PROPOSED GOVERNMENT REGULATION OF TOBACCO ADVERTISING USES TEENS TO DISGUISE FIRST AMENDMENT VIOLATIONS

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The battle lines between Big Brother and Joe Camel have been drawn and a victory by either side is likely to result in a controversy similar to that following the verdict from the O.J. Simpson trial. The outcome of the tobacco advertising war turns on a choice between the lesser of two evils; either the advertising of a potentially harmful product will be permitted or an advertiser's freedom of speech will be restricted. The reviewing courts should rule in favor of preserving the constitutional principle of free speech as guaranteed by the First Amendment. Even if such a decision appears to defend actions that most Americans oppose, it would, in the long run, provide a greater benefit to the American public.

This Comment evaluates the constitutionality of the recently proposed tobacco advertising restrictions. Part I reviews the course of governmental regulation of tobacco from its introduction in America to present day. Part II examines the evolution of commercial speech jurisprudence. Part III argues that the recently proposed restrictions, which seek to limit tobacco advertising, do not comply with the established standards governing commercial speech. Although a substantial government interest exists, the regulations fall short of furthering this interest because they are over-inclusive and because less intrusive alternatives are available. This Comment concludes, in Part IV, that the reviewing courts should dismiss the proposed regulations for their failure to satisfy the existing standards for commercial speech analysis.

I. HISTORY OF TOBACCO REGULATION

Government regulation of tobacco is barely a century old. Tobacco itself was introduced to the Western World in 1492 by Christopher Columbus during his first voyage to the New World. By the middle of the sixteenth century tobacco had become popular in Europe and, while the colonies settled, it became the most desired American crop.

Although the recently proposed regulations are the most comprehensive, the government has been restricting tobacco advertising and methods of sale for over a century. As early as 1890, when cigarettes began increasing in popularity among the American public, twenty-six states passed regulations banning sales to minors. By 1909, with an anti-smoking lobby growing in strength, over a dozen states completely banned the manufacture, sale, and possession of cigarettes.

1 In the novel, Big Brother is an omnipotent and authoritarian governmental entity which monitors all the behavior of its citizens. GEORGE ORWELL, 1984 (1949).
2 Joe Camel is the star of a cigarette advertising campaign which features “a cartoon character who at times [gives] out dating and social advice.” 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 [hereinafter Kids Mustn’t Smoke].
3 President William T. Clinton, Press Conference in the East Room of White House (Aug. 10, 1995) [hereinafter Clinton Transcript] (on file with COMM.LAW CONSPECTUS). On August 10, 1995, President Clinton announced by Executive Authority, that he was instructing the Food and Drug Administration to “initiate a broad series of steps all designed to stop sales and marketing of cigarettes and smokeless tobacco to children.” Id.
4 U.S. Const. amend. I.
6 Id.
7 Clinton Proposes Youth Antismoking Plan; FACTS ON FILE WORLD NEWS DIGEST, Aug. 17, 1995, at 594. [hereinafter FACTS ON FILE].
8 Jacob Sullum, The War On Tobacco; Smoking Regulations Go Way Too Far, SAN DIEGO UNION-TRIBUNE, Aug. 20, 1995, at G1. Then, much as now, these regulations were halfheartedly enforced and children continued to buy cigarettes even in jurisdictions which prohibited sales to minors. Id.
9 Id.
Federal regulation of tobacco advertising officially began in 1964 with the Surgeon General’s report on the health hazards of smoking, which motivated Congress to pass the Federal Cigarette Labeling and Advertising Act in 1965. In 1970, Congress continued to regulate the tobacco industry by enacting the Public Health Cigarette Smoking Act of 1969, which took away the ability of tobacco producers to advertise on television and radio. Subsequently, additional regulations were imposed following further investigation of the consequences of smoking on health. Federal legislation in 1984 instituted requirements for stronger warning labels on all methods of cigarette advertising. These warnings were extended to smokeless tobacco products and print advertisements in the Comprehensive Smokeless Tobacco Health Education Act of 1986.

Despite these legislative measures, the use of tobacco products by teenagers increased, while use by adults decreased. Although research data shows that teenage smoking actually declined by about one percent per annum during the 1980’s, teenage smoking rose dramatically beginning in 1986. Due to the ban on electronic media, tobacco companies altered their advertising methods and adopted the use of popular sporting events and magazines as attractive promotional media. Although it is currently legal, this method of tobacco advertising has drawn criticism.

With intensified regulation and progressively declining sales of their products, tobacco companies aggressively promote their goods through unrestricted media, particularly sporting events. Skeptics argue that while most adults are able to recognize the apparent contradiction between tobacco use and athletic performance, teenagers are more likely to find a false sense of compatibility between the two activities.

II. COMMERCIAL SPEECH JURISPRUDENCE

Despite the apparent goals of the First Amendment, its guarantee of free speech has not been afforded unlimited protection from regulation. In O’Brien v. United States, the Supreme Court demonstrated that it was unwilling to accept the “view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” The Court stated that a limitation imposed

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**United States Dep’t of Health, Educ. & Welfare, Smoking and Health: Report of the Advisory Committee to the Surgeon General Public Health Service 28-29 (1964).**


17 Jay Nelson, an analyst with Brown Bros., Harriman & Co. in New York explained that: “[t]here is a school of thought, that says when the ads were pulled from TV, the cigarette companies actually came out ahead, because they also pulled their anti-smoking ads.” Ira Teinowitz & Andrea Sachs, Clinton Comes Out Smokin’ Against Cigs, ADVERTISING AGE, Aug. 14, 1995, at 1. Cigarette sales volume actually increased in the years following the ban.


19 The Federal Cigarette Labeling and Advertising Act was amended to require the following rotation of warnings:

SURGEON GENERAL’S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

SURGEON GENERAL’S WARNING: Quitting Smoking Now Greatly Reduces Serious Risk to Your Health.

SURGEON GENERAL’S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.

SURGEON GENERAL’S WARNING: Cigarette Smoke Contains Carbon Monoxide.


17 Elizabeth Gleick, Out of Mouths of Babes, TIME, Aug. 21, 1995, at 33. Among eighth graders, the percentage of those who smoked in the past 30 days increased 30% between 1991 and 1994. Id.


19 Id. at 218. Tobacco advertisers have cleverly circumvented the ban on active promotion of their products on television by advertising at widely publicized and watched sporting events such as motor racing. Id. The tobacco industry sponsors racing and in exchange is allowed to display its logos on the cars and billboards surrounding the track.

20 Id. at 220. The racing community overlooks the seemingly contradictory marriage of tobacco and motor sports because the tobacco industry has been a very charitable sponsor.


22 Id. at 376.
on First Amendment freedoms by the government may be justified if it is borne out of a "sufficiently important governmental interest." Therefore, assuming that a given conduct constitutes speech, the courts may find that its protection under the First Amendment is limited. However, the government cannot simply restrict speech because it disagrees with its message or content matter. The government must meet strict standards if it seeks to restrict a method of expression.

Commercial speech has been defined as speech which does "no more than propose a commercial transaction." Traditionally, commercial speech was considered to be an aspect of a free market economy and was subject to government regulation. It did not receive protection under the First Amendment until two decades ago. In the early 1970's, the courts began to recognize that an open, competitive, and informative marketplace should be afforded protection under the First Amendment. The informational function of commercial speech was first recognized by the Supreme Court in two cases, Bigelow v. Virginia and Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council.

Although the Court recognized that the First Amendment guarantees the freedom of commercial speech, it refused to extend the same amount of protection that protects political speech. Laws infringing upon political speech, for example, are analyzed by the courts under the rubric of strict scrutiny. The Court in Widmar v. Vincent stated that the most exacting scrutiny is applied to cases "in which a State undertakes to regulate speech on the basis of its content." The Supreme Court distinguished commercial speech because of its economic content and set a lesser standard of protection than that afforded to non commercial speech. Thus, commercial speech is afforded intermediate scrutiny. The reasoning stems from the Court's determination that such a standard is consistent with the "subordinate position [of commercial speech] in the scale of First Amendment values."

Review of commercial speech regulation under the standard of intermediate scrutiny is conducted under the four-prong test developed in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n. Under the scheme, set forth in Central Hudson the commercial speech must first concern a lawful activity and must not be misleading. Should the commercial speech in question pass this threshold prong, the burden shifts to the government to: (1) assert a substantial interest in support of its regulation; (2) demonstrate that the regulation directly advances the governmental interest asserted; and (3) show that the regulation is narrowly tailored and is "not more extensive than is necessary" to serve the asserted governmental interest.

The basis for affording First Amendment protection under commercial speech regulation is the ability of student religious groups to conduct meetings on campus. It held that the University exclusionary policy was not content-neutral and, therefore, violated the First Amendment. Id. See, e.g., Carey v. Brown, 447 U.S. 455 (1980). See Carey v. Population Serv. Int'l, 431 U.S. 678 (1977)(restricting advertising of contraceptives).

See Florida Bar v. Went For It, Inc., 115 S.Ct. 2371 (1995). The Court applied the intermediary scrutiny standard when examining the effects of lawyer advertising in light of the state's substantial interest of preserving the integrity of the legal profession. Id.

Historically, courts have imposed restrictions on commercial speech and have not been willing to include it under First Amendment protection. See, e.g., Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955); see also Valente v. Chrestenson, 316 U.S. 52 (1942)(upholding a statute that prohibited the advertising of handbills because it found a lack of constitutional limits on governmental restriction of commercial advertising). See Virginia State Bd. of Pharmacy, 425 U.S. 748; see also Bigelow v. Virginia, 421 U.S. 809 (1975).

Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305, 1313 (4th Cir. 1995)(petition for cert. filed) (citing Metromedia, Inc. v. San Diego, 453 U.S. 490, 505-507 (1981)(plurality opinion). 454 U.S. 263, 276 (1981). The Court examined restrictions placed by the University of Missouri, Kansas City upon the ability of student religious groups to conduct meetings on campus. It held that the University exclusionary policy was not content-neutral and, therefore, violated the First Amendment. Id.

Ohrallik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). Commercial speech, which is afforded protection under the First Amendment, may be subjected to greater governmental regulation than, for example, political expression. See Florida Bar v. Went For It, Inc., 115 S.Ct. 2371 (1995). The Court applied the intermediary scrutiny standard when examining the effects of lawyer advertising in light of the state's substantial interest of preserving the integrity of the legal profession. Id.
tion to commercial speech stems from its informational function. Courts have recognized the value of commercial speakers because they "have extensive knowledge of both the market and their products" and "are well-situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity." At the same time, the Supreme Court has not hesitated in upholding governmental restrictions on speech which initiate or evidence illegal conduct. The courts permitted regulation in such instances as the exchange of information regarding securities, direct lawyer solicitation, and the exchange of price and production information.

Generally, the right to engage in commercial speech has been asserted by those seeking to use it to market their products or services. The recipients of the commercial speech have also asserted their right to benefit from such speech. The Supreme Court extended this right to those who relay commercial speech from a speaker for a fee (i.e., advertisers).

The proposed FDA regulations supported by the President are to allow tobacco sales only to people aged over 18 and older, requiring vendors to verify proof of age by checking identification (all states already had similar laws); and white text in other outdoor and in-store tobacco ads; Limit tobacco advertising in publications with a significant amount of young readers to black and white text only; and Require tobacco industry to institute an annual $150 million advertising campaign to prevent youth smoking.

The tobacco industry quickly attacked the proposed advertising restrictions because it has a very high financial stake at risk. Tobacco remains one of

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41 See, e.g., Anheuser-Busch, Inc. v. Schmoke, 63 F.3d at 1312-13 (4th Cir. 1995).
43 Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949). "It has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." Id.
44 See, e.g., SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968).
49 See Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (plurality opinion) (upholding the right to disseminate commercial speech to outdoor advertisers who challenged a billboard ban).
50 The proposed FDA regulations supported by the President are to allow tobacco sales only to people aged over 18 and older, requiring vendors to verify proof of age by checking identification (all states already had similar laws); Prohibit cigarette sales from vending machines and by mail order, allowing only "face-to-face" sales; Prohibit free tobacco samples and ban the sale of individual cigarettes or packs of fewer than 20; Ban brand-name tobacco advertising at sporting events and on products not related to tobacco use, such as clothing, instead allowing only company names; Ban outdoor tobacco advertising within 1,000 yards (900m) of schools and playgrounds, permitting only black

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51 Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed. Reg. 41346 (1995) (to be codified at 21 C.F.R. pts. 801, 803, 804 and 897). The FDA claimed that smokeless tobacco and cigarettes fall under the jurisdiction of the Federal Food, Drug and Cosmetic Act because the nicotine they deliver is "intended to affect the structure or function of the body and it achieves its intended effects through chemical action within the human body." Id. One commentator strongly disapproved of the FDA's announcement, remarking that declaring the cigarette as a "nicotine-delivery-device" was analogous to "saying that Scotch is an 'ethanol-delivery-device' or that coffee is a 'caffeine-delivery-device.' Such simplistic pseudoscientific terminology reduces smoking to a pharmacological compulsion." Sullum, supra note 8, at G1.
53 Currently all 50 states have laws prohibiting the sale of cigarettes to persons under 18 years old. Sullum, supra note 8, at G1.
54 Joseph Perkins, Kids Are Just a Smoke Screen, ATLANTA J. & CONSTITUTION, Aug. 23, 1995, at A11. Health and Human Services Secretary Donna Shalala has claimed that children are pressured into smoking by the images which portray the activity as being "cool." Id.
the largest crops in the United States. It is estimated that if the ban goes into effect, tobacco companies risk losing "$256 million the first year and $1.2 billion over 10 years." 

Opponents of the proposed FDA advertising ban claim that the Administration lacks the appropriate jurisdiction because only Congress has the power to regulate tobacco. Nevertheless, the chief objection raised by critics of the proposed restrictions is the alleged First Amendment violation. A coalition of tobacco companies, publishers, and advertisers argue that a ban on tobacco advertising would violate their right of free speech protected by the First Amendment. Although the dispute over the extent of protection granted to advertising under the First Amendment is not a new one, it is likely that the Supreme Court will be the final arbiter in what is almost certain to be a painstaking legal battle.

III. CONSTITUTIONALITY OF THE PROPOSED ADVERTISING REGULATIONS

Tobacco companies challenged the FDA's jurisdiction in proposing restrictions on tobacco advertising, asserting that only Congress has the power to regulate tobacco. But governmental censorship of traditionally protected commercial speech for the purpose of controlling lawful behavior that the government determines to be harmful remains the key issue. If promulgated, such regulatory measures might start society down a slippery slope of governmental parenting through the use of speech controls. In order to successfully impose the ban on tobacco advertising, the government must satisfy the four part Central Hudson standard for evaluating commercial speech protection under the First Amendment.

A. The Commercial Speech in Question Must Concern a Lawful Activity and Must Not Be Misleading

The commercial speech in question must concern a lawful activity and must not be misleading. Tobacco advertising has been limited to certain media such as magazines, newspapers, billboards, and sponsorship labels at sporting events. The government ignored these methods of promotion after it imposed regulations in the 1970's eliminating tobacco advertising from electronic media. In the form in which it exists today, tobacco advertising is a lawful activity. 

In Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, the Court struck down a ban that restricted the advertising of prescription drug prices in newspapers on the basis that the sale of prescription drugs was an "entirely lawful activity." However, supporters of the proposed ban argue that the tobacco advertising in its present state is misleading because it portrays an inaccurate, glorified image of smoking to the nation's young people. They claim that such advertising is illusory because it attempts to make a harmful product appear desirable. Furthermore, they assert that unlike the ordinary embellishment often associated with product
promotion, tobacco advertising actually deceives consumers about the harmful consequences of tobacco use.\textsuperscript{67}

In response to this contention proponents of unfettered tobacco advertising point out that a great number of advertised products do not disclose their potentially harmful effects.\textsuperscript{68} Makers of fried foods or those high in sodium are not forced to state in promotions that their products may lead to heart disease and clogged arteries, and that they may cause high blood pressure. As required by law, the producers must list only the ingredients and nutritional value of the products and rely on the consumer to make an educated purchase. However, many products intended for adults are attractive to teenagers, who because of their age, may lack the full understanding of the benefits or detriments which stem from using the products. This does not justify an outright ban on such advertising because, consequently, the informative value of the advertisements will be kept from adults.\textsuperscript{69} A comprehensive regulatory ban, such as the one proposed, will institute a de facto ban on outdoor tobacco advertising in many urban areas due to restrictions based on proximity of schools within city limits.\textsuperscript{70}

There is little merit in asserting that First Amendment protection should not be accorded commercial speech that advertises a legal but harmful product. In Lamar Outdoor Advertising, Inc v. Mississippi State Tax Comm'n,\textsuperscript{71} the Court refused to impose a ban on advertising alcoholic beverages in Mississippi based on the State's assertion that alcohol is a product which is considered "hazardous beyond controversy."\textsuperscript{72} The Court determined that there is no "hazardous exception" to the First Amendment and that such an exception could not exist without "destroying the commercial speech doctrine."\textsuperscript{73}

What next potentially harmful product will incite a purist reaction banning its promotion because young people may misunderstand its effects? Will it be caffeine, or foods heavy in fat or sugar? If the restrictions are implemented, will the simple appearance of cigarettes in movies or on television thereafter be banned because celebrities smoking may negatively influence children? It is not improbable to suspect that a ban on tobacco advertising will lead to gags on manufacturers of other products that at any given time may be considered politically incorrect. If the public develops a negative sentiment towards certain products, market mechanisms, not the government, should decide whether these products survive.

Tobacco manufacturers are not advocating through their advertisements that their products perform a specific function or achieve a specific result. Instead, at least one commentator concluded that deceptive advertising exists where products claim representations which are not supported by substantial evidence. \textsuperscript{74} Comparison of goods such as medicines, or tires to tobacco fails to recognize that tobacco advertising is not based on any specific utility. The utility function of a product can be objectively determined by the public. On the other hand, a claim of a product to be tasty or pleasurable is purely subjective and, thus, it would be difficult, if not impossible, to determine whether such a claim is deceptive.

The First Amendment can be a double edged sword. Advertisements can portray smoking as hip, individualistic, and vigorous. But the same can be done with fast-food. Yet the Federal Trade Commission ("FTC")\textsuperscript{75} is not ready to ban advertisements of cheeseburgers and fries loaded with cholesterol simply because a percentage of the public is "conned" by advertisements using thin models to depict that fast food is healthy. Even if it could be shown that a percentage of teen smoke because of the glamorous image and attractive characters in the ads, that fact does not demonstrate that the reason for cigarette consumption is to make smokers look and feel like the individuals in the commercials.

Unlike the manufacturers of other "unhealthy" products, the tobacco industry has been compelled to dispel any misunderstandings that may involve the health risks related to tobacco use. Recently, Massa-

\textsuperscript{67} Id. at 114.
\textsuperscript{68} See Sullum, supra note 8, at G1.
\textsuperscript{69} See Hernandez, supra note 50 at 12. The proposed regulations directed at children will blanket virtually all tobacco advertising in large cities, which often carry several school districts. Under the regulations, tobacco advertisements would be prohibited within 1,000 feet of a schools and playgrounds. Id.
\textsuperscript{70} Id.
\textsuperscript{71} 701 F.2d 314 (5th Cir. 1983).
\textsuperscript{72} Id. at 324.
\textsuperscript{73} Polin, supra note 5, at 114.
\textsuperscript{74} See Rhodes Pharmaceutical Co. v. FTC, 208 F.2d. 382 (7th Cir. 1953), modified, 348 U.S. 940 (1955)(holding that an advertisement was deceptive even if as little as nine percent of the public interpreted its mention of a "cure" for arthritis to mean that the product actually cured the disease).
\textsuperscript{75} See Firestone Tire & Rubber Co. v. FTC, 481 F.2d 246 (6th Cir. 1973).
\textsuperscript{76} Federal Trade Commission, Staff Report on the Cigarette Advertising Investigation 2-2 (1981). The FTC is responsible for detecting deception in advertising. The standard is whether a substantial portion of the public is deceived by the advertising. Id.
In its present state, tobacco advertising satisfies the legality requirement of *Central Hudson*. Tobacco advertising should remain lawful until clear evidence demonstrates that it specifically targets children and incites them to violate the prohibition on sale of cigarettes to minors. Also, tobacco advertising has not been shown to be clearly deceptive. The existing cautionary measures, such as the requirement of warning labels on packages specifically counter and eliminate any misleading effects of tobacco advertising. Moreover, it appears that the proposed regulations are themselves deceptive. The public should be weary of a paternalistic campaign run under the guise of protecting young people, but which in essence seeks to eliminate a product from the market. Prohibition should not be sought at the expense of speech. If at all necessary, it should be overt.

In light of these considerations, reviewing courts would likely determine that tobacco advertising is entitled to limited First Amendment protection because it satisfies the first requirement of the *Central Hudson* commercial speech test.

B. Can the Government Demonstrate a Substantial Interest in Support of Its Proposed Regulation?

Once it is determined that the commercial speech, which the government seeks to regulate, involves legal products or activities and is not misleading, the state will need to assert a substantial interest as a basis for its restrictions pursuant to the second prong of *Central Hudson*. According to the recent announcements by the President, the government intends to protect the youths of America from the ill effects of smoking by restricting the advertising of tobacco.

The inherent governmental interest is to...
preserve the health and safety of young people.\textsuperscript{91} The government asserts that its interest in restricting tobacco advertising furthers the public policy associated with the prohibition of cigarette sales to minors.\textsuperscript{92}

In his announcement of the ban, President Clinton referred to the health risks of smoking and its influence on the young.\textsuperscript{93} Approximately 3,000 young people begin to smoke each day and 1,000 will die as a result of a smoking related illness.\textsuperscript{94}

Because sale of cigarettes to minors is illegal in the United States, the government has an obvious interest in and seeks to restrict tobacco advertising based on the notion that it contributes to these illegal sales.\textsuperscript{95} The government asserts its interest in limiting the exposure of minors to stimuli which encourage them to purchase cigarettes, with the objective of reducing the number of minors buying cigarettes and, thereby, decreasing the number of illegal transactions.\textsuperscript{96} However, by purchasing cigarettes, minors themselves do not expressly violate prohibitive ordinances in most states.\textsuperscript{97} These ordinances focus their restrictions on those who actually sell the cigarettes to young people.\textsuperscript{98} Therefore, if the number of minors who seek to purchase cigarettes decreases, the number of illegal transactions will also decline.\textsuperscript{99}

The Supreme Court has generally been lenient in recognizing a substantial governmental interest when applying the second prong of the \textit{Central Hudson} test to proposed advertising bans. For example, in \textit{Posadas de Puerto Rico, Inc. v. Tourism Co. of Puerto Rico},\textsuperscript{100} the Supreme Court determined that in restricting casino gambling advertisements, the Puerto Rican government had a substantial interest in decreasing the demand for casino gambling by its citizens.\textsuperscript{101} Also, in \textit{Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore},\textsuperscript{102} the United States District Court for the District of Maryland concluded that, by seeking to restrict tobacco advertising on billboards within the city, the City of Baltimore demonstrated a substantial interest in furthering the prohibition of cigarette sales to minors.\textsuperscript{103} Based on these considerations, it is reasonable to assume that the government's asserted interests in restricting tobacco advertising would satisfy the second prong of the \textit{Central Hudson} test.

\section*{C. Do the Proposed Restrictions Directly Advance the Governmental Interest?}

The third prong of the \textit{Central Hudson} test requires the government to demonstrate a precise connection between its proposed commercial speech restrictions and the interest it seeks to accomplish through their enforcement.\textsuperscript{104} In applying this standard to the recently proposed tobacco advertising ban, the reviewing courts need to evaluate the purpose for the regulations. Accordingly, the government would need to demonstrate a \textit{direct} connection between the tobacco advertising and reduction in tobacco consumption by minors.

As with the second \textit{Central Hudson} prong, courts
have generally been lenient in their application of the third standard which requires a direct link between the proposed restrictions and the governmental interest. However, in Edenfield v. Fane, the Supreme Court appeared to tighten the "intermediate level" of scrutiny which previously had been applied to challenges on the restraints on commercial speech. The Supreme Court stated that the proposed restrictions must alleviate the alleged harms to a material degree. Based upon this statement, the plaintiff advertising company in Penn Advertising argued that the Edenfield Court introduced a higher burden of proof on the government, which required a "fact-intensive inquiry" and not simply an assertion of legislative judgment. However, the District Court in Penn Advertising of Baltimore Inc. v. Mayor of Baltimore was not ready to recognize an increased level of scrutiny for commercial speech analysis and reverted to the traditional intermediary standard. In relying on this hardly persuasive interpretation of Edenfield, the FDA would seek to show only that the proposed ban directly advances the government's interest in preserving the health of young people. But, the District Court in Penn Advertising appears to have ignored the intent of the Edenfield opinion. By increasing the scrutiny for commercial speech in Edenfield, the Supreme Court seemed to be setting a tone solidifying the constitutional protection afforded to commercial speech.

The courts have given deference to the legislative judgment that the purpose of advertising is to increase consumption. In response, Tobacco advertisers asserted that the purpose of cigarette advertising is not to increase overall consumption but rather to increase market share by winning over smokers consuming competing brands. Failing to see the reason why so much energy and expense is devoted to promotion of tobacco products solely to increase market share at the expense of competitors, the courts have not been persuaded by this argument. The FTC claims that tobacco advertising is not aimed at brand promotion, as the industry maintains, but rather to increase tobacco consumption.

In 1989, Surgeon General C. Everett Koop conceded that no study has yet indicated a link between advertising and tobacco consumption.

Whether or not tobacco advertising intends or actually causes increased consumption, a problem remains in establishing the nexus between advertising and consumption of tobacco products by minors, particularly because minors are prohibited by law from purchasing tobacco products. Assuming arguing that tobacco advertising seeks to increase sales and consumption by adults, it may be more difficult to

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106 See Dunagin v. Oxford, 718 F.2d 738 (5th Cir. 1983)(finding it necessary to examine any scientific evidence as to whether a link existed between alcohol advertising and consumption); see also Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328, 341 (1986)(accepting without examining evidence, Puerto Rico Legislature's assertion that casino advertising would increase gambling); Central Hudson, 447 U.S. at 569 (finding an immediate connection between advertising and demand for electricity). "Central Hudson Gas & Electric would not contest the advertising ban unless it believed that promotion would increase its sales." Id.

107 See Dunagin v. Oxford, 718 F.2d 738 (5th Cir. 1983); see also Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328, 341 (1986) (accepting without examining evidence, Puerto Rico Legislature's assertion that casino advertising would increase gambling). Central Hudson, 447 U.S. at 569 (finding an immediate connection between advertising and demand for electricity). "Central Hudson Gas & Electric would not contest the advertising ban unless it believed that promotion would increase its sales." Id.

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110 Id. (quoting Dunagin v. Oxford, 718 F.2d 738, 749 (5th Cir. 1983)).

111 See Dunagin v. Oxford, 718 F.2d 738 (5th Cir. 1983). (finding it necessary to examine any scientific evidence as to whether a link existed between alcohol advertising and consumption); see also Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328, 341 (1986)(accepting without examining evidence, Puerto Rico Legislature's assertion that casino advertising would increase gambling); Central Hudson, 447 U.S. at 569 (finding an immediate connection between advertising and demand for electricity). "Central Hudson Gas & Electric would not contest the advertising ban unless it believed that promotion would increase its sales." Id.

112 Id. at 1407-08. Penn argued that Edenfield increased the level of scrutiny for commercial speech restrictions and that it is "inappropriate for the Courts to defer to a legislative judgment that advertising increases consumption" of alcohol. Id.

113 Id. at 1408-09 (stating that it was unable to find language specifying in Edenfield the precise level of scrutiny with which this Court must review the Ordinance). The government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Id. The Court allowed room for legislative judgments and found that the link cited by the government in the case at hand was "more immediately apparent." Id.


115 U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES. REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS; A REPORT OF THE SURGEON GENERAL 516-17 (1989). 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. Given the complexity of the issue, none is likely to be forthcoming in the foreseeable future. [The analysis cited by the Surgeon General] also concluded that the extent of influence of advertising and promotion on the level of consumption is unknown and possibly unknowable.

116 Id.
demonstrate that the same advertising also targets minors. In light of the existing prohibition of tobacco sales to minors, a link between tobacco advertising and consumption by young people is presumably less apparent. If tobacco advertising is generally considered a lawful activity, how can it seek to advance consumption by minors, a clearly unlawful transaction? Although 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.

Arguably, advertising is more likely to affect those who can relate to it because of the products being promoted. Consequently, cigarette advertisements may have a stronger impact on those teens who already smoke. Although recently gathered data indicates that a link to consumption by minors may exist, it is uncertain. The number of teens who smoke has increased in recent years, but teenagers still account for just $1.26 billion of total sales or only 2.7 percent. Moreover, research has shown that when it comes to smoking, teenagers are more influenced by their peers, their perceptions of relevant risks and benefits, and the presence of smokers in the home, rather than by advertising.

Considering the judicially-recognized proposition that tobacco advertising increases consumption and the lack of substantial empirical evidence to prove it, the direct advancement of the government's interest in restricting tobacco advertising to protect the health of minors can only be surmised at best. Therefore, the third prong of the Central Hudson test would not be fulfilled.

D. Are the Proposed Restrictions on Tobacco Advertising Narrowly Tailored to Meet the Government’s Interest?

The fourth and final prong of the Central Hudson analysis requires that the proposed governmental restrictions be narrowly tailored and serve as the least restrictive means of accomplishing the government's interest. In Central Hudson, Justice Brennan expressed his concern "whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to 'dampen' demand for or use of the product." First Amendment protection of commercial speech serves as an "alternative" to paternalistic government regulations because it allows people to make a free choice about a product based on the information provided to them. It is because of the informational value offered by advertising that regulations seeking to limit it must be narrowly drawn.

Recently, the Supreme Court has appeared to relax the fourth prong of the Central Hudson test by requiring only a reasonable link between the government's restrictions on commercial speech and the interest involved. The Court explained that the means used by the government need not be the least restrictive but must be narrowly tailored. Advertising restrictions, which establish a de facto ban on advertising of tobacco altogether, can reasonably be found to constitute a sweeping measure that is too broad to pass this test. The significance of the government's inherent encroachment may be further exacerbated when considering that, having chosen to legalize the sale of tobacco, it now seeks to reduce demand for this product by censoring commercial speech. It should be noted that in order to avoid the First Amendment challenge, the government may seek the most drastic measure in its arsenal, which is a complete prohibition on the sale of tobacco. The

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118 Kids Mustn't Smoke, supra note 2, at A18. 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.” Id. The percentage of eight graders who have smoked in the past 30 days increased 30 percent between 1991 and 1994. See Gleick, supra note 17, at 33. It has been estimated that of all adult smokers, 90 percent started smoking before the age of 20. Id.

119 Tony Jackson, Too Soon To Stub Out Big Tobacco: Clinton’s Campaign Is Unlikely To Lead To a Sharp Decline In Smoking In the U.S., FIN. TIMES, Aug. 12, 1995, at 9. Last year, consumption of cigarettes in the U.S. at 485bn units, was 21 percent lower than the peak in 1977. This was the first time in 10 years that it has remained consistent with the previous year. Since 1990, the proportion of the U.S. population smoking has been consistently around 25 percent. Id.


111 See Sullum, supra note 8, at G1.


113 447 U.S. at 574 (Blackmun, J., concurring).


115 Board of Trustees of State Univ. v. Fox, 492 U.S. 469 (1989).

116 Id. at 480. The Court explained that the required link is "not necessarily perfect, but reasonable; [it] represents not necessarily the single best disposition but one whose scope is in 'proportion to the interest served'; [one] that employs not necessarily the least restrictive means but, . . . a means narrowly tailored to achieve the desired objective." Id.
greater power to completely ban tobacco sales necessarily includes the lesser power to ban tobacco advertising.\textsuperscript{126} Although outright prohibition on the sale of tobacco would not specifically implicate the First Amendment, it would, nonetheless, provide only a “Pyrhhic victory” for tobacco advertisers considering they would be out of business.\textsuperscript{128}

In choosing to evaluate potentially less restrictive alternatives, as per the fourth prong of the Central Hudson test, the courts preserve the integrity of First Amendment commercial speech protection. Strict application of this standard to the proposed tobacco advertising restrictions demonstrates that they are not the least restrictive means of accomplishing the government’s interest. The reviewing courts should carefully evaluate less restrictive options.

As it now stands, the proposed ban is over inclusive in its coverage, because in attempting to keep cigarettes away from minors, it also severely infringes on the freedoms of adults to smoke. The ban on cigarette vending machines\textsuperscript{137} exemplifies governmental overkill.\textsuperscript{128} Although sales through vending machines do not directly implicate the First Amendment, the ban is slipped under the general blanket theme of tobacco advertising limitations. Children may be able to easily buy cigarettes from vending machines, which are often unattended, but they would not be able to obtain them from places which prevent underage access (e.g., bars, nightclubs).\textsuperscript{129}

The same argument applies to the proposed magazine advertising restrictions. Tobacco advertising in magazines is already low and has fallen drastically during the last decade.\textsuperscript{130} By restricting tobacco advertising in publications that have a fifteen percent readership, the government is effectively restricting the up to eighty-five percent adult readers of those magazines from receiving the information.\textsuperscript{131}

The proposed restrictions also prohibit tobacco advertising within 1,000 feet of any school.\textsuperscript{133} This provision appears to be more reasonable because its application, in many instances, is not overly restrictive. In Penn Advertising\textsuperscript{135} the U.S. District Court determined that Baltimore’s restrictions on billboard advertising were directly related to the City’s interest in the health of minors.\textsuperscript{134} A distinction should be recognized between the Penn Advertising\textsuperscript{135} ruling and the issues raised by the proposed FDA restrictions. Baltimore sought only to ban outdoor billboard advertising in certain areas of the city.\textsuperscript{136} Its restrictions did not affect any other types of tobacco advertising, and as a result, they were not overly restrictive.\textsuperscript{137} The Baltimore ban still allowed for tobacco advertisements in other areas of the city. Contrarily the FDA’s proposed restrictions sweep more broadly by infringing on other means and methods of advertising tobacco instead of limiting the restriction to just billboards.

Potential problems also exist with the “1,000 feet” billboard restriction when it is to be applied within city limits. Many urban areas contain schools, which are located near each other, and as a result, it would be difficult, if not impossible, for advertisers to find zoned areas where they could legally display their ads.

President Clinton stated that “[a]dults make their own decisions about whether or not to smoke”.\textsuperscript{138} However, can they if so much of the informational value they receive from advertising may be effectively wiped out? Under the guise of protecting teenagers, the government seems to be making this decision for them.

A ban on promotional brand name tobacco advertising carries some validity. Although, because pro-

\textsuperscript{126} See Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 345 (1986). The Court applied this analysis to the wholesale prohibition of casino gambling in Puerto Rico. Id.
\textsuperscript{128} Id. “It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand.” Id.
\textsuperscript{137} Research shows that cigarette vending machines are the most common means through which the youngest teens obtain cigarettes. Kids Mustn't Smoke, supra note 2, at A18.
\textsuperscript{130} Sullum, supra note 8, at G1.
\textsuperscript{131} See Hernandez, supra note 50, at 12. According to Magazine Publishers of America, by mid 1995, tobacco advertising in 200 consumer magazines (about 85 percent of the industry) made up less than three percent of all advertising. Eight years ago it constituted about seven percent to eight percent. Id.
\textsuperscript{132} Id.
\textsuperscript{133} See discussion, supra note 101 and accompanying text.
\textsuperscript{134} Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore, 862 F. Supp. 1402 (D. MD. 1994).
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id. at 1404.
\textsuperscript{138} Id. at 1414. “Billboards [in the city] are conspicuously absent from more affluent communities. They present a stark contrast to adolescents between the lifestyle depicted in the advertisement and the actual neighborhood surrounding them thereby enhancing the attractiveness of the advertised product.” Id. at 1411 (citing Anheuser-Busch v. Mayor of Baltimore City, 855 F. Supp. 811, 818, aff’d, 63 F. 3d 1305 (4th Cir. 1995)).
\textsuperscript{139} See Clinton Transcript, supra note 3.
motional items do not display warning labels they can, arguably, be misleading. A prohibition on promotional merchandise also raises other red flags. Because it infringes on commercial speech rights of advertisers, the ban may implicate due process issues. By prohibiting the use of trademarks or copyrighted material without statutory authorization, the FDA would likely deprive tobacco manufacturers of their property rights without due process of law, taking their property without just compensation. Moreover, proposed restrictions such as the ban on mail-orders of tobacco products are limitations on commerce which can only be regulated by Congress.

Several less restrictive alternatives to the advertising ban should be considered. Perhaps the strongest argument can be summed up in favor of a more effective anti-smoking campaign. The FDA proposal would require the tobacco industry to spend $150 million a year on an anti-smoking campaign. As it is, the tobacco industry currently spends approximately $6 billion on advertising. Perhaps a compromise could be reached in which the industry would agree to pay a higher premium on the anti-smoking campaign in exchange for retaining their advertising rights. Such an arrangement might ultimately be less expensive than the inevitable long litigation. After all, anti-smoking advertising is not new to the tobacco industry. It was required to pay for broadcast anti-smoking advertisements prior to 1971.

An anti-smoking campaign could also be subsidized with a government imposed "sin tax" on tobacco products. Although the consumer would share the burden of higher prices with tobacco producers, such a sacrifice would be warranted if it could place the price of cigarettes and other tobacco items out of reach of most children. Doing so would accomplish the government's interest in promoting better health.

Anti-smoking campaigns have demonstrated promising results among the youth population. It has been estimated that eight out of ten youngsters reach the age of majority without becoming habitual smokers. For example, African-American anti-smoking groups have enlisted churches, parents and school groups to help discourage underage smoking. Their efforts appear to be paying off because only 4.4 percent of black teens smoke compared with nearly 23 percent of white teens.

In San Jose, California, an anti-smoking group was able to convince the local law enforcement authorities to conduct sting operations on vendors who sell to children. A stricter enforcement of the prohibition law could make any potentially enticing tobacco advertising irrelevant, if such enforcement accomplishes a decline in teen smoking.

In Massachusetts, tobacco-control officials persuaded 200 businesses to give discounts to children who would be willing to sign a smoke-free pledge. The state contributed to this effort with extensive anti-smoking advertisement campaigns. The result was a forty percent reduction in cigarette sales to teens since 1994. In addition to the anti-smoking advertisement campaigns aimed at children, there should be a more expansive effort to involve parents in the campaign. Arguably, even with countless modern-day distractions, parents still have the greatest influence over their children's behavior.

The proposed tobacco advertising restrictions fail...
to establish a significant link to the government’s interest in protecting the health of children. They are, for the most part, over-inclusive in that they virtually eliminate adults’ access to the information presented in the advertisements. Moreover, several less restrictive means of accomplishing the government’s purpose exist and should not be ignored at the expense of a major setback to First Amendment commercial speech protection.

IV. CONCLUSION

The President and the FDA hope to achieve the laudable goal of protecting the health of America’s youth from the harmful effects of tobacco. The means intended to achieve this objective are the recently proposed tobacco advertising restrictions. As a result of their commercial speech infringements, the regulations raise valid First Amendment objections. Reviewing courts would likely determine that the proposed restrictions should not be upheld because they fail to satisfy the established constitutional standards protecting commercial speech. There is a lack of solid evidence demonstrating that tobacco advertising targets and induces children to consume tobacco products. Although, the government’s interest is valid, it can not be directly advanced by the proposed restrictions without being overly inclusive. Moreover, several less constitutionally intrusive alternatives could be utilized to eliminate tobacco consumption by children. The proposed advertising ban is paternalistic and condescending in its application because it manipulates the behavior of the public by restricting its exposure to a legally sold product. One does not need to be a teenager or a smoker to be concerned about the potential for subsequent government infringements founded upon a precedent upholding the present regulations. The First Amendment was established to guard against government sponsored truth, even in the realm of commercial speech.

"the mystique of the forbidden to-
ization of cigarettes” claiming that doing so would make smoking so taboo “only enhancing] the mystique of the forbidden tobac fruit.” Id.