# Tobacco Advertising: The Clash of Public Health Protection and First Amendment Rights

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**Abstract:**

*The public health community has achieved success in lowering the prevalence of tobacco use in the United States. This effort has included campaigns to outlaw or severely restrict tobacco advertisements. Yet, regulation of tobacco advertisements raises a difficult constitutional question regarding the commercial speech rights of the tobacco industry and the compelling interest of the government to protect public health. This paper discusses the Supreme Courts creation of a commercial speech doctrine. It then analyzes these Supreme Court decisions focusing on the repercussions to the tobacco-control community's efforts to regulate and restrict tobacco marketing campaigns. Finally, the paper makes recommendations for how the tobacco-control community should pursue future advertising restriction campaigns in order to maximize effect and avoid first amendment violations of commercial speech protections.*

## Introduction

Tobacco use is harmful to not only those who smoke, but also to the whole community. Public health activists have worked for years to lower the harms of smoking by limiting its use in public places and by discouraging the start of its use. The government has reacted to these concerns and has passed many pieces of legislation that coincide with the public health community's goals. However, the government is limited in its actions by the Constitution of the United States. And when it comes to the restriction of tobacco advertising the government is very much restrained by the First Amendment. When dealing with tobacco advertising the government is forced to make the difficult choice between protecting public health or protecting the tobacco industry's First Amendment rights. Such a choice has created "divisions that have, in the context of the 3-decade campaign against tobacco, pitted civil libertarians and public health

officials against each other."[1] This division has been played out in Supreme Court in the past decades. For quite some time the Supreme Court did not find a protection of commercial speech in the First Amendment. It wasn't until *Biglowe v. Virginia* in 1975 that the Supreme Court first began to develop a commercial speech doctrine. Since this time the commercial speech doctrine, as defined by the court, has been changed and reinterpreted. At times is has given commercial speech greater protection and at other times has denied commercial entities strict scrutiny of their speech rights. The first part of this paper will look at why the government has an obligation to protect the public health of its citizens. It will then follow the evolution of the commercial speech doctrine and follow it to its current day interpretation. It will then further analyze issues brought up by the Central Hudson test and the future path public health activists can take to continue advancing their goals. The commercial speech jurisprudence has left room for the government to carefully structure some tobacco advertising regulations. This paper attempts to describe just what the government must do to make those regulations constitutional.

**The Governments Role in Protecting Public Health**

The protection of Public Health has always been a government's concern. While an individual is concerned only about their own health, the government is the only entity that will be concerned about the health of the whole group. Especially when it comes to communicable disease and epidemics the risk to any one person depends on factors that are far outside that

[1] Bayer, Ronald. "Tobacco, Commercial Speech, and Libertarian Values: The End of the Line for Restrictions on Advertising?" American Journal of Public Health 92 (2002). 356

individual's own control.[2] Due to the interdependency of risk inherent to many public health crises there is a need for the government to "give less weight to individual rights and more leeway for government actions taken in the name of public health."[3] "Moreover, given the capacity of some epidemics to destroy and disrupt economic and civil life, risk-reducing interventions are not simply desirable, they may be essential to the survival of community."[4] Therefore, many of the government actions taken to promote public health are not "merely gratuitous services provided by the welfare state; they are critical, as they have always been, to a state's ability to thrive."[5]

However, the need for government action in promoting public health is not limited only to infectious disease. "Many of the determinants of health and disease rest on human behaviors, which affect not only individuals but also the broader society."[6] Much of this behavior comes about from lack of information or too much inaccurate information.[7] Such a lack of information can lead to a spread of disease through behavior such as smoking, lack of hand washing, or unsafe sexual practices. The Government has the capability to correct this misinformation and it has a duty to its citizen's to use that power to protect them.

Public health officials believe that the necessity for government intervention in to matters of public health is due to the fact that "public health authorities are skeptical that truthful ideas

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[2] Parmet, Wendy E. "Public Health and Constitutional Law: Recognizing the Relationship." University of Maryland, School of Law Journal of Health Care Law & Policy 10 (2007). 5

[3] Ibid., 6

[4] Ibid., 6

[5] Ibid., 6

[6] Gostin, Lawrence O., and Gail H. Javitt. "Health Promotion and the First Amendment: Government Control of the Informational Environment." The Milbank Quarterly 79 (2001). 547

[7] Ibid., 547

about health will necessarily prevail in a free market of communication." [8] This is due to the fact that most of the information citizens receive comes not from credible health sources but from "private entities whose motive is profit." [9] Therefore, without government regulation public health would be left to companies who are marketing potentially dangerous products and looking to make a profit.[10]

In fact, such strong arguments in support of government regulation of public health may be unnecessary since the United States government has always seen the protection of the public health as a part of its duty to its citizen's. While the Constitution is silent on the issue, this does not public health was not considered at the time of the framing. Instead "both the obligation and the power to protect public health were widely viewed as belonging to the states." [11] Therefore, no where in the Constitution are powers to protect public health enumerated.[12] However, as further proof of the governments ongoing ability to regulation public health the courts ruled as early as 1824 in the case of *Gibbons v. Ogden* and again in *Wilson v. Black-bird Creek Marsh Co.*, that "states could properly enact laws to improve the health of their residents and that such laws were constitutional, even if they created some burden upon interstate commerce."[13] Even in present day the courts have consistently ruled that the pursuit of public health does in fact constitute a substantial government interest. [14]

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[8] Gostin and Javitt 550
[9] Ibid., 551
[10] Ibid., 551
[11] Parmet, 2
[12]Ibid., 2
[13] Ibid., 2
[14] Ibid., 4

Currently it appears that the government is presented with three options for promoting public health. The government may apply regulations to private companies regarding the way vendors may offer their products for sale (commercial speech), require warning labels or other disclosures (compelled speech) and finally they may deliver health messages directly to the public (government speech).[15] However, this paper is only concerned with the constitutionality of regulations of commercial speech.

**Evolution of the Commercial Speech Doctrine in the Supreme Court**

Prior to discussing the future of tobacco advertisement regulation it is necessary to examine the history of the Supreme Court's views on the protection of commercial speech. Analyzing trends in the past of Court thinking will assist in predicting future decisions and in understanding the most recent decisions.

The Supreme Court has continuously stated that when it comes to speech protected under the First Amendment the government is prevented "from suppressing speech by private citizens even when the subject matter is incorrect or offensive."[16] The government may only restrict speech's "physical and temporal attributes."[17] Meaning, the government can only put time, place and manner restrictions on protected speech. For example, a rally could be constitutionally prohibited due to taking place during rush hour, but the same rally could not be prohibited due to the belief that the position for which it was advocating was in some ways offensive.[18] If this were

[15] Gostin and Javitt 548
[16] Ibid., 549
[17] Ibid., 549
[18] Ibid., 549

the only law relevant to freedom of speech there would be no question that the government could not put restrictions on tobacco advertisements because such regulations would not be targeting all advertisements, but only certain advertisements due to the products they advertised.

However, it is quite obvious that this is not the case at least with certain kinds of speech. "Government restrictions on commercial speech date back at least to the beginning of the twentieth century." [19]For example, the government has imposed strict labeling requirements on food, drugs, and cosmetics without facing any impediments from the First Amendment.[20]

For many years the Supreme Court did not grant First Amendment protection to any kind of commercial speech. Prior to the 1970s the Supreme Court believed that the "First Amendment did not impose any limits on the government's ability to restrain 'purely commercial advertising'"[21] because commercial speech was thought to have "little value in the marketplace of ideas." [22] And what little benefits commercial speech contained were far outweighed by their potential harm.[23]

Such refusal to grant commercial speech First Amendment protections can be seen in the 1942 case *Valentine v. Chrestensen.* In *Christensen* "the Supreme Court upheld the city's ban on the distribution of a handbill, classifying it as commercial in nature and therefore outside the

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[19] Vladeck, David, Gerald Weber, and Lawrence O. Gostin. "Commercial Speech and the Public's Health: Regulating Advertisements of Tobacco, Alcohol, High Fat Foods and Other Potentially Hazardous Products." The Journal of Law, Medicine & Ethics 32 (2004). 33

[20] Ibid., 33

[21] Bayer, Ronald, Lawrence O. Gostin, and Gail H. Javitt. "Tobacco Advertising in the United States: A Proposal for a Constitutionally Acceptable Form of Regulation." JAMA 287 (2002).

[22] Gostin and Javitt 552

[23] Ibid., 552

First Amendment's protection."[24] The Supreme Court's reasoning rested on the assumption that the First Amendment only protected speech of public interest. In the Court's view "speech motivated by a desire for private profit does not qualify for the public interest classification."[25]

In *Breard v. Alexandria (1951)* the court again did not extend First Amendment rights to commercial speech. In this case, the Court found the actions of a door-to-door salesman to be a commercial activity and thus not protected by the First Amendment.[26]

This trend did not last forever. The Court first began to be receptive of the idea of commercial speech receiving First Amendment protection in *New York Times Co. v. Sullivan (1964)*. However, unlike in *Chrestensen* the Court found the speech in the *New York Times* case was more than just commercial speech because the advertising in question "communicated information, expressed grievances, protested claimed abuses, and sought support for matters of the highest public interest and concern."[27] Such reasoning presented a potential future problem of "differentiating specifically commercial speech from other forms of speech."[28] While the decision did not present a clear standard for defining pure commercial speech, it did allow room for the Court to recognize that commercial speech has more benefit to society than simply the seller's ability to sell products. Eventually the Court's opinion evolved to believe that consumer knowledge was in fact a matter of public interest.

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[24] Lee, Hyo-Seong. "Exploring the Constitutionality of Commercial Speech: A View of Tobacco Advertising." Communications and the Law (2001). 43

[25] Ibid., 43
[26] Ibid., 43
[27] Ibid., 43
[28] Ibid., 43

Using the same line of thinking as the *Chrestensen* and *Beard* cases, two major tobacco advertising regulations were upheld in 1968. The first regulation, the fairness doctrine, was upheld in the Federal Court of Appeals for the DC Circuit.[29] The fairness doctrine was a requirement by the Federal Communications Commission (FCC) that a significant amount of anti-tobacco advertisements were aired.[30] The second important decision occurred in 1971 when the Supreme Court upheld a ban on cigarette advertising on all television and radio stations.[31] In foreshadowing to future Supreme Court decisions, Justice J. Skelley Wright wrote in his dissent that "the First Amendment does not protect only speech that is healthy or harmless."[32]

In *Bigelow v. Virginia* (1975) the court finally admitted that commercial speech was not "valueless in the marketplace of ideas."[33] In *Bigelow*, the Court held that non-political commercial speech is in fact entitled to First Amendment protection.[34] The court said, "the relationship of speech to the marketplace of products and services does not make it valueless in the marketplace of ideas."[35] The law in question prohibited the advertising of abortion services. In determining that commercial speech did have value in the marketplace of ideas the Supreme Court argued that, "the relationship of speech to the marketplace of products and services does not make it valueless sin the marketplace of ideas."[36] But, commercial speech was still not given the protection of strict scrutiny under the First Amendment. Instead, it was still considered a

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[29] Bayer, Ronald, Laurence O. Gostin, and Gail H. Javitt. 2992
[30] Ibid.,2992
[31] Ibid.,. 2992
[32] Ibid., 2992
[33] Ibid.,. 2992
[34] Lee, 43
[35] *Bigelow v. Virginia* 421 U.S. 809. No. No. 73-1309. The United States Supreme Court. 16 June 1975.
[36] Gostin, and Javitt,. 552

lower valued form of expression and "deserved less exacting constitutional protection than social or political discourse." [37]

***Virginia State Board of Pharmacy***

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.* (1976) the Supreme Court emphasized that "the economic motive for the advertiser does not, in and of itself, deprive the advertiser's speech of constitutional protection,"[38] further extending and clarifying the extent of commercial speech protection. To explain its change in thinking the Supreme Court stated, "Commercial price and product advertising differs markedly from ideological expression because it is confined to the promotion of specific goods and services. The First Amendment protects the advertisement because of the information of potential interest and value conveyed rather than because of any direct contribution to the interchange of ideas."[39] In fact the Court found that public interest in the free flow of commercial information "may be as keen, if not keener if not keener by far, than [their] interest in the day's most urgent political debate.'"[40] This argument was made by pointing to the fact that business practices and products are issues of substantial importance to the general public. [41] The Court also pointed to the fact that in a capitalist system the quality of economic decisions hinges on the ability to obtain the maximum amount of information. [42]

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[37] Bayer, Ronald, Laurence O. Gostin, and Gail H. Javitt. 2992
[38] Lee, 45
[39] Gostin, Lawrence O., and Gail H. Javitt. 553
[40] Fischette, Charles. "A New Architecture of Commercial Speech Law." Harvard Journal of Law and Public Policy 31 (2008)., 2
[41] Ibid., 2
[42] Ibid., 2

The Court also argued for lack of regulation of commercial speech due to its disdain for government paternalism. The Court wrote, "There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them…It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."[43]

The two most important arguments the court made in support of commercial speech protection under the First Amendment was that commercial speech served an important societal interest by providing the public with important information necessary in a capitalist system and by the fact that many times commercial speech will also touch on political concerns. [44]

"*Virginia Board of Pharmacy* emphasized that the Court was also sensitive to the fact that commercial speech has "greater potential for deception or confusion" which was also expressed later in *Bolger v. Youngs Drug Prods Corp* in 1983.[45] Therefore, while protected, commercial speech still "warranted more extensive government intervention to protect consumers," due to its more threatening nature.[46] Yet Fisher points out that this rational presented in *Virginia Board of Pharmacy* isn't as clear an endorsement of commercial speech rights as it first seems. For one thing, Fischette finds a problem with the use of the argument regarding consumer interests. He fails to see why "securing commodities at the most efficient

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[43] Fischette, 3
[44] Ibid., 3
[45] Gostin and Javitt 553
[46] Ibid. 553

cost" is an interest supported by the First Amendment.[47] The more promising argument presented by the Court according to Fischette is the belief that commercial speech can provide significant commentary on political and social issues - issues for which speech is protected by the First Amendment. He explains by saying,

> "both advertising and speech by corporations often concern matters of public importance. A complete ban on such speech might limit public access to information about matters of democratic concern. A ban might also limit access to economic facts, which are clearly relevant to political decisions about desirable forms of economic regulation. In extreme cases, an absolute ban on commercial speech might result in public exposure to only one side of a public debate: Who but tobacco companies would defend smoking, and who but Nike would defend its employment practices?"[48]

Therefore, in the *Virginia Board of Pharmacy* decision the court stated that "the first amendment limits the means by which government can achieve its legitimate goals."[49]

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

Following *Virginia Board of Pharmacy*, one of the next important commercial speech cases occurred in 1980 when the Court decided the case *Central Hudson Gas & Electric Corp. v. Public Service Comm'n.* This case is important due to the creation of the Central Hudson test.[50] "Instead of the usual 'strict scrutiny' standard applied to other types of expression, the Supreme

[47] Fischette, 3
[48] Ibid., 3
[49] Ibid., 3
[50] Bayer, Ronald, Laurence O. Gostin, and Gail H. Javitt. 2992

Court used a balancing test that was permissive of state regulation."[51] The Court detailed the *Central Hudson* Test in the following passage;

> "For commercial speech to come within [the scope of First Amendment Protection], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."[52]

In other words, the Central Hudson test asserts that absolutely no First Amendment protection is afforded to commercial advertising that is misleading or promotes unlawful activity.[53] Second, the government must have a "substantial interest" for restricting commercial speech and if not the government regulation is considered unconstitutional.[54] However, the Supreme Court almost always finds that the government interest is substantial when it comes to protecting public health.[55] Third, the regulation in question must directly advance the above mentioned governmental interest.[56] If the regulation only has "a tangential or remote impact on a problem" this step will not be satisfied.[57] And finally, if all the other criteria were met, the regulation imposed on the commercial speech could not be more broad than necessary to fulfill the previously enumerated governmental interest.[58]

David Vladeck believes that in *Central Hudson* the Court was hoping to provide significant deference to legislative judgments. In fact, Vladeck also points out the lack of

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[51] Bayer, Ronald, Laurence O. Gostin, and Gail H. Javitt. 2992
[52] Central Hudson Gas & Elec. V. Public Serv. Comm'n, 447 U.S. 557. No. No. 79-565. The United States Supreme Court. 20 June 1980.
[53] Gostin, and Javitt. 555
[54] Bayer, Ronald, Laurence O. Gostin, and Gail H. Javitt. 2992
[55] Gostin, and Javitt. 556
[56] Bayer, Ronald, Laurence O. Gostin, and Gail H. Javitt. 2992
[57] Gostin, and Javitt. 556
[58] Bayer, Ronald, Laurence O. Gostin, and Gail H. Javitt. 2992

concern for speaker rights in the *Central Hudson* decision. The Court does not address speaker interests but instead the interests of the consumers to have access to truthful information.[59]

The *Central Hudson* test does present many problems. For example, the second prong of the *Central Hudson* test "does not contain any restriction on the sorts of goals the government may pursue." [60] The final two steps of the Central Hudson test are also problematic in that these prongs do all the heavy lifting in the test but fail to provide guidance for future applications. In fact, the third and fourth prongs inherently contradict each other. For instance, under the third prong of the *Central Hudson* test a regulation could be struck down for not succeeding in fulfilling the government interest. And yet, at the same time, if the regulation in question was broad enough to succeed in fulfilling the governmental objective the court could easily find it too broad and in violation of the fourth prong of the test. Fischette explains it as follows:

> "If the Court is willing to accept that reducing the amount of information available about a product will lead to decreased demand, and that this constitutes a substantial interest under *Central Hudson*, the obvious solution for the government is to make the informational ban more comprehensive. If one believes that commercial speech serves any constitutional interest, the likelihood of this strategy should raise concerns, because it will lead to speech regulations effecting a near-total blackout, for anything less might fail the third prong."[61]

The lack of a clear standard provides the Court with significant leeway to decide each commercial speech regulation case on its own merits without being stuck with a strict overriding principle. [62] It also allows the Court to "obscure the real reason that the Court struck down a given law…Therefore, the Court can use the test to defeat objectionable legislation without

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[59] Collins, Ronald, Mark Lopez, Tamara Piety, and David Vladeck. "Examining the Health of Democracy: Corporations and Commercial Speech." Seattle University Law Review 30 (2007). 10

[60] Fischette, 5
[61] Ibid. 5
[62] Gostin, and. Javitt,. 556

articulating any set of coherent limits for commercial speech doctrine." [63] However, such leeway makes it difficult for both lower courts to confidently rule on cases brought before them and for Congress to draft constitutional legislation.[64]

The *Central Hudson* test has been used in subsequent commercial speech cases. From 1980 to the 1990s the court used the Central Hudson test to be the most deferential to commercial speech regulations to date.[65] *Posadas de Puerto Rico Associates v Tourism Company of Puerto Rico* in 1986 is considered by many to be the high water mark of the Court's leniency to commercial speech regulations.[66] In *Posadas de Puerto Rico Associates* the Court ruled that because the Puerto Rican government had banned gambling for its residents it was constitutional for the government to also ban gambling advertising directed at Puerto Rican residents. In the decision Chief Justice Rehnquist wrote, "It would surely…be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity."[67] The regulation in Posadas de Puerto Rico was then found to satisfy the last prong of Central Hudson. "Specifically, the Court held that the restriction was no more extensive than necessary because it was directed only at that segment of the population among which the government wished to reduce demand." [68] It would then seem to follow that because states have the power to regulate activities such as the sale of cigarettes, alcohol, and firearms, they should also have the

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[63] Fischette, 6
[64] Ibid., 5
[65] Bayer, Ronald, Laurence O. Gostin, and Gail H. Javitt. 2992
[66] Bayer, Ronald, Laurence O. Gostin, and Gail H. Javitt. 2992
[67] Bayer, Ronald, Laurence O. Gostin, and Gail H. Javitt. 2992
[68] Fischette, 4

constitutional authority to ban the advertising of the same products.[69] Another particularly interesting finding in the Posadas case was that the court found that "it is up to the legislature to decide whether or not a counterspeech policy would be as effective [as advertising restriction]."[70]

The Supreme Court did not continue to be as forgiving of governmental authority to regulate commercial speech. For example, in *Rubin v Coors Brewing Co* (1995), the Supreme Court invalidated a federal ban on including alcohol content on beer labels. [71] The Court found that the government failed to satisfy the second prong of the Central Hudson test when it rejected the government's asserted interests of preventing strength wars against brewers.[72]

In the next year, 1996, the Court again struck down a governmental commercial speech regulation. In *44 Liquormart, Inc. v Rhode Island* "the court became even more insistent that the government demonstrate a relationship between means and ends."[73] In this case "the Supreme Court found unconstitutional a state law prohibiting liquor-price advertisements other than in retail establishments."[74] The rationale behind this decision relied on the third prong of the *Central Hudson* test. Justice John Paul Steven wrote that "the state bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so 'to a material degree.' …The State has presented no evidence to suggest that its speech prohibition will significantly reduce market-wide consumption."[75] Rather than simply need to "directly advance the governmental interest"[76] Justice John Paul Stevens now increased the necessary scrutiny to

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[69] Bayer, Ronald, Laurence O. Gostin, and Gail H. Javitt. 2992
[70] Fischette, 4
[71] Bayer, Ronald, Laurence O. Gostin, and Gail H. Javitt. 2992
[72] Ibid.,2992
[73] Gostin and Javitt. 557
[74] Bayer, Ronald, Laurence O. Gostin, and Gail H. Javitt. 2992
[75] Gostin, and Javitt. 557
[76] *Central Hudson*

include advancing the states interest to a "material degree." [77] While not decided by a majority, the plurality in *44 liquormart* required a higher standard of review than the Court required in the *Central Hudson* decision and were more concerned about whether the "speech prohibition would "significantly reduce market-wide consumption."[78] The Court also emphasized the need for the government to exhaust all other alternative means of regulation prior to adopting commercial speech regulation.[79]

Following *44 Liquormart* the Court continued to look at the third prong of the *Central Hudson* test with much greater scrutiny.[80] For example, "the Supreme Court held in 1999 that the FCC could not ban broadcast advertisements by private gambling casinos."[81] In this case, *Greater New Orleans Broadcasting Association v. United States* the Court "made clear its intention to use a more rigorous First Amendment standard."[82] Therefore, "in the aftermath *of Coors Brewing, 44 Liquormart*, and *Greater New Orleans Broadcasting*, the government must demonstrate, presumably with credible evidence, that the regulation will, in fact achieve the asserted public health goal and not be an 'ineffective' or 'remote' method."[83]

The Court also increasingly demanded a more rigorous application of the fourth step in the *Central Hudson* test.[84] For example in 1989, in *Board of Trustees of the State University of New York v. Fox*, the Court was much more relaxed in its application of the fourth prong. "The Court held that the fourth Central Hudson criterion did not require the government to use the

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[77] Gostin, and Javitt. 557
[78] Fischette, 5
[79] Ibid., 5
[80] Ibid., 5
[81] Bayer, Ronald, Laurence O. Gostin, and Gail H. Javitt. 2992
[82] Gostin and. Javitt. 558
[83] Ibid., 558
[84] Ibid., 558

least restrictive alternative."[85] In the decision the court argued, "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."[86] However, later in *Coors Brewing*, *44 Liquormart*, and *Greater New Orleans Broadcasting* the court invalidated the restrictions placed on advertisements "because less restrictive alternatives were available to achieve the desired ends."[87]

The fourth test of *Central Hudson* was again interpreted rigorously in the Court's most recent decision relating to tobacco advertising was in the *Lorillard Tobacco Co. v. Reilly*.[88] In this case the Supreme Court struck down Massachusetts regulations put in place to reduce minor's use of tobacco products. The regulations in question prohibited outdoor advertising within 1000 feet of a school or playground and tobacco advertisements inside lower than 5 feet from the ground.[89] "In *Lorilard Tobacco Co v. Reilly*, the court once again gave expression to its increasingly hostile reception to measures designed to restrict commercial speech in the name of the social good."[90] The Court found the regulations to be in violation of the fourth prong in the Central Hudson test due to being too excessive to achieve the desired goal.[91] *Lorillard* also illustrated the Court's aversion to the paternalism of government. The Supreme Court wrote, "so long as the sale and use of tobacco is lawful for adults the tobacco industry has a protected

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[85] Gostin and. Javitt. 558
[86] Ibid., 558
[87] Ibid., 558
[88] Ibid., 559
[89] Bayer, Ronald, Laurence O. Gostin, and Gail H. Javitt. 2990
[90] Bayer, 356
[91] Gostin, and Javitt. 559

interest in communication information about its products and adult customers have an interest in receiving that information."[92]

**Recent Court Decisions**

*Lorillard* has been the most recent relevant commercial speech case regarding tobacco regulation decided by the Supreme Court. However, the decisions of the lower courts may also be useful in discerning the legal world's overall thinking on commercial speech issues. On March 31, 2008 the U.S. District Court for the Eastern District of Virginia issued their opinion for the case E*ducational Media Company at Virginia Tech, Inc, and the Cavalier Daily, Inc, v. Susan R. Swecker, et al*. The court ruled that the Virginia Administrative Code prohibiting certain words and phrases in alcohol advertisements in college student publications violated the First Amendment.[93] The case was decided through the third prong of the *Central Hudson* test. The court argued that "the regulation does not directly advance the governmental interest asserted…the litany of permitted words in [the law] does not directly advance the goal of temperance or diminished consumption of distilled spirits."[94] Basically, the regulation contained too many holes to be effective and thus there was no compelling interest of the government for which to uphold the law.[95] When looked at from a tobacco advertising point of view, it is clear that the courts are now requiring that all advertising restrictions be narrowly tailored to allow for the largest amount of free speech, and also to have a visible impact on the alleged government interest.

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[92] Bayer, Ronald, Laurence O. Gostin, and Gail H. Javitt. 2990

[93] Educational Media Company at Virginia Tech, Inc., and The Cavalier Daily, Inc., Plaintiffs, v. Susan R. Secker, el al., Defendants. No. 3:06CV396. United States District Court for the Eastern District of Virginia, Richmond Division. 31 Mar. 2008. , 1

[94] Ibid., 8

The prior history of the Court's approach to the commercial speech doctrine shows that while the Court originally found that the commercial speech was not protected by the First Amendment, this belief evolved so that the Court now applies strict scrutiny to regulations restricting or limiting commercial speech. The public health community must keep the changing nature of the Supreme Court in mind and adjust their tobacco control strategies accordingly. What once may have been considered constitutional may now be struck down by the United States Supreme Court.

**Other Arguments Regarding Government Regulation of Commercial Speech**

While this paper has previously discussed the Supreme Court's rationale for granting first amendment protection to commercial speech, there has yet been a more detailed discussion of both sides of the argument, both in the courts and in academia as to the true pros and cons of protecting all forms of commercial speech.

There are multiple arguments in favor of commercial speech protections. These arguments include an argument for the "democratic rationale," accountability, avoidance of paternalism. First, the argument found in the democratic rationale argument seems to be the argument most relied on by the courts when deciding commercial speech cases. This argument suggests that commercial speech does have important public policy implications.[96] Such an impact on public policy discussions can be seen in advertisements that advertise green products while at the same time advocating for greener laws. Because it presents politically relevant

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[95] Educational Media, 10
[96] Fischette, 7

information "it is hard to see how its being broadcast in a commercial manner somehow disqualifies it from First Amendment protection."[97] Virginia Pharmacy used this rationale to find support for commercial speech protection.[98]

Commercial speech protection also fosters political accountability. This argument is not quite as obvious at first glance. However, when looked at closely this argument does make sense. For example, when a government imposes a tax or otherwise restricts the sale of a product in an effort to limit its use the new regulation is easily visible to the general public.[99] However, restrictions placed on certain types of advertising are nearly impossible to notice. American's view thousands of advertisements a day, and are unlikely to notice that they are viewing fewer advertisements for a certain product and attribute it to a government action.[100] This limits the amount of possible public reaction, and thus limits the accountability legislatures will be faced with for creating restrictions on commercial speech.[101]

Finally, there is a great aversion in American society to an overly paternalistic government, that is, a government that dictates how individuals should live and act. Such actions are believed to be "a vote of no confidence in the capacity of ordinary Americans to judge for themselves how to react" to advertisements such as tobacco advertisements.[102] Those who hold this point of view would continue to argue that the average American is smart enough to know what is and what is not harmful to them. And if they still chose the harmful alternative it was a

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[97] Fischette, 8
[98] Ibid., 7
[99] Ibid., 9
[100] Ibid., 9
[101] Ibid., 9
[102] Bayer, 357

matter of free choice and not a matter for the government to regulate.[103] Bayer further explains the argument by saying, "Such an elitist approach, which treats Americans as the incompetent wards of a benevolent state who can't be trusted to evaluate speech for themselves, is wholly antithetical to the faith in human reason that underlies our political and economic system."[104]

The aforementioned arguments are not all fool-proof. For example, if it can be argued that all commercial speech has some political relevance than it is "at the cost of showing that almost everything does." This would then force one to make the argument that "all speech is subject to First Amendment protection, a conclusion few are willing to reach."[105] Also, in terms of the paternalism argument, such a desire to avoid governmental paternalism forgets the points described above during the discussion on the necessity to protect public health. It was concluded that at times the individual does not do what is best for the whole, and in those instances government intervention is in the best interest of everyone.

Other arguments against commercial speech protection point to the negative effects certain advertisements can have on society. "Tamara Piety has argued that advertising contributes to the degradation of women, promotes alcohol and tobacco use, and creates a demand for happiness that cannot ultimately be fulfilled."[106] It can also be argued that today's advertisements are "so far removed from anything resembling rational deliberation that society actually benefits when such advertisements are removed from view."[107] If the advertisements are

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[103] Bayer, 357
[104] Ibid., 357
[105] Fischette, 9
[106] Ibid., 11
[107] Ibid., 12

actually not presenting anything of value, then wouldn't the arguments presented above no longer support commercial speech protections?

**Tobacco: The Intersection of Public Health and Free Speech**

Tobacco advertising is right in the cross-hairs of the public health and free speech debate. For one thing it is obvious that tobacco is a harmful product to individuals, as well as a hazard to others through second-hand smoke. Yet, at the same time the courts have ruled that all forms of commercial speech have some protection under the First Amendment. The proposal to ban or severely limit cigarette advertising has continuously created disagreements between those who see cigarette advertisements as promoting a deadly habit and those who see it as a blatant disregard to cigarette companies' first amendment rights.[108] In testimony before Congress in 1985, the American Public Health Association said, "Cigarettes are killing us! Some people are getting rich with blood money which flows at the expense of many deaths…Advertisements should be to promote good health products and not products that kill. Cigarette companies practice false advertising at its worst; deceptively offering freedom while actively inducing bondage."[109]

Tobacco use is a serious public health problem. According to the Campaign for Tobacco Free Kids, one of the leading tobacco control groups in the nation, each year 400,000 people die due to their own cigarette smoking, and another 50,000 will die just from exposure to second hand smoke.[110] That means that 1,170 people die from smoking every day.[111] In fact, "smoking

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[108] Bayer, 357
[109] Ibid., 357
[110] Lindblom, Eric. "Toll of Tobacco on the United States of America." Campaign for Tobacco-Free Kids. 1 Apr. 2009. 28 Apr. 2009 <http://www.tobaccofreekids.org>. 1

kills more people than alcohol, AIDS, car accidents, illegal drugs, murders, and suicides combined."[112] If current smoking trends continue more than six million kids who are currently under the age of 18 will eventually die from tobacco related disease.[113]

Smoking related deaths are not the only public health problem caused by smoking. Studies have shown that annual Federal and State government smoking related Medicaid expenditures come in at about $30.9 billion.[114] That is $30.9 billion dollars that could be used to treat other diseases and further improve public health. An additional $4.98 billion is spent on health issues caused by secondhand smoke.[115] By looking just at the impact of secondhand smoke it is easy to see that tobacco use is clearly a societal concern. The individual whose health was impacted by secondhand smoke did not have a choice in the matter, thus making it the government's responsibility to protect them.

While the government has been willing and able to address the problem of tobacco use in the United States through the implementation of smoke-free laws and increased excise taxes on cigarettes; it has been less enthusiastic about pursuing advertising regulations. However, "epidemiological evidence clearly demonstrates that advertising and marketing increase the rate of tobacco use and illness across a population."[116]

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[111] Lindblom, Eric. "The Daily Toll of Tobacco Use in the USA." The Campaign for Tobacco-Free Kids. 10 Jan. 2007. 28 Apr. 2009 <www.tobaccofreekids.org>., 1
[112] Lindblom, "Toll of Tobacco", 1
[113] Ibid., 1
[114] Ibid., 1
[115] Ibid., 1
[116] Parmet, 5

Cigarette companies spend $13.1 billion dollars a year, of $35.9 million dollars a day on tobacco advertisements.[117] While some people argue that advertising doesn't work and thus the regulation of tobacco advertising is pointless, it is difficult to believe this assertion in the face of the tobacco companies advertising expenditures.[118] Tobacco companies would not spend billions of dollars on a marketing strategy that did not work. Therefore, it would seem only logical that restricting tobacco advertisements would lead to a decrease in the prevalence of tobacco use. Yet, in the Lorillard decision, the Court ignored these facts and "considered only the burdens of the regulation on speech rather than whether there were other effective ways for the state to address the public health threat created by tobacco marketing and advertising."[119]

There is also substantial evidence towards the effects cigarette advertisements have on children and teens. For example, a study published in the May 2007 issue of *Archives of Pediatrics and Adolescent Medicine* found that the more point-of-sale advertising a teen was exposed to, the more likely they were to smoke.[120] Teens are also much more likely to smoke Marlboro, Camel or Newport cigarettes, three heavily advertised brands. In fact, "Marlboro, the most heavily advertised brand, constitutes almost 50 percent of the youth market."[121] This seems to be clear evidence that tobacco advertising does work.

The Federal Cigarette Labeling and Advertising Act of 1965 (FCLAA) is the United States current prevailing legislation that restricts Cigarette advertising. But public health experts agree that the FCLAA includes very few meaningful public health requirements. The most

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[117] Riordan, Meg. "Tobacco Company Marketing to Kids." Campaign for Tobacco-Free Kids. 30 Sept. 2008. 29 Apr. 2009 <http://www.tobaccofreekids.org>.
[118] Collins, Lopez, et.al., 3
[119] Parmet, 5
[120] Riordan, 3
[121] Ibid., 3

impactful of which is the requirement of warnings on all cigarette packages and advertisements.[122] But, while "the public health research literature supports the use of health warnings, nearly unanimously concludes that the health warnings under FCLAA are ineffective."[123] To provide a more effective deterrent to smoking, warning labels would need to be both larger and more graphic.[124]

**Misleading and Untruthful Advertisements**

The first prong of the *Central Hudson* test requires that commercial speech "at least must concern lawful activity and not be misleading"[125] However, most of the commercial speech cases decided by the Supreme Court have not seriously considered the potential deceptive quality of commercial speech. Instead, the cases have focused much more strongly on the application of the third and fourth prongs of the *Central Hudson* test.[126] Yet, the first prong of the *Central Hudson* test could prove to be very useful to those who are hoping to gain Court approval of some tobacco advertisement restrictions.

For example, Tobacco companies continue to come out with new products and new claims about their products. Yet, many times such claims are not backed up by definitive scientific evidence. Couldn't making unverified claims then be considered misleading and

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[122] Banthin, Christopher N., and Richard A. Daynard. "Current Issues in Tobacco Regulation, Litigation, and Policy: Symposium: Room for Two in Tobacco Control: Limits on the Preemptive Scope of the Proposed Legislation Granting FDA Oversight of Tobacco." Univeristy of Maryland, School of Law Journal of Health Care Law & Policy 11 (2008). , 60

[123] Ibid., 60
[124] Ibid., 60
[125] Central Hudson
[126] Gostin and Javitt 563

therefore a violation of the first prong of the *Central Hudson* test.[127] Yet, "industry advocates take the position that speech may not be restrained unless the government can prove its claims are false."[128]

The Court has been adamant about protecting speech because it benefits the bargaining process and contributes to the marketplace of ideas. However, the Court has also recognized that "commercial speech that is false, deceptive, or misleading undermines the fair bargaining process by creating an unequal relationship between buyer and seller."[129] But, beyond expressing displeasure at the practice of misleading speech, the court has "never clearly defined what constitutes untruthful or deceptive speech."[130] However, the question of what makes an advertisement misleading or deceptive could prove to create a large impact in future commercial speech cases.

*Virginia Pharmacy Bd* provided some explanation for the courts decision to extend protection only to truthful commercial speech. The rationale in *Virginia Pharmacy Bd*. For commercial speech protection was "because of the need for truthful information in the marketplace to assist consumers in making purchasing decisions."[131] Alternatively, false speech would not warrant this protection, because false speech would not enhance consumer decision making.

It is not difficult to see how tobacco advertisements can be misleading. "Tobacco advertisements portray tobacco use as a healthy and desirable habit and fail to disclose fully the

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[127] Vladeck, 33
[128] Ibid., 33
[129] Gostin and Javiitt 563
[130] Ibid., 563
[131] Collings, Lopez, et al., 4

lethal and addictive nature of tobacco use."[132] For example, tobacco advertisements are continuously portraying smokers as active and healthy individuals and they fail to mention that smoking is something that will eventually inhibit the user's health and athletic prowess. [133] Yet, "to the extent that such advertisements fail to disclose the real and serious health hazards associated with these products, it can reasonably be contended that they are deceptive and misleading and therefore not subject to First Amendment protection."[134]

In fact, one of the goals of advertising is to be somewhat misleading. Advertisements strive "to create a 'persona' associated with the product with which consumers want to identify."[135] This goal is achieved through the use of alluring images, contexts and associations, and obviously not always based in fact[136]

Unlike in the past "fewer claims are made in advertising."[137] Many advertisements aren't meant to create factual claims, instead they are crafted to "evoke some sort of emotional response." [138] A lack of outright claims makes it difficult to argue that advertisements are misleading. For example, it may be impossible to come to a water-tight conclusion regarding the meaning of the Newport Cigarette slogan that says, "Newport: Alive with pleasure." [139] The public health community could easily argue that "alive with pleasure" is misleading because if a consumer were to smoke Newports for a significant amount of time there would first be a large possibility that the consumer would no longer be alive, and secondly, it would be unlikely that

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[132] Lee, 46
[133] Gostin and Javitt 563
[134] Ibid., 563
[135] Ibid., 563
[136] Ibid., 563
[137] Collins, Lopez, et al., 4
[138] Ibid., 4
[139] Ibid.., 4

the consumer would find life to be as pleasurable. Yet, Lorillard, the producer of the Newport brand, could just as easily argue that the phrase, "alive with pleasure" only refers to the act of smoking, which many smokers have described as pleasurable. However, the question still remains, which of the two arguments is more valid? The Court has failed to acknowledge this change in the nature of advertising and instead see advertising as only the dissemination of information. But, as was just seen, "advertising isn't remotely like information in the ordinary sense of the word."[140]

Yet, even if the changing nature of advertising is not taken into account there is still seemingly unlimited evidence of the tobacco companies' attempts to mislead the public. Documents unearthed in some of the many lawsuits against big tobacco have found that the tobacco industry "engaged in deliberate obfuscation of the health risks of smoking, knowingly marketed to children, and falsely denied the addictive properties of nicotine and the negative health consequences of secondhand smoke."[141] In the *United States v. Philip Morris USA Inc.,* (1996), a case brought by the United States Department of Justice, Federal District Court Judge Gladys Kessler "concluded that these companies, ignoring everything but the goal of selling as many cigarettes as possible, together designed and implemented one of the most extensive disinformation campaigns in this country's history aimed at obfuscating the public's knowledge of tobacco-caused diseases."[142] In Judge Kessler's opinion she devotes 817 pages to the findings of fact. "The findings detail her conclusions that the industry has devised and executed a scheme to defraud the public with regard to: the adverse health consequences of smoking; the addictive properties of nicotine; the manipulation of nicotine and nicotine delivery; the use of 'light' and

[140] Collins, Lopez, et al., 4
[141] Ibid., 7
[142] Banthin, 57

'low tar' brand indicators; youth marketing; environmental tobacco smoke; and research suppression and document destruction."[143] It seems obvious that Judge Kessler would find in favor of the government were a case regarding regulation of tobacco advertisements brought before her. However, the reaction of the Supreme Court cannot be as certain.

While the argument that tobacco advertisements have been misleading does seem compelling, commercial speech advocates and tobacco companies would argue that proving an idea is false is a difficult task. "As the case law stands, and as it has been settled for at least fifty years, under the First Amendment there is no such thing as a false idea."[144] The ACLU therefore argues that the government bears the burden of proving falsity.[145] Therefore, in the above mentioned example regarding the Newport slogan "alive with pleasure," the government would need to prove that Lorillard did in fact mean for the statement to imply that users would live a long and pleasurable life and not that smoking Newports was a pleasurable experience. Such a claim would be nearly impossible to prove.

The courts have not taken a proactive step in allowing the government to regulate false and misleading advertisements. For example, in a 1999 ruling, the Federal Court of Appeals overturned regulations issued by the Food and Drug Administration for health claims for dietary supplements. "The court found that the FDA rule was too strict, and that claims could be made even when they lacked strong scientific support, provided that the seller added a disclaimer that acknowledged the lack of scientific consensus supporting the health claim."[146]

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[143] Banthim, 72
[144] Collins, Lopez, et al., 8
[145] Vladeck, 33
[146] Ibid., 33

Additionally, in *Lorillard Tobacco Co*. the government argued that "consumers should be protected from advertising that might mislead and potentially cause harm." [147] However, the Court ruled instead that if a consumer needs to be protected from harm caused by a product the government must regulate the sale of that product and not the potentially misleading information presented in advertisements.[148]

While the courts have failed to find tobacco advertising to be misleading and thus in violation of the first prong of the *Central Hudson* test, there are currently a handful of ongoing cases that could potentially reveal a changing in the court's thinking. "There are a couple of pending cases which challenge the first criteria, that commercial speech not be misleading. The cases involve unsubstantiated health claims of cold prevention by Listerine, Warner-Lambert Company v. FTC, and calcium benefit from *Kraft, Kraft Inc. v. FTC*." [149] However, there is no guarantee to the public health community that the courts will be swayed towards their way of thinking. For example, a recent federal court decision in *Pelman v. McDonald's* may show that the courts will not change course. In this case the Federal Court "rejected a deceptive advertising claim against McDonald's 'Eat Every Day' ad campaign, saying that harm had not been proven, and that the ads were mere 'puffery'."[150] If such decisions continue to prevail the public health community may need to give up this argument and pursue more areas more likely to result in success.

More promising however is Justice David Souter's dissent in *Lorillard Tobacco Co.*. Justice David Souter wrote, "the attorney general for Massachusetts remains free to proffer

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[147] Vladeck, 34
[148] Ibid., 34
[149] Ibid., 34
[150] Ibid., 34

evidence that the advertising is in fact misleading.' Thus the door is left open for a future case to argue that images associating tobacco use with a vibrant, athletic lifestyle while failing to disclose their short- and long-term negative consequences on health are deceptive and misleading."[151] The public health community has now been put to the challenge of putting together a law suit to take up Justice Souter's challenge and attempt to change the Court's mind regarding misleading advertising.

**Unlawful Activity**

A potentially more advantageous argument for the public health community continues to focus on the first prong on the Central Hudson test, but rather than look at misleading advertising it looks at the advertising of illegal activity. Just as was the case for misleading speech, Supreme Court jurisprudence has failed to provide a nuanced analysis of what it means by lawful activity. This may of course be based "on the assumption that such a determination is obvious." [152] However, in certain cases, such in terms of tobacco advertising, it is not so obvious. For example both smoking and drinking are legal for those above a certain age, but illegal for those under it.[153] Yet, despite such prohibitions regarding teen smoking "the vast majority of today's smokers continue to start in their mid-teens. A substantial body of evidence points to tobacco advertising as a reason for this trend."[154] Public health activists first began to use the issue of the tobacco companies directing their advertising towards children as ammunition to restrict the scope of

[151] Gostin and Javitt 564
[152] Ibid., 562
[153] Ibid., 562
[154] Banthin, 68

cigarette advertisements in the 1990s.[155] The campaign was prompted in part by the "RJ Reynolds tobacco company's launching in 1988 of its Joe Camel campaign, with its appeal to the young that was hard to ignore."[156]

The government has a strong interest in preventing teen smoking. In 1994 the Surgeon General released a report "Preventing Tobacco Use Among Young People", which asserted, "when young people no longer want to smoke the epidemic itself will die."[157] This presents a strong argument for doing everything possible to keep youth away from tobacco. The report concluded that, "whether casual or not, [promotion] fosters the uptake of smoking, initiating for many a dismal and relentless chain of events."[158]Also, in 1994 the Institute of Medicine issued a report titled, "Growing up Tobacco Free." In this report they called "for severe restrictions on tobacco advertising, including the possible imposition of a total ban."[159] In 1996 the FDA even declared smoking a pediatric disease.

The Supreme Court has repeatedly recognized the governmental interest of "protecting young people from harmful products, recognizing that they may not be able to make responsible decisions about them."[160] The assumption has been that "children and young adolescents ere incapable of making determinations on their own behalf and needed protection from manipulation by those who sought to stimulate their desires for harmful goods."[161] Although the court has rejected paternalism as a government function for adults, it has never had an issue with

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[155] Bayer 357
[156] Ibid., 358
[157] Ibid., 358
[158] Ibid., 358
[159] Ibid., 358
[160] Gostin and Javitt 562
[161] Bayer, 358

the government's use of paternalism over those under the age of consent.[162] "Since cigarette smoking, once commenced, is driven by the addictive power of nicotine, the exercise of restrictive and protective authority to prevent smoking in the young was morally justified."[163]

However, the court has never found that because an activity is illegal to minors that the commercial speech in question fails the first prong of the *Central Hudson* test. It seems impossible however that the Court would ever overturn a government regulation that only explicitly restricted tobacco advertising directed solely at youth.[164] For example, it seems unlikely that the Court would be very unlikely to find that a ban on Joe the Camel would be unconstitutional. This is because Joe the Camel was blatantly directed towards teens and young children due to its cartoonish nature.

However, combating advertising towards youth was the goal of the regulations imposed by the Massachusetts regulations in question in *Lorillard Tobacco Co*. Yet, even here there Attorney General of Massachusetts stipulated that the advertisements in question did not violate the first prong of the Central Hudson test.[165]

Arguments against the ability to prohibit tobacco advertisements that are potentially aimed at youth argue that any kind of ban would be unconstitutional if it did nothing to address the established government interest. "Certainly restrictions on advertising directed at youths could be justified only if, in fact, they affected patterns of smoking. From a constitutional

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[162] Bayer, 358
[163] Ibid., 358
[164] Gostin and Javitt 562
[165] Lorillard Tobacco Co. et al. v. Reilly, Attorney General of Massachusetts, et al. No. 00-596. The United States Supreme Court. 28 June 2001., 16

perspective, the issue was crucial."[166] "The court's jurisprudence on commercial speech restrictions stipulated that, no matter how narrowly tailored, limitations could not pass muster if there was no evidence that they could achieve their goals."[167] Yet, in Lorillard Tobacco Co. Justice O'Connor writes, "in previous cases, we have acknowledged the theory that product advertising stimulates demand fro products, while suppressed advertising may have the opposite effect."[168]

"Despite laws prohibiting cigarettes sales to anyone less than eighteen years of age in most states, the vast majority of today's smokers continue to start in their mid-teens. A substantial body of evidence points to tobacco advertising as a reason for this trend."[169]

However, a more justifiable argument against limiting tobacco advertising due to its impact on youth was discussed a great deal in the *Lorillard Tobacco Co*. case. The Court has ruled on numerous occasions that "the governmental interest in protecting children from harmful materials does not justify an unnecessarily broad suppression of speech addressed to adults."[170] The court has consistently ruled that it is unconstitutional to limit access to information just because it is inappropriate for children because doing so would "reduce the adult population to reading only what is suitable for children."[171] First amendment advocates have continued this argument by saying that "although the protection of children was an important and legitimate governmental purpose, such protective impulses could not justify restring access by adults to

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[166] Bayer, 359
[167] Ibid., 359
[168] Lorillard, 18
[169] Banthin, 68
[170] Lorillard, 21
[171] Ibid., 21

material not fit for children."[172] Long-time commercial speech advocates have also "denounced the child-centered justification for the proposed limitations because they would 'reduce all of society to a community of children for purposes of the First Amendment.'"[173] Such efforts have also been called "content-based efforts to stifle one side of a public debate because of a paternalistic governmental fear that the citizenry cannot be trusted to judge the truthful advocacy of lawful conduct."[174]

Some analysis's have also concluded that bans on tobacco advertising do little to combat smoking. "An analysis by Saffer and Chaloupka in 200 suggested that only a total ban on advertising and promotion could have a desired, if modest, impact on smoking." But partial or limited restrictions were found to have almost not impact.[175]

**Proposed solutions:**

The Supreme Court has not created a clear path for the government to follow when looking to pursue tobacco advertisement regulations in the name of public health. In fact, while the Supreme Court consistently states in their opinions that *some* forms of government regulation are constitutional, it has become more and more difficult to predict just what those regulations would be. This problem comes about because within the *Central Hudson* test the Court has the ability to say that the regulation is both too narrow and therefore ineffective, or too broad and therefore unconstitutional.

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[172] Bayer, 359
[173] Ibid., 359
[174] Ibid., 359
[175] Ibid., 359

Therefore, in order to create effective and constitutional regulations the public health community must be flexible enough to work around these changing constitutional guidelines. Consistently shown that it is against the government making regulations seeking to "keep people in the dark for what the government perceives to be their own good. The court has reiterated that it is the job of the 'speaker and the audience, not the government, [to] assess the value' of the commercial information presented."[176] Therefore, "the court is likely to find unconstitutional those regulations that constitute blanket prohibitions or that censor content."[177] However, "requirements that certain speech be disclosed to prevent deception are more likely to pass constitutional muster than are those that ban the speech altogether."[178] For example, warning labels have been required on cigarette packets since the Federal Cigarette labeling and Advertising Act of 1965. However, the public health community has "unanimously concluded that the health warnings under FCLAA are ineffective."[179] Therefore, the government should pass stricter laws making warning labels "larger in size and include a rotating series of pictorials that graphically depict the health effects to the potential user and those who will be exposed to the user's secondhand smoke."[180] A fight for larger warning labels is already in the making with proposed legislation in Congress that would give the FDA authority over tobacco. The legislation would "improve cigarette health warnings by authorizing the FDA to increase the required label warning area from thirty percent to fifty percent of a package's panel, as well as require pictorial warnings, package, and advertising inserts." [181]

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[176] Gostin and Javitt 565
[177] Ibid., 565
[178] Ibid., 565
[179] Banthin, 60
[180] Ibid., 60
[181] Ibid., 65

Along these lines, the Campaign for Tobacco-Free Kids (CTFK) has recognized the difficulty of imposing restrictions on tobacco advertising. Therefore, rather than lobbying congress or state assemblies to ban tobacco advertisements CTFK has advocated for a simple solution involving more government speech used to counteract harmful tobacco advertising. "One of the most inexpensive and easiest [ways to counteract tobacco advertisements] is to require signs in key locations that warn consumers of the harms and addictiveness of tobacco products and provide information to help them quit."[182] Obviously, such a strategy does not keep anyone from seeing or being influenced by tobacco advertisements, but it does provide a way to remind the public that the images and phrases used in tobacco advertisements may be misleading.

Public health activists could also continue to test the courts in regards to advertising restrictions. Lee argues that tobacco advertising restrictions should be found constitutionally acceptable under the first two prongs of the *Central Hudson* test. The first reason Lee points towards as evidence of this is the fact that he believes tobacco advertising is misleading and therefore would advertising restrictions would pass the first prong of the *Central Hudson* Test.[183] However, as was discussed earlier in this paper, the burden is on the government to prove falsity, which could prove to be difficult. However, Lee continues to argue that "tobacco advertising, therefore, would be entitled to limited First Amendment protection, but even a First Amendment right is not worth certain harms to the citizens' health."[184]

The *Lorillard Tobacco Co*. case also left some room for optimism for the public health community. While the court did strike down the law restricting advertising within 1,000 feet of

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[182] Lindlom, Eric. "Simple and Inexpensive Government Strategy to Counter Tobacco Product Ads." Campaign for Tobacco-Free Kids. 6 Mar. 2008. 29 Apr. 2009 <http://www.tobaccofreekids.org>.,2
[183] Lee, 49
[184] Ibid., 50

schools and playgrounds, one of the reasons for finding the legislation unconstitutional was that, "in some geographical areas, these regulations would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers. The breadth and scope of the regulations, and the process by which the Attorney General adopted the regulations, do not demonstrate a careful calculation of the speech interests involved."[185] The promising feature of this passage is that the Court is not saying that a limited ban on advertising is unconstitutional, but just that this particular ban was poorly thought out. However, it also serves as a warning for legislatures considering passing tobacco advertising bans. It warns that the bans must be carefully thought out and not based on arbitrary numbers. The 1,000 foot number was not chosen because studies proved that anything close than 1,000 feet increased greatly the number of children impacted by the advertisements.[186] Crafting such specific and scientifically backed legislation is sure to prove to be a difficult process, but if a state is adamant about protecting its citizens' public health it will take these necessary steps, and hopefully be able to craft legislation that is both constitutional and effective.

Obviously, the government also has one other option. The government could ban the sale of any tobacco product anywhere in the United States. If it were to do this tobacco advertising restrictions would be constitutional due to the fact that the advertisements would be advertising something illegal. Such a ban, however, occurs only in the dreams of public health activists. In the current political atmosphere of the United States, voting for any such legislation would be political suicide for congressmen from tobacco states. Thus, the public health community must focus their efforts on more attainable goals.

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[185] Lorillard, 20
[186] Ibid., 20

**Conclusion**

There is no question that tobacco use is harmful to both those to use it and those who don't. It contributes to hundreds of thousands of deaths every year and is a drain on the healthcare system. Tobacco advertising contributes to the continued prevalence of tobacco use, even in light of studies proving the harmful effects of tobacco. Therefore, in order to advance public health goals the government and public health groups have tried to put restrictions on tobacco advertising.

However, the Supreme Court has continuously struck down restrictions imposed on tobacco advertisements, most recently in the *Lorillard Tobacco Co*. case. While commercial speech protection is a relatively new phenomenon in Supreme Court jurisprudence it does not appear to be going away anytime soon. The *Central Hudson* Test provides the prevailing criteria for determining the constitutionality of commercial speech restrictions. However, even though there is a clearly established test, the public health community must struggle with the changing interpretations of the *Central Hudson test's* guidelines. The Court drafted *Central Hudson* in such a way that there is almost unlimited variability in how the Court may choose to decide future cases.

Based on past cases it seems that the most promising avenues available to governments looking to create restrictions on tobacco advertisements lay in the first prong of the Central Hudson Test. If the government can prove that tobacco advertisements are either promoting the illegal activity of underage smoking or are untruthful and misleading the Court would have to

rule that tobacco advertisement restrictions are constitutional even if they didn't satisfy the other 3 prongs of the *Central Hudson* test.

Failing to prove the falsity or illegality of tobacco advertisement restrictions the government is faced with much more restrictive options. If the government or public health group still wants to restrict advertising they must be sure to carefully tailor the restrictions so as to only ban the advertising they are specifically targeting. Otherwise, the courts will most likely find the regulation unconstitutional.

Failing to create acceptable advertisement restrictions the public health community must chose other options to combat tobacco use. Possible actions include creating larger and more graphic warning labels for cigarette packs, or increasing anti-tobacco advertisements in hopes of counteracting the effects of traditional tobacco advertising.

The First Amendment of the United States Constitution is a powerful doctrine. As Justice J. Skelley Wright wrote in his dissent, "the First Amendment does not protect only speech that is healthy or harmless."[187] For this reason, the government must be respectful of the tobacco companies' legal rights to engage in all types of speech including commercial advertising. However, the necessity to protect even the tobacco companies from First Amendment violations does not lessen the government's responsibility towards protecting public health. For this reason, even if the government is unable to pass constitutional tobacco advertisement regulations, it must still take every action within its power to lessen the threat that tobacco use poses to society.

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[187] Bayer, Ronald, Laurence O. Gostin, and Gail H. Javitt. 2992

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