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COMMENT

SNUFFING OUT THE FIRST AMENDMENT: THE FDA REGULATION OF TOBACCO COMPANY ADVERTISING AND SPORTS SPONSORSHIPS UNDER THE FEDERAL FOOD, DRUG, AND COSMETIC ACT.

BRADFORD J. PATRICK*

I. INTRODUCTION

Cigarette smoking did not become a large part of society in America until around 1910, when the Camel brand, the first blended tobacco cigarette, was introduced by R.J. Reynolds.¹ After peaking in the mid-1950s, consumption of all forms of tobacco has continued to drop.² In 1955, the National Cancer Institute conducted the first large-scale nationwide survey of adult tobacco use patterns and found that 60% of men and 28% of women were current smokers.³ Today, about 25% of adults in America are smokers,⁴ but the percentage of adult women who smoke has remained largely unchanged since 1955.⁵ On August 28, 1996, cigarettes and smokeless tobacco became the subject of regulation by the Food and Drug Administration (hereinafter "FDA") when the Regula-

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1. U.S. DEP'T OF HEALTH & HUMAN SERVICES, SMOKELESS TOBACCO OR HEALTH XX-XIX (SMOKING & TOBACCO CONTROL MONOGRAPH 2, NAT'L INST. OF HEALTH PUB. NO. 93-3461 (photo. reprint 1993) (1992)) [hereinafter SMOKELESS TOBACCO OR HEALTH].

2. *Id.* at xli. Forms of tobacco include cigarettes, cigars, pipes, self-rolled cigarettes, leaf, and snuff.

3. Samuel Broder, *Foreword* to STRATEGIES TO CONTROL TOBACCO USE IN THE UNITED STATES, at iii, iii, U.S. DEP'T OF HEALTH & HUMAN SERVICES (SMOKING & TOBACCO CONTROL MONOGRAPH NO. 1, NAT'L INST. OF HEALTH PUB. NO. 92-3316, 1991) [hereinafter STRATEGIES TO CONTROL TOBACCO USE].

4. *Id.*

5. *Id.* at iv. Nearly fifty million persons regularly use cigarettes, and in 1990, 527 billion cigarettes were smoked in the U.S. See *id.*

tion of Cigarettes and Smokeless Tobacco Under the Federal Food, Drug, and Cosmetic Act (hereinafter "the regulations") was finalized.⁶ The regulations create a new part 897 of Title 21 of the *Code of Federal Regulations*, which will govern the sale, distribution, labeling, and advertising of cigarettes and smokeless tobacco. Subpart D of part 897, governing labeling and advertising, severely restricts billboard advertising and sports sponsorships by the tobacco industry, and it is comprised of three sections.

Subsection (c) of section 897.34 will take away the ability of a tobacco company to use its brand names in most sponsorship efforts, and will also ban the use of any word, color, or item that is used to identify a tobacco brand, such as using the color red in the case of Marlboro cigarettes, or using the slogan "Marlboro Country." This subsection, effective August 28, 1998, provides in full:

(c) No manufacturer, distributor, or retailer may sponsor or cause to be sponsored any athletic, musical, artistic, or other social or cultural event, or any entry or team in any event, in the brand name (alone or in conjunction with any other word), logo, symbol, motto, selling message, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of cigarettes or smokeless tobacco. Nothing in this paragraph prevents a manufacturer, distributor, or retailer from sponsoring or causing to be sponsored any athletic, musical, artistic, or other social or cultural event, or team or entry, in the name of the corporation which manufactures the tobacco product, provided that both the corporate name and the corporation were registered and in use in the United States prior to January 1, 1995, and that the corporate name does not include any brand name (alone or in conjunction with any other word), logo, symbol, motto, selling message, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of cigarettes or smokeless tobacco.⁷

Clothing and other merchandise sales and promotions of the tobacco companies, such as "Marlboro Gear," will also be banned under section 897.34:

6. Regulation of Cigarettes and Smokeless Tobacco Under the Federal Food, Drug, and Cosmetic Act, 61 Fed. Reg. 44,396 (1996) (to be codified at 21 C.F.R. pt. 801 et seq.) [hereinafter Regulation of Cigarettes and Smokeless Tobacco].

7. Regulation of Cigarettes and Smokeless Tobacco, 61 Fed. Reg. at 44,618 (to be codified at 21 C.F.R. 897.34 (c)).

(a) No manufacturer and no distributor of imported cigarettes or smokeless tobacco may market, license, distribute, sell, or cause to be marketed, licensed, distributed, or sold any item (other than cigarettes or smokeless tobacco) or service, which bears the brand name (alone or in conjunction with any other word), logo, symbol, motto, selling message, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of cigarettes or smokeless tobacco.⁸

(b) No manufacturer, distributor, or retailer may offer or cause to be offered any gift or item (other than cigarettes or smokeless tobacco) to any person purchasing cigarettes or smokeless tobacco in consideration of the purchase thereof, or to any person in consideration of furnishing evidence, such as credits, proofs-of-purchase, or coupons, of such a purchase.⁹

Section 897.32 will, effective August 28, 1997, restrict the format, content, and placement of tobacco advertisements to a black text on white background "tombstone" format:

(a) Except as provided in paragraph (b) of this section, each manufacturer, distributor, and retailer advertising or causing to be advertised, disseminating or causing to be disseminated, any labeling or advertising for cigarettes or smokeless tobacco shall use only black text on a white background. This section does not apply to advertising: (1) In any facility where vending machines and self-service displays are permitted under this part, provided that the advertising is not visible from outside the facility and that it is affixed to a wall or fixture in the facility: or (2) Appearing in any publication (whether periodic or limited distribution) that the manufacturer, distributor, or retailer demonstrates is an adult publication. For the purposes of this section, an adult publication is a newspaper, magazine, periodical, or other publication: (i) Whose readers younger than 18 years of age constitute 15 percent or less of the total readership as measured by competent and reliable survey evidence; and (ii) That is read by fewer than 2 million persons younger than 18 years of age as measured by competent and reliable survey evidence.

(b) Labeling and advertising in an audio or video format shall be limited as follows: (1) Audio format shall be limited to words only with no music or sound effects. (2) Video formats shall be limited to static black text only on a white background. Any au-

8. *Id.* at 44,617 (to be codified at 21 C.F.R. 897.34(a)).

9. *Id.* at 44,617-618 (to be codified at 21 C.F.R. 897.34(b)).

dio with the video shall be limited to words only with no music or sound effects.¹⁰

The main thrust of section 897.30, effective August 28, 1997, is its subsection (b):

(b) No outdoor advertising for cigarettes or smokeless tobacco, including billboards, posters, or placards, may be placed within 1,000 feet of the perimeter of any public playground or playground area in a public park (e.g., a public park with equipment such as swings and seesaws, baseball diamonds, or basketball courts), elementary school, or secondary school.¹¹

On June 20, 1997, the landscape surrounding tobacco continued its dramatic change. The tobacco industry and the attorneys general of forty states agreed to a \$368.5 billion settlement to compensate the states for their costs in treating smoking-related illness, ending the states' lawsuits seeking recovery of those costs, as well as all class-action lawsuits now and in the future.¹² Individual lawsuits could be filed, but capped at \$5 billion a year.¹³ Further, the industry agreed to help meet pre-set goals for the reduction of teen-age smoking by spending at least \$500 million on anti-smoking messages, with an end goal of reducing the rate by sixty percent within ten years, and including an \$80 million per year penalty for each percentage point not reached under the goal.¹⁴ As part of the proposed settlement, which still must be ratified by Congress, the industry agreed to accept the FDA's jurisdiction over tobacco, and further, to end all billboard advertising and sports sponsorships.¹⁵ In addition, Philip Morris and R.J. Reynolds would end the use of its "Marlboro Man" and "Joe the Camel" campaigns respectively.¹⁶ The historic settle-

10. *Id.* (to be codified at 21 C.F.R. 897.32(a),(b)).

11. Regulation of Cigarettes and Smokeless Tobacco, 61 Fed. Reg. at 44,617 (to be codified at 21 C.F.R. 897.30(b)).

12. John M. Broder, *The Tobacco Agreement: The Overview; Cigarette Makers In A \$368 Billion Accord To Curb Lawsuits And Curtail Marketing*, N.Y. TIMES, June 21, 1997, at 1.

13. *Id.* at 8.

14. *Id.* at 8. Other provisions include a payment of \$50 billion over 25 years to help pay for the health care for millions of children without insurance, and warning labels that would state that cigarettes are addictive and cause severe health problems.

15. *Id.* at 1.

16. *Id.* at 8. This concession was probably to avoid more litigation, especially in the case of Joe the Camel. In 1994, the FTC had closed an investigation of the Joe the Camel advertising campaign, finding that it did not lead children to smoke. See *FTC Statements Regarding R.J. Reynolds Tobacco Company—Camel Cigarettes*, FTC NEWS RELEASE, June 8, 1994, FTC File No. 932-3162, 1994 WL 584651 (F.T.C.). Recently, however, the FTC re-opened its 1994 investigation, citing new evidence. See Bruce Ingersoll, *Joe Camel Ads Illegally Target Kids, FTC Says*, WALL ST. J., May 29, 1996, at B1. The FTC holds its authority to conduct such investigations in the Federal Trade Commission Act, 15 U.S.C. 41, et. seq. (1997). Section 5 of

ment came soon after a products liability settlement was reached on March 20, 1997, between the Liggett Company and the attorneys general of twenty-two states.¹⁷ Representing only two percent of the industry, Liggett made admissions in the course of its settlement talks that cigarettes are addictive and that the tobacco industry targets children with its advertisements.¹⁸ These damaging admissions, and the agreement itself, forced R.J. Reynolds and Philip Morris to come to the settlement table as well.¹⁹

Still remaining, however, is a legal appeal by the industry, its future dependent on Congress. Soon after the proposed rule²⁰ was announced on September 7, 1995, in the United States District Court for the Middle District of North Carolina, five tobacco companies filed suit against the FDA and Commissioner David Kessler. On April 25, 1997, District Judge Osteen granted the tobacco companies' Motion for Summary Judgment in part and denied it in part in *Coyne Beahm, Inc. v. United States Food & Drug Administration*.²¹ While the court found that the FDA acted under its device authorities in the Federal Food, Drug, and Cosmetic Act²² in regulating tobacco, the part of the decision that the industry is now appealing, the court agreed with the tobacco companies that the "FDA may not restrict advertising and promotion pursuant to section 360j(e) of the Act."²³ Subpart D was thus struck down. Impor-

the Act gives the FTC the ability to conduct subjective investigations based on the "unfairness" of advertisements. See 15 U.S.C. 45 (1997).

17. Anthony Flint, *Tobacco firm cites danger of smoking*, BOSTON GLOBE, Mar. 21, 1997, at A1.

18. *Id.*

19. Liggett has long been involved in lawsuits seeking recovery for damages caused by its tobacco products. See *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504, 530-531 (1992) (holding that the 1965 FCLA Act, *infra* note 43, did not pre-empt state law damages actions; that the 1969 Public Health Cigarette Smoking Act, *infra* note 47, did pre-empt claims based on a failure to warn; but that the 1969 Public Health Cigarette Smoking Act does not pre-empt claims based on express warranty, intentional fraud and misrepresentation, or conspiracy). The attorneys general found their ability to bring suit in that holding.

20. Regulation of Cigarettes and Smokeless Tobacco Under the Federal Food, Drug, and Cosmetic Act, 60 Fed. Reg. 41,314 (1995) (finalized Aug. 28, 1996).

21. 966 F.Supp. 1374.

22. *Id.* at 1-19.

23. *Id.* at 20. While it is the grounds of the industry's appeal, the action of the FDA in granting itself jurisdiction over tobacco will be assumed to be a proper exercise of its powers granted by Congress. For the reader interested in the jurisdictional debate, and not just the constitutional argument against the regulations, compare Lars Noah & Barbara A. Noah, *Nicotine Withdrawal: Assessing the FDA's Effort to Regulate Tobacco Products*, 48 ALA. L. REV. 1 (1996) (noting that both the lack of an affirmative statement from Congress giving jurisdiction and the FDA's own numerous previous statements that it did not have jurisdiction lead one to conclude that no jurisdiction exists), with Allison M. Zieve, *The FDA's Regulation of*

tant to this paper, if the proposed settlement fails to win approval, the tobacco industry will then continue its appeal seeking a reversal of Judge Osteen's decision upholding the FDA's jurisdiction over tobacco, and the debate over tobacco will rage on.

As Congress debates whether to approve the settlement, this paper will analyze the constitutionality of subpart D of the FDA Regulations. In Section VI of this note, it will be concluded that subpart D involves the impermissible restriction of commercial speech under the First Amendment.²⁴ Section II of this note will use the history and value of the two most prominent tobacco brands involved in advertising and sports sponsorships, Philip Morris's Marlboro brand and R.J. Reynolds's Camel brand, as the backdrop to examine the impact of subpart D. Section III of this note will discuss the history of tobacco regulation at both the federal and state level. Section IV of this note will develop the early days of the commercial speech doctrine. Section V will discuss the latest commercial speech decisions, including the Court's most recent, *44 Liquormart, Inc. v. Rhode Island*.²⁵ Section VI will explain why subpart D does not withstand constitutional scrutiny. Lastly, Section VII will end this note, offering some perspective on where commercial speech protection may be headed and on the nearly century-old debate over how far the First Amendment was meant to take free speech, whether non-commercial or commercial.

II. SUBPART D AND ITS IMPACT

Section 897.34 would have a tremendous impact, both on the industry itself and on the events it sponsors. The first commercial racing sponsorship by a tobacco company was in 1968, when the English cigarette com-

Tobacco Products, 48 FOOD & DRUG L.J. 495 (1996) (arguing that the FDA has merely reacted to the new evidence showing that tobacco companies regulate the amount of nicotine put into cigarettes and therefore the FDA has jurisdiction over cigarettes as they now can be classified as a "drug" under the Federal Food, Drug, and Cosmetic Act), and David A. Kessler, et al., *The Legal and Scientific Basis for FDA's Assertion of Jurisdiction Over Cigarettes and Smokeless Tobacco*, JAMA 405 (1997) (FDA assertion of jurisdiction is proper in light of new evidence showing tobacco is made to be addictive).

24. The full text of the amendment is as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend I.

25. 116 S. Ct. 1495 (1996).

pany Gold Leaf sponsored Team Lotus, a Formula One²⁶ racing series entry.²⁷ In the 1990s, sponsorship in the United States is big business. R.J. Reynolds serves as the well-known title sponsor of the National Association of Stock Car Auto Racing ("NASCAR") series, "The Winston Cup,"²⁸ named after its Winston cigarette brand, and spends over \$33 million annually on motor sports.²⁹ Philip Morris spends over \$18 million for its sponsorship of Marlboro IndyCar teams and races,³⁰ and it was estimated that all tobacco companies combined would spend \$194 million on sports-related sponsorships in 1996.³¹

A commonly heard suggestion by proponents of section 897.34 is that the Winston Cup could easily be renamed and simply become the "R.J. Reynolds Cup." But, this evidences a complete lack of understanding of the value of a brand name and the efforts taken to establish it; for brand names are the most valuable assets of a company. Consider the view of John Stuart, Chairman of Quaker, that "[i]f [Quaker] were to be split up, I would be glad to take the brands, trademarks and goodwill and you could have all the bricks and mortar-and I would fare better than you."³² Recent sales of brand names back Stuart's claim. In 1988, the European brand names, not the companies themselves, of R.J.R.-Nabisco were

26. This series is run in Europe and is similar to the United States' two Indy-Car series, the upstart Indy Racing League (known as the "IRL"), and the Championship Auto Racing Teams circuit (known as "CART").

27. Gregg Feistman, *Under Attack*, INDY CAR RACING, Nov. 1995, at 22.

28. The 1997 Winston Cup Series will have 35 races, 32 point-scoring. This series has become immensely popular. Attendance has risen from 1.55 million fans in 1980, averaging 48,594 per race for 32 races, to 5.58 million in 1996, when 31 races averaged over 180,000 fans per contest (figures on file with NASCAR).

29. Jeff Jensen, *Non-Tobacco Sponsors Could Fill Motor Void; Nascar Popularity Expanding, Likely to Make Up \$50 Million Hit*, ADVERTISING AGE, Sept. 2, 1996, at 34 (citing Chicago-based Int'l Entertainment Group, Inc. ("IEG") Sponsorship Report).

30. *Id.*

31. Bill Koenig, *Auto Racing May Have To Kick Habit; Tobacco companies' sponsorship money will go up in smoke, If New Federal Rules Stand*, INDIANAPOLIS STAR, Aug. 24, 1996, at D01 (citing estimate of IEG). These expenditures are only a part of the tobacco industry's advertising and promotional budgets. The FTC, in its annual report to Congress on cigarette and smokeless tobacco sales and advertising, reported that in 1994, \$4.83 billion was spent on cigarette advertising and promotion, but nearly 20% less than in 1993 (\$6.03 billion). FTC NEWS RELEASE, Oct. 9, 1996, 1996 WL 578900 (F.T.C.). Spending on advertising and promotion for smokeless tobacco amounted to nearly \$126 million. FTC NEWS RELEASE, Jan. 8, 1997, 1997 WL 5569 (F.T.C.).

32. INTERBRAND GROUP, PLC, *WORLD'S GREATEST BRANDS 7* (1992). The advertising and marketing group points out that "[u]nless brands are differentiated no brand personality exists and the consumer has no reason to select any one brand in preference to another. . . . [and] the brand must be supported through advertising and other forms of promotion. . . ." *Id.* at 14.

sold to the French food company BSN for \$2.5 billion.³³ Also in 1988, Philip Morris bought Kraft, paying \$12.9 billion, four times the value of Kraft's "tangible" assets.³⁴ In fact, Philip Morris's Marlboro brand is ranked as the world's fifth-strongest brand, ahead of such brand names as IBM, American Express, and Sony.³⁵

Philip Morris, with its Marlboro brand, and R.J. Reynolds, with its Camel brand, have succeeded in developing and maintaining market-leading brand personalities and positioning. The Camel brand was started in 1913 and was number one soon after its introduction until Marlboro's succession to the top by the early 1970s.³⁶ Since then, Camel has not enjoyed the same success worldwide as Marlboro, but it has had a comeback in Europe recently by its sponsorship of the Camel Trophy and Camel Adventure motor sports series.³⁷ The Marlboro brand was introduced in 1924 to the United States.³⁸ Philip Morris first aimed its brand at women.³⁹ That strategy did not work and in 1955, Philip Morris redirected its efforts at men by developing the now-famous Marlboro Man image and the Marlboro Country backdrop.⁴⁰

The regulations would erase these brand differentiations; over time, one tobacco product would be virtually indistinguishable from the next. To take away the tobacco companies' ability to use their brand names in sports sponsorship efforts would mean more than just removing a name. It would mean removing potentially billions of dollars in value from these companies. But, more importantly, it would mean removing the right to free speech.⁴¹

III. THE HISTORY OF TOBACCO REGULATION: FROM THE EARLY 1900s TO TODAY

Tobacco has been the target for regulation for over a century, both at the federal level, including previous attempts to give the FDA jurisdiction over tobacco and to regulate tobacco company sports sponsorships and advertising, and at the state level.

33. *Id.* at 12.

34. *Id.*

35. *Id.* at 22. Coca-Cola led all other brands: The Kellogg brand ranked second, McDonald's third, and Kodak fourth. *See id.*

36. *Id.* at 38.

37. *Id.*

38. *Id.* at 37.

39. *Id.*

40. *Id.*

41. *See* discussion *infra* Section V.

A. *Federal Regulation Of Tobacco, Advertising, and Sports Sponsorships*

In 1964, the Surgeon General came out with its now well-known report on the health hazards of smoking.⁴² In 1965, Congress approved the Federal Cigarette Labeling and Advertising (hereinafter "FCLA") Act⁴³, which required all cigarette advertising vehicles, from packages to print ads to billboards, to contain the following warning: "Caution: Cigarette Smoking May Be Hazardous to your Health."⁴⁴ In addition, the FCLA Act gives the Federal Trade Commission (hereinafter "FTC") regulatory authority over the cigarette promotional sales and distribution programs used by tobacco companies.⁴⁵

Tobacco advertising was next on the list to be regulated. In 1967, the Federal Communications Commission (hereinafter "FCC") required television stations to provide free air time for anti-smoking messages under the "fairness doctrine."⁴⁶ The Public Health Cigarette Smoking Act of 1969⁴⁷ amended the FCLA Act, and banned tobacco companies from advertising "on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission,"⁴⁸ thus eliminating the counter-advertisements as well. For tobacco companies, that represented a windfall, for not only had they been losing customers, they were paying for these counter-ads, as the policy of fair access demanded the broadcast of about one anti-smoking message for every three or four cigarette ads, which in 1970 dollars amounted to \$75 million dollars worth of annual commercial air time for anti-smoking messages.⁴⁹ The

42. UNITED STATES DEP'T OF HEALTH, EDUC. & WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL PUBLIC HEALTH SERVICE 2829 (1964).

43. 15 U.S.C. §1331-1341 (1994).

44. 15 U.S.C. §1333 (1994).

45. 15 U.S.C. §1333(a)(1) (1994).

46. 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, at 666 (1992) (citing Michael J. Garrison, *Should All Cigarette Advertising Be Banned? A First Amendment and Public Policy Issue*, 25 AM. BUS. L.J. 169, 202 (1987)) (citations omitted). This FCC action was then supported by the courts in *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968).

47. 15 U.S.C. §1331-1341 (1994).

48. 15 U.S.C. §1335 (1994). For a view by two researchers that the sponsorship by tobacco companies of sports programming circumvents this ban, see Patricia A. Madden & Joel W. Grube, *The Frequency and Nature of Alcohol and Tobacco Advertising in Televised Sports*, 84 AM. J. PUBLIC HEALTH 297 (1994).

49. Daniel Helberg, Note and Comment, *Butt Out: An Analysis of the FDA's Proposed Restrictions on Cigarette Advertising Under the Commercial-Speech Doctrine*, 29 LOY. L.A. L.

broadcasters attempted to fight the statute because of this large loss of revenue for their stations, but they were unsuccessful.⁵⁰

In 1984, the FCLA Act was again amended to include more warnings that must be rotated by the advertiser.⁵¹ Smokeless tobacco did not gain the attention of Congress until 1986, when Congress passed the Comprehensive Smokeless Tobacco Health Education Act.⁵² This Act mirrors the FCLA Act in its requirements,⁵³ including warning labels on products and advertisements,⁵⁴ and a ban on all electronic media.⁵⁵

The structure and content of subpart D can be traced to several past legislative efforts to either ban or severely restrict advertising and sports sponsorships by tobacco companies. In 1987, two bills were considered which would have completely banned sports sponsorships and all tobacco advertising, as well as distribution of tobacco samples.⁵⁶ The Tobacco Control and Health Protection Act⁵⁷ and, a year earlier, The Protect our Children from Cigarettes Act of 1989,⁵⁸ would have severely

REV. 1219, at 1236 (1996) (citing Regulation of Cigarettes and Smokeless Tobacco Under the Federal Food, Drug, and Cosmetic Act, 60 Fed. Reg. 41,327 (1995) (finalized Aug. 28, 1996)).

50. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.C. Cir. 1971), *aff'd*, 405 U.S. 1000 (1977).

51. 15 U.S.C. §1333 (c) (1994). The amended warnings read as follows:

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

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

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

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

Id. §1333(a).

52. 15 U.S.C. §4401-4408 (1994).

53. *Id.*

54. The warnings are as follows:

WARNING: THIS PRODUCT MAY CAUSE MOUTH CANCER

WARNING: THIS PRODUCT MAY CAUSE GUM DISEASE AND TOOTH LOSS

WARNING: THIS PRODUCT IS NOT A SAFE ALTERNATIVE TO CIGARETTES.

Id. §4402 (a)(1).

55. *Id.* §4402 (f).

56. Charles J. Harder, Comment, *Is it Curtains for Joe Camel? A Critical Analysis of the 1995 FDA Proposed Rule to Restrict Tobacco Advertising, Promotion and Sales to Protect Children and Adolescents*, 16 LOY. L.A. ENT. L.J. 399, at 403-404 (1995) (discussing H.R. 1272, 100th Cong., 1st Sess. (1987) and H.R. 1532, 100th Cong., 1st Sess. (1987)).

57. H.R. 5041, 101st Cong., 2d Sess. (1990).

58. H.R. 1250, 101st Cong., 1st Sess. (1989).

restricted sports sponsorships and advertising.⁵⁹ In addition, during the past ten years, several other bills have been introduced, but none were enacted.⁶⁰

B. Legislative and Judicial Challenges Made To The Current Regulations

Over the past several decades, many attempts have been made to give the FDA jurisdiction over tobacco.⁶¹ Congressional approval of the settlement will involve anything but a "rubber stamp." Congress became involved before the regulations were even finalized, announcing three bills in the House, each one seeking to eliminate the regulations.⁶² The Senate also became involved in the debate, introducing two bills in the first session of 1995.⁶³

Additionally, the decision of Judge Osteen still stands for now. Subpart D could not stand because section 360j(e) of the Federal Food, Drug, and Cosmetic Act did not encompass such a regulation.⁶⁴ In relevant part, this section provides that:

(1) The Secretary may by regulation require that a device be restricted to sale, distribution, or use — (A) only upon the written or oral authorization of a practitioner licensed by law to administer or use such device, or (B) upon such other conditions as the Secretary may prescribe in such regulation, if, because of its potentiality for harmful effect or the collateral measures necessary to its use, the Secretary determines that there cannot otherwise be reasonable assurance of its safety and effectiveness. . . .⁶⁵

59. Stoner, *supra* note 46, at 648-649 (pointing out that the language of the Act included the "tombstone" format, the 1000 foot advertising ban around schools, and a brand-name sports sponsorship ban).

60. Michael Whatley, Note, *The FDA v Joe Camel: An Analysis of the FDA's Attempt to Regulate Tobacco and Tobacco Products Under the Federal Food, Drug and Cosmetic Act*, 22 J. LEGIS 121, at 124, n.27 (1996) (discussing H.R. 3294, 100th Cong., 1st Sess. (1987); H.R. 1494 and S. 769, 101st Cong., 1st Sess. (1989); H.R. 4350 and S. 2298, 103d Cong., 1st Sess. (1992); H.R. 2147 and S. 672, 104th Cong., 1st Sess. (1993)).

61. *Id.* at 122-125.

62. *Id.* at 131-132 (discussing the Motor Sports Protection Act, H.R. 2265, 104th Cong., 1st Sess. (1995); the bill referred to as the Tobacco Farmer Protection Act, H.R. 2238(1)(a), 104th Cong., 1st Sess. (1995); and the Youth Smoking Prevention Act of 1995, H.R. 2414, 104th Cong., 1st Sess. (1995)).

63. *Id.* at 132-133 (discussing the Tobacco Products Control Act of 1995, § 1262, 104th Cong., 1st Sess. (1995); and The Motorsports Protection Act, § 1295, 104th Cong., 1st Sess. (1995)).

64. *Coyne Beahm, Inc. v. United States Food & Drug Admin.*, 1997 WL 200007 (M.D.N.C.), at 20.

65. *Id.*

The court found that "both as ordinarily defined and as used in the phrase 'may. . . be restricted to sale, distribution, or use,' the word 'sale' does not encompass the advertising or promotion of a product."⁶⁶ Inquiring into the intent of Congress when it enacted this section, the court pointed out that "as Plaintiffs note, although Congress expressly used the words 'offer for sale' and 'advertising' or 'advertisements' elsewhere in the FDCA, it chose not to use such language in section 360j(e)."⁶⁷

Hypothesizing that "[e]ven if 'sale' as used within section 360j(e), could be construed to encompass the advertising and promotion of a product. . . the section's grant of authority to the FDA to impose 'other conditions' . . . does not authorize the FDA to restrict advertising and promotion."⁶⁸ The court found that "[t]he phrase 'other conditions' must be construed within the context of section 360j(e) and other relevant sections of the FDCA,"⁶⁹ and made the finding that the authorization under section 360j(e) for the FDA to "provide a reasonable assurance of safety and effectiveness" did not include the ability to restrict advertising and promotion of a product.⁷⁰ Comparing other FDCA sections to this section, the court held that "the fact that Congress has specifically granted to the FDA the authority to regulate advertising of restricted devices in a separate section [sections 353(q), 352(r)] supports the court's finding that Congress did not intend to grant the FDA such authority under section 360j(e)."⁷¹

C. State Regulation Of Tobacco

Marketing of cigarettes began to increase at the start of this century, in part as a response to the public health campaigns that were being waged against it.⁷² In response to the marketing of a new, milder form of tobacco than the cigar tobacco previously used for cigarettes, many community leaders sponsored anti-cigarette campaigns that by the early 1920s had resulted in either prohibitions or limitations on cigarette smoking in most states.⁷³ But, the laws failed to impact smoking rates, and by 1927 only sales to minors were prohibited in only a few states.⁷⁴

66. *Id.* (footnote omitted).

67. *Id.* (footnotes omitted).

68. *Id.* at 21.

69. *Coyne Beahm, Inc.*, 1997 WL 200007 (M.D.N.C.) at 20.

70. *Id.*

71. *Id.* (footnote omitted).

72. Elizabeth Edmundson et al., *Approaches Directed to the Individual*, in STRATEGIES TO CONTROL TOBACCO USE, *supra* note 3, at 145, 147.

73. *Id.* at 148.

74. *Id.*

Today, the sale of tobacco to minors is illegal in every state.⁷⁵ While the states have not directly addressed sports sponsorship by tobacco companies, the Justice Department in 1995 planned to file suit against Philip Morris for alleged violations of the statutory ban on tobacco television commercials⁷⁶ before the company agreed to remove advertisements from the view of television cameras in sports arenas and stadiums located in numerous states.⁷⁷ Finally, nearly every state and at least five hundred local governments have put restrictions on smoking in various public places.⁷⁸

IV. THE FIRST AMENDMENT AND COMMERCIAL SPEECH

The commercial speech doctrine under the First Amendment has been developed by decisions of the Court during the past twenty years. But, the protection for commercial speech has evolved more quickly since the mid-1990s.⁷⁹

A. *The Early Development of the Commercial Speech Doctrine*

In *Valentine v. Chrestensen*,⁸⁰ the appellant contended that as he was engaged in a protected political protest on one side of his handbill, the other side of his handbill that advertised his submarine tours could not remove that protection.⁸¹ But, Justice Roberts cited no authority⁸² in decreeing that “[w]e are . . . clear that the Constitution imposes no such

75. Regulation of Cigarettes and Smokeless Tobacco, 61 Fed. Reg. at 44,397 (1996) (to be codified at 21 C.F.R. pt. 801, et seq.)

76. *Supra* notes 47-48 and accompanying text.

77. Bruce Horowitz, *Cigarette firm to shift ads out of TV range*, USA TODAY, June 7, 1995, at 1A (reporting that billboards at 14 pro football stadiums, 14 baseball parks and five basketball/hockey arenas would be moved).

78. Jef I. Richards, *Politicizing Cigarette Advertising*, 45 CATH. U. L. REV. 1147, 1179 (1996) (citing Wayne Hearn and Laurie Jones, *Kicking Butts: Anti-Smoking Troops Relish Victories, but the War Isn't Over Yet*, AM. MED. NEWS, Apr. 25, 1994, at 3).

79. See discussion *infra* Section IV.

80. 316 U.S. 52 (1942). Chrestensen was a Florida citizen and owner of a former United States Navy submarine who decided to bring his submarine up to New York City in 1940 to exhibit it there. After being told that his first handbill violated a city sanitary code, but a code which allowed political advertisements, he then made the double-sided handbill.

81. *Id.* at 55.

82. Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, (1990) (pointing out that “the Supreme Court plucked the commercial speech doctrine out of thin air”). See also, *Bigelow v. Virginia*, 421 U.S. 809, 820 n.6 (1975) (“MR. JUSTICE DOUGLAS, who was a Member of the Court when Chrestensen was decided and who joined that opinion, has observed: ‘The ruling was casual, almost offhand. And it has not survived reflection’”) (citation omitted).

restraint on government as respects purely commercial advertising.”⁸³ Thus, the exception for commercial speech was born, providing it with no protection under the First Amendment. It would not be until over thirty years later that the court would show that it would no longer summarily exclude commercial speech from First Amendment protection.⁸⁴

In *Bigelow v. Virginia*,⁸⁵ the Court stated that “[*Valentine*] obviously does not support any sweeping proposition that advertising is unprotected per se. This Court’s cases decided since *Chrestensen* clearly demonstrate as untenable any reading of that case that would give it so broad an effect.”⁸⁶ *Bigelow* involved a weekly newspaper publisher in Virginia, where abortions were illegal, who carried advertisements for abortion services in New York, where abortions were legal. In doing so, the publisher violated a Virginia statute which prohibited abortion services advertising. The Court, while explaining that Virginia “has a legitimate interest in maintaining the quality of medical care provided within its borders,” held that the statute was impermissibly aimed at New York’s providers.⁸⁷ But, earlier in its opinion, the Court had allowed that “[a]dvertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. . . . [But] [a]dvertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.”⁸⁸

Importantly, *Bigelow* was not solely decided on a commercial speech ground, as the publisher’s second appeal was heard in the wake of two highly-charged cases legalizing abortion.⁸⁹ Not surprisingly, in light of the deeply emotional and political atmosphere surrounding abortion then, and still continuing today, the Court remarked that “[t]he advertisement published in appellant’s newspaper did more than simply propose a commercial transaction. It contained factual material of clear ‘public interest.’ Portions of its message. . . involve the exercise of the freedom of communicating information and disseminating opinion.”⁹⁰

83. *Valentine*, 316 U.S. at 54.

84. For a discussion of the commercial speech exception and its development, see EDWIN P. ROME & WILLIAM H. ROBERTS, *CORPORATE AND COMMERCIAL FREE SPEECH* 11-39 (1985).

85. 421 U.S. 809 (1975).

86. *Id.* at 820.

87. *Id.* at 827 (citation omitted).

88. *Id.* at 826 (citations and footnotes omitted).

89. *Roe v. Wade*, 410 U.S. 113 (1973); and *Doe v. Bolton*, 410 U.S. 179 (1973).

90. 421 U.S. at 822. Here, the Court distinguished *Valentine* and *Pittsburgh Press Co. v. Human Rel. Comm’n*, 413 U.S. 376 (1973). That case involved an advertiser who published

Finally, in its next term, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁹¹ the Court announced that it was faced with an advertisement solely commercial in nature: "Some fragment of hope for the continuing validity of a 'commercial speech' exception arguably might have persisted because of the subject matter of the advertisement in *Bigelow*. . . . Here, in contrast, the question whether there is a First Amendment exception for 'commercial speech' is squarely before us."⁹² Thus, the continuing validity of the commercial speech exception would finally be decided. The appellees were prescription drug consumers who challenged a Virginia statute that did not allow licensed pharmacists to advertise prescription drug prices, claiming that it violated the First and Fourteenth Amendments.⁹³

First, examining the interests of the advertiser, the Court held that while "we may assume that the advertiser's interest is a purely economic one" such an interest "hardly disqualifies him from protection under the First Amendment."⁹⁴ Looking next to the consumer, the Court held that:

As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. . . . Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely 'commercial,' may be of general public interest.⁹⁵

The state argued that price advertising would result in price competition that would erode the professional standards of the pharmacy industry, harming consumers and eliminating the most professional pharmacists, or in the alternative, prices might not drop, and instead, the cost of advertising would be passed on to consumers in the form of higher prices.⁹⁶ So, to protect its citizens, the state must forbid price advertising.⁹⁷

job opportunities preferenced by sex. The Court there held that the publisher's argument that the commercial speech exception of *Valentine* no longer deserved recognition and would not be entertained because the advertisement concerned the illegal activity of sex discrimination. See 413 U.S. at 388.

91. 425 U.S. 748 (1976).

92. *Id.* at 760-761.

93. *Id.* at 749.

94. *Id.* at 762.

95. *Id.* at 763-764.

96. 425 U.S. at 767-768.

97. *Id.* at 767.

The Court responded that there was "an alternative to this highly paternalistic approach. . .open the channels of communication rather than to close them."⁹⁸ Then, ending over thirty years of debate, the Court decided that "commercial speech, like other varieties, is protected. . . ."⁹⁹ But, the Court qualified its holding by stating that "we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible,"¹⁰⁰ such as deceptive advertising.¹⁰¹ The Court continues to follow this reasoning in cases involving advertising by other professionals.¹⁰²

98. *Id.* at 770.

99. *Id.*

100. *Id.*

101. 425 U.S. at 771. The Court explained:

In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does 'no more than propose a commercial transaction,' and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech may be more easily verifiable by its disseminator. . . Also, commercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely. Attributes such as these, the greater objectivity and hardness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.

See *id.* at n.24 (citing *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, at 385 (1973)).

102. See, e.g., *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (truthful attorney price advertising protected by the First Amendment). But cf. *Ohralik v. Ohio State Bar*, 436 U.S. 447 (1978) (attorneys not allowed to use in-person solicitation of automobile accident victims due to the vulnerable status of such victims); see also, *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995) (Florida Bar Rule which prohibited attorneys from using direct mail to solicit wrongful death and personal injury victims within 30 days of the accident was allowable under the First Amendment). But cf. *In re R.M.J.*, 455 U.S. 191 (1982) (while the Missouri Supreme Court Rules can regulate the advertising of attorneys, it can not do so in a way that is more extensive than necessary to further its interest in protecting the public from misleading advertisements); see also *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626 (1985) (while state can regulate deceptive advertisements, it can not ban the use of illustrations and the mere solicitation of legal services); see also *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (state can not universally prohibit lawyers from sending letters soliciting business from persons with known problems). Compare *Ibanez v. Florida Dept. of Bus. & Prof. Regulation*, 114 S. Ct. 2084 (1994) (state board can not prohibit an attorney from using the designations of CPA (certified public accountant) and CFP (certified financial planner), as advertising such names is not deceptive and is not misleading), and *Edenfield v. Fane*, 507 U.S. 761 (1993) (see *infra* text accompanying notes 129-131), with *Friedman v. Rogers*, 440 U.S. 1 (1979) (state of Texas can prohibit the use of trade names by optometrists because of their potential to mislead the public).

B. *The Refinement of Commercial Speech Protection*

In 1980, the Court decided *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.¹⁰³ Similar to *Virginia Pharmacy*, as a state again chose the paternalistic action of trying to achieve its non-speech objective by suppressing truthful information about a lawful activity, the Court now developed a four-part test to determine whether a regulation of commercial speech would be allowable under the First Amendment:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.¹⁰⁴

This test marked a change from its traditional test of whether the governmental action involved "illegitimate paternalistic means."¹⁰⁵

The Court was faced with a New York State regulation that banned any advertisement by electric utility companies during the 1970s energy crunch that promoted the use of electricity. While holding that the regulation met the first three parts of its new test,¹⁰⁶ the Court held that the regulation failed the fourth part of its test, as it was too extensive in light of the many other alternatives available to promote saving energy,¹⁰⁷ and thus, the regulation violated the First Amendment.¹⁰⁸

C. *A Step Backward: A Reduction in Protection for Commercial Speech*

In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,¹⁰⁹ a 5-4 decision, Chief Justice Rehnquist delivered the opinion of the court and granted the legislature of Puerto Rico great deference in not requiring any evidence of how a ban on gambling advertising would

103. 447 U.S. 557 (1980).

104. *Id.* at 566.

105. *ROME & ROBERTS*, *supra* note 84, at 125. The authors describe the standard employed by the Court as "a hybrid between the rational relationship standard and the strict scrutiny standard, with the least restrictive means requirement added on." *Id.* at 119.

106. 447 U.S. at 566-569.

107. *Id.* at 569-571.

108. *Id.* at 571.

109. 478 U.S. 328 (1986).

directly advance the island's interest in preventing moral decay.¹¹⁰ The Court had skipped to that prong without requiring the legislature to show how gambling "would produce serious harmful effects," thus giving the island a substantial interest to be addressed by the restriction on commercial speech.¹¹¹ Completing its deferential analysis, the Court accepted the legislation as narrowly tailored because it was aimed only at preventing residents from seeing advertisements, not tourists, and further, the Court did not require the legislature to use counter-speech, or another non-speech suppressing alternative, instead of the advertising ban.¹¹² Not content to end its opinion after holding that the legislature had met the test, the Court also approved the now-disavowed logic¹¹³ that since the island has the greater power to completely prohibit gambling, it must, therefore, also have the lesser power to simply ban advertising about gambling.¹¹⁴

In 1989, in *Board of Trustees of the State University of New York v. Fox*,¹¹⁵ the Court further reduced the protection given commercial speech when it held that, under *Central Hudson's* fourth prong, it need not be shown that "the manner of restriction is absolutely the least severe that will achieve the desired end."¹¹⁶ Now, the Court only would ask for a reasonable "'fit' between the . . . ends and the means chosen to accomplish those ends."¹¹⁷ The Court continued to leave commercial speech largely unprotected with its decision in *United States v. Edge Broadcasting Co.*¹¹⁸ In *Edge Broadcasting*, a television broadcaster chal-

110. *Id.* at 342. See, e.g., *Metromedia Inc. v. City of San Diego*, 453 U.S. 490, 509 (1981) (while applying *Central Hudson's* third prong, the Court remarked that "[w]e . . . hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety") (footnote omitted).

111. 478 U.S. at 341.

112. *Id.* at 343-344.

113. 44 *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996):

Contrary to the assumption made in *Posadas*, we think it quite clear that banning speech may sometimes prove far more intrusive than banning conduct. . . . As a matter of First Amendment doctrine, the *Posadas* syllogism is even less defensible. The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct.

Id. at 1512.

114. 478 U.S. at 345-346.

115. 492 U.S. 469 (1989).

116. *Id.* at 480.

117. *Id.* (quoting *Posadas*, 478 U.S. at 341).

118. 509 U.S. 418 (1993). But see, *Valley Broadcasting Co. v. United States*, 107 F.3d 1328 (9th Cir. 1997) (holding that regulations which criminalized the broadcast of advertisements for casino gambling not consistent with the First Amendment). The Ninth Circuit cited 44

lenged a federal statute that prohibited state lottery commercials to be run on a television station located in a state where lotteries were illegal. Over 90% of the station's listeners were from Virginia, where lotteries were legal, but the broadcaster was located in North Carolina, where lotteries were illegal. The Court reasoned that it could not determine whether the government interest sought to be achieved, namely the protection of the non-lottery states' policies on gambling, was directly advanced or not under the third prong of *Central Hudson* solely by looking at its effects by banning one broadcaster's advertisements, as the statute also applies to all other North Carolina stations.¹¹⁹ Once again, as in *Posadas*, the Court gave great deference to the government, and did not require a showing of how gambling advertisements increased the demand for gambling, before holding that the statute was permissible.¹²⁰

V. THE LATEST COMMERCIAL SPEECH DECISIONS

In 1996, in *44 Liquormart*, Justice Stevens, delivering the judgment of the Court, disavowed much of *Posadas*'s reasoning:

[O]n reflection, we are now persuaded that *Posadas* erroneously performed the First Amendment analysis. . . . Because the 5-to-4 decision in *Posadas* marked such a sharp break from our prior precedent, and because it concerned a constitutional question about which this Court is the final arbiter, we decline to give force to its highly deferential approach.¹²¹

Before *44 Liquormart*, in two decisions barely one month apart,¹²² the Court showed its willingness to restore and even to expand the level of protection given commercial speech by its decisions before *Posadas*.

A. The Start of Heightened Protection For Commercial Speech

In *City of Cincinnati v. Discovery Network*,¹²³ the city of Cincinnati revoked a permit given to the respondent companies that allowed them to distribute free magazines on public property throughout the city in sixty-two newsracks, asserting the interest to be protected by the ban on

Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996), in its opinion: "While *44 Liquormart* fails to present a coherent framework for reviewing these claims, one point is clear: the government's asserted interest in reducing demand for casino gambling seems less likely to succeed following the Court's decision." 107 F.3d at 1334.

119. 509 U.S. at 427.

120. *Id.* at 434.

121. *44 Liquormart*, 116 S. Ct. at 1511 (1996).

122. *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (decided March 24, 1993), and *Edenfield v. Fane*, 507 U.S. 761 (decided April 26, 1993).

123. 507 U.S. 410 (1993).

the magazines, labeled as "commercial handbills," as protecting the aesthetics and safety of the city streets and sidewalks.¹²⁴ The city still allowed almost two thousand other newsracks to remain in place which were used to distribute newspapers, but as the city labeled them non-commercial, they were allowed to remain in place.¹²⁵ Due to this fact, the Court held that the city ban failed the third prong, as the ordinance did not directly advance the interests asserted.¹²⁶ Then, the Court went on to hold that the fourth prong also had not been met, as the elimination of only sixty-two newsracks was not narrowly tailored enough to accomplish the goal of aesthetics and safety, as the ban still allowed almost two thousand other newsracks to remain.¹²⁷ The Court dismissed the city's main argument, offering the first sign that the Court was increasing the low level of protection given commercial speech in *Posadas*:

The major premise supporting the city's argument is the proposition that commercial speech has only a low value. . . . We cannot agree. In our view, the city's argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech.¹²⁸

Barely one month after *Discovery Network*, the Court clearly placed the burden on the party seeking approval of a regulation that restricts commercial speech to show that it meets First Amendment scrutiny with its decision in *Edenfield v. Fane*.¹²⁹ The Florida Board of Accountancy had a rule that prohibited in-person, direct, and uninvited solicitation of new clients by accountants. However, the Court held that the board had failed to meet its burden of showing how its rule directly advanced its substantial interest in preventing fraud by accountants, stating that the danger to the profession of accountants who would be eager to earn business by bending the rules was not backed up by any studies or other evidence of the reality of these dangers.¹³⁰ The Court, in bold language, which offers great protection for tobacco advertising and sports sponsorship and none for the FDA, strengthened the third prong of *Central Hudson* by holding that "[t]his burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a re-

124. *Id.* at 418.

125. *Id.* at 415.

126. *Id.* at 425-426.

127. *Id.* at 427-428.

128. 507 U.S. at 418-419.

129. 507 U.S. 761 (1993).

130. *Id.* at 770-771.

striction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”¹³¹

B. *The Solidification of Commercial Speech Protection*

In *Rubin v. Coors*,¹³² a 1995 decision which dealt with a federal statute that prohibited beer labels from displaying the percentage of alcohol, the government asserted that the interest to be served by the statute, was the protection of the welfare of its citizens from beer brewers who might engage in competition, by increasing the amounts of alcohol in beer.¹³³ The Court followed *Edenfield* in its analysis of the *Central Hudson* third prong and required that the government show how the regulation advances its interest “in a direct and material way.”¹³⁴ Continuing to follow *Edenfield*, the Court would not allow the government to satisfy its burden “by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree.”¹³⁵ The Court held that the government had failed to meet its burden, as the ban on putting alcohol content on labels could not materially, nor directly, advance the government’s asserted interest, because the act at the same time allowed advertisements to mention alcohol content, which most states did not legislate against, and further, that wines and hard alcohol were both not only allowed but required to print their alcohol contents on a label.¹³⁶

C. *The Latest Commercial Speech Decision*

In the Court’s most recent commercial speech decision, 44 *Liquormart*, the State of Rhode Island prohibited the advertisement of liquor prices. Justice Stevens delivered the judgment of the Court, but four opinions were written.¹³⁷ In Part V of his opinion, Justice Stevens applied, but modified, *Central Hudson*’s four-part test, and the rest of his colleagues concurred in the judgment that reversed the First Circuit

131. *Id.* at 770-771 (citations omitted).

132. 115 S. Ct. 1585 (1995).

133. *Id.* at 1588.

134. *Id.* at 1592 (quoting *Edenfield*, 507 U.S. 761, at 798 (1993)).

135. *Id.* (quoting 507 U.S. 761 at 798).

136. *Id.* at 1592.

137. For another discussion of this decision and its four opinions in more detail, see Sean P. Costello, Comment, *Strange Brew: The State of Commercial Speech Jurisprudence Before and After 44 Liquormart, Inc., v. Rhode Island*, 47 CASE W. RES. L. REV. 681 (1997).

Court of Appeals decision,¹³⁸ holding that the statutory ban on liquor price advertising did not meet scrutiny under the First Amendment.¹³⁹ The 9-0 decision was somewhat surprising, as until this decision, Chief Justice Rehnquist could aptly be called "the great dissenter" in the decisions by the Court favoring commercial speech protection under the First Amendment.¹⁴⁰ But now, even the Chief Justice disavowed the analysis of the third and fourth prongs performed in *Posadas*, joining Justices Souter and Breyer in the concurrence of Justice O'Connor:

Since *Posadas*. . . this Court has examined more searchingly the State's professed goal, and the speech restriction put into place to further it, before accepting a State's claim that the speech restriction satisfies First Amendment scrutiny. . . The closer look that we have required since *Posadas* comports better with the purpose of the analysis set out in *Central Hudson*, by requiring the State to show that the speech restriction directly advances its interest and is narrowly tailored.¹⁴¹

The parties in *44 Liquormart* had already stipulated that the first and second prongs were met.¹⁴² Justice Stevens then made the *Edenfield* standard for the third prong even more stringent by requiring that the state show that its ban would "significantly advance" the state's interest,¹⁴³ and held that the state had failed to meet its burden, as "the State has presented no evidence to suggest that its speech prohibition will significantly reduce market-wide consumption."¹⁴⁴ Justice Stevens also modified the fourth prong of *Central Hudson*, which the Court most recently modified in *Fox* to require only that the state show "a reasonable fit" between a speech restriction and its ends sought to be achieved to meet this prong.¹⁴⁵ Making it more difficult for regulations seeking to abridge commercial speech to be upheld, Justice Stevens held that it

138. *44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994), *vacated and remanded*, 116 S. Ct. 1495 (1996).

139. 116 S. Ct. at 1515.

140. Richards, *supra* note 78, at 1162-63 (pointing out that since 1975, the Chief Justice has dissented in ten cases, making up most of the cases which gave commercial speech some protection).

141. 116 S. Ct. at 1522 (O'Connor, J. concurring in the judgment) (citations omitted).

142. 829 F.Supp 543, at 551 (D.R.I. 1993).

143. 116 S. Ct. at 1509 (citing *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)).

144. 116 S. Ct. at 1509. On this modification's impact, on the standard of review to be used, see Costello, *supra* note 137, at 729 (commenting that "Justice Stevens' insistence on proof that the means significantly advance the end clearly sets an evidentiary hurdle that more closely resembles strict scrutiny than rational or intermediate level review") (emphasis in original omitted).

145. *Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, at 480 (1989).

would be violated where there exists "alternative forms of regulation that would not involve any restriction on speech [that] would be more likely to achieve the State's goal. . . ."¹⁴⁶ Pointing out the existence of numerous alternatives, as the Court did in *Rubin v. Coors*,¹⁴⁷ Justice Stevens held that Rhode Island had failed to meet its burden under prong four.¹⁴⁸ In her concurrence, Justice O'Connor saw the state's regulation as failing only the fourth prong of *Central Hudson*, because the advertising ban was too extensive in light of the many other alternative methods to accomplish the interest of promoting temperance.¹⁴⁹

Justice Thomas offered the most protection for commercial speech. After having applied the *Central Hudson* test, just a year earlier, in his opinion for the Court, in *Rubin*, he now argued that the test should not have been applied here, and further, that it should no longer be used by the Court:

In cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in *Central Hudson*. . . should not be applied. . . . Rather, such an 'interest' is per se illegitimate and can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial' speech.¹⁵⁰

After reasoning that the third and fourth prongs of the test may lead to incorrect results, depending on the facts of each subject sought to be regulated,¹⁵¹ Justice Thomas argued that he "would adhere to the doctrine adopted in *Virginia Pharmacy Bd.* and in Justice Blackmun's *Central Hudson* concurrence, that all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible."¹⁵² Thomas' views garnered immediate support. In his concurrence, Justice Scalia wrote that he "share[s] Justice Thomas's discomfort with the *Central Hudson* test, which seems to me to have nothing more than policy intuition to support it."¹⁵³ Interestingly, in light of his application of the *Central Hudson* test in *44 Liquormart*, Justice Stevens had expressed a similar view in his concurrence in *Rubin*, remarking that "the borders of the commercial speech category are not nearly as clear as the Court has as-

146. 116 S. Ct. at 1510.

147. 115 S. Ct. at 1593.

148. 116 S. Ct. at 1510.

149. *Id.* at 1521-22 (O'Connor, J., concurring in the judgment).

150. *Id.* at 1515-1516 (Thomas, J., concurring).

151. *Id.* at 1518-1520.

152. *Id.* at 1520.

153. 116 S. Ct. at 1515 (Scalia, J. concurring in part and concurring in the judgment).

sumed, and its four-part test is not related to the reasons for allowing more regulation of commercial speech than other speech.”¹⁵⁴

VI. SUBPART D IS UNCONSTITUTIONAL

Subpart D of the regulations fails to withstand scrutiny under the First Amendment. The regulations fail to withstand scrutiny when the *Central Hudson* test, as modified by *44 Liquormart*,¹⁵⁵ is applied to this abridgment of commercial free speech. In addition, subpart D involves an impermissible viewpoint and content-based discrimination, even when it is considered that children are sought to be protected by the regulations.¹⁵⁶

A. Applying the Central Hudson Test As Modified By 44 Liquormart

While the arguments made by Justice Thomas in *44 Liquormart* are very persuasive and may prove to be so in future commercial speech cases involving adults, they will not prove persuasive in the context of deciding the constitutionality of the FDA Regulations. This is so because tobacco use by children is illegal and therefore any regulation seeking to prevent this use by children would not involve, in the words of Justice Thomas in *44 Liquormart*, “impermissible” governmental “attempts to dissuade legal choices by citizens by keeping them ignorant. . .”¹⁵⁷ Therefore, the *Central Hudson* test, as applied, but modified, by Justice Stevens in *44 Liquormart*, will be used to put subpart D of the FDA Regulations to scrutiny under the First Amendment.

1. Subpart D Concerns Lawful, Truthful Advertising

Subpart D meets prong one of the test, as its sections 897.30, 897.32, and 897.34 seek to regulate a lawful product, tobacco, whose product advertising is not misleading.¹⁵⁸ If the advertisements were misleading, the test would end here. An argument is frequently heard that tobacco advertising is misleading, “because no cigarette advertising gives adequate warning of the wide range of serious and life threatening diseases

154. 115 S. Ct. 1585, at 1595 (1995) (Stevens, J. concurring) (citations omitted).

155. *Supra* text accompanying notes 143-48.

156. *See infra* discussion Section VI(B).

157. 116 S. Ct. 1495, at 1520 (Thomas, J. concurring) (emphasis added).

158. For an argument that its product advertising, in particular the Joe Camel advertising campaign of R.J. Reynolds, is misleading, and that therefore, the *Central Hudson* test would be quickly ended, *see* John Harrington, Note, *Up In Smoke: The FTC's Refusal to Apply the "Unfairness Doctrine" to Camel Cigarette Advertising*, 47 FED. COM. L. J. 593, at 608-10 (1995).

induced by the ordinary use of the product. . . Smoking is portrayed as not harmful, by associating it with traditionally young, healthy, athletic, and virile activities.”¹⁵⁹ But, such an argument seriously misunderstands tobacco advertising, as in the words of one commentator, “[t]his rationale for the suppression of tobacco advertising is truly puzzling, in light of the fact that, unlike advertising for virtually any other lawful product, tobacco advertising is already required by government to place a variety of explicit warnings concerning the dangers of smoking.”¹⁶⁰ In addition, as another commentator has plainly argued, “[t]obacco is a legal product. . . it is difficult to deceive consumers about a product with well-known attributes.”¹⁶¹

2. The Asserted Governmental Interest Is Substantial

The regulations have, as their purpose, the establishment of “restrictions on the sale, distribution, and use of cigarettes and smokeless tobacco in order to reduce the number of children and adolescents who use these products, and to reduce the life-threatening consequences associated with tobacco use.”¹⁶² The substantiality of the FDA’s asserted purpose will not be disputed, as tobacco use by children is a significant problem in our country. About 3000 teenagers take up smoking each day,¹⁶³ and they usually begin using between grades six through nine, with very few tobacco users starting after high school.¹⁶⁴ In 1991, about 19% of high school seniors smoked cigarettes daily, but down from a high of nearly 29% for the senior class of 1977.¹⁶⁵

159. Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, at 608 (1996) (citing Vincent Blasi & Henry P. Monaghan, *The First Amendment and Cigarette Advertising*, 256 JAMA 502, 506 (1986) (authors in favor of a constitutional ban on tobacco advertising)).

160. Redish, *supra* note 159, at 609 (citation omitted).

161. Richards, *supra* note 78, at 1152.

162. Regulation of Cigarettes and Smokeless Tobacco, 61 Fed. Reg. at 44,616 (to be codified at 21 C.F.R. § 897.2).

163. Broder, *Foreword to STRATEGIES TO CONTROL TOBACCO USE*, *supra* note 3, at iv.

164. LLOYD D. JOHNSTON ET AL., *SMOKING, DRINKING, AND ILLICIT DRUG USE AMONG AMERICAN SECONDARY SCHOOL STUDENTS, COLLEGE STUDENTS, AND YOUNG ADULTS—VOL. 1, SECONDARY SCHOOL STUDENTS, 1975-1991*, at 14, U.S. DEP’T OF HEALTH & HUMAN SERVICES (NAT’L INST. OF HEALTH PUB. NO. 93-3480, 1992).

This on-going study has surveyed high school seniors since the class of 1975, and beginning in 1991, eighth and tenth graders were added to the study. *Id.* at 1. The nationwide study uses very large subject groups, using 18,000 students from 160 eighth-grade schools; tenth graders-130 schools, 16,000 students; and seniors-125 to 135 schools since inception of the study, consisting of 15,000 to 17,000 students. *Id.* at 25.

165. *Id.* at 75, table 14. The trends in daily and half-pack use have fluctuated since the study began:

3. The FDA Can Not Meet Prong Three

The FDA can not meet its burden of showing how subpart D directly and materially advances its interest in ending tobacco use by children. One widely-cited study found that six-year-old children could recognize "Joe the Camel" just as easily as Mickey Mouse.¹⁶⁶ However, the researchers failed to find a causal connection between this recognition and initiation, required by 44 *Liquormart*,¹⁶⁷ concluding that "[i]t is obviously impossible to predict how the exposure of children to environmental tobacco advertising might influence their later smoking behavior."¹⁶⁸

While tobacco advertising has been targeted for its supposed ability to make children begin tobacco use,¹⁶⁹ many studies clearly point to other reasons for initiation. Use of tobacco has been found in numerous studies to directly correspond to low levels of education.¹⁷⁰ One study

Daily cigarette use: High of 28.8% in 1976 and in 1977; down to 20.3% in 1981; dropping to 18.1% by 1988 (lowest in study); up to 19.1% in 1990; drop down to 18.5% in 1991. *Id.*

Rates for half-pack or more use: Peak of 19.4% in 1977; down to 13.5% in 1981; at 10.7% in 1991. *Id.*

The rates by racial group are quite different, with 21% of white seniors, 12% of hispanic, and only 5% of black seniors smoking daily. *Id.* at 68. In fact, blacks have a much lower rate of smoking at all grade levels. *Id.*

166. Paul M. Fischer et al., *Brand Logo Recognition by Children Aged 3 to 6 Years: Mickey Mouse and Old Joe the Camel*, 266 JAMA 3145, 3147 (1991). The researchers conclude, without direct, supporting evidence, that this knowledge of cigarette logos is "most likely the result of their exposure to environmental tobacco advertising," such as movies, billboards, and promotional displays and items. *Id.* at 3148 (internal quotation marks omitted).

167. *Supra* text accompanying notes 143-44.

168. Fischer, *supra* note 166, at 3148.

169. Nicola Evans et al., *Influence of Tobacco Marketing and Exposure to Smokers on Adolescent Susceptibility to Smoking*, 87 J. NAT'L CANCER INST. 1538, 1545 (1995) (concluding that "tobacco marketing may be a stronger current influence in encouraging adolescents to initiate the smoking uptake process than demographic characteristics, perceived school performance, or exposure to other smokers in the peer or family network"); see also, John P. Pierce et al., *Does Tobacco Advertising Target Young People to Start Smoking?*, 266 JAMA 3154, 3158 (1991) (concluding that their findings "suggest that tobacco advertising is causally related to young people becoming addicted to cigarettes; the sum of this evidence is considerable although not yet complete"); see also, Joseph R. DiFranza et al., *RJR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children*, 266 JAMA 3149, 3152 (1991) (concluding that the Joe Camel campaign and other tobacco advertisements "promotes and maintains nicotine addiction among children and adolescents").

170. For an understanding of this connection, see Luis G. Escobedo & John P. Peddicord, *Smoking Prevalence in US Birth Cohorts: The Influence of Gender and Education*, 86 AM. J. PUBLIC HEALTH 231, 234-235 (1996) (finding that more than 50% of White and African American women with less than a high school education smoked); see also, John P. Pierce et al., *Smoking Initiation by Adolescent Girls, 1944 Through 1988*, 271 JAMA 608, 610 (1994) (finding that between 1967 and 1973, the increase in the smoking initiation rate of girls aged

made the powerful finding that a child was almost twice as likely to use smokeless tobacco if the father was a user, than if the father was a non-user.¹⁷¹

Often, opponents of tobacco company sports sponsorships claim that children idolize sports figures, such as race car drivers, and will do anything to be like them, including using tobacco. So, they conclude, banning brand-name sponsorship by tobacco companies is necessary. But, in the Southern region of the United States, the "hot bed" of racing, children do not behave this way. Especially of interest are the smokeless tobacco usage rates of children from the southern states of North Carolina and South Carolina, where seven Winston Cup events were held in 1997.¹⁷² One study found that North Carolina had the fourth-lowest rate of smokeless tobacco use and that South Carolina stood seventh-lowest.¹⁷³ In fact, the five highest rates all came from states that are not NASCAR or IndyCar racing venues.¹⁷⁴ Another study found that compared to the Southern Region, the percentage of seniors smoking daily was nearly one-third higher in the Northeast region and nearly twice as high in the North Central Region.¹⁷⁵

10 to 17 years who never attended college was 1.7 times higher than those who went on to college); see also, Luis G. Escobedo et al., *Sociodemographic Characteristics of Cigarette Smoking Initiation in the United States*, 264 JAMA 1550, 1554 (1990) (concluding that "our findings suggest that smoking prevention should begin early and should emphasize the needs of persons of low socioeconomic status").

171. Karl E. Bauman et al., *Parent Characteristics, Perceived Health Risk, and Smokeless Tobacco Use Among White Adolescent Males*, in SMOKELESS TOBACCO USE IN THE UNITED STATES, at 43, 44 (U.S. DEPT OF HEALTH & HUMAN SERVICES, NAT'L CANCER INST. MONOGRAPHS No. 8, 1989). The study found a 24.1% usage rate in children of tobacco-using fathers versus a 12.9% usage rate for children whose fathers did not use tobacco. *Id.*

172. The events scheduled for this two-state region for the 35-race, 1997 Winston Cup Series: Feb. 23, *Goodwrench Service 400* (North Carolina Motor Speedway); Mar. 23, *TransSouth Financial 400* (Darlington Raceway (S.C.)); May 17, *The Winston Select* (Charlotte Motor Speedway (N.C.)); May 25, *Coca-Cola 600* (Charlotte Motor Speedway); Aug. 31, *Mountain Dew Southern 500* (Darlington Raceway); Oct. 5, *UAW-GM Quality 500* (Charlotte Motor Speedway); Oct. 26, *AC-DELCO 400* (North Carolina Motor Speedway).

173. Elbert D. Glover & Penny N. Glover, *The Smokeless Tobacco Problem: Risk Groups in North America*, in SMOKELESS TOBACCO OR HEALTH, *supra* note 1, at 3, 7, table 5 (citing MORBIDITY & MORTALITY WEEKLY REPORT, *Current tobacco, alcohol, marijuana, and cocaine use among high school students: United States*, MMWR 40(38): 659-663 (1991)). The rates of these two states were 8% and 9%, respectively. *Id.*

174. SMOKELESS TOBACCO OR HEALTH, *supra* note 1, at Table 4 (citing MORBIDITY & MORTALITY WEEKLY REPORT, *Current tobacco, alcohol, marijuana, and cocaine use among high school students: United States*, MMWR 40(38): 659-663. (1991)). The states, in order, were: West Virginia (20%), South Dakota (19%), Oklahoma (16%), Kentucky (16%), and Alabama (14%). See *id.*

175. JOHNSTON ET AL., *supra* note 164, at 60. The percentages were found to be as follows: North Central (23%); Northeast (21%); South (16%); and West (14%). *Id.*

These lower rates of both smokeless tobacco use and smoking in the southern region offer evidence that tobacco company motor sports sponsorships and tobacco advertisements are not making children smoke. Additionally, the researchers, in a long-term study of Little League players, concluded that even when such a state of idolatry exists, it was not shown to translate into the decision to initiate tobacco use, while "[a]bout 28% of our current Little League sample (aged 12 or younger) believes that more than half of professional players use [smokeless tobacco]. . . [T]his perception is not a strong discriminator between never having used [smokeless tobacco] and having initiated [smokeless tobacco] use."¹⁷⁶

Peer and family influences also play large parts in a child's decision to use or not use tobacco. The influence of peers should not be underestimated.¹⁷⁷ In fact, one study made the powerful finding that, "'modeling friends' smoking behavior appears to dominate the process of adolescents' smoking initiation. . . After initial use, social and nonsocial reinforcement is more likely to be experienced, and therefore, maintenance of the behavior is less dependent on imitation of others' behavior."¹⁷⁸ In another recent study, the researchers concluded that their,

current study provides evidence that peer use of [smokeless tobacco] is the primary factor distinguishing between male adolescents who have become daily users and those who have tried it but have not gone on to become daily users. It seems that peer influence is important not just at onset but in the development of a daily use pattern.¹⁷⁹

176. Richard I. Evans et al., *Applying the Social Inoculation Model To a Smokeless Tobacco Use Prevention Program With Little Leaguers*, in *SMOKELESS TOBACCO OR HEALTH*, *supra* note 1, at 260, 268.

177. SELINA S. GUBER & JON BERRY, *MARKETING TO AND THROUGH KIDS* 25 (1993): There are. . . tens of thousands more adult products that kids can't help but notice when they watch TV or go into a store. How do kids decide which ones they want to have? Product packaging; advertising; and endorsements from athletic heroes, movie stars, and other role models all contribute to making a product stand out from the pack. But the most important influencer for kids is their own peer group. . . Kids look to their friends as sources of information on what's in and what's out in activities, entertainment, styles, and language.

Id.

178. Brian R. Flay et al., *Differential Influence of Parental Smoking and Friends' Smoking on Adolescent Initiation and Escalation of Smoking*, 35 *J. HEALTH & SOCIAL BEHAV.* 248, 260 (1994).

179. Dennis V. Ary, *Use of Smokeless Tobacco Among Male Adolescents: Concurrent and Prospective Relationships*, in *SMOKELESS TOBACCO USE IN THE UNITED STATES*, *supra* note 171, at 49, 53.

Participation by children in school sports also corresponds with a lower rate of smoking.¹⁸⁰

Finally, in Part VI of his opinion, in *44 Liquormart*, Justice Stevens provides guidance here as well. Justice Stevens did not accept the logic of the State of Rhode Island that since the opinions offered on the effectiveness of the price advertising ban on promoting temperance “go both ways,” the legislature was entitled to deference by the Court.¹⁸¹ The tobacco studies discussed here can arguably be described as showing that the researchers “go both ways” on whether tobacco advertising causes children to initiate smoking. So, as the State of Rhode Island, in *44 Liquormart*, was not allowed its price advertising ban, where the evidence supporting its position consisted of opposite conclusions, subpart D must also be found to be an impermissible restriction of commercial speech, under the First Amendment.

4. The FDA Regulations Are More Extensive Than Necessary

The Court in *Rubin*, strengthened the fourth prong of the *Central Hudson* test by requiring the consideration and implementation of non-speech alternatives, if they existed, before a ban on commercial speech could be used.¹⁸² The Court held that “the availability of . . . options, all of which could advance the Government’s asserted interest in a manner less intrusive to respondent’s First Amendment rights, indicates that [the section of the act] is more extensive than necessary.”¹⁸³ In *44 Liquormart*, Justice Stevens followed *Rubin* in holding that Rhode Island’s ban on price advertising did not satisfy the fourth prong as it was “perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State’s goal. . . .”¹⁸⁴ Other alternative means to achieve the FDA’s laudatory goal of ending tobacco use by children are readily apparent and should prove to achieve the FDA’s goal of ending tobacco use initiation by chil-

180. Luis G. Escobedo et al., *Sports Participation, Age at Smoking Initiation, and the Risk of Smoking Among US High School Students*, 269 JAMA 1391, 1394 (1993).

181. *44 Liquormart, Inc.*, 116 S. Ct. 1495, at 1510-11 (1996).

182. The Court had provided a preview of this holding two years earlier:

A regulation need not be ‘absolutely the least severe that will achieve the desired end,’ but if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the ‘fit’ between ends and means is reasonable.

City of Cincinnati v. Discovery Network, 507 U.S. 410, 417 n.13 (1993) (citing *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989)).

183. *Rubin v. Coors*, 115 S. Ct. 1585, 1593-94 (1995).

184. 116 S. Ct. at 1510.

dren. Before suppressing speech under subpart D, these means must be applied, as the Court reminded us in *44 Liquormart*, that "the First Amendment directs that. . . speech restrictions cannot be treated as simply another means that the government may use to achieve its ends."¹⁸⁵

a. Subpart B Forms The Alternative To Subpart D

Sections 897.14¹⁸⁶ and 897.16,¹⁸⁷ contained in subpart B of the regulations, deal with the accessibility issue by children, at retailers of tobacco products, and went into effect on February 28, 1997. These sections require that each retailer verify every purchase by someone under age twenty-seven by photographic identification,¹⁸⁸ and to sell only by "direct, face-to-face exchange" and not by vending machine where persons under age eighteen are either present or allowed.¹⁸⁹ These regulations do not impinge on commercial speech and are logical ways to attack the problem of accessibility by minors to tobacco products.

In fact, the Court had already embraced this logic nearly thirty years ago in *Jacobellis v. Ohio*.¹⁹⁰ There, a movie theater manager was convicted for violating a state statute, aimed at protecting minors from obscenity, when he showed a French film. The Court reversed his conviction, concluding that the French film being shown in the theater was not obscene.¹⁹¹ The Court, in its analysis, remarked that "[s]tate and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at *preventing distribution* of objectionable material to children, rather than at *totally prohibiting its dissemination*."¹⁹²

Regulations like sections 897.14 and 897.16 have already been proven to block minors' access to tobacco in several studies performed on the state level. In Santa Clara County, California, a study of accessibility of tobacco to minors was made where minors were sent to 412 stores and

185. *Id.* at 1512.

186. Regulation of Cigarettes and Smokeless Tobacco, 61 Fed. Reg. 44,396, 44,616 (to be codified at 21 C.F.R. § 897.14).

187. *Id.* at 44,616-17 (to be codified at 21 C.F.R. § 897.16).

188. *Id.* at 44,616 (to be codified at 21 C.F.R. § 897.14(b)(1),(2)).

189. *Id.* at 44,617 (to be codified at 21 C.F.R. § 897.16(c)(1), (c)(2)(ii)). Subsection (d) of this section will prohibit the distribution of free tobacco samples. *Id.* (to be codified at 21 C.F.R. § 897.16(d)). But this distribution ban, while implicating the Fifth Amendment right to property, does not involve speech rights and therefore will not be discussed.

190. 378 U.S. 184 (1964).

191. *Id.* at 196.

192. *Id.* at 195 (emphasis added).

thirty vending machines to determine if they could purchase tobacco.¹⁹³ Then, both community and merchant educational campaigns were presented to create awareness of the problem of tobacco access by minors, and a follow-up attempt to purchase tobacco from the same sources was made six months after the campaigns.¹⁹⁴ While vending machine sales were made to every minor who attempted to purchase them both before and after the educational campaigns,¹⁹⁵ merchants who sold tobacco to 74% of the minors before the campaigns, sold tobacco to only 39% after the campaigns. The elimination of vending machines in areas where minors can access them involves no infringement on commercial speech and can certainly be viewed as a proper regulation. In addition, the perceived availability of cigarettes, by minors, shows the need for uniform federal regulations on the sale and distribution of tobacco. A study done for the National Institute on Drug Abuse reported that nearly eight in ten eighth graders reported that cigarettes were fairly easy or very easy to get, while nearly all tenth grade students found this same level of access to cigarettes.¹⁹⁶ The need for the requirement of proof of age when selling tobacco to younger persons has also been directly shown by researchers.¹⁹⁷

b. Education Is A Strong Alternative to Subpart D

Education about tobacco use and its inherent risks forms a strong alternative as well, and according to one researcher writing for the Journal of the American Medical Association, “[n]urturing the positive development of children and youth through education is public health’s most powerful approach to prevention.”¹⁹⁸ Yet, the Regulations of Ciga-

193. David G. Altman et al., *Reducing the Illegal Sale of Cigarettes to Minors*, 261 JAMA 80, 80 (1989).

194. *Id.* at 81.

195. *Id.* at 82.

196. JOHNSTON ET AL., *supra* note 164, at 196.

197. *Tobacco Use and Usual Source of Cigarettes Among High School Students—and United States, 1995*, 66 J. SCHOOL HEALTH 222 (1996). The nationwide study found that among smokers under age 17, 77.5% reported that they were not asked for proof of age when buying cigarettes from a merchant in the previous thirty days. *Id.* at 223.

198. Carol N. D’Onofrio, *Marketing Smokeless Tobacco: Implications for Preventive Education*, in SMOKELESS TOBACCO OR HEALTH, *supra* note 1, at 247, 256.

The researcher also called for adults to take responsibility:

During visits to the corner store, attendance at baseball games and other events, or while watching the Indianapolis 500 on television, adults should point out how [smokeless tobacco] is marketed. In these conversations, adults also need to help children understand why a bad product is so readily available, why some good people use it, and why the Government does not ban substances that are harmful. Answering children’s

rettes and Smokeless Tobacco do not contain an educational component. The opinions, held by children, on the risks posed by tobacco, show the need for education programs. A government study, on smokeless tobacco use by children, found that less than half of both eighth graders and tenth graders believed that regular use of smokeless tobacco entails "great risk."¹⁹⁹ The study also found that smoking a pack or more of cigarettes a day was believed by almost one-third of seniors to not involve great risk, while nearly half of the eighth graders and over one-third of the tenth graders in the study held that same belief.²⁰⁰

On the state level, despite this aversion to the risks of tobacco by children, our schools have not made education, about tobacco use risks, a priority, as "[m]any schools provide no health education course or regularly scheduled time for health education in the curriculum. . . . In the war on drugs, most of the nation's schools do not identify tobacco as a major enemy."²⁰¹

c. Many Other Alternatives To Subpart D Also Exist

Other alternatives have already been offered, such as placing a clearly visible warning label on all tobacco sponsorship items, from the cars themselves to billboards at the venue.²⁰² The Canadian Tobacco Council also offers many alternatives in its voluntary tobacco advertising code,²⁰³ such as limiting the size of the brand trademarks to no greater than one-quarter of the size of the advertisement and no larger than the size of the name of the event or activity being advertised.²⁰⁴ This code was developed and instituted by the council members after the Canadian Supreme Court overturned a government ban on the advertising of to-

questions about [smokeless tobacco] is likely to require explaining history, politics, government, law, economics, and other complex aspects of society.

The educational challenge is formidable, but if young people are to make wise decisions about [smokeless tobacco], both as individuals and as community members, adults in all walks of life must rise to the task.

Id.

199. JOHNSTON ET AL., *supra* note 164, at 155, table 19.

200. *Id.*

201. D'Onofrio, *supra* note 198, at 248-49.

202. Stoner, *supra* note 46, at 668.

203. The Tobacco Industry Voluntary Packaging and Adverting Code of the Canadian Tobacco Manufacturers' Council (amended 1996) (on file with the Canadian Tobacco Manufacturers' Council).

204. *Id.* at Section 4.3.

bacco products.²⁰⁵ Before its ban was overturned, Canada was one of 21 countries that, as of 1994, had a complete ban on tobacco advertising.²⁰⁶

Counter-advertising, which was so successful in the 1960s,²⁰⁷ forms another alternative. However, the government must find funding for such advertising on its own, as "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."²⁰⁸ Justice Stevens mentioned the possibility of counter-speech as an alternative in *44 Liquormart*.²⁰⁹ Children do pay attention to counter-messages, with one study's findings showing that more than 90% of both non-smokers and smokers aged 11-19 years old who saw anti-smoking messages on television thought that such advertisements made people aware that smoking is dangerous, and over half of both smokers and non-smokers felt that these messages made people want to quit smoking.²¹⁰ Perhaps more important, peer pressure to use tobacco may be overcome by such messages, as almost 72% of smokers and more than 80% of non-smokers thought that those messages made non-smokers tell smokers, their peers, to quit.²¹¹ No matter the alternative or alternatives chosen, commercial speech must not be suppressed by subpart D when these and other alternatives exist.

Notwithstanding the constitutional problems, children themselves offer evidence that section 897.30 will not help the FDA achieve its goal of ending tobacco use by children. A survey of teenagers conducted recently revealed that even when children remember tobacco billboards, including Joe the Camel, they are not persuaded to start smoking.²¹² In

205. *RJR-MacDonald Inc. v. Canada* (Attorney General), 100 C.C.C. 3d 449 (1995).

206. CLAIRE CHOLLAT-TRAQUET, WORLD HEALTH ORGANIZATION, EVALUATING TOBACCO CONTROL ACTIVITIES 112 (1996).

207. See discussion *supra* Section III(A).

208. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

209. *44 Liquormart*, 116 S. Ct. at 1510.

210. Samuel W. Monismith et al., *Opinions of Seventh to Twelfth Graders Regarding the Effectiveness of Pro- and Anti-Smoking Messages*, in *DRUG ABUSE: FOUNDATION FOR A PSYCHOSOCIAL APPROACH*, at 209, 216 (Seymour Eiseman et al. eds., 1984). The book focus is on drug abuse education using a psychosocial approach rather than a medical approach.

211. *Id.*

212. Bruce Horovitz and Melanie Wells, *Ads For Adult Vices Big Hit With Teens*, USA TODAY, Jan. 31, 1997, at 1A, 2A (reporting that fewer than two in ten teens were persuaded by Joe the Camel to try Camel cigarettes); see also, Melanie Wells, *Kids Know Joe Camel, but they follow Marlboro Man*, USA TODAY, Jan. 31, 1997, at 5B (reporting that Marlboro is preferred by more teenage smokers even though Joe Camel ads are liked better and are more recognized; reporting that 83% of the teenagers said Camel ads do not make them want to use the brand, 78% said the same for Marlboro ads, and over 90% said the same for the brands Kool, Benson & Hedges, and Lucky Strike).

another study, only 13.6% of non-smoking teenagers ages 11-19 who reported seeing ads on billboards or in magazines that made smoking look attractive said that those ads made them want to smoke, again showing the lack of a direct connection between advertising and smoking initiation.²¹³

B. Subpart D Involves Viewpoint and Content-Based Discrimination

Viewpoint discrimination has been described as existing when, government makes the point of view of the speaker central to its decision to impose, or not to impose, some penalty. . . . [T]he government is trying to protect a preferred side in a debate and to ban the side that it dislikes. . . . We know that we are dealing with a viewpoint-based restriction if and only if the government has silenced one side in a debate.²¹⁴

Viewpoint-based restrictions are a "subset" of content-based restrictions,²¹⁵ as "the government cannot silence one side in a debate without making content crucial."²¹⁶ In *Ward v. Rock Against Racism*,²¹⁷ a decision concerning the protected speech category of music, the Court explained that "[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."²¹⁸

Tobacco advertisements and sports sponsorships express tobacco use, something that the government wishes to "silence" to protect children. But, the other side of the debate, consisting primarily of the FDA, the Surgeon General, the FCC, and the FTC, but also of numerous privately

213. Monismith et al., *supra* note 210, at 217.

214. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 12 (1993).

215. *Id.* Content-based restrictions have been defined as follows:

[This restriction is] viewpoint neutral but content-based. For example, the government might ban all political speech in a certain place. . . . But the viewpoint of the speaker is not crucial, or even relevant, to the restriction. . . . In a sense, such a restriction has a degree of neutrality.

Id.

216. *Id.*

217. 491 U.S. 781 (1989). The Court was faced with a city guideline on sound amplification for a bandshell in Central Park. The justification given for the guideline was the control of noise levels to avoid disrupting the surrounding park areas. The Court held that such a restriction on speech "satisfies the requirement that time, place, or manner regulations be content neutral." *Id.* at 792.

218. *Id.* at 791 (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, at 295 (1984)). See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). There, the Court held that "[t]he First Amendment does not permit [a government] to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 391 (citations omitted).

funded anti-tobacco groups,²¹⁹ remains free to run any type of anti-tobacco advertisement that it can design, with no limitations on its content, format, message, or sponsorship connections. For instance, the FDA could sponsor a NASCAR race team with the team name of "Tobacco Kills" on its hood.²²⁰ Subpart D shows that it discriminates based on content, by its prohibitions, on the use of colors or brand names, by tobacco companies, in their advertisements and sponsorships.²²¹

When the protection of children is at issue, however, the Court has sometimes allowed viewpoint and content-based restrictions. *FCC v. Pacifica Foundation*²²² involved the FCC's characterization of comedian George Carlin's "Filthy Words" monologue broadcast, over the afternoon radio airwaves, as "patently offensive."²²³ Finding that the broadcast occurred "when children were undoubtedly in the audience," the FCC prohibited its broadcast at that time of the day.²²⁴ The Court agreed, holding that "[t]he ease with which children may obtain access to broadcast material. . .justif[ies] special treatment of indecent broadcasting."²²⁵ The Court thus allowed a time, place, or manner restriction on speech. But in *Ward*, the Court explained that "the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech. . . .'"²²⁶ Subpart D restricts commercial speech which is not indecent, unlike *Pacifica Foundation*, based on its content.²²⁷ Further, in *Edenfield*, while discussing the third prong of the *Central Hudson* test, the Court declared that "[w]here a restriction on speech lacks. . .[a] close and substantial relation to the governmental interests asserted, it cannot be, by definition, a reasonable time, place or manner restriction."²²⁸ As subpart D has already been shown to fail the

219. Northeastern University's "Tobacco Products Liability Project," which monitors lawsuits against the industry, has become a well-known foe of tobacco companies, replete with their own Worldwide Web Page. A prominent face on Capitol Hill is the "Campaign for Tobacco-Free Kids" lobbying group.

220. It would readily be agreed that sans forming their own team, the opponents of tobacco would find it difficult to get a race team to carry such a slogan on its car, in light of the fact that the success of racing is largely due to the tobacco industry's sponsorship dollars.

221. *Supra* text accompanying notes 7-11.

222. 438 U.S. 726 (1978).

223. *Id.* at 731.

224. *Id.* at 732.

225. *Id.* at 750.

226. 491 U.S. 781, 791 (1989) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, at 293 (1984)).

227. See discussion *infra* note 244-60 and accompanying text.

228. *Edenfield*, 507 U.S. at 773.

third prong of *Central Hudson*, as modified by Justice Stevens in *44 Liquormart*,²²⁹ it can not qualify as such a restriction.

But, in *Bethel School District v. Fraser*,²³⁰ another decision by the Court allowing a restriction on speech to protect children, a public high school was allowed to set limitations on the content of student elective office nomination speeches. The Court carved out an exception to the First Amendment when it remarked that while:

[t]he First Amendment guarantees wide freedom in matters of adult public discourse. . . [i]t does not follow. . . that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school.²³¹

But, subpart D does not involve a speech restriction in a public school setting. Instead, it restricts speech that the adult public would view, not just children. Still, the ability of a legislature to protect children, in spite of an impingement on the First Amendment, was also given approval by the Court in *Ginsberg v. New York*.²³² There, the Court stated that "[t]he well-being of its children is of course a subject within the State's constitutional power to regulate. . ."²³³ But, the Court in *Ginsberg* was dealing with a statute that prohibited anyone from selling materials containing obscene pictures, and obscenity is not protected speech,²³⁴ unlike the commercial speech restricted by subpart D.

Importantly, under several other decisions of the Court dealing with the protection of children, in the commercial speech context, subpart D fails to withstand scrutiny under the First Amendment. In seeking to protect children, while upholding commercial free speech under the First Amendment, the Court in *Butler v. Michigan*²³⁵ held that the state could not "reduce the adult population. . .to reading only what is fit for children."²³⁶ In *Butler*, the defendant was convicted of selling a book containing material that, in the opinion of the trial court judge, would corrupt youths in an immoral way, thus violating a state penal code provision against the sale of such material to any person, no matter the

229. See discussion *supra* Section VI(A)(3).

230. 478 U.S. 675 (1986).

231. *Id.* at 682.

232. 390 U.S. 629 (1968).

233. *Id.* at 639.

234. *Roth v. United States*, 354 U.S. 476 (1957).

235. 352 U.S. 380 (1957).

236. *Id.* at 383.

age.²³⁷ The Court dismissed the State's argument that the code was constitutional: "The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig."²³⁸

Then, in *Erznoznik v. City of Jacksonville*,²³⁹ the local government sought to protect minors by enacting an ordinance that prohibited a drive-in movie theater, whose screens were visible from the street, from showing films containing nudity. However, the Court held that

[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.²⁴⁰

More recently, in *Sable Communications v. FCC*,²⁴¹ the Court struck down a federal statute that banned "dial-a-porn" telephone messages, holding that such legislation, "has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear,"²⁴² and represented "another case of 'burn[ing] up the house to roast the pig,'" and was therefore unconstitutional.²⁴³

1. Children, Speech Restrictions, and Section 897.34 of Subpart D

Under *Butler*, *Erznoznik*, and *Sable Communications*, the limits on merchandising and sports sponsorships found under section 897.34²⁴⁴ are impermissible viewpoint and content-based restrictions of commercial speech. Winston racing apparel does not even come in children's sizes or even in an adult small.²⁴⁵ Perhaps most powerful to the analysis under

237. *Id.* at 381.

238. *Id.* at 383. *See, e.g.,* *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73 (1983) (prong three of *Central Hudson* could not be met as the Court, pointing out that "parents must already cope with the multitude of external stimuli that color their children's perception of sensitive subjects," held that a "marginal degree of protection is achieved by purging all mailboxes of unsolicited material that is entirely suitable for adults").

239. 422 U.S. 205 (1975).

240. *Id.* at 213-14 (citations and footnote omitted).

241. 492 U.S. 115 (1989).

242. *Id.* at 131.

243. *Id.* (quoting *Butler*, 352 U.S. at 383).

244. *See supra* text accompanying notes 7-9.

245. Gerald Martin, *NASCAR Not Running Scared Yet*, *RALEIGH NC NEWS & OBSERVER*, Aug. 24, 1996, at A1.

these decisions is that persons under age eighteen make up only three percent of the NASCAR demographic.²⁴⁶ Under *Sable*, this section "has the invalid effect of limiting the content [of sponsorships] to that which is suitable for children. . . ."²⁴⁷ Furthermore, borrowing from *Sable's* predecessor *Butler*, "[s]urely, this is to burn the house to roast the pig."²⁴⁸

2. Children, Speech Restrictions, and Section 897.32 of Subpart D

The restrictions on the format and content of advertisements under section 897.32 ignore the Court's holding in *Sable Communications*. While subsection (a)(1) and (a)(2) of section 897.32²⁴⁹ create exceptions for the "tombstone" restrictions on tobacco advertisements created by the section, the requirements to be met before an advertisement can be placed will prove, in actual practice, to violate the First Amendment protection given commercial speech by "limiting the content. . . to that which is suitable for children. . . ."²⁵⁰ The difficulty of measuring the percentage and number of readers under age eighteen, required under subsection (a)(2)(i) and (a)(2)(ii) respectively,²⁵¹ to avoid the format restriction, will serve to predetermine the violation.

3. Children, Speech Restrictions, and Section 897.30 of Subpart D

A zone of protection around schools against tobacco advertising is created by section 897.30.²⁵² The Court has previously shown its approval for similar restrictions when the purpose is to protect children,²⁵³

246. Gerald Martin, *NASCAR Backing Tobacco*, RALEIGH NC NEWS & OBSERVER, Aug. 18, 1995, at C1 (citing research by Simmons Research Bureau).

247. *Sable Communications v. FCC*, 492 U.S. 115, 131 (1989).

248. *Butler*, 352 U.S. at 383.

249. See *supra* text accompanying note 10.

250. 492 U.S. at 131.

251. See *supra* text accompanying note 10.

252. See *supra* text accompanying note 11.

253. See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (city ordinance on adult movie theaters prohibited their locating within 1000 feet of residential areas, churches, parks and schools was upheld); see, e.g., *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (banning adult theaters and other commercial uses from within 500 feet of residential areas and from within 1000 feet of other "regulated uses" allowable under the First Amendment to accomplish city's interest in planning and regulating the use of property); see, e.g., *Packer Corp. v. Utah*, 285 U.S. 105 (1932) (Utah statute allowing tobacco product advertising only in newspapers and periodicals but not in billboards, street car signs, and placards upheld due to its agreement with precedent that the banned mediums presented captive audience problems); see, e.g., *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (ban on political advertising covering the city transit system which still allowed all other types of advertising was upheld as the city was seeking to accomplish the proper objective of avoiding the imposition of political views on the captive audiences in the transit cars).

and soon after its decision in *44 Liquormart*, the Court accepted certiorari for two companion Fourth Circuit Court of Appeals cases that had upheld billboard advertising bans that sought to protect children.²⁵⁴ The Court remanded both cases for review in light of its decision in *44 Liquormart*. On remand, the Fourth Circuit considered *Anheuser Busch, Inc. v. Schmoke* as representative of the companion cases. Claiming to have applied *44 Liquormart*, the court reasoned that “[i]n contrast to Rhode Island’s desire to enforce adult temperance through an artificial budgetary constraint, Baltimore’s interest is to protect children who are not yet independently able to assess the value of the message presented.”²⁵⁵ Calling the restriction one of “time, place and manner,” the court again affirmed the district court judgment.²⁵⁶ The court reaffirmed *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore* for the reasons given in the companion case.²⁵⁷ But, under the Court’s reasoning in *Jacobellis*, the dissemination of tobacco billboard advertising, around school zones, is impermissible when the sale and distribution of tobacco products in that same zone is still permitted. The FDA’s purpose of ending tobacco use by children, “would be better served by laws aimed specifically at *preventing distribution* of objectionable material to children, rather than at *totally prohibiting its dissemination*.”²⁵⁸ Children do not spend their time staring at billboards dreaming of cigarettes when they can instead walk around the corner and buy them.

The dissent of Senior Circuit Judge Butzner presented the correct analysis, under *44 Liquormart*, for these cases on remand.²⁵⁹ He pointed to the failure of the court to “[answer] the third and fourth inquiries of *Central Hudson*. To obtain a sound basis for deciding these inquiries, district and reviewing courts need factual records.”²⁶⁰

254. *Anheuser-Busch, Inc., v. Schmoke*, 63 F.3d 1305 (1995), *rev’d and remanded*, 116 S. Ct. 1821 (1996); *see also*, *Penn Adver. of Baltimore, Inc., v. Mayor of Baltimore et al.*, 63 F.3d 1318 (1995), *rev’d and remanded*, 116 S. Ct. 2575 (1996).

255. *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 329 (1996), *cert. denied*, 1997 WL 120533 (U.S.).

256. *Id.* at 330.

257. 101 F.3d 325, at 332 (1996), *cert. denied*, 1997 WL 120537 (U.S.).

258. *Jacobellis v. State of Ohio*, 378 U.S. 184, 195 (1964) (emphasis added).

259. 101 F.3d at 330-32 (Butzner, dissenting).

260. *Id.* at 331.

VII. CONCLUSION

The issues surrounding tobacco use arguably form the most active public debate this century. After the FDA announced its proposed rule,²⁶¹ over 700,000 public comments were made to the FDA.²⁶² Over twenty reports of the Surgeon General on tobacco and health and an estimated 40,000 published articles and books have served to document this debate.²⁶³ As Congress considers the proposed settlement, on one extreme are those who argue that tobacco advertising should find no protection at all under the First Amendment.²⁶⁴ On the other extreme, one commentator has proposed that, given the intensely political nature of the debate, tobacco advertising should not be viewed by the Court as commercial speech, but rather, as political speech and thus fully protected.²⁶⁵

A debate over how much protection free speech should receive, under the First Amendment, has been raging on since at least 1925.²⁶⁶ Today, many of the debates that once involved only political speech cases, "have a strikingly different character. They involve free speech claims by owners of restaurants featuring nude dancing. . .[and] by tobacco companies objecting to restrictions on cigarette advertising. . ."²⁶⁷

261. Regulation of Cigarettes and Smokeless Tobacco, 60 Fed. Reg. 41,314 (1995) (finalized Aug. 28, 1996).

262. Preface to Regulation of Cigarettes and Smokeless Tobacco, 61 Fed. Reg. 44,396 (1996).

263. David Satcher & Michael Eriksen, *The Paradox of Tobacco Control*, 271 JAMA 627, 627 (1994).

264. Compare Kenneth L. Polin, Article, *Argument For The Ban Of Tobacco Advertising: A First Amendment Analysis*, 17 HOFSTRA L. REV. 99, 100 (1988) (arguing that "tobacco advertising. . . is inherently misleading, if not fraudulent, and/or relates to criminal activity (i.e. the sale of tobacco to minors). . .") (footnotes omitted), and Daniel Hays Lowenstein, *Commercial Speech and the First Amendment: "Too Much Puff": Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1224 (1988) ("the informational content of most cigarette advertising is negligible"), with Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 780 (1993) (in part responding to Lowenstein's argument, remarks that "[t]he theoretical question should not be what qualifies commercial speech for First Amendment coverage, but what, if anything, disqualifies it").

265. Richards, *supra* note 78, at 1210. He argues that:

Tobacco ads and related promotions differ from other commercial speech on several dimensions, and they definitely involve subject matter of the highest public interest and concern. Although many will balk at the idea of awarding such status to marketing communications of any kind - let alone tobacco products - cigarette advertising appears to meet the necessary conditions for protection as fully protected speech.

Id.

266. SUNSTEIN, *supra* note 214, at 4-5.

267. *Id.* at 2.

The boundaries of protection that have been made by the Court in deciding political speech cases under the First Amendment are rather remarkable. While placing limits on this right to free speech,²⁶⁸ the Court has upheld this right in allowing flag burning;²⁶⁹ in allowing a citizen, protesting the Vietnam War draft, to wear a jacket emblazoned with an obscenity in public, in front of children;²⁷⁰ and in striking down a city ordinance that criminalized cross burning.²⁷¹

The four opinions in *44 Liquormart*, while divergent in their analysis of how to arrive at what constitutes the proper amount of commercial speech protection, but each one giving heightened protection in some manner,²⁷² all serve to reveal that future decisions of the Court should prove to make out enlarged boundaries for commercial speech protection under the First Amendment. Dr. David A. Kessler, who resigned his position as FDA Commissioner just months after the regulations were finalized, believes, along with other anti-tobacco proponents, that these regulations will help the FDA meet its mission of protecting the public health because, as less children take up tobacco use, the number of adults addicted to nicotine will progressively decrease, as those children age.²⁷³ While ending tobacco use by children is a goal that should be supported by all, we can not allow the First Amendment to be snuffed out as the means to accomplish that end.

268. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) ("fighting words" will not be protected under the First Amendment).

269. *Texas v. Johnson*, 491 U.S. 397 (1989). *See also*, *United States v. Eichman*, 496 U.S. 310 (1990) (Congress's Flag Protection Act of 1989 held unconstitutional).

270. *Cohen v. California*, 403 U.S. 15 (1971) (on the jacket were the words "Fuck the Draft.")

271. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

272. *See* discussion *supra* Section IV(C).

273. David A. Kessler et al., *The Food and Drug Administration's Regulation of Tobacco Products*, 335 NEW ENG. J. MED. 988, 993 (1996). The authors further assert that the goal of the FDA Regulations "is to cut the use of tobacco among young people by half over a seven-year period." *Id.*

