

PUT A REIN ON THAT UNRULY HORSE:
BALANCING THE FREEDOM OF
COMMERCIAL SPEECH AND THE
PROTECTION OF CHILDREN IN
RESTRICTING CIGARETTE BILLBOARD
ADVERTISING

Children have a *very special* place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children.¹

—Justice Frankfurter

INTRODUCTION

The Marlboro man galloping on his glamorous range; Joe Camel, a jovial cartoon character, driving a slick race car and wearing hip Ray-Bans; and the Virginia Slims gals portraying the image that smoking makes women thin and sexy.² These billboard images of

1. *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring) (emphasis added).

2. The attractive and healthy images mask the chilling fact that advertising models have suffered from smoking-related health problems. For instance, several of the original Marlboro men have since died of smoking-related cancer. See Janine di Giovanni, *Cancer Country: Who's Lucky Now?*, SUNDAY TIMES (London), Aug. 2, 1992, at 12. David Millar, Jr., the

independence, healthiness, and romance are frequent scenes in American cities. However, concern about the luring effect of powerful images on teenagers has prompted³ urban planners to limit or even ban cigarette billboards to prevent a "teen epidemic" of smoking.⁴ Yet, urban planners who have attempted such measures are

original rugged Marlboro man of the 1950s, died of emphysema in 1987. *See id.* Wayne McLaren, who posed for Marlboro Man print advertisements in the 1970s died of emphysema in 1992. *See id.* Most recently the famous TV Marlboro Man of the 1970s died of lung cancer in 1995. *See Ammonia Country*, STAR-LEDGER (NEWARK), Oct. 30, 1995, at B1. Moreover, Will Thornbury, who posed as the "I'd walk a mile for a Camel" model, died from lung cancer in 1992. *See di Giovanni, supra*, at 12. Janet Sackman, who posed as Lucky Strike Girl, suffered throat cancer in 1982. *See id.* Ironically, later in their lives, many of the cigarette advertising models actively campaigned against smoking. *See id.*

3. Studies have found that the attractive images used in cigarette advertisements, appeal to adolescents' psychological desire for independence and romance. *See, e.g., Hooked on Tobacco: The Teen Epidemic*, 60 CONSUMER REPS. 142, 143 (1995) [hereinafter *Hooked on Tobacco*]. In 1991, University of Georgia researcher Paul Fischer concluded that almost one-third of three-year-olds and 91% of six-year-olds could match the Joe Camel cartoon character with the cigarette that R.J. Reynolds promoted. *See id.* at 144. Moreover, Joseph DiFranza, a physician at the University of Massachusetts, found that almost 98% of high-school students recognized the Joe Camel character, versus 72% of adults. *See id.* Furthermore, teenagers who could name a favorite cigarette advertisement, such as the Joe Camel cartoon, or who owned a Marlboro T-shirt were found to be nearly four times as likely to start smoking than youngsters who were not influenced by the marketing campaigns. *See Dolores Kong, Studies Link Tobacco Marketing to Smoking Among the Young*, BOSTON GLOBE, Oct. 18, 1995, at 10. In addition, John P. Pierce, director of the University of California, San Diego cancer and control program, linked tobacco marketing campaigns between 1890 and 1977 to subsequent increases in teenage smoking. *See id.*

4. *See Hooked on Tobacco, supra* note 3, at 142. Research indicates that the number of adult smokers in the United States has declined in the past three decades, but this decline has leveled off with a steady increase in the number of teenage smokers. *See id.* In 1989, American children under 18 purchased almost one billion packs of cigarettes. *See William J. Bailey & James W. Crowe, A National Survey of Public Support for Restrictions on Youth Access to Tobacco*, 64 J. SCH. HEALTH 314 (1994). More than one million Americans start smoking cigarettes each year (about 3,000 people every day), at least 75% are children under the age of 18. *See id.* In addition, according to the 1995 University of Michigan Survey Research Center Report, roughly 31% of high school seniors smoke, and of the 3,000 children who begin smoking each day, 1,000 will one day die of a tobacco-related disease. *See Shari Roan, The Lesser Evil?*, L.A. TIMES, Oct. 24, 1995, at E1.

In an effort to curb the rising tide of underage smoking, more cities are trying to regulate outdoor cigarette advertising. Baltimore initiated this trend in 1993 by banning cigarette advertisements on billboards and sides of buildings. *See infra* note 16 for the content of the Baltimore city ordinance. In 1994, the City Council of Cincinnati passed an ordinance, which became effective on June 1, 1996, banning any cigarette advertisement on "any outdoor advertising sign" in Cincinnati. *See Ben L. Kaufman, City Ban on Tobacco Ads Prompts Suits*,

being challenged for impeding the First Amendment's⁵ guarantee of free commercial speech.⁶

In a parallel proposal to the local cigarette outdoor advertising ban, in August 1995 President Clinton suggested comprehensive executive actions to curb the advertising, promotion, and sale of cigarettes to teenagers by expanding the rulemaking authority of the Food and Drug Administration.⁷ This proposal prohibits outdoor

CIN. ENQUIRER, July 7, 1995, at C2. The Cincinnati ordinance also provides serious penalties for violations: a \$100 fine and 30 days in jail for the first offense; a \$1,000 fine and forfeiture of the billboard for the second offense; each day's violation to be counted as a separate offense. See *id.* As of 1994, the New York City Metropolitan Transit Authority prohibits cigarette advertising on subway stations, subways, buses, bus stops, and train stations. See Daniel E. Troy, *City Ordinances Banning Tobacco and Alcohol Advertising Are Unconstitutional*, LEGAL OPINION LETTER, (Wash. Legal Found., Washington, D.C.), July 29, 1994. In 1995, Washington, D.C. proposed a cigarette advertising ban similar to the Cincinnati ordinance. See Kristan Metzler, *Targeting Temptation: Sign Ban Hits Allure of Alcohol and Tobacco*, WASH. TIMES, Nov. 20, 1995, at C5. Also in 1995, the Board of Supervisors of San Francisco introduced a city ordinance banning cigarette advertising within 1,500 feet of parks, recreation centers, churches, schools, and other sites. See Michael Wilke, *Outdoor Biz Urged to Join Ad-Limit Fight: Tobacco Is No. 2 Category*, ADVERTISING AGE, Nov. 6, 1995, at 8. Other cities that have enacted or proposed ordinances banning cigarette billboard advertising include Amherst, Massachusetts; Preston, Minnesota; and Wauweshia, Wisconsin. See, e.g., Metzler, *supra*; Pay Doyle, *The Great Smoking Debate; Ban on Tobacco Ads, Although Overturned, Puts Preston on Map*, STAR TRIB. (Minneapolis-St. Paul), Nov. 16, 1995, at 10A; Sam Martino, *City May Duke it out with the Marlboro Man*, MILWAUKEE J. SENTINEL, Nov. 6, 1995, at 1.

5. The First Amendment states: "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.

6. For example, in 1994, Penn Advertising, Inc., the largest outdoor advertising company in Baltimore, brought suit in the United States District Court in Maryland to challenge the constitutionality of the advertising ban in Baltimore on First Amendment grounds. See Geyelin, *infra* note 7, at B5. In 1995, Martin Media Company and Norton Outdoor Advertising Company, two major advertising concerns in Cincinnati, challenged the Cincinnati city ordinance in the United States District Court in Cincinnati on the grounds that the ordinance was a violation of the First Amendment's protection of commercial speech. See Kaufman, *supra* note 4, at C2. However, shortly before the Fourth Circuit delivered its decision upholding the constitutionality of the advertising ban in Baltimore, the Cincinnati advertising companies voluntarily dropped the suit and negotiated with the city to work out other arrangements. See *id.*

7. See Philip J. Hilts, *Clinton To Seek New Restrictions On Young Smokers*, N.Y. TIMES, Aug. 10, 1995, at A1 [hereinafter *New Restrictions*]. One month after President Clinton's announcement, some members of Congress expressed bipartisan support for this plan. See *Congressmen Support Clinton's Cigarette Ban*, N.Y. TIMES, Sept. 29, 1995, at A1. Specifically, Sen. Bob Bennett (R-UT), Chairman of the Senate Republican Health Care Task Force, pointed out the importance of supporting President Clinton's plan to "cut down on the enticements of

advertising within 1,000 feet of a school or playground and requires those advertisements beyond 1,000 feet to appear only in black and white text.⁸ In addition, the proposal prohibits the use of misleading images such as Joe Camel on public billboards.⁹ Shortly after President Clinton's announcement, the five largest tobacco companies in the United States brought suit to challenge the legality of this proposal primarily on First Amendment grounds.¹⁰

In attacking the cigarette advertising ban, the tobacco and advertising industries relied, in part, on the First Amendment

tobacco for America's youth." *Id.*

On the other hand, some senators have strongly objected to the new cigarette regulating plan. A letter signed by then Majority Leader Bob Dole (R-Kan.), Minority Leader Tom Daschle (D-S.D.) and thirty other senators, claimed that the FDA plan would "trample [First] Amendment rights to advertise legal products to adults." *Teens, Tobacco Firms Stoke Smoking Debate on FDA Regulation*, CHI. TRIB., Jan. 3, 1996, at 1 [hereinafter *Teens, Tobacco*].

8. See Hiltz, *supra* note 7, at A1. Other measures proposed by President Clinton include: (1) allowing only black-and-white text-only ads for tobacco products in publications with a non-adult readership of 15% or with two million readers under age 18; (2) using only the corporate name, not the cigarette brand name or corporate logo, for sponsorship of events; (3) prohibiting give away items, such as caps, T-shirts, and bags, printed with cigarette brand names; (4) requiring that the tobacco industry fund a \$150 million national anti-smoking advertising campaign directed at youths; and (5) requiring each tobacco manufacturer to submit sample labels and advertisements to the FDA for enforcement purposes. See Debra G. Hernandez, *Restrictions on Cigarette Advertising*, EDITOR AND PUBLISHER MAG., Aug. 19, 1995, at 12.

9. See Hernandez, *supra* note 8, at 12. President Clinton linked the growth of teenage smoking to the attractive advertisements: "When Joe Camel tells young children that smoking is cool, when billboards tell teens that smoking will lead to true romance, when Virginia Slims tells adolescents that cigarettes may make them thin and glamorous, then our children need our wisdom, our guidance, and our experience[.]" *Id.*

10. Brown & Williamson Tobacco Corporation, the Liggett Group, Inc., Lorillard Tobacco Company, Philip Morris Companies, Inc., and R.J. Reynolds Tobacco Company brought suit in the United State District Court in Greensboro, North Carolina. See Glenn Collins, *Teenagers and Tobacco: The Reaction*, N.Y. TIMES, Aug. 11, 1995, at A18. Also suing was Coyne-Beahm Inc., an advertising agency that "derived substantial revenue from the promotion of cigarettes." *Id.* The plaintiffs claimed that FDA proposals contained a "hidden agenda" to ban cigarette smoking by adults. Moreover, the plaintiffs argued that restricting certain ads to black-and-white text and banning tobacco billboards within 1,000 feet of schools was more extensive than necessary and violated their freedom of commercial speech. See Wade Lambert & Milo Geyelin, *FDA's Planned Tobacco-Ad Rules Spur Suits Over Agency's Powers*, WALL ST. J., Aug. 14, 1995, at B6. The plaintiffs also contended that the FDA overstepped its authority by proposing such sweeping advertising restrictions because Congress withheld jurisdiction from the FDA when it passed the Federal Cigarette Labeling and Advertising Act in 1965. See *id.* The authority of the FDA to regulate cigarettes is beyond the scope of this Note.

privilege of commercial speech.¹¹ The Supreme Court reviewed this privilege in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* and articulated a “means-ends test” for determining the constitutionality of the government’s regulation of commercial speech.¹² Under the *Central Hudson* test, regulation of commercial speech is constitutional if (1) the government’s interest contemplated in the regulation is substantial, (2) the regulation directly advances such interest, and (3) the regulation is not more extensive than necessary to serve that interest.¹³ However, this test is vague, and the Court’s application of the test in the post-*Central Hudson* era fell short of providing a consistent interpretation. Notably, in two commercial speech cases in 1995, which the Court decided only two months apart, the Court appeared to exercise a differing level of judicial scrutiny over the legislative judgment on means-ends rationality.¹⁴

Although the Court has occasionally opined on balancing the protection of free speech and the protection of children’s welfare,¹⁵ it

11. Professor Nowak defines commercial speech as any form of speech that “advertises a product or service for profit or for a business purpose.” JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 16.26, at 1062 (5th ed. 1995). However, courts have applied the definition of commercial speech inconsistently. *See id.* For a general discussion of the development of the commercial speech doctrine, see Jonathan Weinberg, Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720 (1982); Thomas W. Merrill, Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205 (1976).

12. 447 U.S. 557 (1980).

13. *See id.* at 566.

14. In *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995), a case decided on April 19, 1995, the Court stated that the legislature’s judgment that a ban on alcohol-content labeling would directly advance the government’s interest in preventing a “strength war” among brewers was irrational and speculative. *See id.* at 1593. However, in *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995), a case decided on June 21, 1995, the Court deferred to the legislative judgment, which was based on data studies, history or common sense, that a prohibition on soliciting accident victims’ families by lawyers would directly advance the government’s interest in preserving the privacy of victims’ families and the ethical integrity of the legal profession. *See id.* at 2378.

15. *See, e.g., Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 131 (1989) (invalidating a federal statute that banned indecent telephone messages on the ground that a total ban exceeded that which was needed to curtail children’s access to such messages); *New York v. Ferber*, 458 U.S. 747, 774 (1982) (concluding that the state’s interest in protecting minors from exploitation by child pornographers outweighed the interest of adults in obtaining

has never addressed this issue in the context of regulating outdoor cigarette advertising. However, the dispute surrounding the Baltimore ordinance,¹⁶ which bans billboard cigarette advertising in areas regularly frequented by children, is likely to give the Court an opportunity to address this issue. In *Penn Advertising, Inc. v. Mayor of Baltimore* ("Penn Advertising I"),¹⁷ the Fourth Circuit interpreted the means-ends test in *Central Hudson* as a standard of "reasonable fit" between the legislative ends and the means chosen to accomplish such ends, and upheld the Baltimore ordinance against a First Amendment attack.¹⁸ However, on appeal, the Supreme Court vacated the decision of *Penn Advertising I* and remanded the case to the Fourth Circuit¹⁹ for further consideration in light of *44 Liquormart, Inc. v. Rhode Island*,²⁰ which held that Rhode Island's

pornographic materials); *FCC v. Pacifica Found.*, 438 U.S. 726, 751 (1978) (upholding the banning of broadcasting obscene or profane materials in media in order to protect children); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (noting that the government has the right to adopt more stringent controls on media available to youths than on those primarily available to adults); *Ginsberg v. New York*, 390 U.S. 629, 645 (1968) (upholding a law that limited the availability of pornographic magazines to minors because of the potential harmful effects).

16. Baltimore Ordinance 307 provides in relevant part: "No person may place any sign, poster, placard, device, graphic display, or other form of advertising that advertises cigarettes in a publicly visible location. In this section 'publicly visible location' includes outdoor billboards, sides of buildings, and free standing signboards." BALTIMORE, MD. CODE art. 30, § 10.0-1(I) (1994), cited in *Penn Advertising, Inc. v. Mayor of Baltimore*, 63 F.3d 1318, 1321 n.1 (4th Cir. 1995) (emphasis added).

17. 63 F.3d 1318 (4th Cir. 1995). Decided on August 31, 1995, *Penn Advertising I* was regarded as the first federal appeals court decision upholding a local government's restrictions on cigarette billboards. See Milo Geyelin, *Court Rules Cigarette Billboards Can Be Limited to Protect Minors*, WALL ST. J., Sept. 7, 1995, at B2.

On the same day as *Penn Advertising I* was decided, the Fourth Circuit delivered a companion case, *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995) [hereinafter *Anheuser-Busch I*]. In *Anheuser-Busch I*, the court upheld a similar Baltimore city ordinance banning the outdoor advertising of alcoholic beverages in certain locations of the city. See *id.* Finding that the constitutionality issue of cigarette and beverage advertising bans is the same, the *Penn Advertising I* court expressly adopted *Anheuser-Busch I*'s reasoning in full. See *Penn Advertising I*, 63 F.3d at 1325-26. For the convenience of discussion, this author will, where appropriate, cite the *Anheuser-Busch I* opinion as the *Penn Advertising I* opinion in the footnotes.

18. See *Penn Advertising I*, 63 F.3d at 1326.

19. *Penn Advertising, Inc. v. Mayor of Baltimore*, 116 S. Ct. 2575 (1996).

20. 116 S. Ct. 1495 (1996).

ban on the advertising of alcoholic beverage price violated the First Amendment. On remand, the Fourth Circuit again upheld the constitutionality of the Baltimore ordinance in November 1996 ("*Penn Advertising II*").²¹ The court in *Penn Advertising II* distinguished *44 Liquormart* because Rhode Island's ban, which prohibited liquor price advertising in all manners except for price signs displayed with the beverages, was far more sweeping than Baltimore's ban on cigarette billboard advertising, which merely restricts the time, place, and manner of such advertising.²²

Because the Fourth Circuit would rule on three pending challenges to the Clinton administration's proposals,²³ the ruling in *Penn Advertising II* will have significant impact on the Clinton administration's proposals restricting cigarette advertising in various media. Indeed, the *Wall Street Journal* anticipates that *Penn Advertising II* increases the possibility that at least some of Clinton's proposals will survive constitutional challenges.²⁴

This Note argues that the government's special interest in protecting children justifies a limited cigarette billboard advertising ban, such as the one in Baltimore. Part I briefly traces the legislative efforts in regulating cigarette advertising. Part II reviews the evolving judicial standard in reviewing the regulation of commercial advertising. Part III summarizes the Fourth Circuit's holdings in *Penn Advertising I* and *Penn Advertising II*. Part IV analyzes the balancing

21. *Penn Advertising, Inc. v. Mayor of Baltimore*, 101 F.3d 332 (4th Cir. 1996) [hereinafter *Penn Advertising II*]. On the same day, the Fourth Circuit delivered its opinion in *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325 (4th Cir. 1996) [hereinafter *Anheuser-Busch II*]. As in *Penn Advertising I*, the *Penn Advertising II* court expressly adopted the reasoning of *Anheuser-Busch II* in full. See *Penn Advertising II*, 101 F.3d at 333. For the convenience of discussion, this author will, where appropriate, cite the *Anheuser-Busch II* opinion as the *Penn Advertising II* opinion in the footnotes of this Note.

22. See *Anheuser-Busch II*, 101 F.3d at 328-29.

23. See Milo Geyelin, *Appeals Court Again Upholds Ban Involving Billboard Cigarette Ads*, WALL ST. J., Nov. 15, 1996, at B10.

24. See *id.* Although the ruling in *Penn Advertising II* provides strong support to the Clinton administration's proposed ban on cigarette advertising within 1000 feet of schools and playgrounds, it remains unclear how the ruling would affect more sweeping proposals such as those requiring only black-and-white text for outdoor advertising and magazines read by children. See *id.*

of the protection of children and the First Amendment rights of free speech and argues that the limited cigarette billboard advertising ban in Baltimore is constitutional.

I. CIGARETTE ADVERTISING LEGISLATION

A. Broadcasting Ban

The publication of the Surgeon General's report in 1964, linking cigarette smoking to lung cancer and heart disease,²⁵ increased the momentum for the regulation of cigarette marketing and promotion.²⁶ In 1964, Congress passed the Federal Cigarette Labeling and Advertising Act (FCLAA).²⁷ In addition to mandating a warning on cigarette packages about the health hazards of smoking,²⁸ the FCLAA required the Federal Communications Commission (FCC) to issue reports on the number of smoking advertisements on the airwaves.²⁹ The FCC's 1968 report revealed an astonishing frequency of cigarette TV advertisements viewed by minors.³⁰

In 1969, out of its concern over the effects of cigarette TV advertising on the well-being of young people, Congress enacted the Public Health Cigarette Smoking Act (PHCSA).³¹ The PHCSA enhanced the gravity of health hazard warnings on cigarette packages,³² and banned the advertising of cigarettes from radio and

25. See, e.g., Kenneth L. Polin, *Argument for the Ban of Tobacco Advertising: A First Amendment Analysis*, 17 HOFSTRA L. REV. 99, 101 n.15 (1988).

26. See David S. Welkowitz, *Smoke in the Air: Commercial Speech and Broadcasting*, 7 CARDOZO L. REV. 47, 48 (1985).

27. Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. § 1331-1341 (1994)).

28. Before 1970, the FCLAA required the following warning: "Caution: Cigarette Smoking May Be Hazardous to Your Health." Pub. L. No. 89-92, § 4, 79 Stat. 282, 283 (1965) (codified as amended at 15 U.S.C. § 1333 (1994)).

29. See 15 U.S.C. § 1337 (1994).

30. See, e.g., S. REP. NO. 91-566, at 3, 5, 19 (1969), reprinted in 1970 U.S.C.C.A.N. 2652, 2656. The 1968 report showed that each child watched 44.5 cigarette commercials and that each teenager watched 60.88 cigarette commercials in the month of January, 1968. See *id.*

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

32. See *id.* Section 4 of the PHCSA required cigarette companies to conspicuously label

TV beginning January 1, 1971.³³

The broadcasting ban of cigarette advertisements survived constitutional challenge in *Capital Broadcasting Co. v. Mitchell* in 1971.³⁴ The plaintiffs, several broadcasters and the National Association of Broadcasters, contended that the advertising ban under the PHCSA violated their First Amendment right to freedom of speech and their due process rights.³⁵ The federal district court in Washington, D.C. upheld the advertising ban, and the Supreme Court affirmed without an opinion.³⁶

The *Capital Broadcasting* court's analysis of the First Amendment rights of broadcasters was cursory.³⁷ The district court

packages: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." Pub. L. No. 91-222, § 4, 84 Stat. at 88 (codified as amended at 15 U.S.C. § 1333(a)(1) (1994)).

33. See 15 U.S.C. § 1335 (1994). The PHCSA, later amended to include little cigars, currently reads: "After January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communications subject to the jurisdiction of the Federal Communications Commission." *Id.*

Notably, before the cigarette TV advertising ban, the Federal Communications Commission (FCC) declared that the fairness doctrine, a now-abolished rule that required the broadcasting of opposing viewpoints on controversial issues of public importance, should be applied to cigarette advertising. See 47 C.F.R. § 73.1910 (1987); Mark A. Conrad, *The Demise of the Fairness Doctrine: A Blow for Citizen Access*, 41 FED. COMM. L.J. 161, 168 (1989). The District of Columbia Circuit upheld the FCC's application of the fairness doctrine to require anti-smoking broadcasts by cigarette companies outlining the danger of smoking. See *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). Ironically, the 1969 advertising ban of cigarettes on TV and radio was, in part, a response to pressure from the cigarette industry, which felt that a total ban would be less detrimental than the mandatory anti-smoking advertisements. See Mark A. Conrad, Board of Trustees of the State University of New York v. Fox—*The Dawn of A New Age of Commercial Speech Regulation of Tobacco and Alcohol*, 9 CARDOZO ARTS & ENT. L.J. 61, 90 (1990).

34. 333 F. Supp. 582 (D.D.C. 1971), *aff'd mem. sub nom. Capital Broadcasting Co. v. Kleindienst*, 405 U.S. 1000 (1972).

35. See *id.* at 584-85.

36. See 405 U.S. 1000 (1972).

37. See *Capital Broadcasting*, 333 F. Supp. at 584. Judge Skelly Wright's dissenting opinion, however, was based mainly on First Amendment grounds. See *id.* at 589-94. Judge Wright argued that the majority ignored the First Amendment rights of viewers and listeners, whose rights should be considered of paramount importance. See *id.* at 593. Therefore, he considered the advertising ban an unconstitutional infringement on viewers' access to important information. See *id.* Moreover, Judge Wright pointed out that *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968) had recognized smoking as an issue of "public controversy." *Id.* at 592. Thus, Judge Wright concluded that the First Amendment fully protected cigarette advertising. See *id.*

based its decision on the premise that product advertising traditionally received less protection under the First Amendment than other forms of speech.³⁸ Without a detailed review of the First Amendment rights, the district court concluded that Congress could ban advertising in any media by using either its power to regulate interstate commerce or its supervisory power to control regulatory agencies.³⁹

Notably, the *Capital Broadcasting* court gave great consideration to the broadcast media's special accessibility to children, a feature different from other forms of media.⁴⁰ The district court implied that the uniquely accessible nature of the broadcast media made it more susceptible to governmental regulation, and granted the broadcast media a lower level of constitutional protection.⁴¹ The district court's concern for children's welfare echoed the Supreme Court's earlier opinion in *Ginsberg v. New York*,⁴² where the Court emphasized the importance of protecting children's well-being, and upheld a law that restricted the availability of pornographic magazines to minors.⁴³

The legal significance of the *Capital Broadcasting* rationale is not clear. The *Capital Broadcasting* court followed the Supreme Court's decision in *Valentine v. Chrestensen*,⁴⁴ which denied any First Amendment protection to commercial advertising.⁴⁵ Five years after *Capital Broadcasting*, the Court rapidly changed its course in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer*

at 594.

38. See *Capital Broadcasting*, 333 F. Supp. at 584.

39. See *id.* The district court noted that courts have repeatedly upheld similar advertising regulations. See *New York State Broadcasters Ass'n v. United States*, 414 F.2d 990 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970) (upholding the FCC ban of broadcast lottery information); *United States v. Re*, 336 F.2d 306 (2d Cir. 1963), *cert. denied*, 379 U.S. 904 (1964) (upholding the powers of SEC to regulate information in stock business solicitation); *Giant Food Inc. v. FTC*, 322 F.2d 977 (D.C. Cir. 1963), *cert. dismissed*, 376 U.S. 967 (1964) (upholding the FTC advertising regulations to prevent unfair and deceptive practices).

40. See *Capital Broadcasting*, 333 F. Supp. at 585-86.

41. See *id.* at 584.

42. 390 U.S. 629 (1968).

43. See *id.*

44. 316 U.S. 52 (1942).

45. See *id.* at 54.

Council.⁴⁶ In *Virginia Pharmacy*, the Court conferred a degree of First Amendment protection to commercial speech to protect "a consumer's interest in the free flow of commercial information."⁴⁷ Although Justice Blackmun distinguished *Virginia Pharmacy* from *Capital Broadcasting* based on the special problems inherent in the electronic media,⁴⁸ commentators appeared convinced that the modern commercial speech doctrine precludes the *Capital Broadcasting* analysis.⁴⁹

After *Virginia Pharmacy*, the Court never reexamined the broadcast ban on cigarette advertising.⁵⁰ Arguably, to the extent that *Capital Broadcasting* relied on *Valentine*, *Capital Broadcasting's* analysis is no longer valid. However, the *Capital Broadcasting* court's emphasis on children's interest should remain viable, given the fact that the Supreme Court has continued its special consideration of children's well-being.⁵¹

Despite the increasingly serious health hazards of smoking,⁵² and the need to expand and strengthen the regulation of cigarette advertising in non-electronic media, various legislative efforts have yielded little because of the complicated nature of cigarette regulation and the strong lobbying by the cigarette and advertising industries.⁵³

46. 425 U.S. 748 (1975).

47. *Id.* at 763. The Court reasoned that the most efficient allocation of resources comes about when consumers are "intelligent and well-informed." *Id.* at 765.

48. *See id.* at 773.

49. Professor Nowak, for example, reasoned that because the *Capital Broadcasting* decision was based on *Chrestensen* and its progeny, Justice Blackmun's reference to the *Capital Broadcasting* decision in *Virginia Pharmacy* was inaccurate. *See* JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 933 (2d ed. 1983). ("[T]he [*Mitchell*] decision was not based upon any special aspects of the broadcast media; rather it was squarely based on a view of the commercial speech doctrine promulgated in *Chrestensen*, that so-called commercial speech is completely outside the protection of the first amendment."). *Cf.* Gregory T. Wuliger, *The Constitutional Rights of Puffery: Commercial Speech and the Cigarette Broadcast Advertising Ban*, 36 FED. COMM. L.J. 1 (1984) (arguing that reliance on *Capital Broadcasting* analysis is inappropriate).

50. *See* Conrad, *supra* note 33, at 91.

51. *See* cases cited *supra* note 15.

52. Congressional findings showed that tobacco use in the United States results in more than 450,000 deaths each year. *See* H.R. 2147, 103d Cong. § 2 (1993).

53. *See infra* notes 60-63 and accompanying text for discussions of various bills in Congress. The tobacco industry reportedly gave \$5.6 million to political candidates for federal

Therefore, seventeen years after the enactment of the PHCSA, the only concrete progress that Congress has made was the Comprehensive Smokeless Tobacco Health Education Act of 1986,⁵⁴ which similarly banned electronic media advertising of smokeless tobacco and required comparable warning labels on smokeless tobacco product packages and print advertisements.⁵⁵ The 1986 Act did no more than impose on smokeless tobacco advertisements the same level of restriction as cigarettes.

B. Legislative Efforts to Restrict Cigarette Advertising

The tobacco industry has appeared to be so strong, both economically and legally, that it was once regarded as almost unbeatable in legal battles.⁵⁶ Although an increasing number of smoking victims have been waging wars against the industry for tort liability, rarely have they succeeded in court.⁵⁷ In the legislative

offices in 1992. See Mark Curriden, *The Heat Is On*, A.B.A. J., Sept. 1994, at 58, 59. In 1993, reports said that the \$1.6 million in campaign contributions were only a fraction of the contributions made on behalf of the cigarette lobby. See Shannon Brownlee & Steven V. Roberts, *Should Cigarettes Be Outlawed?*, U.S. NEWS & WORLD REP., Apr. 18, 1994, at 32, 38. The tobacco industry also donated money to non-profit organizations favored by key lawmakers and even their spouses. See *id.*

54. Pub. L. No. 99-252, 100 Stat. 30 (1986) (codified at 15 U.S.C. §§ 4401-4408 (1994)). On November 4, 1993, the Federal Trade Commission ("FTC") issued a Notice of Proposed Rulemaking, proposing to require racing cars sponsored by smokeless tobacco manufacturers to carry the same health warning labels currently mandated for smokeless tobacco packages. See 58 Fed. Reg. 58810 (1993) (proposed Nov. 4, 1993)).

55. See Pub. L. No. 99-252, § 3(a)(2), 100 Stat. at 31 (codified at 15 U.S.C. § 4402(a)(2) (1994)).

56. See generally Irene Scharf, *Breathe Deeply: The Tort of Smokers' Battery*, 32 HOUS. L. REV. 615 (1995) (discussing the legal difficulties of imposing liability on the tobacco industry, and the causes of action and types of damages in such lawsuits).

57. See, e.g., *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 236 (6th Cir. 1988) (affirming the district court's judgment and holding that the claim of failure to warn under Tennessee state laws was preempted by federal laws and that cigarettes were neither defective nor unreasonably dangerous); *Ross v. Philip Morris & Co.*, 328 F.2d 3, 13-14 (8th Cir. 1964) (affirming the district court's judgment and stating that while a manufacturer is held as an absolute insurer against knowable dangers, knowledge is still a condition of liability). See also Charles Strum, *Major Lawsuit on Smoking Is Dropped*, N.Y. TIMES, Nov. 6, 1992, at B1, B5 ("For four decades the cigarette industry has been successful in defending itself in [smoke-related injury] cases, never settling nor paying any damages or compensation.").

However, in recent years the victims have begun to gain limited victories. In 1988, in

arena, the tobacco industry has similarly extended its influence to defeat a variety of proposals aimed at restricting cigarette advertising in non-electronic media such as magazines, billboards, street cars, and sporting events—areas in which tobacco companies have spent huge amounts of advertising dollars to circumvent the broadcasting ban.⁵⁸

Nevertheless, like the incessant litigation against the tobacco industry,⁵⁹ the legislative efforts in Congress have been continuous.⁶⁰

Cipollone v Liggett Group, Inc., 693 F. Supp. 208, 219 (D. N.J. 1988), *aff'd in part, rev'd in part, and remanded*, 893 F.2d 541 (3d Cir. 1990), *aff'd in part, rev'd in part, and remanded*, 505 U.S. 504 (1992), the jury ordered the Liggett Group to pay \$400,000 of compensatory damages to the husband of the deceased smoker on an express warranty claim. The Supreme Court affirmed the Third Circuit's decision that federal statute did not preempt the common law warranty claim, but remanded the case for examining the express warranty issue. See *Cipollone*, 505 U.S. at 530-31. Moreover, in September 1995, a San Francisco jury awarded \$1.3 million in compensatory damages and \$700,000 in punitive damages, the largest damage award in a tobacco liability suit, against Lorillard, Inc. and its filter-manufacturer for using asbestos in filters in the 1950s. See Suein L. Hwang, *Former Smoker Is Awarded \$2 Million*, WALL ST. J., Sept. 5, 1995, at B6.

58. See Alan Blum, M.D., *The Marlboro Grand Prix: Circumvention of the Television Ban on Tobacco Advertising*, 324 NEW ENG. J. MED. 913, 914 (1991). For discussion of the tobacco companies' heavy use of motorsports in advertising, see Locke, *infra* note 60, at 221.

59. The wave of litigation against the tobacco industry has continued to increase. Most notably, a suit for \$200 billion in damages has been filed in a Florida court by a group of smokers suffering from lung cancer and emphysema, contending addiction as the cause. See Michael Janofsky, *Ailing Smokers Sue the Tobacco Industry*, N.Y. TIMES, May 7, 1994, at A11. The plaintiffs accused the industry of deceiving the public about the health problems resulting from smoking by denying the addictiveness of cigarettes, and suppressing research. See *id.*

60. Approximately 20 bills on reducing the rate of tobacco consumption in the United States were pending in Congress during the period between 1985 and 1987. Typically, these bills include, *inter alia*: (1) S. 1950, 99th Cong. (1985) (to amend the Internal Revenue Code to disallow an income tax deduction for advertising any tobacco product); (2) Health Protection Act of 1986, H.R. 4972, 99th Cong. (1986) (to prohibit advertising or promotion of all tobacco products in any medium); (3) Nonsmokers Health Protection Act of 1987, H.R. 1008, 100th Cong. (1987) (to restrict smoking in federal buildings); (4) Prohibition of Smoking in Public Conveyances Act of 1987, S. 51, 100th Cong. (1987) (to ban all smoking on public conveyance such as planes, trains and buses, and restricts smoking in terminal and station buildings); (5) Health Protection Act of 1987, H.R. 1272, 100th Cong. (1987) (to amend the Federal Cigarette Labeling and Advertising Act and the Comprehensive Smokeless Tobacco Health Education Act of 1986 to prohibit "any consumer sales promotion" of tobacco products); and (6) Health Protection Act of 1987, H.R. 1532, 100th Cong. (1987) (to disallow any consumer sales promotion of tobacco products, including sponsorship of athletic or artistic events under the registered brand name of a tobacco product). House Bills 1272 and 1532 are similar to House Bill 4972. The subsequent bills are mainly products of modified versions of the previous ones.

Among numerous bills before Congress, the Health Protection Act of 1986 ("House Bill 4972"),⁶¹ the Tobacco Control and Health Protection Act of 1990 ("House Bill 5041"),⁶² and the Tobacco Education and Child Protection Act of 1993 ("House Bill 3614")⁶³ are closely related to the topic of this Note and merit discussion.

1. Health Protection Act

In 1985, the American Medical Association ("AMA") overwhelmingly voted to urge Congress to outlaw tobacco advertising and promotion.⁶⁴ In 1986, after finding that smoking posed severe health hazards,⁶⁵ Representative Mike Synar of

The later bills include, *inter alia*: (1) Children's Health Protection Act of 1989, H.R. 1493, 101st Cong. (1989) (to modify House Bill 1532 and allow tobacco companies to sponsor events only in the registered company name, logo, or symbol without pictures or graphics); (2) Tobacco Control and Health Protection Act, H.R. 5041, 101st Cong. (1990) (to completely ban corporate use of tobacco product trademarks in the sponsoring of sporting and entertainment events); (3) Fairness in Tobacco and Nicotine Regulation Act of 1993, H.R. 2147, 103d Cong. (1993) (to give the FDA authority to regulate the manufacture, labeling, distribution, sale, promotion, and advertising of tobacco products); (4) Tobacco Education and Children Protection Act of 1993, H.R. 3614, 103d Cong. (1993) (to restrict the advertising and promotion of tobacco products through amendment of existing regulations); and (5) Youth Smoking Prevention Act of 1995, H.R. 2414, 104th Cong. (1995) (to prohibit the sale of tobacco products to teenagers under 18 years old and to ban billboard advertising near schools and playgrounds). For additional background information about the relevant congressional bills before 1994, see David A. Locke, Note, *Counterspeech as an Alternative to Prohibition: Proposed Federal Regulation of Tobacco Promotion in American Motorsport*, 70 IND. L.J. 217 (1994).

61. H.R. 4972, 99th Cong. (1986).

62. H.R. 5041, 101st Cong. (1990).

63. H.R. 3614, 103d Cong. (1993).

64. See Philip M. Boffey, *A.M.A. Votes to Seek Total Ban on Advertising Tobacco Products*, N.Y. TIMES, Dec. 11, 1985, at A1.

65. The findings in the bill include, in part, the following:

(1) tobacco use is the leading preventable cause of illness and premature death in the United States, and is the major cause of lung, larynx, oral cavity, and esophagus cancer and is a contributory factor in cancer of the urinary bladder, kidney, and pancreas;

(2) cigarette smoking is the primary cause of lung cancer in women, responsible for about 75 percent of 38,600 deaths per year;

(3) the United States health care system spent an estimated \$22 billion to treat smoking related illnesses in 1985, of which the federal government paid about \$4.2 billion, while lost productivity costs due the such illnesses and premature death were \$43 billion;

Oklahoma and several other congressmen introduced the Health Protection Act.⁶⁶

House Bill 4972 represented a sweeping attempt to ban “[a]ll consumer sales promotion of tobacco products by manufacturers, packers, distributors, importers, or sellers of such products in or affecting commerce.”⁶⁷ The ban covered a wide array of advertising media including radio, television, newspaper, magazines, billboards, posters, signs, decals, match books, retail outlet posters (except price information), and all other materials used to promote the sale or consumption of tobacco products.⁶⁸ The bill also prohibited advertising promotion allowances, premiums and free samples, and the sponsorships of athletic, artistic or other events under the registered brandname of a tobacco product.⁶⁹

House Bill 4972’s outright and indiscriminate ban on all kinds of advertising was overbroad. Even after its sponsors substantially compromised the broad ban by permitting some type of corporate tobacco sponsorship and black-and-white print advertisements under the Children’s Health Protection Act of 1989 (“House Bill 1493”),⁷⁰ these concessions failed to gain support in the House Committee on Energy and Commerce.⁷¹

2. Tobacco Control and Health Protection Act

In 1990, the anti-smoking advocates, represented by

(4) sales promotion of tobacco products undermines the credibility of government and private health education campaigns against smoking.

H.R. 4972, 99th Cong. § 2 (1986).

66. See § 1.

67. See § 3(a).

68. See § 5(2)(A).

69. See §§ 5(2)(B)-(D).

70. H.R. 1493, 101st Cong. (1989). House Bill 1493 provides two attempts at compromise: (1) tobacco companies would be allowed to sponsor events, vehicles, sports equipment, and toys “in the name of a registered brand name, logo, or symbol” of a tobacco product, provided that the registered brand name was also the name of the corporate manufacturer and (2) print advertisements would be permitted so long as they utilized a black-and-white format without pictures or graphics. § 3(b)(2), § 3(a)(3).

71. See Locke, *supra* note 60, at 234.

Representatives Henry Waxman from California and Mike Synar from Oklahoma,⁷² introduced the ambitious Tobacco Control and Health Protection Act.⁷³ Unlike House Bill 1493, which allowed certain types of sports sponsorship by tobacco companies,⁷⁴ House Bill 5041 banned the corporate use of tobacco product brandnames in sports and entertainment events.⁷⁵ Similar to House Bill 1493, House

72. Representative Synar, a long-time anti-smoking activist, lost his re-election bid in the November 1994 congressional race. It is not clear how Mr. Synar's absence in the House of Representatives will affect anti-smoking legislative efforts.

73. See *supra* note 62 and accompanying text.

74. See *supra* note 70.

75. H.R. 5041, 101st Cong. (1989). Section 6 of the bill provides in relevant part:

(a) Advertising. It shall be unlawful for any person to manufacture, package, or distribute for sale within the United States any tobacco product except in accordance with the following requirements:

(1) No human or cartoon figure or facsimile thereof, no tobacco product trademark logo or symbol, and no picture, other than the picture of a single package of the tobacco product being advertised which meets the requirement of subsection (C) displayed against a neutral white background, shall be used in or as part of any tobacco product advertisement.

(2) The print in any tobacco product advertisement, including the print on any tobacco product package in any tobacco product advertisement, shall be black on a white background.

(3) No tobacco product shall be located—

(A) in or on a sports stadium or other sports facility or any other facility where sporting activity is regularly performed,

(B) on cars, boats, or other sporting equipment used in or associated with any sporting event, or

(C) within 1,000 feet of any school which student under the age of 21 years of age regularly attend.

(b) Promotion. It shall be unlawful . . .

(1) to distribute or cause to be distributed any tobacco products as a free sample or to make any tobacco product available at no or reduced cost through use of coupons or other promotional method,

(2) to sponsor or cause to be sponsored any athletic, music, artistic, or other event in the name of a tobacco product trademark . . . ,

(3) to market or cause to be marketed non-tobacco products (including toys) or services which bears the name of a tobacco product trademark,

(4) to pay or cause to be paid to have any tobacco product or any tobacco product trademark appear in any movie, music video, television show, play, video arcade game, or other form of entertainment, or

(5) to pay or cause to be paid to have any tobacco product trademark appear on any vehicle, boat, or other equipment used in sports.

(c) Tobacco Product Packages. It shall be unlawful . . . if the package of the product . . . contains a picture or human figure or facsimile thereof or cartoon figure . . .

Bill 5041 continued to allow the black-and-white print advertisements.⁷⁶ Notably, House Bill 5041 explicitly expanded the age range of the protected young people to twenty-one years of age and specifically prohibited outdoor advertising signs within 1,000 feet of schools regularly attended by students under twenty-one years of age.⁷⁷ President Clinton's executive proposal banning certain outdoor cigarette advertising adopted the concept of a 1,000-foot no-advertising zone.⁷⁸

However, powerful lobbying by the tobacco industry eliminated the advertising and promotion restrictions, leaving only the black-and-white format requirement intact.⁷⁹ Moreover, the House Committee on Energy and Commerce took no action on the toothless revised bill during the 101st Congress, thus providing another example of a fruitless legislative attempt to regulate cigarette advertising and promotion. The failure of House Bills 4972, 1493, and 5041 implies that a cigarette advertising bill is unlikely to pass various legislative hurdles if its scope and manner of regulation are not narrowly calculated.

3. Tobacco Education and Child Protection Act

House Bill 3614 represents a change of legislative technique.⁸⁰ The bill's sponsors, Representatives Waxman and Synar, used the

(d) Audio Tape, Audio Discs, Videotape, and Film. It shall be unlawful to advertise any tobacco product on any audio tape, audio disc, videotape, video arcade game, or film.

H.R. 5041, 101st Cong. § 6.

76. See H.R. 5041, 101st Cong. § 6(a)(2).

77. See H.R. 5041, 101st Cong. § 6(a)(3)(c). Cf. H.R. 2414, 104th Cong. § 3(a)(K)(I) (1995) (prohibiting tobacco billboard advertising "within the line of sight of any individual in a school or in an area designated as a playground"); H.R. 3614, 103d Cong. § 6(a)(2)(B) (1993) (prohibiting tobacco product advertisement "within 2,000 feet of any school which students under the age of 18 years of age regularly attend").

78. See *supra* note 8 and accompanying text for President Clinton's proposal.

79. See Julie Rovner, *House Subcommittee Approves Strong Antitobacco Measure*, 48 CONG. Q. 2922 (1990). The bill's provisions on restricting advertising and promotion were regarded "by far the most contested portion of the bill." *Id.*

80. H.R. 3614, 103d Cong. (1993).

goal of protecting children to justify the means of restricting adults' access to commercial information about tobacco products.⁸¹ House Bill 3614 uniquely added a declaration-of-purpose section to the beginning of the bill, providing as its objective to protect children's interests by ensuring accurate information about the adverse health effects of smoking, and by requiring the display of such information on tobacco packaging, advertising and promotion.⁸² In contrast, House Bills 4972 and 5041 lacked a declaration-of-purpose section and started immediately with the fact-finding sections.⁸³ Although this structural revision does not necessarily indicate a substantive policy change, it may signal a change in legislative technique by asserting a compelling societal interest to preempt challenge.⁸⁴

On the other hand, House Bill 3614 demonstrates legislative flexibility by markedly reducing the restrictions on advertising tobacco products at sporting events.⁸⁵ House Bill 5041, the immediate

81. H.R. 3614, 103d Cong. § 2.

82. *Id.* The "purpose" section reads:

It is the purpose of this Act to assure that accurate information on the adverse health effects of tobacco use are displayed on tobacco product packaging, advertising, and promotion in an effective means that will assist—

- (1) adolescents who are tempted to start using tobacco products,
- (2) adolescent who are experimenting with tobacco and are not yet addicted to tobacco, and
- (3) adults and adolescents who are considering quitting, to reduce serious risks to their health.

Id.

83. *See supra* notes 65, 75.

84. *See Locke, supra* note 60, at 236 ("With protection of children's health as the stated purpose, it is presumptively easier for the government to show both a substantial interest and direct advancement of that interest.") (footnote omitted).

85. *See* H.R. 3614, 103d Cong. § 6(b). Section 6 of the bill provides, in relevant part:

(a) Advertising. It shall be unlawful for any person to manufacture, package, or distribute for sale within the United States any tobacco product unless the advertising for such tobacco product conforms with the following requirements:

(1) Audio Tape, Audio Discs, Videotape, and Film. No tobacco product may be advertised on any audio tape, audio disc, videotape, video arcade game, or film.

(2) Location. No tobacco product advertisement shall be located—

(A) in or on a sports stadium or other sports facility or any other facility where sporting activity is performed, or

(B) within 2,000 feet of any school which students under the age of 18 years of

legislative predecessor of House Bill 3614, made it unlawful to advertise or promote cigarettes by showing product trademarks on sports facilities, vehicles, or sports equipment.⁸⁶ Under House Bill 3614, however, it is permissible for tobacco product trademarks to appear under those circumstances as long as the equipment or clothing displays a warning label.⁸⁷ Moreover, House Bill 3614 allows the sponsoring of a sporting event in the name of a tobacco product trademark if health information, which is “in the same proportion or prominence as the sponsor [having] sponsored such event,” is simultaneously disseminated at the event.⁸⁸

The structural and substantive changes under House Bill 3614 may represent a revised strategy by Congress to set a more defined end of protecting the compelling interest of children in regulating cigarette advertising. However, the constitutional viability of a legislative act that restricts cigarette advertising will ultimately depend on the Supreme Court’s treatment of judicial review standard,

age regularly attend.

.....

(b) Promotion. It shall be unlawful for any person to manufacture, package, or distribute for sale within the United States any tobacco product unless the promotion for such tobacco product conforms with the following requirements:

(1) Distribution. No tobacco product may be distributed or caused to be distributed as a free sample.

(2) Vending Machine. No tobacco product may be sold or distributed through a vending machine

(3) Sponsorship. No athletic, music, artistic, or other event may be sponsored or caused to be sponsored in the name of a tobacco product trademark . . . unless the Secretary has approved a plan for the simultaneous dissemination of health information at such event in the same proportion or prominence as the sponsor has sponsored such event.

(4) Appearance with Entertainment. To pay or cause to be paid to have any tobacco product or any tobacco product trademark appear in any movie, music video, television show, play, video arcade game, or other form of entertainment.

(5) Sports Equipment. No tobacco product trademark may appear on any vehicle, boat, or other equipment or clothing used in sports unless such equipment or clothing displays a health warning pursuant to regulations of the Secretary which assure prominence equivalent to that required by section 5(b)(1).

Id.

86. H.R. 5041, 101st Cong. § 6(a)(3).

87. H.R. 3614, 103d Cong. § 6(b)(5).

88. H.R. 3614, 103d Cong. § 6(b)(3).

currently the *Central Hudson* test. Therefore, the outcome of the Supreme Court's review in *Penn Advertising* should have a great impact on the future legislative regulation of cigarette advertising.

II. THE CENTRAL HUDSON TEST AND ITS APPLICATION IN REVIEWING ADVERTISING REGULATIONS

A. *The Central Hudson Test*

In 1942, the Supreme Court held that the government had unlimited power to ban advertising because the First Amendment did not protect commercial speech.⁸⁹ Although the Court radically limited this holding in 1975,⁹⁰ it was not until its 1976 decision in *Virginia*

89. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) ("We are . . . clear that the Constitution imposes no . . . restraint on government as respects purely commercial advertising. Whether, and to what extent, one may . . . promote or pursue a gainful occupation in the streets . . . [is a] matter[] for legislative judgment."). In *Valentine*, the Court held that a New York ordinance banning distribution of business advertisements in street did not violate the First Amendment. *See id.* at 55.

In concluding that the First Amendment does not protect commercial speech, however, the Court provided no precedent or other authority. The Court seemed to conclude that commercial speech is nothing more than another form of commercial activity that can be regulated by the states in any manner that it considers reasonable. *See* NOWAK & ROTUNDA, *supra* note 11, § 16.27. This type of analysis, proposed by the Court in the determining the constitutionality of a regulation on commerce, is an economic due process analysis derived directly from *Nebbia v. New York*: "If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied. . . ." 291 U.S. 502, 537 (1934).

90. *See Bigelow v. Virginia*, 421 U.S. 809 (1975) (holding a Virginia statute prohibiting abortion advertising unconstitutional because the "commercial aspects" of the abortion advertising did not negate its First Amendment protection, and because the advertising included information of public interest involving the exercise of the freedom of opinion dissemination).

During the period between *Valentine* and *Bigelow*, the Court adhered to the *Valentine* decision and employed a "dominant purpose" test, which examined whether the main motive underlying the speech was one of profit-seeking. *See* NOWAK & ROTUNDA, *supra* note 11, § 16.28, at 1064. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 265-66 (1964) (accord full protection to a political advertisement even though the newspaper was paid to print it); *Breard v. Alexandria*, 341 U.S. 622, 641-44 (1951) (holding that a statute preventing door-to-door solicitation is constitutional because the selling rendered it a commercial transaction); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943) (holding that the selling of religious materials did not transform the spreading of religious beliefs into commercial speech and was thus protected).

*State Board of Pharmacy v. Virginia Citizens Consumer Council*⁹¹ that the Court expressly recognized that commercial speech deserves First Amendment protection.⁹² The Court, however, limited the protection of commercial speech in other cases by pointing out that it has only a secondary position in the ranking of First Amendment rights.⁹³

In *Central Hudson Gas & Electric Corp. v. Public Service*

91. 425 U.S. 748 (1976). In this case, the Court held a Virginia statute banning the publication or advertising of prices for prescription drugs by licensed pharmacists unconstitutional. *See id.* at 771-73. The Court found that the consumers' interests in the free flow of pricing information, which is indispensable to the making of informed economic decisions, outweighs the state's interest in maintaining the professionalism of pharmacists. *See id.* at 765-70. The Court emphasized that the ban in question does not have a direct effect on professional standards. *See id.* at 769.

92. *See id.* Justice Rehnquist filed the only dissent in *Virginia Pharmacy*. He opposed extending the First Amendment protection to cover purely commercial activity. *See id.* at 781-84 (Rehnquist, J., dissenting). According to Justice Rehnquist, the propriety of allowing the flow of free and full information should be left to state legislatures; the Court should not mandate to states how they must regulate their economic or professional markets. *See id.* at 784 (citing *Nebbia v. New York*, 291 U.S. 502 (1934)).

93. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). *See also Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2375 (1995) (holding that review of commercial speech regulation is one of intermediate scrutiny); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505-07 (1981) (plurality opinion) (stating that protection of commercial speech is significantly weaker than noncommercial speech in that regulation of the latter is examined under a higher degree of scrutiny). For a detailed discussions on commercial speech, see C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 49 (1976) (advancing the somewhat metaphysical notion that because profit orientation is externally imposed on capitalist enterprises by the market, commercial speech cannot be rooted in freedom of choice and thus can justifiably be restricted); Thomas H. Jackson & John Calvin Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 30-31 (1979) (equating commercial speech with all other economic activities).

Notably, the Supreme Court has placed some types of political speech on the same level as commercial speech. *See, e.g., Cox v. Louisiana*, 379 U.S. 559, 562 (1965) ("A State may adopt safeguards necessary and appropriate to assure that the administration of justice . . . is free from outside control and influence."); *Dennis v. United States*, 341 U.S. 494, 516-17 (1951) (plurality opinion) (applying the "clear and present danger" test and holding communist speech advocating the overthrow of the government too dangerous to protect); *Schenck v. United States*, 249 U.S. 47 (1919) (applying the "clear and present danger" test, and holding that a circular which seemed effective in encouraging draft resistance during wartime was not protected). *But see NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (holding consumer boycott for political purposes protected by the First Amendment); *New York Times Co. v. United States*, 403 U.S. 713, 718 (1971) (permitting publication of Pentagon papers despite government's argument that disclosure would threaten national security).

Commission of New York,⁹⁴ the Court attempted to clarify the level of commercial speech protection and the standard of constitutional review. The Court set out a detailed four-prong test to balance commercial speech rights and the government's regulation of advertising.⁹⁵ The Court in *Central Hudson* struck down a New York regulation prohibiting promotional advertising by utilities companies.⁹⁶ The Court rejected the state's claim that a utility's monopoly status, justified a ban on advertising because the advertising was useless in a "noncompetitive market."⁹⁷

Under the *Central Hudson* test, four conditions must be met for a regulation restricting commercial speech to pass First Amendment muster. First, the commercial speech "must concern lawful activity and not be misleading" (if not, the government can regulate or ban the speech and the remainder of the test is not applicable).⁹⁸ Second, the government's interest in regulating the commercial speech must be substantial.⁹⁹ Third, the regulation must "directly advance[] the governmental interest asserted."¹⁰⁰ Fourth, the regulation must not be "more extensive than is necessary to serve that interest."¹⁰¹

The *Central Hudson* test can be ambiguous in application.¹⁰² The *Central Hudson* Court did not give further interpretation to the "directly advances" and "not more extensive than is necessary" standards. Thus an open question remains: what level of scrutiny should a court use to review the legislative belief that its means of regulating commercial speech are narrowly tailored to its chosen ends?

94. 447 U.S. 557 (1980).

95. See *id.* at 566.

96. See *id.* at 572.

97. *Id.* at 566-67.

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

99. See *id.*

100. *Id.*

101. *Id.* In his concurring opinion, Justice Blackmun criticized the four-prong test as insufficient, and inconsistent with the mandate of *Virginia Pharmacy* to safeguard commercial speech rights under the First Amendment. See *id.* at 573-579 (Blackmun, J., concurring).

102. For theoretically conflicting arguments on the application of the *Central Hudson* test, see Paul J. Weber and Greg Marks, *Debate on the Constitutionality and Desirability of A Tobacco-Products Advertising Ban*, 15 N. KY. L. REV. 57 (1988).

B. Application of the Central Hudson Test

1. *Posadas* and *Fox*: Heightened Deference to Legislative Judgment

The ambiguity in the level of judicial deference to legislative judgment has led to inconsistent results in post-*Central Hudson* cases. *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*¹⁰³ and *Board of Trustees of the State University of New York v. Fox*¹⁰⁴ represent a deferential approach to legislative judgment.

Posadas is the first case where the Court approved a limited ban of advertising a harmful though legal product since the emergence of the commercial speech doctrine.¹⁰⁵ The Court upheld a Puerto Rico statute prohibiting casino gambling advertisements aimed at residents of Puerto Rico, despite the fact that gambling is legal in Puerto Rico.¹⁰⁶ The Court found that the local government has a substantial interest in protecting the health, safety, and welfare of its citizenry by reducing gambling among residents to prevent the "disruption of moral and cultural patterns."¹⁰⁷ The Court also noted that the statute directly advanced the government's interest, and rejected the argument that the ban was "underinclusive" because the advertising of traditional types of gambling, such as horse racing, cock-fighting, and the lottery were not prohibited.¹⁰⁸

Writing for the majority, Justice Rehnquist applied the *Central Hudson* test in a less rigid manner, and deferred to the legislative judgment that the harm of casino gambling is significantly greater than that of traditional kinds of gambling in Puerto Rico.¹⁰⁹ Incorporating *Central Hudson's* third and fourth prongs into a "reasonable fit" standard, the Court stated that the legislature was in

103. 478 U.S. 328 (1986).

104. 492 U.S. 469 (1989). For discussion of the Supreme Court's approach in *Fox*, see Conrad, *supra* note 33.

105. See Conrad, *supra* note 33, at 79.

106. See *Posadas*, 478 U.S. at 348.

107. *Id.* at 341.

108. See *id.* at 342.

109. See *id.*

the best position to decide what measure would be effective to discourage gambling among local residents.¹¹⁰ Although the Court has not subsequently overruled *Posadas'* highly deferential approach, the plurality opinion in the 1996 case of *44 Liquormart*¹¹¹ indicates that this approach is losing its validity.¹¹²

Following *Posadas*, the Court in *Fox* took another step toward resolving the interpretation of the "not more extensive than necessary" standard. The Court upheld a state university's regulation banning "private commercial enterprises" from operating on its campuses and thus barred a company from holding a "tupperware party" in a student's dormitory.¹¹³

The *Fox* court squarely confronted the issue of whether restrictions on commercial speech are invalid if they go beyond the least restrictive means to achieve the desired end.¹¹⁴ The *Fox* Court followed the *Posadas* rationale and gave a high degree of deference to the government advertising regulation.¹¹⁵ Furthermore, the Court explained the meaning of the "reasonable fit" standard established in *Posadas*:

[W]e have not gone so far as to impose upon [regulators] the burden of demonstrating that . . . the manner of restriction is absolutely the least severe that will achieve the desired end.

110. See *id.* at 341, 343. Justice Rehnquist did not give any explanation for his assertion that if the legislature has authority to prohibit casino gambling, then it should also have authority to prohibit casino advertising. See *id.* at 354 n.4. The plurality opinion in *44 Liquormart, Inc. v. Rhode Island* disagrees with this "greater-includes-the-lesser" notion because it is "inconsistent with logic and well-settled doctrine." 116 S. Ct. 1495, 1512 (1996) (plurality opinion).

111. 116 S. Ct. 1495 (1996) (plurality opinion).

112. See *id.* at 1511 ("[W]e are now persuaded that *Posadas* erroneously performed the First Amendment analysis.") (opinion by Stevens, Kennedy, Souter, and Ginsberg, JJ.).

113. See 492 U.S. at 471-72. The regulation provides:

No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events.

Id. (quoting SUNY Resolution 66-156 (1979)).

114. See *id.* at 473.

115. See *id.* at 480.

What our decisions require is a “‘fit’ between the legislature’s ends and the means chosen to accomplish those ends,”—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is “in proportion to the interest served”; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.¹¹⁶

In addition, although the Court required the state to carry the burden of justifying its restrictions,¹¹⁷ the Court rejected the “least restrictive test.”¹¹⁸ The “reasonable fit between means and ends” standard adopted by the *Fox* Court is more flexible and makes a stronger case for advertising regulations to withstand constitutional scrutiny.¹¹⁹ Indeed, one commentator stated that the *Fox* standard would boost the chances of the Court’s acceptance of tobacco advertising limitations.¹²⁰ However, as the following section notes, the Court’s post-*Fox* cases do not provide a bright line rule.¹²¹

2. From *Discovery Network* to *Florida Bar*: Defining the Perimeter of Intermediate Scrutiny

The Court’s post-*Fox* cases in the 1990s applied the *Central Hudson* test inconsistently. Although the Court did not expressly limit *Posadas* and *Fox*, the ambiguity of the “reasonable fit” standard gave ample room for differing interpretations. One line of cases invalidated advertising restrictions under an implicitly enhanced

116. *Id.* (citations omitted).

117. *See id.*

118. *See id.* at 476-81. *See, e.g.,* *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985) (stating that the state must find less restrictive means to achieve its goal); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 564 (1980) (“[I]f the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.”).

119. *See* Albert P. Mauro, Jr., Comment, *Commercial Speech After Posadas & Fox: A Rational Basis Wolf in Intermediate Sheep’s Clothing*, 66 TUL. L. REV. 1931, 1950 (1992).

120. *See* Conrad, *supra* note 33, at 92.

121. *See infra* notes 125-69 and accompanying text (discussing the Court’s commercial speech decisions in the 1990s).

scrutiny, which requires the choosing of a “less-burdensome alternative.”¹²² A second line of cases, however, employed a higher level of judicial deference and upheld advertising regulations by reiterating that the “least restrictive means” test plays no role in intermediate scrutiny analysis under the *Central Hudson* test.¹²³ In addition, the Court tried to establish a compromise approach between the two lines.¹²⁴

a. The “Less-Burdensome-Alternative” Approach: An Enhanced Level of Intermediate Scrutiny

Beginning in 1993 with *City of Cincinnati v. Discovery Network, Inc.*,¹²⁵ the Court moved toward subjecting regulation of commercial speech to a higher degree of scrutiny.¹²⁶ Although continuing to cite *Posadas* and *Fox* with support, the Court altered its previous deferential stance by requiring the government to justify its advertising restriction by choosing a less burdensome, though not the least burdensome, alternative.¹²⁷

122. See, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993) (“[I]f 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.”).

123. See *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2705 (1993).

124. See *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2380 (1995).

125. 113 S. Ct. 1505 (1993). *Discovery Network* is the first case after *Fox* where the Court directly applied the *Central Hudson* test in reviewing the advertising regulation. But see *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387-89 (1992) (extending the presumptive unconstitutionality of content-based regulation to commercial speech); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388-91 (1992) (holding that state regulation of airline advertising is preempted by the Federal Airline Deregulation Act of 1978).

126. See *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995) (invalidating a federal ban on beer labeling of alcohol content); *Ibanez v. Florida Dep’t of Bus. and Prof’l Regulation*, 114 S. Ct. 2084 (1994) (holding unconstitutional the reprimand of a lawyer who advertised her true credentials as attorney, certified accountant (CPA), and certified financial planner (CFP)); *Edenfield v. Fane*, 113 S. Ct. 1792 (1993) (invalidating a state ban on in-person solicitation by CPAs); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993) (striking down a city ban of commercial newsracks in public property).

127. See *Rubin*, 115 S. Ct. at 1593-94 (discussing other less-burdensome options available to prevent an alcoholic content strength war); *Edenfield*, 113 S. Ct. at 1800 (stating that the government has the burden of proving that the “restriction will in fact alleviate [the harms] to a material degree”) (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648-49

The *Discovery Network* Court struck down a Cincinnati city ordinance banning newsracks containing commercial handbills but allowing those containing newspapers.¹²⁸ Because the ban achieved only a “marginal degree of protection” for the city’s safety and aesthetics interest, the Court held that there was no reasonable relationship between the means and the end.¹²⁹

The dicta in *Discovery Network* arguably enhanced the *Fox* “reasonable fit” threshold.¹³⁰ While not limiting *Fox*, the Court stressed that the government must carefully calculate the costs of limiting commercial speech and must affirmatively prove the reasonable fit between ends and means.¹³¹ In contrast to the *Fox* Court, which did not inquire into the regulator’s study about the advertising restriction, the *Discovery Network* Court found that the city failed to either investigate the new development of the newsrack advertising business or to explore the alternatives to regulating the size, appearance, and number of newsracks.¹³²

In *Edenfield v. Fane*,¹³³ the Court continued the enhanced intermediate scrutiny implied in *Discovery Network*. In *Edenfield*, the Court held that Florida’s ban on in-person solicitation by certified public accountants (CPAs) violated the First Amendment.¹³⁴

(1985)); *Discovery Network*, 113 S. Ct. at 1510 n.13 (noting that the availability of “less-burdensome alternatives” is relevant in deciding whether there is a reasonable fit between ends and means).

128. See *Discovery Network*, 113 S. Ct. at 1517.

129. *Id.* at 1515 (reasoning that an advertising restriction will be invalid if “provid[ing] only the most limited incremental support for the interest asserted,” and if “achiev[ing] only a marginal degree of protection”) (quoting *Bolger v. Youngs Drug Products*, 463 U.S. 60, 73 (1983) (citations omitted)). The Court also denied the city’s argument that the newsrack ban is content-neutral and is a valid time, place or manner restriction on protected speech. See *id.* at 1516 (“[G]overnment may impose reasonable restrictions on the time, place or manner of engaging in protected speech provided that they are adequately justified ‘without reference to the content of the regulated speech.’”) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

130. See *supra* note 122.

131. See 113 S. Ct. at 1510 n.12 (requiring “the government goal to be substantial, and the cost to be carefully calculated,” and the government to “affirmatively establish the reasonable fit”) (quoting *Fox*, 492 U.S. at 480) (emphasis added).

132. See *id.* at 1510.

133. See 113 S. Ct. 1792.

134. See *id.* at 1804; see also *Ibanez v. Florida Dep’t of Bus. & Prof’l Regulation*, 114 S.

Although recognizing the state's substantial interest in protecting consumers from fraud or overreaching by CPAs and in maintaining CPAs' independent judgment, the Court found that the state failed to prove that the ban *directly* and *materially* advanced those interests.¹³⁵

Furthermore, the *Edenfield* court rejected the state's argument that the ban can be justified as a prophylactic rule because the CPA solicitation is not inherently overreaching.¹³⁶ The Court found that the regulator provided no study or anecdotal evidence to prove the harms of CPA solicitation and concluded that the state's concern was simply a supposition.¹³⁷

Similar to *Discovery Network* and *Edenfield*, the Court in *Rubin v. Coors Brewing Co.*¹³⁸ required the government to produce actual evidence, not mere "speculation or conjecture," that the regulation directly advanced its goals and was not more extensive than necessary.¹³⁹ While recognizing the federal government's substantial interest in protecting the public health and safety by preventing a competition of alcoholic strength,¹⁴⁰ the Court invalidated a federal rule preventing beer labels from indicating alcoholic content because the government failed to produce non-speculative evidence.¹⁴¹

Ct. 2084 (1994) (holding that the First Amendment protects a CPA, who is also a lawyer, to use her non-misleading credentials of CPA and CFP on her law firm stationary, business cards, and in advertisements).

135. See 113 S. Ct. at 1801-02.

136. See *id.* at 1802-03 (differentiating the CPAs who are trained to be independent and objective, rather than persuasive, from advocates such as lawyers). Cf. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978) (upholding Ohio's ban on in-person solicitation by lawyers because lawyer solicitation is "inherently conducive to overreaching and other forms of misconduct").

137. See 113 S. Ct. at 1800. The Court also noted that a report of the American Institute of CPAs provided no empirical data supporting the state's concern. See *id.* at 1801.

138. 115 S. Ct. 1585 (1995).

139. *Id.* at 1592 (quoting *Edenfield v. Fane*, 113 S. Ct. at 1800). In his concurrence, Justice Stevens urged a further extension of his majority opinion in *Discovery Network* that truthful and non-misleading commercial speech should receive full First Amendment protection, as opposed to "relying on the formulaic approach announced in *Central Hudson*," which he described as "misguided." *Id.* at 1594-95 (Stevens, J., concurring). He also argued that a "rigid commercial/noncommercial distinction" is artificial. *Id.* at 1595.

140. See *id.* at 1594.

141. See *id.* at 1593. The Court also emphasized that the beer label ban obviously deprived consumers of important product information. See *id.* at 1592.

Applying the third and fourth prongs of the *Central Hudson* test, the *Rubin* Court found that the regulatory scheme was “irrational” because it required alcohol content disclosure of wines and spirits on labels and did not apply in states mandating alcohol content disclosure.¹⁴² Noting further that the government failed to offer convincing evidence that the ban prevented strength wars, the Court held that the ban did not advance the asserted goal in a “direct and material fashion.”¹⁴³ Moreover, the Court stated that the ban was more excessive than necessary because the government did not choose alternatives that were less intrusive on brewers’ First Amendment rights, such as directly limiting the alcohol content of beers or prohibiting advertising of high alcohol strength.¹⁴⁴

Notably, the *Rubin* court limited the famous Rehnquist pronouncement in *Posadas* indicating that if government can ban an unlawful product, it has the power to ban advertising for the product.¹⁴⁵ The *Rubin* court noted that the pronouncement was mere dictum, unnecessary for the decision in *Posadas*.¹⁴⁶ Furthermore, the *Rubin* Court indicated that neither *Posadas* nor *United States v. Edge Broadcasting Co.*¹⁴⁷ compelled the Court “to craft an exception to the *Central Hudson* standard,” giving legislatures “broader latitude to regulate speech that promotes socially harmful activities, such as

142. See *Rubin*, 115 S. Ct. at 1593.

143. *Id.* at 1594. The *Rubin* Court based its conclusion on two observations particularly relevant to the analysis of cigarette billboard advertising ban in Part IV, *infra*. First, no witness, deposition, or credible evidence shows that alcohol content disclosure on labels would promote strength wars. See *id.* at 1593 (citing district court’s finding). Second, disseminating factual information about alcohol content does not demonstrate that brewers intend to compete on the basis of alcohol content. See *id.* However, in the cigarette advertising context, there are ample independent studies showing that cigarette advertising promotes cigarette consumption by teenagers, and cigarette companies intend to target the teenager market by using attractive images in billboard advertising. See *infra* Part IV.B.

144. See *Rubin*, 115 S. Ct. at 1593-94.

145. See *id.* at 1589-90 n.2. Justice Rehnquist, who wrote for the majority in *Posadas*, joined the *Rubin* majority and did not opine on the *Rubin* court’s reading of his dictum in *Posadas*. See *supra* note 110 (discussing Justice Rehnquist’s dictum in *Posadas* that a power to regulate a product includes a subordinate power to regulate its advertising).

146. See *id.* at 1589-90 n.2.

147. 113 S. Ct. 2696 (1993) (upholding a federal ban on radio advertising of gambling by stations located in non-lottery states).

alcohol consumption," gambling, and the like.¹⁴⁸ The *Rubin* Court's implicit limitation of the Rehnquist pronouncement only appears in a footnote.¹⁴⁹ This placement choice raises questions about the degree to which the Court has limited Rehnquist's pronouncement in *Posadas*.

While the *Discovery Network* line of cases discussed do not expressly restrict judicial deference to the legislature, a principle developed in *Posadas* and *Fox*, the cases require legislatures to choose less burdensome means of regulating commercial advertising.

b. *Edge*: Higher Deference to Legislative Regulation of "Vice" Activities Advertising

*United States v. Edge Broadcasting Co.*¹⁵⁰ represents a differing line of rationale by the Court in the post-*Fox* era. Consistent with *Posadas*, the Court applied a low degree of scrutiny to the regulation of gambling advertising, which the Court designated as a "vice" activity.¹⁵¹

In *Edge*, the Court upheld a federal law banning gambling advertising by radio stations located in the non-gambling states.¹⁵²

148. 115 S. Ct. at 1590 n.2.

149. *See id.*

150. 113 S. Ct. 2696 (1993). *Edge Broadcasting Company* operates a radio station in Moyock, North Carolina, a non-lottery state. Moyock is located only three miles away from the border with Virginia, a lottery state. Its listening audience is composed of 92.2% Virginians and only 7.8% are residents of North Carolina. *Edge* derives 95% of this advertising revenue from Virginia sources. *See id.* at 2702.

151. *See id.* at 2703 ("[T]he activity underlying the relevant advertising—gambling—implicates no constitutionally protected rights; rather, it falls into a category of 'vice' activity that could be, and frequently has been, banned altogether."). *Cf.* 113 S. Ct. at 2710 n.3 (Stevens, J., dissenting) ("[T]he fact that underlying conduct is not constitutionally protected increases . . . the value of unfettered exchange of information across state lines. When a state has proscribed a certain product or service, its citizens are all the more dependent on truthful information regarding the policies and practices of other States.").

152. *See* 113 S. Ct. at 2708. *Edge* involved section 316 of the Communications Act of 1934 which bans broadcast gambling advertising, with exemptions for newspapers and broadcasters licensed to a state that conducts a state-run lottery. *See id.* at 2701. The Court noted that the exemption is to "accommodate the operation of legally authorized State-run lotteries consistent with continued Federal protection to the policies of non-lottery States." *Id.* (citing, *inter alia*, S. REP. NO. 93-1404, at 2 (1974)).

The ban prevented a small portion of residents in North Carolina, a non-gambling state, from listening to gambling advertising by a North Carolina radio station, which is close to and has most of its audience in Virginia, a lottery state.¹⁵³ Nevertheless, the Court held that this gambling advertising ban serves the congressional policy of properly balancing the interests of gambling and non-gambling states.¹⁵⁴ Given the importance of this balancing interest, the Court stated that “even if . . . there were only [a] *marginal* advancement of that interest,” it would be “plainly” true that the gambling advertising ban directly advances that interest.¹⁵⁵ Likewise, in *Rubin*, the Court suggested that the critical nature of the interest justified a greater deference to legislative judgment, even if that judgment was only based on common sense.¹⁵⁶

Although decided after *Discovery Network* and *Edenfield* during the Court’s 1992 term, *Edge* notably did not coordinate the different levels of judicial deference in the *Posadas-Fox* analysis and the

153. See *id.* at 2702.

154. See *id.* at 2704.

155. *Id.* at 2704 (emphasis added). In contrast, *Discovery Network* reasoned that if a regulation offers only “the most limited incremental support” for the asserted interest, and if it achieves only a “marginal degree of protection,” such regulation is invalid. *Discovery Network*, 113 S. Ct. at 1515 (citing *Bolger v. Youngs Drug Prods.*, 463 U.S. 60, 73 (1983)). However, the context in *Edge* is significantly different. The balancing of gambling and non-gambling states’ interests is a federalism principle and a congressional policy. In contrast, the interest involved in *Discovery Network* only concerns the city’s safety and aesthetics. See *supra* note 125 and accompanying text (discussing *Discovery Network*). Therefore, the *Edge* Court’s comment on “marginal degree” is valid only in a very narrow context.

156. See 113 S. Ct. at 2704. The Court stated:

Congress plainly made the *commonsense judgment* that each North Carolina station would have an audience in that State, even if its signal reached elsewhere and that enforcing the statutory restriction would insulate each station’s listeners from lottery ads and hence advance the governmental purpose of supporting North Carolina’s laws against gambling.

Id. (emphasis added). See also *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 509 (1981) (plurality opinion) (upholding a city ban on any billboard that constituted a distraction and therefore a hazard to traffic safety, despite a claim that the record did not adequately show any connection between billboards and traffic safety). The Court in *Metromedia* also stated that a court may be satisfied by the legislative “accumulated, common-sense judgments” if “not manifestly unreasonable.” *Id.*

Discovery Network-Edenfield analysis.¹⁵⁷ In fact, the *Edge* Court did not even significantly refer to *Discovery Network* or *Edenfield*, indicating the apparent difficulty that the Court faced in adopting a properly balanced approach between two different lines of reasoning.

c. *Florida Bar*: Toward A More Balanced Approach

Florida Bar v. Went for It, Inc.,¹⁵⁸ the last commercial speech case concluding the Court's 1995 term, modified the high degree of scrutiny in *Rubin*.¹⁵⁹ In *Florida Bar*, the Court endeavored to develop a more balanced approach by coordinating its differing opinions after *Central Hudson*.¹⁶⁰

In *Florida Bar*, the Court upheld a state ethical rule prohibiting lawyers from sending targeted direct-mail solicitations to accident or disaster victims and their families within thirty days following the event.¹⁶¹ The Court strongly supported Florida's substantial interests in protecting the privacy and tranquility of personal injury victims, their family members, and the integrity of the legal profession.¹⁶²

157. See *id.* at 2702-07. Cf. *id.* at 2708 (Stevens, J., dissenting) (arguing that the majority's reasoning is contrary to *Discovery Network* and *Edenfield*).

158. 115 S. Ct. 2371 (1995).

159. See *id.* Interestingly, the Court for the first time referred to a "three-part" *Central Hudson* test, as opposed to a four-part test. Part one of the original test under *Central Hudson* (advertising concerns unlawful activity or is misleading) became a prerequisite to the application of this test. In addition, the others parts were renumbered as: part one, real and substantial interest; part two, proof of "direct and material advancement"; and part three, "the regulation must be narrowly drawn." *Id.* at 2375.

160. See *id.*

161. See *id.* at 2381. Justice Kennedy, who wrote for the majority in *Edenfield*, delivered a strong dissent joined by Justices Stevens, Souter and Ginsberg. See *id.* Justice Kennedy argued that Florida's restriction would deprive accident victims of information critical to their claims for compensation. See *id.* at 2382 (Kennedy, J., dissenting). He tried to level the playing field for commercial speech with other traditional protected speech:

It would oversimplify to say that what we consider here is commercial speech and nothing more, for in many instances the banned communications may be vital to the recipients' right to petition the courts for redress of grievances. The complex nature of expression is one reason why even so-called commercial speech has become an essential part of the public discourse the First Amendment secures.

Id. (citing *Edenfield*, 507 U.S. at 770).

162. See *id.* at 2376. The Court distinguished *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466

In holding that the ban was not more excessive than necessary, the Court rejected an alternative rule that would categorize victims according to the severity of their injuries.¹⁶³ The Court reasoned that a ban applicable to all lawyer solicitations for a thirty-day period addressed the difficulty of classifying victims based on their injuries.¹⁶⁴ Moreover, the Court concluded that there were no “numerous and obvious less-burdensome alternatives” to Florida’s thirty-day restriction on solicitation.¹⁶⁵

On the other hand, the Court scrutinized the anecdotal record offered by Florida as it did in *Edenfield*.¹⁶⁶ While it declined to indicate the level of the state’s burden of proof, the Court reviewed the statistical and anecdotal data in great detail.¹⁶⁷ Convinced by Florida’s 106-page summary of its two-year study of lawyer direct-mail solicitation, the Court held that the ban directly targeted a “concrete, non-speculative” harm.¹⁶⁸

Furthermore, the Court stated that the “reasonable fit” standard under *Fox* is neither a “least restrictive means” test, nor a “less rigorous obstacle[] of rational basis review,” evidencing its effort to establish a more balanced approach by coordinating *Fox* with

(1988), which invalidated a state ban on general direct-mail solicitations by lawyers. See *Florida Bar*, 115 S. Ct. at 2378. The Court noted that in *Shapiro* the State did not seek to justify its ban as a measure protecting privacy, and the ban broadly covered all direct-mail solicitations, “whatever the time frame and whoever the recipient.” *Id.*; cf. *id.* at 2382 (Kennedy, J., dissenting) (arguing that *Shapiro* is controlling).

163. See *id.* at 2380.

164. See *id.*

165. *Id.* (citing *Discovery Network*, 113 S. Ct. at 1510 n.13). However, Justice Kennedy argued that the ban creates a “wild disproportion between the harm supposed and the speech ban enforced.” *Id.* at 2384 (Kennedy, J., dissenting).

166. See *id.* at 2377.

167. See 115 S. Ct. at 2377-78 (listing data on the irritating effect of lawyers’ direct solicitation). However, the Court went one step further in favor of regulators, stating that “[i]n any event, we do not read our case law to require that empirical data [must be] accompanied by a surfeit of background information. . . . [W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes” *Id.* at 2378 (citing *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 50-51 (1986)).

168. *Id.* In contrast, Justice Kennedy described the State’s Summary of Record as a few pages of self-serving and unsupported statements by the State because the document did not indicate the sample size or selection procedure, the explanation of methodology, and the discussion of excluded results. See *id.* at 2384 (Kennedy, J., dissenting).

Discovery Network.¹⁶⁹

III. THE ANALYSIS OF PENN ADVERTISING I AND PENN ADVERTISING II

A. The "Logical Nexus" Rationale in Penn Advertising I

In *Penn Advertising I*, the Fourth Circuit implicitly leaned toward the *Posadas* and *Edge* interpretation of *Central Hudson's* intermediate scrutiny standard.¹⁷⁰ Finding that the city had a substantial public interest in avoiding teenage smoking,¹⁷¹ the court held that the city ban on cigarette billboard advertising reasonably fits within such an interest.¹⁷²

The court argued that the "directly advance" prong of *Central Hudson* test does not concern the strict nexus inherent in the traditional tort concept of causation.¹⁷³ Relying heavily on *Edge* and *Florida Bar* and without distinguishing *Discovery Network*, *Edenfield*, and *Rubin*, the court reasoned that although the government has the burden of justifying an advertising ban, it does not need to "canvass every conceivable situation in which some member of the public may be affected atypically by the statute."¹⁷⁴ In particular, the court stated:

169. *Id.* at 2380 (citing *Fox*, 492 U.S. at 480, and *Discovery Network*, 113 S. Ct. at 1505, 1510 n.13).

170. *See supra* notes 103-10, 150-57 and accompanying text.

171. The *Penn Advertising I* court also found that the cigarette billboard advertising ban promotes compliance with the state prohibition of the sale of cigarettes to minors and furthers the public policy by preventing the consumption of cigarettes by minors. *See Penn Advertising I*, 63 F.3d at 1325 (citing *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore*, 862 F. Supp. 1402, 1406 (D. Md. 1994)). The court found: "In the context of the current public concern over the dangers of cigarette consumption by minors, there can be little opposition to the assertion that the City's objective in reducing cigarette consumption by minors constitutes a substantial public interest." *Penn Advertising I*, 63 F.3d at 1325.

172. *See Penn Advertising I*, 63 F.3d at 1326.

173. *See Anheuser-Busch I*, 63 F.3d at 1313. The court then stated that "the inquiry [under *Central Hudson*] seeks to elicit whether it was reasonable for the legislative body to conclude that its goal would be advanced in *some* material respect by the regulation." *Id.* (emphasis added).

174. *Anheuser-Busch I*, 63 F.3d at 1311.

[T]he court's inquiry is limited to consideration of the ordinance *on its face* against the background of the government's objective and the prospect of the ordinance's general effect. If it appears to the court that the legislative body could reasonably have believed, based on data, studies, history, or common sense, that the legislation would directly advance a substantial governmental interest, the government's burden of justifying it is met.¹⁷⁵

Noting that in *Edge* the Supreme Court deferred to the "commonsense judgment" of Congress that the gambling advertising ban on radio directly advanced congressional interest,¹⁷⁶ the court argued that the "directly advance" test requires only a "logical nexus" between the ends and means.¹⁷⁷ According to the court, the "logical nexus" does not have to exist "in fact,"¹⁷⁸ but rather, it is sufficient if it exists "on its face."¹⁷⁹ Under this approach, a court seemingly does not need to inquire whether there are numerous less-burdensome alternatives.¹⁸⁰ Therefore, it is quite likely that the Supreme Court would equate the Fourth Circuit's "logical nexus" standard with the rejected "rational basis" review. Indeed, Justice O'Connor rejected such an "accept at face value" approach in her concurring opinion in *44 Liquormart*,¹⁸¹ and the Fourth Circuit has subsequently limited such a liberal approach in *Penn Advertising II*.

175. *Id.* (citing *Florida Bar*, 115 S. Ct. at 2371) (emphasis added).

176. *See id.* at 1313-14 (citing *Edge*, 113 S. Ct. at 2704).

177. The *Penn Advertising I* court emphatically cited *Anheuser-Busch I*:

There is a logical nexus between the City's objective and the means it selected for achieving that objective, and it is not necessary . . . to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem. If that were required, communities could never initiate even minor steps to address their problems, for they could never be assured of the success of their efforts. The proper standard for approval must involve an assessment of the reasonableness of the legislature's belief that the means it selected will advance its ends.

Penn Advertising I, 63 F.3d at 1325 (citing *Anheuser-Busch I*, 63 F.3d at 1314).

178. *Anheuser-Busch I*, 63 F.3d at 1314.

179. *Id.* at 1311.

180. *See id.*

181. *44 Liquormart*, 116 S. Ct. at 1522 (O'Connor, J., concurring) (joined by Rehnquist, C.J., and Souter and Breyer, JJ.).

B. Penn Advertising II *Distinguishes* 44 Liquormart

In May 1996, the Supreme Court remanded *Penn Advertising I* for further consideration in accordance with the Supreme Court's decision in *44 Liquormart*.¹⁸² However, finding that the Baltimore ban is far less restrictive than Rhode Island's ban on alcoholic beverage price advertising, the *Penn Advertising II* court readopted the result of *Penn Advertising I*.¹⁸³

44 Liquormart dealt with a Rhode Island ban that prohibited "advertising in any manner whatsoever" the sale price of any alcoholic beverages within the state, except for price signs displayed with the beverages that are not visible from the street.¹⁸⁴ Although the Court unanimously struck down this ban, the effect of its holding on the commercial speech doctrine is limited because it primarily deals with the bounds of state power in regulating liquor under the Twenty-First Amendment.¹⁸⁵ In addition, the Court's decision fails to form a majority of the Court concerning the commercial speech doctrine.¹⁸⁶

Although *44 Liquormart* does not explicitly overrule *Posadas*, a majority of Justices disagreed with *Posadas*' highly deferential approach. Justice Stevens, joined by Justices Kennedy, Thomas, and Ginsberg, argued that "*Posadas* clearly erred in concluding that it was 'up to the legislature' to choose suppression over a less speech-restrictive policy."¹⁸⁷ In addition, citing *Florida Bar, Rubin, Edenfield* and *Discovery Network*, Justice O'Connor stated that after *Posadas*

[the Court] declined to accept at face value the proffered justification for the State's regulation, but examined carefully the relationship between the asserted goal and the speech

182. *See Penn Advertising, Inc. v. Mayor of Baltimore*, 116 S. Ct 2575 (1996).

183. *See Penn Advertising, Inc. v. Mayor of Baltimore*, 101 F.3d 332 (4th Cir. 1996).

184. *44 Liquormart*, 116 S. Ct. at 1501 (citing R.I. GEN. LAWS § 3-8-7 (1987)).

185. *See id.* at 1514-15.

186. *See id.* *44 Liquormart* contains five separate opinions and three concurrences.

187. *Id.* at 1511. Justices Stevens, Kennedy, Thomas, and Ginsberg also argued that "a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purpose." *Id.*

restriction used to reach that goal. 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.¹⁸⁸

The Fourth Circuit in *Penn Advertising II* accepted these Justices' rejection of the highly deferential approach in *Posadas*. In *Penn Advertising II*, the Fourth Circuit made clear that in readopting its decision in *Penn Advertising I*, it did not rely on *Posadas*.¹⁸⁹ The court stated:

Because we do not defer blindly to the legislative rationale, but rather agree with it based on our own independent conclusion about the fit between legislative objective and the regulation used to achieve that objective, the holding in *Posadas* is not necessary to our opinions upholding Baltimore City's ordinance.¹⁹⁰

However, the court in *Penn Advertising II* failed to clarify the appropriate level of scrutiny. Under a presumed higher standard of judicial scrutiny, the court still held that Baltimore's restriction on cigarette billboard advertising does not violate commercial speech rights under the First Amendment.¹⁹¹ The court distinguished the facts concerning the Baltimore ordinance from the facts in *44 Liquormart* in at least three ways. First, Baltimore's ordinance expressly targets children who cannot legally smoke cigarettes, while in *44 Liquormart* the ban of liquor price advertising targets legal users in Rhode Island.¹⁹² Second, and more significantly, the Baltimore ordinance does not ban outdoor advertising of cigarettes entirely, but merely

188. *Id.* at 1522 (O'Connor, J., concurring) (joined by Rehnquist, C.J., and Souter and Breyer, JJ.).

189. See *Anheuser-Busch II*, 101 F.3d at 327 n.*.

190. *Id.*

191. See *Penn Advertising II*, 101 F.3d at 333.

192. See *Anheuser-Busch II*, 101 F.3d at 329. In citing *Anheuser-Busch II*, this author has changed the wording "alcoholic beverages" used in *Anheuser-Busch II* to "cigarette" to reflect the situations in *Penn Advertising II*.

restricts the time, place, and manner of such advertising, while Rhode Island's blanket ban prohibits liquor price advertising "in any manner whatsoever."¹⁹³ Third, unlike Rhode Island's desire to enforce adult temperance, Baltimore seeks to protect children who do not have the independent ability to assess the value of the advertising message.¹⁹⁴

In particular, the court in *Penn Advertising II* emphasized the Supreme Court's long-standing position that "children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media."¹⁹⁵ As the following section will discuss, both relevant judicial precedents and health evidence support the *Penn Advertising II* court's conclusion.

IV. PROTECTION OF CHILDREN VERSUS FREEDOM OF COMMERCIAL SPEECH

A. The Public Interest in Protecting Children Is Substantial and Compelling

1. The Government Has a Substantial Interest in Preventing Teenage Smoking

Tobacco smoking is dangerous and costly. Since the publication of the 1964 Surgeon General's Report,¹⁹⁶ scientific and statistical research has continued to show that tobacco use, the main cause of lung cancer and heart disease, is "the leading preventable cause of illness and premature death in the United States."¹⁹⁷ In addition, the United States health care system spent about \$22 billion in treating smoking-related disease in 1985, with related lost productivity costs

193. *Id.*

194. *See id.*

195. *Anheuser-Busch II*, 101 F.3d at 329.

196. This is the first Surgeon General's Report that affirmatively linked smoking with lung cancer and heart disease. *See supra* note 25 and accompanying text.

197. H.R. 4972, 99th Cong. § 2 (1986). *See supra* note 65 (discussing the findings in the proposed Health Protection Act of 1986).

of \$43 billion.¹⁹⁸

The teenage smoking problem is serious. Although the number of smokers in the United States is declining, the number of teenage smokers is steadily increasing, accounting for ninety percent of new smokers.¹⁹⁹ With the reality that thirty-one percent of high school seniors smoke, 3,000 teenagers begin smoking each day, 1,000 of whom will eventually die of tobacco-related disease,²⁰⁰ the enormity of the government's interest in preventing this teenage smoking epidemic cannot be overstated.

2. The Supreme Court Traditionally Increases Protection for the Compelling Interest of Children

Children lack analytical and judgmental development.²⁰¹ Research confirms children's inability to deal with abstract concepts²⁰² and to distinguish between fantasy and reality.²⁰³ Children accept the world at face value and do not have the healthy skepticism of an adult when viewing advertisements.²⁰⁴ Therefore, children are especially susceptible to attractive and "fun" advertising images,²⁰⁵ but neither care about nor understand facts such as price and nutritional value.²⁰⁶

Deeply concerned about the vulnerability of children, the Supreme

198. See *supra* note 65.

199. See Joseph R. DiFranza et al., *RJR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children*, 266 J. OF AM. MEDICAL ASS'N 3149, 3149 (1991); see also *Hooked on Tobacco*, *supra* note 3.

200. See Roan, *supra* note 4.

201. See Molly Pauker, *The Case for FTC Regulation of Television Advertising Directed Toward Children*, 46 BROOK. L. REV. 513, 514 (1980).

202. See *id.* at 515. Children have only embryonic intellectual systems that produce "preconcepts," which are "[a]ctive and concrete, rather than schematic and abstract." *Id.* at 515 n.11 (citing D. PAPALIA & S. OLDS, *A CHILD'S WORLD: INFANCY THROUGH ADOLESCENCE* 277 (1975)).

203. See *id.* at 515.

204. See *id.*

205. For example, one study found that "[w]hen the reality presented to children on television is more lively, fun and satisfying than real life, television becomes an attractive haven for children." *Id.* at 515 n.14 (citing W. SCHRAMM ET AL., *TELEVISION IN THE LIVES OF OUR CHILDREN* 67 (1961)).

206. See *id.* at 515 n.15 (citing Atkin & Heald, *The Content of Children's Toy and Food Commercials*, 27 J. COM. 107, 107-14 (1977)).

Court has traditionally treated a state's interest in protecting children's welfare and temperance as compelling, which often overrides other competing interests.²⁰⁷ Indeed, the Court has recognized that the successful continuation of a democratic society depends "upon the healthy, well-rounded growth of young people into full maturity as citizens."²⁰⁸ The Court's analysis in pornography cases offers a good example of its concern for the well-being of children.²⁰⁹

In *Ginsberg v. New York*,²¹⁰ the Court held in 1968 that a state law banning distribution of indecent film and printed materials to minors fell within a "state's constitutional power to regulate" the "well-being of its children."²¹¹ Even though the materials were not obscene to adults, the restraint was justified because of the recognized constitutional authority of parents in rearing their children and because of the state's "independent interest" in protecting children.²¹²

Similarly, in 1982 the Court in *New York v. Ferber*²¹³ unanimously rejected a First Amendment challenge to a state ban on

207. See *infra* notes 211, 215, 218-20 and accompanying text. See also *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978) (recognizing the need to protect children from indecent broadcasts); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). *But cf.* *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-08 (1982) (recognizing that a compelling state interest in the physical and psychological well-being of children does not permit mandatory exclusion of the public from trials involving criminal sexual offenses against minors).

208. *Prince*, 321 U.S. at 168.

209. For a discussion of protecting children in the pornography context, see, for example, T. Christopher Donnelly, Comment, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. MICH. J.L. REF. 295, 296-304 (1979). For a discussion of broadcasting advertising legislation and the protection of children, see, for example, Gail E. Lees, Comment, *Unsafe for Little Ears?: The Regulation of Broadcasting Advertising to Children*, 25 UCLA L. REV. 1131 (1978) and Peggy Charren, *Children's Advertising: Whose Hand Rocks the Cradle?*, 56 U. CIN. L. REV. 1251 (1988).

210. 390 U.S. 629 (1968). For a discussion of *Ginsberg*, see Dabney E. Bragg, Note, *Regulation of Programming Content to Protect Children After Pacifica*, 32 VAND. L. REV. 1377, 1389 (1979).

211. 390 U.S. at 639 ("The well-being of . . . children is of course a subject within the State's constitutional power to regulate . . . at least if it was rational for the legislature to find that the minors' exposure to [indecent] material might be harmful.").

212. *Id.* at 640.

213. 458 U.S. 747 (1982). For a discussion of *Ferber*, see Eric L. Dauber, Note, *Constitutional Law—Child Pornography: A New Exception to the First Amendment—New York v. Ferber*, 50 U.S.L.W. 5077 (U.S. July 2, 1982), 10 FLA. ST. U. L. REV. 684 (1983).

the distribution of material depicting children engaged in sexual conduct, even if the material was not legally obscene.²¹⁴ The Court held that because the state had a "compelling interest" in protecting children and because the value of such speech was "*de minis*," the protection of children overrode the First Amendment right of access to pornography.²¹⁵

The Court consolidated the *Ginsberg* and *Ferber* principles in two recent cases, *Sable Communication of California, Inc. v. FCC*²¹⁶ and *Osborne v. Ohio*.²¹⁷ In *Sable*, the Court relied on *Ginsberg* in upholding a federal rule prohibiting obscene interstate commercial telephone communications.²¹⁸ Furthermore, "given the importance of the State's interest in protecting [children],"²¹⁹ the *Osborne* court extended the *Ferber* analysis to uphold an Ohio statute prohibiting the private possession or viewing of child pornography.²²⁰

The principle of protecting children's interests in pornography cases is analogous to cigarette advertising bans. Both cigarette smoking and pornography endanger "the healthy, well-rounded growth of young people into full maturity as citizens."²²¹ Furthermore, the restriction on these two kinds of speech similarly affects the First Amendment rights of adults, which, according to the Court's traditional view, should be overridden by the compelling interest of protecting children. As previously discussed, the federal district court in *Capital Broadcasting* specifically noted the broadcast media's special accessibility to children as a reason to uphold the federal broadcast ban on cigarette advertising.²²² The Supreme Court

214. See 458 U.S. at 774.

215. *Id.* at 756-58, 762-63.

216. 492 U.S. 115 (1989).

217. 495 U.S. 103 (1990).

218. "[T]here is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable*, 492 U.S. at 126 (citing *Ginsberg*, 390 U.S. at 639-40; *Ferber*, 458 U.S. at 756-57).

219. *Osborne*, 495 U.S. at 110.

220. See *id.* at 126.

221. *Prince*, 321 U.S. at 168.

222. See *supra* notes 40-41 and accompanying text.

found that the ban did not violate the First Amendment.²²³ This reasoning reflects the long-standing judicial emphasis on protecting children's health and moral welfare to justify cigarette advertising bans.²²⁴ Given the overwhelming evidence available to contemporary courts linking cigarette advertising to teenage smoking,²²⁵ the government's interest in protecting children from cigarette advertising is certainly compelling.

Another analogous situation is the regulation of violence and sex on television.²²⁶ In February, 1996, Congress passed the Telecommunications Reform Act to protect children from television violence.²²⁷ This Act requires the television industry to establish content ratings to help parents screen out unwanted programming by using a blocking device known as the "V-chip."²²⁸ This mandate evidences the increasing congressional consensus on the compelling nature of child welfare in today's sophisticated industrialized society.

B. The Baltimore Ban Directly Advances the Interest of Protecting Children

In considering the "directly advance" prong of *Central Hudson*, the Supreme Court in *Rubin* applied a more balanced approach and reviewed whether the government possessed substantial evidence to directly link the advertising and the affected interest.²²⁹ In *Penn Advertising*, the Baltimore City Council conducted public hearings receiving an extensive range of evidence, including previously conducted studies and various testimony that detailed the correlation

223. See *supra* note 36.

224. See *supra* note 207.

225. See *supra* note 4.

226. For a discussion of the regulation of TV violence and the children's interest, see, for example, Ian M. Ballard, Jr., Note, *See No Evil, Hear No Evil: Television Violence and the First Amendment*, 81 VA. L. REV. 175 (1995).

227. See Wisely, *The TV Industry Moves Toward Policing Itself; New Law and Outcry on Sex and Violence May Spur Change*, L.A. TIMES, Feb. 19, 1996, at B4.

228. See *id.* The 1996 Act gives the TV industry a year to design a rating system, and if not, the Federal Communications Commission will form a panel to do the job. See *id.*

229. See *supra* note 139.

between cigarette advertising and smoking by minors.²³⁰ The Supreme Court, were it reviewing the case, would likely find that Baltimore has met its burden of proving a reasonable fit between the means and the ends because of the substantial evidence linking cigarette billboard advertising to teenage smoking.

The glamorous or independent appearance of many cigarette advertising characters fits perfectly with teenagers' desire for fun, romance, and independence.²³¹ One of the most widely known cigarette cartoon characters is Joe Camel, designed by RJR Nabisco. Joe Camel, portrayed as a "smooth character" in advertisements, depicts a playful, humorous, and romantic image, visually linking smoking with convivial outings.²³² A comprehensive study published in the *Journal of American Medical Association* ("JAMA Research") shows a marked difference in attitude about Joe Camel among teenagers and adults: About ninety-three percent of high school students know the cigarette brand, as opposed to about fifty-eight percent of adults; about forty-three percent of students think the character is "cool," as opposed to only about twenty-six percent of adults.²³³

230. See *Penn Advertising I*, 63 F.3d at 1321.

231. See *supra* notes 201-06 and accompanying text (discussing the characteristics of children's judgmental ability). See also *Hooked on Tobacco*, *supra* note 3.

232. For example, one cartoon picture shows Joe Camel playing a game of billiards with a charming young lady while smoking, and another picture shows a playful Joe Camel partying with several other masked Joe Camels. See DiFranza, *supra* note 199, at 3150.

233. See DiFranza, *supra* note 199, at 3151. The comparison of teenager and adult responses to the Old Joe Camel character advertisements shows as following:

	Total Students (%)	Total Adults (%)
Have seen Old Joe	97.7	72.2
Know product	97.5	67.0
Know brand	93.6	57.7
Think ads look cool	58.0	39.9
Ads are interesting	73.6	55.1
Like Joe as friend	35.0	14.4
Think Joe is cool	43.0	25.7
Smoke Camel	33.0	8.7

Id. This survey by Dr. DiFranza and six other researchers covered five states (Georgia, Massachusetts, Nebraska, New Mexico and Washington) representing five regions of the

Furthermore, the use of attractive advertising images has substantially increased brand shares in the teenage cigarette market. The JAMA Research shows that in 1986, before Joe Camel existed, Camel's share in the illegal child market was merely 0.5 percent.²³⁴ Five years later, Camel boasted a record share of 32.8 percent of the illegal child market.²³⁵

A separate 1991 study which focused on child smoking in California confirmed the JAMA Research conclusion that cigarette advertising has effectively targeted children.²³⁶ Moreover, the cigarette industry itself admitted its desire to "learn how smoking begins."²³⁷ Aware of the suggestive power of playful billboard images on children, some advertising companies, such as 3M Media, have decided to eliminate tobacco advertisements from their billboards.²³⁸

Therefore, the evidence demonstrates a direct link between

nation. *See id.*

234. *See id.* at 3151.

235. *See* DiFranza, *supra* note 199, at 3151. The JAMA Research concluded:

Old Joe Camel cartoon advertisements are far more successful at marketing Camel cigarettes to children than to adults. This finding is consistent with tobacco industry documents that indicate that a major function of tobacco advertising is to promote and maintain tobacco addiction among children.

Id. at 3149.

236. John P. Pierce et al., *Does Tobacco Advertising Target Young People to Start Smoking?; Evidence from California*, 266 J. AM. MED. ASS'N 3154 (1991). Dr. Pierce and other researchers found that teenagers most often buy Marlboro and Camel cigarettes. Marlboro's market share of young smokers increased until age 24 and then decreased gradually with age; Camel's market share, however, decreased abruptly with age. *See id.* Dr. Pierce and his colleagues concluded:

Perception of Advertising is higher among young smokers; market-share patterns across age and sex groups follow the perceived advertising patterns; and changes in market share resulting from advertising occur mainly in younger smokers. Cigarette advertising encourages youth to smoke and should be banned.

Id.

237. DiFranza, *supra* note 199, at 3152.

238. 3M Media, Minnesota Mining & Manufacturing Company's outdoor advertising unit, one the largest billboard advertising companies in the United States, decided to eliminate tobacco billboard advertising by the end of 1998 because of the "public perception of tobacco." *End to Tobacco Billboards*, WALL ST. J., May 3, 1996, at B12. President Clinton praised 3M Media "for accepting responsibility for the impact billboards have," and stated that "[w]e must all work together to protect our children from the lures of tobacco." *Id.*

aggressive cigarette advertising and the significant increase in teenage smoking. The findings of independent research rebut the tobacco industry's assertions that cigarette advertising is intended to persuade smokers to switch brands, and that the main causes of teenage smoking are peer pressure and family influence. These assertions contradict the tobacco industry's own traditional policy of "preferentially placing selected advertisements where children are most likely to see them."²³⁹

The Supreme Court would reach the same conclusion in *Penn Advertising* as it did in *Florida Bar*,²⁴⁰ holding that a state may satisfy its burden of proof by introducing a detailed survey about the effect of cigarette advertising on teenage smoking. Moreover, *Discovery Network*, *Edenfield*, and *Rubin* are distinguishable from *Penn Advertising*. In *Rubin*, for example, the government failed to conduct a study or to offer any concrete evidence indicating that the disclosure of alcohol content on beer labels would lead to strength wars.²⁴¹ Instead, the government offered only inferential arguments based on speculation and conjecture.²⁴²

C. The Baltimore Ban Is Not More Extensive Than Necessary

The Baltimore city ordinance provides only a limited ban on cigarette advertising.²⁴³ The city limited its ban to billboards in "publicly visible places" where children typically go, such as where they live, attend school and church, and play.²⁴⁴ In addition, the ban

239. DiFranza, *supra* note 199, at 3151.

240. *Florida Bar*, 115 S. Ct. at 2377.

241. *See supra* note 143.

242. *See supra* note 141. *See also supra* note 132 and accompanying text (discussing *Discovery Network* where the Court noted that the city relied on an outdated city ordinance and did not study the new development of newsrack advertising business); *supra* note 137 and accompanying text (discussing *Edenfield* where the Court found that no studies or anecdotal evidence supported the state's supposition about the dangers of personal solicitation by CPAs in a business context).

243. *See supra* note 16 for the content of the Baltimore city ordinance.

244. *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore*, 862 F. Supp. 1402, 1414 (D. Md. 1994). In contrast to the limited scope of cigarette billboard advertising ban in Baltimore, the Canadian Government proposed a complete tobacco advertising ban. *See Bob*

would not apply to cigarette advertising on buses, taxicabs, commercial vehicles used to transport cigarettes, or signs at businesses licensed to sell cigarettes.²⁴⁵

In applying intermediate scrutiny to determine whether the regulation is narrowly drawn, the Court does not require the regulation to be the least restrictive means, absent numerous less-burdensome alternatives.²⁴⁶ Because the Baltimore ban applies only to limited places and to a limited medium (billboards), it should survive the “not more extensive than necessary” test.²⁴⁷ In addition, *Rubin* is distinguishable from the Baltimore ordinance. In *Rubin*, the ban of alcohol content disclosure on labels achieved the interest of preventing strength wars only by a “marginal degree,” and there were numerous less-burdensome measures that the government could have taken, such as a limiting the alcohol content of beer or banning the advertisement of alcoholic strength.²⁴⁸ However, the alluring billboard advertising in public places frequented by children is a leading cause of teenage smoking.²⁴⁹ A restriction on this type of advertising substantially achieves the asserted interest of protecting children’s welfare.

CONCLUSION

Since the emergence of the *Central Hudson* four-prong test, the Court has failed to develop a bright line rule for interpreting the perimeter of the test—especially the “directly advance” and “not

Geiger, *Focus on the Tobacco Industry: Tightening Up*, ATLANTA CONST., Jan. 3, 1996, at 4A. The Canadian Supreme Court overturned this proposed ban in September 1995, stating that the ban was overbroad because regulators had failed to show the reason that a partial ban would not be as effective. See *id.* For a detailed discussion of the Canadian Supreme Court ruling, see Jeffrey S. Edelman, *New Limitations on Commercial Speech*, N.Y. L.J., Oct. 20, 1995, at 3.

245. See *Penn Advertising I*, 63 F.3d at 1324.

246. See *id.* at 1325.

247. In *Florida Bar*, the Court upheld the prohibition of direct mail lawyer solicitation within 30 days after an accident because there are sufficient alternative means to receive information about the availability of legal representation, such as advertising in media, billboard, yellow pages, and untargeted solicitation. See *Rubin*, 115 S. Ct. at 2380-81. Similarly, the Baltimore ban should be upheld because it is limited and is narrowly drawn.

248. *Rubin*, 115 S. Ct. at 1592-93.

249. See *supra* note 3.

more excessive than necessary” prongs. In spite of such ambiguity, the plurality opinion in *44 Liquormart* indicates that the highly deferential approach in *Posadas* is losing its validity, and that the Court will impose close judicial scrutiny on legislative action regulating commercial speech.

The *Penn Advertising I* court proposed a “logical nexus” standard, which would give great deference to the government. Such deference would improperly tilt the balance between commercial speech and regulatory interests. The *Penn Advertising II* opinion, however, indicates that the Fourth Circuit has abandoned such a low-threshold standard.

In addition, the Fourth Circuit in *Penn Advertising II* concluded that even under closer scrutiny, the Baltimore ordinance restricting the billboard advertising of cigarettes does not violate the First Amendment. This conclusion is meritorious. First, the interest of avoiding teenage smoking is not only substantial, but also compelling. Second, the ban directly advances the state interest in preventing teenage smoking because cigarette advertising has played a key role in increasing teenage smoking.²⁵⁰ Third, the ban is not more extensive than necessary because it is limited in terms of locations and medium and does not deprive adults of their right to receive market information about cigarettes from billboards in other locations and from other forms of advertising.

Furthermore, the Supreme Court has traditionally increased the level of protection for children, whose compelling interest may override other competing interests.²⁵¹ Therefore, when balancing the children’s interests against the First Amendment right of cigarette advertising for the first time, the Court will likely continue to confer a special protection to children and uphold the constitutionality of the cigarette advertising ban in Baltimore.

*Yabo Lin**

250. See *supra* note 3.

251. See *supra* note 207.

* J.D. 1997, Washington University. The author would like to dedicate this Note to his beloved wife Hongmei, whose support has made this Note possible.

