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# BUTT OUT: AN ANALYSIS OF THE FDA'S PROPOSED RESTRICTIONS ON CIGARETTE ADVERTISING UNDER THE COMMERCIAL-SPEECH DOCTRINE

## I. INTRODUCTION

In 1969 in response to the growing recognition of the dangers of cigarette smoking, Congress passed the Public Health Cigarette Smoking Act.<sup>1</sup> In doing so Congress made a highly political choice to attack the problem by limiting the marketing of cigarettes over the broadcast media rather than directly regulating the product. The Act made it unlawful to "advertise cigarettes . . . on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."<sup>2</sup>

On its face the Smoking Act seemed to inflict a major blow on cigarette manufacturers. However, the history of the Act reveals that the restriction was in the best interests of the cigarette manufacturers, and that cigarette consumption actually increased upon passage of the Act.<sup>3</sup>

Over the past two decades, the scientific community's understanding of the dangers of smoking has grown stronger. At the same time cigarette manufacturers have shifted their advertising dollars into other media or found ways to skirt the rules by advertising at televised sporting events.<sup>4</sup> Their presence is particularly striking in

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1. Pub. L. No. 91-222, 84 Stat. 87 (1970) (codified as amended at 15 U.S.C. §§ 1331-1340 (1994)).

2. 15 U.S.C. § 1335 (1994).

3. See *infra* part III.B.

4. The Justice Department recently cracked down on one tobacco giant, bringing suit against Philip Morris for illegally advertising on broadcast television through stadium signs. The parties immediately settled under an agreement requiring the cigarette company to move their signs to positions less conspicuous to television cameras. However, the agreement excludes auto racing; its application is limited to football, basketball, and baseball stadiums. A Philip Morris spokesperson suggested that auto racing sponsorship was very different and that the ruling had no implications on motorsports. The Justice Department, however, did not foreclose the possibility of action in that venue. Ira Teinowitz & Jeff Jensen, *Roadblock for Racing?*, ADVERTISING AGE, June 12, 1995, at 44, 44.

the sport of auto racing in which cigarette companies sponsor racing series, and sponsored teams dominate various racing circuits. When a Roger Penske-owned race car leads a race, Marlboro's logo may appear on national television for hours. Such promotion is cost-effective and targets a very loyal audience with an appealing image.<sup>5</sup>

The continuing shift in public and political opinion towards cigarette smoking led President Clinton to instruct the Food and Drug Administration (FDA) to draft regulations which would keep tobacco away from teenagers.<sup>6</sup> The FDA responded by proposing regulations restricting the sale and distribution of cigarettes and smokeless tobacco products to protect children and adolescents.<sup>7</sup> The FDA proposal places substantial limitations on advertising and promotional practices, including event sponsorship, to "decrease the amount of positive imagery that makes [cigarette] products so appealing to [children]."<sup>8</sup> This will significantly reduce the ability of cigarette companies to market their products, with a consequential impact on industries dependent upon the sponsorship revenue. In particular, the money-intensive auto racing industry faces a significant loss of operating revenue.<sup>9</sup>

Following Clinton's announcement, the top five cigarette manufacturers immediately brought suit disputing the FDA's jurisdiction.<sup>10</sup> However, the FDA released an extensive jurisdictional analysis along with the proposed rules,<sup>11</sup> concluding that "nicotine in cigarettes . . . is a drug, and . . . these products are drug delivery devices within the meaning of the Food, Drug, and Cosmetic Act."<sup>12</sup>

Critics initially suggested that Clinton was using the FDA to force a compromise.<sup>13</sup> Under current law if the regulatory body directly regulates cigarettes, rather than their advertisement, it must either declare nicotine safe and effective and approve it, or outlaw the

5. See *infra* part II.D.

6. Elizabeth Gleick, *Out of the Mouths of Babes*, TIME, Aug. 21, 1995, at 33, 33.

7. 60 Fed. Reg. 41,314 (1995) (to be codified at 21 C.F.R. pts. 801, 803, 804, 897) (proposed Aug. 11, 1995).

8. *Id.* at 41,314.

9. Jeanne Whalen, *Cigarette Interest Flags in Racing*, ADVERTISING AGE, Dec. 6, 1993, at 28, 28.

10. Gleick, *supra* note 6, at 34.

11. 60 Fed. Reg. 41,454 (1995).

12. *Id.* at 41,455.

13. Philip J. Hilts, *F.D.A. Head Says He is Seeking No Big Change in Cigarette Rules*, N.Y. TIMES, June 29, 1994, at A1, A20.

drug.<sup>14</sup> Despite the American Medical Association's expressed desire for a smoke-free society by the year 2000,<sup>15</sup> the government is unlikely to go that far. Both Representative Henry Waxman, a leading opponent of the cigarette industry, and FDA Commissioner Dr. David A. Kessler have gone on record stating that their aim is not a total ban on cigarettes.<sup>16</sup> The proposed compromise legislation would allow the FDA to "regulate advertising, promotion, sales and nicotine level—in exchange for keeping cigarettes on the market."<sup>17</sup>

While this scenario unfolded, the 104th Congress introduced a series of bills designed to curb other forms of advertisement of tobacco products;<sup>18</sup> bring regulation of such products under the control of the FDA;<sup>19</sup> and require the reduction and eventual elimination of nicotine in tobacco products.<sup>20</sup>

The cigarette industry countered by lobbying for the introduction of bills, in both the Senate and House, prohibiting the regulation of tobacco-sponsored advertising "used by the National Association of Stock Car Auto Racing [(NASCAR)] . . . or any other professional motor sports association."<sup>21</sup> In addition the R.J.Reynolds Tobacco Company, in direct response to the President's rhetoric and the FDA proposals, ran a series of ads criticizing the proposal, including one which directly addressed the sponsorship of auto racing.<sup>22</sup> The tobacco company enlisted legendary stock car driver and Winston Cup Champion Richard Petty<sup>23</sup> to write an open letter to the Presi-

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14. Alan C. Miller, *Will Foe Throw Tobacco Firms a Lifeboat?*, L.A. TIMES, July 1, 1994, at A3.

15. Thomas E. Kottke, *Smoke-Free 2000: A Step Closer*, 274 JAMA 503 (1995).

16. Hilts, *supra* note 13, at A1; Miller, *supra* note 14, at A3.

17. Miller, *supra* note 14, at A3.

18. Tobacco Products Control Act of 1995, S. 1262, 104th Cong., 1st Sess. (1995). This bill would amend the Federal Cigarette Labeling and Advertising Act to restrict advertising on billboards near elementary and secondary schools; print ads in publications with more than 15% of its subscribers under the age of 18; and placement of cigarette products packages or advertisements in motion pictures, videos, video game machines, or on or within a family amusement center. *Id.* § 2.

19. Youth Smoking Prevention Act of 1995, H.R. 2414, 104th Cong., 1st Sess. (1995).

20. Freedom From Nicotine Addiction Act of 1995, H.R. 1853, 104th Cong., 1st Sess. (1995).

21. S. 1295, 104th Cong., 1st Sess. § 1 (1995); H.R. 2265, 104th Cong., 1st Sess. (1995).

22. See Advertisement, R.J.Reynolds Tobacco Company, *Together We Can Work It Out*, L.A. TIMES, Oct. 3, 1995, at C5 [hereinafter R.J.R. Advertisement].

23. R.J.Reynolds has sponsored the Winston Cup series since 1970. Chris Roush, *Red Necks, White Socks, and Blue-Chip Sponsors*, BUS. WK., Aug. 15, 1994, at 74, 74. The marketer currently sponsors the series, a race team, and contributes \$3.5 million in prizes to drivers. Teinowitz & Jensen, *supra* note 4, at 44.

dent.<sup>24</sup> The cigarette company attempted to trade on public distrust of bureaucracies, and attacked the President's administration with what amounts to a veiled political threat. Petty wrote:

Look, the fact of the matter is nobody wants kids to smoke. Not the President. Not the tobacco companies. Not me. But preventing a company from putting its brand name on NASCAR Winston Cup racing isn't going to make a bit of difference. The way I see it, this Administration's just looking to distract our attention from the things you and I really care about. And anybody connected to tobacco is an easy target.

I've been around for a long time now, and I've seen plenty of Government regulation. But I never thought I'd see the day when the Government told me I couldn't paint somebody's name on the side of my car.<sup>25</sup>

Despite this vigorous response, the cigarette industry faces a daunting task under current commercial-speech doctrine.

This Comment reviews the case law leading to the original ban on tobacco broadcast ads. It then analyzes the constitutionality of the proposed FDA advertising and sponsorship regulations in light of cases comprising the modern conception of commercial speech within the First Amendment. Along the way it articulates an updated formulation of the *Central Hudson Gas & Electric Corp. v. Public Service Comm.* test and discusses the many difficulties in its application. Ultimately the analysis suggests that cigarette advertisers will find their strongest argument in *Central Hudson's* requirement that restrictions on commercial speech be no more extensive than necessary.

There is no doubt regarding the dangers of smoking and the power of the media to influence buying behavior. However, the decision to reduce cigarette smoking through advertising restrictions sacrifices First Amendment principles, personal autonomy, and the health of existing smokers in the name of political expediency.

In many ways Richard Petty is right. Preventing a company from putting its brand name on NASCAR Winston Cup racing is not the best way to discourage smoking. The government should regulate the nicotine content of cigarettes. By gradually removing the addictive

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24. See R.J.R. Advertisement, *supra* note 22, at C5.

25. *Id.*

substance, demand for tobacco products will more accurately reflect public will in light of legal advertising, and undoubtedly lead to a more significant reduction in overall smoking than any ban on promotion.

## II. THE TOBACCO PROBLEM, PROPOSED RESTRICTIONS AND POTENTIAL IMPACT ON SPORTING EVENTS

### A. *The Tobacco Problem*

The dangers of cigarette smoking are very real and substantial in both individual and societal terms. The statistics are sobering. An estimated fifty million Americans smoke cigarettes,<sup>26</sup> and another six million use smokeless tobacco products.<sup>27</sup> To keep up with this demand the United States tobacco industry produces more than 1.6 million cigarettes each day.<sup>28</sup>

Tobacco remains the largest preventable cause of illness and premature death.<sup>29</sup> Each year more than 400,000 Americans die from smoking-related illnesses.<sup>30</sup> At this rate the cigarette companies would soon kill their entire market were it not for the fact that each day another 3000 young people become regular smokers.<sup>31</sup> Approximately three million American adolescents currently smoke, a figure of particular significance in light of data suggesting that "anyone who does not begin smoking in childhood or adolescence is unlikely to ever begin."<sup>32</sup>

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26. SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: POPULATION ESTIMATES 1993, Publication No. 94-3017 (1994) at 89, 95; *Cigarette Smoking Among Adults—United States, 1993*, 43 MORBIDITY & MORTALITY WKLY. REP. 925, 925-30 (1994).

27. *Use of Smokeless Tobacco Among Adults—United States, 1991*, 42 MORBIDITY & MORTALITY WKLY. REP. 263, 263 (1993).

28. Mark Clayton, *Would a Total Ad Ban Be Hazardous to Tobacco Industry's Health?*, CHRISTIAN SCI. MONITOR, Dec. 12, 1985, (Business) at 25.

29. *Cigarette Smoking—Attributable Mortality and Years of Potential Life—United States, 1990*, 42 MORBIDITY & MORTALITY WKLY. REP. 645, 645 (1993).

30. *Id.* By comparison, 250,000 Americans die each year from AIDS, alcohol, murders, car accidents, suicides, illegal drugs, and fires combined. INSTITUTE OF MEDICINE, COMMITTEE ON PREVENTING NICOTINE ADDICTION IN CHILDREN AND YOUTHS, GROWING UP TOBACCO FREE: PREVENTING NICOTINE ADDICTION IN CHILDREN AND YOUTHS 4 (Barbara S. Lynch & Richard J. Bonnie eds., 1994) [hereinafter TOBACCO FREE].

31. TOBACCO FREE, *supra* note 30, at 8.

32. 60 Fed. Reg. 41,314 (1995) (citing U.S. DEP'T OF HEALTH AND HUMAN SERVS.,

### B. *The Power of the Media*

The proposed FDA and Congressional legislation is predicated on the conclusion that "easy access to tobacco products, advertising and promotional activities can influence a young person's decision to smoke or use smokeless tobacco products."<sup>33</sup> Despite the Public Health Cigarette Smoking Act,<sup>34</sup> which proscribed the use of broadcast advertising, tobacco products remain "among the most heavily advertised products in the United States."<sup>35</sup> To maintain and replace customers, the tobacco industry spends an estimated \$6 billion to advertise and promote their product.<sup>36</sup>

The tobacco industry continues to assert that advertising does not create smokers but instead cultivates brand loyalty.<sup>37</sup> Its spokespeople suggest that a ban on advertising, "would just reduce the [advertising] cost to the companies."<sup>38</sup> However, critics of such ads conclude that they "convey to young people that tobacco use is desirable, socially acceptable, safe, healthy, and prevalent in society."<sup>39</sup> While some of these conclusions are open to debate,<sup>40</sup> significant evidence attests to the media's power to build brand

PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL 5, 58, 65-67 (1994)).

33. *Id.* at 41,315.

34. Pub. L. No. 91-222, 84 Stat. 89 (1970) (codified as amended at 15 U.S.C. § 1335 (1994)).

35. 60 Fed. Reg. at 41,315 (citing the U.S. DEP'T OF HEALTH AND HUMAN SERVS., PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL 160 (1994)).

36. *Federal Trade Commission, Report to Congress for 1993 Pursuant to the Federal Cigarette Labeling and Advertising Act* 4 tbl. 3, 18 tbl. 3D (1995); see also Henry A. Waxman, *Tobacco and Our Kids*, KEEPING IN TOUCH (Henry A. Waxman, Wash. D.C.) Nov. 1995, at 4.

37. Clayton, *supra* note 28, (Business) at 25 (citing Anne Browder, Assistant to the President of the Tobacco Institute). Studies show cigarettes have the highest brand loyalty among consumers of any consumer product. Ronald Alsop, *Brand Loyalty is Rarely Blind Loyalty*, WALL ST. J., Oct. 19, 1989, at B1.

38. Clayton, *supra* note 28, (Business) at 25 (citing Anne Browder, Assistant to the President of the Tobacco Institute).

39. 60 Fed. Reg. at 41,315.

40. See Erica Swecker, Note, *Joe Camel: Will "Old Joe" Survive?*, 36 WM. & MARY L. REV. 1519, 1522-25 (1995) (discussing the existing studies on the causal link between cigarette ads and smoking among children).

awareness among children,<sup>41</sup> thereby ensuring brand loyalty if the children do start smoking.

### C. Proposed FDA Restrictions

The FDA proposal will effectively close a wide range of loopholes left open by the Public Health Cigarette Smoking Act of 1969. However, it offers little relief to those smokers already hooked on nicotine. Rather than directly address the general problem by reducing nicotine levels, the FDA limits its focus to the laudable goal of "preventing future generations from developing an addiction to nicotine-containing tobacco products."<sup>42</sup> Accordingly, the proposal proscribes the sale, distribution, and advertisement of cigarette products to minors.

Under subpart B of proposed title 21, section 897, the FDA directly targets teen smoking by "restrict[ing] the sale of cigarettes and smokeless tobacco products to individuals age 18 and older";<sup>43</sup> "eliminat[ing] 'impersonal' methods of sale that do not readily allow age verification, such as mail orders, self-service displays, and vending machines";<sup>44</sup> prohibiting the distribution of free samples and sale of single cigarettes and "kiddie" packs;<sup>45</sup> restricting redemption of coupons to face-to-face transactions with individuals eighteen and older;<sup>46</sup> and finally, by "prohibit[ing] manufacturers from using a trade name or brand name of a nontobacco product for a cigarette or smokeless tobacco product."<sup>47</sup> The latter provision will prevent a manufacturer from transferring the image, good will, and appeal of a popular nontobacco product to a tobacco product.<sup>48</sup>

While this Comment will not analyze the sales and distribution restrictions, these provisions stand in sharp contrast to the advertising provisions, offering direct solutions to keep cigarettes out of the hands of minors without impinging on constitutional rights.

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41. See Paul M. Ficher et al., *Brand Logo Recognition by Children Aged 3 to 6 Years: Mickey Mouse and Old Joe the Camel*, 266 JAMA 3145 (1991).

42. 60 Fed. Reg. 41,314 (1995).

43. *Id.* at 41,315, 41,322-23, 41,373-74 (proposed 21 C.F.R. § 897.14).

44. *Id.* at 41,315, 41,324-26, 41,373 (proposed 21 C.F.R. §§ 897.12(a), 897.14(b)).

45. *Id.* at 41,324, 41,374 (proposed 21 C.F.R. § 897.16(b)). "Kiddie" packs contain fewer cigarettes, and are both more affordable and easier to conceal by minors, than full-size packs. *Id.*

46. *Id.* at 41,315, 41,325-26, 41,373-74 (proposed 21 C.F.R. § 897.14(a)).

47. *Id.* at 41,315, 41,324, 41,374 (proposed 21 C.F.R. § 897.16).

48. *Id.* at 41,315.



Subpart C of the FDA proposal adds an education program, putting more information in front of potential and current smokers. The section requires "each manufacturer to establish and maintain a national public education program"<sup>49</sup> to counteract "the effects of the pervasive and positive imagery that . . . foster[s] a youth market for tobacco products."<sup>50</sup> Each manufacturer would be required to contribute an amount in proportion to its share of the national total of advertising and promotional expenditures.<sup>51</sup> The contributions will total \$150 million each year, the major portion of which would be spent on television.<sup>52</sup> Here again, this proposal raises no constitutional issues; instead, the FDA seeks to maximize the power of the media to shape public thought without restricting opposing points of view regarding a legal product.

By contrast, subpart D proscribes labeling and advertising practices,<sup>53</sup> directly implicating First Amendment rights. Under proposed section 897.32, the FDA would restrict print advertising that primarily reaches minors to black-and-white, text-only formats.<sup>54</sup> This provision reflects the conclusion that "children and adolescents are very receptive to images and cartoons and less attentive to texts."<sup>55</sup> This conclusion also informs the proposed prohibition on outdoor advertising on billboards outside of buildings within 1,000 feet of any playground, elementary school, or secondary school.<sup>56</sup>

The proposal would also require that cigarette advertising contain a statement of the product's established name; intended use; and a brief statement regarding relevant warnings, precautions, side effects, and contraindications.<sup>57</sup> In addition, there would be a complete prohibition on branded, nontobacco items used by the manufacturers as an "inducement to purchase cigarettes or generate purchases

49. *Id.* at 41,326, 41,373 (proposed 21 C.F.R. § 897.29).

50. *Id.* at 41,326.

51. *Id.* at 41,328, 41,374 (proposed 21 C.F.R. § 897.29(b)).

52. *Id.* at 41,328.

53. *Id.* at 41,334-40, 41,374.

54. *Id.* at 41,335-36, 41,374. "[T]he proposed regulations would require that advertising in any publication with a youth readership of more than 15 percent . . . or more than 2 million children and adolescents . . . be limited to a text-only format in black and white." *Id.* at 41,328.

55. *Id.* at 41,315, 41,335. By contrast, the "FDA believes that advertising in publications that are read primarily by adults should be allowed to use imagery and color because the effect of such advertising on young people would be nominal." *Id.* at 41,335.

56. *Id.* at 41,334, 41,374 (proposed 21 C.F.R. § 897.30(b)).

57. *Id.* at 41,374 (proposed 21 C.F.R. § 897.32(b)).

through the use of proof-of-purchase coupons."<sup>58</sup> Currently, smokers, or those claiming to be smokers, can pick up a range of clothing including free t-shirts and caps, and paper promotional products such as calendars and pin-ups.<sup>59</sup> Such promotions are particularly effective with young people who carry these walking billboards into schools and other locations where such advertising is usually prohibited.<sup>60</sup>

Finally, proposed section 897.34(c) severely restricts the sponsorship of athletic, musical, or artistic events.<sup>61</sup> This restriction applies to both the overall sponsorship of the events and the individual entries and teams, and will have a significant effect on sports such as auto racing.<sup>62</sup>

The proposal limits event sponsorship to the name of the tobacco company with a total prohibition on the use of any "brand name . . . logo, symbols, motto, selling message, or any other indicia of product identification similar or identical to those used for any brand of cigarettes or smokeless tobacco products."<sup>63</sup> The proposal prevents manufacturers from circumventing this rule by incorporating each brand separately, through restriction of sponsorship to registered corporate names in existence prior to January 1, 1995.<sup>64</sup> Sponsorship of individual entries and teams is also limited to the name of the tobacco company and must appear in a text-only, black-and-white format.<sup>65</sup>

These limitations will effectively destroy the usefulness of event sponsorships, since a good portion of their value derives from the exploitation of the logo and color scheme of the products. To its credit, however, the proposal effectively allows modest recognition for those corporations sponsoring events based on philanthropic motives.<sup>66</sup>

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58. *Id.* at 41,336, 41,374-75 (proposed 21 C.F.R. § 897.34(a), (b)).

59. *Id.* at 41,336. This author received a range of promotional items as part of a Marlboro racing promotion including a t-shirt and a wall calendar. More expensive merchandise is available in exchange for symbols detached from packs of cigarettes. All of this merchandise, of course, bears the Marlboro name. The registration form simply requests a written verification of age.

60. *Id.*

61. *Id.* at 41,336, 41,375 (proposed 21 C.F.R. § 897.34(c)).

62. *Id.* at 41,336-37.

63. *Id.* at 41,336, 41,375 (proposed 21 C.F.R. § 897.34(c)).

64. *Id.* (proposed 21 C.F.R. § 897.34(c)).

65. *Id.* (proposed 21 C.F.R. § 897.34(c)).

66. *Id.* at 41,375 (proposed 21 C.F.R. § 897.34(c)).

The FDA's proposal offers a wide-range of provisions which will undoubtedly affect the sale of cigarettes to minors. However, those provisions proscribing advertising represent a serious imposition on freedom of speech and are predicated solely on the content of such speech. In addition, the proposal only indirectly addresses other significant socialization factors such as peer pressure and the highly correlated effect of parental smoking on their children's choice to begin smoking.<sup>67</sup> While advertising surely serves to legitimize smoking and build brand recognition, it is undoubtedly true that direct peer and parental behavior is a much more salient factor in the decision to smoke.

More importantly, the proposal fails to address the most significant factor ensuring the continued use of the product—the addictive quality of nicotine. Thus, the proposal acts as a gatekeeper discouraging children from entering into the addiction but offers no help to those trapped inside its walls.

#### *D. Potential Impact on the Auto Racing Industry*

The motorsport industry was founded on its marketing value. Early automobile manufacturers invested in auto racing to demonstrate the quality of their products.<sup>68</sup> Nonetheless, the sport remained small until the late 1960s and early 1970s when “[t]elevision coverage brought the excitement and danger of competition into people's homes,”<sup>69</sup> and package product advertisers discovered the value of painting their logos on car doors.<sup>70</sup> Sponsorship had a profound impact on auto racing; the exploding financial resources enabled racing to develop into a high-tech, high-profile sport.<sup>71</sup>

Today an estimated 440 million television viewers watch Formula 1 racing internationally.<sup>72</sup> In America the sponsor of a NASCAR Winston Cup stock car receives more than thirty hours of television coverage over the course of the series for the cost of one thirty-

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67. Mark Fuerst, *Passing the Torch*, AM. HEALTH, June 1992, at 9, 9.

68. Bob Eastoe, *Still in with a Sporting Chance*, ACCT., Nov. 1994, at 34, 34.

69. *Id.* at 35.

70. In 1971 R.J.Reynolds began its association with NASCAR creating the Winston Cup Championship, ushering in the modern and profitable era of stock car racing. Winston also sponsors the National Hot Rod Association's Winston Drag Racing Series and the NASCAR Winston West Series. Whalen, *supra* note 9, at 28.

71. RAINER W. SCHLEGELMILCH & HARTMUT LEHBRINK, *PORTRAITS OF THE 60S FORMULA 1 6* (1994).

72. Eastoe, *supra* note 68, at 34.

second spot broadcast during the Super Bowl,<sup>73</sup> making sponsorship of auto racing particularly cost effective to advertisers. Furthermore, research suggests that such advertising targets a particularly loyal fan base.<sup>74</sup> Despite the NASCAR's "red neck" image, studies suggest that stock car fans have considerable disposable income and are more likely to buy products from a NASCAR sponsor than from a competitor that is not.<sup>75</sup>

The FDA restrictions on cigarette advertising will eliminate an estimated \$60 million in sponsorships,<sup>76</sup> a significant source of revenue for the sport. While other packaged goods will undoubtedly fill the void,<sup>77</sup> their contributions may not match those of cigarette companies. Prohibited from directly advertising over the airwaves, the cigarette industry finds a premium in such sponsorship. For producers of nonrestricted products, the sponsorship of a sporting event or entry is just one more venue to highlight a trademark on television. By contrast, it is the only way that tobacco brands may appear on television, amplifying the value of the powerful medium.

Deprived of the full value of sponsorship, cigarette manufacturers will undoubtedly pull out of auto racing rather than limit sponsorship to the name of the corporate parent.<sup>78</sup> As the Chairman and CEO of R.J.Reynolds once noted, "we are in the business of selling cigarettes, not the racing business."<sup>79</sup> Proscription of cigarette sponsorship will therefore have a significant short-term impact on the financial structure of auto racing.

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73. 60 Fed. Reg. 41,337 (1995) (citing IEG INC., IEG'S COMPLETE GUIDE TO SPONSORSHIP: EVERYTHING YOU NEED TO KNOW ABOUT SPORTS, ARTS, EVENTS, ENTERTAINMENT, AND CAUSE MARKETING 5 (Chicago, Ill., 1995)). By one account, Philip Morris and R.J.Reynolds received nearly \$40 million in "free" time on television through sponsorships. Teinowitz & Jensen, *supra* note 4, at 44.

74. Also, *supra* note 37, at B1, B10.

75. Roush, *supra* note 23, at 74.

76. Whalen, *supra* note 9, at 28.

77. Over the last two years McDonald's Corp., Hershey Foods Corp., and the Kellogg Co. entered racing, sponsoring cars in the NASCAR stock car series. *Id.*

78. However, the cigarette companies, which have diversified into other packaged goods, may continue their investment through sponsorship in the name of these unrestricted goods. David Phillips, *Where There's Smoke: Will Congress Strip Racing of Its Tobacco and Beer Sponsorship Dollars?*, AUTOWEEK, Jan. 14, 1991, at 49, 52.

79. S. CHAPMAN, INTERNATIONAL ORGANIZATION OF CONSUMERS, THE DYING TRADE, THE HAGUE, NETH. 53 (Sept. 1985).

### III. JUDICIAL HISTORY OF CIGARETTE ADVERTISING RESTRICTIONS

#### A. *Banzhaf v. FCC and the FCC's Fairness Doctrine Ruling*

*Banzhaf v. FCC*<sup>80</sup> heralded judicial approval of state restrictions on cigarette advertising. The Court of Appeals for the District of Columbia affirmed "a ruling of the Federal Communications Commission requiring radio and television stations which carry cigarette advertising to devote a significant amount of broadcast time to presenting the case against cigarette smoking."<sup>81</sup> While the case did not directly endorse restrictions on advertising, it set the stage for subsequent legislation and litigation.

In December 1966, John F. Banzhaf set the entire controversy in motion when he wrote to WCBS-TV requesting free airtime "in which anti-smokers might respond to the pro-smoking views he said were implicit in the cigarette commercials it broadcast."<sup>82</sup> Banzhaf suggested that through the "'portrayals of youthful or virile-looking or sophisticated persons enjoying cigarettes in interesting and exciting situations' [cigarette ads] raised one side of a 'controversial issue of public importance.'"<sup>83</sup> As a result, he concluded that "under the FCC's fairness doctrine, WCBS was under obligation to . . . [air] 'contrasting viewpoints.'"<sup>84</sup> The station replied that it had already broadcast a number of news and information programs regarding the smoking controversy and "doubted . . . that 'the fairness doctrine

80. 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied sub nom.*, 396 U.S. 842 (1969).

81. *Id.* at 1085.

82. *Id.* at 1086.

83. *Id.* (quoting Letter of John F. Banzhaf, III to Television Station WCBS-TV (Dec. 1, 1966)).

84. *Id.* The FCC articulated the Fairness Doctrine in 1949 in response to a Supreme Court mandate that the FCC, in determining who could broadcast over the radio, must consider the "'public interest, convenience, or necessity.'" Roland F. L. Hall, *The Fairness Doctrine and the First Amendment: Phoenix Rising*, 45 MERCER L. REV. 705, 709 (1994) (citing *National Broadcasting Corp. v. United States*, 319 U.S. 190, 216 (1943)). The FCC determined that the public interest required "'ample play for the free and fair competition of opposing views'" on all issues of importance to the public. *Id.* (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 377 (1969)). The fairness doctrine, as applied by the FCC, imposes a duty on broadcasters to "'devote a reasonable percentage of time to the coverage of controversial issues of public importance,' and 'to afford a reasonable opportunity for the presentation of contrasting points of view.'" *Id.* at 710 (citing DANIEL L. BRENNER ET AL., *CABLE TELEVISION AND OTHER NON-BROADCAST VIDEO* (1992)).

[could] properly be applied to commercial announcements solely and clearly aimed at selling products and services.’”<sup>85</sup>

Banzhaf subsequently forwarded the correspondence to the FCC claiming that the station was violating the fairness doctrine.<sup>86</sup> The FCC agreed with Banzhaf, concluding that because cigarette commercials “‘present the point of view that smoking is “socially acceptable and desirable, manly, and a necessary part of a rich full life,”’” the fairness doctrine was implicated.<sup>87</sup> The Commission was careful to limit its holding to cigarettes because of the particular dangers smoking poses to public health.<sup>88</sup> While the Commission refused to mandate equal time for the antismoking position, it required television stations carrying cigarette ads to provide “‘a significant amount of time for the other viewpoint.’”<sup>89</sup> When pressed with petitions to reconsider their decision, the Commission affirmed its ruling in a Memorandum Opinion and Order<sup>90</sup> and parties from both sides of the smoking issue appealed.

In its review the circuit court in *Banzhaf v. FCC*<sup>91</sup> examined both the FCC’s jurisdiction as well as the validity of the ruling under the First Amendment. The court began its analysis by confronting the assertion that “‘the Commission’s action [was] precluded by the Federal Cigarette Labeling and Advertising Act of 1965.’”<sup>92</sup> The Labeling Act required cigarette manufacturers to print the warning “Caution: Cigarette Smoking May Be Hazardous to Your Health” on each pack.<sup>93</sup> At that time, a similar warning was not required on cigarette advertisements.<sup>94</sup> The court concluded that “[s]ince the Commission’s ruling does not require the inclusion of any ‘statement . . . in the advertising of any cigarettes,’ but rather directs stations . . .

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85. *Banzhaf*, 405 F.2d at 1061 (quoting Letter from Clark S. George, Vice-President and General Manager, WCBS-TV to John F. Banzhaf, III (Dec. 30, 1966)).

86. *Id.*

87. *Id.* (citing *Television Station WCBS-TV*, 8 F.C.C.2d 381, 381 (1967)).

88. *Id.* (citing *Television Station WCBS-TV*, 8 F.C.C.2d at 381-82).

89. *Id.* at 1087 (citing *Television Station WCBS-TV*, 8 F.C.C.2d at 382).

90. *Id.* (citing *Television Station WCBS-TV*, 9 F.C.C.2d 921 (1967)).

91. 405 F.2d 1082 (D.C. Cir. 1968).

92. *Id.* at 1087 (citing 79 Stat. 282 (1965) (current version at 15 U.S.C. §§ 1331-1341 (1994))).

93. *Id.* at 1087-88 (citing Federal Cigarette Labeling and Advertising Act of 1965, 15 U.S.C. §§ 1331-1339 (Supp. 1966)).

94. “No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.” 15 U.S.C. § 1334(b) (Supp. III 1964).

to present 'the other side' [of the smoking issue], . . . it does not violate the letter of the Act."<sup>95</sup>

This conclusion required a narrow reading of the Act and a determination that it was "passed in response to a pending Federal Trade Commission rule which would have required warnings both on packages and in all advertising."<sup>96</sup> By excluding a labeling requirement from advertisements, Congress balanced the government's interest in informing the public of the dangers to health and the interests of protecting commerce and the national economy.<sup>97</sup> The court was careful to note that they did "not assume that Congress wished to protect the economy at the expense of life and health, [but that] it clearly did wish to protect it to the maximum extent compatible with intelligent individual decisions on the health issue."<sup>98</sup>

The court then turned to the issue of whether the Commission had the authority to make the public interest ruling under the public interest standard of the Communications Act.<sup>99</sup> In its fair access ruling, the Commission suggested that the presentation of commercials "urging the consumption of a product whose normal use has been found . . . to represent a serious potential hazard to public health"<sup>100</sup> was inconsistent with broadcast licensees' "obligation to operate in the public interest."<sup>101</sup> Deferring this issue to the judgment of Congress, the Commission nonetheless concluded that licensees "who present . . . such commercials [must] devote a significant amount of time to informing his listeners of the other side of the matter. . . . [T]he public interest means nothing if it does not include such a responsibility."<sup>102</sup>

While the Communications Act of 1934<sup>103</sup> merely authorized the FCC to grant and renew broadcast licenses according to the

95. *Banzhaf*, 405 F.2d at 1088.

96. *Id.* at 1089 (citing 29 Fed. Reg. 8325 (1964)).

97. *Id.* at 1090. During hearings before the House Commerce Committee, a tobacco industry spokesperson went so far as to suggest that "[t]he right to advertise . . . is virtually destroyed if a manufacturer is required in every advertisement to disparage the product." *Id.* at 1091 n.28 (quoting *Hearings on H.R. 2248, H.R. 3014, H.R. 4007, H.R. 7051, H.R. 4244 Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 1st Sess. 284 (1964)).

98. *Id.* at 1090 n.25.

99. *Id.* at 1091.

100. *Id.* at 1092-93 (citing *Television Station WCBS-TV*, 9 F.C.C.2d 921, 949 (1967)).

101. *Id.* at 1093 (citing *Television Station WCBS-TV*, 9 F.C.C.2d at 949).

102. *Id.* (citing *Television Station WCBS-TV*, 9 F.C.C.2d at 949).

103. 47 U.S.C. §§ 151-609 (1988 & Supp. V 1994).

dictates of the public interest, convenience, or necessity,<sup>104</sup> the Supreme Court in *National Broadcasting Co. v. United States*<sup>105</sup> determined that this language gave the Commission authority over broadcast content.<sup>106</sup> Clearly such a determination has broad-reaching implications on the FCC's power to censor programming by denying, or threatening to deny, license renewals. Such an interpretation seems dubious at best given the express terms of the Communications Act which provides: "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship . . . and no regulation . . . shall be promulgated . . . which shall interfere with the right of free speech."<sup>107</sup>

The circuit court downplayed the danger of such a position suggesting that "[i]f agency power to designate programming 'not in the public interest' is a slippery slope, the Commission and the courts started down it too long ago to go back to the top now unless Congress or the Constitution sends them."<sup>108</sup>

The court went on to say that "[i]n practice, the Commission rarely denies licenses for breaches of these duties"<sup>109</sup> and the Commission's practice of focusing on a licensee's overall performance and good faith rather than specific errors "probably minimizes the dangers of censorship or pervasive supervision."<sup>110</sup> Ultimately, the court suggested that "public interest rulings relating to specific program content [do not] invariably amount to 'censorship' within the meaning of the Act."<sup>111</sup>

The court, however, did not seem completely convinced of this conclusion and further justified the Commission's actions against a First Amendment challenge. Recognizing that the First Amendment "is unmistakably hostile to governmental controls over content of the press,"<sup>112</sup> the court first attempted to find support in the distinctions between newspapers and the broadcasting media. Chief Judge Bazelon suggested that communication through newspapers requires the affirmative act of reading, while the broadcast media is "omnipresent"

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104. *Id.* § 307(a), (d).

105. 319 U.S. 190 (1943).

106. *Id.* at 217.

107. 47 U.S.C. § 326 (1988).

108. *Banzhaf*, 405 F.2d at 1094.

109. *Id.* at 1095.

110. *Id.*

111. *Id.* at 1096.

112. *Id.* at 1100.



and can only be avoided by leaving the room or changing channels.<sup>113</sup> Without suggesting why this distinction should alter the First Amendment analysis, Bazelon turned to the constitutionality of the cigarette ruling itself and concluded that the "ruling does not abridge the First Amendment freedoms of speech or press."<sup>114</sup>

Bazelon articulated five considerations contributing to this conclusion. First, the cigarette ruling did not ban any speech but rather only had a potentially chilling effect.<sup>115</sup> Second, case law up to that point suggested that product advertising "barely qualifie[d] as constitutionally protected 'speech.'"<sup>116</sup> Commercial speech did not implicate an interest which the First Amendment sought to protect such as the political process, the exchange of ideas or information, or self-expression.<sup>117</sup> While the court accepted the contention that "cigarette advertising implicitly states a position on a matter of public controversy,"<sup>118</sup> it concluded that the advertisements did not present information contributing to the public debate on smoking.<sup>119</sup> Clearly, this position is dubious in the context of fair access and Banzhaf's original contention that the advertisements raised one side of a controversial issue. Ultimately the court ignored this inconsistency and suggested that "even if cigarette commercials are protected speech, we think they are, at best, a negligible 'part of any exposition of ideas, and are of . . . slight social value as a step to truth.'"<sup>120</sup>

The third consideration focused on the economic incentives as a countervailing force against any chilling effect. The court suggested that "the cigarette manufacturers' interest in selling their product guarantees a continued resourceful effort to reach the public."<sup>121</sup> As the next section of this Comment explains, the impact of this case would ultimately prove this consideration wrong.<sup>122</sup> This would also hold true of both the fourth consideration, which suggested that the Commission's ruling would support the "primary First Amendment

113. *Id.*

114. *Id.* at 1101.

115. *Id.*

116. *Id.* The court cited a number of Supreme Court cases indicating that commercial speech was less rigorously protected than other forms of speech. *Id.* at 1101 n.81.

117. *Id.* at 1101-02.

118. *Id.* at 1102.

119. *Id.*

120. *Id.* (alteration in original) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

121. *Id.*

122. *See infra* part III.B.

policy . . . to foster the widest possible debate and dissemination of information on matters of public importance,"<sup>123</sup> and the related fifth consideration that the ruling would provide rather than repress information.<sup>124</sup> Chief Judge Bazelon was confident that where

one party to a debate has a financial clout and a compelling economic interest in the presentation of one side unmatched by its opponent, and where the public stake in the argument is no less than life itself—we think the purpose of rugged debate is served . . . by an attempt to redress the balance.<sup>125</sup>

However, Bazelon also prophetically suggested that "[i]f the fairness doctrine cannot withstand First Amendment scrutiny, the reason is that to insure a balanced presentation of controversial issues may be to insure no presentation, or no vigorous presentation, at all."<sup>126</sup> Within four years Congress banned all broadcast advertisements at the behest of the cigarette manufacturers as a direct result of this case.

### B. *Impact of Banzhaf*

Judge Skelly Wright suggested, in his dissent in *Capital Broadcasting Co. v. Mitchell*,<sup>127</sup> that "[t]he history of cigarette advertising since *Banzhaf* has been a sad tale of well meaning but misguided paternalism."<sup>128</sup> Following the *Banzhaf* decision "the broadcast media were flooded with exceedingly effective antismoking commercials. For the first time in years, the statistics began to show a sustained trend toward lesser cigarette consumption."<sup>129</sup> The decision in *Banzhaf* put the "industry in a delicate, paradoxical position. . . . [I]ndividual tobacco companies could not stop advertising for fear of losing their competitive position; yet for every dollar they spent to advance their product, they forced the airing of more anti-smoking advertisements and hence lost more customers."<sup>130</sup> The

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123. *Banzhaf*, 405 F.2d at 1102.

124. *Id.* at 1103.

125. *Id.*

126. *Id.* at 1102-03.

127. 333 F. Supp. 582 (D.D.C. 1971), *aff'd*, 405 U.S. 1000 (1977).

128. *Id.* at 587 (Wright, J., dissenting).

129. *Id.* (Wright, J., dissenting) (citing U.S. DEP'T OF AGRICULTURE, TOBACCO SITUATION 5 (Sept. 1971); *Hearing on H.R. 6543 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 132 (1969)).

130. *Id.* at 588 (Wright, J., dissenting).

FCC's fair access requirement mandated the broadcast of one antismoking message for every three or four cigarette ads, amounting "to approximately \$75 million (in 1970 dollars) in commercial air time for antismoking messages annually."<sup>131</sup> Thus, advertising on electronic media became a losing proposition for cigarette companies.

At that time the Consumer Subcommittee of the Senate Committee on Commerce was in the process of considering new cigarette legislation to replace the expiring statute governing the health warnings in cigarette ads.<sup>132</sup> "The context in which this decision had to be made shifted dramatically when a representative of the cigarette industry suggested that the Subcommittee draft legislation permitting the companies to remove their advertisements from the air."<sup>133</sup> The Public Health Cigarette Smoking Act of 1969<sup>134</sup> ultimately saved the industry hundreds of millions of dollars in broadcast media time,<sup>135</sup> "relieved political pressure for FTC action, and removed most antismoking messages from the air."<sup>136</sup> In addition, the "industry's 'altruism' [provided] a delay in pending FTC action against cigarette advertising and a prohibition against stricter state regulation of cigarette advertising."<sup>137</sup> For the public, however, the legislation cut off the important flow of information regarding the dangers of smoking.

131. 60 Fed. Reg. 41,327 (1995).

132. *Capital Broadcasting Co.*, 333 F. Supp. at 588 (Wright, J., dissenting).

133. *Id.* (citing *Hearing on H.R. 6543 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 78 (1969)). "The cigarette companies requested an antitrust exemption so they could reach an agreement among themselves not to advertise on the electronic media without fear of prosecution for restraint of trade." *Id.* at 588 n.10.

134. Pub. L. No. 91-222, 84 Stat. 87 (1970) (codified as amended at 15 U.S.C. §§ 1331-1341 (1994)).

135. See S. REP. NO. 566, 91st Cong., 1st Sess. 8 (1969). Interestingly, Congress did not limit the preclusion to broadcast media but rather to "any medium of electronic communication." 15 U.S.C. § 1335 (1994). This broad description proved prescient given the array of narrow-cast electronic media such as CD-ROMs and on-line systems which might have otherwise escaped a statute limited to broadcast media.

136. *Capital Broadcasting Co.*, 333 F. Supp. at 588 (citing *Hearing on H.R. 6543 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 1st Sess., at 160-62, 172).

137. *Id.* at 588-89 (Wright, J., dissenting) (footnote omitted) (citing 15 U.S.C. §§ 1334(b), 1336 (Supp. V 1969)).

C. *Judicial Challenge To the Smoking Act: Capital Broadcasting Co. v. Mitchell*

Given the cigarette manufacturers' complicity in the legislation banning broadcast advertising, the dearth of First Amendment challenges to the law is not surprising. In fact, the only significant challenge to the Act was brought by broadcasters, who lost advertising revenue following the enactment of the Act, rather than cigarette manufacturers. Petitioners in *Capital Broadcasting Co. v. Mitchell*<sup>138</sup> were six broadcast corporations and the National Association of Broadcasters (NAB).<sup>139</sup> The petitioners sought to enjoin the enforcement of the Act and to have the Act declared violative of both the First and Fifth Amendments.<sup>140</sup>

While the court noted that "product advertising is less vigorously protected than other forms of speech"<sup>141</sup> and that "[t]he unique characteristics of electronic communication make it especially subject to regulation in the public interest,"<sup>142</sup> the court's decision was not based on this substantive issue. Rather, it concluded that the Act had "no substantial effect on the exercise of [the radio broadcasters'] First Amendment rights."<sup>143</sup> The court focused on the fact that the Act did not prohibit broadcasters from disseminating information about cigarettes, but only prevented them from collecting revenues from others whose rights may have been denied.<sup>144</sup>

Though the conclusion was not stated in terms of standing, this view runs counter to precedent on third-party standing and relies on a slippery distinction between advertisers' and broadcasters' expression.<sup>145</sup> This distinction is only strong if the broadcasters were

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138. 333 F. Supp. 582 (D.D.C. 1971). Interestingly, the District of Columbia District Court requested that John Banzhaf write a brief amicus curiae in his capacity as a professor. *Id.* at 583.

139. *Id.*

140. *Id.* The court held that the Act did not conflict with the Fifth Amendment, finding a reasonable basis for the government to classify media into two classifications; one prohibited from carrying cigarette advertisements and the other not. *Id.* at 585. The court concluded that the persuasive power of broadcasting—particularly its influence on young people—as compared to print advertising constituted a sufficiently reasonable basis. *Id.* at 585-86.

141. *Id.* at 584.

142. *Id.*

143. *Id.*

144. *Id.*

145. Arguably the broadcasters' claim is sufficient even under the restrictive standard articulated in the case of *Laird v. Tatum*, 408 U.S. 1 (1972). The Supreme Court held that

required to run all advertisements. Instead, the broadcasters make a choice, albeit primarily an economic choice, in accepting the advertisements; and thus, the ideology expressed within the advertisements is, by limited extension, their own. Additionally, as the dissent pointed out, the court misperceived the nature of the issue: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."<sup>146</sup>

In dicta the court offered a cursory discussion on the limited protection due commercial speech. In announcing an acceptance of *Banzhaf*, the court paradoxically suggested that while cigarette advertising is covered by the fairness doctrine by virtue of public importance, this "political nature" is insufficient to accord full First Amendment protection.<sup>147</sup> As Judge Wright noted in his dissent, "[i]t can hardly be contended that cigarette commercials are 'controversial speech' for purposes of the First Amendment based fairness doctrine, yet mere 'product advertising' for purposes of the First Amendment."<sup>148</sup>

Judge Wright's vigorous dissent offered a more thorough analysis of the Smoking Act's constitutionality.<sup>149</sup> Wright evaluated the history leading up to the Act's passage, including the cigarette companies' complicity, and concluded that the Act violated the First Amendment by "suppress[ing] the ventilation of [the smoking issue] on the country's most pervasive communication vehicle."<sup>150</sup> Wright noted the correlation between the airing of antismoking advertisements mandated by the FCC and a decline in cigarette consumption, and recognized the passage of the Act as a "dramatic legislative *coup* for the tobacco industry" removing the smoking controversy from the air.<sup>151</sup> Accordingly, he concluded that the legislation cut off debate on the smoking controversy "just when *Banzhaf* had made such a debate a real possibility."<sup>152</sup> This effect was inconsistent with the

in order to have standing an individual must present more than "[a]llegations of a subjective 'chill.' [There must be a] claim of specific present objective harm or threat of specific future harm." *Id.* at 13-14.

146. *Capital Broadcasting Co.*, 333 F. Supp. at 591 n.25 (Wright, J., dissenting) (quoting Supreme Court Justice White in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)).

147. *Id.* at 585.

148. *Id.* at 592 (Wright, J., dissenting).

149. *Id.* at 587-94 (Wright, J., dissenting).

150. *Id.* at 587 (Wright, J., dissenting).

151. *Id.* at 589 (Wright, J., dissenting).

152. *Id.* at 590 (Wright, J., dissenting).

purposes underlying free speech; that "people will make the right choice if presented with all points of view on a controversial issue."<sup>153</sup>

Wright suggested that the Act could survive constitutional scrutiny by showing that the "advertising [was] not speech within the meaning of the First Amendment or [if] it create[d] a clear and present danger of such substantial magnitude that governmental suppression is justified."<sup>154</sup> Applying the second test, Wright concluded that the cigarette advertisement did not rise to a level of clear and present danger as the advertisements did not pose a threat to state security.<sup>155</sup>

Under the first test, Wright adopted the *Banzhaf* court's finding that the commercial speech in question involved matters of public controversy and argued that the speech deserved full First Amendment protection due to its political component.<sup>156</sup>

The rulings in *Banzhaf* and *Capital Broadcasting Co.* were based on the prevailing but ill-defined stature of commercial speech, which was accorded less protection than political and artistic speech.<sup>157</sup> Over the following two decades, the Supreme Court further defined the parameters of protection for commercial speech, setting the stage for the current debate.

#### IV. REGULATION OF COMMERCIAL SPEECH

##### A. *Establishment of Broad Protection Under Virginia Pharmacy Board*

Broadly speaking, commercial speech falls within the scope of protected speech under the First Amendment but receives less protection than other forms of speech. Prior to the decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,<sup>158</sup> the Supreme Court danced around the issue of whether, and to what extent, the First Amendment protected commercial speech.<sup>159</sup>

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153. *Id.* (Wright, J., dissenting).

154. *Id.* at 591 (Wright, J., dissenting).

155. *Id.* at 593 (Wright, J., dissenting).

156. *Id.* at 592 (Wright, J., dissenting).

157. *Id.* at 591 (Wright, J., dissenting).

158. 425 U.S. 748 (1976).

159. The Court first articulated a commercial-speech doctrine in *Valentine v.*

In *Virginia State Board*, Justice Blackmun ruled for a consumer group challenging a section of the Virginia Code that proscribed the advertisement of prescription drugs.<sup>160</sup> He noted that while past decisions gave some indication that commercial speech was unprotected,<sup>161</sup> and at other times imposed protection because the speech in question was not purely commercial,<sup>162</sup> the "Court has never *denied* protection on the ground that the speech at issue was 'commercial speech.'"<sup>163</sup> Blackmun, however, concluded that commercial speech was not without limits. As an example, he suggested that commercial speech could be regulated where the speech was false or misleading<sup>164</sup> or proposed an illegal transaction.<sup>165</sup> In addition, the state may place less burdensome time, place, and manner restrictions on advertisements.<sup>166</sup>

The Court in *Virginia State Board* ultimately established only broad parameters for modern commercial speech law by concluding that the state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients."<sup>167</sup> The Court reserved delineating the scope of protection while indicating that any restrictions intended to regulate the effect of commercial speech on the audience would be disfavored.<sup>168</sup>

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Chrestensen, 316 U.S. 52 (1942). The Court ruled that commercial advertising was unprotected. However during the 1970s the Court began to protect commercial speech that did more than merely propose a commercial transaction and additionally, contained matters of public interest. Patrick M. Garry, *Commercial Speech*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 169 (Kermit L. Hall et al. eds., 1992).

160. VA. CODE ANN. § 54-524.35 (Michie 1974).

161. *Virginia State Bd.*, 425 U.S. at 758 (citing *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (noting the First Amendment forbids the banning of all communication by handbill but does not restrain a narrow ban on purely commercial handbills)); *Breard v. Alexandria*, 341 U.S. 622 (1951) (distinguishing proscribable door-to-door leafletting of magazine subscriptions from leaflets publicizing a religious meeting).

162. *Id.* at 758-59 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

163. *Id.* at 759 (emphasis in original).

164. *Id.* at 771.

165. *Id.* at 772.

166. *Id.* at 771. Time, place, and manner restrictions have been approved where "they are justified without reference to the content of the regulated speech, . . . serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Id.*

167. *Id.* at 773.

168. *Id.* at 773 n.25.

In a vigorous dissent Justice Rehnquist derided the majority for the breadth of the decision “extend[ing] the protection of [the First] Amendment to purely commercial endeavors” and in the process “elevat[ing] commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane . . . previously reserved for the free marketplace of ideas.”<sup>169</sup> He suggested that such a position would open the way for “active promotion of . . . liquor, cigarettes, and other products the use of which it has previously been thought desirable to discourage.”<sup>170</sup>

### B. Central Hudson Test for Commercial Speech Protection

In 1980 the Supreme Court effectively limited the scope of protection for commercial speech under the First Amendment. The Court’s decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*<sup>171</sup> established a four-part test to evaluate the constitutionality of restrictions on commercial speech.<sup>172</sup> This test may effectively foreclose the continued promotion of cigarettes.

Justice Powell’s opinion in *Central Hudson* extended the *Virginia State Board* holding that the First Amendment protects commercial speech from unwarranted governmental regulation.<sup>173</sup> Simultaneously, it recognized “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.”<sup>174</sup> Tying these two positions together, the Court concluded that the “Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”<sup>175</sup> Such protection was further limited to commercial speech that “accurately inform[s] the public about lawful activity.”<sup>176</sup>

From this premise Justice Powell built a four-part test.<sup>177</sup> As a threshold issue to determine whether the expression falls within

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169. *Id.* at 781 (Rehnquist, J., dissenting).

170. *Id.* (Rehnquist, J., dissenting).

171. 447 U.S. 557 (1980).

172. *Id.*

173. *Id.* at 566. Justice Powell articulated his position along with three separate concurring opinions by Justices Brennan, Blackmun, and Stevens, and a dissent from Justice Rehnquist.

174. *Id.* at 562 (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-56 (1978)).

175. *Id.* at 563 (citing *Ohralik*, 436 U.S. at 456-57).

176. *Id.*

177. *Id.* at 566.



First Amendment protection, the speech “must concern lawful activity and not be misleading.”<sup>178</sup> From there the Court asks “whether the asserted governmental interest is substantial.”<sup>179</sup> An affirmative answer to the first two questions leads to a determination of “whether the regulation directly advances the governmental interest asserted”<sup>180</sup> and finally “whether [the regulation] is not more extensive than is necessary to serve that interest.”<sup>181</sup>

### C. *Alternate Characterization of the Central Hudson Test*

The *Central Hudson* test is perhaps better characterized as a two-step analysis comprised of five issues.<sup>182</sup> Under the first step, the court must determine whether a constitutional analysis is required. This inquiry includes two distinct threshold issues: whether the speech is commercial, and whether it is not misleading or concerning an illegal activity. An affirmative answer to these two questions leads to the second step of the analysis under which the court determines whether the regulation impinging on protected commercial speech is narrowly tailored to directly affect a substantial government interest.<sup>183</sup>

#### 1. Threshold issue 1: is the speech commercial?

Any analysis of commercial speech regulations requires the court to determine whether the restricted speech is in fact commercial, enjoying limited protection, or noncommercial and thus entitled to full First Amendment protection.

##### a. *should commercial speech be distinguished from noncommercial speech?*

In *Central Hudson* Justice Blackmun denounced the application of the intermediate scrutiny four-part test “when a State seeks to suppress information about a product in order to manipulate a private

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. In *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995), both the majority and the dissent referred to a “three part test” using the original *Central Hudson* prong number one “false or illegal speech” inquiry as a prerequisite to the application of the test. *Id.* at 2376, 2382.

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

economic decision that the State cannot or has not regulated or outlawed directly."<sup>184</sup> Blackmun concluded that "[n]o differences between commercial speech and other protected speech justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information."<sup>185</sup> Blackmun characterized such restrictions as "a covert attempt by the State to manipulate the choices of its citizens, . . . [insulating the State] from the visibility and scrutiny that direct regulation would entail."<sup>186</sup>

In the subsequent case of *Posadas de Puerto Rico Assoc. v. Tourism Co.*,<sup>187</sup> Justice Brennan suggested that the government's interest in the regulation of content in commercial speech is limited to preventing the "dissemination of information that is false, deceptive, or misleading, or that proposes an illegal transaction."<sup>188</sup> Brennan supported his position by citing the Court's consistent invalidation of "restrictions designed to deprive consumers of accurate information about products and services legally offered for sale."<sup>189</sup> In his opinion "no differences between commercial and other kinds of speech justify protecting commercial speech less extensively where . . . the government seeks to manipulate private behavior by depriving citizens of truthful information concerning lawful activities," and any "such regulation should be subject to strict judicial scrutiny."<sup>190</sup>

By contrast, Justice Rehnquist, dissenting in *Central Hudson*,<sup>191</sup> continued his disapproval of any scheme that "fails to give due deference to [the] subordinate position of commercial speech."<sup>192</sup> While admitting that

184. *Id.* at 573 (Blackmun, J., concurring).

185. *Id.* at 578 (Blackmun, J., concurring).

186. *Id.* at 574-75 (Blackmun, J., concurring).

187. 478 U.S. 328 (1986).

188. *Id.* at 350 (Brennan, J., dissenting) (citations omitted). This opinion suggests that Justice Brennan would radically alter the first step in the *Central Hudson* test so that the entire test applies only where the commercial speech concerns unlawful activity or is misleading or fraudulent.

189. *Id.* (citing *Bates v. State Bar*, 433 U.S. 350 (1977); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 700-02 (1977); *Linmark Assoc. v. Willingboro*, 431 U.S. 85 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975)).

190. *Posadas*, 478 U.S. at 351 (Brennan, J., dissenting).

191. 447 U.S. at 583 (Rehnquist, J., dissenting).

192. *Id.* at 589 (Rehnquist, J., dissenting).

[t]he line between "commercial speech," and the kind of speech that those who drafted the First Amendment had in mind, may not be a technically or intellectually easy one to draw . . . it surely produced . . . fewer problems than has the development of judicial doctrine in this area since *Virginia Pharmacy Board* [sic].<sup>193</sup>

*b. distinguishing commercial speech from pure speech*

Despite Rehnquist's conclusion, the line between commercial and noncommercial speech remains problematically elusive. In part this difficulty lies in the fact that advertising implicitly contains an informational component often extending beyond the proposal of a commercial transaction.

In *Bigelow v. Virginia*<sup>194</sup> the Court alluded to this problem in striking down a Virginia statute that made any advertisement "encourag[ing] or prompt[ing] the procuring of abortion or miscarriage . . . a misdemeanor."<sup>195</sup> Justice Blackmun noted that "[t]he existence of 'commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.'"<sup>196</sup>

While the Court previously ruled that an advertiser cannot evade a restrictive ordinance by appending a message of public interest,<sup>197</sup> the *Bigelow* Court concluded that the abortion advertisements "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.'"<sup>198</sup> Under the majority's analysis, the portion of the advertisement stating that abortions were legal in the State of New York communicated information and disseminated an opinion.<sup>199</sup>

193. *Id.* at 598 (Rehnquist, J., dissenting).

194. 421 U.S. 809 (1975).

195. *Id.* at 812-13 (citing VA. CODE ANN. § 18.1-63 (Michie 1960)).

196. *Id.* at 818 (quoting *Ginzburg v. United States*, 383 U.S. 463, 474 (1966)).

197. *Valentine v. Chrestensen*, 316 U.S. 52, 55 (1942).

198. *Bigelow*, 421 U.S. at 822.

199. Justice Stevens noted that

Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia.

*Id.*

Years later, in *United States v. Edge Broadcasting Co.*,<sup>200</sup> Justice Stevens suggested that *Bigelow* was not about the issue of abortion but rather “about paternalism, and informational protectionism . . . [and the] citizens’ fundamental constitutional right to travel in a state of enlightenment, not government-induced ignorance.”<sup>201</sup> The weight of the underlying issue cannot, however, be minimized so easily. At the time of the *Bigelow* decision, the political issue of abortion was growing in intensity, creating a particularly charged context for this decision. In fact, the *Bigelow* Court gave substantial weight to the fact that the activity in question, abortion, “pertained to . . . constitutional interests of the general public.”<sup>202</sup>

Ultimately, it is difficult to assess the impact of *Bigelow*. The Court did not conclude that the pure speech elements of the advertisements elevated the commercial speech to pure speech nor any intermediate position, but rather imbued commercial speech with a greater purpose.

The *Virginia State Board*<sup>203</sup> decision took this position a step further. The Court suggested that commercial speech itself serves purposes akin to pure speech, contributing to the free flow of important commercial information which is, arguably, of clear public interest. Writing for the majority, Justice Blackmun suggested that the suppression of prescription drug information harmed marginalized groups such as the poor, sick, and elderly who spend a disproportionate amount of their income on prescription drugs and lack the ability to comparison shop.<sup>204</sup> In this context, the free flow of commercial information was “indispensable to the formation of intelligent opinions.”<sup>205</sup>

In *Central Hudson* Justice Stevens added to the debate his concern that “the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed.”<sup>206</sup> Stevens addressed the two “definitions” of commercial speech suggested by the majority’s opinion and found one too broad and the other somewhat too narrow.<sup>207</sup>

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200. 113 S. Ct. 2696, 2710 (1993) (Stevens, J., dissenting).

201. *Id.* (Stevens, J., dissenting).

202. *Bigelow*, 421 U.S. at 822.

203. 425 U.S. 748 (1975).

204. *Id.* at 763.

205. *Id.* at 765.

206. *Central Hudson*, 447 U.S. at 579 (Stevens, J., concurring).

207. *Id.* at 579-80 (Stevens, J., concurring).

The Court's first description of speech as "expression related solely to the economic interests of the speaker and its audience"<sup>208</sup> could encompass "speech that is entitled to the maximum protection afforded by the First Amendment."<sup>209</sup> Stevens offered as examples the exhortations of a labor leader and an economist's dissertation on the money supply. In addition, he rejected the economic motivation of the speaker as a qualification for constitutional protection.<sup>210</sup> This broad definition would include almost all disseminations by a cigarette manufacturer as commercial speech subject to regulation depending on the scope of the term "economic interests."

The majority's second description referred to the language in the *Ohralik v. Ohio State Bar Ass'n* decision describing commercial speech as "'speech proposing a commercial transaction.'"<sup>211</sup> Stevens interpreted this definition as limited to speech intended to advise consumers of the availability, price, and desirability of a product, and perhaps communications "that do little more than make the name of a product or a service more familiar to the general public."<sup>212</sup>

The open letter to President Clinton written by Richard Petty<sup>213</sup> illuminates the disparate application of *Central Hudson's* two descriptions. Despite being a paid advertisement by a cigarette company, the letter clearly articulates a political and ideological position without proposing a commercial transaction. At the same time, the ad relates to the economic interest of the speaker in the protection of its ability to market its product for a profit. Nonetheless, as a political statement, this advertisement should enjoy the greatest amount of First Amendment protection.<sup>214</sup>

Certainly, ideology itself is not sufficient. The "Joe Camel" campaign run by its parent R.J.Reynolds often emphasizes how cool smoking is, as much as it proposes a commercial transaction. In fact,

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208. *Id.* at 561.

209. *Id.* at 579 (Stevens, J., concurring).

210. *Id.* at 580 (Stevens, J., concurring). "Some of our most valued forms of fully protected speech are uttered for profit." *Board of Trustees v. Fox*, 492 U.S. 469, 482 (1989).

211. *Central Hudson*, 447 U.S. at 562 (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978)).

212. *Id.* at 580 (Stevens, J., concurring).

213. See R.J.R. Advertisement, *supra* note 22, at C5.

214. "Discussion of public issues . . . [is] integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression . . ." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

critics have argued that the campaign specifically targets children,<sup>215</sup> a portion of the population which is not allowed to purchase cigarettes.<sup>216</sup> Therefore, the purpose of the ads becomes more ideological, if not illegal, promoting cigarette smoking in general and developing brand loyalty in contemplation of future sales. However, as one critic suggests "in commercial speech . . . there is an implicit ideology in favor of market-ordering, and perhaps some sort of ideology involving the product advertised. But that fact does not justify a conclusion that courts should accord such speech the highest level of constitutional protection."<sup>217</sup>

In *Central Hudson* Stevens suggested that it was "too early to enunciate an exact formulation" of commercial speech but he was "persuaded that it should not include the entire range of communication that is embraced within the term 'promotional advertising.'"<sup>218</sup> More recently in *Rubin v. Coors Brewing Co.*,<sup>219</sup> in which the parties actually stipulated to the fact that the information on beer labels, including alcohol content, constituted commercial speech,<sup>220</sup> Justice Stevens nonetheless revisited this issue in his concurring opinion.<sup>221</sup> He warned that "the borders of the commercial speech category are not nearly as clear as the Court has assumed"<sup>222</sup> and suggested that the labeling case illustrated the "artificiality of a rigid commercial/noncommercial distinction."<sup>223</sup> At issue was a law precluding the labeling of alcohol content on beer products. Stevens suggested that the statement of alcohol content probably would not be considered commercial if it were published by a consumer group.<sup>224</sup>

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215. John Schwartz, *Elders Takes Aim at Teenage Smoking*, WASH. POST, Feb. 25, 1994, at A1.

216. At least forty-four states prohibit the sale of tobacco products to minors. CAL. HEALTH & SAFETY CODE § 118950 (West 1988). Moreover, the Department of Health and Human Services recently issued a final rule requiring states to pass and enforce laws prohibiting the sale and distribution of tobacco products to minors in order to receive block grants for substance abuse prevention and treatment services. Tobacco Regulation for Substance Abuse Prevention and Treatment Block Grants, 61 Fed. Reg. 1492 (1996) (to be codified at 45 C.F.R. § 96).

217. Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 607.

218. *Central Hudson*, 447 U.S. at 580 (Stevens, J., concurring).

219. 115 S. Ct. 1585, 1589 (1995).

220. *Id.*

221. *Id.* at 1594 (Stevens, J., concurring).

222. *Id.* at 1595 (Stevens, J., concurring).

223. *Id.* (Stevens, J., concurring).

224. *Id.* (Stevens, J., concurring).

He therefore concluded that the content itself was not dispositive as to whether the speech was commercial.<sup>225</sup>

Despite Stevens' position, case law indicates that pure speech elements or analogous attributes merely justify limited protection of commercial speech. None of these cases suggest an amount of pure speech sufficient to require greater protection.

Furthermore, *Board of Trustees v. Fox*<sup>226</sup> implied that before the Court will assess this issue it will first determine whether the pure speech is "inextricably intertwined" with the commercial speech.<sup>227</sup> *Fox* involved a challenge of a state university regulation precluding private commercial enterprise from operating on campus.<sup>228</sup> Student plaintiffs could not throw "Tupperware Parties" which consisted of the demonstration and sale of Tupperware products but also included lectures on financial responsibility and running an efficient home.<sup>229</sup>

The students argued that the restricted commercial speech was "inextricably intertwined" with pure speech and therefore must be classified as noncommercial to protect the pure speech elements.<sup>230</sup> The Court concluded that there was "nothing whatever 'inextricable' about the noncommercial aspects of these presentations. No law of man . . . makes it impossible to . . . teach home economics without selling housewares."<sup>231</sup> Advertising which "'links a product to a current debate' is not thereby entitled to the constitutional protection afforded noncommercial speech."<sup>232</sup> This decision suggests that an advertising campaign such as that run by Philip Morris to promote their Benson & Hedges brand,<sup>233</sup> which directly acknowledges the debate over secondhand smoke while proposing a commercial

225. *Id.* (Stevens, J., concurring).

226. 492 U.S. 469 (1989).

227. *Id.* at 474 (quoting *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 796 (1988)).

228. *Id.* at 471-72 (citing *State Univ. of N.Y. Res.* 66-156 (1979)).

229. *Id.* at 473-74.

230. *Id.* at 474 (citing *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 796 (1988)).

231. *Id.*

232. *Id.* at 475 (quoting *Central Hudson*, 447 U.S. at 563 n.5).

233. One ad runs the following copy over a photo of smokers riding atop a commuter train: "These days, commuters can't climb aboard with a cigarette. For a great smoke, travel the scenic route." The ad includes a yin/yang type symbol with the line, "Finally, a welcome sign for both smokers and nonsmokers. Call 1-800-494-5444 for more information." Advertisement, Philip Morris Inc., *Benson & Hedges 100: The Length You Go to for Pleasure* (1995) (on file with the *Loyola of Los Angeles Law Review*). Business establishments use this symbol to denote that they participate in an "accommodation program." PHILIP MORRIS, HEY, SMOKERS IT PAYS TO VOICE YOUR CHOICE (1994) (on file with the *Loyola of Los Angeles Law Review*).

transaction, will find no greater protection under the commercial-speech doctrine. In such a case, the secondhand smoke ideology could be extracted and expressed outside of the commercial context.

*c. are cigarette ads more than mere commercial speech?*

When the Court of Appeals for the District of Columbia in *Banzhaf v. FCC* upheld the FCC's decision, it based its holding on the conclusion that "cigarette advertising implicitly states a position on a matter of public controversy."<sup>234</sup> In *Capital Broadcasting Co. v. Mitchell*, district court Judge Skelly Wright seized upon this language in his dissent to argue that "[i]t can hardly be contended that cigarette commercials are 'controversial speech' for purposes of the First Amendment based fairness doctrine, yet mere 'product advertising' for purposes of the First Amendment."<sup>235</sup>

By contrast, the *Capital Broadcasting* majority, in dicta,<sup>236</sup> drew upon the *Banzhaf* court's conclusion that the

advertisements . . . present no information or arguments in favor of smoking which might contribute to the public debate. Accordingly, even if cigarette commercials are protected speech . . . they are at best a negligible 'part of any exposition of ideas, and are of . . . slight social value as a step to truth.'<sup>237</sup>

The district court therefore concluded that "[t]he fact that cigarette advertising is covered by the FCC's fairness doctrine does not require a finding that it is to be given full First Amendment protection."<sup>238</sup>

Thus, the two major decisions directly addressing the proscription of cigarette advertising suggest that the position on a matter of public controversy implicitly stated by broadcast advertisements was insufficient to raise the speech to the level of fully protected pure speech.

*d. application to the FDA proposal*

Under the current language of the FDA proposal, the regulations sweep too broadly<sup>239</sup> as they apply to any "[a]dvertising which bears

234. *Banzhaf v. F.C.C.*, 405 F.2d 1082, 1102 (D.C. Cir. 1968).

235. 333 F. Supp. 582, 587 (1971) (Wright, J., dissenting).

236. *Id.* at 585.

237. *Banzhaf*, 405 F.2d at 1102 (citations omitted).

238. *Capital Broadcasting Co.*, 333 F. Supp. at 585 (footnote omitted).

239. Although overbreadth "does not normally apply to commercial speech" due to its "hardy" nature, the challenge does apply to noncommercial speech. See *Fox*, 492 U.S. at



the cigarette or smokeless tobacco product brand name . . . or any other indicia of tobacco product identification."<sup>240</sup> This language suggests that the proposed restrictions will apply to any advertisement, regardless of content, unconstitutionally sweeping up pure speech sponsored by a brand-name product and possibly by its parent company. Campaigns such as R.J.Reynolds's "Together, We Can Work it Out," and Philip Morris's "Our Position Word by Word,"<sup>241</sup> may be precluded based on their tobacco product identification.

2. Threshold issue 2: neither misleading nor related to an unlawful act

As a second threshold issue to determine whether the expression falls within First Amendment protection, the speech "must concern lawful activity and not be misleading."<sup>242</sup> Unlike the first threshold issue determining whether the speech will receive limited or full protection, a negative answer to this question will result in no protection.<sup>243</sup> While there is no doubt that cigarette smoking is a legal act, Congressman Henry Waxman and other commentators suggest that cigarette ads fall outside of the *Central Hudson* test and therefore the protection of the First Amendment because cigarette ads are inherently misleading.<sup>244</sup>

A bill introduced in the House of Representatives in 1990 explicitly noted that "[t]hrough advertisements during and sponsorship of sporting events, tobacco has become strongly associated with sports and has become *deceptively* portrayed as an integral part of sports and the healthy lifestyle associated with rigorous sporting activity."<sup>245</sup> While such an inference may be drawn from print ads portraying smokers playing sports, arguably the mere placement of trademarks at sporting events falls short of this inference, as the athletes themselves are generally not seen smoking.

481-82.

240. 60 Fed. Reg. 41,374 (1995) (proposed 21 C.F.R. § 897.30(a)(1)).

241. See Advertisement, *We want you to know where we stand, Our position, word by word: Youth*, HARPER'S MAG., Dec. 1995, at 23. This campaign sets out Philip Morris' position on underage smoking, including their Action Against Access program designed to prevent minors from having access to cigarettes.

242. *Central Hudson*, 447 U.S. at 566.

243. *Id.* at 563.

244. See Kenneth L. Polin, *Argument for the Ban of Tobacco Advertising: A First Amendment Analysis*, 17 HOFSTRA L. REV. 99, 113 (1988); Steven W. Colford, *Cigarette ad hearings spark July fireworks*, ADVERTISING AGE, June 16, 1986, at 1, 90.

245. H.R. 5041, 101st Cong., 2d Sess. 4 (1990) (emphasis added).

Waxman has since backed away from this position. Language in a more recent bill states that a "failure to provide adequate and complete health warnings and labeling information to fully inform consumers about the risks and dangers of tobacco use is misleading."<sup>246</sup>

While commentators suggest that the portrayal of healthy smokers in ads is deceptive,<sup>247</sup> tobacco industry representatives counter that "[m]ost persons in their twenties and thirties, whether smokers or not, look perfectly normal and healthy. The models used in cigarette advertising are not more attractive, healthy or successful looking than the models used in most advertising."<sup>248</sup>

Finally, it has been persuasively argued that awareness of the detrimental health effects of smoking is high enough to preclude any claim that consumers will be otherwise misled.<sup>249</sup> Thus, it is likely that cigarette advertising will not be found to be misleading under the *Central Hudson* formulation.

### 3. Three-part constitutional analysis

#### *a. evolving standard of review*

Despite Justice Rehnquist's concern expressed in his dissent in *Central Hudson* that the four-part test would "elevate . . . the protection accorded commercial speech . . . to a level that is virtually indistinguishable from that of noncommercial speech,"<sup>250</sup> subsequent case law suggests that the Court will apply a standard of review falling far short of strict scrutiny. As articulated below within the

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246. H.R. 3614, 103d Cong., 1st Sess. 3 (1993).

247. Randall H. Stoner, Note, *200 MPH Cigarette Ads: A Comparison of International Restrictions on Tobacco Sports Sponsorship*, 15 HASTINGS INT'L & COMP. L. REV. 639, 654 (1992) (citing David Elsner, *Smoking Ads Seep Through Loopholes: Nations' Bans Lost in a Cloud of Thin Disguises*, CHI. TRIB., Feb. 16, 1986, at C3).

248. *Smoking Prevention Education Act: Hearings on H.R. 1824 Before the Subcomm. on Health and the Environment of the Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 518 (1983) (comments of the Tobacco Institute on the FTC Staff Report on the Cigarette Advertising Investigation).

249. Paul J. Weber & Greg Marks, *Debate on the Constitutionality and Desirability of a Tobacco-Products Advertising Ban*, 15 N. KY. L. REV. 57, 69 (1988); see also, *Tobacco Control and Health Protection Act: Hearings on H.R. 5041 Before the Subcomm. on Health and the Environment of the Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 581-83 (1990) (statement of Gerald M. Goldhaber, Ph.D.) (noting that surveys suggested that more Americans were aware of the dangers of smoking than could name George Washington as the first president).

250. *Central Hudson*, 447 U.S. at 591 (Rehnquist, J., dissenting).

discussion of the individual prongs, the Court has applied a standard of review ranging from total deference to a level which can be, at best, described as meaningful review.

Initial decisions, such as *Posadas de Puerto Rico Assn. v. Tourism Co.*,<sup>251</sup> suggest that judicial deference to legislative conclusions, and the harmful nature of cigarettes, handicap cigarette manufacturers. However, the more recent opinion in *Rubin v. Coors Brewing Co.*<sup>252</sup> rejects a harmful products exception and requires a more strict showing by the government that a proposed restriction directly and actually advances a substantial interest, and that the restriction is narrowly tailored to avoid interference with First Amendment rights.

It is not surprising that a number of decisions upholding restrictions on commercial speech under the *Central Hudson* test involve underlying activities deemed potentially harmful to the public. The second test of "substantial government interest" virtually guarantees that some harm is contemplated. However, two cases predating *Rubin v. Coors Brewing Co.*<sup>253</sup> suggest that a deferential standard applies where the underlying activity is deemed socially harmful, as is the case with cigarette advertising.

The Court initially applied this deferential standard in *Posadas de Puerto Rico Assn. v. Tourism Co.*,<sup>254</sup> a case involving the regulation of advertising by gambling casinos. While the opinion did not expressly articulate a "harmful activities" exception to *Central Hudson*, one subsequent Supreme Court decision and the FDA interpret the harmful nature of gambling as justifying the deferential standard of review.<sup>255</sup> This interpretation is due in part to Justice Rehnquist's dicta distinguishing the constitutional protection granted to the advertisement in *Carey v. Population Services International*<sup>256</sup> and *Bigelow v. Virginia*<sup>257</sup> from that provided to the advertisements in *Posadas*. "In *Carey* and *Bigelow*, the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the State."<sup>258</sup> By

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251. 478 U.S. 328 (1986).

252. 115 S. Ct. 1585 (1995).

253. *Id.*

254. 478 U.S. 328 (1986).

255. See *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993); 60 Fed. Reg. 41,314, 41,355 (1995).

256. 431 U.S. 678 (1977).

257. 421 U.S. 809 (1975).

258. *Posadas*, 478 U.S. at 345.

contrast “the Puerto Rico Legislature surely could have prohibited casino gambling.”<sup>259</sup> Rehnquist suggested that this “greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.”<sup>260</sup> The FDA seized upon this language, concluding that because the agency could ban the sale or distribution of tobacco products, “the lesser steps of regulating labeling and advertising and requiring manufacturers to fund a government approved educational campaign are reasonable.”<sup>261</sup> If this conclusion is true, however, the protection of commercial speech is truly emasculated given the broad range of commercial activities which may be completely banned. Rehnquist’s decision is, perhaps, better explained by his disdain for the original conception of *Central Hudson*.<sup>262</sup>

Nonetheless, seven years after the *Posadas* decision, the Supreme Court indicated its approval of special treatment for harmful activities in *United States v. Edge Broadcasting Co.*<sup>263</sup> The Court noted that the statute restricting advertising of lotteries in nonlottery states involved a substantial government interest because “the activity underlying the relevant advertising—gambling—implicates no constitutionally protected right; rather, it falls into a category of ‘vice’ activity that could be, and frequently has been, banned altogether.”<sup>264</sup> Furthermore, in discussing the quality of the fit between the regulation and the asserted government interest, the Court cited exclusively to examples of speech involving harmful activities when arguing that the reduction in demand is the goal of restrictions.<sup>265</sup>

Under the restrictive standard established in *Posadas* and *Edge Broadcasting*, any challenge to a ban on cigarette advertising would likely encounter the lower standard of scrutiny given the well-documented dangers associated with the product. However, more recently in *Rubin v. Coors Brewing Co.*,<sup>266</sup> the Court rejected the government’s contention that legislatures have “broader latitude to regulate speech that promotes socially harmful activities.”<sup>267</sup> Writing for the

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259. *Id.*

260. *Id.* at 345-46.

261. 60 Fed. Reg. at 41,355.

262. See *Central Hudson*, 447 U.S. at 583-84 (Rehnquist, J., dissenting).

263. 113 S. Ct. 2696 (1993).

264. *Id.* at 2703.

265. *Id.* at 2707.

266. 115 S. Ct. 1585 (1995).

267. *Id.* at 1590 n.2.

majority, Justice Thomas concluded that “[n]either *Edge Broadcasting* nor *Posadas* compels us to craft an exception to the *Central Hudson* standard” because both cases were decided on the *Central Hudson* test, and the harmful activity language appeared in response to alternate arguments.<sup>268</sup>

While a harmful activity exception would clearly doom a challenge to cigarette advertising restrictions, such an exception is still preferable to the application of a deferential standard across the board.

*b. substantial government interest*

Under the *Central Hudson* formulation, the Court next asks “whether the asserted governmental interest is substantial.”<sup>269</sup> Articulation of the specific government interest is important in order to justify the need for regulation, and also plays a crucial role in determining whether the regulation directly advances, and is narrowly tailored toward, an important end. As the scope of the substantial interest grows, the *Central Hudson* requirement that the regulations be narrowly tailored becomes more difficult to satisfy. Accordingly, both the standard of review and the precision in articulating the substantial interests become critical.

In *Posadas*, the first major decision incorporating the substantial government interest standard, the Supreme Court applied a completely deferential standard of review accepting without discussion the Puerto Rico Superior Court’s conclusions that a substantial government interest existed in protecting the Puerto Rican citizens from the harmful effects of casino gambling.<sup>270</sup> In a compelling dissent Justice Brennan sharply criticized the majority’s application of *Central Hudson*,<sup>271</sup> pointing out that nothing in the statute or its legislative history supported the Puerto Rico Superior Court’s conclusion that residents would suffer serious harm from casino advertising.<sup>272</sup> Furthermore, the asserted substantial interests were actually articulated by the defendant Tourism Board, not the legislature.<sup>273</sup> Brennan noted that “a court may not . . . simply speculate about valid reasons

268. *Id.*

269. *Central Hudson*, 447 U.S. at 566.

270. *Posadas*, 478 U.S. at 341.

271. *Id.* at 348-59 (Brennan, J., dissenting).

272. *Id.* at 352-53 (Brennan, J., dissenting).

273. *Id.* at 341.

that the government might have for enacting such restrictions. Rather, the government ultimately bears the burden [of] justify[ing] the challenged regulation, and . . . prov[ing] that the interests it seeks to further are real and substantial."<sup>274</sup>

Seven years later the *Edenfield v. Fane*<sup>275</sup> Court attempted to place some common-sense restrictions on the application of the *Central Hudson* test. In determining that a Florida code section banning personal solicitation by certified public accountants was unconstitutional, the Court emphasized the importance of identifying the *actual* substantial interests asserted by the state.<sup>276</sup> Under the *Edenfield* interpretation of the *Central Hudson* test, the *Posadas* regulations would not survive as the Court impermissibly "supplant[ed] the precise interests put forward by the State with other suppositions"<sup>277</sup> by adopting the conclusions of the Superior Court drawn from assumptions and the Tourism Board's brief rather than the legislation itself.<sup>278</sup>

However, one month after the *Edenfield* decision, the Court seemed to take a step backwards. In *Edge Broadcasting*<sup>279</sup> the Court wholly ignored its *Edenfield* standards when it upheld an amended section of the Communications Act of 1934<sup>280</sup> which limited advertising of lotteries to broadcasters within the state that conducts the lottery.<sup>281</sup> In a decision written by Justice White, the Court suggested that "as in *Posadas* . . . the Government obviously legislated on the premise that the advertising of gambling serves to increase the demand for the advertised product."<sup>282</sup>

Justice White's opinion demonstrates the importance of carefully shaping the substantial interest. While the lower court located the government interest in the restriction of all advertisements directed at the nonlottery state,<sup>283</sup> White placed the locus "in supporting the policy of nonlottery States, as well as not interfering with the policy

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274. *Id.* at 355 (Brennan, J., dissenting) (emphasis in original).

275. 113 S. Ct. 1792 (1993).

276. *Id.* at 1798.

277. *Id.*

278. *Posadas*, 478 U.S. at 334, 341.

279. 113 S. Ct. 2696 (1993).

280. 48 Stat. 1064, 1088 (1934) (codified as amended at 18 U.S.C. § 1307 (1988 & Supp. III 1992)).

281. *Id.* at 1088.

282. *Edge Broadcasting*, 113 S. Ct. at 2707 (citing *Posadas*, 478 U.S. at 344).

283. *Id.* at 2703-04 (citing *Edge Broadcasting Co. v. United States*, 956 F.2d 263 (4th Cir. 1992)).

of States that permit lotteries.”<sup>284</sup> This distinction is subtle, yet important, in understanding the Court’s application of the subsequent elements of the *Central Hudson* test. It is far easier to state that the restriction directly advances the goal of supporting the nonlottery-state policies than to justify the interest in restricting the advertisement directed at the nonlottery state. Any level of reduction in listeners resulting from the Act directly advances the interest of supporting the nonlottery-state policy. By contrast, the interest in restricting lottery advertisements directed at nonlottery states is subverted by the Act’s failure to regulate lottery-state broadcasters transmitting into nonlottery states.

In his dissent in *Edge Broadcasting*, Justice Stevens sharply criticized Justice White’s decision, pointing out the danger of manipulating the substantial government interest.<sup>285</sup> He noted that “[u]nless justified by a truly substantial governmental interest, this extreme, and extremely paternalistic, measure surely cannot withstand scrutiny under the First Amendment.”<sup>286</sup>

Just two years after its reversal in *Edge Broadcasting*, the Court in *Rubin v. Coors Brewing Co.*<sup>287</sup> expressly declined to apply the deferential standard of review and avoided the temptation to manipulate the government interest to achieve a desired holding.<sup>288</sup>

In 1987 the Coors Brewing Company applied for approval of proposed beer labels and accompanying advertisements which disclosed the alcohol content of the beer.<sup>289</sup> The application was rejected based on a section of the Federal Alcohol Administration Act of 1935<sup>290</sup> prohibiting disclosure of the alcohol content of beer on labels or in advertising.<sup>291</sup> The government’s primary contention

284. *Id.* at 2703. The Court also noted that “the activity underlying the relevant advertising—gambling—implicates no constitutionally protected right; rather, it falls into a category of ‘vice’ activity that could be, and frequently has been, banned altogether.” *Id.* See *supra* part IV.C.3.a. for a discussion of *Edge Broadcasting* and commercial speech involving harmful activities.

285. *Edge Broadcasting*, 113 S. Ct. at 2710 (Stevens, J., dissenting).

286. *Id.* (Stevens, J., dissenting).

287. 115 S. Ct. 1585 (1995).

288. *Id.* at 1590 n.2. See *supra* note 265 and accompanying text for a discussion of the significance of footnote 2 in the rejection of a harmful activities exception to the commercial-speech doctrine.

289. *Id.* at 1588. Coors suggested that its products suffered from consumer misperception about their alcohol content. *Id.* at 1592.

290. 27 U.S.C. § 205(e)(2) (1994).

291. Section 205(e)(2) provides that “statements of, or statements likely to be considered statements of, alcoholic content of malt beverages are prohibited unless

was that Congress enacted the ban to curb strength wars among brewers.<sup>292</sup> Coors countered that Congress created the ban to prevent brewers from making inaccurate claims concerning alcohol, noting that at the time of the Act, brewers could not produce beer within predictable alcohol levels.<sup>293</sup> Because this is no longer a problem, they suggested that the substantial government interest no longer existed.<sup>294</sup> While the Court considered this argument plausible, it accepted the government's "significant interest in protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength."<sup>295</sup> However, the Supreme Court ultimately concluded that the government failed to demonstrate that the prohibition prevented strength wars,<sup>296</sup> noting that the Act applies an opposite policy to wine and distilled spirits.<sup>297</sup>

In the case of the FDA proposal, the express purpose of the regulations is to "[r]educe the number of people under 18 years of age who become addicted to nicotine," and to "[p]rovide important information regarding the use of these products to users and potential users."<sup>298</sup> There is little doubt of the continuing substantiality of this interest. However, the success of the proposal under the balance of the *Central Hudson* test turns on the regulations' fit with these precise goals. As demonstrated below, certain sections of the proposal are susceptible to the argument that they are neither narrowly tailored nor directly advance these precise goals. These conclusions, however, rely on the presumption that the Court will respect the expressed purposes of the proposal.

The FDA's own analysis of the proposal under the First Amendment suggests a "substantial government interest [in] protecting the public health."<sup>299</sup> While this interest may be valid in itself, it is not the interest expressed by the proposal. Throughout the proposal, the FDA focuses its analysis on advertising targeted at

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required by State law." *Id.*

292. *Rubin*, 115 S. Ct. at 1590.

293. *Id.*

294. *Id.*

295. *Id.* at 1591.

296. *Id.*

297. *Id.* at 1590. Section 205(e)(2) requires the disclosure of alcohol content on labels of wines and spirits. See 27 C.F.R. § 4.36 (wines), § 5.37 (distilled spirits) (1994).

298. 60 Fed. Reg. at 41,373 (proposed 21 C.F.R. § 897.2).

299. *Id.* at 41,354.



minors and expressly states that the proposed rule is "intended to help prevent persons younger than 18 years of age from becoming addicted . . . by reducing the appeal of . . . cigarettes [to] . . . persons under 18 years of age."<sup>300</sup> In fact, the proposal expressly disclaims a desire to regulate advertising targeted at adults<sup>301</sup> noting that adult smokers' brand preferences correlate with price value, not with brand advertising.<sup>302</sup> The balance of the present analysis of the FDA proposal under *Central Hudson* is predicated on this more narrow government interest.

*c. directly advances state interest*

In determining the constitutionality of the fit between the means of the FDA's proposed regulations and the goal of reducing underage smoking, a court must first determine whether the regulations directly advance the state interest.<sup>303</sup> As suggested above, this analysis will turn on the standard of review of both the underlying substantial interest and the regulation's ability to directly advance this interest. The FDA's First Amendment analysis incorrectly concludes that the current standard of review under this prong allows the Court to "defer to the 'common-sense judgments' of the regulatory agency as long as they are not unreasonable."<sup>304</sup>

The Court initially applied such a deferential standard in *Posadas*.<sup>305</sup> Following the Court's deferential determination of the underlying interests, it concluded that restrictions on advertising of casinos would in fact restrain the demand for casino gambling.<sup>306</sup> However, the substantial interest in *Posadas* was not simply to reduce demand but rather to discourage "the risks associated with casino gambling [which were determined to be] significantly greater than those associated with the more traditional kinds of gambling in Puerto Rico."<sup>307</sup> Accordingly, Justice Brennan, in his dissent, attacked the majority's conclusion that the ban directly advanced the range of

300. *Id.* at 41,322.

301. *Id.* at 41,323 (selecting an age limit of 18 as consistent with the 1992 Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act).

302. *Id.* at 41,332.

303. *Central Hudson*, 447 U.S. at 564.

304. 60 Fed. Reg. at 41,354 (citing *Metromedia Inc. v. City of San Diego*, 453 U.S. 490, 509 (1981)).

305. 478 U.S. 328 (1986).

306. *Id.* at 341-42.

307. *Id.* at 343.

specific interests accepted by the Court.<sup>308</sup> These interests included the “disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime.”<sup>309</sup> Brennan suggested that these harmful effects would exist regardless of the ad ban by virtue of the very existence of casino gambling.<sup>310</sup>

In *Edenfield v. Fane*<sup>311</sup> the Court tightened the standard of review for this prong, requiring a determination of “whether the challenged regulation advances these interests in a *direct and material way*.”<sup>312</sup> However, two months later the Court seemed to retreat from this position in *United States v. Edge Broadcasting Co.*<sup>313</sup> when Justice White suggested that the decreasing demand for gambling directly advances the interest, despite substantial evidence that the restriction had only a marginal, if not insignificant, impact on the demand for the out-of-state lottery.<sup>314</sup>

The current standard of review is controlled by the recent case of *Rubin v. Coors Brewing Co.*<sup>315</sup> in which the Court expressly applied the *Edenfield* formulation requiring that “the challenged regulation advances the Government’s interest ‘in a direct and material way.’”<sup>316</sup> Under this formulation, the government carries the burden which “‘is not satisfied by mere speculation and conjecture,’” but instead “‘must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.’”<sup>317</sup>

While the tobacco industry continues to assert that advertising does not create smokers but instead cultivates brand loyalty,<sup>318</sup> statistics belie this fact.<sup>319</sup> “According to the Centers for Disease Control and Prevention, after the Joe Camel advertising campaign, which depicts a camel wearing sunglasses and driving a fancy car,

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

309. *Id.* at 341.

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

311. 113 S. Ct. 1792 (1993).

312. *Id.* at 1798 (emphasis added).

313. 113 S. Ct. 2696 (1993).

314. *Id.* at 2707-08.

315. 115 S. Ct. 1585 (1995).

316. *Id.* at 1592 (quoting *Edenfield*, 113 S. Ct. at 1798).

317. *Id.* (quoting *Edenfield*, 113 S. Ct. at 1800).

318. Clayton, *supra* note 28, at 25 (quoting Anne Browder, assistant to the president of the Tobacco Institute).

319. Gleick, *supra* note 6, at 33.

began in 1988, the proportion of teenage smokers who prefer[ed] Camels more than tripled."<sup>320</sup> However, studies in other countries that have imposed complete bans on tobacco advertisements are less conclusive and suggest that other factors play a role in declining smoking statistics.<sup>321</sup>

The tobacco industry has also claimed that a ban on sponsorship and other advertising will actually result in higher consumption.<sup>322</sup> Manufacturers assert that a ban would merely reduce their advertising costs allowing them to pass the savings on to the consumer in the form of lower prices, thereby stimulating demand.<sup>323</sup> However, as one commentator indicates, this rationale clearly lacks force as "it would indicate that it is in the tobacco companies' best economic interests to stop advertising and . . . increase consumption."<sup>324</sup> This latter interpretation is somewhat simplistic. Without government-mandated restrictions on advertising, no single cigarette manufacturer could afford to be the first to abandon advertising for fear of losing its market share.

While the proposal itself suggests only that "advertising and labeling *may* make young people more receptive to using . . . tobacco products and . . . [that the proposal] *may* reduce the potential harm to young people,"<sup>325</sup> common sense suggests that restrictions on advertisements targeted at minors will have some effect on demand and thus will advance the government's interest. The question remains whether this interest is sufficient to warrant the intrusion on free speech rights under the individual provisions of the FDA proposal.

Empirical studies, demonstrating the positive visual appeal to young people of color graphics<sup>326</sup> and the use of cartoon salesper-

320. *Id.*

321. For a comprehensive analysis of tobacco advertising bans in foreign countries, and the resulting impact, see Stoner, *supra* note 247, at 658-63.

322. Stoner, *supra* note 247, at 656.

323. *Id.*

324. *Id.*

325. 60 Fed. Reg. at 41,354 (emphasis added).

326. See Margaret F. Callcott & Patricia A. Alvey, *Toons Sell . . . and sometimes they don't: An Advertising Spokes-Character Typology and Exploratory Study*, in PROC. OF THE 1991 CONF. OF THE AM. ACADEMY OF ADVERTISING 43-52 (1991); Donald Wayne Hendon, *How Mechanical Factors Affect Ad Perception*, J. OF ADVERTISING RES., Aug. 1973, at 39, 39-45; P. Huang et al., *Black-White Differences in Appeal of Cigarette Advertising Among Adolescents*, 1 TOBACCO CONTROL 249-55 (1992); John R. Rossiter & Larry Percy, *Attitude Change Through Visual Imagery in Advertising*, 9 J. OF

sons,<sup>327</sup> support the black-and-white, text-only restriction on print ads<sup>328</sup> and the prohibition of billboards “within 1,000 feet of any playground, elementary . . . or secondary school.”<sup>329</sup> However, critics have challenged the conclusions<sup>330</sup> and methodology<sup>331</sup> of those studies and conducted manufacturer-sponsored studies of their own.<sup>332</sup> This led at least one commentator to conclude that “[m]ore direct evidence is necessary to link a ban of [cartoon characters] to a decrease in the number of children who smoke cigarettes.”<sup>333</sup>

The FDA’s proposed ban on the sale and distribution of branded nontobacco products is predicated on the effective message arguments noted above, as well as the particular appeal of these products to underage smokers and their penetration into the underage market. T-shirts, head gear, and sporting goods allow minors to associate themselves with a product reserved for adults<sup>334</sup> and enable those with little disposable income to get “something for nothing.”<sup>335</sup> In turn, these products enter places, where such ads are otherwise precluded, as status symbols and ultimately “walking billboard[s].”<sup>336</sup>

The FDA proposal devotes a great deal of effort supporting the ban on motor sport sponsorships through evidence demonstrating the general effectiveness of these marketing avenues.<sup>337</sup> However, the FDA concedes that specific “[e]vidence regarding sponsorship’s impact on young people is somewhat limited.”<sup>338</sup> The proposal cites

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ADVERTISING, 10-16 (1980).

327. Joseph R. DiFranza et al., *RJR Nabisco’s Cartoon Camel Promotes Camel Cigarettes to Children*, 266 JAMA 3149 (1991); Fischer, *supra* note 41, at 3146; John P. Pierce et al., *Does Tobacco Advertising Target Young People to Start Smoking?*, 266 JAMA 3154 (1991).

328. 60 Fed. Reg. at 41,374 (proposed 21 C.F.R. § 897.32(a)).

329. *Id.* (proposed 21 C.F.R. § 897.30(b)).

330. Lawrence O. Gostin & Allan M. Brant, *Criteria for Evaluating a Ban on the Advertisement of Cigarettes: Balancing Public Health Benefits With Constitutional Burdens*, 269 JAMA 904 (1993).

331. *Id.* at 906.

332. Susan Cohen, *Smooth Sell*, WASH. POST, Feb. 20, 1994, (Magazine) at 8; Maria Mallory, *That’s One Angry Camel*, BUS. WK., Mar. 7, 1994, at 94.

333. Swecker, *supra* note 40, at 1555 (footnote omitted).

334. *See* 60 Fed. Reg. at 41,336.

335. *Id.*

336. *Id.* Almost one half of all adolescent smokers, and one quarter of nonsmokers, owned at least one of these items. *Id.* (citing THE GEORGE H. GALLUP INT’L INSTIT., *TEEN-AGE ATTITUDES AND BEHAVIOR CONCERNING TOBACCO: REPORT OF THE FINDINGS* 17, 59 (Sept. 1992)).

337. *Id.* at 41,336-38.

338. *Id.* at 41,337.

four studies which, taken together, indicate that such sponsorship “can lead young people to associate brand names with certain life styles or activities or can affect their purchasing decisions.”<sup>339</sup> Given evidence of the power of the media to influence viewers it is difficult to suggest that removing cigarette sponsorship would not reverse these affects. However, as discussed below, it remains to be seen whether this result is significant enough to justify the considerable imposition on First Amendment commercial speech rights.

*d. no more extensive than necessary*

i. standard of review: reasonableness vs. proportionality

Cigarette manufacturers find their strongest argument in the fourth prong of *Central Hudson* which posits, “if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.”<sup>340</sup> As originally formulated, this prong is notable for its imprecision. Subsequent litigation of this prong has demonstrated that this standard of review may range anywhere from a “least restrictive means” test to a significantly more deferential and no more precise “reasonable fit” standard.<sup>341</sup> The FDA reads the post-*Central Hudson* case law as requiring the lesser standard, and accordingly, the FDA proposal concludes that “the proposed rule meets the fourth prong of the *Central Hudson* test [as] . . . modified to require that the governmental regulation of commercial speech not be overbroad.”<sup>342</sup> However, the FDA’s interpretation of the case law is debatable and does not take into account the Court’s recent restrictive interpretation of this prong in *Rubin v. Coors Brewing Co.*<sup>343</sup>

The Court’s *Posadas* ruling set the original deferential interpretation of this prong.<sup>344</sup> Justice Rehnquist announced, “it [is] clear

339. *Id.* at 41,337-38 (emphasis added) (citing P.P. Aitken et al., *Children’s Awareness of Cigarette Brand Sponsorship of Sports and Games in the UK*, 1 HEALTH EDUC. RES., THEORY AND PRAC. 203-11 (1986); F. Ledworth, *Does Tobacco Sports Sponsorship on Television Act as Advertising to Children*, 43 HEALTH EDUC. J. (1984); Memorandum from N. Gray, Anti-Cancer Council of Victoria, to All Members of the Federal Parliament (Dec. 15, 1989); J. Hoek et al., *Some Effects of Tobacco Sponsorship Advertisements on Young Males*, 12 INT’L J. OF ADVERTISING (Jan. 1993).

340. *Central Hudson*, 447 U.S. at 564.

341. See *infra* notes 344-46 and accompanying text.

342. 60 Fed. Reg. at 41,355.

343. See *infra* notes 371-76 and accompanying text.

344. 478 U.S. 328 (1986).

beyond peradventure that the challenged statute and regulations satisfy the fourth . . . step of the *Central Hudson* analysis,<sup>345</sup> and therefore the narrowed regulation is “no more extensive than necessary to serve the government’s interest.”<sup>346</sup> Accordingly, he rejected Posadas’s contention that the First Amendment requires the Puerto Rican legislature to reduce demand by promulgating speech to discourage gambling or by directly addressing the underlying problems rather than by suppressing commercial speech.<sup>347</sup>

In his dissent Justice Brennan challenged the majority’s conclusion that the ban was no more extensive than necessary.<sup>348</sup> He suggested a number of ways in which Puerto Rico could directly address the specific harms thought to be “associate[d] with casino gambling, . . . avoiding the First Amendment problems raised where the government seeks to ban constitutionally protected speech.”<sup>349</sup>

In *Board of Trustees v. Fox*<sup>350</sup> the Court claimed to focus on the scope of this prong for the first time outside of dicta.<sup>351</sup> Writing for the majority, Justice Scalia concluded that the standard is “something short of a least-restrictive-means standard.”<sup>352</sup> Scalia’s position stemmed from the need to establish a standard lower than that accorded pure speech.<sup>353</sup> In suggesting that the fit between means and ends need not be perfect but rather “reasonable,” Scalia defines this standard by indicating that the “scope is ‘in proportion to the interest served’”<sup>354</sup> and “far different . . . from the ‘rational basis’ test.”<sup>355</sup>

In his dissent, Justice Blackmun criticized the rejection of the least-restrictive-means analysis, noting that the Court reached the

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345. *Id.* at 343.

346. *Id.*

347. *Id.* at 344.

348. *Id.* at 348 (Brennan, J., dissenting).

349. *Id.* at 357 (Brennan, J., dissenting).

350. 492 U.S. 469 (1989).

351. *Id.* at 477.

352. *Id.*

353. *Id.* at 478. Scalia’s choice of words is interesting. He writes, “we think it would be incompatible with the *asserted* ‘subordinate position of commercial speech . . .’ to apply a more rigid standard in the present context.” *Id.* (alteration in original) (footnote omitted) (emphasis added). Does he mean to suggest that commercial speech should not take a subordinate position?

354. *Id.* at 480 (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

355. *Id.* (distinguishing the standard of the Fourteenth Amendment equal protection analysis articulated in *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 109-10 (1949)).

holding "only by recasting a good bit of contrary language in . . . past cases."<sup>356</sup>

While the Court in *Edenfield v. Fane*<sup>357</sup> adopted the "reasonable proportion to the interest served"<sup>358</sup> test, two months later in *United States v. Edge Broadcasting Co.*,<sup>359</sup> the Court focused instead on the "reasonable fit" language articulated in *Fox*.<sup>360</sup> This deferential language was necessary to uphold the challenged regulation in light of evidence of its marginal impact on the asserted substantial interest.<sup>361</sup> This switch suggests a willingness to adjust the standard of review to fit the government's underlying goals, which does not bode well for the cigarette industry.

Nonetheless, the *Edge Broadcasting* Court stopped short of complete deference, recognizing the argument that the government should first legislate against the harmful act before restricting commercial speech regarding the act. The Court concluded that "the Government [need not] make progress on every front before it can make progress on any front."<sup>362</sup>

In his dissent, Justice Stevens also analyzed the case under the language in *Fox*, but focused instead on the "in proportion to the interest served" standard.<sup>363</sup> Applying this test, Stevens concluded that the "selective ban on . . . advertising unquestionably flunks that test; for the means chosen by the Government, a ban on speech imposed for the purpose of manipulating public behavior, is in no way proportionate to the . . . asserted interest."<sup>364</sup>

## ii. proportionality applied to the FDA proposals

While a proportionality test would seem to offer additional precision in determining whether there is a reasonable fit between a restriction and the asserted interest, the Court offers little guidance

356. *Id.* at 486 (Blackmun, J., dissenting).

357. 113 S. Ct. 1792 (1993).

358. *Id.* at 1798.

359. 113 S. Ct. 2696 (1993).

360. *Id.* at 2705.

361. *Edge Broadcasting Co. v. United States*, 956 F.2d 263 (4th Cir. 1992), *aff'd*, 113 S. Ct. 2696 (1993).

362. *Edge Broadcasting Co.*, 113 S. Ct. at 2707.

363. *Id.* at 2708 (Stevens, J., dissenting) (quoting *Fox*, 492 U.S. at 480) (internal quotes omitted).

364. *Id.* (Stevens, J., dissenting).

in its application. Under the FDA proposals, there is room to argue that at least some of the provisions fail for lack of proportionality.

The proposed black-and-white, text-only restriction on print ads in publications with significant minor readerships<sup>365</sup> is by far the most carefully tailored of the provisions. The proposal sets out clear standards exempting the restriction from publications “(1) [w]hose readers aged 18 years or older constitute 85 percent or more of the total readership, and (2) [t]hat is read by fewer than 2 million persons under age 18.”<sup>366</sup> However, it is not clear why these precise figures should demarcate publications primarily read by adults, though ultimately a court is likely to defer to the legislature’s conclusion.

The complete prohibition on nontobacco items,<sup>367</sup> by contrast, offers no attempt at proportionality. Certainly, there are many ways to reduce the distribution of these products to minors and therefore reduce their impact as walking billboards in schools. For example, product promotions could be limited to proof-of-purchase programs placing the burden on retailers to completely restrict sales to minors consistent with the current law. Since such programs would encourage sales to the detriment of legal smokers, an alternative solution would require strict proof of age to obtain the nontobacco product. This formality could be accomplished, for mail-in promotions, by requiring a photocopy of a driver’s license, or by limiting the promotions to over-the-counter transactions where the retailer can check the identification more carefully. Each of these proposals suggest that this section could be more narrowly tailored while serving the government interest in reducing the effectiveness of such promotions to minors.

The FDA proposal to restrict event and entry sponsorship is less susceptible to narrowing, though its proportionality may be questioned. The FDA cites a study measuring the viewership of 354 motorsport events broadcast in 1992.<sup>368</sup> Children or adolescents comprised less than seven percent of the total viewing audience of 915 million.<sup>369</sup> Furthermore, the chairman of R.J.Reynolds Tobacco Company cites one study indicating that “97 percent of attendees at

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365. 60 Fed. Reg. at 41,374 (proposed 21 C.F.R. § 897.32(a)).

366. *Id.* (proposed 21 C.F.R. § 897.32(a)(1)-(2)).

367. *Id.* at 41,374-75 (proposed 21 C.F.R. § 897.34(a)-(b)).

368. J. Slade, Tobacco Product Advertising During Motorsport Broadcasts: A Qualitative Assessment, Presentation at the Ninth World Conference on Tobacco and Health (Oct. 10-14, 1995).

369. *Id.*



Winston Cup events are 18 years of age and older."<sup>370</sup> Certainly, the sheer number of underage viewers cannot be ignored. However, the eighty-five percent adult readership cutoff, sufficient to exempt print publications from the lesser penalty of text-only ads is at odds with the more draconian prohibition of sponsorship for events carrying a ninety-three percent adult viewership.

These statistics demonstrate the difficulty in determining proportionality in an area where the comparison is not even apples to oranges but rather apples to assault weapons. It is tempting to suggest that the dangers inherent in smoking justify any prohibition on advertising. But these dangers also justify a complete ban on tobacco products. Arguably, a complete ban or the gradual reduction of nicotine, if either were practical, would accomplish results far more in proportion to their regulations than the marginal impact of the FDA proposals.

iii. impact of the availability of alternatives to the regulation of speech

In *Rubin v. Coors Brewing Co.*,<sup>371</sup> the Court rested its opinion on the government's failure to show that the regulation directly advanced the asserted government interest.<sup>372</sup> However, the Court went on to suggest that the regulation also would not survive First Amendment scrutiny because it was "not sufficiently tailored to its goal."<sup>373</sup> Coors suggested several alternatives to the label ban and the Court agreed that "the availability of these options, all of which could advance the Government's asserted interest in a manner less intrusive to . . . First Amendment rights, indicate[d] that [the regulation] is more extensive than necessary."<sup>374</sup>

Despite the FDA's dismissal of *Rubin* based on a wholly incorrect interpretation of the holding,<sup>375</sup> the case is particularly

370. Andrew Crask, *Tobacco Sponsorships Under Threat*, RACER, Oct. 1995, at 8.

371. 115 S. Ct. 1585 (1995).

372. *Id.* at 1593. While the materiality test traditionally falls under the "directly advances" prong of *Central Hudson*, it can be argued that it is more properly a measure of the fit of the regulation under the final prong.

373. *Id.*

374. *Id.* at 1593-94.

375. The FDA states "nothing in [*Rubin*] is to the contrary" and parenthetically suggests that the regulation in *Rubin* "failed completely to advance the government interest." 60 Fed. Reg. at 41,355. In fact, the Court found that the regulation served a legitimate government interest, but that the overall scheme was irrational, given the disparity of rules applied to other types of alcohol and in other forms of advertising, which

relevant in the context of the cigarette advertising debate. Certainly, there are many ways that the government can reduce the demand for cigarettes. For example, the government could use counterspeech, or gradually reduce the level of addictive nicotine.<sup>376</sup> Furthermore, such methods would not infringe on a constitutional right.

v. counter speech as an alternative to regulation

In his concurrence in *Virginia State Board*,<sup>377</sup> Justice Stewart suggested that the only way ideas should be suppressed is through “the competition of other ideas.”<sup>378</sup> Where the government regulates commercial speech, it implies a fear of the profound impact of the media and suggests that the public is unable to perceive its own best interests. The *Virginia State Board* majority noted that “[i]t 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.”<sup>379</sup> The Court also stated that the First Amendment presupposes that “people will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them.”<sup>380</sup>

In his dissent in *Central Hudson*, Justice Rehnquist, however, suggested that this “marketplace of ideas” metaphor is misplaced in the context of commercial speech.<sup>381</sup> Rehnquist placed great weight on the free flow of ideas in the political context “not because it will lead to the discovery of any objective ‘truth,’ but because it is essential to our system of self-government.”<sup>382</sup> However, he advanced this proposition without suggesting how the free flow of information benefits self-government outside of its function as a battlefield for truth.

Rehnquist also expressed cynicism regarding market imperfections within the marketplace of ideas,<sup>383</sup> citing as an example *Gertz*

undermine the challenged regulation. *Rubin*, 115 S. Ct. at 1592-93.

376. See findings contained in H.R. 1853, 104th Cong., 1st Sess. § 2 (1995).

377. 425 U.S. 748, 775 (1976) (Stewart, J., concurring).

378. *Id.* at 780 (Stewart, J., concurring) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974)).

379. *Id.* at 770.

380. *Id.*

381. *Central Hudson*, 447 U.S. at 597 (Rehnquist, J., dissenting).

382. *Id.* at 598 (Rehnquist, J., dissenting).

383. *Id.* at 592-93 (Rehnquist, J., dissenting).

v. *Robert Welch, Inc.*,<sup>384</sup> wherein the Court noted that “an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood.”<sup>385</sup> Clearly, however, defamation can be distinguished from truthful commercial speech regarding a lawful practice, as counterspeech has been shown to be effective in the latter context. Further on in his dissenting opinion, Rehnquist suggested that the “notion that more speech is the remedy to expose falsehood [in commercial speech] . . . is wholly out of place . . . [because] if applied logically the remedy of one who was defrauded would be merely a statement, available upon request, reciting the Latin maxim ‘*caveat emptor.*’”<sup>386</sup> Such a conclusion is clearly arguable as the additional speech generally comes from those with a financial or social interest in exposing the fraud in order to drive the purveyor from the market. In the context of cigarette advertising, the effectiveness of counterspeech has already been evidenced by the profound impact of the antismoking advertisements broadcast following the result in *Banzhaf*.

In *Posadas* the Court articulated a far more compelling reason why counterspeech is not always a sufficient alternative to restriction of commercial speech. The Court suggested that the public may still be encouraged by advertisements despite the known dangers.<sup>387</sup> However, this interpretation underestimates the power of counterspeech which may co-opt the techniques of the product advertisement or directly expose their manipulation.

In his dissent in *Posadas*,<sup>388</sup> Justice Brennan placed the burden of proving that counterspeech would be insufficient to protect the government’s interest on the government,<sup>389</sup> thereby placing greater faith in the public to perceive their own best interest when presented with conflicting arguments.<sup>390</sup>

384. 418 U.S. 323 (1974).

385. *Id.* at 344 n.9.

386. *Central Hudson*, 447 U.S. at 598 (Rehnquist, J., dissenting).

387. *Posadas*, 478 U.S. at 344 (citing *Dunagin v. City of Oxford*, 718 F.2d 738, 751 (5th Cir. 1983)(en banc), cert. denied, 467 U.S. 1259 (1984)). The *Dunagin* Court stated:

We do not believe that a less restrictive time, place and manner restriction, such as a disclaimer warning of the dangers of alcohol, would be effective. The state’s concern is not that the public is unaware of the dangers of alcohol. . . . The concern instead is that advertising will unduly promote alcohol consumption despite known dangers.

*Dunagin*, 718 F.2d at 751.

388. *Posadas*, 478 U.S. at 348-59 (Brennan, J., dissenting).

389. *Id.* at 357 (Brennan, J., dissenting).

390. *Id.* at 358 (Brennan, J., dissenting).

vi. antismoking counterspeech and the proposed educational programs under the FDA

In 1994 the Surgeon General's report suggested that "a nationwide, well[-]funded antismoking campaign could effectively counter the effects of cigarette advertising in its currently permitted media forms."<sup>391</sup> Coming from a leading critic of cigarette smoking, this represents significant confidence in the power of counterspeech.

Antismoking counterspeech has already proved effective in California<sup>392</sup> and Massachusetts<sup>393</sup> where antismoking advertisements are one element of comprehensive smoking control programs. In fact, the Clinton Administration is studying the Massachusetts tobacco control program which is funded by thirty-six million dollars in state tobacco taxes.<sup>394</sup> Each year, Massachusetts spends fourteen million dollars directly on antismoking ads, and since 1994, cigarette sales to teens in the state have dropped forty percent.<sup>395</sup>

Grassroots antismoking campaigns have also shown some promise. As an example, "African-American groups have focused attention on the way certain ads and cigarette brands are aimed specifically at blacks and have enlisted churches, parents, and school groups to combat underage smoking."<sup>396</sup> Apparently such efforts

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391. DEPARTMENT OF HEALTH AND HUMAN SERVS., PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL 188 (Feb. 24, 1994) (Executive Summary).

392. 60 Fed. Reg. at 41,327 (citing T.W. Hu et al., *The State Antismoking Campaign and the Industry Response: The Effects of Advertising on Cigarette Consumption in California*, AEA PAPERS & PROCEEDINGS, May 1995, at 89). The California program was found to influence 200,000 Californians when they chose to quit smoking between 1990 and 1991. W. James Popham et al., *Do Anti-Smoking Media Campaigns Help Smokers Quit?*, 108 PUB. HEALTH REP. 510, 510-13 (1993). A subsequent report indicated that the media campaign resulted in high levels of awareness among minors and may have contributed to halting the rise of teen smoking in California. 60 Fed. Reg. at 41,329 (citing W. James Popham et al., *Effectiveness of the California 1990-1991 Tobacco Education Media Campaign*, AM. J. PREV. MED. (1994)).

393. Bob Hohler, *U.S. Examines State's Youth Tobacco Effort*, BOSTON GLOBE, Aug. 8, 1995, at 3. In addition to antismoking advertisements, the Massachusetts government has attempted to counter marketing programs such as "Marlboro Miles" in which smokers are encouraged to save labels to be exchanged for merchandise carrying the company's trademark. *Id.* In April 1995, the state enlisted 200 retailers, including McDonald's, to give discounts to teens in exchange for a smoke-free pledge. Gleick, *supra* note 6, at 33-34.

394. Hohler, *supra* note 393, at 3.

395. Gleick, *supra* note 6, at 34.

396. *Id.* at 33.

have been effective. In 1993, "only 4.4% of black teens smoke[d], compared with nearly 23% of white teens."<sup>397</sup>

While it is tempting to suggest that a total ban on advertising would render such antismoking advertising unnecessary, such a position ignores the powerful social factors encouraging adolescents to smoke, and the need to counteract the addictive force of nicotine. In fact, the FDA itself mandates a manufacturer-financed national education program, which includes a national antismoking broadcast campaign along with the proposed restrictions on advertising.<sup>398</sup> The FDA based its proposal, in part, on the success of the antismoking campaigns following the *Banzhaf* decision.<sup>399</sup> The FDA was encouraged by the substantial impact of the campaign in the face of broadcast pro-smoking advertising, suggesting that the antismoking campaigns may be sufficient to counteract the effect of the current level of advertising.

vii. the gradual reduction in nicotine levels as an alternative to regulation of speech

Short of an outright ban on cigarettes, the most effective regulation contributing towards the reduction of smoking would be the elimination of the addictive ingredient of nicotine. With this in mind, Congressman Meehan recently introduced a bill to reduce, and eventually eliminate, nicotine in tobacco products.<sup>400</sup> The bill contemplates the gradual reduction of nicotine from 10 mg in 1997 to .05 mg by 2002.<sup>401</sup>

Such a reduction and elimination could potentially dismantle the entire cigarette market without the social and political backlash that would accompany a direct prohibition of cigarettes.<sup>402</sup> Clearly, such an option is anathema to cigarette manufacturers who attempt to downplay the significance of nicotine in smoker's behavior, and insist

397. *Id.*

398. 60 Fed. Reg. at 41,374 (proposed 21 C.F.R. § 897.29).

399. *See* 60 Fed. Reg. at 41,326-27.

400. H.R. 1853, 104th Cong., 1st Sess. (1995).

401. *Id.*

402. It is likely that a total ban on smoking would only create a high-profit black market with the attendant problems of violence and intimidation found within the current distribution of illegal drugs. Furthermore, the country's attempt at liquor prohibition and the current drug culture suggests that the criminalization of substances creates social demand.

that “[n]icotine . . . is an important component of the taste and flavor of cigarettes.”<sup>403</sup>

However, the elimination of nicotine is not without pitfalls. In making the choice to forgo directly regulating nicotine as a drug<sup>404</sup> and cigarettes as drug delivery devices, the FDA weighed the public health cost of a sudden and total withdrawal of cigarettes from the market.<sup>405</sup> The agency concluded that the “current health care system and available pharmaceuticals may not be able to provide adequate or sufficiently safe treatment for such a precipitous withdrawal” of fifty million smokers.<sup>406</sup> Furthermore, the black market would step in to supply addicted users with cigarettes which may be more dangerous, containing more nicotine, tar, or other carcinogens.<sup>407</sup>

The FDA proposal does not contemplate a gradual reduction in nicotine. A plan such as that introduced in the House of Representatives may reduce or prevent the dangers articulated by the FDA and allow tobacco companies time to further diversify and shift their resources and labor force into the production of safer products.

Clearly, the combination of education programs and the gradual reduction of nicotine offers a viable and potent alternative to the further reduction in cigarette advertising. The addictive qualities of cigarettes would be eliminated and the promotion of the legal product could compete in the marketplace of ideas. If smokers choose to continue smoking it will then be based on a true choice.

## VII. CONCLUSION

When John Banzhaf petitioned the FCC to declare that the fairness doctrine applied to cigarette advertising as an issue of public importance, the Columbia Law student<sup>408</sup> set in motion a series of judicial and legislative events worthy of a novel. Over the ensuing years, cigarette manufacturers have carefully fought mounting

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403. *Lawmaker Charges Philip Morris Tracked Children, Students as Potential Smokers*, L.A. TIMES, July 25, 1995, at D3.

404. If the FDA were to regulate cigarettes as a drug, the product must be shown to be safe and effective to prevent their removal from the market. 21 U.S.C. §§ 321(g), 331(d), 355(a) (1994).

405. 60 Fed. Reg. at 41,348.

406. *Id.*

407. *Id.* at 41,349.

408. Gerald J. Thain, *Prohibitions on Advertising for Products It is Legal to Sell: A Constitutionally Valid Option*, J. PROD. L., Sept./Dec. 1984, at 83, 91.

scientific evidence and social condemnation, empowered primarily by the addictive quality of their product. The FDA's proposed restrictions on advertising will undoubtedly have an impact on a minor's decision whether to take up the habit. However, the proposal does not provide help to the fifty million smokers currently addicted to the nicotine in cigarettes. Rather than directly address the underlying evil of nicotine, the FDA instead seeks to sacrifice the First Amendment protection of commercial speech in an unnecessary tradeoff.

Given the profound dangers inherent in the use of tobacco and the intermediate level of protection afforded commercial speech under the *Central Hudson* test and its progeny, tobacco manufacturers face a daunting task in challenging these further restrictions. As this Comment demonstrates, the tobacco industry will find its strongest argument by challenging the tailoring of the law to the government's interest in protecting underage smokers and nonsmokers.

Undoubtedly the current proposal is merely a stop on the way to a complete ban on tobacco advertising.<sup>409</sup> In the near future, nicotine is likely to remain unregulated and cigarettes will continue to claim the lives of smokers. In this light, the demise of cigarette brand sponsorship of auto racing is an exceedingly minor loss. Modern auto racing was born, in part, upon the banishment of cigarette advertisements from the broadcast media. With package product brands poised to fill the void caused by the proposal, the racing industry will not die with the proposed restrictions, nor will commercial speech. However, the same cannot be said for current smokers.

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409. Cf. *Canada to Seek Total Ban on Tobacco Ads*, L.A. TIMES, Dec. 12, 1995, at D1. In September 1995, the Canadian Supreme Court, in a surprise decision, struck down a partial ban on tobacco advertising as violative of the right to freedom of speech. Nonetheless, Canada's health minister announced that the government will seek to ban all tobacco advertising. *Id.*

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