to studies used by FTC in investigation of Joe Camel campaign). Although the FTC's unfair advertising investigation of the Joe Camel campaign was closed in June of 1994, some members of Congress have urged its reopening. *See* Press Release: Tim Roemer Urges FTC to Reopen Joe Camel Investigation, July 29, 1996 (asserting, along with other House members, that time is right to reopen investigation since FTC commissioners and chairmen who voted to close investigation have been replaced), *available in* 1996 WL 11123999.

155. *See* Freedom to Advertise Coalition, News Conference on President Clinton's Expected Announcement to Allow FDA Regulations of Tobacco Products (Aug. 23, 1996) (referencing other countries' failures to deter cigarette consumption through bans and restrictions on tobacco advertising), *available in* LEXIS News Library, Script File. It is contended that the FDA's limited analysis of foreign countries' experiences with tobacco restrictions is self-serving. *Id.* The Advertising Coalition argues that there are numerous studies which indicate that tobacco ads do not prompt individuals to smoke and countries that ban tobacco ads experience a very high incidence of youth smokers. *Id.*; *see* Richard Blatt, *A Look at Selling Tobacco: Curbing Ads Won't Work and It's Unconstitutional, Madison Avenue Isn't the Reason That Kids Smoke*, WASH. POST, Sept. 8, 1996, at C3 (citing countries "like Finland, Sweden, Norway, Iceland, Italy, Singapore, Australia and the former Soviet Union" where adolescent tobacco use rose after implementation of tobacco restrictions).

156. Freedom to Advertise Coalition, News Conference on President Clinton's Expected Announcement to Allow FDA Regulations of Tobacco Products (Aug. 23, 1996), *available in* LEXIS, News Library, Script File.

157. *Id.* Advertisers fear the threat to creative freedom as well as the adverse impact on business; namely, job loss. *Id.*

this problem; however, it contends that the billions of dollars spent on advertisements not only go to promote brand loyalty, but also to induce people, including minors, to smoke.[158] As a result, ads filled with seductive and attractive imagery manipulate and prompt children to pick up this deadly vice. For this reason, the FDA argues that elimination of such ads will directly and materially curb this influence over children, thereby satisfying the third prong of the *Central Hudson* test.[159] Despite the FDA's argument, such conclusionary evidence, coupled with other obvious influences such as peer pressure, may undercut all of the research the FDA has compiled to prove this circumstantial link.[160]

In addressing this prong of *Central Hudson*, the Supreme Court has vacillated on the extent of proof needed to substantiate whether the restrictions will materially advance the stated interest.[161] Nonetheless, it is

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158. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,475 (referring to $6.1 billion tobacco ad campaign). *But see Tobacco Firms Spent Less in '94 to Promote Cigarettes in U.S.*, WALL ST. J., Oct. 10, 1996, at A20 (signifying tobacco industry's substantial spending drop in marketing). Yet, anti-tobacco forces claim that the spending cuts did not impact the images that are most influential to kids like billboards and T-shirts. *Id.*

159. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,467–68 (arguing that images lure children into smoking habit).

160. *See* Martin Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 619–20 (1996) (noting that any evidence proffered by tobacco industry to disprove "directly-advance" prong of *Central Hudson* test is unnecessary since burden is on government). Thus, when the tobacco industry claims that advertising is used to shift market share, this evidence need not be proved. *Id.* Conversely, if the FDA argues that the tobacco industry's billion-dollar ad campaign is to tap into the kiddie market, the FDA must prove this assertion.

161. *See Posadas*, 478 U.S. at 341 (finding that empirically void record did not hurt legislative determination that regulation directly advanced interest); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68–75 (1983) (concluding without applying third prong that *Central Hudson* test was met); Metromedia, Inc. v. San Diego, 453 U.S. 490, 508–9 (1981) (explaining that although "meager record" does not show nexus between traffic safety and elimination of billboards, legislative judgment is not so manifestly unreasonable as to satisfy third prong). *But see 44 Liquormart*, 116 S. Ct. at 1509 (opining that evidence must show significant relationship between alcohol consumption and liquor price ban). Justice Thomas took issue with this anomaly in *44 Liquormart* by intimating that the weight of the truth is in the eye of the beholder. *See 44 Liquormart*, 116 S. Ct. at 1520 (Thomas, J., concurring in part and concurring in judgment) (indicating that third prong allows for result-oriented judgments by noting that "a court more inclined to uphold the ban here could have pointed to [expert opinions] in support" of contrary decision). Justice Thomas noted that the plurality opinion in *44 Liquormart* required significant evidence to sustain the assertion that price bans would "reduce market-wide consumption," while previous decisions assumed that advertising bans decreased consumption without question. *Id.* at 1517–18 (Thomas, J., concurring in part and concurring in judgment). Presumably, for Justice Thomas, this is just one more reason to do away with such a balancing test.

now clear that a closer analysis of the evidence will be considered by some members of the Court in determining this prong of the *Central Hudson* test.[162]

Recognizing that there is no conclusive proof of advertising's direct link to tobacco use,[163] the FDA is quick to assert that they have compiled more evidence "than any that existed in any of the cases in which the Supreme Court upheld restrictions on commercial speech."[164] Further, the FDA notes that "[v]irtually every court that has examined the issue has held that there is a direct connection between advertising and demand for the product advertised."[165] Finally, after citing to *Central Hudson* and *Posadas*, as well as various other cases decided before *44 Liquormart*, the FDA contends that Justice Stevens's principal opinion in *44 Liquormart* apparently approves of such a construction.[166]

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162. *See 44 Liquormart*, 116 S. Ct. at 1502 (discussing prior cases dealing with material advances of state's interest). Justices Kennedy, Souter and Ginsburg joined this part of Justice Stevens's opinion. *Id.* Thus, although this is only a plurality opinion, these Justices, taken together with Justice Thomas's ill regard for restrictions on non-misleading and legal commercial speech, can conceivably constitute a majority in future cases involving commercial speech restrictions.

163. *Cf.* Jef I. Richards, *Politicizing Cigarette Advertising*, 45 CATH. U. L. REV. 1147, 1153 (1996) (indicating that scientific studies have failed to establish direct link between cigarette advertising and smoking, but have linked smoking to family influence and peer pressure). Professor Richards believes the argument that advertising influences children to smoke is overstated because "no study has proven that ads *cause* children to smoke even though more research has been conducted regarding the effects of tobacco advertising on children than on any other 'vulnerable' group." *Id.* at 1155.

164. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,475.

165. *Id.* at 44,493.

166. *Id.* at 44,494. The FDA's reading of this troublesome evidentiary prong's applicability prior to *44 Liquormart* is exemplified in Justice Thomas's criticism of *Central Hudson*. *See 44 Liquormart*, 116 S. Ct. at 1520 n.9 (Thomas, J., concurring in part and concurring in judgment) (finding inconsistencies in proposition that advertising promotes consumption). The plurality in *44 Liquormart* states that common sense is not evidence and will be treated as such unless the record suggests that regulations will significantly advance the stated interest. *Cf. 44 Liquormart*, 116 S. Ct. at 1509 (evaluating record for evidence to support assertion that "advertising ban will significantly advance State's interest in promoting temperance"). Consequently, it is futile for the FDA to rely on the assertion that common sense dictates that advertising promotes consumption, even if prior cases have said as much. Unfortunately, this logic begs the question of what constitutes significant evidence and how much is necessary to prove a case under this prong. However, Justice Stevens did not leave reviewing courts devoid of any guidance. Justice Stevens made a rather lucid point in concluding that the regulation in *44 Liquormart* lacked support by reasoning that the State failed to even identify how effective the speech-restrictions would be. *See id.* at 1510 (opining "that any connection between the [liquor advertising] ban and a significant change in alcohol consumption would be purely fortuitous"). Obviously, the FDA does not know, and does not even pretend to know, how effective the

Nevertheless, if the United States Supreme Court addresses the constitutionality of the FDA restrictions of tobacco advertising, the FDA will be forced to justify its position by using circumstantial evidence to persuade the Court that tobacco ads not only influence children, but do so to a material degree. Although the FDA may be afforded some deference[167] based upon its findings, the FDA still may not have enough proof to sustain its regulations.[168] Since the efficacy of the restrictions could conceivably fail in curbing tobacco use by minors, the FDA may be unable to prove that the regulations directly and materially advance its stated interest in protecting children from tobacco. Moreover, because the FDA cannot say for certain that the restrictions will work or, at the very least, roughly estimate their impact, the regulations must fail under a stricter application of the *Central Hudson* test.[169]

3. Are the Restrictions on Tobacco Speech Narrowly Tailored?

To satisfy this part of the *Central Hudson* test, there need not be a perfect fit between the restrictions on tobacco advertisements and the goal of curbing tobacco use by minors; the FDA is merely required to

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speech restrictions will be in curbing tobacco use by minors. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed. Reg. 41,314, 41,314 (1995) (explaining that objective of rule is to reduce tobacco use by minors in half; however, if rule does not fulfil goal, FDA may take additional measures to help achieve reduction in tobacco use by minors). Thus, this may "require . . . [the Court] to engage in the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances a . . . [government] asserted interest." *See 44 Liquormart*, 116 S. Ct. at 1510 (citing Edenfield v. Fane, 507 U.S. 761, 770 (1993)).

167. *44 Liquormart*, 116 S. Ct. at 1511 (recognizing "some room for exercise of legislative judgment") (citing Metromedia, Inc. v. San Diego, 453 U.S. 490, 507–08 (1981)). Although the principal opinion addressed the fourth prong of *Central Hudson*, the underlying question required whether deference would be given when expert opinions conflicted on an evidentiary point. *See id.* (determining that when expert evidence can "go either way," that alone does not grant governmental body right to choose what it believed to be reasonable choice). Justice O'Connor also undercut the usual deference given to legislatures in criticizing the *Posadas* decision. *See id.* at 1522 (O'Connor, J., concurring) (noting that legislative determination may not be enough to sustain commercial speech regulation).

168. *See* Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 621–22 (1996) (calling for strict judicial scrutiny in protection of First Amendment rights and noting that such oversight may result in "battle of the experts"). Under this approach, the question then becomes whether the reviewing court acted appropriately by adopting an expert's opinion that contradicts a legislative decision. *Id.* at 622–23 n.163. Professor Redish notes, however, that it is appropriate for the judiciary to make such determinations "given the First Amendment rights [that] are implicated." *Id.*

169. *44 Liquormart*, 116 S. Ct. at 1509 (reiterating *Central Hudson* test prongs and elaborating that "commercial speech regulation 'may not be sustained if it provides only ineffective or remote support for the government's purpose'") (citation omitted).

show that the restrictions are reasonable.[170] In support of this requirement, the FDA contends that the restrictions in question are "carefully crafted to focus on those media and aspects of advertising that children are routinely exposed to, . . . while leaving informational aspects of the advertising largely untouched."[171] For example, the restrictions do not ban advertisements per se; they merely restrict the use of color and imagery or product identification in venues accessible to children.[172]

Thus, the FDA argues that it has chosen the path of least resistance by not banning tobacco or tobacco advertisements by allowing for "alternative channels" of communication.[173] Regardless, if "the regulation imposes too great and unnecessary prohibitions" on speech that can be achieved through "less burdensome alternatives," the restrictions must

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

171. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,497. It appears that the FDA has placed considerable weight on an information/non-information dichotomy that it contends can be distinguished between verbal/written and non-verbal/images and color, respectively. *See id.* (arguing that FDA is adopting restrictions which allow for "all the informational functions that are protected by First Amendment"). However, the FDA's reliance on this dichotomy is not as apparent in commercial speech cases. *See 44 Liquormart*, 116 S. Ct. at 1508 (quoting various commercial speech cases without differentiating ideas or images from information). Arguably, information may flow from images and color as much as through words. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 647 (1985) (stressing that "use of illustrations or pictures in advertisements serves important communicative functions"). The *Zauderer* Court went on to recognize that commercial illustrations were protected under the First Amendment because such non-verbal communications "also serve to impart information." *Id.* Moreover, Justice Stevens in *44 Liquormart* noted that the "general rule is that the speaker and the audience, not the government, assess the value of the information presented." *44 Liquormart*, 116 S. Ct. at 1508. Therefore, it is possible that images and color are valuable adjuncts to the information presented without which the speaker and audience would find tobacco advertisements worthless.

172. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,497. In particular, the FDA notes that it is not banning outside advertising, it is preventing children from viewing certain images harmful to them. *Id.* In addition, restrictions on imagery and color in periodicals are only restricted to certain publications, while others catering primarily to adults are not. *Id.* The FDA also contends that bans on product brands will not prevent companies from using their corporate logos to promote good will through sponsorship of events. *Id.* Finally, prohibitions on non-tobacco products such as T-shirts are necessary since "it is the young who find particular value in these items." *Id. But see* Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 627 (1996) (reasoning that "tombstone limitations may actually be even more pernicious than a total ban on tobacco advertising . . . because they give the illusion of allowing communication while in reality [they] significantly interfer[e] with the message conveyed by that communication").

173. *See 44 Liquormart*, 116 S. Ct. at 1521 (O'Connor, J., concurring in judgment) (noting that "[i]f alternative channels permit communication of the restricted speech, the regulation is more likely to be considered reasonable").

fail.[174] In this vein, the FDA contends that in the last thirty years our society has seen a rise in the number of children smoking; therefore, it is undeniable that previous measures have failed to curb tobacco use by minors.[175]

Assuming, arguendo, that the restrictions do materially and directly advance the FDA's goal of protecting children from tobacco addiction, the FDA's determination that no other less-burdensome alternatives are as effective is questionable.[176] Additionally, opponents of tobacco advertis-

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174. *Id.* The FDA asserts that the Supreme Court has "made clear" that speech restrictions will be found unreasonable if there are, "at least in part . . . numerous and obvious less burdensome alternatives to restrictions on commercial speech." Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,499 (citing Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2380 (1995)). *But see 44 Liquormart*, 116 S. Ct. at 1518–19 (Thomas, J., concurring in part and concurring in judgment) (alluding to Court's adoption of "stricter, more categorical interpretation of the fourth prong of *Central Hudson* than that suggested in some of [its] other opinions [including *Went For It*]"). From Justice Thomas's perspective, direct regulation either by "banning a product, rationing it, taxing it, controlling its price, or otherwise restricting its sale in specific ways, would virtually always be at least as effective in discouraging consumption" as restricting the advertisement of the product. *Id.* (Thomas, J., concurring in part and concurring in judgment). Thus, all commercial restrictions would necessarily fail the fourth prong. *Id.* (Thomas, J., concurring in part and concurring in judgment).

175. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,499 (noting that measures including counter speech, self-imposed advertisement bans by tobacco industry, and age restrictions on purchase of tobacco products have had little or no impact on smoking by young people). The FDA claims that counter speech is drowned out by the allure of targeted tobacco ads that "fosters the perception that experimentation with tobacco by young people is expected and accepted." *Id.* Moreover, voluntary educational campaign ads, according to FDA reasoning, have had minimal impact on getting kids to stop smoking as evidenced by the increase in tobacco use by America's youth. *Id.* Although the FDA believes that strict enforcement of laws prohibiting the sale of tobacco to minors is important, advertising continues to play a motivating role in tobacco use by young people and must be dampened. *Id.* Recognizing the importance of stopping access of tobacco products to children, the agency notes that the provisions are not only aimed at advertising, but also to prevent access. *Id.*

176. *See id.* at 44,500 (citing to precedent without distinguishing cases that are adverse to their position). Clearly, the FDA was careful not to cite *Posadas* as granting them discretion when determining what is a reasonable fit. The FDA instead relies on *Edge* for the proposition that a speech-restrictive measure is narrowly tailored when the government's regulation is the most effective way to achieve its end. *Id.* Thus, to reach this end, the FDA strategically addressed each alternative to prove that no other measures are as effective as the restrictions on tobacco advertising, thus arriving at the logical conclusion that no less burdensome alternatives are available. *Id.* This argument lacks support, however, because the FDA must disprove recent statistics showing that other alternatives are as effective if not more so. *See* John Schwartz, *5 Million Young Smokers Risk Early Death*, WASH. POST, Nov. 8, 1996, at A3 (reporting that smoking rates among young people have de-

ing limitations argue that tailoring ads so that they are not appealing to kids robs much of their appeal to adults.[177] Tailoring essentially eliminates not only the intended appeal to adults, but any informational qualities the ad may reap from the imagery and color that attract the lawful purchaser to view the ad in the first place.[178] Tobacco companies may argue that even though the regulations are not designed to prevent adult members of the public from receiving truthful, non-misleading tobacco messages, the FDA regulations may nevertheless shield the government's anti-tobacco policy "from the public scrutiny that more direct, non-speech regulation would draw."[179] From a policy standpoint, the restrictions seem justifiable, despite the FDA's and the tobacco industry's conflicting positions. However, from a legal standpoint, the restrictions are both manifestly under-inclusive[180] and over-inclusive, and may not pass constitutional muster.

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creased in California and Massachusetts because of rigorous educational campaigns and tobacco tax increases). Both states have lower smoking rates among teens than the national average. *Id.* For example, in California the smoking rate dropped 15% while other states saw an increase of 6% during the same period. *Id.* Although just below the national average of 21.7%, Massachusetts' has seen a 20% drop in teenage smoking since instituting a 51 cent per-pack tax on cigarettes. *Id.* Although the FDA takes great pains to refute many of the proposed "least-restrictive means" as being as effective as the advertising ban, it fails to address the possibility of direct regulation such as taxation. This is extremely relevant considering that both Justices Stevens and O'Connor have placed special emphasis on such a less-burdensome alternative under the fourth prong of *Central Hudson*. *44 Liquormart*, 116 S. Ct. at 1510, 1521–22.

177. *See All Things Considered: Clinton Strengthens FDA's Anti-Cigarette Hand* (NPR Radio Broadcast, Aug. 23, 1996) (interviewing Dan Jaffe from Association of National Advertisers, who stated that new rules make ads "invisible"), *available in* 1996 WL 12726406. Thus, Jaffe argues, "no one's going to spend a dime on advertising that's not going to work and so this is a very, very serious proposal that goes far beyond what the [Clinton] administration admits it's doing." *Id.* Imagery and color obviously play a significant role in marketing and without which advertisements are, arguably, as effective as a motivational speaker with a monotone voice. Consequently, these restrictions may have the effect of an indirect ban on tobacco advertisements. *Id.*

178. *See* Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 627 (1996) (criticizing text-only ads as "blatantly content-based" which "significantly interfere with communicator's ability to reach the intended audience"). Professor Redish contends that tombstone ads have serious implications because they do not allow a tobacco company to "advocat[e] the activity of smoking." *Id.*

179. *Cf. 44 Liquormart*, 116 S. Ct. at 1511 (citing regulation of gambling advertisements in *Posadas* to show government's ability to shield anti-gambling policy from public).

180. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,502 (refusing to include regulation of on-line tobacco advertising through Internet). As it stands, the FDA will not regulate tobacco ads over the Internet since the information superhighway is within the province of the FCC under the "Cigarette Act" and "Smokeless Act," the Department of Justice, and the Federal Trade Commission (FTC). *Id.* Thus, the FDA is non-

a. Adult v. Child-Only Publications and the Glamorization of Tobacco Sponsorship

The new FDA regulations apply to magazines that have readerships of at least fifteen percent youth, or of two million young readers.[181] This restriction on publications dramatically illustrates how broad these provisions will be. The FDA contends that the restrictions that attach to publications are reasonable.[182] However, the rule will preclude at least eighty-

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committal as to what measures it will take if advertising were to become prevalent on this medium and the appropriate agencies do not impose restrictions. *Id.* It could be argued, therefore, that regulations are manifestly under-inclusive for the sole reason that the restrictions do not prevent minors from being exposed to tobacco ads over the Internet. This, presumably, poses the paradoxical situation of allowing billboards marketing Joe Camel cigarettes over a medium that appears to be the fastest growing source of information the nation's youth use today, but not over conventional billboards that may be less ubiquitous. *See* David Greising, *The Race Around the FDA: How Cigarette Companies Aim to Bypass New Federal Regs on Promotion and Ads*, BUS. WK., Sept. 9, 1996, at 38 (indicating that direct marketing over Internet is "a natural pipeline to the nation's young people"). The result is that it is impossible to narrowly tailor such sweeping restrictions and any significant advancement of the interest under the third prong of *Central Hudson* is severely undercut.

181. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,513–14 (placing limitations on publications that have 15% youth readership or more than 2,000,000 youth readers under age eighteen, while construing such limitations as reasonable).

182. *Id.* at 44,514. The FDA notes that the exceptions for adult publications minimize the effects of the regulation and the text-only format "will have significantly less impact on adults than on young people" because adults will be able to spot or search for the information they need. *Id.* at 44,515. The FDA attempts to justify the 15% cut-off by pointing to census figures showing that young people between the ages of five through seventeen make up this same percentage of the population. *Id.* at 44,516. Thus, if youth readership surpasses this magical number for any given publication, it must "be viewed as having particular appeal to young readers." *Id.* However, it is utterly impossible to measure the readership of widely circulated magazines like *Rolling Stone*, *Time* and the like. *See id.* at 44,514 (acknowledging commentary from magazine and newspaper industries that illustrates difficulty in gauging readership as opposed to subscribers, yet chastising them for not providing any solutions); *see also* Dominic Bencivenga, *Groups Cry 'Censorship,' But Regulation Is Expected*, 214 N.Y. L.J. 5, 5 (1995) (questioning methodology of calculating readership and concluding it would be impossible). Obviously, these magazines generally have wide readership since they are shared, given away, or found in business establishments such as coffee shops, doctors offices, hair salons and the like. The rules also leave a vague impression of the scope of coverage this publication provision requires. For example, many adult magazines like *Playboy* and *Penthouse*, which cater to adults only, could now or in the future fall under the general category of youth readership. Although the FDA does not express any concern with publications which have intended audiences and only want to reach advertisements young people cannot avoid, this still does not explain why potential unrestricted ads in publications sought out by young readers are permissible. Once the FDA realizes this problem it could conceivably require the same limitations on these publications as well. *See* Regulations Restricting the Sale and Distribution of Cigarettes and

five percent of adults who actually subscribe to these magazines from receiving commercial messages deemed harmful to children.[183]

Other provisions are equally overbroad. For instance, restrictions on tobacco sponsorship of events such as NASCAR racing[184] are overreaching.[185] The FDA contends that even though attendance and viewership of such events by minors are substantially below the percentiles[186] set out for publications, the prolonged exposure to such events warrants the restrictions.[187] However, the FDA does not provide any empirical or other evidence to support such an assertion. Furthermore, the tobacco industry can argue that shorter, eye-catching messages, such as a magazine advertisement, are more effective and likely to persuade than commercial

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Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,514 (claiming that FDA can and will take further action to restrict exposure of tobacco ads to kids if merited). Thus, a potential situation could exist where pornographic expression has greater protection than truthful, non-misleading commercial speech under the First Amendment.

183. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,514. One constitutional scholar has rebuffed such an attempt by opining that "established First Amendment doctrine makes clear that government may not reduce adults to status of children, by regulating expression directed primarily at adults on the grounds that minors may also be exposed to it." *See* Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 608 (1996) (citing Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 131 (1989)); *see also* Butler v. Michigan, 352 U.S. 380, 383 (1957) (finding legislation limiting type of books sold insofar as not to corrupt "morals of youth" unconstitutional since result would "reduce adult population . . . to reading only what is fit for children"). *But see* FCC v. Pacifica Found., 438 U.S. 726, 728 (1978) (justifying limitations on indecent material heard over airwaves since regulation did not foreclose all avenues of receiving such material).

184. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,529 (discussing tobacco industry's promotion of and relationship to NASCAR racing).

185. *See* Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 607 n.89 (1996) (arguing that tobacco sponsorship regulations may violate First Amendment based on reasons given by government for such restrictions). Professor Redish thinks it impermissible under constitutional jurisprudence to regulate "sponsorships for an impermissible speech-related reason." *See id.* (citing United States v. O'Brien, 391 U.S. 367 (1968)).

186. *But see Newly-Released Data Show Rodeos Popular with Children: Senators Asked to Keep Rodeos Tobacco-Free*, U.S. NEWSWIRE, Sept. 26, 1996 (indicating that individuals between the ages of 12 and 17 make up one third of rodeo attendees, 21% of television viewers, and over half of all radio listeners), *available in* 1996 WL 12123104. The Tobacco-Free Kids campaign is using these timely statistics as ammunition in getting members of Congress to support the FDA and approving the advertising restrictions. *Id.*

187. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,529.

messages viewed continuously while one attends sporting events like NASCAR.[188]

b. T-shirts and Other Non-Tobacco Paraphernalia

Obviously, restrictions on T-shirts and caps with tobacco logos reach adults who choose to identify with their choice of brand product. The FDA still contends, however, that non-tobacco branded items are problematic because these items are usually given away to promote tobacco products and they easily fall into the hands of children.[189] Although this argument may appear credible, there are many other obvious ways of preventing minors from becoming "walking billboards," such as dress code enforcement in schools, parental guidance, and policies instituted by tobacco industry to restrict offers to adults only. Although these measures may not solve this problem entirely, they will most likely have the same effect on tobacco consumption as the FDA regulations comport, without violating the First Amendment.

c. Obscuring Outside Advertising

Finally, the FDA asserts that billboards are ubiquitous and especially problematic when close to schools and playgrounds because they overemphasize the use of tobacco to young children.[190] Although the FDA admits that these restrictions effectively ban billboards in most urban areas,[191] the FDA explains that this result is an unintended conse-

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188. *Cf.* John P. Jones, *Conventional Wisdom May Not Ad Up*, SYRACUSE HERALD AM., Apr. 7, 1996, at B5 (explaining recent study showing that "money spent aiming for long-term psychological attachment on the part of the consumer" may be waste of advertising dollars). An advertising professor's recent study of commercial exposure and its effect on consumers has concluded that a "single advertising exposure" over a period of seven days may be just as effective as a media blitz for a longer period of time. *Id.*

189. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,521 (claiming that promotional products get into hands of children because they are usually given away). Thus, this creates a "new advertising medium . . . which can come into schools or other locations where advertising is usually prohibited." *Id.* To prove the prevalence of such a new medium, the FDA cites to a 1992 Gallup poll finding that 27% of adolescent nonsmokers and 44% of adolescent smokers owned at least one such item. *Id.* at 44,525.

190. *Id.* at 44,502. This provision includes, but is not limited to, "billboard, posters, or placards, placed within 1000 feet of any public playground or playground in a public park, elementary school, or secondary school." *Id.* Some commentators have agreed with such a restriction as it relates to time, place, and manner. *See* Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 607 n.89 (1996) (evaluating such rules as not giving rise "to serious First Amendment problems because they constitute appropriate time-place-manner restrictions").

191. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,506.

quence.[192] However, intent is not a consideration under *Central Hudson* when examining the fit between the ends and the means of the regulation.[193] Undeniably, there are numerous other ways to prevent such tobacco promotion around schools and playgrounds, including action by school administrators, parents, and community leaders. Even if these measures did not prove as effective as restrictions like those voluntarily observed by the tobacco industry, they are still more narrowly tailored than those found in the new FDA regulations.[194] Most, if not all, of the above mentioned FDA regulations prevent adult consumers from making commercial choices.[195] Moreover, according to the *44 Liquormart* decision, there can be no leniency or deference given to the FDA's decision to regulate tobacco advertising simply because is deemed deleterious.[196] Thus, any contention by the FDA that it should be given deference because of the harmful consequences of smoking should be dismissed.

Although few disagree with the notion that society must play a role in preventing children from smoking, the First Amendment should not be

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192. *Id.*

193. *See 44 Liquormart*, 116 S. Ct. 1522 (O'Connor, J., concurring in judgment) (construing relationship between asserted goal and speech restriction used to reach that goal with caution).

194. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,502–03 (discussing "Cigarette Advertising and Promotion Code" by tobacco industry to include self-imposed ad bans within 500 feet of schools and playgrounds).

195. *See id.* at 44,500 (determining that rules affect "all commercial uses of the brand name of a product (alone or in conjunction with other words), logo, symbol, motto, selling message, or any other indicia of product identification"). Arguably, this commercial speech restriction, like that found in *Central Hudson*, would not even allow for commercial speech that would educate children about the advantages of non-smoking. *See Central Hudson*, 447 U.S. at 570 (holding over-inclusive regulation suppressing all advertising by gas company, including that which promotes state's interest in conservation of energy). Furthermore, the restrictions are over-inclusive since they curtail commercial information from reaching lawful purchasers. As noted above, all appeal will be absorbed from the ads, leaving one ad virtually indistinguishable from the next. The result will be that many of the ads will go unnoticed in publications, billboards, and other media affected by these regulations. It appears that the FDA has not carefully weighed the enormous burden these provisions inevitably bear on truthful, non-misleading speech with the alleged benefits of reducing tobacco use by minors. *Cf. 44 Liquormart*, 116 S. Ct. at 1521 (O'Connor, J., concurring in judgment) (explaining that "regulation must indicate a 'carefu[l] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition'") (quoting City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993)).

196. *See 44 Liquormart*, 116 S. Ct. at 1513 (finding no vice exception to commercial speech doctrine). Justice Stevens explains that a "vice" exception would "be difficult, if not impossible, to define." *Id.* According to Justice Stevens, there are too many products that pose health threats or could be categorized as immoral. *Id.* Further, allowing a "vice" exception would permit legislatures to pronounce whatever lawful activities they deem unworthy of protection as a vice in order to censor commercial speech. *Id.*

burdened when there are many other equally effective ways to achieve this goal. The FDA is charged with protecting the health of this nation, but this can *only* be accomplished by instituting *constitutional* measures that prevent children from taking up the dangerous habit of smoking. Thus, those measures that infringe upon the First Amendment, which the FDA terms as "common sense" provisions, are anything but common and are highly unreasonable.

B. *Proposed Alternatives to the FDA Regulations*

Although it appears that the current FDA rules impermissibly tread on the tobacco industry's First Amendment rights, some regulation on tobacco advertising may still be necessary in order to resolve this impasse. As a result, alternatives to the promulgated FDA regulations need to be examined in order to determine constitutional solutions.

1. Mega-Deal: Federal Legislation As a Form of Regulation in Return for Tobacco Industry Immunity

The tobacco industry has been riding a perilous wave of uncertainty that may eventually lead to financial ruin.[197] Playing on this fear, various governmental officials have proposed a controversial deal that would halt FDA regulations and grant the tobacco industry special immunity from litigation for fifteen years.[198] The draft proposal calls for the tobacco industry to pay an estimated $6 million to $10 million a year for fifteen years to fund an anti-tobacco campaign and reimbursements for Medicaid, which in turn would be distributed to individual states.[199] In return, tobacco companies would be immune from product liability during the years in which payments were being made to the federal government.[200] As an incentive to get tobacco companies to settle, the draft proposal includes terms that would prohibit the FDA from regulating tobacco products, yet some advertising restrictions would stay in place.[201]

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197. *See* James F. Peltz & Denise Gellene, *News Analysis: Industry Fears Lawsuits More Than Clinton*, L.A. TIMES, Aug. 24, 1996, at A1 (commenting on tobacco industry's growing litigation problems).

198. *See Face the Nation: Interview: Mississippi Attorney General Mike Moore Discusses a Possible Deal Between the Government and the Tobacco Industry* (CBS television broadcast, Sept. 1, 1996) (discussing media leak concerning idyllic compromise between tobacco industry, plaintiffs, state attorneys general and members of 104th Congress), *available in* 1996 WL 8024593.

199. *Id.*

200. *Id.*

201. *Id.* The settlement talks between big tobacco, federal government players and state attorney generals have continued up until publication of this Comment, and have reached monumental proportions. *See Tobacco Industry Would Offer Broad Concessions*

Obviously, there are many legal, equitable, and ethical questions that a deal of this size would create, not to mention the complexity such a settlement presents.[202] One governmental official, for example, expressed concern over the feasibility and the breadth of such a proposal.[203] Another official was particularly concerned with the rumored deal because it required transferring state claims to Congress, which is heavily influenced by large corporations, including tobacco companies.[204] In addition, as a matter of public policy, it would be unfair to give the tobacco industry "immunity from obeying the same consumer fraud and antitrust laws that every other business must obey."[205]

Whatever fears a large settlement of this kind may garner, the practical implications have been somewhat blurred. This deal could potentially be classified as a lose/lose situation. For example, not only will the tobacco industry pay out potentially billions of dollars to comply with unconstitutional advertising restrictions, but society loses on a larger scale considering the immoral nature of taking money from an industry so that it can continue to kill thousands of people each year.[206]

2. Tobacco Industry Self-Regulation or Voluntary Ban?

Immediately after the *44 Liquormart* decision, the tobacco industry began to strongly urge the implementation of its own voluntary code on

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to Settle Suit, SAN ANTONIO EXPRESS-NEWS, May 1, 1997, at A13 (reporting negotiations ongoing in Chicago). According to sources privy to the talks, the tobacco industry is willing to accept all of the advertisement limitations the FDA demands and pay up to $1 billion a year to fund an anti-tobacco campaign in return for "blanket immunity from virtually all lawsuits." *Id.*

202. *See* Claudia MacLachlan, *Tobacco's Road Is Smooth: FDA Regs Face Legal Fight*, NAT'L L.J., Sept. 9, 1996, at B1 (quoting plaintiff's attorney from Medicaid suit as saying that proposed legislative solution would be difficult to reach consensus considering that "there are so many different interests to protect"). Although the tobacco industry is faced with problematic litigation, many believe that the industry "will have to lose some big cases before it is willing to come to the table." *Id.*

203. *See Face the Nation: Interview: Representative Henry Waxman, Steven Parrish of Philip Morris and Charles Blixt of R.J. Reynolds Company Discuss a Possible Deal Between Tobacco Companies and the U.S. Government* (CBS television broadcast, Sept. 1, 1996) (interviewing Rep. Waman, who sees no hope for such legislation given that it does not help solve specific problem of underage smoking), *available in* 1996 WL 8024592.

204. *See Ad Hoc Hearing on Tobacco*, 142 CONG. REC. S11,443–44 (daily ed. Sept. 26, 1996) (statement of Hubert H. Humphrey III, Minnesota Attorney General).

205. *Id.* at S11,444.

206. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,398 (claiming that over 400,000 people die from tobacco related deaths yearly).

advertising practices.[207] To keep the FDA at bay, tobacco giant Philip Morris agreed that Congress should sign into law its own self-imposed regulations similar to the FDA restrictions.[208] The Clinton administration, however, rebuked these self-imposed provisions as inadequate measures in preventing tobacco use by minors.[209] However, any legally imposed restrictions on tobacco advertising and distribution would be far from lenient.[210] Critics of the proposal were surprised by Philip Morris's move, since this compromise could effectively waive their First Amendment right to engage in commercial speech.[211]

In addition, the nation's second largest tobacco company, R.J. Reynolds, has offered to voluntarily submit to regulations similar to those proposed by Philip Morris, but these regulations would instead be centered around tougher restrictions against tobacco sales to minors.[212] However,

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207. *See Philip Morris'[s] Proposal*, NAT'L L.J., May 27, 1996, at A8 (explaining self-imposed restrictions by "nation's largest tobacco company" released two days after *44 Liquormart* decision); Ira Teinowitz, *RJR Tobacco Proposes Voluntary Ad Restrictions: Talks in N.C. Aim to Fend Off New FDA Rules*, ADVER. AGE, Sept. 9, 1996, at 1 (comparing recent voluntary proposals with previous Philip Morris's ad restrictions); *see also* Kathryn Ericson, *Philip Morris Proposes Federal Tobacco Restrictions, but Only If FDA Butts Out*, West's Legal News, May 16, 1996 (detailing Philip Morris's tobacco advertising proposal), *available in* 1996 WL 265176. The provisions would allow:

1. A ban on cigarette vending machines and mail order sales;
2. A minimum age requirement of 18 under federal law to purchase tobacco products;
3. A ban on brand identification on [T]-shirts and hats;
4. A ban on outside advertising within 1000 feet of schools, public transportation, bus stops and terminals;
5. limitations on sponsorship of sporting and other events (unlike the FDA rules, race car and rodeo events would not be precluded since not deemed youth oriented);
6. A limit to ads in publications with 15% youth subscriber rates (unlike the FDA, which would require 15% readership or 2 million youth readers);
7. contributions of $250 million to help enforce rules by FTC, DHHS, and DOJ.

Id.

208. *See Philip Morris'[s] Proposal*, NAT'L L. J., May 27, 1996, at A8 (listing acceptable measures Philip Morris is willing to take to prevent FDA regulations).

209. *See id.* (indicating that tobacco proposal is not as stringent as FDA regulations).

210. *See* Editorial, *Free Speech Flaps*, WALL ST. J., June 24, 1996, at A14 (reporting author's amazement in Philip Morris's willingness to make advertising restrictions into "law of the land").

211. *See id.* (calling it egregious to sacrifice First Amendment while implicitly coercing others to do same); *see also* Alicia Mundy, *High-Stakes Showdown: Playing a Shrewd Smoke-Free-Kids Hand, Philip Morris Has the Media Right Where It Wants It*, MEDIAWEEK, May 27, 1996 (categorizing Philip Morris's proposal as "bombshell" while addressing complex situation where tobacco lobby is not as concerned about commercial speech as is advertising lobby), *available in* 1996 WL 8523292.

212. Ira Teinowitz, *RJR Tobacco Proposes Voluntary Ad Restrictions: Talks in N.C. Aim to Fend Off New FDA Rules*, ADVER. AGE, Sept. 9, 1996, at 1. R.J. Reynolds has

many critics are justifiably leery of the effectiveness of such voluntary codes because of the liquor industry's recent actions in breaching their own voluntary codes.[213]

3. Working Together: A Constitutional, Pragmatic Approach

There appear to be several pragmatic solutions to the problem of tobacco consumption by minors. Some of these ideas have repeatedly surfaced in the media, around kitchen tables, and in legislative debates around the country. These include eliminating the advertising expense deduction for tobacco companies,[214] raising the sales tax on tobacco products,[215] restricting vending machine sales,[216] imposing strict sanctions

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sought to develop a "model" state law which would require states to enforce laws preventing illegal sales of tobacco to minors in return for campaign funds to send anti-smoking messages to minors. *Id.* In addition, R.J. Reynolds is willing to go along with Philip Morris's proposals, but only on a voluntary basis. *Id.*

213. *See AMA to Seek Federal Action Ending TV Liquor Ads*, U.S. NEWSWIRE, June 27, 1996 (reporting on breach of 50-year voluntary broadcast ban by manufacturer of distilled spirits), *available in* 1996 WL 5622309; *All Things Considered: Seagram Defies TV and Radio Liquor Advertising Ban* (NPR radio broadcast, Oct. 13, 1996) (reporting on possible violations of self-imposed television and radio advertising ban by others in liquor industry), *available in* 1996 WL 12726827. Some have been highly critical of allowing the tobacco industry to police themselves as well. *See* RICHARD KLUGER, ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS 279 (1996) (referring to early voluntary Cigarette Advertising Code, initiated by tobacco companies to "blunt charge that industry was massively seducing minors to take up smoking," as riddled with loopholes); William D. Novelli, *FDA Rule Needed*, ADVER. AGE, Oct. 7, 1996, at 28 (criticizing recently proposed model law in North Carolina as just another "smokescreen of appearing to police themselves whenever they are threatened with effective regulation"). *But cf. Other Voices on Tobacco: Amateur Ads?*, ADVER. AGE, Oct. 7, 1996, at 28 (claiming that there is nothing wrong with voluntary code instituted by ad industry but does not want to get involved in tobacco business).

214. *See* H.R. 2962, 104th Cong. (1996) (proposing to amend Internal Revenue Code to forbid tobacco industry from deducting advertising expenses).

215. *See* Editorial, *Smoke and Piety*, NAT'L L.J., July 4, 1994, at A18 (opining that society could negatively affect tobacco consumption by raising cigarette cost through increased taxation); John Schwartz, *5 Million Young Smokers Risk Early Death CDC Report Says*, WASH. POST, Nov. 8, 1996, at A3 (commenting on success of measures to decrease tobacco consumption through increased taxation); *Statement by Tobacco-Free Kids on Oregon Ballot Measure*, U.S. NEWSWIRE, Nov. 6, 1996 (declaring that even though there is "general nationwide anti-tax sentiment," recent anti-tobacco measure raising taxes on cigarettes in Oregon proves Americans will support tax increases when children are benefitted), *available in* 1996 WL 12124331; *Saturday Today: Government Study Reveals That Underage Smoking Is on the Rise, Raising Taxes on Cigarettes Analyzed As a Potential Reduction Technique* (NBC television broadcast, Nov. 9, 1996) (quoting anti-tobacco proponent as saying "[f]or every 10 percent you increase [in] price," there is "[a] 4 percent decrease in consumption"), *available in* 1996 WL 11489347.

on underage sales of tobacco by retailers,[217] and criminalizing possession and use of tobacco by minors.[218] In addition, teaching tobacco awareness in schools, churches, and through governmental educational campaigns could conceivably enhance and complement these legal measures.

Like the FDA, anti-tobacco forces believe that this pragmatic approach is not enough, because more measures are needed to combat teenage use of tobacco. However, never before have the dangers of tobacco use been more publicly known and never has there been such an enormous anti-tobacco attitude that currently exists in the United States. In addition, both private and public political movements are creating change in public policy concerning tobacco.

As a result of the debate over tobacco advertising, stricter enforcement of current prohibitions of tobacco sales to minors are finally being touted as a way to curb cigarette use by minors.[219] The current national trend of criminalizing tobacco possession by minors is even more encouraging.[220] Organizations like the American Cancer Society have joined forces with other groups to continue the fight to keep kids off tobacco by pressuring members of Congress from accepting tobacco industry campaign contributions and demanding that Congress raise sales taxes on tobacco prod-

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216. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,427 (prohibiting vending machines that are accessible to children). This is one of the most pragmatic approaches the FDA has introduced to keep children from easily obtaining cigarettes.

217. *See* John Cunniff, *Commentary: Ad Ban May Be Illegal*, DAYTON DAILY NEWS, Sept. 3, 1996, at B6 (explaining that debate over FDA rules will prompt much criticism as being unnecessary since problem may stem from lax enforcement of laws prohibiting cigarette sales to minors).

218. *See* Youth Smoking Regulation Act, H.R. 2414, 104th Cong. (1995) (introducing bill that would criminalize tobacco possession by minors and violators would be required to pay fine, perform community service, or attend classes that teach hazards of smoking).

219. *See Saturday Today: Government Study Reveals That Underage Smoking Is on the Rise, Raising Taxes on Cigarettes Analyzed as a Potential Reduction Technique* (NBC television broadcast, Nov. 9, 1996) (recognizing need, as FDA has proffered, to enforce laws to restrict accessibility of tobacco through strict enforcement of laws prohibiting sales to minors).

220. *See* James L. Tyson, *Cities and Towns Enact Laws to Snuff out Teen Smoking: Local Measures Spread Across U.S. As Tobacco Use Rises Among Minors*, CHRISTIAN SCI. MONITOR, Mar. 12, 1996, at 3 (indicating legal trend to criminalize possession of tobacco by minors across United States). In some jurisdictions, first offenders will be given a warning and the tobacco product will be confiscated. *Id.* Repeat offenders may be required to appear in court or attend informational classes on the dangers of smoking. *Id.* However, if an offender is caught a third time, he or she may face a substantial fine or be required to perform community service. *Id.*; *see Teen Tobacco Possession Criminalized*, NAT'L L.J., Oct. 2, 1995, at A8 (citing various cities around America which have enacted ordinances criminalizing tobacco use by minors). The goal is to deter minors from smoking by establishing laws akin to those that prohibit alcohol consumption by minors. *Id.*

ucts.[221] Thus, as long as society continues to recognize the ill effects of tobacco use and the discussions become more open and frank, there is no real need to infringe upon the First Amendment to prevent our country's youth from making bad choices when it comes to tobacco use.[222]

V. CONCLUSION

The regulation of tobacco advertising has been a controversial issue for many years, yet never before has the debate been more turbulent or the tobacco industry more vulnerable to regulation. Thus, as tobacco use by minors increased, the FDA took action by promulgating regulations in an attempt to thwart tobacco consumption by minors. Although the FDA advertising rules have been touted as common sense provisions with reasonable limitations therein, many of the provisions may prove ineffective and may also violate the tobacco industry's commercial speech rights.

The Supreme Court has stated repeatedly, and most recently in *44 Liquormart*, that commercial speech must be protected under the First Amendment and that the government has a heavy burden to justify infringing upon this right. Nonetheless, the FDA has either ignored or contorted the Court's declaration by promulgating potentially unconstitutional regulations that attempt to prevent a "pediatric disease." Obviously, there is nothing wrong with preventing children from smoking. In fact, there are many constitutional ways our government can prevent both children and adults from picking up the smoking habit. Both

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221. *See NBC Nightly News: A New Group with Heavy Financial Support Begins Campaign Against Teen Smoking* (NBC television broadcast, Feb. 12, 1996) (reporting on Tobacco-Free-Kids campaign, which is privately funded by American Cancer Society and Robert Wood Johnson Foundation), *available in* 1996 WL 3637831.

222. *Cf.* United States v. Edge Broadcasting Co., 509 U.S. 418, 440 (1993) (Stevens, J., dissenting) (commenting on draconian speech-restrictions that could be alleviated through public awareness, not ignorance). Although Justice Stevens's comments in *Edge* relate to differences in state laws regarding the legality of commercial messages promoting gambling, they are relevant to the analysis of the restrictions on tobacco advertising. Justice Stevens wrote:

> In my view, the sea change in public attitudes toward state-run lotteries that this country has witnessed in recent years undermines any claim that a State's interest in discouraging its citizens from participating in state-run lotteries is so substantial as to outweigh respondent's First Amendment right to distribute, and the public's right to receive, truthful, non-misleading information about a perfectly legal activity conducted in a neighboring State.

Id.; *see* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1508 (1996) (opining that bans which target truthful, non-misleading commercial messages rarely protect legal consumers [presumably even illegal consumers] from such harms). Arguably, these bans "serve only to obscure an 'underlying governmental policy' that could be implemented without regulating speech.'" *Id.* at 1508. Thus, bans actually "impede debate over central issues of public policy." *Id.*

state and federal governments can start by raising the sales tax on tobacco, enforcing stringent laws prohibiting sales of tobacco products to minors, ban or limit vending machines sales, and criminalize tobacco possession by minors. Clearly, the available means of reducing tobacco consumption is within our government's control and within constitutional parameters. Therefore, it is time for the federal government, specifically the FDA, to rethink its position on restricting tobacco advertising before we spend any more money defending a plan that may not work and will likely be found unconstitutional.