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TOBACCO ADVERTISEMENTS AND COMMERCIAL SPEECH BALANCING: A POTENTIAL CANCER TO TRUTHFUL, NONMISLEADING ADVERTISEMENTS OF LAWFUL PRODUCTS

INTRODUCTION

The 1996 presidential election earmarked what may be the tobacco companies' toughest political and legal challenge to date. On August 23, 1996, President Bill Clinton announced as part of his campaign that the Food and Drug Administration (FDA) has broad jurisdiction to regulate cigarettes and smokeless tobacco because nicotine is an addictive drug.¹ Following a year-long drafting process, the FDA published a final rule on August 28, 1996 which restricts the sale and distribution of cigarettes and smokeless tobacco products.² The rule³ establishes eighteen as the national legal smoking age; bans vending machines and self-service displays in most locations; bans brand sponsorship of events; eliminates the sale and promotion of nontobacco merchandise; prohibits billboard advertising near schools; and restricts certain print media to a black-and-white, text-only format.⁴

Advertising regulations are not new to tobacco companies. Tobacco advertisements have been subject to an increasing number of federal regulations for the past thirty years. In 1965, following the first Surgeon General's Report on smoking, Congress enacted legisla-

¹ See Sheryl Stolberg, *Clinton Imposes Wide Crackdown on Tobacco Firms*, L.A. TIMES, Aug. 24, 1996, at A1. See also President Bill Clinton, Remarks by the President During the Announcement of Food and Drug Administration Rule on Children and Tobacco, Address at the Rose Garden, White House (August 23, 1996) [hereinafter Clinton 1996 Press Conference] (transcript available from Federal News Service).

² See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (1996) (to be codified at 26 C.F.R. § 801 et seq.) [hereinafter FDA Rule].

³ The bulk of the FDA Rule will become effective on August 28, 1997. See *id.* Additional requirements for tobacco retailers will become effective on February 28, 1997. See *id.* And, prohibitions on the sale or distribution of brand-identified promotional nontobacco items and on the sponsorship of events using a tobacco product brand-name will become effective on February 28, 1998. See *id.*

⁴ See FDA Rule, *supra* note 2, at 44,396. As mentioned above, this regulatory scheme was finalized more than a year after the FDA drafted an initial proposal. See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed. Reg. 41,314 (1995) (to be codified at 21 C.F.R. §§ 801, 803, 804, and 897) (proposed Aug. 11, 1995) [hereinafter Proposed FDA Rule]. Public comment on the initial proposal set a record for federal rulemaking with over 700,000 pieces of mail. See Stolberg, *supra* note 1, at A1.

tion requiring that cigarette packages carry a printed warning.⁵ Shortly thereafter, the Federal Communications Commission (FCC) required broadcasters to air antismoking commercials in conjunction with cigarette advertisements.⁶ And, in 1969, Congress banned television and radio advertisements for cigarettes.⁷ Yet, tobacco companies continue to market cigarettes through the print media as well as through promotional activities.⁸ In response to the continued tobacco presence, President Clinton urged the FDA to take stronger action against the advertising, promotion, distribution, and marketing of cigarettes to teenagers.⁹ In support of the FDA rule, President Clinton stated:

Children are bombarded daily by massive marketing campaigns that play on their vulnerabilities, their insecurities, their longings to be something in the world. Joe Camel promises that smoking will make you cool. Virginia Slims models whisper that smoking will help you stay thin. T-shirts and sports sponsorships sends [sic] the message that healthy and vigorous people smoke and that smoking

⁵ See Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 4, 79 Stat. 282, 283 (codified as amended at 15 U.S.C. § 1333(a) (1994)). Since the implementation of the Act, Congress has increased the requirements for warning labels and mandated their inclusion on all cigarette advertisements. See The Comprehensive Smoking Education Act of 1984, Pub. L. No. 98-474, § 4(a), 98 Stat. 2000, 2201-02 (codified as amended at 15 U.S.C. § 1333(a) (1994)).

⁶ See *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968) (upholding antismoking advertisements as part of the fairness doctrine), *cert. denied*, 396 U.S. 842 (1969). Under the fairness doctrine, the FCC required radio and television broadcasters to provide a balanced representation and fair coverage of controversial issues of public importance. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369 (1969).

⁷ See Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 6, 84 Stat. 87, 89 (codified as amended at 15 U.S.C. § 1335 (1994)). See *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom. Capital Broad. Co. v. Kleindienst*, 405 U.S. 1000 (1972).

⁸ Statistics indicate that cigarettes are one of the most heavily advertised products in America. For example, in 1986, cigarette advertising and promotional expenditures totaled \$2.3 billion. See Sylvia A. Law, *Addiction, Autonomy and Advertising*, 77 IOWA L. REV. 909, 913 (1992). Law notes that in 1986, cigarette advertisements provided one percent of the advertising revenues of American newspapers and 8.4% of the advertising revenues of American magazines. See *id.* (percentages taken from Ronald M. Davis, *Current Trends in Cigarette Advertising and Marketing*, 316 NEW ENG. J. MED. 725, 726 (1987)). In 1994, advertising and promotion expenditures increased to \$4.6 billion. See Erica Swecker, Note, *Joe Camel: Will "Old Joe" Survive?*, 36 WM. & MARY L. REV. 1519, 1521 (1995) (statistic taken from *Teens Drawn In by Cigarette Ads, Study Finds*, CHI. TRIB., Aug. 19, 1994, § 1, at 5). Other reports indicate that the tobacco industry spends an estimated \$6 billion for advertisements and promotions. See David Helberg, Note, *Butt Out: An Analysis of the FDA's Proposed Restrictions on Cigarette Advertising Under the Commercial-Speech Doctrine*, 29 LOY. L.A. L. REV. 1219, 1224 (1996) (figure taken from Federal Trade Commission, Report to Congress for 1993 Pursuant to the Federal Cigarette Labeling and Advertising Act 4 tbl.3, 18 tbl.3D (1995)).

⁹ See Clinton 1996 Press Conference, *supra* note 1; see also President Bill Clinton, Press Conference on Tobacco Related to Teenagers, Address at the East Room, White House (August 10, 1995) [hereinafter Clinton 1995 Press Conference] (transcript available in Federal News Service).

is fun. . . . With this historic action that we are taking today, Joe Camel and the Marlboro Man will be out of our children's reach forever.¹⁰

The regulation's opponents fear that the FDA rule extends beyond the legitimate concern of protecting minors. Steve Parrish, Senior Vice President of Philip Morris, summarized the tobacco companies' opposition:

Our opposition to the FDA's rule rests not with its stated goal of reducing underage tobacco use but with the FDA's specious and arbitrary interpretation of federal law. The rule opens a Pandora's box of regulation that tramples the Constitution and the rights of millions of adult Americans. We will stand by those adults who choose to smoke.¹¹

Therefore, opponents maintain that the FDA rule unlawfully restricts truthful advertising to adult consumers.

For the past twenty years, the Supreme Court has accorded commercial speech¹² some level of First Amendment protection.¹³ In 1980, the Court developed a four-part balancing test for commercial speech regulations in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.¹⁴ Under the four-prong analysis, the Court stated:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.¹⁵

However, because courts have applied the *Central Hudson* commercial speech analysis inconsistently, it remains unclear what kinds of adver-

¹⁰ Clinton 1996 Press Conference, *supra* note 1, at 3.

¹¹ *Philip Morris U.S.A. Responds to FDA Rule on Tobacco Regulation*, PR NEWSWIRE, Aug. 23, 1996, at 16:21:00.

¹² The Court has offered different definitions for commercial speech. For example, the Court has defined commercial speech as speech which does "no more than propose a commercial transaction." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (citing *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)). The Court has also defined commercial speech broadly as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980).

¹³ See *Virginia Pharmacy*, 425 U.S. at 761-65 (extending First Amendment protection to licensed pharmacists advertising the prices of prescription drugs).

¹⁴ 447 U.S. at 566.

¹⁵ *Id.* The Court clarified in *Board of Trustees v. Fox*, 492 U.S. 469, 475-81 (1989), that the fourth prong of the balancing test only requires a reasonable fit between the government's ends and the means chosen to accomplish those ends.

tising regulations will survive constitutional scrutiny under the four-prong balancing test—particularly when the regulations involve advertisements of harmful products.

This Note focuses on the recent FDA initiative against tobacco sales and advertisements targeting promotion of harmful products. This Note argues that lower courts have diluted the commercial speech protection that the Supreme Court recognized over twenty years ago.¹⁶ As a result, harmful products, such as tobacco and alcohol, have become easy targets under an essentially misapplied *Central Hudson* balancing test. In other words, the slippery slope door is now open wide to allow regulations against truthful, nonmisleading advertisements of lawful products.¹⁷ Therefore, this Note concludes that the Court should strengthen the *Central Hudson* balancing test to better protect truthful, nonmisleading advertising of lawful products, and it should only permit restrictions on advertising of harmful products where such restrictions are narrowly tailored to protect children.

Part I of this Note describes the current regulatory movements to restrict tobacco advertisements and the problems they might raise under the First Amendment.¹⁸ This Part will focus on the FDA's final rule,¹⁹ exempting broad advertising restrictions of commercial speech which warrant First Amendment scrutiny. This Part will also discuss other federal, state, and municipal regulations.

Part II analyzes how the proposed FDA rule would fare under First Amendment scrutiny.²⁰ The first section traces the development of the commercial speech doctrine and discusses various tests the Court has applied to advertising regulations. The second section examines the advertising restrictions under the modern commercial speech doctrine. The final section discusses the problems with the

¹⁶ See *Virginia Pharmacy*, 425 U.S. at 773.

¹⁷ See *Central Hudson*, 447 U.S. at 573 (Blackmun, J., concurring) (“[T]he test now evolved and applied by the Court is not consistent with our prior cases and does not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech.”).

¹⁸ Besides the First Amendment question, there have also been recent constitutional challenges to the FDA's jurisdiction to regulate cigarette advertisements. For example, in the U.S. District Court of North Carolina, at least two cases were filed challenging the FDA's jurisdiction. See *American Advertising Fed'n v. Kessler*, No. 2:95CV00593 (D. N.C. filed Sept. 27, 1995); *Coyne Beahm, Inc. v. United States Food and Drug Admin.*, No. 2:95CV00591 (D. N.C. filed Sept. 27, 1995). The jurisdiction issue is beyond the scope of this Note.

¹⁹ See FDA Rule, *supra* note 2, at 44,396.

²⁰ Similar to this Note, Helberg's Note, *supra* note 8, at 1250-71, analyzes the FDA rule and concludes that the regulation violates the First Amendment because it is more extensive than necessary to accomplish the government objective of preventing smoking by minors. This Note is broader in scope because it analyzes the final rule and explores the theoretical and practical implications for truthful, nonmisleading advertising of legal products. Moreover, this Note suggests regulations that the FDA could pass which would survive First Amendment scrutiny and protect minors from the dangers of smoking.

current test's protection of truthful advertisements. This Part analyzes the theories advanced under First Amendment jurisprudence and suggests other theories that justify broader protection for commercial speech. In addition, this Part will explain how the inconsistent degree of scrutiny given regulations under the *Central Hudson* test weakens the very protection the Court tried to provide to advertisers and consumers.²¹ Therefore, this Part concludes that, under modern commercial speech analysis, the FDA rule violates commercial speech protections, but that the Court might nevertheless uphold overbroad restrictions on truthful advertisements of tobacco products. As a result, the theories and rationales which limit advertisements spread a growing cancer that endangers First Amendment values.

Part III recommends an approach that would strengthen the commercial speech test of the First Amendment, while still permitting some regulations on advertising that targets the young. Since the recent advertising restrictions strive to protect minors from harmful products, the regulations should be narrowly tailored to meet that objective. This Note concludes that courts can embrace a paternalistic attitude to protect children and yet endorse an unfettered flow of information for the adult consumer audience.

I

THE ANTISMOKING INITIATIVE: PROTECTING THE YOUNG

Few would dispute that smoking creates health hazards. Tobacco products are responsible for more than 400,000 deaths each year from cancer, respiratory illness, heart disease, and other ailments.²² Smokers who die from such health problems lose an average of twelve to fifteen years of life.²³ Despite the documented risks associated with cigarette smoking, the FDA reports that fifty million Americans currently smoke cigarettes and another six million use smokeless tobacco products.²⁴ A Surgeon General's Report indicates that more than three million American adolescents smoke cigarettes and more than

²¹ See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). Justice Blackmun stated, "What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Id.*

²² See FDA Rule, *supra* note 2, at 44,398 (citing information from U.S. DEP'T OF HEALTH & HUMAN SERVS. (DHHS), *Cigarette Smoking—Attributable Mortality and Years of Potential Life Lost—United States, 1990*, 42 MORBIDITY & MORTALITY WKLY. REP. 645, 645-49 (1993)).

²³ See Proposed FDA Rule, *supra* note 4, at 41,314 (citing information from DHHS, *Cigarette Smoking—Attributable Mortality and Years of Potential Life Lost—United States, 1990*, *supra* note 22, at 645-49).

²⁴ See FDA Rule, *supra* note 2, at 44,398.

one million adolescent males use smokeless tobacco.²⁵ According to the FDA, three thousand young people become addicted to nicotine every day, and smoking rates continue to rise among young people.²⁶

In response to these alarming numbers, the government adopted measures to protect children and adolescents. On August 10, 1995, President Clinton first authorized the FDA to initiate broad action, stating:

When Joe Camel tells young children that smoking is cool, when billboards tell teens that smoking will lead to true romance, when Virginia Slims tells adolescents that cigarettes may make them thin and glamorous, then our children need our wisdom, our guidance and our experience. We're their parents, and it's up to us to protect them.²⁷

The FDA rule targets young people in an attempt to reduce the overall use of tobacco. Data suggests that most people who smoke start during adolescence.²⁸ Thus, the FDA hopes its rule will reduce—by at least half—the use of tobacco products by children and adolescents and, consequently, will reduce the number of overall smokers in the future.²⁹

In order to protect minors, the FDA placed restrictions on the sale, distribution, and marketing of tobacco products.³⁰ The FDA rule establishes eighteen as the minimum age to purchase cigarettes and requires retailers to verify that each purchaser is of legal age.³¹ The rule prohibits free samples of tobacco products and bans the sale of those products through vending machines and self-service displays ex-

²⁵ See *id.* (citing DHHS, PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL (1994) [hereinafter 1994 SURGEON GENERAL'S REPORT]).

²⁶ See FDA Proposed Rule, *supra* note 4, at 41,314, 41,315. The FDA reported: Between 1991 and 1994, the prevalence of smoking by eighth graders increased 30%, from 14.3% to 18.6%. Among tenth grade students, it increased from 20.8% to 25.4% and for twelfth grade students, it rose from 28.3% to 31.2%. Between 1985 and 1994, smoking among college freshmen increased from nine percent to 12.5%.

Id. at 41,315.

²⁷ Clinton 1995 Press Conference, *supra* note 9, at 1-2.

²⁸ See FDA Rule, *supra* note 2, at 44,398-99; FDA Proposed Rule, *supra* note 4, at 41,314 (citing 1994 SURGEON GENERAL'S REPORT, *supra* note 25, at 5, 58, 65-67).

²⁹ See FDA Proposed Rule, *supra* note 4, at 41,314.

³⁰ Interestingly, congressional indecision probably played a key role in initiating administrative action. From 1987 to 1994, for example, Congress considered a variety of bills which would have banned, among other things, tobacco advertising, sports sponsorships by tobacco companies, the distribution of tobacco samples, marketing of nontobacco products under tobacco brand names, and tobacco advertising near schools. See, e.g., H.R. 3614, 103d Cong., 2d Sess. (1993); H.R. 5041, 101st Cong., 2d Sess. (1990); H.R. 1493, 100th Cong., 2d Sess. (1988); H.R. 1250, 100th Cong., 2d Sess. (1988); H.R. 1532, 100th Cong., 1st Sess. (1987); H.R. 1272, 100th Cong., 1st Sess. (1987). These bills were not enacted.

³¹ See FDA Rule, *supra* note 2, at 44,399.

cept in facilities where individuals under eighteen are not permitted at any time.³² The speech restrictions limit advertising and labeling in publications which have either a youth readership of fifteen percent or more than two million readers under age eighteen to black-and-white, text-only tombstone ads.³³ Outdoor advertisements of tobacco products cannot appear within one thousand feet of an elementary or secondary school or playground.³⁴ The FDA Rule also prohibits: the sale or distribution of nontobacco items that are identified with tobacco brands; free "gifts" of nontobacco items in conjunction with the purchase of tobacco products; contests and lotteries linked to the purchase of tobacco products; and sponsorship of events under a tobacco brand name or identifying characteristic.³⁵ Recently, Senator Lautenberg proposed the Tobacco-Free Children's Internet Act of 1996 which would extend the FDA rule to advertisements of cigarettes and smokeless tobacco over the Internet or other computer services.³⁶

In addition to federal initiatives, state and municipal regulations also limit the advertisement of harmful products to minors.³⁷ For ex-

³² See *id.*

³³ See *id.* at 44,399, 44,513. Current advertisements include colorful graphics. The FDA rule, however, requires that advertisements in publications with the requisite number of readers under age 18 use only black text on a white background to reduce the appeal of cigarette labeling and advertising to minors without affecting the informational message conveyed to adults. See *id.* at 44,508; Proposed FDA Rule, *supra* note 4, at 41,335. This requirement does not apply to adult-readership publications; therefore, these publications will be allowed to use imagery and color because the effect of such advertising on young people would be minimal. See Proposed FDA Rule, *supra* note 4, at 41,335.

³⁴ See FDA Rule, *supra* note 2, at 44,399, 44,502.

³⁵ See *id.* at 44,399, 44,521-36. The final rule differs from the original rule in several respects. First, the proposed rule would have completely prohibited the sale of cigarettes in vending machines, but the final rule permits them in establishments, such as bars and nightclubs, where children are not permitted. See *id.* at 44,427, 44,448-50. Second, while the proposed rule would have banned mail-order sales, the final rule allows those sales except for mail-order redemption of coupons and the distribution of free samples. See *id.* at 44,427, 44,458-62. Third, the original plan banned tobacco companies from sponsoring sporting events using their brand names, and the final rule extends that to sponsorship of teams. See *id.* at 44,527-36. Finally, the original plan called for a \$150 million fund to conduct a national campaign to educate minors about smoking, but the FDA eliminated that provision and will require an education campaign through warnings to the consumers of the harm caused by the product. See *id.* at 44,538-39.

³⁶ 142 CONG. REC. S12,126-02 (daily ed. Oct. 1, 1996) (statement of Sen. Lautenberg).

³⁷ The Federal Cigarette Labeling and Advertising Act (FCLAA), 15 U.S.C. § 1334 (1994), preempts state law with respect to the advertising or promotion of cigarettes when the state's prohibition is based on smoking and health. See, e.g., Vango Media, Inc. v. City of New York, 34 F.3d 68 (2d Cir. 1994) (holding that the FCLAA preempts an ordinance requiring city-licensed facilities to display one message addressing the dangers of smoking for every four tobacco advertisements displayed); Chiglo v. City of Preston, 909 F. Supp. 675, 678 (D. Minn. 1995) (holding that the FCLAA preempted Preston's ordinance prohibiting all "point of sale" advertising in retail establishments and that the ordinance impermissibly regulated the "content and appearance" of advertisements). State regulations are not preempted if they merely restrict the location of cigarette advertisements. The FCLAA also allows common law claims for breach of express warranty, misrepresenta-

ample, the City Council of Baltimore passed ordinances that prohibit cigarette and alcohol advertisements on any publicly visible sign except for advertisements in purely commercial areas.³⁸ A similar law regulating the location of tobacco advertisements was enacted in Cincinnati, Ohio.³⁹

Additional federal government actions are also aimed directly at reducing adolescent smoking. For example, the Department of Health and Human Services issued a rule requiring that states (1) prohibit the sale or distribution of tobacco products to individuals younger than eighteen; and (2) police such underage distribution through annual reports and random, unannounced inspections.⁴⁰ Only states in compliance with these requirements can qualify for a Substance Abuse Prevention and Treatment block grant.⁴¹ Other federal government programs include The Pro-Children Act of 1994,⁴² which forbids smoking in any school or day care center receiving federal funds, and The Safe and Drug-Free Schools and Communities Act of 1994,⁴³ which provides for tobacco education in the schools. Finally, numerous states have funded multimillion dollar projects to prevent adolescent smoking.⁴⁴

tion, intentional fraud, and conspiracy. *See, e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (finding that the FCLAA only preempted certain common law claims against tobacco companies based on failure to warn and misrepresentation, but permitted state recoveries based on other common law claims); *Penn Adver., Inc. v. Mayor of Baltimore*, 63 F.3d 1318, 1324 (4th Cir. 1995) (bolding that the FCLAA does not preempt a municipal ordinance banning cigarette billboards in certain areas of the city), *vacated sub nom.* *Penn Adver. of Baltimore, Inc. v. Schmoke*, 116 S. Ct. 2575, *aff'd on reh'g*, 101 F.3d 332 (4th Cir. 1996).

³⁸ *See Penn Advertising*, 63 F.3d at 1321, 1324 (upholding the constitutionality of Baltimore City Code, Art. 30 (zoning), § 10.0-1(I) which prohibits cigarette advertisements on publicly visible signs); *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1308-09 (4th Cir. 1995) (upholding the constitutionality of Baltimore City code, Art. 30 (zoning), § 10.0-1(H) which prohibits alcohol advertisements on publicly visible signs), *vacated*, 116 S. Ct. 1821, *aff'd on reh'g*, 101 F.3d 325 (4th Cir. 1996).

³⁹ *See Tobacco: Companies Face Setbacks in Two Court Fights*, AM. HEALTH LINE, Sept. 5, 1995, at 10.

⁴⁰ *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). In its final rule, the DHHS Substance Abuse and Mental Health Services Administration stated that, "while this final rule is directed to the States and the FDA proposal focuses on the tobacco industry and retailers, they are both designed to help address the serious public health problem caused by young people's use of and addiction to nicotine-containing tobacco products." *Id.* at 1492.

⁴¹ *See id.*

⁴² 20 U.S.C. §§ 6081-6084 (1994).

⁴³ 20 U.S.C. §§ 7101-7143 (1994).

⁴⁴ Plaintiff's Complaint for Declaratory and Injunctive Relief, *Coyne Beahm, Inc. v. United States Food and Drug Admin.*, No. 2:95CV00591 (D. N.C. filed Sept. 27, 1995). The complaint indicates that, as an example, the Massachusetts Department of Health initiated a \$58 million program designed to prevent underage smoking.

These federal, state, and local actions demonstrate a common and sincere effort to target smoking by minors. Free speech advocates, however, worry that some of the regulations extend beyond legitimate governmental regulation and impermissibly stifle commercial speech. The recent FDA initiative combines nonspeech regulations such as establishing a federal legal age to purchase cigarettes with speech restrictions such as limiting advertisements in publications and on billboards.⁴⁵ A pending lawsuit challenging the FDA rule claims that the regulations cannot meet the Supreme Court standards for commercial speech because they "do not directly advance the FDA's stated objective of reducing underage use of cigarettes and smokeless tobacco products, and they are not narrowly tailored to reasonably fit that objective."⁴⁶ In response to the portion of the FDA rule that requires black-and-white, text-only advertisements, Magazine Publishers of America Vice President George Gross—a party to the lawsuit—criticized the regulation as not narrowly tailored, explaining that restricting tobacco advertisements in publications with fifteen percent youth readership means that eighty-five percent of adult readers will not receive the tobacco companies' full message.⁴⁷ The ban on tobacco advertisements near schools, the lawsuit states, "is an unconstitutional de facto ban on tobacco advertisements in most urban areas."⁴⁸

This lawsuit demonstrates the constitutional tension between the government's substantial interest in protecting minors from addiction to tobacco products and advertisers' free speech right to provide information about their products to consumers. The FDA rule represents a growing trend of regulations that attempt to combat the significant problem of nicotine addiction among the country's adolescents.⁴⁹ The next section will explore the extent to which commercial speech balancing will protect tobacco advertisements and the implica-

⁴⁵ See *supra* text accompanying notes 31-35.

⁴⁶ Plaintiff's Amended Complaint for Declaratory Judgment and Injunctive Relief at 15, *American Advertising Fed'n v. Kessler*, No. 2:95CV00593 (D. N.C. filed Sept. 27, 1995) [hereinafter Plaintiff's Amended Complaint]. The complaint refers to the third and fourth prongs of the *Central Hudson* balancing test. See *supra* text accompanying note 15; *infra* Part II.A (discussing the Court's treatment of the *Central Hudson* balancing test).

⁴⁷ Debra G. Hernandez, *Restrictions on Cigarette Advertising*, EDITOR & PUBLISHER, Aug. 19, 1995, at 12. The magazines that would be restricted to black and white, text-only advertisements include: *Sports Illustrated*, *People*, *TV Guide*, *Parade*, *Cosmopolitan*, *Entertainment Weekly*, *Better Homes & Gardens*, *Glamour*, *Rolling Stone*, *Car & Driver*, *Life*, *Outdoor Life*, *Road & Track*, *Mademoiselle*, *Vogue*, *Hot Rod*, *Ebony*, *Gentleman's Quarterly*, *Motor Trend*, *Premiere*, *Sport, Elle*, *Essence*, *Jet*, *Popular Science*, *Self*, *Harper's Bazaar*, *The Sporting News*, *Cable Guide*, and *Ski*. See Mike Brown, *Muzzling Tobacco Ads Pits FDA Against Constitution*, *COURIER-J.*, Sept. 8, 1996, at 1A.

⁴⁸ Hernandez, *supra* note 47, at 12; see Plaintiff's Amended Complaint, *supra* note 46, at 8.

⁴⁹ See *supra* text accompanying notes 30-44.

tions for other truthful, nonmisleading advertisements of lawful products.

II

THE COMMERCIAL SPEECH DOCTRINE AND WEAK PROTECTION

An in-depth, historical review of the Supreme Court's treatment of commercial speech aids in understanding how the regulation of tobacco advertising might fare under First Amendment scrutiny. The Court has struggled to define the proper constitutional protection that should be accorded advertisements and the proper amount of deference that should be accorded legislatures when courts evaluate commercial speech regulations.⁵⁰ In so doing, the Court has created inconsistencies in the theory and application of the *Central Hudson* balancing test.⁵¹ As a result, advertisers are left wondering which regulations will survive First Amendment scrutiny.

A. The History of Commercial Speech: A Bumpy Road to Constitutional Protection

Commercial advertising initially received no protection under the First Amendment. In *Valentine v. Chrestensen*,⁵² the Court held that, although speech cannot be unduly burdened, the Constitution imposes no such restraint on regulations for commercial advertisements.⁵³ The Court accorded the legislature broad deference in proscribing commercial speech to protect the public interest.⁵⁴ As a result of commercial speech's unprotected status, numerous regulations restricted commercial advertisements.⁵⁵

The Court finally granted commercial speech First Amendment protection in *Virginia State Board of Pharmacy v. Virginia Citizens Con-*

⁵⁰ See discussion *infra* Part II.A.

⁵¹ See discussion *infra* Part II.C.

⁵² 316 U.S. 52 (1942).

⁵³ See *id.* at 54 (upholding a conviction under a New York ordinance that limited the right to distribute advertising handbills in public places).

⁵⁴ See *id.*

⁵⁵ See, e.g., *Breard v. Alexandria*, 341 U.S. 622, 644-45 (1951) (upholding a municipal ordinance which prohibited door-to-door solicitation by vendors or merchants). In *Ohralik v. Ohio State Bar Ass'n*, the Court cited other regulations that permissibly limited communications. 436 U.S. 447, 456 (1978). See, e.g., *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (the exchange of securities information); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) (the publication of corporate proxy statements); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921) (the exchange of price and production information among competitors). Another particularly relevant example is the federal ban of tobacco advertisements on television and radio. See Public Health Smoking Act of 1969, 15 U.S.C. § 1335 (1994).

sumer Council⁵⁶ when it struck down a statute banning licensed pharmacists from advertising the prices of prescription drugs.⁵⁷ The Court established three important principles for commercial speech. First, the Court affirmed the proposition that the economic motivation behind commercial speech does not eliminate First Amendment protection.⁵⁸ Second, the Court found that the First Amendment offers protection for the dissemination of information and ideas to consumers.⁵⁹ The Court, therefore, recognized that the First Amendment protects the interests of both the speaker and the audience.⁶⁰ Finally, the First Amendment protects commercial speech from paternalistic regulations.⁶¹ Raising the banner against paternalism, the Court argued:

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that

⁵⁶ 425 U.S. 748 (1976). After *Chrestensen*, the Court retreated from the position that the government had unlimited regulatory power over commercial speech. See *New York Times v. Sullivan*, 376 U.S. 254 (1964) (holding that First Amendment protection applies to opinions on public issues even when printed in advertisements, thus refusing to apply the *Chrestensen* commercial speech doctrine to a libel action against a newspaper for publishing a paid political advertisement). See also *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (upholding an ordinance prohibiting newspapers from listing employment advertisements based on gender, but suggesting that the First Amendment might protect some advertisements for legal activity, but not for illegal activity); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (striking down an ordinance which prohibited the circulation of any publication that encouraged or promoted abortion because the advertisements related to the public's constitutional interests). In *Bigelow*, the Court left unresolved whether the First Amendment "permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit." *Id.* at 825.

⁵⁷ *Virginia Pharmacy*, 425 U.S. at 748.

⁵⁸ *Id.* at 761. In an important footnote, the Court differentiated commercial speech from other types of speech. See *id.* at 772 n.24. The Court stated that "[e]ven if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired." *Id.*

⁵⁹ See *id.* at 763 ("[T]he particular consumer's interest in the free flow of information, . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate.").

⁶⁰ See *id.* at 761-64. The audience's right to know has been recognized by the Court in several noncommercial cases prior to *Virginia Pharmacy*. See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978) ("[T]he Court's decisions involving corporations in the business of communication or entertainment are based . . . also on [the First Amendment's] role in affording the public access to discussion, debate and the dissemination of information and ideas."); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (recognizing the audience's right to preserve the uninhibited marketplace of ideas in which truth will prevail, rather than approving monopolization of that market by the government or a private licensee).

⁶¹ See *Virginia Pharmacy*, 425 U.S. at 770.

end is to open the channels of communication rather than to close them. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.⁶²

The Court essentially breathed life into First Amendment protection for commercial speech. Absent recognized restrictions on advertising,⁶³ a state may not suppress the dissemination of truthful information about entirely lawful activity due solely to fear that the information will harm its disseminators and recipients.⁶⁴

The Court, however, has afforded commercial speech a *limited* measure of protection in recognition of its subordinate First Amendment position.⁶⁵ The Court failed to articulate precisely why commercial speech receives limited protection, but rationalized its position by stating, "We have not discarded the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."⁶⁶ The Court then articulated the degree of protection commercial speech receives under its subordinate First Amendment position. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,⁶⁷ the Court developed the prevailing four-step test for evaluating commercial speech regulation.⁶⁸ The questions that must be evaluated under this balancing test are: (1) whether the speech concerns lawful activity and is not misleading; (2) whether the governmental interest is substantial; (3) whether the regulation directly advances the governmental interest; and (4) whether the regulation is not more extensive than necessary.⁶⁹

The *Ohralik* and *Central Hudson* cases retreated from the anti-paternalistic language Justice Blackmun used to protect the dissemination of truthful information.⁷⁰ As Professor Steven Shiffrin

⁶² *Id.*

⁶³ *See id.* at 770-72 (stating that some commercial speech regulations are permissible, such as time, place, and manner restrictions, regulations against false and misleading speech, or laws banning advertisements that promote illegal activity).

⁶⁴ *See id.* at 773.

⁶⁵ *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) ("[W]e instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.").

⁶⁶ *Id.* at 455-56. The Court also stated a concern that "[t]o require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Id.* at 456.

⁶⁷ 447 U.S. 557 (1980).

⁶⁸ *See id.* at 566.

⁶⁹ *See id.*

⁷⁰ In *Central Hudson*, Justice Blackmun criticized the majority's test as inconsistent with prior caselaw. Blackmun argued that such a test "does not provide adequate protec-

observed, "The Court has not explained why commercial speech deserves a subordinate place in a hierarchy of protected speech and why it has shifted its stand on paternalism without extended consideration of the implications of either position."⁷¹ As a result, commercial speech receives some First Amendment protection, but can be regulated so long as it passes *Central Hudson* scrutiny.⁷²

Under *Central Hudson*, however, the Court continued to loosen the scrutiny with which it analyzed regulations against commercial speech. For example, in *Metromedia, Inc. v. City of San Diego*,⁷³ the Court found that the city ordinance imposing prohibitions on billboards directly advanced the city's substantial interest in preserving the aesthetic beauty of the city and in protecting the public from traffic hazards.⁷⁴ Although the Court struck down the San Diego ordinance,⁷⁵ the case paved the way for deferential treatment of the legislature's reasons for enforcing a regulation.⁷⁶ In *Posadas de Puerto Rico Associates v. Tourism Co.*,⁷⁷ the Court upheld a Puerto Rico statute banning the advertisement of casino gambling aimed at Puerto Rico citizens.⁷⁸ In applying the *Central Hudson* test, the Court deferred to the legislative determination that advertising for gambling would increase the demand for the product, and that the restriction on advertising was no more extensive than necessary to reduce the demand for casino gambling.⁷⁹ In addition, the *Posadas* majority rejected the *Virginia Pharmacy* principle that a state may not completely suppress the dissemination of truthful information about entirely lawful activity.⁸⁰ In dictum, the Court stated that "it is precisely because the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through

tion for truthful, nonmisleading, noncoercive commercial speech." *Id.* at 573 (Blackmun, J., concurring).

⁷¹ Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 Nw. U. L. REV. 1212, 1223 (1984).

⁷² Shiffrin observed that "the test adopted by the Court in *Central Hudson* . . . makes it clear that the Court will permit suppression of the truth if substantial state objectives are furthered in the least restrictive way." *Id.* at 1260.

⁷³ 453 U.S. 490 (1981).

⁷⁴ *See id.* at 507-08.

⁷⁵ *See id.* at 512-17 (striking down the ordinance because it permitted on-site commercial billboard advertising while prohibiting on-site noncommercial billboard advertising, and further permitting exceptions to the ban on noncommercial messages so the city had to allow billboards conveying other noncommercial messages).

⁷⁶ *See id.* at 507-09 (finding that the legislature's reasoning was not manifestly unreasonable on these facts).

⁷⁷ 478 U.S. 328 (1986).

⁷⁸ *See id.* at 331.

⁷⁹ *See id.* at 341-44.

⁸⁰ *See id.* at 345-46.

restrictions on advertising.”⁸¹ Such a constitutional theory would abolish almost all truthful advertising, since most economic and commercial conduct could be banned by legislatures. The Court then further weakened the *Central Hudson* test. In *Board of Trustees v. Fox*,⁸² the Court interpreted the fourth prong of the test—“not more extensive than necessary”—as requiring something less than a least-restrictive-means standard.⁸³ The Court concluded that the fourth prong requires only a reasonable fit between the government’s ends and the means narrowly tailored to accomplish those ends.⁸⁴

Collectively, these cases have made it easier for federal and state legislatures to regulate commercial speech. A regulation can suppress truthful information about a lawful product as long as the substantial government interest is directly advanced by a reasonable means narrowly tailored to achieve the desired objective.⁸⁵ It remains unclear under this line of cases whether the Court will interpret *Central Hudson* as calling for an intermediate standard of review or as calling for a more deferential standard.

In recent years, the Court has attempted to rehabilitate First Amendment protection for commercial speech. For example, in *City of Cincinnati v. Discovery Network, Inc.*,⁸⁶ the Court invalidated a ban on distributing commercial handbills in newsracks because the city failed “to establish a ‘reasonable fit’ between its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition on newsracks as the means chosen to serve those interests.”⁸⁷ The Court applied the *Central Hudson* balancing test with an intent to fortify the First Amendment inquiry of commercial speech regulations.⁸⁸ In considering other alternatives, the Court stated, “[W]hile we have rejected the ‘least-restrictive-means’ test for judging restrictions on commercial speech, . . . if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the ‘fit’ between ends and means is reasonable.”⁸⁹ The Court refused to defer to

81 *Id.* at 346.

82 492 U.S. 469 (1989).

83 *See id.* at 477.

84 *See id.* at 480 (“Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.”).

85 *See supra* notes 73-84 and accompanying text.

86 507 U.S. 410 (1993).

87 *Id.* at 416-17 (finding that the city “failed to address its recently developed concern about newsracks by regulating their size, shape, appearance, or number,” which indicated that the city did not carefully calculate the costs and benefits associated with the burden of speech imposed by its prohibition). The Court determined that the safety and aesthetic benefit was minimal since the ban would remove only 62 commercial newsracks from the city’s streets leaving 1500 to 2000 newsracks in place. *See id.* at 417-18.

88 *See id.* at 416.

89 *Id.* at 417 n.13.

legislative findings in determining a reasonable fit for the government's substantial interests.⁹⁰

In *Edenfield v. Fane*,⁹¹ the Court struck down a prohibition against solicitations by certified public accountants (CPAs) because the government could not justify such a restriction on "mere speculation or conjecture."⁹² The Court observed that the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."⁹³ Therefore, the state failed to demonstrate that a reasonable fit existed between the ban on CPA in-house solicitation and the government's interests in preventing fraud, ensuring privacy, and maintaining CPA independence.⁹⁴

Discovery Network and *Edenfield* placed the burden on the government to prove that the regulation advanced a substantial interest. In *United States v. Edge Broadcasting Co.*,⁹⁵ however, the Court returned to the deferential standard elaborated in *Posadas*.⁹⁶ The *Edge* Court upheld a federal ban restricting broadcasters licensed in nonlottery states from advertising other states' lotteries, finding that "Congress clearly was entitled to determine that broadcast of promotional advertising of lotteries undermines . . . [a] policy against gambling, even if the . . . audience is not wholly unaware of the lottery's existence."⁹⁷ The Court concluded:

If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced. Accordingly, the Government may be said to

⁹⁰ See *id.* at 428 (holding that Cincinnati failed to justify its differential treatment of commercial and noncommercial newsracks).

⁹¹ 507 U.S. 761 (1993).

⁹² *Id.* at 770-71.

⁹³ *Id.* at 771. The Court held that, unlike a ban on attorney solicitation, where the potential for fraud and overreaching is great, see *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 465-66 (1978), solicitation by CPAs does not pose substantial harms. See *Edenfield*, 507 U.S. at 775.

⁹⁴ *Edenfield*, 507 U.S. at 770-73.

⁹⁵ 509 U.S. 418 (1993).

⁹⁶ See *id.* at 434; see also *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 341-44 (1986).

⁹⁷ *Edge*, 509 U.S. at 434. There may be a connection between the changing standard and the medium for the advertising. Broadcast media, such as television and radio, are more regulated than print media due to the limited number of available broadcast licenses and the concept of public ownership of the airwaves. Compare *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (recognizing the editorial autonomy of newspapers in deciding what material to print) with *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (upholding the right to impose broadcast requirements on radio licensees because of the scarcity of radio frequencies and, consequently, the government's power to place restraints on licensees to permit the public to retain rights in the medium).

advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated.⁹⁸

The *Edge* Court's decision to follow the *Posadas* precedent⁹⁹ may have been motivated by one of two reasons: a desire to adhere to a deferential standard of review in regulating broadcast licensees¹⁰⁰ or a desire to apply a deferential standard of review to commercial speech restrictions on advertisements which promote harmful products or activities. Regardless, the Court certainly moved away from the position that a state could never suppress advertisements of truthful information through paternalistic regulations.

The *Edge* Court did not address the Government's argument that because gambling is an activity often characterized as a vice, the greater power to prohibit gambling necessarily includes the lesser power to ban its advertisement.¹⁰¹ In *Rubin v. Coors Brewing Co.*,¹⁰² the Court removed any doubt as to whether the *Central Hudson* standard applied to regulations which limit speech that promotes socially harmful activities.¹⁰³ The Court flatly rejected the argument that legislatures have broader latitude to regulate speech that promotes socially harmful activities than other types of speech.¹⁰⁴

The Court has clearly upheld the *Central Hudson* test, but it has applied the test with varying degrees of scrutiny. Generally, the Court analyzes the commercial speech regulations under intermediate scrutiny, placing the burden on the government to prove that its chosen means directly advance a substantial government interest.¹⁰⁵ However, when the Court faces advertising regulations of harmful products, the Court has deferred to legislative findings in order to uphold the regulation.¹⁰⁶

⁹⁸ *Edge*, 509 U.S. at 434.

⁹⁹ See *supra* text accompanying notes 77-81.

¹⁰⁰ See *supra* note 97 and accompanying text.

¹⁰¹ *Edge*, 509 U.S. at 425 (refusing to address this issue because the Court of Appeals did not discuss the argument, and holding that the statute is constitutional under the standards of *Central Hudson* as applied by the courts below); see also *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 345-46 (1986) (using this argument as a secondary basis to uphold the Puerto Rico regulation banning gambling advertisement).

¹⁰² 115 S. Ct. 1585, 1594 (1995) (striking down a federal regulation prohibiting beer labels from displaying alcohol content because the restriction failed to further the government's interest in suppressing strength wars in a direct and material fashion, and because the regulation was more extensive than necessary, since available alternatives to the labeling ban would be less intrusive).

¹⁰³ *Id.* at 1589-90 n.2 ("Neither *Edge Broadcasting* nor *Posadas* compels us to craft an exception to the *Central Hudson* standard, for in both of those cases we applied the *Central Hudson* analysis.")

¹⁰⁴ See *id.*

¹⁰⁵ See, e.g., *id.* at 1592; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993); *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

¹⁰⁶ See, e.g., *United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993) (deferring to the legislature's belief that banning lottery advertisements in a nonlottery state would dis-

The Court's recent commercial speech cases require a rigorous review of how the advertising restriction advances its governmental interest. In *Coors*, the Court required the Government to show that prohibiting beer labels from displaying alcohol content would curb alcohol strength wars.¹⁰⁷ Recently in *44 Liquormart, Inc. v. Rhode Island*,¹⁰⁸ the Court struck down a statutory ban on price advertising for alcoholic beverages.¹⁰⁹ The Court, even though split among several opinions, required the State to carry the burden and to show that a "price advertising ban will significantly advance the State's interest in promoting temperance."¹¹⁰ The Court chose not to defer to legislative findings but to require "findings of fact" and "evidentiary support."¹¹¹

The *Coors* and *Liquormart* cases involved regulations which broadly restricted purely informational ad content.¹¹² Even with the Court's independent evaluation of commercial speech regulations, however, the applicability of *Central Hudson* to regulations limiting advertisements of socially harmful or undesirable activities still remains uncertain.¹¹³ After *Liquormart*, the Court vacated the judgments in the Baltimore outdoor-tobacco-advertising regulation cases—*Penn Advertising* and *Anheuser-Busch*—and remanded the cases to the Fourth Circuit for further consideration.¹¹⁴ The Fourth Circuit affirmed its decisions notwithstanding *Liquormart's* call for an independent evalua-

courage citizens from public participation in lotteries); *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 344 (1986) (deferring to Puerto Rico's decision to protect its citizens from casino gambling advertisements despite possible alternatives).

¹⁰⁷ See *Coors*, 115 S. Ct. at 1585. The Court struck down the statute because of the overall irrationality of the Government's regulatory scheme. See *id.* at 1592-93.

¹⁰⁸ 116 S.Ct. 1495 (1996).

¹⁰⁹ See *id.* at 1501.

¹¹⁰ *Id.* at 1509 (Stevens, Kennedy, Souter, Ginsburg, JJ., joining in this part of the opinion).

¹¹¹ *Id.* at 1509-11. Justice O'Connor stated that in recent cases "we declined to accept at face value the proffered justification for the statute's regulation, but examined carefully the relationship between the asserted goals and the speech restriction used to reach that goal." *Id.* at 1522 (O'Connor, J., concurring in the judgment).

¹¹² In other commercial speech regulations against advertisements of harmful products, the restrictions aim at broader marketing and promotion techniques that allegedly increase consumption. See, e.g., FDA Rule, *supra* note 2, at 44,466-68 (discussing the effects on minors of image advertising in magazines and on billboards).

¹¹³ The Supreme Court itself has retreated to a deferential application of *Central Hudson*. In *Florida Bar v. Went For It, Inc.*, the Court upheld a rule prohibiting attorneys from soliciting personal injury victims for 30 days following the occurrence of the injury. See 115 S. Ct. 2371 (1995). Just two months after *Coors*, Justice O'Connor relied on a scant two-year study to prove sufficiently that the State's regulation directly advanced its interests. See *id.* at 2378. In a deferential tone, Justice O'Connor stated, "[W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'" See *id.* (citations omitted).

¹¹⁴ *Penn Adver., Inc. v. Schmoke*, 116 S. Ct. 2575 (1996); *Anheuser-Busch, Inc. v. Schmoke*, 116 S. Ct. 1821 (1996). See *supra* note 38 and accompanying text.

tion.¹¹⁵ The Fourth Circuit stated that “[a]fter our own independent assessment, we recognized the reasonableness of Baltimore City’s legislative finding that there is a ‘definite correlation between alcoholic beverage advertising and underage drinking.’”¹¹⁶ Therefore, courts still might permit restrictions with more rational schemes or less drastic measures to restrict commercial messages.

Moreover, the *Liquormart* decision added more confusion to the commercial speech doctrine. Even though the Court struck down the advertising ban, the reasoning varied by justice.¹¹⁷ One plurality created two tests under the *Central Hudson* analysis to overturn a total ban against truthful price advertising of alcoholic beverages.¹¹⁸ Four other Justices agreed that the ban on alcohol advertising violated the First Amendment by applying the established *Central Hudson* test rather than adopting a new analysis.¹¹⁹ If one lesson from these cases is clear, it is that the Court needs to reconcile the inconsistent treatment of commercial speech regulation.

The next section will analyze the FDA rule under the current—and inconsistent—commercial speech doctrine.

B. Regulations Against Tobacco Advertisements Might Survive First Amendment Scrutiny

Tobacco advertisements present the next challenge for the courts in the area of commercial speech. Regulations prohibiting tobacco advertisements may vary from a total ban to a few minor restrictions aimed at curtailing promotion of the harmful product.¹²⁰ For exam-

¹¹⁵ See *Penn Adver., Inc. v. Mayor of Baltimore*, 101 F.3d 332 (4th Cir. 1996); *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325 (4th Cir. 1996).

¹¹⁶ *Anheuser-Busch*, 101 F.3d at 327 (citation omitted).

¹¹⁷ 116 S. Ct. 1495, 1501 (1996).

¹¹⁸ See *id.* at 1507. Justices Stevens, Kennedy, and Ginsburg determined that regulations which protect consumers from misleading, deceptive, or aggressive sales practices, or which require the disclosure of beneficial consumer information, should receive less than strict review. See *id.* However, regulations that entirely prohibit the dissemination of truthful, noncommercial messages should receive the rigorous review that the First Amendment generally demands with “special care, mindful that speech prohibitions of this type rarely survive constitutional review.” *Id.* at 1507-08. If this analysis garners a majority, a partial ban like the FDA rule against tobacco advertising might pass the less than strict scrutiny discussed by the plurality.

¹¹⁹ See *id.* at 1520-23 (O’Connor, Souter, Breyer, JJ., and Rehnquist, C.J., concurring in the judgment). Justice Thomas concluded that regulations aimed at keeping legal users of a product or service ignorant in order to manipulate their choices in the marketplace are per se illegitimate, and the *Central Hudson* balancing test does not apply. See *id.* at 1515-16 (Thomas, J., concurring). Although Justice Scalia adhered to the Court’s existing jurisprudence, he concluded that the Court must look to the long accepted practices of the American people where suppression of political ideas is not at issue. See *id.* at 1515 (Scalia, J., concurring).

¹²⁰ In *Posadas*, Justice Rehnquist stated for the majority that “legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prosti-

ple, the proposed FDA rule completely bans tobacco advertisements on billboards near schools, and it restricts the lay-out of advertisements in magazines with youth readership of fifteen percent to a black-and-white, text-only format.¹²¹ Each regulation against truthful, nonmisleading tobacco advertisements would have to pass the *Central Hudson* balancing test.¹²²

Some Supreme Court opinions, however, maintain that such regulations should survive any First Amendment commercial speech scrutiny. For example, when commercial speech was initially accorded First Amendment protection, Justice Rehnquist disapproved, reminding the Court that "the way will be open not only for dissemination of price information but for active promotion of prescription drugs, liquor, cigarettes, and other products the use of which it has previously been thought desirable to discourage."¹²³ In *United States v. Edge Broadcasting Co.*,¹²⁴ the Court upheld a lottery advertisement restriction even though the regulation did not shield residents from all information about lotteries. The Court analogized that, "Congress has, for example, altogether banned the broadcast advertising of cigarettes, even though it could hardly have believed that this regulation would keep the public wholly ignorant of the availability of cigarettes."¹²⁵

Some commentators have similarly supported the constitutionality of regulations limiting advertisements of tobacco products. Professor Daniel Hay Lowenstein suggests a commercial speech theory that only protects informational advertising useful to consumers.¹²⁶ Lowenstein reasons:

[A]ny principle of freedom of commercial speech requiring the invalidation of a ban on cigarette advertising would be unacceptable, because it would impose on the country an extremely unreasonable—perhaps outrageous—impediment to solving a public health problem of overriding importance, with no noticeable gain in the flow of useful information to consumers, which is what the commercial speech doctrine has been designed to promote.¹²⁷

tution, has varied from outright prohibition on the one hand, to legalization of the product or activity with restrictions on stimulation of its demand on the other hand." 478 U.S. at 346 (citations omitted).

¹²¹ FDA Rule, *supra* note 2, at 44,399, 44,502, 44,513.

¹²² See *supra* text accompanying note 15.

¹²³ See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 781 (1976) (Rehnquist, J., dissenting).

¹²⁴ 509 U.S. 418 (1993).

¹²⁵ *Id.* at 434.

¹²⁶ See Daniel H. Lowenstein, "Too Much Puff": *Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1208 (1988).

¹²⁷ *Id.* at 1248.

One author advocates abandoning the modern commercial speech doctrine in favor of removing commercial speech from First Amendment protection altogether, thus requiring courts to review tobacco regulations under a rational basis standard.¹²⁸ The author argues that, “[c]ombining the physical consequences of smoking with the fact that regulating cigarette advertising is indistinguishable from regulating the underlying transactions makes cigarette advertising completely different from other forms of speech, either commercial or noncommercial.”¹²⁹ Professor Greg Marks argues in favor of keeping a commercial speech balancing test and finds that “a state’s interest in the ‘health, life, and safety’ of its citizens is a more important interest than a tobacco company’s right to advertise cigarette’s [sic] in that state.”¹³⁰

Like these scholars, the FDA does not anticipate a First Amendment problem with restricting tobacco advertisements—even in the form of a total ban.¹³¹ In its proposed rule, the FDA states, “While a total ban on advertising, therefore, would likely be justified, FDA believes that limiting advertisements and labeling to which children are exposed to a text-only format is less burdensome and would effectively reduce the appeal of tobacco products to children and adolescents.”¹³² Bolstered by this reasoned outcry against tobacco advertisements, the Court might uphold regulations, such as the FDA rule, under the *Central Hudson* balancing test.¹³³

There is a greater urge to protect society from activities characterized as vices, for safety, health and moral reasons.¹³⁴ Therefore, courts struggle to determine how substantial the government’s interest needs to be under *Central Hudson*, how directly the regulations

¹²⁸ See Jeffrey A. Berman, Note, *Constitutional Realism: Legislative Bans on Tobacco Advertisements and the First Amendment*, 1986 U. ILL. L. REV. 1193, 1194 (1986).

¹²⁹ *Id.* at 1214. Berman also states that “[c]ommercial advertising serves economic values that merit careful legislative consideration, and such interests are not proper subjects for judicial review under the first amendment.” *Id.* at 1215.

¹³⁰ Paul J. Weber & Greg Marks, *Debate on the Constitutionality and Desirability of a Tobacco-Products Advertising Ban*, 15 N. KY. L. REV. 57, 57 (1988). As part of the state’s interest in protecting the health of its citizens, Marks states that “[cigarettes] kill large numbers of people, debilitate an even greater number, and require the expenditure of billions of tax dollars taking care of those with smoking-related diseases.” *Id.* at 73.

¹³¹ See Proposed FDA Rule, *supra* note 4, at 41,336.

¹³² *Id.*

¹³³ The Court has thoroughly rejected the argument that the *Central Hudson* analysis does not apply to vices. See *supra* text accompanying notes 101-04.

¹³⁴ See *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1591 (1995) (“[T]he Government here has a significant interest in protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength, which could lead to greater alcoholism and its attendant social costs.”); *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 341 (1986) (“We have no difficulty in concluding that the Puerto Rico Legislature’s interest in the health, safety, and welfare of its citizens constitutes a ‘substantial’ governmental interest.”).

must advance that interest, and how restrictive the regulations can be to serve that interest.¹³⁵

This Note argues that the FDA rule fails First Amendment scrutiny when the *Central Hudson* test is properly applied. To receive any First Amendment protection, tobacco advertisements must first concern lawful activity and not be misleading.¹³⁶ Since anyone over eighteen can purchase and smoke cigarettes, the speech does not concern an unlawful activity.¹³⁷ The speech cannot be labeled misleading. Although the Federal Trade Commission presents a strong case that advertisements for cigarettes deceptively associate smoking with attractive lifestyles, courts do not recognize these types of ads as inherently misleading.¹³⁸

Once tobacco advertisements are shown to contain lawful and truthful information, the government must demonstrate a substantial interest in order to regulate them.¹³⁹ Courts have spoken clearly on the issue that protecting the public health qualifies as a substantial government interest.¹⁴⁰ In *Penn Advertising, Inc. v. Mayor of Baltimore*,¹⁴¹ the Fourth Circuit simply assumed a substantial government interest in restricting outdoor tobacco advertisements.¹⁴² The court stated, "In the context of the current public concern over the dangers of cigarette consumption by minors, there can be little opposition to the assertion that the City's objective in reducing cigarette consump-

¹³⁵ These standards are part of the *Central Hudson* balancing test. See *supra* text accompanying note 15.

¹³⁶ See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

¹³⁷ "Currently, all 50 states have laws prohibiting the sales of cigarettes to persons under 18 years old." Mark R. Ludwikowski, Comment, *Proposed Government Regulation of Tobacco Advertising Uses Teens to Disguise First Amendment Violations*, 4 COMM'LAW CONSPICUOUS: J. COMM. L. & POL'Y 105, 108 n.53 (Winter 1996) (statistic taken from Jacob Sullum, *The War on Tobacco; Smoking Regulations Go Way Too Far*, SAN DIEGO UNION-TRIB., Aug. 20, 1995, at G1). In addition, federal regulations recognize the legality of selling cigarettes to anyone over 18 years of age. See Tobacco Regulation for Substance Abuse Prevention and Treatment Block Grants, *supra* note 40, at 1492 (requiring states to prohibit selling or distributing tobacco products to any individual under 18); FDA Rule, *supra* note 2, at 44,399 (establishing 18 as the minimum age of purchase).

¹³⁸ See Berman, *supra* note 128, at 1207-08. Berman states, "Courts have held that the Supreme Court's concern with misleading advertising is directed towards methods which encourage fraud, overreaching, or confusion, not the technique of image creation present in advertising most products." *Id.* at 1208. In the comparable situation of liquor advertisements, the Fifth Circuit stated, "Nearly all advertising associates the promoted product with a positive or alluring lifestyle or famous or beautiful people." *Dunagin v. City of Oxford*, 718 F.2d 738, 743 (5th Cir. 1983) (en banc).

¹³⁹ See *Central Hudson*, 447 U.S. at 566.

¹⁴⁰ See *supra* note 134 and accompanying text.

¹⁴¹ 63 F.3d 1318 (4th Cir. 1995), *vacated sub nom.* *Penn Adver., Inc. v. Schmoke*, 116 S. Ct. 2575, *aff'd on reh'g*, 101 F.3d 332 (4th Cir. 1996).

¹⁴² See *id.* at 1325.

tion by minors constitutes a substantial public interest."¹⁴³ The FDA rules aim to protect children and adolescents from health problems caused by the use of, and addiction to, tobacco products.¹⁴⁴ Therefore, the governmental interest satisfies the second prong of the *Central Hudson* test.¹⁴⁵

The tobacco advertising restrictions,¹⁴⁶ however, fail the third prong of the commercial speech balancing test: whether the regulation directly advances the asserted governmental interest.¹⁴⁷ Following recent Supreme Court decisions, scrutiny under the third prong is more rigorous and requires courts' independent evaluations of how the regulation would advance the government's asserted purpose.¹⁴⁸ The FDA relied on many domestic and foreign studies in formulating its final rule.¹⁴⁹ A proper application of the third prong would strike down the FDA rule, however, because these studies establish a weak connection between advertising and tobacco consumption by minors.

¹⁴³ *Id.*

¹⁴⁴ See FDA Rule, *supra* note 2, at 44,397-99.

¹⁴⁵ Such a finding would be consistent with courts' treatment of the substantial government interest regarding restrictions on advertising alcoholic beverages. See, e.g., *Dunagin v. City of Oxford*, 718 F.2d 738, 747 (5th Cir. 1983) (en banc) (determining that alcohol abuse harms society through disease, traffic accidents, and occupational and family problems); *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 500 (10th Cir. 1983) (finding that the State's interest in health, welfare, safety, productivity, and family stability supports efforts to ban alcohol advertisements), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). For background commentary, see Krista L. Edwards, Comment, *First Amendment Values and the Constitutional Protection of Tobacco Advertising*, 82 Nw. U. L. REV. 145, 168 n.136 (1987).

¹⁴⁶ To review the FDA's commercial speech restrictions:

The rule also limits the advertising and labeling to which children and adolescents are exposed. The rule accomplishes this by generally restricting advertising to which children are exposed to a black-and-white, text-only format. In addition, billboards and other outdoor advertising are prohibited within one thousand feet of schools and public playgrounds. The rule also prohibits the sale or distribution of brand-identified promotional, nontobacco items such as hats and tee shirts. Furthermore, the rule prohibits sponsorship of sporting and other events, teams, and entries in a brand name of a tobacco product, but permits such sponsorship in a corporate name.

FDA Rule, *supra* note 2, at 44,399.

¹⁴⁷ See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993) (stating that it was the city's burden to establish a "reasonable fit" between its legitimate interests and choice of a limited and elective prohibition as the means chosen to serve those interests); *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989) ("Here we require the government goal to be substantial, and the cost to be carefully calculated. Moreover, since the State bears the burden of justifying its restrictions, it must affirmatively reestablish the reasonable fit we require.") (citations omitted).

¹⁴⁸ See *supra* text accompanying notes 107-11.

¹⁴⁹ Proposed FDA Rule, *supra* note 4, at 41,315. The FDA examined many domestic and foreign tobacco control statutes, regulations, and legislation, as well as numerous studies and reports. The FDA reviewed recommendations and reports from the World Health Organization, the Office of the Surgeon General, the Centers for Disease Control and Prevention, the National Cancer Institute, and the Institute of Medicine.

Although the FDA maintains that a link exists between advertising and smoking by minors,¹⁵⁰ some experts have made contrary findings.¹⁵¹ For example, in 1989, Surgeon General C. Everett Koop stated, "There is no scientifically rigorous study available to the public that provides a definitive answer to the basic question of whether advertising and promotion increase the level of tobacco consumption."¹⁵² A link between advertising and tobacco consumption by minors seems less likely since teens account for less than three percent of total smokers.¹⁵³ In addition, studies have shown that teenagers are more influenced by their peers and the presence of smokers in their lives.¹⁵⁴ Without proof of a direct link between advertising and tobacco con-

¹⁵⁰ *Id.* at 41,332-33. The FDA's findings assert that the 1994 Surgeon General's Report concluded that "[a] substantial and growing body of scientific literature has reported on young people's awareness of, and attitudes about, cigarette advertising and promotional activities." *Id.* at 41,332. The 1994 Surgeon General's Report also found that "[c]onsidered together, these studies offer a compelling argument for the mediated relationship of cigarette advertising and adolescent smoking." *Id.* (citing 1994 SURGEON GENERAL'S REPORT, *supra* note 25, at 188).

¹⁵¹ For background commentary, see Lowenstein, *supra* note 126, at 1215 ("Numerous econometric studies have yielded a variety of results, some showing a positive statistically significant relationship between the incidence of smoking and the amount of advertising, and other studies, especially those funded by the tobacco and advertising industries, showing no such relationship.")

¹⁵² Ludwowski, *supra* note 137, at 113 n.115 (quoting DHHS, REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS, A REPORT OF THE SURGEON GENERAL 516-17 (1989)). See also MICHAEL G. GARTNER, ADVERTISING AND THE FIRST AMENDMENT 38-39 (1989) (discussing a 1986 study by the International Advertising Association of growth in per capita cigarette consumption in eight Communist-bloc countries in which tobacco advertising was banned between 1970 and 1984). The IAA world study concluded:

There is no evidence from those countries where tobacco advertising has been banned, that the ban has been accompanied by any significant reduction in overall consumption, per-capita consumption or the incidence of smoking. The market trends apparent prior to the introduction of a ban have largely continued unchanged in the years following it. On the other hand, there is some evidence that the absence of advertising can significantly hold back the development of new and more advanced tobacco products.

Id. at 39 (emphasis omitted).

¹⁵³ See Ludwowski, *supra* note 137, at 114 (citing data from Robert T. Garrett, *Tobacco Plan a Free-Speech Issue? Don't Kid Yourself*, COURIER-J., Adg. 13, 1995, at 1D). Ludwowski asserts that "[i]n light of the existing prohibition of tobacco sales to minors, a link between tobacco advertising and consumption by young people is presumably less apparent." *Id.* Therefore, the author argues that "[a]lthough young people may easily be able to recall cigarette ads, this correlation does not necessarily indicate that minors are likely to smoke because of the advertising." *Id.* But see FDA Proposed Rule, *supra* note 4, at 41,332 (citing considerable empirical evidence on the effects of cigarette advertising on young people); Ludwowski, *supra* note 137, at 114 n.116 ("Ever since the 'Joe Camel' advertising campaign came into effect, the 'share of teens who smoke Camels jumped from 3 to 13 percent; the proportion of adults choosing Camels stayed stable.") (quoting *Kids Mustn't Smoke; Clinton's Right to Regulate Nicotine As a Drug, Although His Limits On Ads Go Too Far*, NEWSDAY, Aug. 14, 1995, at A18)).

¹⁵⁴ See Ludwowski, *supra* note 137, at 114 (citing Jacob Sullum, *supra* note 137, at G1).

sumption, the FDA restrictions on tobacco products fail to advance the government objective of decreasing teen smoking in a direct and material way.

The FDA rule also fails the fourth prong of the *Central Hudson* test: whether it is not more extensive than is necessary to serve the asserted governmental interest.¹⁵⁵ Although the Supreme Court relaxed this standard requiring only a reasonable fit between the regulation and the government's interest, the means chosen by the government still must be narrowly tailored.¹⁵⁶ Restricting tobacco advertisements in publications with youth readership of fifteen percent or more to black-and-white, text-only format¹⁵⁷ infringes on the truthful dissemination of tobacco advertisements to the eighty-five percent adult readers.¹⁵⁸ Professor Martin Redish explains:

[r]estrictions on the use of color and imagery do more than interfere with creative self-realization. They also significantly interfere with the communicator's ability to reach the intended audience. . . . Moreover, a speaker's ability to choose the manner of expression should not be viewed as uniquely tied to the speaker's developmental interest, but to the listener's free speech rights as well.¹⁵⁹

The ban on tobacco advertising within one thousand feet of any school or playground¹⁶⁰ is also broader than necessary, because the regulation applies to all outdoor advertising and fails to adequately protect advertising in zoned commercial areas.¹⁶¹ A ban on the sale or distribution of branded nontobacco items such as hats and t-shirts¹⁶² extends beyond protecting children and adolescents, because it restricts adults from purchasing these items. Similarly, the restric-

¹⁵⁵ See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

¹⁵⁶ See *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989) (requiring a fit "that employs not necessarily the least restrictive means but, . . . a means narrowly tailored to achieve the desired objective.").

¹⁵⁷ See FDA Rule, *supra* note 2, at 41,399, 44,513.

¹⁵⁸ See *supra* text accompanying note 47.

¹⁵⁹ Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 627 (1996).

¹⁶⁰ See FDA Rule, *supra* note 2, at 41,399, 44,502.

¹⁶¹ This regulation is broader than the Baltimore outdoor advertising restriction upheld in *Penn Advertising, Inc. v. Mayor of Baltimore*, 63 F.3d 1318 (4th Cir. 1995), *vacated sub nom. Penn Adver. v. Schmoke*, 116 S. Ct. 2575, *aff'd on reh'g*, 101 F.3d 332 (4th Cir. 1996). In *Penn Advertising* the court upheld a Baltimore ordinance that prohibited the placement of any sign that "advertises cigarettes in a publicly visible location," i.e. on "outdoor billboards, sides of building[s], and free standing signboards." *Id.* at 1321. However, that regulation contained exceptions permitting such advertising on buses, taxicabs, commercial vehicles used to transport cigarettes, signs at businesses licensed to sell cigarettes, and in certain commercially and industrially zoned areas of the city. See *id.* The FDA rule would prohibit any outdoor advertising within one thousand feet from a school without any exceptions.

¹⁶² See FDA Rule, *supra* note 2, at 44,399, 44,521.

tion limiting sponsorship of events to the corporate name only¹⁶³ severely limits tobacco companies from marketing their products to the adult consumer. As the Court affirmed in *Bolger v. Youngs Drug Products Corp.*,¹⁶⁴ the state may not "reduce the adult population . . . to reading only what is fit for children."¹⁶⁵ Therefore, the ban is more restrictive than necessary to meet its objective of protecting minors.

There are less restrictive alternatives than these broad prohibitions that could decrease the number of minors who smoke and become addicted to tobacco products. Some suggestions include government and corporate sponsored educational programs, subsidized medical programs to treat tobacco addiction, increased taxes on tobacco products in order to price tobacco products out of the reach of children, and stricter enforcement of laws prohibiting the sale of cigarettes to minors under eighteen.¹⁶⁶ All of these options would advance the government's interest with less intrusion on tobacco companies' First Amendment rights.¹⁶⁷

If courts follow the intermediate scrutiny of the *Central Hudson* balancing test, the FDA's tobacco advertising restrictions fail to significantly advance the government's interest in protecting the health of minors. Rather, the restrictions eliminate information from adult consumers. Therefore, a proper application of *Central Hudson* would allow tobacco advertisers to disseminate truthful and lawful information to consumers.¹⁶⁸

A deferential application of the balancing test, however, would result in the validation of these FDA restrictions. Courts reviewing restrictions on advertising of harmful products in recent cases have misapplied the *Central Hudson* test and have accepted the legislative

¹⁶³ See *id.* at 44,399, 44,527.

¹⁶⁴ 463 U.S. 60 (1983) (holding that a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives violates the First Amendment).

¹⁶⁵ *Id.* at 73-74 (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). Indiana University law professor Patrick Baude opined that "[y]oung people don't have the same right to these materials as adults, but it's also established that these materials can't be withheld from adults to keep them from reaching children." Brown, *supra* note 47, at 1A.

¹⁶⁶ See Edwards, *supra* note 145, at 173; Ludwikowski, *supra* note 137, at 116.

¹⁶⁷ For similar reasoning, see *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1510 (1996) (finding that a state cannot satisfy the requirement that a price advertising ban on alcoholic beverages be no more extensive than necessary because temperance can be achieved through less intrusive means such as higher prices, taxation, and educational campaigns); *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1593 (1995) (finding available alternatives to a labeling ban of alcohol content).

¹⁶⁸ A proper application would be consistent with the Court's language in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*. See 425 U.S. 748, 765 (1976) ("Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price.").

judgment that advertising increases consumption.¹⁶⁹ The *Penn Advertising* decision demonstrates the need for the Supreme Court to continue to tighten the commercial speech balancing test in order to evaluate all truthful advertisements of legal products consistently. In *Penn Advertising*, the Fourth Circuit upheld a Baltimore ordinance that prohibited the placement of any sign that “advertises cigarettes in a publicly visible location,” such as on “outdoor billboards, sides of building[s], and free standing signboards,” but included exceptions for advertising on certain vehicles and at “businesses licensed to sell cigarettes.”¹⁷⁰

The Fourth Circuit scrutinized the regulation under the four-prong *Central Hudson* test.¹⁷¹ First, the court found that the speech pertained to lawful activity and was not misleading.¹⁷² Second, the court agreed that the government’s substantial interest was to promote compliance with state prohibition of cigarette sales to minors, and to prevent the purchase and consumption of cigarettes by minors.¹⁷³ Finally, the Fourth Circuit considered the third and fourth prongs of the balancing test regarding the fit between the City’s ends and the means chosen to accomplish them.¹⁷⁴ Relying on the legislature’s reasonable belief that the means selected would advance its ends, the court found that the City had met its burden of proving that its regulation would directly advance the interest of reducing cigarette consumption by minors.¹⁷⁵ As for evaluation of the “least restrictive means,” the court gave the City reasonable latitude to address the problem.¹⁷⁶ In upholding the statute, the court relied heavily on the

¹⁶⁹ The Fourth Circuit affirmed its decision to uphold restrictions on outdoor advertising of tobacco and alcohol products notwithstanding the Supreme Court’s *Liquormart* decision. See *Penn Adver. v. Mayor of Baltimore*, 101 F.3d 332 (4th Cir. 1996), *aff’g*, 63 F.3d 1318 (4th Cir. 1995); *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325 (4th Cir. 1996), *aff’g* 63 F.3d 1305 (4th Cir. 1995).

¹⁷⁰ *Penn Advertising*, 63 F.3d at 1321. On the same day, the court upheld a Baltimore ordinance that restricted the placement of signs that advertise alcoholic beverages in “publicly visible locations,” but with the same exceptions as the ordinance for cigarettes. See *Anheuser-Busch*, 63 F.3d at 1308-09.

¹⁷¹ See *Penn Advertising*, 63 F.3d at 1325.

¹⁷² See *id.*

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See *id.* (“There is a logical nexus between the city’s objective and the means it selected for achieving that objective, and it is not necessary, in satisfying *Central Hudson*’s third prong, to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem.”).

¹⁷⁶ See *id.* at 1326 (“In the face of a problem as significant as that which the City seeks to address, the City must be given some reasonable latitude.”). See also *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1316 (4th Cir. 1995), *vacated*, 116 S.Ct. 1821, *aff’d on reh’g*, 101 F.3d 325 (4th Cir. 1996) (citing *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 346-47 (1996), *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509 (1981), and *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-56 (1978)).

deferential standard set forth in many Supreme Court opinions.¹⁷⁷ Such a deferential balancing inquiry maintains a low level of judicial scrutiny for commercial speech regulations.

Some commentary favors deferential review for evaluating regulations of advertisements of harmful products. One author argues that "[s]uch deference is appropriate because a thorough judicial inquiry would require the court to duplicate the legislative process. A court is not equipped to review the conclusion that there is a link between advertising and consumption without the fact-finding mechanisms of the legislature."¹⁷⁸ Court opinions evaluating restrictions on alcohol advertisements posit this deferential standard. In *Dunagin v. City of Oxford*,¹⁷⁹ the court deferred to the legislature's belief that suppression of advertising promoted the state's interest in decreasing alcohol consumption.¹⁸⁰ In *Oklahoma Telecasters Ass'n v. Crisp*,¹⁸¹ the court deferred to the state legislature's decision to ban liquor advertisements and found the policy choice not "constitutionally unreasonable."¹⁸² This deferential approach rejects the stringent requirement that the government needs to prove a direct and material link between its regulation and its interest. Professor Sylvia A. Law explains that "[t]he leading scholarly defense of broad state authority to restrict tobacco advertising rejects the notion that the state should be required to demonstrate an empirical connection between suppression of commercial speech and an important state goal."¹⁸³ Therefore, courts might apply a deferential standard to tobacco advertisements.¹⁸⁴

Under such a standard, the government could easily show a link between its regulation and the substantial interest in lowering tobacco consumption. The government would only have to demonstrate that the legislature or agency reasonably believed that the regulation directly advanced the asserted governmental interest.¹⁸⁵ As the Court

¹⁷⁷ See *Penn Advertising*, 63 F.3d at 1325-26; *Anheuser-Busch*, 63 F.3d at 1311-16.

¹⁷⁸ Berman, *supra* note 128, at 1210.

¹⁷⁹ 718 F.2d 738 (5th Cir. 1983) (en banc) (upholding a ban on locally produced alcohol advertising).

¹⁸⁰ See *id.* at 748 n.8 (stating that a legislative finding could not be put aside by two experts and a judicial trier of fact).

¹⁸¹ 699 F.2d 490 (10th Cir. 1983) (upholding a ban on wine advertisements), *rev'd on other grounds sub nom.* *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

¹⁸² *Id.* at 501. *But see* 44 *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1509 (1996) (requiring the State to show that its alcohol advertising ban would advance its interest to a material degree, and stating that "without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance.").

¹⁸³ Law, *supra* note 8, at 937-38 (quoting Vincent Blasi & Henry P. Monaghan, *The First Amendment and Cigarette Advertising*, 256 *JAMA* 502, 508 (1986) ("To demand such proof of legislative facts would render government unworkable.")).

¹⁸⁴ See *supra* text accompanying notes 169-77.

¹⁸⁵ See, e.g., *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 342 (1986). The Court stated that "[t]he Puerto Rico Legislature obviously believed, when it enacted

stated in *United States v. Edge Broadcasting Co.*,¹⁸⁶ "Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments."¹⁸⁷ The FDA reviewed numerous studies when drafting its proposed rule.¹⁸⁸ Following a deferential standard, the FDA's belief that the means it selected will advance its ends appears reasonable.¹⁸⁹ For the fourth prong of the test, one must determine whether the regulation is not more extensive than necessary to serve the government's interest.¹⁹⁰ Applying a loose application of the standard, a court would defer to the agency to determine whether an alternative was as effective as an advertising restriction.¹⁹¹ Essentially, this means that under such a deferential standard, the FDA would have wide latitude to address the significant problem of tobacco consumption by minors through advertising restrictions.¹⁹²

The FDA rule might also survive First Amendment scrutiny under the plurality's test set forth in *Liquormart*.¹⁹³ Using this approach, the Court might characterize the FDA rule as a partial ban meant to protect minors from misleading, deceptive, or aggressive sales practices. Therefore, the regulation would be subjected to a less than strict review, and it would likely be upheld as a legitimate partial ban.¹⁹⁴

In this latest battle against tobacco products, commercial speech advocates and commentators have sounded the alarm in response to a possible loose application of the *Central Hudson* balancing test for restrictions on advertisements of lawful, but harmful, products. In a statement criticizing the FDA rule, American Association of Advertising Agencies Executive Vice President Harold A. Shoup said, "We are concerned about the rights of marketers to advertise legal products and the precedent this would set for other politically correct [sic] but

the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised." *Id.* at 341-42.

¹⁸⁶ 509 U.S. 418 (1993)

¹⁸⁷ *Id.* at 434 (citing *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989)).

¹⁸⁸ See *supra* note 149 and accompanying text.

¹⁸⁹ For a similar test applied in a tobacco advertisement case, see *supra* text accompanying note 175.

¹⁹⁰ See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

¹⁹¹ See, e.g., *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 344 (1986) ("We think it is up to the legislature 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.").

¹⁹² For a similar test applied in a tobacco advertisement case, see *supra* note 176 and accompanying text.

¹⁹³ See *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1507 (1996). See also test cited *supra* note 118 and accompanying text.

¹⁹⁴ See *supra* note 118 and accompanying text.

legal products."¹⁹⁵ Regarding a deferential application of the *Central Hudson* standard to advertisements of tobacco products and the implication of such a loose application for other products, Professor Sylvia A. Law warned:

[I]f courts must defer to the legislative determination that suppression promotes state interests, the *Central Hudson* standard provides little protection for commercial speech. . . . The state legitimately could assert an interest in discouraging consumption of many products including beef, sugar, dairy products, fast automobiles, clothing, and cosmetics that promote gender or sexual ideals that the state deems inappropriate. The state probably could not demonstrate, in any rigorous way, a connection between suppression of such advertisements and a substantial state interest. Nevertheless, under a loosely applied *Central Hudson* standard such regulations might be upheld.¹⁹⁶

Courts have baffled advertisers and consumers with an inconsistent application of the *Central Hudson* test. If the commercial speech doctrine protects the dissemination of truthful information about entirely lawful activity from legislators who fear the information's impact upon its disseminators and its recipients,¹⁹⁷ then judicial scrutiny should remain consistent in evaluating a regulation against any truthful, nonmisleading advertisement of lawful products. The *Coors* and *Liquormart* cases clarified that the *Central Hudson* test requires the courts to independently review commercial speech regulations.¹⁹⁸ However, the history of commercial speech jurisprudence indicates that the Court applies a rigorous balancing test in some cases,¹⁹⁹ yet relaxes the very same test in other cases.²⁰⁰ In addition, lower courts seem content to apply a deferential review of state regulations that ban types of alcohol and tobacco advertisements.²⁰¹

Under such a deferential standard, free speech advocates and advertisers have legitimate concerns about the extent of the government's power to regulate commercial speech. The following section will examine the problems with the current *Central Hudson* test in its inconsistent application to advertising restrictions of truthful, nonmisleading advertisements of lawful products. These problems highlight the very reason the Court must continue to clarify the *Central Hudson*

¹⁹⁵ Hernandez, *supra* note 47, at 12. The article quoted Mr. Shoup as saying "politically correct"; however, he was referring to harmful products and could only have meant "politically incorrect."

¹⁹⁶ Law, *supra* note 8, at 937.

¹⁹⁷ See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 773 (1976).

¹⁹⁸ See *supra* text accompanying notes 102-04, 107-11.

¹⁹⁹ See *supra* text accompanying notes 86-94, 102-05, 107-11.

²⁰⁰ See *supra* text accompanying notes, 73-84, 95-98, 106.

²⁰¹ See *supra* text accompanying notes 115-16, 169-77, 179-82.

balancing test and strengthen the protections accorded commercial speech under the First Amendment.

C. Commercial Speech Balancing: The Court's Inconsistent Treatment of Regulations Endangers All Truthful Advertisements

There are two problems with the current *Central Hudson* balancing test when applied with varying degrees of scrutiny to advertising restrictions. First, the Court has ignored the rights of the listener as an important element in First Amendment protection. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,²⁰² the Court protected the right of the consumer to receive information.²⁰³ The Court stated that "the protection afforded is to the communication, to its source and to its recipient both. . . . If there is a right to advertise, there is a reciprocal right to receive the advertising"²⁰⁴ However, when the Court wants to uphold regulations against advertisements of harmful products, the rights of the consumer seem to disappear from the analysis. Second, a deferential application of the balancing test to commercial speech regulations aimed at limiting the consumption of harmful products could, in effect, lead the government to discourage the use of a variety of legal products.²⁰⁵ Free speech advocates explain the possible spiraling effects, stating that "[f]irst it was tobacco, then it was alcohol, which is unquestionably good for you in small amounts; and next it could be high-fat foods, high-sugar foods, and you don't know where it stops."²⁰⁶ Collectively, these two problems illustrate the dangers of weakening the First Amendment protections accorded commercial speech.

1. *The First Danger: Ignoring the Rights of the Listener*

The first problem indicates that a deferential *Central Hudson* balancing test neglects the paramount rights of the listener in commercial speech cases.²⁰⁷ In *Bates v. State Bar of Arizona*,²⁰⁸ the Court summarized the reasons for extending First Amendment protection to commercial speech:

The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his

202 425 U.S. 748 (1976)

203 *See id.* at 756-57.

204 *Id.*

205 *See Law, supra* note 8, at 937 (stating that a loosely applied *Central Hudson* test might uphold the government's interest in discouraging the consumption of unhealthy items, such as beef and sugar, or dangerous products, such as fast automobiles or motorcycles).

206 Claudia Maclachlan, *Ad Limits Get Harder to Enact*, NAT'L L.J., July 26, 1993, at 1, 29.

207 *See supra* text accompanying notes 202-04.

208 433 U.S. 350 (1977).

concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.²⁰⁹

In *City of Cincinnati v. Discovery Network, Inc.*,²¹⁰ the Court highlighted the value of advertisements. Quoting from colonial literature, the Court stated, “[Advertisements] are well calculated to enlarge and enlighten the public mind, and are worthy of being enumerated among the many methods of awakening and maintaining the popular attention, with which more modern times, beyond all preceding example, abound.”²¹¹ Therefore, truthful advertisements that promote any lawful product, even harmful ones, facilitate the efficient allocation of resources in a predominantly free enterprise economy, and allow consumers to make informed economic decisions.²¹²

The Court should adopt a more vigorous, listener-based interpretation of the First Amendment for three reasons. First, the widely accepted interpretations of the First Amendment fail to protect the underlying values of commercial speech.²¹³ Second, First Amendment jurisprudence supports a listener-based value.²¹⁴ Finally, this interpretation would result in consistent protection of advertisements for adult consumers, and it would also provide a rationale for some protective measures for children in regulating advertisements of harmful products.²¹⁵ Commentators advance multiple theories as to

²⁰⁹ *Id.* at 364 (citations omitted).

²¹⁰ 507 U.S. 410 (1993).

²¹¹ *Id.* at 421-22 n.17 (quoting D. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 415 (1958) (quoting I. THOMAS, *HISTORY OF PRINTING IN AMERICA WITH A BIOGRAPHY OF PRINTERS, AND AN ACCOUNT OF NEWSPAPERS* (2d ed. 1810))).

²¹² See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

²¹³ See, e.g., T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970) (stating that freedom of expression advances knowledge and discovery of truth); A. MEIKLEJOHN, *POLITICAL FREEDOM* (1960) (arguing for a politically-based interpretation); C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 *IOWA L. REV.* 1 (1976) (interpreting the First Amendment as protecting the “individual liberty and self-realization” of the speaker).

²¹⁴ See, e.g., *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (finding the right of listener to be paramount); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (holding that the freedom of speech embraces both a right to distribute and a right to receive information).

²¹⁵ Compare *Virginia Pharmacy*, 425 U.S. at 765 (“So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.”) with *Ginsberg v. New York*, 390 U.S. 629, 638 n.6 (1968) (“[T]he power of the state to control the conduct of

what speech merits First Amendment protection.²¹⁶ While these theories represent popular interpretations of the First Amendment, the Court does recognize a listener-based value as well.²¹⁷

One interpretation focuses on the politically-based value of the First Amendment. This view advances the value of the First Amendment as a paragon of self government and civic virtue.²¹⁸ Alexander Meiklejohn, one of the foremost proponents of the politically-based theory, explains that “[t]he principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.”²¹⁹ Therefore, Professor Meiklejohn argues that “[t]he guarantee given by the First Amendment is not, then, assured to all speaking. It is assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal—only therefore, to the consideration of matters of public interest.”²²⁰

In several cases, the Court has supported a First Amendment theory of political awareness and participation. For example, endorsing a theory that promoted political discussion, Justice Brandeis stated, “Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government.”²²¹ In the area of libel, the Court explained that “we consider this case against the background of a profound national commitment to the principle that debate on public issue should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”²²² Such language by the Court supports a politically-based interpretation as one theory of the First Amendment.

children reaches beyond the scope of its authority over adults . . .”) (quoting Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 938-39 (1963)).

²¹⁶ See *supra* note 213 and accompanying text.

²¹⁷ See *supra* note 214 and accompanying text.

²¹⁸ See generally MEIKLEJOHN, *supra* note 213.

²¹⁹ *Id.* at 27.

²²⁰ *Id.* at 79. Professor Meiklejohn later expanded his theory of First Amendment protection to include nonpolitical speech about education, philosophy, the social sciences, literature and the arts as contributing to self-government. See Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256-57.

²²¹ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled* by *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

²²² *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Proponents of this theory, such as Meiklejohn,²²³ Lillian BeVier,²²⁴ and Judge Robert Bork,²²⁵ believe that commercial speech falls outside of First Amendment protection.²²⁶ In support of this position, Thomas Jackson and John Jeffries argue that no justification exists for protecting commercial speech under the First Amendment.²²⁷ The authors maintain that they were "unable to discover—in the opinion of the Court, in the secondary literature, or in our reflections—any other principle that would bring the protection of commercial speech within the scope of the first amendment."²²⁸ Such a narrow interpretation of the First Amendment shortchanges commercial speech in two respects. First, commercial speech touches a political chord with the American public. Second, the politically-based theory does not encompass all of the speech protected by the First Amendment.

The problem with excluding commercial speech from First Amendment protection based on a politically-based interpretation, Professor Shiffrin argues, is that "[e]ven if one accepts [the] . . . assumption that the First Amendment is exclusively concerned with political speech, there is good reason to think that much so-called economic regulation touches speech of political importance."²²⁹ While advertisers market a product to entice consumers, advertisements often raise important political and social issues. For example, one recent controversy focused on Calvin Klein's widely criticized jean advertisements showing teen-age models in provocative poses.²³⁰ Another provocative topic involved General Mills' new Betty Crocker and her darker skin color.²³¹ In defense of protecting commercial speech and its underlying political connection, Justice Stewart explained that "[t]he information about price and product conveyed by commercial advertisements may, of course, stimulate thought and debate about political questions."²³² For example, drug price information might impact a person's views concerning price control issues, government subsidy proposals, or legislation aimed at health care, consumer pro-

²²³ See MEIKLEJOHN, *supra* note 213.

²²⁴ See Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 300 (1978).

²²⁵ See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27-29 (1971).

²²⁶ See Thomas Jackson & John Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 10-12 (1979) (arguing that Meiklejohn's and Bork's politically-based First Amendment theory does not extend protection to commercial speech).

²²⁷ See *id.* at 13-14.

²²⁸ *Id.* at 14.

²²⁹ Shiffrin, *supra* note 71, at 1232.

²³⁰ See *U.S. Starts Inquiry on Calvin Klein Ads*, N.Y. TIMES, Sept. 10, 1995, at A27.

²³¹ See Elaine W. Shoben, *Getting the Skin Color 'Right'*, CHI. TRIB., Mar. 28, 1996, at 25.

²³² *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 780 n.8 (1976) (Stewart, J., concurring).

tection, or taxation.²³³ These political issues could equally concern consumers when exposed to tobacco advertisements. Therefore, advertisements promoting harmful products might serve the interests of political discussion, awareness, and participation.²³⁴

Even if commercial speech does not advance political issues, Court opinions and secondary literature support a broader reading of the First Amendment than the view expressed by Jackson and Jeffries.²³⁵ Professor Shiffrin explains, "The Court has been unwilling to confine the first amendment to a single value or even to a few values."²³⁶ The Court has advocated other First Amendment theories besides the politically-based interpretation, namely a marketplace of ideas model.²³⁷ In addition, a politically-based interpretation would fail to protect artistic and scientific speech although both types of speech provides citizens a forum for ideas and education.²³⁸

Another First Amendment interpretation values the rights of the speaker but often forgets the rights of the listener. C. Edwin Baker bases his interpretation of the First Amendment on the self-expression of the speaker.²³⁹ Baker states that "[a]s long as speech represents the freely-chosen expression of the speaker while depending for its power on the free acceptance of the listener, freedom of speech represents a charter of liberty for noncoercive action."²⁴⁰ Baker argues that the First Amendment does not protect speech which "does not represent an attempt to create or affect the world in a way which can be ex-

²³³ See *id.*

²³⁴ See GARTNER, *supra* note 152, at 22-23. The author states, "Commercial speech and political speech cannot be separated . . . all commercial speech is political by its very nature. No commercial speech is entirely devoid of noncommercial, political, or social implications." *Id.* at 22. Therefore, Gartner argues, "All information about the quality and price of products potentially relates to important political issues. In our complex society, all issues that affect attitudes about access to needed goods and services are political issues." *Id.* at 23.

²³⁵ See *supra* text accompanying notes 226-28.

²³⁶ Shiffrin, *supra* note 71, at 1252.

²³⁷ See *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting). Under this theory, Holmes stated:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Id. at 630. The marketplace of ideas theory traces its roots to the writings of John Stuart Mill. See JOHN S. MILL, *ON LIBERTY* (Currin V. Shields ed., 1956) (1859).

²³⁸ Even Meiklejohn, the foremost proponent of the political-based interpretation, concedes that First Amendment protection embraces some nonpolitical speech. See Meiklejohn, *supra* note 220, at 256-57. Meiklejohn specifically argues for the protection of artistic and scientific speech. See *id.* at 257, 263.

²³⁹ See Baker, *supra* note 213, at 7.

²⁴⁰ *Id.*

pected to represent anyone's private or personal wishes."²⁴¹ Therefore, the author concludes that commercial speech should remain unprotected because advertisements represent corporate profit motives and market forces rather than individual expression.²⁴² This view, however, ignores one of the important values of commercial speech. Martin Redish posits that the First Amendment should protect commercial speech to advance the value of allowing individuals to control decisions that affect their lives.²⁴³ Redish argues that "if the first amendment right consists at least in part of the listener's right to receive information, then the speaker's motive logically should be irrelevant to the analysis."²⁴⁴ Therefore, Baker's speaker-centered interpretation neglects the underlying values of commercial speech.

Thomas I. Emerson advances a more inclusive view, arguing that the First Amendment protects speech to discover the truth.²⁴⁵ Emerson states that "freedom of expression is an essential process for advancing knowledge and discovering truth. An individual who seeks knowledge and truth must hear all sides of the question, consider all alternatives, test his judgment by exposing it to opposition, and make full use of different minds."²⁴⁶ A similar theory advancing the discovery of truth derives from Justice Holmes' marketplace of ideas.²⁴⁷ Under this theory, truth will emerge in the marketplace when ideas compete freely.²⁴⁸ While this theory provides a vehicle for commercial speech in the marketplace of ideas, it still does not advance the protection of commercial speech for the value of the consumer's right to receive information and make every day determinations, regardless of whether the ultimate truth would emerge from the speech. Redish explains the value of commercial speech from a consumer perspective, stating that:

[w]hen the individual is presented with rational grounds for preferring one product or brand over another, he is encouraged to consider the competing information, weigh it mentally in the light of the goals of personal satisfaction he has set for himself, counter-balance his conclusions with possible price differentials, and in so doing exercise his abilities to reason and think; this aids him towards the intangible goal of rational self-fulfillment.²⁴⁹

²⁴¹ *Id.* at 3.

²⁴² See generally Baker, *supra* note 213.

²⁴³ See M. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 19-29 (1984).

²⁴⁴ Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 VAND. L. REV. 1433, 1447 (1990).

²⁴⁵ See generally EMERSON, *supra* note 213.

²⁴⁶ *Id.* at 6-7.

²⁴⁷ See *supra* note 237 and accompanying text.

²⁴⁸ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

²⁴⁹ Martin H. Redish, *First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 443-44 (1971).

The lengthy commentary provides many theories which lead to only one conclusion, namely that no single theory completely explains the First Amendment. Professor Shiffrin observes that "first amendment literature has exploded with commentary finding first amendment values involving liberty, self realization, autonomy, the marketplace of ideas, equality, self-government, checking government, and more."²⁵⁰ With all the interpretations that attempt to unite First Amendment jurisprudence, a listener-based theory would offer commercial speech consistent protection from government regulation.

A listener-based model has a rich history in First Amendment jurisprudence. In the 1940s, the Court first recognized the rights of the public to receive information. In *FCC v. Sanders Bros. Radio Station*,²⁵¹ the Court found that the Communications Act of 1934 did not protect a licensee against competition, but rather did protect the public.²⁵² In *Martin v. City of Struthers*,²⁵³ the Court stated explicitly that the right of freedom of speech "embraces the right to distribute literature, and necessarily protects the right to receive it."²⁵⁴ In *Thomas v. Collins*,²⁵⁵ the labor registration statute restricted the rights of the organizer to speak and the workers to hear the information.²⁵⁶ In *Marsh v. Alabama*,²⁵⁷ the Court recognized that the preservation of a free society depends upon the right of each individual citizen to receive literature.²⁵⁸ The Court also recognized this right in *Lamont v. Postmaster General*,²⁵⁹ where an addressee had an affirmative First Amendment right not to be unjustifiably burdened by a statute.²⁶⁰ The Court also discussed the public's right to receive information in privacy cases. For example, in *Stanley v. Georgia*,²⁶¹ the Court stated that "[i]t is now well established that the Constitution protects the right to receive in-

²⁵⁰ Shiffrin, *supra* note 71, at 1252.

²⁵¹ 309 U.S. 470 (1940) (holding that the Communications Act of 1934 did not protect a broadcast licensee from the FCC granting a new license to a proposed new station).

²⁵² *See id.* at 475.

²⁵³ 319 U.S. 141 (1943) (holding an ordinance prohibiting door-to-door solicitation unconstitutional).

²⁵⁴ *Id.* at 143 (citation omitted).

²⁵⁵ 323 U.S. 516 (1945) (finding a statute requiring labor organizers to register before soliciting membership unconstitutional as a prior restraint).

²⁵⁶ *See id.* at 534.

²⁵⁷ 326 U.S. 501 (1946) (finding a right to distribute literature in a company-owned town).

²⁵⁸ *See id.* at 505.

²⁵⁹ 381 U.S. 301 (1965) (upholding the First Amendment right of citizens to receive political publications sent from abroad).

²⁶⁰ *See id.* at 305.

²⁶¹ 394 U.S. 557 (1969) (protecting an individual's privacy interest in possessing obscene material in his own home).

formation and ideas."²⁶² In furthering the rights of listeners, the Court, in *Red Lion Broadcasting Co. v. FCC*,²⁶³ stated that "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."²⁶⁴ In commercial speech, the Court made the logical connection between the consumer and the right to receive advertised information.²⁶⁵ This Supreme Court precedent recognizes the right of the consumer to receive information as a separate right under the First Amendment.

Since the Court extended the First Amendment's reach to include a right of the consumer to know and to receive information, commercial speech merits full First Amendment protection because of its utilitarian value to the listener in his or her role as economic decisionmaker.²⁶⁶ When the Court protects the advertisements of drug prices²⁶⁷ or information about electric utility services,²⁶⁸ the opinions place importance on the consumer's need to receive information. However, when courts uphold restrictions on advertisements of casino gambling,²⁶⁹ lotteries,²⁷⁰ alcoholic beverages,²⁷¹ and tobacco products,²⁷² the same need for information disappears from the judicial opinions. This inconsistent treatment of the public's right to know endangers the value of economic decisionmaking. When commercial speech initially received First Amendment protection, the Court highlighted this value, stating that for private economic decisions to be intelligent and well-informed, "the free flow of commercial information is indispensable. And if it is indispensable to the proper

²⁶² *Id.* at 564. See also *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (recognizing that the First Amendment also protects the right to distribute, the right to receive, and the right to read).

²⁶³ 395 U.S. 367 (1969) (upholding the FCC's fairness doctrine requiring a balanced representation of controversial ideas of public importance).

²⁶⁴ *Id.* at 390.

²⁶⁵ See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Unlike most commercial speech cases, the consumers brought suit against the state restriction to advertising. The Court answered affirmatively that both the consumers and the advertisers enjoy First Amendment protection attached to the flow of drug price information. See *id.* at 756.

²⁶⁶ See Richard T. Kaplar, *The FDA and the First Amendment, in BAD PRESCRIPTION FOR THE FIRST AMENDMENT: FDA CENSORSHIP OF DRUG ADVERTISING AND PROMOTION* 43, 56 (Richard T. Kaplar ed., 1993).

²⁶⁷ See *Virginia Pharmacy*, 425 U.S. at 748.

²⁶⁸ See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

²⁶⁹ See *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986).

²⁷⁰ See *United States v. Edge Broad. Co.*, 113 S. Ct. 2696 (1993).

²⁷¹ See *Adheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995), *vacated*, 116 S. Ct. 1821, *aff'd on reh'g*, 101 F.3d 325 (4th Cir. 1996); *Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983) (en banc).

²⁷² See *Penn Adver., Inc. v. Mayor of Baltimore*, 63 F.3d 1318 (4th Cir. 1995), *vacated sub nom.*, *Penn Adver. v. Schmoke*, 116 S. Ct. 2575, *aff'd on reh'g*, 101 F.3d 332 (4th Cir. 1996).

allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered."²⁷³ This indispensable free flow of commercial information is necessary for all lawful products, even harmful ones. One commentator observed, "Even well-intentioned restrictions that seek to protect the public—such as the prohibition against cigarette ads on television—are highly paternalistic, underestimating the public's ability to recognize the limits of advertising."²⁷⁴ Therefore, the rights of the listener should remain the driving force behind judicial review of commercial speech regulations.

Many theories have offered unifying themes for First Amendment jurisprudence, but the Court has not relied on any one to decide speech cases. Professor Shiffirin explains, "[T]he Court has been generous about the range of values relevant in first amendment theory, and unreceptive to those who ask it to confine first amendment values to a particular favorite."²⁷⁵ The listener-based theory adds another perspective to First Amendment jurisprudence.²⁷⁶ The fact that the speech comes from a corporation or a company should not alter the interests of the consumer.²⁷⁷ In the context of noncommercial speech, the Court stated that "the Court's decisions involving corporations in the business of communication or entertainment are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas."²⁷⁸ If advertisements, in part, advance the interests of the consumers to make informed decisions for their own self, the same rationale for the dissemination of information and ideas extends to commercial speech.²⁷⁹ This same rationale should further extend to advertisements that disseminate information about harmful products, such as cigarettes. Advertising harmful products still informs the consumer about details of the product, its producer, and its price.²⁸⁰ Court decisions that use the *Central Hudson* test to uphold advertising restrictions of harmful products often ignore the right of consumers to make self-informed, economic decisions.

²⁷³ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (citations omitted).

²⁷⁴ GARTNER, *supra* note 152, at 25.

²⁷⁵ Shiffirin, *supra* note 71, at 1252.

²⁷⁶ See *supra* text accompanying notes 251-65.

²⁷⁷ See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.")

²⁷⁸ *Id.* at 783.

²⁷⁹ See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

²⁸⁰ See *id.* at 765.

2. *The Second Danger: Regulating the Advertising of More Legal Products*

The second problem with a deferential *Central Hudson* analysis illustrates the harmful effects of the government's broad power to restrict truthful, nonmisleading advertisements of lawful products. If courts uphold regulations aimed at decreasing consumption of harmful products, then the same logic could apply to other products, thus creating a slippery slope.²⁸¹ One commentator observed that "[g]overnment restrictions on certain types of speech can ultimately become restrictions on all speech . . . [R]estrictions on one group of commercial speakers . . . can ultimately become restrictions on all commercial speakers."²⁸² If a state has a legitimate interest in protecting people from harmful products, such as cigarettes, then a state could regulate the advertisements of other products.²⁸³

A recent Ninth Circuit case provides an example of how a loose *Central Hudson* test can be extended to other kinds of products. In *Association of National Advertisers, Inc. v. Lungren*,²⁸⁴ the court upheld a California law that made it unlawful for a manufacturer or distributor of consumer goods to advertise its products as environmentally-safe unless the goods complied with statutory definitions.²⁸⁵ The undisputed government interest in ensuring truthful environmental advertising and encouraging recycling satisfied the second prong of the *Central Hudson* balancing test.²⁸⁶ The court found that the regulation directly advanced the governmental interest in protecting the consumers against "green marketing."²⁸⁷ The court only required a reasonable belief that the advertising increased the demand for a

²⁸¹ See Maclachlan, *supra* note 206, at 1.

²⁸² Richard T. Kaplar, *Conclusion: Valuing Freedom of Speech, in* BAD PRESCRIPTION FOR THE FIRST AMENDMENT: FDA CENSORSHIP OF DRUG ADVERTISING AND PROMOTION, *supra* note 266, at 113.

²⁸³ See Law, *supra* note 8, at 937 (noting that a substantial interest in protecting people could lead to discouraging consumption of many products including beef, sugar, dairy products, fast automobiles, clothing, and cosmetics that promote gender or sexual ideals that the state deems inappropriate); Weber & Marks, *supra* note 130, at 81 (statement of Weber) (arguing that a substantial interest in protecting people from the grave harm caused by cigarettes could be applied to a variety of activities other than smoking, such as handguns, motorcycle riding, boxing, playing football, auto racing, or liquor consumption).

²⁸⁴ 44 F.3d 726 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 62 (1995).

²⁸⁵ See *id.* at 727 (restricting the use of the terms "ozone friendly," "biodegradable," "photodegradable," "recyclable," and "recycled").

²⁸⁶ See *id.* at 732.

²⁸⁷ See *id.* (defining "green marketing" as increased sales of goods as a result of potentially specious claims or ecological puffery about products with minimal environmental attributes).

product.²⁸⁸ The court stated that “the nexus between advertising, consumer demand and the asserted governmental interests is sufficiently close. Although comprehensive economic data are lacking, the record contains abundant support for the proposition that green marketing boosts consumer demand for the allegedly recycled or biodegradable product.”²⁸⁹ This opinion differs from the Supreme Court’s intermediate scrutiny of the third prong requiring the regulation to directly advance the government’s interests to a material degree.²⁹⁰ However, the *Lungren* opinion resembles the deferential Supreme Court cases that allow the legislature to regulate advertising on the premise that it increases demand for the product.²⁹¹

The desire to protect consumers from harmful or potentially misleading advertisements should not compromise the constitutionally mandated commercial speech balancing test. A relaxed standard has already led to restrictions on advertisements for gambling, tobacco, and alcohol.²⁹² This same deferential standard has been extended to advertisements for other legal products.²⁹³ This standard then could logically apply to an advertising regulation of any product if the courts find that the legislatures or agencies reasonably believed the regulation would protect consumers. The *Central Hudson* test would then prove ineffective in protecting all truthful commercial speech if courts relaxed their review for some regulations.²⁹⁴

The *Central Hudson* test established intermediate scrutiny as the proper standard for reviewing commercial speech regulations.²⁹⁵ But, the Court has applied that balancing test inconsistently during the past twenty years.²⁹⁶ As a result, courts often fail to recognize the right of the consumer to receive commercial information.²⁹⁷ This problem poses a danger to all truthful, nonmisleading advertisements because it remains unclear when the *Central Hudson* test will be applied to pro-

²⁸⁸ See *id.* at 733 (citing *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 342 (1986), for the proposition that the court need not look further than the reasonableness of the legislature’s belief regarding a link between advertising and demand).

²⁸⁹ *Id.*

²⁹⁰ See, e.g., *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). In *Edenfield*, the Court decided that the Board of Accountancy did not present any comprehensive studies to demonstrate that a ban on CPA solicitation would advance its asserted interests in any direct and material way. See *id.* at 771.

²⁹¹ See *United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993); *Posadas*, 478 U.S. at 342.

²⁹² See *supra* text accompanying notes 95-98, 169-77, 179-82.

²⁹³ See, e.g., *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995) (attorney advertising); *Association of Nat’l Advertisers, Inc. v. Lungren*, 44 F.3d 726 (9th Cir. 1994) (environmental advertising), *cert. denied*, 116 S. Ct. 62 (1995).

²⁹⁴ See *supra* text accompanying note 196.

²⁹⁵ See *supra* Part II.A.

²⁹⁶ See *supra* Part II.A.

²⁹⁷ See *supra* Part II.C.1.

vide meaningful review. The FDA rule on tobacco advertising reflects the tension between the substantial interest in protecting minors from tobacco addiction and the recognized protection for commercial speech. A proper application of First Amendment scrutiny warrants striking down the FDA rule because it fails to advance in a direct and material way the government's interest in protecting minors, and because it is more extensive than necessary to serve the interest.²⁹⁸ However, a deferential application might uphold these same restrictions on tobacco advertising finding that they *are* reasonably tailored to the government's interest in protecting minors.²⁹⁹ These divergent results pose a threat to commercial speech that could spread easily to other advertisements and products. The next Part suggests an alternative that would confront tobacco addiction and smoking problems among minors without weakening commercial speech protections.

III

A PRAGMATIC SOLUTION TO KILL THE CANCER WITHIN

Even though the First Amendment protects commercial speech, some tobacco regulations should survive constitutional scrutiny. Courts, however, must not uphold such valid regulations at the expense of lawful advertising of other products. The following proposed solution both strengthens the protection for commercial speech and recognizes the legitimate concern of preventing smoking by minors.³⁰⁰

The Court should reconsider the entire *Central Hudson* balancing test in order to further the First Amendment values of a marketplace of information and a better-informed citizenry.³⁰¹ Throughout the Court's treatment of commercial speech, several justices have warned that the current test fails to adequately protect truthful, noncoercive advertising.³⁰² Justice Stevens argued:

²⁹⁸ See *supra* Part II.B.

²⁹⁹ See *supra* Part II.B.

³⁰⁰ This author hopes, like Justice Blackmun, that "the Court ultimately will come to abandon *Central Hudson's* analysis entirely in favor of one that affords full protection for truthful, noncoercive commercial speech about lawful activities." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 438 (1993) (Blackmun, J., concurring). However, this Note recognizes the Court's reluctance to abandon the intermediate scrutiny test for commercial speech. See *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1589 (1995) (stating that "*Central Hudson* identified several factors that courts should consider in determining whether a regulation of commercial speech survives First Amendment scrutiny . . .").

³⁰¹ See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 769-70 (1976).

³⁰² For example, Justice Blackmun consistently questioned the *Central Hudson* test, stating:

[I]ntermediate scrutiny is appropriate for a restraint on commercial speech designed to protect consumers from misleading or coercive speech, or a regulation related to the time, place, or manner of commercial speech. I

Any "interest" in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the First Amendment . . . [T]he Constitution is most skeptical of supposed state interests that seek to keep people in the dark for what the government believes to be their own good.³⁰³

The overall inconsistency of the "commercial speech" doctrine, according to Stevens, "is that the Court sometimes takes such paternalistic motives seriously."³⁰⁴ The Court needs to recast the values of commercial speech for the consumer and society and question whether the current test protects the dissemination of truthful advertisements of lawful products.

Such an inquiry should lead to an approach that allows regulations for misleading or coercive speech, but protects truthful, nonmisleading advertisements. This approach would reflect a listener-based First Amendment perspective to protect commercial speech, but it would still allow certain kinds of government regulation that would not be permitted for noncommercial speech.³⁰⁵ Although the Court should adopt this more protective approach, the Court will probably not abandon the *Central Hudson* analysis for truthful advertisements.³⁰⁶ Therefore, the underlying value of private, informed decisionmaking for the listener should guide the Court in its application of the *Central Hudson* test. The Court should consistently require that the government prove that its regulation of any truthful advertisement of lawful products advances a substantial interest in a direct and material way.³⁰⁷ This burden requires the Court to carefully consider the regulation, analyzing the link between the proffered regulation and

do not agree, however, that the Court's four-part test is the proper one to be applied when a State seeks to suppress information about a product in order to manipulate a private economic decision that the State cannot or has not regulated or outlawed directly.

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring).

³⁰³ *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1597 (1995) (Steven, J., concurring). See *Virginia Pharmacy*, 425 U.S. at 769 (striking down a regulation banning pharmacists from listing drug prices because "on close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance.").

³⁰⁴ *Coors*, 115 S. Ct. at 1597 (Stevens, J., concurring) (citing *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993); *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986)).

³⁰⁵ *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 433-34 (1993) (Blackmun, J., concurring). The distinction between commercial and noncommercial speech allows commercial speech regulations against false, misleading, or illegal advertisements. See *id.* at 432.

³⁰⁶ See *supra* note 300.

³⁰⁷ See *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989) (not requiring the government to demonstrate that the regulation is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end).

the substantial interest.³⁰⁸ In addition, the regulation must be narrowly tailored to achieve the desired objective.³⁰⁹

The commercial speech doctrine compels this rigorous scrutiny for three reasons. First, the government will pay closer attention to its regulations, thus accomplishing its objective narrowly without overly infringing upon speech. Second, the Court can return consistent review to commercial speech regulations so that lower courts can properly apply the standards to all advertising restrictions including those aimed at harmful products. Finally, a rigorous review would recognize the rights of the consumer as the paramount underlying consideration for commercial advertisements.

While a proper intermediate review would protect tobacco advertisements from excessive regulations,³¹⁰ the government could enforce advertising restrictions to protect minors from the harmful effects of tobacco.³¹¹ Such tailored restrictions would survive First Amendment scrutiny without damaging the commercial speech doctrine. The Court analyzes restrictions aimed at minors differently, thus resulting in a willingness to limit constitutional protections in order to protect children.³¹² In *Bellotti v. Baird*,³¹³ the Court explained the difference between constitutional protections for adults and chil-

³⁰⁸ See *supra* notes 107-11, 145 and accompanying text.

³⁰⁹ See *Fox*, 492 U.S. at 480.

³¹⁰ See *supra* text accompanying notes 146-68.

³¹¹ The Fourth Circuit made this argument in upholding its prior decisions restricting outdoor advertising of tobacco and alcohol products after the Supreme Court remanded both cases for review in light of *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996). See *Penn Adver., Inc. v. Mayor of Baltimore*, 101 F.3d 332, 333 (4th Cir. 1996), *aff'g* 63 F.3d 1318 (4th Cir. 1995); *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 329 (4th Cir. 1996), *aff'g* 63 F.3d 1305 (4th Cir. 1995). Differentiating the Baltimore regulation of outdoor advertising of alcohol products from *Liquormart's* restrictions, the Fourth Circuit stated:

In contrast to Rhode Island's desire to enforce adult temperance through an artificial budgetary constraint, Baltimore's interest is to protect children who are not yet independently able to assess the value of the message presented. This decision thus conforms to the Supreme Court's repeated recognition that children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media.

Anheuser-Busch, 101 F.3d at 329.

³¹² See *FCC v. Pacifica Foundation*, 438 U.S. 726, 749-50 (1978) (upholding the FCC's power to regulate indecent speech over the radio, in part because of greater restrictions when the state's interest in protecting children is involved); *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding a law prohibiting the sale of sexually-explicit magazines to minors under the age of 17 because it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (sustaining the conviction of a child's guardian for violating a child labor law prohibiting minors from selling merchandise in public). The *Prince* Court stated, "[T]he power of the state to control the conduct of children reaches beyond the scope of its authority over adults. . . ." *Id.* at 170.

³¹³ 443 U.S. 622 (1979) (examining when the state may require parental consent before allowing a minor to have an abortion).

dren, stating that "although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . parental attention.'"³¹⁴ The Court has recognized a "compelling interest in protecting the physical and psychological well-being of minors."³¹⁵ With this distinction between adults and minors, the Court could apply a similar division for tobacco advertisements.

When the government interest focuses on protecting minors from illegal smoking and the influence of tobacco advertisements,³¹⁶ regulations should narrowly address this problem. As long as tobacco products are legal, the adult population should remain informed in order to make personal choices about tobacco use. The concern that minors cannot make reasoned choices given the potent influence of glamorous advertising weighs in favor of more restrictions designed to protect young people.³¹⁷ Professor Emerson explains, "The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules."³¹⁸ Therefore, this factor may justify a ban on advertising to which children have unavoidable access, such as billboard advertising.³¹⁹

Once advertising restrictions encroach upon the rights of adult consumers, the regulations cross the permissible line. The Court affirmed the principle that the state may not restrict the rights of the adult population to protect only what is fit for children.³²⁰ For example, the proposed FDA rule, which in part restricts advertisements in

³¹⁴ *Id.* at 635 (citing *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971) (plurality opinion)).

³¹⁵ *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989) (recognizing the compelling state interest in protecting minors from obscene material, but striking down a total ban against indecent dial-a-porn because the statute exceeded what was necessary to protect minors).

³¹⁶ See FDA Rule, *supra* note 2, at 44,397-99. Since it is illegal for children to smoke cigarettes, the government rationale is that the FDA restrictions address the problem of advertisers marketing tobacco products to them. See Clinton 1995 Press Conference, *supra* note 9. President Clinton stated, "[I]t cannot be a violation of the freedom of speech in this country to say that you cannot advertise to entice people to do something which they cannot legally do." *Id.* at 10.

³¹⁷ See Clinton 1995 Press Conference, *supra* note 9. President Clinton observed that "we all know that teenagers are especially susceptible to pressures. Pressure to the manipulation of mass media advertising, the pressure of the seduction of skilled marketing campaigns aimed at exploiting their insecurities and uncertainties about life." *Id.* at 1.

³¹⁸ Emerson, *supra* note 215, at 939. Emerson concluded that "it suffices to say that regulations of communication addressed to [children] need not conform to the requirements of the first amendment in the same way as those applicable to adults." *Id.*

³¹⁹ For a similar argument, see Edwards, *supra* note 145, at 178 n.185.

³²⁰ See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73-74 (1983); *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

magazines with adult readers and limits sponsorship of events to the corporate name, regulates more advertising than necessary to meet the interests of protecting minors.³²¹ Regulations aimed at protecting the physical well-being of children satisfy a compelling state interest test, but these restrictions must be narrowly tailored to affect only children. Professor Emerson cautions that "[s]erious administrative difficulties arise, of course, in attempting to frame restrictions which affect only children, and do not impinge upon the rights of others."³²² Nevertheless, billboard restrictions near schools, and perhaps, advertising limitations for magazines without any adult readers, would directly further the state interest in protecting minors.³²³

Besides narrow restrictions for advertisements aimed only at children, there are other government measures that could help decrease tobacco consumption by minors without infringing First Amendment rights. First, the government should pursue stricter enforcement against illegal sale of cigarettes to minors, by establishing a minimum age to purchase tobacco products,³²⁴ imposing greater fines against sellers who violate the minimum-age rule,³²⁵ and removing vending machines which allow easy access to cigarettes.³²⁶ Second, the government should promote educational speech instead of suppressing tobacco advertisements.³²⁷ Third, higher tobacco taxes can provide another source of funding for educational campaigns, and they can financially deter smokers from purchasing tobacco products. Fourth, the government can gradually reduce the level of addictive nicotine in

³²¹ See *supra* text accompanying notes 155-65.

³²² Emerson, *supra* note 215, at 939.

³²³ Professor Redish agrees with this analysis, stating:

This analysis dictates the conclusion that restrictions on tobacco advertising within a certain distance of a school or playground are constitutional. However, more general restrictions on tobacco advertising cannot constitutionally be regulated on the grounds that minors will also be exposed to it. To allow such restrictions would be to reduce all of society to a community of children for purposes of the First Amendment.

Redish, *supra* note 159, at 608.

³²⁴ FDA Rule, *supra* note 2, at 44,399.

³²⁵ Ludwikowski, *supra* note 137, at 116 ("A stricter enforcement of the prohibition law could make any potentially enticing tobacco advertising irrelevant, if such enforcement accomplishes a decline in teen smoking.").

³²⁶ FDA Rule, *supra* note 2, at 44,399.

³²⁷ Evidence suggested that cigarette consumption declined when there was a concentrated effort to provide antismoking advertisements under the fairness doctrine. See *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 587-88 (D.D.C. 1971) (Wright, J., dissenting) ("[T]he broadcast media were flooded with exceedingly effective anti-smoking commercials. For the first time in years, the statistics began to show a sustained trend toward lesser cigarette consumption."), *aff'd sub nom. Capital Broadcasting Co. v. Kleindienst*, 405 U.S. 1000 (1972); Proposed FDA Rule, *supra* note 4, at 41,327 ("During this time, per capita cigarette consumption declined seven percent, from 4,280 in 1967 to 3,985 in 1970. Most of the seven percent decline (6.2%) was attributable to the anti-smoking messages.").

tobacco products.³²⁸ Finally, the government should continue to impose more restrictions on smoking, such as the prohibition of smoking on domestic airline flights, to show an active disapproval of tobacco consumption.³²⁹ These alternatives address the government's concerns, but maintain the free flow of information for adult consumers.³³⁰

The current debate on tobacco regulations serves as a useful tool to evaluate the current commercial speech doctrine. The government and courts could properly deal with this legitimate public concern and simultaneously return consistency to commercial speech. Courts should not struggle when applying the *Central Hudson* test to restrictions on advertising of harmful products. Instead, regulations should narrowly address tobacco consumption by minors and vigorously pursue other alternatives without transgressing First Amendment rights. This solution would honor an antipaternalistic attitude toward commercial speech for adult consumers, return the responsibility for informed decisionmaking to the adult consumer under a properly defined *Central Hudson* test, and uphold narrowly tailored regulations for children.

CONCLUSION

First Amendment scholars and advertisers cannot predict with certainty how regulations aimed at tobacco advertisements, or other harmful products, would fare under the *Central Hudson* analysis. There are strong legal arguments suggesting that the broad restrictions inhibiting dissemination of this information to consumers fail under intermediate scrutiny. There are courts, however, which refuse to hold these regulations to heightened scrutiny and, instead, defer to

³²⁸ See Helberg, *supra* note 8, at 1267 (citing H.R. 1853, 104th Cong., 1st Sess. § 2 (1995)). In the context of alcohol, Justice Stevens argued:

If Congress is concerned about the potential for increases in the alcohol content of malt beverages, it may, of course, take other steps to combat the problem without running afoul of the First Amendment—for example, Congress may limit directly the alcoholic content of malt beverages. But Congress may not seek to accomplish the same purpose through a policy of consumer ignorance, at the expense of the free-speech rights of the sellers and purchasers.

Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1597 (1995) (Stevens, J., concurring). The same logic should apply to regulations of tobacco advertisements.

³²⁹ See Law, *supra* note 8, at 917. Law states, "Federal law bans smoking on virtually all domestic flights. Over 38 states have banned smoking in a range of public spaces. Localities often adopt restrictions on smoking that go beyond state laws, and private employers enforce no-smoking rules that are more rigorous than those required by state law." *Id.* (footnotes omitted).

³³⁰ See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (stating that people will determine their best interests when they are informed and when the channels of communication remain open).

legislative findings. The inconsistent *Central Hudson* doctrine should concern consumers, since advertisements lead to informed, intelligent economic decisions about products—whether the products are harmful or not. Commercial speech has strayed from the *Virginia Pharmacy* rationale which protected the rights of the consumer instead of accepting the government's paternalistic interests.

This Note's proposal would bring the rights of the consumer to the forefront of commercial speech jurisprudence. As a result, all truthful advertisements of legal products to adult consumers would receive the requisite protection accorded them under the commercial speech doctrine. Thus, the regulation would fail unless the government met its rigorous burden of proving that it had a substantial interest; that there existed a direct and material link between the regulation and the interest; and that the regulation was not more extensive than necessary to satisfy that interest. The government could limit to a greater extent the rights of minor consumers, who cannot always make mature, intelligent decisions. Narrow regulations to address physical health dangers to children merit greater latitude. Therefore, because the current FDA rule fails the intermediate scrutiny test accorded commercial speech, the government should consider narrower restrictions for advertisements aimed at protecting children. In addition, the government should undertake other alternatives that urge more antismoking speech and stricter enforcement of current laws prohibiting the sale of cigarettes to minors. Although not all advertisements can receive absolute First Amendment protection, this solution will prove more effective than having courts, legislatures, consumers, and advertisers struggle through a nebulous balancing of rules of interpretation. Such a struggle could lead only to damaging effects for the overall protection of truthful, nonmisleading advertisements for the astute consumer.

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