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ARGUMENT FOR THE BAN OF TOBACCO ADVERTISING: A FIRST AMENDMENT ANALYSIS

Kenneth L. Polin*

OVERVIEW

The argument for the ban of tobacco advertising raises the perplexing problem of how to treat a uniquely dangerous product, which is legal only because of its exceptional social, financial, and political background, without violating the strong first amendment protection afforded commercial speech. This Article demonstrates


1. For the purpose of this Article, tobacco is defined as consumer tobacco products such as cigarettes, cigars, pipe tobacco, and smokeless tobacco. The tobacco product most recently introduced on the market is the "smokeless" cigarette, which manufacturers began test marketing in October 1988. Stark, The Tobacco Industry's Last Gasp (Editorial), N.Y. Times, Sept. 27, 1988, at A35, col. 2.

2. The term "advertising" includes a vast array of non-gratis methods such as advertisements in magazines and newspapers, inserts in tobacco product packages, industry publications which extol the virtues of tobacco use, outdoor displays (billboards, skywriting, and inflatable objects), paid encouragement of product use on stage and screen, displays at point of purchase, distribution of discount coupons, and free samples.

3. See Banzhaf v. FCC, 405 F.2d 1082, 1097-99 (D.C. Cir. 1968). The court explained that tobacco is harmful in the normal use of the product, id. at 1097, and upheld an FCC rule requiring anti-smoking advertisement, stating that, "[i]n view of the potentially grave consequences of a decision to continue—or above all to start—smoking, we think it was not an abuse of discretion for the Commission to attempt to insure not only that the negative view be heard, but that it be heard repeatedly." Id. at 1099; see also infra note 33 and accompanying text (quoting Dr. Robert McAfee, representative of the American Medical Association).

4. See infra notes 11-36 and accompanying text.

5. While an equal protection attack under the fifth amendment could be asserted against an advertising ban, the strength of such an argument pales in comparison to the opposition offered by a first amendment objection. In United States v. Carolene Prods. Co., 304 U.S. 144 (1938), the Supreme Court concluded that the fifth amendment does not require legislatures "to prohibit all like evils, or none. A legislature may hit at an abuse which it has found, even though it has failed to strike at another." Id. at 151. The requirement of the fourteenth amendment that "all persons [in this instance, corporations] similarly circumstanced shall be treated alike," Reed v. Reed, 404 U.S. 71, 76 (1971) (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)), is easily overcome if tobacco, and thus its sale, is proven unique.
that tobacco advertising is not commercial speech protected by the first amendment because it is inherently misleading, if not fraudulent,\(^9\) and/or relates to criminal activity\(^7\) (i.e. the sale of tobacco to minors\(^8\)). Assuming, *arguendo*, that tobacco advertising is protected commercial speech, this Article subsequently asserts, in recognition that tobacco is lawful only because of its exceptional background,\(^9\) that the substantial governmental interest at stake justifies extraordinary control of its intended effect—promoting the use of a uniquely harmful product.\(^10\)

I. Operational Setting of Tobacco Advertising

Fortified by a one half millenium tradition of strong tobacco promotion,\(^11\) the cigarette companies collectively sought to head off congressional action\(^12\) to regulate advertising by voluntarily adopting, in 1964, the “Cigarette Advertising Code.”\(^13\) This Code in-

Therefore, comparisons to other advertising bans, such as for alcohol (which would present the additional consideration of the states’ “enhanced power under the Twenty-First Amendment,” Oklahoma Broadcasters Ass’n v. Crisp, 636 F. Supp. 978, 982 (W.D. Okla. 1986)), need not be explored in depth. Accordingly, this Article undertakes to focus on the strongest source of objection to an advertising ban, the first amendment.

6. *See infra* notes 101-38 and accompanying text (characterizing tobacco advertising as misleading or fraudulent speech and therefore not protected by the first amendment).

7. *See infra* notes 143-62 and accompanying text (discussing the definition of criminal solicitation and its relevance to the advertising of tobacco products).

8. *See infra* note 150 (citing examples of state statutes prohibiting the sale of cigarettes to minors). New York further requires that all sellers of cigarettes post a conspicuous notice that it is unlawful to sell tobacco to those under eighteen years of age. *See N.Y. GEN. BUS. LAW § 399-c(1) (McKinney Supp. 1987)*.

9. *See infra* notes 11-36 and accompanying text.

10. In an attempt to persuade the American Bar Association to join in efforts seeking the adoption of a federal law barring all advertisements of tobacco products, Professor Henry Paul Monaghan argued that “[i]t is quite wrong to insist that the Constitution of the United States protects the advertising of such a *unique and gravely harmful product*.” Shipp, *A.B.A. Rejects Plan on Tobacco Ad Ban*, N.Y. Times, Feb. 17, 1987, at A14, col. 1 (emphasis added); *see also infra* note 48 (discussing the American Bar Association’s refusal to join in such efforts); *supra* note 3 (discussing the dangers of tobacco).

11. Tobacco was discovered by Europeans on Columbus’ first voyage in 1492. J. Brooks, *The Mighty Leaf: Tobacco Through the Centuries* 11-12 (1952); *see also* C. Werner, *TobaccoLand* 19-24 (1922) (giving an historical account of Columbus’ first encounter with tobacco and its use by the American Indians). By the mid-sixteenth century, tobacco had been widely introduced into Europe and, later that century, became the most desired American crop. J. Brooks, *supra*, at 47-50.

12. *See generally* Wilson v. New, 243 U.S. 332 (1917) (holding that the nature of the circumstances surrounding the legislation will be a determining factor in an interstate commerce analysis).

cludes, in pertinent part, an assurance that cigarette ads would not be directed at those under twenty-one years of age. Nevertheless, spurred on by the insidious effects attributed to smoking in the Surgeon General's Report of 1964, Congress passed the "Cigarette Labeling and Advertising Act" which required all cigarette packages to include the following warning: "Caution: Cigarette Smoking May Be Hazardous to Your Health." As medical evidence of tobacco's injurious effects has grown, the required warnings have increased in sternness and scope. In 1970, Congress enacted the Public

14. Id.
15. See generally United States Dep't of Health, Educ. & Welfare, Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service 28-29 (1964) [hereinafter Smoking and Health] (reviewing the smoking habits of 1,123,000 men involved in seven prospective population studies and concluding that cigarette smoking was causally related to certain forms of cancer in men).
   SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.
   SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risk to Your Health.
   SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.
   SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.
Health Cigarette Smoking Act of 1969,21 thereby incorporating a television and radio advertising ban for cigarettes.22 Because cigarette advertisements on radio and television had been countered with Federal Communications Commission (FCC) mandated anti-smoking commercials,23 the tobacco industry to a certain extent favored the creation of the ban. That is, the industry perceived the ban as far preferable to the anti-smoking commercials required by the FCC of stations which ran cigarette advertisements.24 Soon thereafter, this ban was extended to prohibit television and radio advertisements of “little cigars”25 and, in 1986, was extended to smokeless tobacco.26

Although tobacco is responsible for more than 390,000 deaths

99-252, § 3(a), 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 30, 30-31 (requiring warnings on smokeless tobacco products).
22. See 15 U.S.C. § 1335 (1982) (prohibiting cigarette advertisement on any medium over which the Federal Communications Commission has jurisdiction). Shortly after its enactment, the Public Health Cigarette Smoking Act of 1969 was upheld in Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972), summarily aff’g Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971). The district court in Capital Broadcasting held that the unique characteristics of electronic communication warranted regulation in the public interest. 333 F. Supp. at 584. Since there was substantial evidence to show that radio and television are highly persuasive advertising methods which reach a very large audience of young people, the court concluded that Congress had a rational basis for the ban. Id. at 585-86.

It should be noted that this Article places no reliance on Capital Broadcasting in consideration of its predating what are now deemed the leading cases on commercial speech, including Posadas de Puerto Rico Assoc’s. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n, 447 U.S. 557 (1980); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

23. The District of Columbia Circuit upheld an FCC ruling requiring radio and television stations which carried cigarette advertising (i.e. prior to its ban) to accord significant time to presenting the case against smoking. See Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968) (holding that congressional passage of the Cigarette Labeling Act of 1965 does not preempt the field of regulation addressed to the health problem posed by cigarette smoking and, therefore, does not deny the FCC any authority it otherwise had to issue its cigarette ruling).

24. As one commentator observed, “[g]iven that the health scare was a stronger marginal determinant of cigarette demand than was cigarette advertising, the [tobacco] companies' eagerness to assist the government to end the subsidized anti-smoking advertising was not surprising.” Hamilton, The Demand for Cigarettes, 54 REV. ECON. & STATISTICS 401, 408 (1972); see also Capital Broadcasting Co. v. Mitchell, 333 F. Supp. at 588 (Wright, J., dissenting) (stating that the cigarette companies viewed voluntary withdrawal of television advertising as less harmful to the industry than anti-smoking advertising). The tobacco industry believed that the detriment of the anti-smoking messages would outweigh the potential benefits of television and radio ads. Cohen, Cigarette Advertising is Still a Drag, N.Y. Times, Aug. 16, 1970, at 63, col. 1.

in the United States annually27 and the subject of approximately 125 product liability suits,28 it continues to flourish in this country as a $33.3 billion industry29 supported by more than 50 million consumers.30 While the vast majority of tobacco consumers want to stop using tobacco and would like to make a concerted effort to quit,31 failure is the norm because of the product's strongly addictive nature.32 It is the unavoidable risk of danger arising from tobacco use,

27. The Surgeon General recently reported that "390,000 deaths in the United States in 1985 were attributed to smoking . . . . more than one out of every six deaths in the United States today." Molotsky, Surgeon General Rebukes Tobacco Industry Over Combative Ads, N.Y. Times, Jan. 12, 1989, at A16, col. 1; see also Fielding, Smoking: Health Effects and Control (pt. 1), 313 NEW ENG. J. MED. 491, 491 (1985); Imperato & Mitchell, Cigarette Smoking: A "Chosen" Risk, 86 N.Y. ST. J. MED. 485, 485 (1986); Ban Cigarette Advertising?, CONSUMER REP., Sept. 1987, at 565 (stating that "[t]he U.S. Public Health Service puts cigarette induced premature deaths in this country at 350,000 a year."). Surgeon General C. Everett Koop believes that nearly 142,000 of these deaths are from cancer alone. The General's Warning: Koop Vows to Win the War Against Smoking, COPE MAG., Oct. 1986, at 16. The Surgeon General has publicly stated, "I now realize that without doubt, smoking is the number one public health problem in this country." Id.

28. Daynard, Tobacco Liability Litigation as a Cancer Control Strategy, 80 J. NAT'L CANCER INST. 9 (1988). Recently, a jury found a cigarette manufacturer liable in the lung cancer death of a woman and awarded $400,000 in damages to the husband. See Cipollone v. Liggett Group, Inc., N.Y. Times, June 14, 1988, at 1, col. 6. Cipollone was the first of more than 300 such cases since 1954 in which a tobacco company was required to pay damages. Janson, Cigarette Maker Assessed Damages in Smoker's Death, N.Y. Times, June 14, 1988, at 1, col. 6; see Blum, Tobacco Litigation: Cipollone and Its Progeny, NAT'L L.J., Dec. 26, 1988, at 20, col. 1.


32. The Office of the Surgeon General initially characterized tobacco as habitual rather than addictive. See SMOKING AND HEALTH, supra note 15, at 34 (characterizing the habitual nature of tobacco as "relat[ing] primarily to psychological and social drives, reinforced and perpetuated by the pharmacological actions of nicotine on the central nervous system."). Recently, however, scientists have begun to understand the physiological basis for nicotine addiction. See Nicotine Sinks a Potent Hook, COPE MAG., Oct. 1986, at 21. Nicotine is viewed as: [a] potent and complex adversary, [that] reaches the brain in seven seconds, twice as fast as an intravenous injection. In the bloodstream, it binds to nerve receptors that help regulate the cardiovascular system and release adrenaline. That, in turn, raises the heart rate and blood pressure.

That's why a smoker initially feels sharp and alert. Then, as more nicotine enters the bloodstream, a feeling of calm may wash over the smoker, quelling anxieties and easing stress.
however, that renders it unique among legal products. As one doctor observed, “[t]obacco is uniquely harmful because it is unsafe when used as intended.”

Without a doubt, if tobacco were introduced today for product approval, it would fail. Any other such product already on the market would be ordered to be made safe or be taken off the market. How then can tobacco continue to be sold as a legal product? Simply put, the answer is that no practical alternative exists. Just as tobacco acceptance and use is firmly rooted in history, product acceptance and use is also entrenched in the addiction of its consumers. These operational considerations in combination with the political and fi-

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33. A.B.A. Rejects Tobacco Ad Ban, A.B.A. J., Apr. 1, 1987, at 32 (statement of Dr. Robert McAfee, trustee for the American Medical Association, before the American Bar Association on its debate whether to endorse a resolution favoring a ban of tobacco advertising); see also infra note 48 (discussing the A.B.A.’s position on a tobacco advertising ban). Dr. McAfee further stated that “[d]eaths are a predictable consequence of doing just what the advertising illustrates—lighting up.” A.B.A. Rejects Tobacco Ad Ban, supra, at 32.

34. Cf. Action on Smoking & Health v. Harris, 655 F.2d 236 (D.C. Cir. 1980) (holding that tobacco is not a drug and therefore not subject to the jurisdiction, and thus standards, of the Food and Drug Administration).

nancial clout of the tobacco industry foreclose the realistic possibility of success in achieving and maintaining the outlawing of tobacco,\textsuperscript{36} as strongly suggested by this country’s experience with the ineffectiveness of Prohibition.

Therefore, it is disingenuous to simplistically assert that if tobacco is so dangerous, its sale should merely be made illegal. Yet, this is precisely the basis on which some legal minds premise the argument that a ban of tobacco advertising is illegal.\textsuperscript{37} In other words, this argument asserts that only through a product’s outlawing would the ban of its advertising sustain first amendment challenge.\textsuperscript{38} It is in this context that tobacco festers as the “ultimate paradox in American society,”\textsuperscript{39} a unique danger that is both accepted and heavily promoted in a “health-conscious and demanding society.”\textsuperscript{40}

Debate over whether to ban all tobacco advertising\textsuperscript{41} has elicited wide-spread support\textsuperscript{42} of such action, led by the federal government’s

\begin{itemize}
\item \textsuperscript{37} See MacNeil/Lehrer Newshour, \textit{supra} note 32 (first amendment attorney Floyd Abrams arguing that the emphasis should be on banning cigarettes as a dangerous product rather than on banning its advertising).
\item \textsuperscript{38} Commercial speech related to illegal activity is not protected by the first amendment. Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 388 (1973) (holding that a newspaper may be prohibited from publishing advertisements for the sale of illegal products or services); \textit{cf.} Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n, 447 U.S. 557, 564 (1980) (holding that governmen may restrict commercial speech even if the advertised activity is not unlawful as long as there is a strong public interest in restricting the communication).
\item \textsuperscript{39} Whelan, \textit{supra} note 32, at 62.
\item \textsuperscript{40} \textit{Id.}
\item \textsuperscript{41} See Cobb, \textit{Clearing the Air: Should All Cigarette Advertising and Promotion be Banned?}, \textit{Common Cause Mag.}, April/May 1986, at 34 (delineating some of the representative positions).
\item \textsuperscript{42} A December 1985 Gallup poll taken for the American Lung Association found 32\% of the U.S. public in favor of a complete cigarette advertising ban. Hall, \textit{Smoking Guns: Philip Morris Seeking to Turn Tide, Attacks Cigarettes’ Opponents}, Wall St. J., Feb. 4, 1986, at 1, col. 6, 18, col. 3. Groups and individuals favoring a total ban of tobacco advertising include the American Medical Association, see Cobb, \textit{supra} note 41, at 35, Americans for Nonsmokers Rights, see \textit{id.} at 36, Henry G. Miller (a leading proponent of the defeated A.B.A. resolution, discussed \textit{infra} note 48), see MacNeil/Lehrer Newshour, \textit{supra} note 32 (statement of attorney Henry G. Miller), Columbia Law Professor Henry Paul Monaghan, see N.Y. Times, Oct. 25, 1986, at 52, col. 2, Dr. Lloyd Johnson, Chairperson of the National Advisory Council on Drug Abuse, see Cobb, \textit{supra} note 41, at 35, Patrick Reynolds, grandson of tobacco magnate R.J. Reynolds, see N.Y. Times, Oct. 25, 1986, at 52, col. 2, and the State Bar Associations of New York, Maryland, and Massachusetts, see MacNeil/Lehrer Newshour, \textit{supra} note 32 (statement of attorney Henry G. Miller).
\end{itemize}
Coalition on Smoking or Health, and spirited opposition, led by the tobacco industry's spokesperson, The Tobacco Institute. In protection of their perceived self-interests, the most vigilant voices have arisen from Surgeon General C. Everett Koop, and the tobacco and advertising industries, respectively. Heated exchanges have taken place in important public forums, notably in congressional hearings and the floor of the American Bar Association.

In light of the tobacco industry's annual advertising expenditure ($2.4 billion in 1986), a rather strong argument can be advanced

43. The Coalition believes that "[a]s long as cigarette advertising and promotion continues unabated, our ability to encourage young people not to use tobacco products will be severely limited. The restrictions on cigarette advertising now being proposed represent a meaningful response to the menace posed by cigarette smoking." Cobb, supra note 41, at 35 (reprinting statement of the Coalition on Smoking or Health on the question of whether all cigarette advertisements and promotions should be banned). The Coalition consists of the American Cancer Society, the American Heart Association, and the American Lung Association. Id.

44. Groups and individuals opposing a ban of tobacco advertising include the American Advertising Federation, see Cobb, supra note 41, at 37, Barry Lynn, legislative counsel for the American Civil Liberties Union, see id. at 37, Helen Gurley Brown, see id. at 38, James J. Kilpatrick, syndicated columnist, see Kilpatrick, The Argument Over Banning Tobacco Advertising: Ban Would be Clearly Unconstitutional, White Plains Rep. Dispatch, July 25, 1986, at A10, col. 1, and Carl Rowan, see Cobb, supra note 41, at 36.

45. See The General's Warning: Koop Vows to Win the War Against Smoking, supra note 27, at 16 (stating that Koop's goal is to have a smoke-free society by the year 2000). Koop believes that in such a society, "the smoker will not smoke in the presence of a non-smoker without first obtaining permission. The non-smoker's home will be his castle and the smoker will not invade it." Id.

46. See International Advertising Ass'n, Tobacco Advertising Bans and Consumption in 16 Countries 4-6 (1983) (disagreeing with Surgeon General Koop and finding that advertising bans do not lead to decreases in tobacco consumption); M. Waterson, Advertising and Cigarette Consumption (1983) (also disagreeing with Koop's conclusions).


48. On February 16, 1987, the A.B.A. chose not to adopt a resolution seeking federal legislation to ban tobacco advertising. Shipp, supra note 10, at A14, col. 1; see A.B.A. Rejects Tobacco Ad Ban, supra note 33, at 32. Opposition arguments were made by Floyd Abrams on first amendment grounds and by William Falsgraf, former president of the A.B.A, over concern that approval would result in costly lobbying efforts and thereby drain other A.B.A. projects. Shipp, supra note 10, at A14, col. 1, col. 2; A.B.A. Rejects Tobacco Ad Ban, supra note 33, at 32.

49. See McGill, Cigarette Industry Financing Wide War on Smoking Bans, N.Y. Times, Dec. 24, 1988, at 1, col. 1, 37, col. 5; see also H.R. 1272, 100th Cong., 1st Sess. § 2(13) (1987) (setting forth a proposed legislative finding that the tobacco industry spent $2 billion on advertising in 1986). Phillip Morris was the largest magazine advertiser in 1987, spending more than $243 million. Tobacco Advertising Holds Steady, Folio, Sept. 1988, at 33, 34. R.J. Reynolds was the fourth largest magazine advertiser in 1987, spending $106 mil-
that the industry uses its speech effectively to drown out opposing viewpoints. Because the federal government, by comparison, spends very little to discourage tobacco use, the tobacco industry "controls the public debate." The industry's operational influence over communication forums far exceeds the mere measurement of tobacco advertising expenditures. Editors in the print media fear publishing the truth about tobacco, not only because of the advertising strength exercised by tobacco companies per se, but also because of the conglomerate advertising strength wielded by parent companies.

Thus results "the apparent incompatibility of massive cigarette advertising and true freedom of the press." In consideration of

lion. *Id.*


51. Imperato & Mitchell, *supra* note 27, at 487. The tobacco industry spends approximately $2 billion annually on advertising and promotion. See *supra* note 49 and accompanying text. In contrast, the federal government's Office of Smoking and Health has an annual budget of approximately $3.5 million. Imperato & Mitchell, *supra* note 27, at 487.


53. White, *supra* note 36, at 291. While editors are "fearful of publishing the truth about smoking because they know that such stories will provoke the wrath of the tobacco companies... even more serious is the human and social cost in death and disease that is a consequence of the suppression of the truth about the hazards of smoking." *Id.*

54. Many of the large tobacco companies own major food manufacturers. For example, R.J. Reynolds owns Nabisco, Inc. and Phillip Morris owns General Foods. *Tobacco: Fighting Back, Not Switching, COPE MAG.*, Oct. 1986, at 22, 22. Furthermore, as of 1984, American Brands, manufacturer of Lucky Strike, Pall Mall, and Tareyton cigarettes, also owned Franklin Life Insurance Company, which ironically offers discounts on policies to nonsmokers. Whefan, *supra* note 32, at 64. By virtue of owning these subsidiaries, tobacco companies not only have considerable leverage power when negotiating with the print media, but it also gives them the income necessary to defend anti-smoking suits. *Tobacco: Fighting Back, Not Switching, supra*, at 22.

In 1988, RJR Nabisco dramatically exercised its advertising clout by dropping Saatchi & Saatchi DFS Compton, the advertising agency used for several Nabisco food products, in retaliation for the agency's development of an ad campaign promoting a Northwest Airlines smoking ban. McGill, *supra* note 49, at A1, col. 2.

55. Warner, *Cigarette Advertising and Media Coverage of Smoking and Health*, 312 *NEW ENG. J. MED.* 384, 388 (1985). Warner believes that advertisers are indirectly related to the "conspiracy of silence" which surrounds the health hazards of smoking and which results primarily from the power of the dollar in the tobacco industry and the media industry's desire
these operational realities, extraordinary governmental regulation of commercial speech promoting a uniquely dangerous product may be warranted simply to protect society's interest in honest public discussion of the product.\textsuperscript{56}

II. THE FIRST AMENDMENT ON COMMERCIAL SPEECH

The first amendment\textsuperscript{57} is foremostly protective of the "free dissemination of ideas of social and political significance."\textsuperscript{58} Government is thereby prohibited from restricting such expression merely because of its message, ideas, subject matter, or content.\textsuperscript{59} Therefore, noncommercial speech is subject to content-based restrictions\textsuperscript{60} only under the most extraordinary of circumstances.\textsuperscript{61}

In recognition of the Supreme Court's "common sense" distinction between commercial speech and other varieties of speech,\textsuperscript{62} the majority view holds that commercial speech is afforded less protec-

\textsuperscript{56} Professor Paul Gervitz of Yale Law School recognizes a growing notion "'[t]hat the [way] media are now structured and things are communicated—certain voices, the wealthier voices, drown out the others—so that you need an active Government role to make debate wide open and robust.'" Taylor, \textit{New and Varied Forms of Free Speech}, N.Y. Times, May 4, 1986, § 4, at 8, col. 1, col. 2.

\textsuperscript{57} U.S. CONST. amend. I (stating, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech . . .").


\textsuperscript{59} Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (holding that a city ordinance was invalid because it described permissible based on subject matter). However, speech which by its nature inflicts injury or tends to incite an immediate breach of the peace, including lewd, obscene, profane, libelous, and fighting words, is not afforded first amendment protection. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1941) (finding that "such utterances are no essential part of any exposition of ideas, and are of such slight social value . . . that any benefit . . . is clearly outweighed by the social interest in order and morality.").

\textsuperscript{60} The Supreme Court began to rely heavily on the content-based restriction analysis in the mid-1970s. See, e.g., Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (upholding a city ordinance which restricted the showing of non-obscene, sexually explicit movies since the content of the film warranted a lesser degree of first amendment protection); Bigelow v. Virginia, 421 U.S. 809 (1975) (upholding the right to advertise out-of-state (New York) abortion services in a state (Virginia) where such services were illegal).


\textsuperscript{62} Bolger, 463 U.S. at 64 (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978)). Commercial speech occurs in areas traditionally subject to government regulation. \textit{Id.}
tion than noncommercial speech. The "hardy" economic basis and context of commercial speech are thought to render it less subject to suppression than other speech. Nevertheless, commercial speech has regularly been afforded strong first amendment protection from unjustified restrictions.

In the primordial case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Court invalidated a state statute which prohibited pharmacists from advertising prices of prescription drugs. The asserted state interest in maintaining professionalism was found not to be served by this advertising ban, and no claim was made as to the advertisements being false or misleading. The Court, therefore, held that speech which does no more than propose a commercial transaction shall be protected by the first amendment.

Nevertheless, the majority view still maintains that content-based regulation of commercial speech is less problematic than such

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63. *Id.* at 64.
64. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 n.6 (1980). The Court found that "commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'" *Id.* (quoting *Bates v. State Bar*, 433 U.S. 350, 381 (1977)). Moreover, "commercial speakers have extensive knowledge of both the market and their products. Thus, they are well-situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity." *Id.; see also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (granting commercial speech limited protection under the first amendment which is "commensurate with its subordinated position in the scale of First Amendment values."); *Bates*, 433 U.S. at 381 (discussing the differences between commercial speech and other forms of speech).
65. See *In re R.M.J.*, 455 U.S. 191 (1982) (attorney advertising); *Bates v. State Bar*, 433 U.S. 350 (1977) (attorney advertising); *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977) (contraceptive advertising). Prior to the 1970s, however, the Supreme Court found many restrictions of commercial speech were not subject to successful first amendment challenge. *See, e.g.*, *Breard v. City of Alexandria*, 341 U.S. 622 (1951) (upholding an ordinance which prohibited the practice of going in, and upon, private residences for the purpose of soliciting orders for the sale of goods); *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (upholding New York State statute that prohibited the distribution of commercial and business advertising in the street). Beginning with *Bigelow v. Virginia*, 421 U.S. 809 (1975), courts have employed a content-based analysis and afforded stronger first amendment protection of commercial speech. *See id.* (upholding right to advertise out-of-state (New York) abortion services in a state (Virginia) in which such services were illegal); *see supra* note 60 (citing examples of the use of content-based analysis by the Supreme Court).
67. *Id.* at 749-50.
68. *Id.* at 769.
regulation of other speech because of "the greater potential for deception or confusion in the context of certain advertising messages." Thus, "the content of a particular advertisement may determine the extent of its protection." However, the first amendment demands more than a rational basis for favoring one kind of commercial speech over another. For example, society's interest in discouraging crime warrants the prohibition of commercial speech related to illegal activity.

Based on society's interest in discouraging sales fraud, "[m]isleading advertising may be prohibited entirely" under the commercial speech doctrine. It is essential to remember that "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake." The government is empowered, and obligated in its protective capacity, to prevent the dissemination of commercial speech which is false, deceptive, or misleading. Even in the absence of an actual finding of deceptive or misleading expression, "the government may ban forms of communication more likely to deceive the public than to inform it."

Even after a finding that a particular commercial speech is neither misleading nor related to illegal activity, its restriction may still be upheld upon meeting the additional criteria set forth in 


71. Bolger, 463 U.S. at 65 (citing In re R.M.J., 455 U.S. 191, 200 (1982)).


75. In re R.M.J., 455 U.S. 191, 203 (1982); Central Hudson, 447 U.S. at 563. Based upon the informational function of commercial speech, "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." Id. Consequently, commercial speech which is more likely to deceive than inform may be banned. Id.


78. Central Hudson, 447 U.S. at 563 (sustaining ban on use of trade names by optometric offices over concern for possibilities to mislead the public); see also Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (sustaining a ban on direct lawyer solicitation because of the danger of abuse through overreaching advertisements).
tural Hudson Gas & Electric Corp. v. Public Service Commission.79 After concluding that the commercial speech at stake was ordinarily protected, the Supreme Court recognized three further conditions as necessary to permit government regulation: (1) the asserted government interest at stake must be substantial, (2) the regulation must directly serve to advance that interest, and (3) the restriction must not be "more extensive than is necessary to serve that interest."80

In Central Hudson, the Court noted the clear absence of any claim that the speech at issue was either inaccurate or related to illegal activity.81 Applying the conditions set forth above, the Court found that New York's concern that electricity rates be fair and efficient constituted a substantial government interest.82 However, while "[t]here is an immediate connection between advertising and demand for electricity," the Court held that the link "between the advertising prohibition and [the Public Service Commission's] rate structure is, at most, tenuous."83 Moreover, under the third criterion, because no showing was made that a less restrictive approach would have been ineffective, the complete suppression of advertising was ruled invalid as improperly based.84 The Court, nonetheless, suggested that both the government interest at stake and the link between advertising and demand could, upon proper showing, justify restriction of advertising which promotes demand for electricity—a legal product.85

In the recent and much celebrated case of Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,86 the Supreme Court addressed the validity of a Puerto Rican statute and its companion regulation. The regulation prohibited the advertising of casino gambling to Puerto Rican residents but permitted some restricted advertising outside the island directed toward non-

79. 447 U.S. 557 (1980). This case addressed a New York State Public Service Commission's total ban of advertising by electric utilities promoting the use of electricity because such speech allegedly contravened the national policy of energy conservation. Id. at 559.
80. Id. at 566.
81. Id.
82. Id. at 569.
83. Id. (emphasis added).
84. Id. at 570-71. The Court further noted that the Public Service Commission could protect its interest in a more limited manner. For example, the Commission might require the advertisements to include information about the related efficiency and expense of the offered service, both under the current conditions and for the foreseeable future. Id.
85. Id. at 569.
86. 478 U.S. 328 (1986).
residents. The Court applied the Central Hudson criteria since the commercial speech at issue did "no more than propose a commercial transaction." By a 5-4 decision, the Court upheld the restrictions as valid legislative means to protect its residents from the harmful effects which may result from continual exposure to casino gambling.

The majority opinion notes, in dicta, that the legislature's "greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling . . . ." Previous rulings which uphold the right to advertise can be clearly distinguished based on the constitutionally protected status of the underlying conduct. Moreover, the Posadas majority opinion notes that "[l]egislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, has varied from outright prohibition . . . to legalization of the product or activity with restrictions on stimulation of its demand." Thus, based on the government's concern for the public welfare, Posados "augurs well for comparable [advertising] restrictions involving other products, such as . . . tobacco, and could lead to increased legislative activity in the area."

87. Id. at 332-33.
88. See Central Hudson, 447 U.S. at 566, discussed supra notes 79-85 and accompanying text.
90. However, Justice Brennan's dissent, in which Justices Marshall and Blackmun joined, found the government interest at stake insubstantial and argued that the legislation was not intended to protect the Puerto Rican resident from the harms of casino gambling. Posadas, 478 U.S. at 354 (Brennan, J., dissenting). Justice Stevens' dissent, in which Justices Marshall and Blackmun also joined, objected to the reverse privileges and immunities effect, in that Puerto Ricans were treated disfavorably in comparison to other Americans. Id. at 360 (Stevens, J., dissenting).
91. Id. at 341. The Court concluded that this concern was a substantial government interest. See id.
92. Id. at 345-46.
94. Posadas, 478 U.S. at 346 (emphasis added) (citations omitted).
96. CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, POSADAS DE PUERTO RICO ASSOCIATES v. TOURISM COMPANY OF PUERTO RICO: SUPREME COURT UPHOLDS BAN ON CASINO ADVERTISING (1986); see Note, Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico: Promising Precedent for Proponents of Tobacco Advertising Prohibition,
A. Limits of Protected Speech

One need not be a zealous first amendment advocate to postulate that "'[b]anning truthful speech about a lawful activity is inconsistent with everything the First Amendment stands for.'" Some would assert that there is no justification to afford accurate commercial speech concerning lawful activity less protection than afforded other types of protected speech. However, no objection would be sustained regarding the banning of commercial speech which is (1) fraudulent or misleading or (2) related to illegal activity.

To permit fraudulent or misleading commercial speech would directly contravene the first amendment's basis of concern for commercial speech—the informational function of advertising. In determining whether the information is misleading, it is judged both as to the level and the quality reaching the listener. In view of the tobacco industry's advertising expenditures, the level presumed to reach the listener is quite high. The quality of information is, at best, dubious, because tobacco advertising inherently promotes tobacco use as a "desirable habit." Therefore, in consideration of the harms posed by tobacco use, it is reasonable to argue that all tobacco promotion is misleading "since its purpose is to induce people to buy a product that is both harmful and addictive." This pur-
pose precludes the seller's presumed guarantee as to the essential "innocence of his product." Furthermore, tobacco advertising is distinguishable from ordinary "product puffing" if it deceives consumers about the harms caused by a uniquely dangerous product.

The Federal Trade Commission (FTC) examines all forms of deceptive advertising under the standard of whether deception is likely among a substantial segment of the purchasing public. Accordingly, it is not necessary to prove that a given advertisement actually misled the public in order to prove that the advertisement is deceptive. It is sufficient that the FTC finds that the advertisement has the tendency to deceive. For example, in Rhodes Pharmacal Co. v. FTC, an FTC finding of deceptive advertising was upheld by the Seventh Circuit when only nine percent of the public interpreted an advertised "cure" for arthritis to mean that the product actually "cured" arthritis. Similarly, in Firestone Tire & Rubber Co. v. FTC, an FTC finding of deception was upheld by the Sixth Circuit when only ten to fifteen percent of the public was found to be misled by a tire advertisement. Given these relatively low standards for products which are usually safe when used, it would only seem proper that the standard for a uniquely harmful product should be even lower.

"Truth" in advertising is defined both by what is included and by what is omitted—advertising must be accurate and must not omit material which would mislead the public. Thus, the FTC has
characterized "[a]n advertiser's failure to disclose material facts . . . [as] fully equivalent to deception by misleading statements or suggestions."\(^{117}\)

Aside from their inclusion of government mandated warnings, tobacco advertisements do not portray the product's commonly caused harms. As the FTC has observed, "The ads are rich in thematic imagery associating smoking with, among other things, outdoor activities, athleticism, individualism and achievement. They are frequently filled with rugged, vigorous, attractive, healthy-looking people living energetic lives full of success and athletic achievement, free from any health hazards."\(^{118}\) Since positive information is thereby conveyed in a highly effective manner,\(^{119}\) the low-key presentation of the required warnings are of highly suspect value,\(^{120}\) thus rendering all tobacco advertising subject to claims of deception.\(^{121}\)

These claims are strengthened by the heightened requirement of the FTC that advertisements for products which affect consumer health and safety be both accurate and complete.\(^{122}\) Pragmatically, tobacco advertising would never be made complete because the tobacco industry would not voluntarily choose to accurately depict its products' health hazards.\(^{123}\) If advertisements were ever required to be so complete, the industry would probably choose to forego all advertising.

There is strong support for the viewpoint that no other industry has abused freedom of speech so egregiously.\(^{124}\) Even today, when

aff'd, 532 F.2d 708 (9th Cir. 1976).
117. FTC STAFF REPORT, supra note 108, at 4-18 to -19 (citing Simeon Management Corp. v. FTC, 579 F.2d 1137, 1145 (9th Cir. 1978); P. Lorillard Co. v. FTC, 186 F.2d 52, 58 (4th Cir. 1950)).
118. Id. at 2-2.
119. Id. at 4-10.
120. See Banzhaf v. FCC, 405 F.2d 1082, 1098-99 (D.C. Cir. 1968); FTC STAFF REPORT, supra note 108, at 2-2; Whelan, supra note 32, at 61, 65-66 (discussing the FTC determination that the tobacco industry denigrates or undercuts health warnings and urging that voluntary and governmental agencies strengthen cigarette warnings and encourage the advertisements to de glamorize the habit); see also infra notes 241-83 and accompanying text (discussing the validity of warnings as the least restrictive means to serve governmental interests).
121. See White, supra note 36, at 289-90.
122. See FTC STAFF REPORT, supra note 108, at 4-33 (citing National Comm'n on Egg Nutrition v. FTC, 88 F.T.C. 89 (1976), modified, 570 F.2d 157 (7th Cir. 1977) (modifying the FTC's order so that the National Commission on Egg Nutrition need only state that on the issue of cholesterol in eggs there is a controversy among the experts and that the Commission is only presenting its side), cert. denied, 439 U.S. 821 (1979)); see also FTC v. Simeon Management Corp., 391 F. Supp. 697 (N.D. Cal. 1975), aff'd, 532 F.2d 708 (9th Cir. 1976).
123. See infra notes 189-94, 200-03 and accompanying text.
124. Cf. Tye, supra note 13, at app. 2 (providing numerous examples of cigarette adver-
the basic ills caused by tobacco are not subject to good-faith controversy, the tobacco industry continues its vigorous campaign of disinformation by publicly denying that cigarettes are devastating to health. R.J. Reynolds Tobacco Co. has waged a recent campaign disputing, and misrepresenting, the connection between heart disease and smoking. In a 1986 publication, The Tobacco Institute declared that "[e]minent scientists believe that questions relating to smoking and health are unresolved." The industry thus deliberately conveys the "erroneous impression that scientists are evenly split on the subject of smoking and its dangers."

Since the informational function of advertising provides the basis for its first amendment protection, the suspect information provided by tobacco advertising may determine the extent of its ban. For example, information on low tar and low nicotine "con-
vey[s] the misleading message that "everything is all right now." Cigarettes advertised as low in tar and nicotine are thereby promoted as safer than competing brands. As used, however, they may be even more dangerous because smokers change their manner of use to compensate for lower nicotine levels, and because of the harm caused by unadvertised agents and additives used to compensate for low tar levels. In short, it is dubious if tobacco advertising provides any information which is not misleading, other than notice of market availability. As misleading speech, this form of commercial speech is subject to a sustainable ban.

The FTC heightens its usual scrutiny of advertising when one or more of the following factors exist: "[1] the product is hazardous to health, [2] particularly vulnerable groups of consumers are affected, and [3] the deception is aggravated by continuous, massive advertising." Both the health hazards and deceptive advertisements have already been established with regard to tobacco advertising. It is necessary, therefore, to examine the effect of tobacco advertising on vulnerable groups of consumers. This third factor may similarly be established by demonstrating that tobacco advertising is a form of commercial speech related to illegal activity and may, therefore, be properly banned.

Criminal solicitation never merits first amendment protection. Even when free speech may enjoy its greatest protection, on the floor

the consumer). Thus, perhaps the only form of tobacco advertising which should be allowed is the "tombstone" advertisement—a plain background with information only as to name, price, and, sometimes, tar and nicotine levels. Stevenson, Continuing Battle Over Tobacco, N.Y. Times, Aug. 28, 1986, at 17, col. 1. Such an advertisement would eliminate the imagery of smoking being linked to a good and healthy life. Id. at 17, col. 2. But see infra text accompanying notes 136-37 (arguing that all advertising of tobacco is misleading).

135. Whelan, supra note 32, at 65.
136. FTC STAFF REPORT, supra note 108, at 1-54.
137. See supra note 106 and accompanying text.
138. See supra note 99.
139. FTC STAFF REPORT, supra note 108, at 4-20; see also infra notes 143-71 and accompanying text (demonstrating that tobacco advertising should be banned because it promotes illegal activity); supra note 38 (discussing the relationship between first amendment protection and illegal activity).
140. See supra notes 27-33 (discussing the negative health effects of tobacco use).
141. See supra notes 104-09 and accompanying text (discussing the deceptiveness of tobacco advertising).
142. See infra notes 143-71 and accompanying text (discussing tobacco advertising as related to criminal activity).
143. See, e.g., Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (holding that the state does not lose its power to regulate commercial activity which is contrary to the public interest merely because speech is a component of that activity).
of Congress under the Speech and Debate Clause,144 immunity is not accorded to solicitations to commit crime.145 Therefore, like deceptive advertising,146 commercial speech which constitutes criminal solicitation may be completely banned.147

In order to constitute criminal solicitation, the crime solicited need not be committed.148 Solicitation only requires that the commission of a crime be promoted.149 The crime at issue is the sale of tobacco to minors.150 Tobacco advertising may or may not directly promote vendors to sell tobacco to minors, but if the advertising encourages minors to purchase tobacco, it must necessarily also promote the manner of purchase (i.e. the sale).151

The first amendment affords no protection to speech whose intent, objective meaning, and effect is to promote crime.152 Despite the industry's public denial,153 their marketing plans explicitly target

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144. U.S. Const. art. I, § 6, cl. 1.
145. See, e.g., United States v. Myers, 692 F.2d 823, 860 (2d Cir. 1982) (stating "that the Speech or Debate Clause accords immunity to what is said on the House floor in the course of the legislative process, . . . not to whispered solicitations to commit a crime."). cert. denied sub nom. Lederer v. United States, 461 U.S. 961 (1983).
146. See e.g., Firestone Tire & Rubber Co. v. FTC, 481 F.2d 246, 249 (6th Cir.) (holding that Firestone must cease and desist from advertising claimed benefits of its product when they were without scientific proof), cert. denied, 414 U.S. 1112 (1973); Rhodes Pharmacal Co. v. FTC, 208 F.2d 382, 387-88 (7th Cir. 1953) (holding that the drug company must cease and desist from making claims and representations about its product which were false and misleading), modified, 348 U.S. 940 (1955).
147. See, e.g., United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1985) (holding that "where speech becomes an integral part of the crime, a first amendment defense is foreclosed even if the prosecution rests on words alone." (citing United States v. Barnett, 667 F.2d 835, 842-43 (9th Cir. 1982); United States v. Buttorff, 572 F.2d 619, 624 (8th Cir.), cert. denied, 437 U.S. 906 (1978))), cert. denied, 476 U.S. 1120 (1986).
148. Criminal solicitation occurs when an individual intends to entice, advise, incite, or otherwise encourage another person to commit a crime; the crime solicited does not necessarily have to be committed. W. LaFave & A. Scott, Criminal Law § 6.1, at 486 (2d ed. 1986) (citing State v. Foster, 379 A.2d 1219 (Me. 1977); State v. Furr, 292 N.C. 711, 235 S.E.2d 193 (1977)).
149. Id. § 6.1, at 487 (citing Model Penal Code § 5.02 (1962)).
151. In light of common practice, such as a minor's purchase of tobacco for his or her parent, the assertion that an adult's purchase of tobacco for a minor does not necessarily constitute a crime is not persuasive.
152. See supra note 147 (discussing the criminality of speech inciting criminal acts).
153. See Whelan, supra note 32, at 65; see also supra note 46 (discussing the tobacco and advertising industries' public denial of the ill health effects arising from the use of tobacco).
the young.154 Each year, as 1,000,000 smokers quit and another 350,000 die from tobacco use, the product, in order to continue sales success, must attract droves of new, young consumers.155 To date, this is precisely what the product has achieved—ninety percent of smokers in the United States start smoking before age twenty;156 sixty percent start before age fifteen;157 and each year 100,000 persons under the age of twelve start to smoke.158 Simply put, the continued strength of the market is dependent upon a market to whom the product may not legally be sold.

This market dependence plays upon the vulnerability159 of young people who, instead of making a conscious decision, "simply drift into smoking behavior."160 Thus, the objective meanings of tobacco advertisements are calculated to create certain subliminal impact upon the young through their strong use of thematic imagery.161 Boys are attracted into product use through the actor's engagement "in all sorts of manly pursuits" and girls are attracted by the linking of smoking with romance.162 At a minimum, tobacco advertising is strongly analogous to criminal solicitation163—through its promotion

154. See, e.g., Tye, supra note 13, at 30-31. But see Memorandum from The Tobacco Institute to Editors 3 (Dec. 9, 1985) (maintaining that "[b]y longtime policy and practice, the cigarette industry does not advertise to young people . . . .")


156. MacNeil/Lehrer Newshour, supra note 32 (statement of attorney Henry G. Miller based on findings by the Surgeon General); see infra note 247.


158. Id. (statement of attorney Henry G. Miller based on findings by Dr. McAphee, a trustee of the American Medical Association); see The General's Warning: Koop Vows to Win the War Against Smoking, supra note 27, at 17 (stating that fourteen years is the average age to start smoking); see also Berke, U.S. Report Raises Estimate of Smoking Toll, N.Y. Times, Jan. 11, 1989, at A20, col. 2 (noting that girls in particular are smoking at younger ages).

159. See Mufson, Cigarette Companies Develop Third World as a Growth Market, Wall St. J., July 5, 1985, at 1, col. 6; Tye, supra note 13, at 34-35 (discussing other vulnerable groups targeted by tobacco advertisements, including the less educated and the third world); infra note 246.


161. FTC Staff Report, supra note 108, at 2-2; see supra text accompanying note 118 (discussing the use of imagery in tobacco advertising).


163. Whether tobacco advertising in fact constitutes criminal solicitation would depend upon the particular jurisdiction and its definition of criminal solicitation, which usually requires the promotion of a felony, see, e.g., CAL PENAL CODE § 653f (West 1988); N.Y. Penal Law §§ 100.00-13 (McKinney 1987), and its classification of the act of selling tobacco to a minor, which is typically a misdemeanor, see, e.g., CAL PENAL CODE § 308(a) (West Supp.
of tobacco use to the young, many of whom are minors, tobacco advertisers concomitantly solicit minors to purchase tobacco.

More objectionable than the misleading depictions of advertisements is the fundamental unfairness regarding advertising which targets the young. The Supreme Court has recognized that "speech may have a deeper and more lasting negative effect on a child than on an adult. For these reasons, society may prevent the general dissemination" of speech deemed to have a negative effect on children. Based upon the government's special interest in the welfare of children, government "can adopt more stringent controls on communicative materials available to youths than on those available to adults." Under this standard, almost all tobacco advertising should be subject to "stringent controls" in light of its being "available to," and perhaps directed toward, the young.

It is rather naive to assert that the government cannot "legitimately distinguish" between tobacco sales and other forms of activity which are unlawful for minors. Nonetheless, at least one commentator has argued that "any advertising ban on products proposing illegal transactions for minors could be vulnerable under Butler v. Michigan." In Butler, the Supreme Court struck down a

164. See Cohen, Unfairness in Advertising Revisited, 46 J. MARKETING 73, 77 (1982) (noting the FTC concern over the unfairness of advertising which targets children); Foote & Mnookin, The "Kid Vid" Crusade, 61 PUB. INTEREST 90, 90-91 (1980) (discussing the FTC's concern with protecting children from advertising which they believe is "inherently unfair"). Health warnings which, for example, state the consequences of smoking are perceived as too remote by the young to influence their behavior. Imperato & Mitchell, supra note 27, at 485-86.
166. See id. at 749-50; Ginsberg v. New York, 390 U.S. 629, 639 (1968) (holding, in part, that the well-being of children was clearly within the state's constitutional power to regulate). This special interest is reflected in proposals aimed at reducing teenage smoking. Legislative recognition that tobacco price increases result in reduced consumption "particularly among teenagers," 133 CONG. REC. E617 (daily ed. Feb. 25, 1987) (statement of Rep. Beilenson), has led to the proposal of legislation which would raise the excise tax from $.16 to $.40 per package of cigarettes, H.R. 1233, 100th Cong., 1st Sess. (1987); see also S. 446, 100th Cong., 1st Sess. (1987) (Sen. Bradley introducing legislation to strip the tobacco industry of its annual $1 billion tax break for advertising).
167. Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975); see also Ginsberg v. New York, 390 U.S. 629, 636-41 (1968) (upholding a conviction for selling "girlie" magazines to a 16-year-old, based on a New York State statute which makes dissemination of indecent material to minors a felony).
168. See supra note 154 and accompanying text.
170. Id. (citing Butler v. Michigan, 352 U.S. 380 (1957)).
statute which barred the sale of material "tending to the corruption
of the morals of youth," holding that the effect of such a statute was
"to reduce the adult population of Michigan to reading only what is
fit for children." 171

In stark contrast, however, tobacco has always been legal for
adults. Furthermore, commercial speech materials such as adult
films do not necessarily "acquire constitutional immunity from state
regulation simply because they are exhibited for consenting adults
only;" 172 the "legitimate state interest at stake . . . [includes] possi-
ibly, the public safety itself." 173 Thus, sale of a uniquely harmful
product, 174 whose advertising targets the young, 175 is "legitimately
distinguishable" from other forms of activity which are unlawful for
minors, under a "public safety" standard. 176

As argued in this section, tobacco advertising can be banned
under either of two standards: (1) commercial speech which is fraud-
ulent or misleading 177 or (2) commercial speech which is related to
illegal activity. 178 Unlike the advertising of drug prices in Virginia
State Board of Pharmacy v. Virginia Citizens Consumer Council, 179
tobacco advertising proposes "more than . . . a commercial transac-
tion;" 180 it promotes addiction 181 to a uniquely harmful product. 182
Moreover, unlike Central Hudson Gas & Electric Corp. v. Public
Service Commission, 183 there is a strong claim that the speech is
inaccurate and unlawful in tobacco advertising. 184 Nevertheless, as-
suming that tobacco advertising constitutes commercially protected

171. Butler v. Michigan, 352 U.S. 380, 383 (1957); see also Pinkus v. United States,
436 U.S. 293, 297 (1978) (holding that children are not to be included in defining the "com-

172. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57 (1973) (regarding obscenity in

174. See supra note 33 and accompanying text.
175. See supra notes 153-62 and accompanying text.
176. But see Wuliger, supra note 169, at 15 (arguing that tobacco advertising is not
distinguishable from other forms of advertising where the product is unlawful for minors).
177. See supra notes 101-38 and accompanying text.
178. See supra notes 143-69 and accompanying text.
179. 425 U.S. 748 (1976); discussed supra notes 66-69 and accompanying text.
181. See supra note 32 and accompanying text (discussing the addictive nature of
cigarettes).
182. See supra note 33 and accompanying text.
183. 447 U.S. 557 (1980), discussed supra notes 79-85 and accompanying text.
184. Perhaps, then, the criteria of Central Hudson may not be applicable to tobacco
advertising.
speech, the criteria of *Central Hudson*¹⁸⁵ must be examined.¹⁸⁶

B. Substantial Government Interest

In *Central Hudson*, the concurring opinion by Justice Blackmun declares that “[i]f the First Amendment guarantee means anything, it means that, absent clear and present danger, government has no power to restrict expression because of the effect its message is likely to have on the public.”¹⁸⁷ The “clear and present danger” that tobacco use presents can be stated in terms of both health and money. The health consequences of cigarette smoking constitute a substantial government interest.¹⁸⁸ The Surgeon General has labeled it “the chief, single, avoidable cause of death in our society and the most important public health issue of our time.”¹⁸⁹ Its basic harmful effects are no longer subject to a genuine controversy.¹⁹⁰

Each year, cigarette smoking results in deaths due to heart disease (170,000), cancer (125,000), and chronic obstructive lung diseases (62,000).¹⁹¹ Tobacco use results in cancer of the lung, larynx, mouth, esophagus, bladder, and pancreas.¹⁹² Some of the medical

¹⁸⁵. *See supra* note 80 and accompanying text (delineating the three necessary conditions to permit government regulation of commercial speech).

¹⁸⁶. Because a very significant public interest is at stake, there may be sufficient justification to ban tobacco advertising under even a strict scrutiny standard. *But see* Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977) (holding that a strong public interest can justify prohibiting “for sale” signs only if there is no alternative means available to promote integrated housing).


¹⁸⁸. *See Banzhaf* v. FCC, 405 F.2d 1082, 1097 (D.C. Cir. 1968) (upholding a public interest standard by which the FCC required radio and television stations carrying cigarette advertising to present the case against cigarette advertising), *cert. denied*, 396 U.S. 842 (1969). In support of its conclusion that regulations on cigarette advertising are necessary to protect the public interest, the court recognized that:

The danger cigarettes may pose to health is, among others, a danger to life itself . . . . [This] danger is inherent in the normal use of the product, not merely associated with its abuse or dependent on intervening fortuitous events. It threatens a substantial body of the population, not merely a peculiarly susceptible fringe group.

*Banzhaf*, 405 F.2d at 1097.


¹⁹⁰. *See* Larus & Brother Co. v. FCC, 447 F.2d 876 (4th Cir. 1971) (upholding an FCC determination that broadcasting the health effects of cigarette smoking does not constitute a controversy which invokes the fairness doctrine, thereby precluding the tobacco industry from free rebuttal opportunities).


¹⁹². *Id.* at 492-93. The Surgeon General believes that “ ‘2 percent to 3 percent of [smokeless tobacco] users developed cancer of the mouth.’” Molotsky, *Surgeon General*
community therefore argues that smoking is causing the United States to lose its fight against cancer.\textsuperscript{198} The preceding death totals do not reflect the almost inevitable ill health consequences of tobacco use.\textsuperscript{194} In short, the overall costs to health, measured in terms of human suffering, are staggering.

Government’s response has included wide-spread educational efforts which seek to inform the public of these health dangers.\textsuperscript{195} Spurred on by the recent studies on the effects of passive smoke,\textsuperscript{196} local government restriction of smoking has spread throughout the country.\textsuperscript{197} Private industry is now also responding to strong public

\textit{ Warns on Snuff,} N.Y. Times, Mar. 26, 1986, at A14, col. 4; \textit{see also} \textit{Health Consequences of Using Smokeless Tobacco,} supra note 18, at xxii-xxvi (providing conclusions on the health consequences of using smokeless tobacco); Breslow & Cumberland, \textit{Progress and Objectives in Cancer Control,} 259 J. A.M.A. 1690, 1693 (1988) (study by the National Cancer Program linking the mortality rate due to cancer with the number of persons smoking and projecting that increased prevention of tobacco use will decrease the cancer rate accordingly).

\textsuperscript{193} \textit{See, e.g., Ballar & Smith, Progress Against Cancer?,} 314 New Eng. J. Med. 1226, 1231-32 (1986) (concluding that it is unlikely to attain control of cancer unless attitudes towards smoking change); Breslow & Cumberland, \textit{supra} note 192, at 1693 (study by the National Cancer Program finding that if smoking prevalent in adults could be reduced to less than 15\%, the cancer mortality rate would decrease 8-15\% by the year 2000); \textit{U.S. Seen as Losing Fight With Cancer,} N.Y. Times, May 8, 1986, at A19, col. 1 (Dr. Lawrence Garfinkel, speaking before the American Cancer Society, stating that the overall death rate of cancer has increased due to lung cancer caused by smoking).

\textsuperscript{194} Other potential ill health effects associated with tobacco use include coronary heart disease, cerebrovascular disease, chronic obstructive lung disease, and gastrointestinal diseases. Fielding, \textit{supra} note 27, at 491-92, 494-95; \textit{see also} \textit{American Cancer Society, 1986 Cancer Facts \\& Figures} 19 (1986) (linking smoking with many forms of cancer as well as with the cause of numerous other ailments).

\textsuperscript{195} Congress has mandated that the Secretary of Health \& Human Services institute programs to inform the public of the health dangers caused by cigarette smoking. \textit{See} 15 U.S.C. \textsection 1341 (Supp. IV 1986).


support\textsuperscript{198} of a ban or restriction of smoking in the workplace.\textsuperscript{199}

Notwithstanding the favorable economic impact of the tobacco industry,\textsuperscript{200} its disfavorable impact is overwhelming. Estimated costs including health expenditures for the treatment of smoke-related diseases\textsuperscript{201} and lost productivity due to smoke-related illness and death\textsuperscript{202} range from $65 to $96 billion each year.\textsuperscript{203} Simply put, tobacco gravely harms both the citizenry and economy. Therefore, government has a substantial interest\textsuperscript{204} in the reduction of its use.\textsuperscript{205}


198. A December 1985 Gallup Poll, taken for the American Lung Association, showed 87\% of the 1540 people polled favored a ban or restriction of smoking in the workplace. Hall, supra note 42, at 1, col. 6, 18, col. 3.

199. A 1987 survey of more than 600 large corporations showed that 54\% of the corporations had some restriction on employee smoking. New Rules Extinguish 'Smoking Lamp' in Growing Number of Places, 259 J. A.M.A. 2809 (1988). This is an increase from 1986 when more than one third of the businesses had established smoking policies. Smoking Restrictions Growing in Workplace, N.Y. Times, June 19, 1986, at C9, col. 2; see also Hubbartt, Smoking at Work—An Emerging Issue Office, 47 ADMIN. MGMT. 21 (1986); Smoking Rules Change for U.S. Offices Today, N.Y. Times, Feb. 6, 1987, at A10, col. 6 (demonstrating changing in attitudes in favor of smoking restrictions in the workplace).

200. In 1984, tobacco was the fifth largest cash crop, grown in twenty-two states, and directly and indirectly provided two million jobs. Tye, supra note 13, at 20. The tobacco industry generates $13 billion in tax revenues for federal, state, and local governments, and spends over $2 billion in advertising. Id.; see also Ban Cigarette Advertising?, supra note 27, at 568; Whelan, supra note 32, at 64; Currier, Tobacco Companies Thrive Despite Anti-Smoking Offensive, Gannett-Westchester Newspaper, July 26, 1987, § H, at 9 (explaining the economic clout exerted by the tobacco industry to suppress any action against cigarettes). But see 7 U.S.C. § 1445 (Supp. IV 1986) (providing tobacco price supports).

201. Annual health costs for the treatment of smoke-related disease have been estimated at $22 billion, see H.R. 1272, 100th Cong., 1st Sess. § 2(12) (1987) (setting forth proposed legislative findings), but others have estimated the costs as high as $35 billion, see Chandler, The Devastating Costs of Tobacco Addiction, 115 USA TODAY 80, 81 (1986).

202. The annual costs attributed to lost productivity due to health-related illness and death range from $43 billion, see H.R. 1272, 100th Cong., 1st Sess. § 2(12) (1987) (setting forth proposed legislative findings), to $61 billion, see Chandler, supra note 201, at 80.


204. See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557,
C. Serves Government Interest

A ban of commercially protected speech must "directly advance" the substantial government interest at stake. The Supreme Court has recognized the "immediate connection between advertising" and sales of the product, as well as the legislature's authority—and practical need—to enact measures, in attempted furtherance of its goals, which may at times be unsupported by "conclusive evidence or empirical data." Nevertheless, counterintuitively, the tobacco industry argues that because its advertising primarily influences only brand choices of present consumers and does not serve to increase overall consumption, a ban of its advertising would not directly serve a government interest.

This tobacco industry position is loudly echoed by its beneficiary, the advertising industry. Together, they promote numerous supporting studies conducted in the United States and abroad.

568-69 (1980); Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969). But see Wuliger, supra note 169, at 17-18 (arguing that the federal interest in the successful sale of tobacco, as substantiated by its giving price supports and collecting tax revenues, precludes a substantial government interest to the contrary). However, this "black and white" form of "logic" is of dubious worth in a world containing a broad spectrum of colors, including dark shades of grey.

205. See Young v. American Mini Theatres, Inc., 427 U.S. 50, 78 (1978) (stating that "[t]he inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect . . . upon freedom of expression.").

206. See supra text accompanying notes 99-100.


210. It should be noted, however, that "[o]nly 10 percent of smokers change [brands] each year. Anyway, many competing brands are manufactured by the same parent companies that are buying the advertising." Will, supra note 155, at A24, col. 4. Moreover, "the introduction of new brands . . . might be viewed as a mechanism for expanding total sales." McGuinness & Cowling, Advertising and the Aggregate Demand for Cigarettes, 6 EUR. ECON. REV. 311, 312 (1975).


212. See, e.g. Schneider, Klein & Murphy, Governmental Regulation of Cigarette
Some of these studies maintain, in apparent conflict with the promotional function of advertising, that it is consumption which affects advertising and that there are “[n]o significant statistics suggesting that [tobacco] advertising changes affect consumption.”

All these studies, however, share certain prejudicial testing conditions. For example, any study taken of the short-term consumption of tobacco is necessarily invalid because it examines the behavior of addicted consumers. Even over the long term, as the addiction of one group may decrease through weaning or illness, the addiction of a new group contaminates the study (i.e. their consumption is largely driven by their addiction). Erroneously, studies conducted within the United States assume a certain level of advertising. Hence, they cannot constitute unbiased evidence as to what would happen in the absence of all advertising.

Without such evidence, the claim that advertising primarily influences brand choices falls prey to contradiction founded on prac-
tical experience. Milk is an example of a product largely promoted without reference to brand. During recent years of significant advertising by the government, milk consumption, in apparent consequence, has significantly increased. Thus, in accord with intuition, advertising is used to promote the product itself.

Strong expert opinion supports the position that advertising promotes increased consumption. Noted American economist John Kenneth Galbraith maintains that salesmen seek both "to find new customers and to win customers away from [their] rivals." Studies fortify the "Galbraithian view that it is possible to use advertising to determine broad patterns of consumer behaviour." Perhaps what

tive observed, "I think it's incontrovertible . . . that advertising things encourages people to use them. The Advertising Industry believes that in every other product. I don't see why the rules are any different for cigarettes."

221. See Dunagin v. City of Oxford, 718 F.2d 738, 747-51 (5th Cir. 1983) (upholding a state ban on liquor advertising), cert. denied, 467 U.S. 1259 (1984). In fact, the Dunagin court concluded, "We simply do not believe that the liquor industry spends a billion dollars a year on advertising solely to acquire an added market share at the expense of competitors." 718 F.2d at 750.


224. According to one agricultural economist, the U.D.I.A. must perceive a good return from its advertising or it would not be willing to spend such large sums of money on advertising. See Telephone interview with Sara Short, Agricultural Economist, United States Department of Agriculture (Apr. 7, 1987). Advertising has served to boost consumption. Id.

225. Milk consumption, including that used in dairy products, rose by 3.1% in 1984, USDA, DAIRY: OUTLOOK AND SITUATION REPORT, DS-403, at 16 (1985), and 3.1% in 1985, USDA, DAIRY: OUTLOOK AND SITUATION REPORT, DS-408, at 16 (1986). These increases are deemed "significant and substantial." Telephone interview with Sara Short, Agricultural Economist, United States Department of Agriculture (Apr. 7, 1987).

226. J. Galbraith, American Capitalism 59 (1962); see also J. Galbraith, The New Industrial State 213 (1971) (stating that "[f]irms spend money to take business away from each other . . . .").

tobacco advertising strives to promote more than the product per se is the social desirability of its use. Edward L. Bernays, Sigmund Freud's nephew and protege, who coined and promoted the "public relations" industry, employed this technique in the late 1920s to induce women to smoke. In order to prevent such propagation to new users, Norway and Finland enacted total bans of tobacco advertising in 1975 and 1978, respectively, which are now credited with having decreased consumption through, in critical part, reducing their numbers of young people who smoke.

Even assuming tobacco advertising effects little influence on consumption, that does not necessarily suggest that its ban would not affect consumption. It is highly improbable that the collective tobacco industry would so vigorously oppose an advertising ban "unless it believed that promotion would increase its sale." With 90% of their consumers desirous of quitting, one million actually quitting each year, and another 390,000 dying from smoking-related

the population as a whole by maintaining and encouraging use and undermining health education efforts." The General's Warning: Koop Vows to Win the War Against Smoking, supra note 27, at 17. This has prompted one commentator to observe that "[t]he industry swears it uses ads only to persuade smokers to switch brands. Koop sees it as a deadly enticement for the young." Id.

228. See Banzhaf v. FCC, 405 F.2d 1082, 1086 (D.C. Cir. 1968), discussed supra note 104; see also Whelan, supra note 32, at 61, 65. In fact, in its 1984 report to Congress for 1981, the FTC concluded that:

[t]he major thrust of cigarette advertising in 1981 continued trends set in previous years.

.... Advertising ... presented a positive image of the cigarette smoker. For example, many ads depicted younger adults appearing to have achieved success and happiness. Often the ads were set in scenic areas and cigarette smoking was related to smiling, happy, robust people engaging in wholesome outdoor activities.


229. Bernays explains that "[p]ublic relations is the attempt, by information, persuasion, and adjustment, to engineer public support for an activity, cause, movement or institution." E. Bernays, The Engineering of Consent 3 (1955).

230. Id.; see also E. Bernays, Propaganda (1928) (setting forth Bernays' theory on the psychology of public relations and how persuasion may be used effectively to sell any idea or concept).

231. P. Taylor, The Smoke Ring: Tobacco Money and Multinational Politics 277 (1984). But see M. Waterson, supra note 46, at 24 (asserting that there is no evidence that the seven year advertising ban had a negative effect on the cigarette consumption of the 15-24 year old age group).

232. Most notably, The Tobacco Institute would not be likely to oppose such a ban.


234. See supra note 31.

235. See Health Promotion, supra note 31, at 10-7, 10-8; see also supra note 32 and
illnesses each year,\textsuperscript{236} "their whole strategy depends on getting new users."\textsuperscript{237}

Thus, because advertising serves to attract new product users\textsuperscript{238} as well as perhaps to increase consumption by present consumers, and since tobacco advertising has not been established without bias to have the extraordinary effect to the contrary, a ban of tobacco advertising should serve the substantial government interest in the reduction of tobacco use,\textsuperscript{239} and is, therefore, valid as "reasonably" based.\textsuperscript{240}

D. Least Restrictive Means Necessary

Since an advertising ban would serve to discourage the flow of information regarding the price and availability of a product, there is "doubt" whether it is ever a permissible manner for the government to "dampen" demand for a product which is legally offered.\textsuperscript{241} The first amendment protection of commercial speech defends the primary interest of the listener (i.e. the consumer) in receiving information.\textsuperscript{242} It is generally presumed that "people will perceive their own best interests if only they are well enough informed." \textsuperscript{243}

Nonetheless, in recognition of the "common-sense" distinction between commercial speech and other varieties of speech,\textsuperscript{244} govern-
ment can regulate the flow of commercial speech when necessary “to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition.”245 The young and the addicted, some 100 million in the United States,246 are particularly vulnerable to tobacco promotion.247 Moreover, contrary to popular argument,248 smoking249 is not merely a “self-regarding” activity;260 e.g. every non-smoking adult in the United States pays annually at least $100 in increased taxes and insurance premiums which result from health care costs incurred by smokers.251

Any approach taken must withstand review as being the least restrictive means necessary to serve the governmental interest.252 Counterspeech, such as warnings, is praised as a less restrictive means than the suppression of speech.253 This approach, however, is based on the premise that the health dangers posed by tobacco advertising are nullified by government health warnings.254


246. Based on census projections for 1985, there is a population of 62 million age 17 or under. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, SERIES P-25, NO. 952, PROJECTIONS OF THE POPULATION OF THE UNITED STATES BY AGE, SEX, AND RACE: 1983 TO 2080, at 7 (1984). When added to 50 million tobacco consumers, see Imperato & Mitchell, supra note 27, at 485, and allowing for overlap of persons in both groups, inconsistent annual birth rates, and unaddicted consumers, the numbers total approximately 100 million. Of course, the uninformed are also vulnerable. See Where There’s Smoke: Less Educated, Poor Found to Smoke More, White Plains Rep. Dispatch, Jan. 6, 1989, at A17, col. 2.

247. See Ban Cigarette Advertising?, supra note 27, at 565-66. Despite the tobacco industry’s written code to keep cigarette advertising from influencing young people, see Memorandum from The Tobacco Institute to Editors 3 (Dec. 19, 1985), the tobacco industry manages to reach the nation’s children directly or indirectly. Id. at 566. T.V. Guide claims to reach 6.1 million children between 12 and 17 years of age with each issue. Id. The Office of Smoking and Health has stated that approximately three-quarters of all smokers begin their habit by age 19. Id. at 565; see supra notes 156-58 and accompanying text (discussing the average age at which individuals begin to smoke).

248. See, e.g., Note, supra note 70, at 649.

249. See Imperato & Mitchell, supra note 27, at 487 (discussing the effect of passive exposure to cigarette smoke); supra note 196 and accompanying text (discussing the dangers of secondary smoke inhalation).

250. Note, supra note 70, at 649.

251. Imperato & Mitchell, supra note 27, at 488; see also supra note 196 and accompanying text (discussing the effects of passive smoking).


254. See SPECIAL COMM. ON MEDIA LAW, N.Y. STATE BAR ASSOC., STATEMENT ON A LEGISLATIVE BAN OF TOBACCO ADVERTISEMENT 1 (1986) (adopting a view that an open mar-
It is more probable that the “seductive and reassuring” nature of tobacco advertising “effectively dilutes the warnings,” and the addicted are “unreceptive to information about its dangers.” It is a charade, therefore, to protect tobacco advertising against additional restrictions because of warnings which do not effectively fulfill their purpose to inform. Furthermore, “it is up to the legislature to decide whether or not such a ‘counterspeech’ policy would be as effective ... as a restriction on advertising.”

Although the Supreme Court upheld the radio and television advertising ban in Capital Broadcasting Co. v. Mitchell, this decision preceded the leading cases on commercial speech. Nevertheless, “[t]he unique characteristics of electronic communication make it especially subject to regulation in the public interest.” These characteristics of the airwaves are based on its scarcity, pervasive impact, and public nature. As applied to tobacco advertising, broadcasting impacts pervasively in a manner uniquely accessible to the aforementioned vulnerable group of children and addicted tobacco consumers.

ketplace is essential because the public should be able to consider all factors and come to a reasonable decision on its own. As one commentator has noted:

Counterspeech is the required legislative means only insofar as the listener possesses the attributes of autonomy—that is, the capacity to evaluate rational arguments for and against certain activities. Where this capacity is in doubt, the concern for autonomy may legitimately be suspended, and the role of counterspeech may accordingly be limited. In this narrow sphere a greater measure of paternalism will be justified.

Note, supra note 70, at 654.

255. Imperato & Mitchell, supra note 27, at 485-87. The Banzhaf court concluded that “[t]he mere fact that information is available, or even that it is effectively heard or read, does not mean that it is effectively understood. A man who hears a hundred ‘yeses’ for each ‘no’, when the actual odds lie heavily the other way, cannot be realistically deemed adequately informed.” Banzhaf v. FCC, 405 F.2d 1082, 1099 (D.C. Cir. 1968).

256. Banzhaf v. FCC, 405 F.2d at 1099.


258. Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 344 (1986); cf. id. at 355 (Brennan, J., dissenting) (stating that “it is incumbent upon the government to prove that the interests it seeks to further are real and substantial.” (emphasis in original)).


260. See supra note 22 (discussing the continued viability of Capital Broadcasting in light of subsequent Supreme Court holdings in the area of commercial speech).


263. See FCC v. Pacifica Found., 438 U.S. 726 (1978); see also supra notes 245-47 and
While governed by the 1971 ban, cable television is distinguishable from other forms of broadcasting since scarcity does not exist in cable systems and its accessibility is more easily controlled. However, the court continues to uphold regulation based, in part, on its use of public facilities. The same basic public interest arguments founded on the pervasive impact of other broadcasting systems should apply to cable television as well, especially since cable transmission use continues to grow in popularity. Thus, to protect the public interest, the broadcasting ban of tobacco advertising should be sustained.

Tobacco advertising exists in a wide range of forums but is most pervasive in outdoor advertising. The powerful influence of pictorial advertising emanates from its continuous and self-equipped nature; unlike reading, neither effort nor skill need be exerted by the recipient in order to receive its message. Widespread billboard advertising of tobacco thereby severely undercuts the accessibility and pervasive impact bases of the television and radio advertising ban. Moreover, a ban of outdoor advertising may be “reasonable” in the

accompanying text.


265. A cable subscriber has the opportunity to select certain channels to be hooked into a television and, by means of a switching device, may choose not to view certain channels. Federal law requires that a subscriber be given the option to exercise further control over the accessibility of cable television: “In order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber.” 47 U.S.C. § 544(d)(2)(A) (Supp. IV 1986).

266. See Preferred Communications, 754 F.2d at 1406.


268. See supra notes 21-22 and accompanying text (discussing the FCC mandatory broadcasting ban of tobacco advertising on radio and television in the public interest). The ban should be broadened to include all tobacco products. See, e.g., supra note 18 (discussing smokeless tobacco).

269. See supra note 2 (discussing the various forms of tobacco advertising).


271. Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974) (citing Packer Corp. v. Utah, 285 U.S. 105, 110 (1932)). The Court recognized the difference as one of choice. Whereas a radio may be turned off, there is no “choice or volition” in observing a billboard—its message is thrust upon the viewer. Id.

interests of traffic, safety, and aesthetics.273 Therefore, since the government has a substantial interest in the reduction of tobacco use,274 this interest should be sufficient to justify extending the ban to outdoor billboards.

Print advertisement, in newspapers, magazines, and the like, does not implicate some key characteristics of the broadcast media275 and billboards.276 Nonetheless, tobacco advertising should be banned on its accessibility basis alone—all print media is widely accessible to the vulnerable, that is, the young and/or the addicted.277 Pragmatically, the tobacco industry would not direct its advertising to an audience which is not especially vulnerable, that is, well-informed, non-addicted adults.278 This operational reality leads to a broader conclusion—a complete ban of tobacco advertising, in all general forums of communication,279 is the least restrictive means necessary to serve the government interest in the reduction of tobacco use.

Past experience also bears out the need for a total ban. Following the imposition of limited bans in the United States and other countries, the tobacco industry merely shifted its advertising budget to other mediums.280 If only free sample distribution is permitted, for instance, and this method is deemed worthwhile by the industry, then heavy expenditures will flow into this means, thereby contravening the substantial government interest served by the ban of other forums.281 Except, perhaps, for the highly unlikely imposition of spending limits,282 the banning of all forums283 is the least restrictive

273. See Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 508-09 (1981) (finding that the basis of this ban, therefore, does not permit discriminatory application).
274. See supra notes 187-205 and accompanying text.
275. See supra notes 261-63 and accompanying text (detailing the key characteristics of media broadcasting).
276. See Metromedia, 453 U.S. at 490; Lehman, 418 U.S. at 302; Banzhaf v. FCC, 405 F.2d 1082, 1100-02 (D.C. Cir. 1968).
277. See supra notes 245-47 and accompanying text.
278. See Where There's Smoke: Less Educated, Poor Found to Smoke More, supra note 246, at A17, col. 2; supra note 52.
279. However, advertisements contained in or on the product's package might be exempt.
280. White, supra note 36, at 289, 291.
281. See Lamar Outdoor Advertising v. Mississippi State Tax Comm'n, 701 F.2d 314, 332 (5th Cir. 1983) (finding that "residents of Mississippi are exposed to so much liquor advertising from sources outside the state that the intrastate ban necessarily must have a minimal effect on consumption and hence little effect on promotion of the state's asserted interest.").
means which would be effective and, therefore, the least restrictive means necessary.

III. CONCLUSION

As the general United States population continues to live longer, the demands put upon its public and private health insurance systems, already burdened by the increasing incidence\(^\text{284}\) and death rate\(^\text{285}\) of cancer and the forecasted draining effects of AIDS,\(^\text{286}\) will ultimately further tax the strength of a federal government saddled with unprecedented debt.

Thus, in consideration of the uniquely harmful nature of tobacco (i.e. a "legal" product which is unsafe when used as intended)\(^\text{287}\) and its unparalleled destructive effects on both the health of Americans and the United States economy, pending congressional legislation provides for a broad range of tobacco measures—from raising its excise taxes and abolishing the tax credit for advertising\(^\text{288}\) to banning its advertising outright.\(^\text{289}\)

Although the congressional bill to ban the promotion of tobacco products died in committee in 1986,\(^\text{290}\) a similar bill was introduced in February 1987.\(^\text{291}\) Other than permitting retail outlets to display a sign stating that tobacco is sold on the premises, the ban is complete: "No manufacturer, packer, distributor, importer, or seller of tobacco products in or affecting commerce may engage in any consumer sales promotion of such products."\(^\text{292}\) The legislative findings conclude that "tobacco product advertising deceptively portrays use of tobacco as socially acceptable and healthful; sales promotion of tobacco products undermines the credibility of government and private health education campaigns against smoking; [and previous] actions

\(^{283}\) However, absent influence from the tobacco industry, the portrayal of tobacco use in certain forums, such as movies for adults, probably cannot be restricted.

\(^{284}\) See supra note 193.

\(^{285}\) See supra note 193 (explaining reasons why the United States is losing the fight against cancer, including attitudes toward smoking).


\(^{287}\) See supra note 33 and accompanying text.


\(^{289}\) H.R. 1272, 100th Cong., 1st Sess. § 3a (1987).


\(^{292}\) Id. § 3(a).
... have not altered the need for further control of advertising and promotion of tobacco products.\textsuperscript{293}

The last of these findings—that previous actions\textsuperscript{294} have been inadequate—could serve as the "reasonable" basis for the court to find that effective regulation of this uniquely harmful product may properly entail a total ban of its advertising.\textsuperscript{295}

\textsuperscript{293} Id. § 2(14), (15), (23) (1987) (setting forth proposed congressional findings).
\textsuperscript{294} See supra notes 15-26 and accompanying text.