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More Speech, Not Enforced Silence: Tobacco Advertising Regulations, Counter-marketing Campaigns and the Government's Interest in Protecting Children's Health

Derigan Silver

University of Denver, derigan.silver@du.edu

Kelly Fenson-Hood

Stanford University, k.fensonhood@gmail.com

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More Speech, Not Enforced Silence: Tobacco Advertising Regulations, Counter-marketing Campaigns and the Government's Interest in Protecting Children's Health

Derigan Silver* & Kelly Fenson-Hood**

The U.S. Supreme Court's decision in Lorillard Tobacco Co. v. Reilly, that the significant interest in protecting children's health would not allow the government to overly burden the flow of communication to adults about tobacco products, has left public health officials with little room to craft tobacco advertising restrictions that are both demonstrably effective and constitutional. This article focuses on social scientific research in the field of health communication, and legal doctrines of counterspeech and governmental speech. It specifically posits how a national counter-marketing tobacco prevention campaign targeting youth and paid with compulsory fees, or a tax paid by tobacco companies, would advance the government's interest in preventing youth smoking while still upholding First Amendment ideals and allowing adults to continue to receive information about legal products. However, the article also concludes that not all counter-marketing campaigns are created equal, and that campaigns should be well-funded and focus on using marketing techniques proven to be effective.

* Assistant Professor, Department of Media, Film and Journalism Studies, University of Denver. Ph.D., University of North Carolina at Chapel Hill. M.A., Arizona State University. B.A., University of California at Santa Barbara.

** Group Research Manager, Civil & Environmental Engineering Department, Stanford University. M.A., University of Denver. B.A., University of Colorado at Denver. The authors thank Renee Botta, Ph.D., Dan Kozlowski, Ph.D., Sheree Martin, J.D., Ph.D., and three anonymous reviewers for reviewing and commenting on early drafts of this article. A prior version of this article was presented to the Law and Policy Division at the 2011 annual conference for the Association for Education in Journalism and Mass Communication.

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I. INTRODUCTION

Tobacco advertising is “one of the most controversial public issues of recent years,”¹ and has attracted interest from both health and legal professionals.² For now, the Supreme Court has settled one argument: Because it is legal for adults to buy and use tobacco, the tobacco industry has a broad right to market its products to adults, and adults have the right to receive that information in order to make an informed decision about purchasing and using tobacco products. The government, however, has an interest in preventing underage tobacco use,³ and tobacco advertising can lead to underage tobacco use.⁴ This article discusses how a national counter-marketing campaign, similar to the truth@ campaign,⁵ could effectively advance the government’s interest in pro-

1. R. Michael Hoefges, *Protecting Tobacco Advertising Under the Commercial Speech Doctrine: The Constitutional Impact of Lorillard Tobacco Co.*, 8 COMM. L & POL’Y 267, 284 (2003).

2. See, e.g., Matthew Miller, *The First Amendment and Legislative Bans of Liquor and Cigarette Advertisements* 85 COLUM. L. REV. 632, 632 (1985) (discussing the attention bans of liquor and tobacco advertising were receiving in the 1980s as well as the arguments from both proponents and opponents of bans).

3. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001) (“The State’s interest in preventing underage tobacco use is substantial, and even compelling.”).

4. Elizabeth A. Gilpin et al., *Receptivity to Tobacco Advertising and Promotions Among Young Adolescents as a Predictor of Established Smoking in Young Adulthood*, 97 AM. J. PUB. HEALTH, 1489, 1489 (2007).

5. A national tobacco counter-marketing campaign would entail the use of commercial marketing tactics to reduce the prevalence of tobacco use by youths. Launched in 2000 and funded by the Master Settlement Agreement (MSA), a negotiated settlement between the four largest tobacco companies and 46 states, the truth@ campaign is the largest smoking prevention campaign in the country not sponsored by the tobacco industry. See Master Settlement Agreement, (Nov. 23, 1988), available at http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/MSA%20with%20Sig%20Pages%20and%20Exhibits.pdf/file_view. See also *infra* notes 225-313 and accompany text for a discussion of the truth@ campaign and other counter-marketing campaigns.

protecting the health of children without conflicting with the Supreme Court's decisions in *Central Hudson Gas & Electric Corp. v. Public Service Commission*⁶ and *Lorillard Tobacco Co. v. Reilly*.⁷ This article also contends that the government speech doctrine would protect such a campaign from a First Amendment challenge by tobacco companies.

Decided in 1980, *Central Hudson Gas & Electric Corp. v. Public Service Commission*⁸ marked the establishment of the *Central Hudson* analysis, a “unique and complex test of intermediate constitutional scrutiny,”⁹ used when commercial speech regulations—such as those designed to restrict tobacco advertising—are challenged on First Amendment grounds. Although commercial speech was once unprotected, the *Central Hudson* analysis has been applied with increasing rigor over the last three decades. The Court's decisions have “[a]rguably . . . nearly eliminated the gap between commercial speech and fully protected non-commercial speech.”¹⁰ Furthermore, the Court has refused to carve out a special place for “vice” advertising—or advertising “for products and activities that are legal for adults but carry harmful secondary effects for society.”¹¹

There are also constitutional barriers to advertising restrictions aimed at protecting minors. Significant for a number of reasons,¹² the Supreme Court's 2001 decision in *Lorillard Tobacco Co. v. Reilly*¹³ was the first case to decide the constitutionality of advertising restrictions aimed at protecting minors, and the first to directly decide the constitutionality of restrictions on tobacco advertising. The *Lorillard* Court “made it clear that even a compelling interest in protecting children's health would not allow government to overly burden the flow of lawful communication to adults about tobacco products.”¹⁴ The decision has “left public health authorities with little room to craft tobacco advertising restrictions that are both demonstrably effective and likely to be deemed [constitutional].”¹⁵ This conclusion was reinforced in 2010 when a federal district court struck down portions of the Family Smoking Prevention and Tobacco Control Act (FSPTCA).¹⁶ In *Commonwealth Brands, Inc. v. United States*, the United States District Court for the Western District of Kentucky held the FSPTCA's ban on color and graphics in tobacco labels and advertising was

6. 447 U.S. 557 (1980).

7. 533 U.S. 525 (2001).

8. 447 U.S. 557 (1980).

9. Hoefges, *supra* note 1, at 267.

10. *Id.* at 268.

11. *Id.*

12. *See id.* at 269 (discussing the case's significance for its reaffirmation of the *Central Hudson* analysis and for “stringently interpreting the federal pre-emption provisions of the Federal Cigarette Labeling and Advertising Act (FCLAA)”).

13. 533 U.S. 525 (2001).

14. Hoefges, *supra* note 1, at 309.

15. Ronald Bayer et al., *Tobacco Advertising in the United States: A Proposal for a Constitutionally Acceptable Form of Regulation*, 287 J. AM. MED. ASSOC. 2990, 2994 (2002).

16. Pub. L. No. 111-31, 123 Stat. 1776 (2009).

overly broad because under the *Central Hudson* test it exceeded the government's interest in protecting youth from the effects of tobacco use.¹⁷ There is, however, an alternative to advertising restrictions, one that would involve "more speech, not enforced silence."¹⁸

This article suggests that focusing on the legal doctrine of counterspeech¹⁹ through tobacco prevention counter-marketing campaigns would both advance First Amendment ideals *and* the government's interest in preventing underage smoking. Counter-marketing campaigns are valuable unto themselves in a society that values freedom of expression—even expression that advocates illegal activity,²⁰ contains violent images²¹ or depicts offensive conduct,²² or markets products that are lawful but harmful.²³ Although other scholars have suggested implementing counter-marketing campaigns, most have failed to link these campaigns to larger issues related to freedom of expression in a democracy or have not evaluated the effectiveness of these campaigns. These scholars seem to suggest that counter-marketing campaigns are *only* useful because the Supreme Court has set such a high barrier for advertising restrictions. By combining legal analysis and theory with social scientific research and health communication principles and theory, this article suggests ways in which counter-marketing campaigns can be used to advance the government's interest in preventing youth smoking in order to avoid clashing with the *Central Hudson* analysis, while also being effective *and* promoting free exchange in the marketplace of ideas.²⁴

17. 678 F. Supp. 2d 512, 525 (W.D. Ky. 2010). Alternatively, the court found that the Act's bans on brand-name event sponsorship and merchandise and requirements that package warnings about the health risks of tobacco use be made more conspicuous were constitutional, while the challenge to the Act's ban on outdoor advertising was unripe. See *infra* notes 144-62 and accompanying text.

18. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 586 (2001) (Thomas, J., concurring) (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

19. The counterspeech doctrine contends, "whenever 'more speech' could eliminate a feared injury" from dangerous or "bad" speech, "more speech is the constitutionally-mandated remedy." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 834 (2d ed. 1988). See Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for "Bad" Speech*, 2000 BYU L. REV. 553 (2000), for a more recent discussion of the doctrine, its detractors, and its use in a wide variety of cases, including speculation about the advantages of and problems associated with possible anti-smoking campaigns).

20. See, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969).

21. See, e.g., United States v. Stevens, 130 S.Ct. 1577 (2010).

22. See, e.g., Texas v. Johnson, 491 U.S. 397 (1989); Hustler v. Falwell, 485 U.S. 46 (1988).

23. See, e.g., Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).

24. First introduced into free speech jurisprudence by Justice Oliver Wendell Holmes Jr. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see also RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 6 (1992) (explaining that the marketplace of ideas is one of "most powerful metaphor[s] in the free speech tradition"); see also W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS. COMM. Q. 40 (1996) (for a detailed analysis of the metaphors used by the U.S. Supreme Court).

Although minors cannot legally purchase tobacco, a national counter-marketing campaign targeting youth is necessary because young children and teens are a high-risk group for initiating tobacco use. Eighty-two percent of adult smokers try their first cigarette by age eighteen, and over half become regular smokers by age eighteen.²⁵ Approximately 350,000 children under age eighteen become new, regular smokers each year in the United States.²⁶ While the tobacco industry insists that marketing campaigns do not target minors, health scholars and others argue that targeting minors is an integral part of tobacco companies' marketing strategies²⁷ and studies have shown that exposure to tobacco advertising at a young age is predictive of future behavior.²⁸ Thus, this article offers a solution to a very real problem of youth tobacco use.

Part II of the article reviews past and current national tobacco advertising regulations. The article also demonstrates the need for counter-marketing campaigns by discussing the evolution of the *Central Hudson* analysis, and focusing on how the test has been applied to vice advertising and how it has impacted tobacco advertising regulations. The article then examines how the analysis was applied in *Lorillard* and *Commonwealth Brands* to strike down advertising regulations designed to protect the health of minors. Part III discusses the effectiveness of tobacco advertising regulations, and then analyzes the effectiveness of various counter-marketing campaigns. Part IV suggests that counter-marketing efforts would also be insulated from compelled speech First Amendment claims by tobacco companies under the government speech doctrine. Part V thus posits that by focusing on *effective* counter-marketing funded by a tax on the production of tobacco products or a compulsory fee paid by tobacco companies,²⁹ the government would advance its interest in preventing youth smoking, better uphold First Amendment ideals, and allow adults to continue to receive information about legal products. However, the article also concludes that the government must be mindful that not all counter-marketing campaigns are created equal, and campaigns must be adequately funded and use techniques proven to be effective.

25. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,398 (Aug. 28, 1996) (to be codified at C.F.R. pt. 801, 803, 807, 820, 897).

26. SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION (SAMHSA), DEPARTMENT OF HEALTH AND HUMAN SERVICES RESULTS FROM THE 2008 NATIONAL SURVEY ON DRUG USE AND HEALTH, NSDUH: DETAILED TABLES, <http://www.oas.samhsa.gov/NSDUH/2K8NSDUH/tabs/Sect4peTabs10to11.pdf>.

27. See, e.g., *Tobacco Companies Marketing to Kids*, Campaign for Tobacco-Free Kids, http://www.tobaccofreekids.org/research/factsheets/toll/tobacco_kids/marketing (last visited Mar. 16, 2012). See also *United States v. Philip Morris, Inc.* 449 F. Supp. 2d 1 (2006).

28. Gilpin et. al., *supra* note 4, at 1489.

29. Although the truth@ campaign has been effective in reducing smoking rates, under the terms of the MSA the campaign stopped receiving funds in 2003. See *Protect The Truth – Truth Campaign*, <http://www.protectthetruth.org/truthcampaign.htm> (last visited, July 22, 2011). Thus, a new funding source would need to be found to support a national counter-marketing campaign.

II. TOBACCO ADVERTISING REGULATIONS AND THE FIRST AMENDMENT

A. A Brief History of Tobacco Advertising Restrictions

The first regulation aimed at protecting minors from tobacco advertising was the Federal Cigarette Labeling and Advertising Act (FCLAA).³⁰ The FCLAA, passed in 1965, requires that health warnings be included on packaging³¹ and in print advertisements.³² The intent was to inform consumers about the adverse health effects of cigarettes.³³ The FCLAA also banned advertising for cigarettes and little cigars on media licensed and regulated by the Federal Communications Commission (FCC).³⁴ In 1971, six corporations that operated radio stations brought suit to have the advertising ban for electronic media declared unconstitutional. However, the federal appeals court rejected the corporations' First Amendment challenges.³⁵

In *Capital Broadcasting Co. v. Mitchell* the United States District Court for the District of Columbia ruled the ban was not a violation of the corporation's First or Fifth Amendment rights, noting both that "product advertising is less vigorously protected than other forms of speech"³⁶ and that "[t]he unique characteristics of electronic communication make it especially subject to regulation in the public interest."³⁷ The court wrote, "Whether the Act is viewed as an exercise of the Congress' supervisory role over the federal regulatory agencies or as an exercise of its power to regulate interstate commerce, Congress has the power to prohibit the advertising of cigarettes in any media."³⁸ Turning to the corporations' argument that prohibiting cigarette advertising on broadcast media and not on print media was unconstitutional, the court relied on two rationales. First, the court concluded that the ban was appropriate because evidence showed the most persuasive cigarette advertising was "being conducted on radio and television, and that these broadcasts were particularly effective in reaching a very large audience of young people."³⁹ Second, the court wrote, "Moreover, Congress could rationally distinguish radio and television from other media on the basis that the public owns the airwaves, and that licenses

30. 15 U.S.C §§ 1333-41 (2006).

31. *Id.* at §1333(a)(1).

32. *Id.* at §1333(a)(2).

33. *Id.* at § 1331(1).

34. 15 U.S.C. § 1335 (2006). The Comprehensive Smokeless Tobacco Health Education Act, discussed below, did the same for smokeless tobacco products. 15 U.S.C. §§ 4401-08 (2006).

35. *Capitol Broad. Co. v. Mitchell*, 333 F. Supp. 582, 585-86 (D.C. Cir. 1971), *aff'd without opinion sub nom. Capitol Broad. v. Kleindienst*, 405 U.S. 1000 (1972).

36. *Id.* at 584.

37. *Id.*

38. *Id.*

39. *Id.* at 585-86. The court also noted that young people are more likely to rely on broadcast messages than printed messages, writing "the younger the individual, the greater the reliance on the broadcast message than the written word. A pre-school or early elementary school age child can hear and understand a radio commercial or see, hear and understand a television commercial, while at the same time be substantially unaffected by an advertisement in a newspaper, magazine or appearing on a billboard." *Id.* at 586.

must operate broadcast facilities in the public interest under the supervision of a federal regulatory agency.”⁴⁰ The Supreme Court affirmed the lower court’s ruling without issuing an opinion.⁴¹ However, it is important to note that the decision was made eight years before the Court’s decision in *Central Hudson*.⁴²

In 1996, the Food and Drug Administration (FDA) concluded that tobacco was within its regulation jurisdiction because tobacco contains nicotine, a drug that affects the structure and/or function of the body.⁴³ The FDA issued a broad set of federal requirements known as the Final Rule, which would have limited the sale, distribution and advertising of tobacco products in the United States.⁴⁴ The Final Rule required all print advertising to appear in black and white, text-only format, and prohibited outdoor advertising within 1,000 feet of any public playground or school, the distribution of promotional items, and the sponsorship of athletic, musical, artistic, or other social or cultural events by tobacco manufacturers.⁴⁵ The Final Rule included an abundance of research that correlated tobacco marketing with youth smoking initiation, although the agency admitted that it could cite no single study that established a direct causal connection between advertising and the use of tobacco products by minors.⁴⁶

Although the FDA regulations included advertising restrictions that the agency claimed would pass *Central Hudson* analysis,⁴⁷ these restrictions were never enacted because, in *FDA v. Brown & Williamson Tobacco Corp.*, the Supreme Court ruled 5-4 that the FDA did not have the authority to regulate tobacco.⁴⁸ The Court’s majority opinion, written by Justice Sandra Day O’Connor, acknowledged that tobacco use posed “perhaps the single most significant threat to public health in the United States.”⁴⁹ Nevertheless, the Court concluded, “an administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.”⁵⁰

The majority relied on three rationales to reach the conclusion that Congress had not granted the FDA the authority to regulate tobacco. First, the Court reasoned that if the FDA had authority to regulate tobacco under the Food, Drug, and Cosmetic Act (FDCA), the administration would have no other choice than to ban tobacco products outright because the products were “un-

40. *Id.* at 586.

41. *Capitol Broad.*, 405 U.S. 1000.

42. See Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589 (1996), for a discussion of how the ban would fare under the *Central Hudson* analysis.

43. See Matthew Myers, *Protecting the Public Health by Strengthening the Food and Drug Administration’s Authority Over Tobacco Products*, 343 NEW ENG. J. MED. 1806, 1806-09 (2000).

44. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,396.

45. *Id.* at 44,617-18.

46. *Id.* at 44,474-96.

47. See generally *id.* at 44,471-513.

48. 529 U.S. 120, 126 (2000).

49. *Id.* at 161.

50. *Id.*

safe,” “dangerous,” and “caused great pain and suffering.”⁵¹ Congress, however, had specifically created legislation to ensure that tobacco products would be publicly available.⁵² The Court reasoned:

[I]f tobacco products were within the FDA’s jurisdiction, the [FDCA] would require the FDA to remove them from the market entirely. But a ban would contradict Congress’ clear intent as expressed in its more recent, tobacco-specific legislation. The inescapable conclusion is that there is no room for tobacco products within the FDCA’s regulatory scheme. If they cannot be used safely for any therapeutic purpose, and yet they cannot be banned, they simply do not fit.⁵³

Next, the Court engaged in a lengthy discussion of the FDA’s historical reluctance to claim jurisdiction over tobacco products, Congress’ rejections of bills that would have granted the FDA jurisdiction, and the lengthy history of tobacco-specific regulations enacted by Congress.⁵⁴ Based on this analysis, the Court concluded “the consistency of the FDA’s prior position, [that it did not have jurisdiction], bolsters the conclusion that when Congress created a distinct regulatory scheme addressing the subject of tobacco and health, it understood that the FDA is without jurisdiction to regulate tobacco products and ratified that position.”⁵⁵

Finally, the Court noted that “[o]wing to its unique place in American history and society, tobacco has its own unique political history”⁵⁶ and, thus, any grant of authority by Congress to the FDA to regulate tobacco would need to be explicit. The Court found that there was no such statement from Congress in the history of specific tobacco legislation passed subsequent to the FDCA, and wrote it was clear “that Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products.”⁵⁷ Thus, the Court never applied the *Central Hudson* analysis to the advertising regulations contained in the Final Rule. However, the research contained in the Final Rule was heavily cited in future tobacco advertising cases, including *Lorillard Tobacco*,⁵⁸ and in more recent FDA regulations discussed below.

In 1998, prior to the Court’s decision about the Final Rule, 46 states entered into the Master Settlement Agreement (MSA),⁵⁹ a negotiated settlement with the four largest tobacco companies—Phillip Morris USA, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp., and Lorillard Tobacco Company.⁶⁰ Arguably the most successful regulation of tobacco advertise-

51. *Id.* at 134.

52. *Id.* at 138-39.

53. *Id.* at 143.

54. *Id.* at 143-59.

55. *Id.* at 158.

56. *Id.* at 159.

57. *Id.* at 160-61.

58. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556-61 (2001).

59. Master Settlement Agreement, *supra* note 5.

60. *Id.*

ments to date, the MSA applied multiple regulations to the tobacco industry, including marketing restrictions, with the central purpose of reducing and preventing smoking, particularly among youth. Under the MSA, the four tobacco companies that signed the agreement are prohibited from marketing tobacco in a number of ways, including using cartoon characters in advertising, using tobacco brand names for stadiums and arenas, and distributing merchandise with brand names.⁶¹

In June 2009, President Barack Obama signed into law the Family Smoking Prevention and Tobacco Control Act (FSPTCA),⁶² which granted the FDA the power to regulate tobacco products⁶³ and amended portions of the Federal Cigarette Labeling and Advertising Act and the Comprehensive Smokeless Tobacco Health Education Act.⁶⁴ The purpose of the FSPTCA was specifically to “curb tobacco use by adolescents,”⁶⁵ while “continu[ing] to permit the sale of tobacco products to adults.”⁶⁶ The Act provides that manufacturers, distributors, and retailers advertising or disseminating any advertising or labeling for cigarettes or smokeless tobacco use only black text on a white background.⁶⁷ In addition, the Act requires tobacco companies to print warning labels on the top fifty percent of both sides of all cigarette packaging, including messages such as “Cigarettes cause cancer,” along with “color graphics depicting the negative health consequences of smoking.”⁶⁸ The Act’s Modified Risk Tobacco Products (MRTP) provisions also prohibited any labels that “explicitly or implicitly” suggested that a product was less harmful than other tobacco products and “any action directed to consumers through the media or otherwise” that would reasonably be expected to result in consumers believing the product would be less harmful than other tobacco products.⁶⁹ Subject to modifications “of governing First Amendment case law,” the Act also bans all “outdoor advertising for cigarettes or smokeless tobacco, including billboards, posters, or placards . . . within 1,000 feet of the perimeter of any public playground or playground area in a public park, . . . elementary school, or secondary school.”⁷⁰ Finally, it prohibits the use of tobacco logos and brand names in event or team sponsorships, and the use of non-tobacco merchandise that promote tobacco products.⁷¹

In response to the legislation, the tobacco industry filed a lawsuit in federal district court, arguing that the new regulations infringed on their First

61. *See id.* at 8 pt. III.

62. Pub. L. No. 111-31, 123 Stat. 1776 (2009).

63. *Id.* at §§ 101-06.

64. *Id.* at §§ 201-06.

65. *Id.* at §§ 2(6), 3(2).

66. *Id.* at § 3(7).

67. *Id.* at § 102(a)(2).

68. *Id.* at § 201(a) (amending 15 U.S.C. § 1333 to add subsections (a)(2) and (d)).

69. *Id.* at § 101(b) (amending the Federal Food, Drug, and Cosmetic Act (FDCA) to add § 911(b)(2)(A)).

70. *Id.* at § 102(a)(2).

71. *Id.*

Amendment rights to advertise their products to adults. In *Commonwealth Brands, Inc. v. FDA*,⁷² the United States District Court for the Western District of Kentucky applied the *Central Hudson* analysis, ruling that restrictions on the use of color and graphics in tobacco labels and advertising violated the tobacco industry's First Amendment rights, but that limits on tobacco-branded merchandise and sponsorships were constitutional.

B. *The Central Hudson Analysis and Vice Advertising*

The test for determining whether advertising regulations are constitutional was created in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁷³ Over the last three decades the *Central Hudson* analysis has been applied with increasing rigor, even when considering advertising for products that have harmful secondary effects, such as tobacco. This section of the article traces the evolution of the *Central Hudson* analysis in order to demonstrate the difficulties the government faces when enacting tobacco advertising regulations.

In *Central Hudson*, the Supreme Court struck down a state regulation that banned electric utility companies from running advertisements that promoted the use of electricity. The intent of the regulation was to conserve energy, but in doing so the ban prohibited ads promoting wasteful as well as efficient electricity uses.⁷⁴ In his majority opinion, Justice Lewis F. Powell, Jr. created a four-part analysis to determine the constitutionality of the government regulation. The first part of the analysis determines "whether the expression is protected by the First Amendment."⁷⁵ In order to be protected, the advertisement must concern a lawful activity and not be misleading.⁷⁶ In *Central Hudson*, the first part of the test was easily met as the advertising was truthful and promoted a legal product—electricity.⁷⁷

The second part of the analysis determines if there is a substantial government interest in regulating the speech.⁷⁸ Traditionally, once the Court has determined that a regulation restricts protected speech, it has been fairly liberal in finding that an asserted government interest is significant under the second factor.⁷⁹ In *Central Hudson*, the second prong was also easily met because the conservation of energy was a "clear and substantial" government interest.⁸⁰ The third prong requires that the regulation directly advance the government

72. 678 F. Supp. 2d 512, 540-41 (W.D. Ky. 2010).

73. 447 U.S. 557 (1980).

74. *Id.* at 560-61.

75. *Id.* at 566.

76. *Id.*

77. *Id.*

78. *Id.*

79. See Hoefges, *supra* note 1, at 275 (describing the history of the Supreme Court's rulings on the second factor of the *Central Hudson* analysis).

80. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 569 (1980).

interest.⁸¹ This requirement necessitates that the government provide evidence of advancement while focusing on the relationship between the government interest and the speech under consideration. In *Central Hudson*, the third prong was met because “there [was] an immediate connection between advertising and demand for electricity.”⁸² The last factor is whether the regulation is “not more extensive than is necessary” to serve the government interest.⁸³ Constitutionally speaking, if there is an alternative method that could serve the interest without restricting expression, it is the preferred alternative.⁸⁴ In *Central Hudson*, the Court found that the regulation failed the fourth prong because the ban was more restrictive than necessary since it prohibited all promotional advertising for electricity.⁸⁵ The Court noted that New York had not proven that less restrictive means were unavailable or would be ineffective in advancing the government’s interest.⁸⁶

Over the two decades following *Central Hudson*, the third and fourth prongs of the test became more clearly defined in a number of notable Supreme Court cases.⁸⁷ Several of these cases are especially germane to a discussion of tobacco advertising regulations because they involved vice advertising. In *Posadas de Puerto Rico Associates v. Tourism Co.*,⁸⁸ decided six years after *Central Hudson*, the Court considered a ban on advertising for casino gambling in Puerto Rico that targeted the local population. The Court held the ban to be permissible because it directly advanced a substantial government interest in protecting the people of Puerto Rico from the social ills of compulsive gambling.⁸⁹ Writing for the majority, Justice William Rehnquist wrote that the regulation could interrupt the “moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime.”⁹⁰ It is important to note, however, that Rehnquist’s assertion was made without any evidence indicating the ban would directly advance the government’s interest.

Similarly, in *United States v. Edge Broadcasting Co.*, decided in 1993, the Court upheld a federal broadcasting ban on state lottery advertisements broadcast in non-lottery states, focusing on its reasoning in *Posadas*.⁹¹ Although the

81. *Id.* at 566.

82. *Id.* at 569.

83. *Id.* at 566.

84. Miller, *supra* note 2, at 652.

85. *Cent. Hudson*, 447 U.S. at 571.

86. *Id.*

87. See Hoefges, *supra* note 1, at 276-79 (describing the evolution of the third *Central Hudson* factor); *id.* at 280-282 (discussing the evolution of the fourth factor of the *Central Hudson* analysis); See also Susan Dente Ross, *Reconstructing First Amendment Doctrine: The 1990s [R]evolution of the Central Hudson and O’Brien Tests*, 23 HASTINGS COMM. & ENT. L.J. 723, 738-45 (2001) (discussing the evolution of the *Central Hudson* analysis).

88. 478 U.S. 328 (1986).

89. *Id.* at 341.

90. *Id.*

91. 509 U.S. 418, 427-28, 432-35 (1993).

Court later rejected *Posadas* in *44 Liquormart Inc. v. Rhode Island*,⁹² as legal scholar Michael Hoefges noted, the majority of the court in *Posadas* and *Edge Broadcasting* suggested that “because gambling was not a constitutionally-protected right and could be banned by the government as a ‘vice’ activity, advertising regulations should be viewed with greater deference to legislative goals than for other ‘non-vice’ activities or products.”⁹³

As noted, under the fourth step of the *Central Hudson* analysis, if there are other means to accomplish the government interest without restricting speech, it is preferable and the Court will likely strike down the regulation. However, it was not until 1989 that the fourth prong was more clearly defined. In *Board of Trustees of State University of New York v. Fox*, Todd Fox, a student at the State University of New York at Courtland, and American Future Systems (AFS) sued the university to allow AFS to perform demonstrations promoting their household products in school dormitories.⁹⁴ Fox argued that the university’s policy of prohibiting commercial enterprises from conducting business on campus was unconstitutional.⁹⁵ In the Court’s majority opinion, Justice Antonin Scalia wrote that the *Central Hudson* analysis only required a reasonable fit between the regulation and the government interest it served.

As Scalia wrote, “What our decisions require is a ‘fit’ between the legislature’s ends and the means chosen to accomplish those ends . . . a fit that is not necessarily perfect, but reasonable, that represents not necessarily the single best disposition but one whose scope is ‘in proportion to the interest served;’ that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective.”⁹⁶

In later years, two cases, *Rubin v. Coors Brewing Co.*⁹⁷ and *44 Liquormart, Inc. v. Rhode Island*,⁹⁸ helped to further clarify the third and fourth prongs of the *Central Hudson* analysis and rejected the idea that the analysis is more lenient for government regulation of vice product advertising. In *Coors Brewing*, the Court held that a federal regulation that banned beer labels from stating alcohol content percentage did not advance the government’s asserted interest in curbing problems related to alcohol consumption. The Court wrote that the regulation failed the third prong for two reasons. First, it was inconsistent to ban alcohol content for beer labeling when it was required for liquor and wine labeling.⁹⁹ Second, the government did not present any evidence illustrating how allowing alcohol content on beer labels would result in a “strength

92. 517 U.S. 484, 509-10 (1996) (“*Posadas* erroneously performed the First Amendment analysis”).

93. Hoefges, *supra* note 1, at 283.

94. *See* 492 U.S. 469 (1989).

95. *Id.* at 469.

96. *Id.* at 479.

97. 514 U.S. 476 (1995).

98. 517 U.S. 484 (1996).

99. *Coors Brewing*, 514 U.S. at 488-89.

war.”¹⁰⁰

In *44 Liquormart*, in a highly fractured opinion, the Court ruled that a Rhode Island law banning retail price advertising for liquor violated the First Amendment because the regulation failed the *Central Hudson* analysis. Specifically rejecting the reasoning of the *Posadas* majority, the Court concluded that “a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes.”¹⁰¹ Although the Court accepted the government’s regulatory interest in encouraging temperance, under the third prong, the Court held that the state failed to present any evidence that a ban on price advertising would be effective in curbing overall alcohol consumption.¹⁰²

Considering the fourth prong—whether the regulation is “not more extensive than is necessary” to serve the government interest¹⁰³—the *Coors Brewing* Court wrote that the ban on alcohol content percentages was not narrowly tailored because the government had more direct ways to curb a “strength war,” such as direct limits on beer alcohol content.¹⁰⁴ In *44 Liquormart*, when considering the fourth prong, the opinion of Justice John Paul Stevens stated it was “perfectly obvious”¹⁰⁵ that the state could have enacted minimum price levels or imposed taxes on liquor to keep prices artificially high. Thus, the ban was not sufficiently narrow because there were more direct means available to curb liquor consumption.¹⁰⁶

Together, these cases established that in order to fulfill the third prong, evidence must be presented illustrating how the regulation serves the government interest. However, the Court did not fully answer how much evidence was required to meet the government interest. This issue has been debated in the tobacco advertising literature and was addressed in subsequent tobacco advertising cases. When discussing how the third prong has been applied in tobacco advertising, those in favor of regulations argue that the abundance of research that shows a correlation adequately fulfills the prong.¹⁰⁷ For example, in evidence submitted in support of the FDA’s 1996 Final Rule,¹⁰⁸ an abundance of

100. *Id.* at 489-90. The government argued that the labeling regulation was necessary to avert the threat of “strength wars” between brewers, who, it was argued, would seek to compete in the marketplace based on the potency of their beer. The government contended competition on the basis of alcohol strength between the brewers would lead to greater alcoholism and an increase in attendant social costs.

101. *44 Liquormart*, 517 U.S. at 510.

102. *Id.* at 505-06. In fact, Justice John Paul Stevens actually concluded that the evidence in the record suggested that excessive drinkers were not likely to be deterred by higher prices. *Id.* at 506.

103. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

104. *Coors Brewing*, 514 U.S. at 490-91.

105. *44 Liquormart*, 517 U.S. at 507.

106. *Id.* at 507-08.

107. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556-57 (2001).

108. Final Rule, 61 Fed. Reg. at 44,396.

research correlated tobacco marketing with youth smoking initiation.¹⁰⁹ The Final Rule noted that eighty-two percent of adult smokers tried their first cigarette by age eighteen, and of those who did over half were regular smokers by age eighteen.¹¹⁰ Research also showed that if “the number of children and adolescents who begin tobacco use can be substantially diminished, tobacco-related illness can be correspondingly reduced because data suggest that anyone who does not begin smoking in childhood or adolescence is unlikely to ever begin.”¹¹¹ However, opponents argue that causal evidence should be required to fulfill the third prong—in other words, research should prove that tobacco advertising actually *causes* children to use tobacco.¹¹²

In addition, these cases demonstrate that the Court has also been rigorous in its application of the fourth prong of *Central Hudson*. Although legal commentators contend that *Fox* greatly reduced the burden on the government,¹¹³ today it is still very difficult for a law to pass constitutional muster under the *Central Hudson* analysis. As Hoefges wrote, “[L]aws restricting the flow of protected commercial speech in order to manipulate consumer behavior are likely to be struck down as unconstitutional,” even when a regulation advances a *compelling* interest, such as protecting the health of minors.¹¹⁴ The Court, however, did not directly apply the analysis to tobacco advertising or a law designed to protect the health of minors until 2001.

C. *Lorillard Tobacco Company v. Reilly* and *Commonwealth Brands v. FDA*

The two prominent cases to consider the constitutionality of tobacco advertising regulations designed to protect minors are the Supreme Court’s decision in *Lorillard Tobacco Company v. Reilly*¹¹⁵ and a federal district court’s decision in *Common Wealth Brands v. FDA*.¹¹⁶ In both cases the courts recognized the government’s interest in protecting youth from tobacco advertising. Nonetheless, both courts still struck down the regulations using the *Central Hudson* analysis. The cases demonstrate both the difficulties the government faces when trying to enact advertising regulations designed to protect minors and the need for alternatives to advertising restrictions.

In 1999, pursuant to his authority to prevent unfair and deceptive practices in trade, then-Massachusetts’ Attorney General Scott Harshbarger enacted state

109. *Id.* at 44,474–96.

110. *Id.* at 44,398.

111. *Id.* at 44,399.

112. *See, e.g.,* *Lorillard Tobacco Co.* 533 U.S. at 557 (writing that *Lorillard Tobacco* contended that the regulations should be struck down as unconstitutional because the attorney general “cannot prove that advertising has a causal link to tobacco use”).

113. *See* Todd Locher, Board of Trustees of the State University of New York v. *Fox: Cutting Back on Commercial Speech Standards*, 75 IOWA L. REV. 1335, 1347 (1990) (discussing the evolution of the *Central Hudson* analysis).

114. Hoefges, *supra* note 1, at 305.

115. 533 U.S. 525, 533 (2001).

116. 678 F. Supp. 2d 512 (W.D. Ky. 2010).

regulations governing the sale and advertisement of cigarettes, smokeless tobacco, and cigars.¹¹⁷ The regulations prohibited any outdoor advertising for cigarettes, smokeless tobacco, and cigars located within a 1,000-foot radius of a school or playground.¹¹⁸ The regulations also required that point-of-sale advertising be placed five feet or higher in retail stores that allowed children and were covered by the 1,000-foot rule.¹¹⁹ A coalition of tobacco manufacturers and retailers, including the top four U.S. cigarette manufacturers,¹²⁰ brought suit in federal district court arguing that the regulations violated the FCLAA's pre-emption provisions and were unconstitutional under the First Amendment. In separate rulings, the district court rejected the pre-emption argument¹²¹ and most of the First Amendment claims. The district court held that only the five-foot-high rule was unconstitutional under the *Central Hudson* analysis.¹²² On appeal, the United States Court of Appeals for the First Circuit affirmed on the pre-emption issue, reasoning that the law only dealt with zoning issues and did not interfere with the labeling and advertising schemes established by the FCLAA.¹²³ Thus, the tobacco advertising regulations were upheld by the Appeals court, which overturned the lower court's ruling on the five-foot height rule.¹²⁴ On appeal, however, the Supreme Court reversed the Appeals court's holding in a fractured decision.

After ruling 5-4 that the FCLAA pre-empted Massachusetts from regulating outdoor and retail point-of-sale cigarette advertising,¹²⁵ the Court applied the *Central Hudson* analysis to the regulation of cigar and smokeless tobacco advertising because Congress had not enacted pre-emption on those products. Applying the material advancement prong to the requirement that point-of-sale advertising be placed five feet or higher in retail stores that allowed children and were covered by the 1,000-foot rule, the Court ruled 6-3 that the point-of-sale regulations failed the third *Central Hudson* requirement. O'Connor noted that "[n]ot all children are less than 5 feet tall, and those who are certainly have

117. *Lorillard*, 533 U.S. at 533.

118. MASS. REGS. CODE tit. 940, §§ 21.04, 21.06 (2000).

119. *Id.*

120. Philip Morris Cos., Inc., R.J. Reynolds Tobacco Holdings, Inc., Brown & Williamson Tobacco Co., and Lorillard Tobacco Co. *Id.* at 537.

121. *Lorillard Tobacco Co. v. Reilly*, 76 F. Supp. 2d 124 (D. Mass. 1999), *aff'd in part and rev'd in part sub. nom. Consol. Cigar Corp. v. Reilly*, 218 F.3d 30 (1st Cir. 2000), *aff'd in part and rev'd in part*, 533 U.S. 525 (2001).

122. *Lorillard Tobacco Co. v. Reilly*, 84 F. Supp. 2d 180 (D. Mass. 1999), *aff'd in part and rev'd in part sub. nom. Consol. Cigar Corp. v. Reilly*, 218 F.3d 30 (1st Cir. 2000), *aff'd in part and rev'd in part*, 533 U.S. 525 (2001).

123. *Consol. Cigar Corp. v. Reilly*, 218 F.3d 30, 41 (1st Cir. 2000), *aff'd in part and rev'd in part*, 533 U.S. 525 (2001).

124. *Id.* at 53.

125. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 551 (2001). O'Connor wrote that the pre-emption ruling was intended to be narrow and would not prevent states from enacting billboard zoning regulations or laws that prohibited conduct such as underage possession of cigarettes or the unlawful sale of cigarettes to minors. *Id.* at 551-52.

the ability to look up.”¹²⁶ The Court thus overturned the lower court’s ruling as it applied to the point-of-sale regulations based on the third prong of *Central Hudson*.

When considering the 1,000-foot regulation, the Court engaged in a detailed discussion of the third and fourth prongs of the *Central Hudson* analysis. Considering the third prong, the direct advancement requirement, the Court wrote that the *Central Hudson* analysis required more than “mere speculation or conjecture” by the government and that the government “must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”¹²⁷ The Court also noted, however, that it did not require that empirical data come from the specific location or situation of the restrictions it was considering. Rather, the Court noted that it had permitted “litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even . . . history, consensus, and ‘simple common sense.’”¹²⁸ Thus, to satisfy this requirement, Massachusetts primarily cited data from the 1996 FDA Final Rule,¹²⁹ claiming that a sufficient amount of social science research clearly illustrated that “advertising and labeling play a significant and important contributory role in a young person’s decision to use cigarettes or smokeless tobacco products.”¹³⁰

However, the tobacco companies made two arguments against the social science evidence presented by the government. First, tobacco companies argued that although the state’s evidence identified a problem with underage cigarette smoking, it had not identified “an equally severe problem with respect to underage use of smokeless tobacco or cigars.”¹³¹ Second, the companies contended that even though there was overwhelming correlated evidence, the state could not “prove that advertising [had] a *causal* link to tobacco use such that limiting advertising [would] materially alleviate any problem of underage [tobacco] use.”¹³² The Court ultimately disagreed with the tobacco company and held 5-4 that the evidence presented by Massachusetts established a relationship and fulfilled the third prong for the 1,000-foot regulation.¹³³ Justice O’Connor wrote:

Our review of the record reveals that the Attorney General has provided ample documentation of the problem with underage use of smokeless tobacco and cigars. In addition, we disagree with the petitioners’ claim that there is no evidence that preventing targeted campaigns and limiting youth exposure to advertising will decrease unde-

126. *Id.* at 566.

127. *Id.* at 555.

128. *Id.* (quoting Fla. Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995)).

129. Final Rule, 61 Fed. Reg. 44,396.

130. *Lorillard Tobacco*, 533 U.S. at 558 (quoting 60 Fed. Reg. 41,332 (proposed Aug. 11, 1995) (to be codified at 21 C.F.R. pt. 897)).

131. *Id.* at 556-57.

132. *Id.* at 557 (emphasis added).

133. *Id.* at 561.

rage use of smokeless tobacco and cigars. . . . [W]e are unable to conclude that the Attorney General's decision . . . was based on mere 'speculation [and] conjecture.'¹³⁴

Thus, while the degree of evidence the Court has accepted to fulfill the third prong has varied over the years, *Lorillard* showed that while supporting evidence is now consistently required, causal evidence is not necessary to establish a relationship between the government interest and the speech under consideration. Although the Court has suggested it would consider more specific and narrow advertising regulations,¹³⁵ supporting evidence alone does not guarantee that advertising regulations will be deemed constitutional as many regulations are still struck down under the fourth prong of *Central Hudson*.¹³⁶ As Hoefges noted, while the *Lorillard* Court was willing to accept the fact that tobacco industry marketing does impact minors' smoking initiation, it is clear the Court "will not tolerate 'irrational' regulatory schemes."¹³⁷

Examining the fourth prong of *Central Hudson*, the reasonable fit requirement, the Court in *Lorillard* held 5-4 that the outdoor and point-of-sale regulations were too broad.¹³⁸ The Court ruled that because of the large number of schools and playgrounds in some cities and towns, the 1,000-foot regulation would act as a blanket ban over an entire city that would interrupt legal communication with adult consumers.¹³⁹ In addition, O'Connor noted that the regulations banned billboards of all sizes and types and did not target those that were highly visible or that would appeal to youth.¹⁴⁰ Based on *Central Hudson*, O'Connor concluded that although protecting the health of children was a substantial, and "even compelling,"¹⁴¹ government interest, the government could not suppress legal speech to adults in order to protect children. She wrote:

The State's interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity. We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products.¹⁴²

The Court thus ruled that the point-of-sale ban failed the third and fourth prongs, and the 1,000-foot ban failed the fourth prong, even though it passed the third. The *Central Hudson* analysis was also used recently to strike down

134. *Id.* (quoting *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)).

135. *See, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565; *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490-91 (1995).

136. *See* Hoefges, *supra* note 1, at 302-05, for a discussion of *Lorillard Tobacco's* impact in the lower courts.

137. Hoefges, *supra* note 1, at 306.

138. *Id.* at 561.

139. *Id.* at 563.

140. *Id.*

141. *Id.* at 564.

142. *Id.*

portions of the Family Smoking Prevention and Tobacco Control Act (FSPTCA), a new set of regulations designed to protect minors from tobacco advertising regulations.

Nine weeks after President Obama signed the FSPTCA into law, five tobacco manufacturers and a tobacco retailer challenged the advertising and labeling restrictions as violations of their First Amendment rights, and district court judge Joseph H. McKinley applied the *Central Hudson* analysis to the Act in *Commonwealth Brands, Inc. v. United States*.¹⁴³ In the case, the district court reached various conclusions about the constitutionality of the multiple provisions of the FSPTCA, finding most unconstitutional. The court found that the regulation requiring labels and advertisements to include only black text on a white background with no graphics was not narrowly tailored.¹⁴⁴ Although the court agreed with the government that minors were particularly susceptible to the use of color and graphics, and that the tobacco companies knew this,¹⁴⁵ it did not agree with the argument that the ban reached only non-informational speech about the products.¹⁴⁶ While the government argued that the ban was not protected by the First Amendment because it only affected speech that targeted minors and did not contribute to “informed and reliable decisionmaking,”¹⁴⁷ the court concluded that the blanket ban prevented tobacco companies from using large categories of “innocuous images and colors” that had no appeal to youth.¹⁴⁸ Quoting the *Lorillard* Court, the district court concluded that the ban’s “uniformly broad sweep . . . demonstrat[ed] a lack of tailoring.”¹⁴⁹

The FSPTCA’s bans on brand-name event sponsorship and merchandise, and requirements that package warnings about the health risks of tobacco use be made more conspicuous, were ruled constitutional because they were sufficiently narrowly tailored under *Central Hudson*. Considering the ban on brand-name event sponsorship, the court wrote that even though the Act’s ban was broader than the ban of events under the MSA, there was a “reasonable fit between the ends and means of the sponsorship ban” because the FSPTCA’s ban was, in part, a reflection of the fact that the MSA was inadequate.¹⁵⁰ Similarly, the court concluded that the ban on merchandise, which included items such as

143. 678 F. Supp. 2d 512 (W.D. Ky. 2010).

144. *Id.* at 526.

145. *Id.* at 523 (quoting Congress’ conclusion that “[a]dvertising, marketing, and promotion of tobacco products have been especially directed to attract young person to use tobacco products” and *United States v. Phillip Morris*, 449 F.Supp.2d 1, 571 (D.D.C. 2006)).

146. *Id.* at 525-26.

147. *Id.* at 522-23.

148. *Id.* at 525. The court noted that the Act banned “images that teach adult consumers how to use novel tobacco products, images that merely identify products and producers, and colors that communicate information about the nature of a product.” *Id.*

149. *Id.* at 526 (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 563 (2001)).

150. *Id.* at 527 (noting that because the MFA did not apply to non-signatories and because it permitted signatories to have one “brand name sponsorship” each year, cigarette advertisers had successfully circumvented the intent of the MSA to not target youths and tobacco companies had increased their sponsorship budgets after signing the MSA).

caps, t-shirts, and sporting equipment that bear the name or logo of a tobacco brand—even merchandise given solely to adult consumers in adult-only venues or to adult employees—was constitutional because Congress had found there was “no way to limit the distribution of these items to adults only.”¹⁵¹ Moreover, the court wrote, assuming there was a way for such advertising to be limited to adults, these adults would become “walking advertisements” for the message that smoking was widely accepted.¹⁵²

The court used similar reasoning when discussing the Act’s warning requirements. The tobacco companies made three arguments against the regulations. First, they argued that the warning requirements were unconstitutional because the labels were designed to protect consumers from a harm that did not exist: the harm of not knowing cigarettes were dangerous.¹⁵³ Second, they contended that the warning labels were larger than warning labels on video games that had been declared unconstitutional by the Seventh Circuit Court of Appeals.¹⁵⁴ Finally, the plaintiffs argued that the regulation compelled them to disseminate the government’s anti-smoking message, and thus had to pass strict scrutiny.¹⁵⁵ The court did not agree with any of these arguments.

Instead, the court wrote there was a purpose to the requirement other than to simply reiterate that smoking was harmful,¹⁵⁶ because the regulation’s goal was to make sure that warning labels were actually seen. In addition, the court concluded that because Congress had provided reasons for the particular features and size of the warning labels, the case was different from the Seventh Circuit video game precedent cited by the tobacco companies.¹⁵⁷ Finally, the court wrote that because the message in question was “objective and ha[d] not been controversial for many decades” there was no need to subject the compelled speech to strict scrutiny.¹⁵⁸ The court held, “[F]or all the above reasons . . . the warning requirement is sufficiently tailored to advance the government’s substantial interest under *Central Hudson*.”¹⁵⁹

Finally, the court concluded the challenge to the FSPTCA’s ban on outdoor advertising was unripe. Although the court concluded that because the regulation was “indistinguishable from the Massachusetts’ [*sic*] ban the Supreme Court struck down in *Lorillard*,”¹⁶⁰ the FSPTCA’s ban on outdoor adver-

151. *Id.*

152. *Id.*

153. The plaintiffs argued there was no such harm to be avoided because surveys demonstrated that the public was already widely aware that smoking was harmful. *Id.* at 529.

154. *See Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006).

155. *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512, 530 (W.D. Ky. 2010).

156. *Id.*

157. *Id.* at 531 (contrasting *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006), in which the government had given no reason for why a smaller warning would be inappropriate, with the FSPTCA, in which Congress had provided reasons).

158. *Id.* at 531-32.

159. *Id.* at 532.

160. *Id.* at 535.

tising was “undoubtedly” unconstitutional. However, because the ban was not to take effect immediately due to Congress having instructed the FDA to modify the law “in light of governing First Amendment case law,”¹⁶¹ McKinley wrote that determination of whether the ban was unconstitutional must wait until the FDA’s final regulation was issued on March 22, 2010.¹⁶²

While the final fate of the FSPTCA will be decided by an appellate court, or possibly the Supreme Court, an alternative to advertising restrictions should be considered—counter-marketing campaigns.

III. COUNTER-MARKETING CAMPAIGNS AND THE FIRST AMENDMENT

A. Counter-marketing as a Form of Counterspeech

In order to determine what roles tobacco advertising regulations and counter-marketing could or should play in tobacco prevention, it is important to review current tobacco control strategies and best practices. In 2000, the Surgeon General recommended using regulatory, clinical, educational, economic, and comprehensive strategies to reduce and prevent tobacco use.¹⁶³ A 2007 Centers for Disease Control and Prevention (CDC) report expanded the Surgeon General’s comprehensive strategy, defining it as a “tobacco control program [that] is a coordinated effort to establish smoke-free policies and social norms, to promote and assist tobacco users to quit, and to prevent initiation of tobacco use.”¹⁶⁴ The CDC also cited state and community interventions, health communication interventions (counter-marketing), cessation interventions, surveillance, evaluation, administration and management as other tobacco control best practices.¹⁶⁵ Thus, both counter-marketing and regulating tobacco advertising are recommended as part of a comprehensive approach to reduce tobacco use.

Regulating tobacco advertising in some form has been recommended since the first Surgeon General’s Report in 1964.¹⁶⁶ As noted, courts and academics agree that “strong and consistent evidence” has demonstrated that exposure to tobacco advertising influences youth to initiate smoking. Research has also revealed that tobacco marketing directed at youth attempts to increase positive self-image, peer acceptance, and emotional needs such as popularity.¹⁶⁷

A report published by the National Cancer Institute and the U.S. Depart-

161. *Id.* at 535-36.

162. *Id.* at 536.

163. DEPARTMENT OF HEALTH AND HUMAN SERVICES, REDUCING TOBACCO USE: A REPORT OF THE SURGEON GENERAL (2000) [hereinafter REDUCING TOBACCO USE].

164. CENTERS FOR DISEASE CONTROL, BEST PRACTICES FOR COMPREHENSIVE TOBACCO CONTROL PROGRAMS 7 (2007) [hereinafter BEST PRACTICES].

165. *Id.* at 8.

166. *See* SURGEON GENERAL’S ADVISORY COMMITTEE ON SMOKING AND HEALTH, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964).

167. NATIONAL CANCER INSTITUTE, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, THE ROLE OF MEDIA IN PROMOTING AND REDUCING TOBACCO USE 280 (2008) [hereinafter THE ROLE OF THE MEDIA].

ment of Health and Human Services suggested that restricting advertising can reduce rates, as long as *all* tobacco-advertising channels are banned.¹⁶⁸ The report noted that other countries found that tobacco rates were effectively reduced after instituting complete or comprehensive advertising bans that extremely limited or completely eliminated alternate outlets for promotion.¹⁶⁹ For example, the report cited one study that concluded: “[I]n Norway, Finland, Canada, and New Zealand, the banning of advertising was followed by a fall in smoking on a scale that cannot reasonably be attributed to other factors.”¹⁷⁰ However, while comprehensive or complete bans may be the most effective way to serve the government interest in protecting the health of children, in the United States a complete ban would fail under the fourth prong of the *Central Hudson* analysis; a total ban would not be narrowly tailored to advance the government’s interest in protecting children.

Unfortunately, partial advertising bans often have ineffective results.¹⁷¹ When central advertising routes are blocked, but other channels remain open, the tobacco industry has responded in a number of ways. First, the tobacco industry often increases marketing expenditures.¹⁷² Second, the industry shifts advertising from banned channels to permitted channels. Third, tobacco brand names are used for non-tobacco products and services.¹⁷³ For example, in 2003, after the MSA implemented partial advertising bans, a record \$15 billion was reportedly spent for marketing and advertising by the tobacco industry.¹⁷⁴ There was also an increase in tobacco sales promotion, interior and exterior advertising at retail stores, and point-of-sale marketing.¹⁷⁵ It is important to note, however, that while the MSA had the effect of increasing tobacco advertising, it was also responsible for one of the most effective counter-marketing campaigns to date.

As noted above, the \$206 billion MSA was negotiated in 1998 between the four largest tobacco companies and 46 states.¹⁷⁶ The remaining states—Florida, Mississippi, Texas and Minnesota—settled with the tobacco companies independently.¹⁷⁷ The MSA required the signing tobacco companies to adhere to the settlement within the signing states, with the central purpose of reducing and preventing smoking, particularly among youth.¹⁷⁸ The agreement included a partial advertising ban, which restricted a number of advertising and market-

168. *Id.* at 276.

169. *Id.*

170. *Id.*

171. *Id.* at 82.

172. *Id.*

173. *Id.* at 87.

174. *Id.* at 82.

175. *Id.* at 83.

176. *See generally* Master Settlement Agreement, *supra* note 5.

177. Steven Schroeder, *Tobacco Control in the Wake of the 1998 Master Settlement Agreement*, 350 NEW ENG. J. MED. 293, 295 (2004).

178. Peter Levin, *Tobacco*, NAT’L ASS’N OF ATT’Y GENs, <http://www.naag.org/tobacco.php> (last visited March 28, 2010).

ing channels.¹⁷⁹ In the broadest sense, the tobacco industry could not directly or indirectly target youth through advertising.¹⁸⁰ More specifically, the agreement banned the use of cartoon characters in advertising¹⁸¹ and most outdoor advertising, including billboards, signs, and place cards in areas such as stadiums, arenas, malls, and arcades.¹⁸² It also prohibited the distribution of brand-name merchandise and apparel¹⁸³ and sponsorship of events or sports with a significant youth audience.¹⁸⁴

Although marketing restrictions were a central piece of the agreement, a number of other components were also included. Participating states received funding over a twenty-five-year period, with each state having the authority to decide how the money would be spent.¹⁸⁵ Another provision of the settlement was the development of the American Legacy Foundation, an organization focused on public tobacco-control and education. The foundation was granted \$1.7 billion, allocated for a minimum of five years.¹⁸⁶

According to the CDC, the incidence of youth tobacco use decreased substantially in the years following the settlement. In 1997, one year prior to the MSA, the reported high school smoking rate was 36.4%, the highest recorded rate for that age group since the data was first measured in 1991.¹⁸⁷ Just one year after the settlement, in 1999, the high school smoking rate dropped approximately two percent.¹⁸⁸ Ten years later, in 2009, rates had decreased to the lowest recorded rate of 19.5%.¹⁸⁹ Since the MSA was enacted, the high school youth smoking rate has been reduced by nearly seventeen percent.¹⁹⁰ As noted, these effects cannot be entirely attributed to advertising regulations under the MSA because they were implemented in combination with the other strategies, including counter-marketing campaigns.

In its 2007 report, the CDC used the term “health communication” to represent counter-marketing,¹⁹¹ which it defined as “the use of commercial marketing tactics to reduce the prevalence of tobacco use.”¹⁹² Effective coun-

179. See Master Settlement Agreement, *supra* note 5, at 18-27.

180. *Id.* at 18-19.

181. *Id.* at 19.

182. *Id.* at 22-23.

183. *Id.* at 25.

184. *Id.* at 19.

185. Schroeder, *supra* note 177, at 295.

186. See Master Settlement Agreement, *supra* note 5, at 41-47.

187. Office on Smoking and Health, *Smoking and Tobacco Use: Trends in Current Cigarette Smoking Among High School Students and Adults, United States, 1965–2009*, CENTERS FOR DISEASE CONTROL AND PREVENTION http://www.cdc.gov/tobacco/data_statistics/tables/trends/cig_smoking/index.htm (last visited Oct. 24, 2010) [hereinafter SMOKING AND TOBACCO USE].

188. *Id.*

189. *Id.*

190. *Id.*

191. BEST PRACTICES, *supra* note 164, at 32.

192. CENTER FOR DISEASE CONTROL, DESIGNING AND IMPLEMENTING AN EFFECTIVE TOBACCO COUNTER-MARKETING CAMPAIGN 13 (2003) [hereinafter EFFECTIVE TOBACCO

ter-marketing campaigns are typically implemented on a broad scale, such as at the state or national level, and use print, radio, and billboard media.¹⁹³ Counter-marketing campaigns also often apply traditional health communication principles and strategies. Renata Schiavo, a health communication scholar, wrote that counter-marketing campaigns should be based on audience-focused research.¹⁹⁴ Successful campaigns should engage, influence, and support individuals to change behavior by changing their attitudes and perceptions of that behavior.¹⁹⁵ Counter-marketing campaigns should thus disseminate research-based messages that are strategically designed to be culturally and age appropriate.¹⁹⁶ They should also be combined with other interventions that support overall prevention of youth tobacco use.¹⁹⁷

Thus, health communicators and public health advocates recommend using both tobacco advertising regulations and research-based counter-marketing campaigns. This approach is a classic example of the legal doctrine of counterspeech, and is the favored approach of the courts. In his concurring opinion in *Lorillard*, for example, Justice Clarence Thomas wrote that the Attorney General had several alternatives to the advertising regulations in question. Thomas suggested that the state “could have directly regulated the conduct with which they were concerned.”¹⁹⁸ Thomas wrote, “Massachusetts already prohibits the sale of tobacco to minors, but it could take steps to enforce that prohibition more vigorously. It also could enact laws prohibiting the purchase, possession, or use of tobacco by minors.”¹⁹⁹ Thomas also proposed that if the state’s concern was that “tobacco advertising communicates a message with which it disagrees, it could seek to counteract that message with ‘more speech, not enforced silence.’”²⁰⁰

Although the counterspeech doctrine certainly has critics,²⁰¹ it also has a long tradition in Supreme Court jurisprudence. As first outlined by Justice Louis Brandeis in his concurring opinion in *Whitney v. California*, counterspeech is the premise that when society is confronted with bad speech, the cor-

COUNTER-MARKETING CAMPAIGN].

193. *Id.* at 16.

194. *See generally*, RENATA SCHIAVO, HEALTH COMMUNICATION FROM THEORY TO PRACTICE 7-10 (2007).

195. *Id.*

196. BEST PRACTICES, *supra* note 164, at 34.

197. *Id.* at 35.

198. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 586 (2001) (Thomas, J., concurring).

199. *Id.*

200. *Id.* (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

201. *See, e.g.*, OWEN M. FISS, THE IRONY OF FREE SPEECH 6 (1996); Robert Jensen & Elvia R. Arriola, *Feminism and Free Expression: Silence and Voice*, in FREEING THE FIRST AMENDMENT: CRITICAL PERSPECTIVES ON FREEDOM OF EXPRESSION 195, 197 (David S. Allen & Robert Jensen eds., 1995); Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulations*, 82 CAL. L. REV. 871, 883-85 (1994); MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 48 (1993).

rect remedy is not censorship, but rather more speech.²⁰² Brandeis wrote, “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”²⁰³ Under this concept, rather than censor harmful information such as tobacco advertisements, a counterspeech response would be to add more information to the marketplace of ideas. As Brandeis’ contemporary, Justice Oliver Wendell Holmes, Jr. wrote that while it is understandable, even perfectly logical, to seek to censor or punish speech contrary to your position when you are convinced of your premise,²⁰⁴ the “best test of truth is the power of the thought to get itself accepted in the competition of the market.”²⁰⁵ This is surely the approach Justice Thomas had in mind when he cited Brandeis’ concurring opinion in *Whitney* in his own concurring opinion in *Lorillard*.²⁰⁶

Scholars have argued for this approach as well. For example, Matthew Miller wrote that counter-advertising “honors the traditional priorities of the first amendment, and guarantees that the listener’s autonomy is respected.”²⁰⁷ Unfortunately, most scholarship by public health professionals has not connected counter-marketing advertising campaigns to counterspeech theory. In addition, while counter-marketing has been suggested as a less restrictive method to prevent children from initiating tobacco use than bans on commercial speech,²⁰⁸ counterspeech scholarship has not necessarily focused on broad national counter-marketing advertising campaigns. For example, while Miller discussed counterspeech in his article, he was primarily concerned with requiring that the advertising for harmful products or the products themselves contain information about the hazards associated with the products.²⁰⁹

The most prominent discussion of counterspeech and broad counter-marketing campaigns is in an article by the First Amendment scholars Robert D. Richards and Clay Calvert, which tied counterspeech to the MSA twelve years ago.²¹⁰ In 2000, Richards and Calvert noted that the MSA made counterspeech “part of a legally enforceable remedy against Big Tobacco.”²¹¹ The authors wrote:

202. 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

203. *Id.*

204. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.”).

205. *Id.*

206. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 586 (2001) (Thomas, J., concurring) (quoting *Whitney*, 274 U.S. at 377 (1927) (Brandeis, J., concurring)).

207. Miller, *supra* note 2, at 652.

208. See, e.g., David D. Vestal, *Tobacco Advertising Debate: A First Amendment Perspective*, 11 COMM & L. 53, 64-65; Redish, *supra* note 42, at 623.

209. Miller, *supra* note 2, at 652-54. On November 30, 2011 four tobacco companies brought suit for pictures placed on cigarette packages. See *R.J. Reynolds Tobacco Co. v. FDA*, No. 11-5332 (D.C. Cir. Filed Nov. 30, 2011).

210. See Richards & Calvert, *supra* note 19.

211. *Id.* at 576.

This situation creates a classic counterspeech scenario, one in which anti-smoking messages do battle against pro-smoking messages. Pro-cigarette and pro-tobacco-product ads, it must be remembered, are not completely leaving the marketplace of ideas under the [MSA]. Although the agreement scraps the use of cartoon characters to sell cigarettes and bans the use of billboards, it does not prohibit the use of often-appealing photographs . . . Advertisements for cigarettes still flourish in the pages of many magazines and, in fact, cigarette companies actually now publish their very own magazines, replete with cigarette ads.²¹²

Yet, although these authors were among the first scholars to examine smoking prevention advertisements through the prism of the counterspeech doctrine, at the time, they were unsure if the campaigns would be successful.

The case for using anti-smoking advertisements as a form of counterspeech is particularly important today, not so much because it may reduce smoking, but because it brings into focus the plethora of problems that threaten the efficacy of any speech that is designed to serve as an antidote for allegedly harmful expression.²¹³

The authors noted that a number of questions would influence the efficacy of such programs, including who should be targeted, what types of appeals would work, how often a target should receive a message, and where messages should be placed.²¹⁴ Richards and Calvert were hopeful that tobacco prevention campaigns financed by the MSA would help scholars “learn about the effectiveness of counterspeech in remedying some evils.”²¹⁵ Fortunately, today we know the answer to these questions—we now know that with the correct funding and strategies, counter-marketing campaigns as a form of counterspeech, *if executed correctly*, have the power to effectively advance the government’s interest in protecting youth, while also upholding First Amendment ideals.

B. Comparing Counter-Marketing Campaigns

In 2000, the American Legacy Foundation launched the national truth[®] campaign, modeled after a pilot campaign, the Florida truth campaign, which was implemented in 1998. The first two years of the national truth[®] campaign were funded by the MSA, with expenditures totaling just over \$324 million.²¹⁶ The MSA and the CDC primarily sponsored continuation of the campaign after the initial two years.²¹⁷ Truth[®] is the largest smoking prevention campaign in

212. *Id.* at 577-78 (citations omitted).

213. *Id.* at 578.

214. *Id.* at 578-79.

215. *Id.* at 586.

216. David R. Holtgrave et al., *Cost-Utility Analysis of the National truth[®] Campaign to Prevent Youth Smoking*, 5 AM J. PREVENTIVE MED. 385, 385 (2009).

217. *Truth*, AMERICAN LEGACY FOUNDATION, <http://www.legacyforhealth.org/28.aspx> (last visited Nov. 3, 2010).

the country not sponsored by the tobacco industry.²¹⁸ The central strategy of the campaign was to develop a positive tobacco-free identity for youth through direct, in-your-face advertising, which portrayed youth confronting the tobacco industry.²¹⁹ The truth[®] brand was created and strategically designed so youths could identify with it, while asserting their independence and individuality by rebelliously rejecting the tobacco industry.²²⁰ Secondary aims of the campaign were to disseminate information about addiction and the health effects and social consequences of smoking, with the intention of allowing teens to make their own informed choices about tobacco use.²²¹ The truth campaigns contained seven key elements/strategies: substantial funding, youth involvement, youth-focused marketing, tone, anti-manipulation, brand development, and campaign focus.²²²

While money alone does not equate with a successful counter-marketing campaign, adequate funding is imperative to success.²²³ Both truth campaigns had substantial funding. The two-year Florida campaign had a \$200 million budget²²⁴ and, as noted, the initial two-years of the national campaign had a \$324 million budget.²²⁵ As Jeffrey J. Hicks, the President of Crispin, Porter & Bogusky, the advertising agency responsible for the Florida truth campaign, noted, “Unlike some anti-tobacco efforts of the past, due to its funding level, [the Florida truth campaign] had the benefit of all the tools of modern marketing.”²²⁶

The second and third strategies of the truth campaign both related to its target audience. Youths were involved during the creation and implementation of the campaign and played a central role in providing feedback and guiding the artistic development of campaign materials and messages.²²⁷ Young adult interviewers also conducted initial research among teens using culturally appropriate language, and the campaign used tactics that had showed success in other youth-focused brands.²²⁸ The truth campaign held annual summits and created a “youth review board” to assist advertising professionals with the creation of the campaign’s tone. In addition, rather than following the lead of other public health efforts, Crispin, Porter & Bogusky instead modeled the launch of

218. *Truth Fact Sheet*, AMERICAN LEGACY FOUNDATION, http://www.legacyforhealth.org/PDF/truth_Fact_Sheet.pdf (last visited Nov. 3, 2010).

219. Matthew C. Farrelly et al., *Getting to the Truth: Evaluating National Tobacco Countermarketing Campaigns*, 92 AM J. PUB. HEALTH 901, 901 (2002).

220. *Id.*

221. American Legacy Foundation, *supra* note 217.

222. See generally Jeffrey J. Hicks, *The Strategy Behind Florida’s “Truth” Campaign*, 10 TOBACCO CONTROL 3 (2001).

223. *Id.* at 3.

224. *Id.*

225. Holtgrave, et al., *supra* note 216, at 385.

226. Hicks, *supra* note 222, at 3.

227. *Id.*

228. *Id.* at 3-4. The goal of the advertising agency was to make the campaign “aspirational, relevant, and ‘cool.’”

the truth campaign on the marketing campaigns of brands such as Sega, Nintendo, Mountain Dew, Vans, Sketchers, and Inco.²²⁹

The fourth and fifth elements of the campaign related to targeting how youth viewed tobacco. The fourth key element of the campaign was tone. As Hicks stated, if the truth campaign “was to be successful it would need to address the tobacco issue in a way and with a tone that reflected how youth viewed tobacco.”²³⁰ Campaign messages played a key role in this strategy. Because research showed that youth disliked anti-tobacco efforts that passed judgment on tobacco users and told them what to do, it was crucial to not “preach” or send a message that said “don’t.”²³¹ The fifth strategy was anti-manipulation. Research revealed that youth had one hundred percent awareness that tobacco killed; therefore, knowledge about the issue was not the problem.²³² The research also showed, however, that emotion was the main factor that led to the decision to smoke.²³³ Using “[t]obacco was a significant, visible, and readily available way for youth to signal that they were in control,”²³⁴ and the fact that tobacco was dangerous made it appealing.²³⁵ The anti-manipulation strategy was designed to provide an alternate focus of rebellion—that of rebelling against the tobacco industry.²³⁶

Both the sixth and seventh strategies also focused on the target audience, youth. The sixth strategy was to make truth a brand with which youth could identify and relate.²³⁷ Finally, the last strategy was project focus. Although there are many different issues related to tobacco that could be included in a tobacco control campaign, the Florida truth campaign was focused solely on reducing the prevalence of youth who used tobacco.²³⁸ In order to keep this narrow focus, every campaign tactic and strategy was analyzed in terms of its impact on reducing youth smoking.²³⁹

The national truth® campaign was based on the successful Florida campaign, and proved highly successful as well. Studies analyzing effects of the national truth® campaign found impressive results. A 2005 study found that approximately twenty-two percent “of the total decline in youth smoking prevalence between 1999 and 2002 was attributable to the [truth] campaign.”²⁴⁰ A 2009 article presented results in terms of the number of youths who were pre-

229. *Id.* at 4.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 5.

238. *Id.*

239. *Id.*

240. Matthew C. Farrelly et al., *Evidence of a Dose-Response Relationship Between “truth” Antismoking Ads and Youth Smoking Prevalence*, 95 AM J. PUB. HEALTH 425, 428 (2005).

vented from initiating smoking. The study concluded that between 2000 and 2004, 450,000 adolescents nationwide who would have statistically been expected to start smoking did not.²⁴¹ In addition, while smoking rates were a primary indicator of success, the study also evaluated smoking attitudes and perceptions. These types of evaluations are important because strategies that seek to change behavior must support new behavior through changing attitudes and perceptions.²⁴² Reports revealed that the campaign was associated with positive beliefs and attitudes toward decreasing youth tobacco use, a decline in intentions to use tobacco, and lowered perception of peer smoking.²⁴³ Additionally, the truth[®] campaign was cost-effective, as shown by a 2009 cost-utility analysis that reported that after the initial two years of the campaign, truth[®] had recouped its cost in health care savings and an additional \$1.9 billion was averted in future medical expenses.²⁴⁴

While the truth[®] campaign showed impressive results, it is imperative to note that not all campaigns are effective. Since the 1980s, a number of tobacco companies have launched tobacco prevention campaigns²⁴⁵ with very different results in terms of preventing youth from initiating smoking. For example, Philip Morris's Think! Don't Smoke campaign was targeted to youths aged ten to fourteen, while the company's Talk, They'll Listen campaign was targeted to parents. The Think! Don't Smoke campaign, launched in 1998, had a \$100 million budget and was active for five years in the United States.²⁴⁶ It was the first time a tobacco company had advertised on television since 1971.²⁴⁷ The slogan "Think! Don't Smoke" was integrated within campaign materials portraying kids in school hallways and school buses, delivering the message that smoking was not a good way to fit in with peer groups and social scenes.²⁴⁸ However, the main message—don't smoke—was in direct contradiction to the Columbia University Tobacco Counter-Advertising Expert Panel,²⁴⁹ which does not recommend using messages that directly tell youths not to smoke or that smoking is not cool.²⁵⁰ In addition, the campaign made few references to advantages of not smoking or negative health consequences of smoking.²⁵¹ The Talk, They'll

241. Matthew C. Farrelly et al., *The Influence of the National truth[®] Campaign on Smoking Initiation*, 36 AM. J. PREVENTIVE MED. 379, 379 (2009).

242. See Schiavo, *supra* note 194, at 7-10.

243. Farrelly et al., *supra* note 219, at 902-06.

244. Holtgrave et. al., *supra* note 216, at 387.

245. Anne Landman, Pamela M. Ling & Stanton A. Glantz, *Tobacco Industry Youth Smoking Prevention Programs: Protecting the Industry and Hurting Tobacco Control*, 92 AM J. PUB. HEALTH 917, 917 (2002).

246. Melanie Wakefield et al., *Effect of Televised, Tobacco Company-Funded Smoking Prevention Advertising on Youth Smoking-Related Beliefs, Intentions, and Behavior*, 96 AM. J. PUB. HEALTH 2154, 2154 (2006).

247. L. Henriksen et al., *Industry Sponsored Anti-Smoking Ads and Adolescent Reactance: Test of a Boomerang Effect*, 15 TOBACCO CONTROL 13, 13 (2006).

248. *Id.*

249. Farrelly et al., *supra* note 219, at 906.

250. *Id.*

251. Henriksen, *supra* note 247, at 13.

Listen campaign, also sponsored by Phillip Morris, was launched in 1999 and encouraged parents to talk to their children about smoking.²⁵²

A 2006 study examined the impact of the two Phillip Morris campaigns on youths' smoking beliefs, intentions, and behaviors, and found disturbing results.²⁵³ Overall, the study found that the Think! Don't Smoke campaign yielded no beneficial outcomes for youth and the Talk, They'll Listen campaign actually produced harmful effects.²⁵⁴ For teens in eighth grade, the parent-targeted messages produced increased beliefs that the negative consequences of smoking were exaggerated.²⁵⁵ Those who were exposed to the parent-targeted advertisements had "lower perceived harm of smoking, stronger approval of smoking, and a higher likelihood of having smoked in the past 30 days."²⁵⁶ Other common themes of industry prevention campaigns included that smoking was an adult choice, smoking was a forbidden fruit, and smoking would signify an act of rebellion,²⁵⁷ all messages that lead to increased youth smoking. The theory of psychological reactance²⁵⁸ suggests that this type of message produces the forbidden fruit effect. This effect can cause something such as smoking to be more desirable when a message presents it as off limits or, as the tobacco industry puts it, an "adult choice."²⁵⁹ This is one reason why experts do not recommend using direct messages that tell youth *not* to smoke.²⁶⁰ One scholar suggested this increase in youth smoking resulted in part because the only reason given for why teens should not smoke was that smoking was forbidden for them.²⁶¹

Overall, results have shown the truth[®] campaign to be substantially more effective than the Think! Don't Smoke campaign. For example, a 2002 study evaluated campaign effects on youth attitudes, beliefs, and intentions towards tobacco, concluding that exposure to truth[®] advertisements was "consistently associated with an increase in anti-tobacco attitudes and beliefs, whereas exposure to Phillip Morris advertisements generally was not."²⁶² In addition, the study found that the truth[®] campaign resonated with youth more than the Think! Don't Smoke campaign.²⁶³ Moreover, a significantly larger percentage of the target audience of the truth[®] campaign was able to remember key messages without hints or assistance (unassisted message recall) than the audience of the Think! Don't Smoke campaign.²⁶⁴ This was true even though the Phillip

252. Wakefield et al., *supra* note 246, at 2154.

253. *Id.*

254. *Id.*

255. *Id.* at 2157-58.

256. *Id.* at 2158.

257. Landman, Ling & Glantz, *supra* note 245, at 917, 919.

258. *See generally* J.W. BREHM, A THEORY OF PSYCHOLOGICAL REACTANCE (1966).

259. Henriksen et al., *supra* note 247, at 14.

260. Farrelly et al., *supra* note 219, at 906.

261. Wakefield et al., *supra* note 246, at 2159.

262. Farrelly et al., *supra* note 219, at 901.

263. *Id.* at 905.

264. *Id.* at 903.

Morris campaign was implemented a year prior to the start of the truth[®] campaign.²⁶⁵ Additionally, a 2001 study found that a considerably larger percentage of youth found the truth[®] marketing materials to be more memorable, more convincing, and more likely to catch their attention than the Think! Don't Smoke marketing materials.²⁶⁶ Perhaps most importantly, the 2002 study results illustrated that while truth[®] showed a marginally significant decrease in the odds that current nonsmokers intended to smoke, the Think! Don't Smoke campaign was associated with an increase in the odds that youth intended to smoke.²⁶⁷

In addition to these problems with the message of the campaigns, an academic study of internal industry documents revealed alternate motives for tobacco companies' counter-marketing campaigns.²⁶⁸ The study noted that the goal of industry youth prevention programs was not to prevent youth tobacco use, but rather to serve the industry's political needs by preventing effective tobacco control legislation, marginalizing public health advocates, preserving the industry's access to youths, creating allies within policymaking and regulatory bodies, defusing opposition from parents and educators, bolstering industry credibility, and preserving the industry's influence with policymakers.²⁶⁹

The report also revealed that tobacco companies studied the effectiveness of their prevention campaigns "as though they were public relations campaigns, tracking the number of 'media hits,' awareness of the program among adults, and the effect of the program on their corporate image."²⁷⁰ Additionally, in 1991, Philip Morris stated the success of these campaigns "would be determined by whether they lead to a 'reduction in legislation introduced and passed restricting or banning our sales and marketing activities.'"²⁷¹

Comparing the success of these two campaigns illustrates a number of points. First, despite the success of some counter-marketing campaigns, not all campaigns will have the desired effects on preventing smoking initiation. Campaigns must be research-based and strategic in order to be successful. Second, campaigns must not be funded by the tobacco industry, with the exception of court-ordered funding, such as the MSA, in which tobacco companies provide funding but have no campaign input. Third, under no condition should tobacco industry counter-marketing campaigns be considered as serving the government interest in protecting children's health. Past campaigns have only been self-serving.

IV. FUNDING FOR A NATIONAL COUNTER-MARKETING CAMPAIGN AND THE

265. *Id.* at 905.

266. Cheryl Heaton, *Who's Afraid of the Truth?*, 91 AM. J. PUB. HEALTH 554, 557 (2001).

267. Farrelly et al., *supra* note 219, at 905.

268. Landman, Ling & Glantz, *supra* note 245, at 917.

269. *Id.*

270. *Id.* at 922.

271. *Id.* at 919.

GOVERNMENT SPEECH DOCTRINE

There is “strong and consistent” social scientific research correlating tobacco advertising as an influencing factor on youth smoking.²⁷² Yet the government has an interest in protecting the health of youths. One way to advance this interest might be a total ban on tobacco advertising. Studies in other countries suggest that if tobacco advertising were completely banned in the U.S., smoking rates would drastically lower.²⁷³ However, as demonstrated in Section II of this article, prohibiting all tobacco advertising in the United States would not pass the *Central Hudson* test. Under the *Central Hudson* test, the government would have the burden of proving that the regulation advances the government’s interest *and* that there is a reasonable fit between the regulation and the interest in protecting children’s health. Thus, a total ban on advertising would fail *Central Hudson*, as a total ban on advertising would not be considered reasonable. Yet research has also shown that blocking only a few selected advertising channels has limited effectiveness in reducing youth smoking prevalence.²⁷⁴ As noted above, this has made it difficult for public health officials to create advertising regulations “that are both demonstrably effective and likely to be deemed [constitutional].”²⁷⁵

Despite these barriers, as explained in Section III, approaches that combine partial regulations with other strategies can still have a positive impact. For example, as noted, the MSA implemented combined strategies that included partial bans and provided money to create counter-marketing campaigns, and yielded nearly a seventeen percent reduction in youth smoking within 10-years of its implementation.²⁷⁶ This suggests that *more* speech or counterspeech is a valid method of advancing the government’s interest in protecting the health of children. However, not all counter-marketing campaigns are equally effective, and any campaign should be mindful of the following conclusions.

First, to be successful, any counter-marketing campaign must have adequate funding. As Jeffery J. Hicks argued about the Florida truth[®] campaign, while money was not the solution to the problem, it made the solution—the campaign—effective.²⁷⁷ Second, campaigns must be research-based and strategically designed using youth involvement and youth-focused messaging. Experts do not recommend using messages that directly tell youths not to smoke,²⁷⁸ and research suggests that messages should not primarily focus on the health consequences of smoking because teens know the dangers.²⁷⁹ In-

272. THE ROLE OF THE MEDIA, *supra* note 167, at 280.

273. *Id.* at 276.

274. *Id.* at 280.

275. Bayer et al., *supra* note 15, at 2994.

276. SMOKING AND TOBACCO USE, *supra* note 187.

277. Hicks, *supra* note 222, at 3.

278. Farrelly et al., *supra* note 219, at 906.

279. Hicks, *supra* note 222, at 3.

stead, the tone and message should provide a way for youth to express their independence and individuality.²⁸⁰ For example, the truth[®] campaign allowed youths to identify with the campaign brand and assert their independence and individuality by rebelliously rejecting the tobacco industry.²⁸¹ Third, the campaigns cannot be implemented by the tobacco industry. As noted above, the Phillip Morris campaign used messages and strategies shown to be less effective and not recommended by experts.²⁸² Finally, this article recommends future research to assess other strategies that may be more timesaving and cost-effective to serve the government's interest. Unfortunately, the American Legacy Foundation, which provided the funding for the national truth[®] campaign, received its last payment from the MSA in 2003.²⁸³ The Foundation's future is now in doubt, and a new funding source would be needed to fund a national counter-marketing campaign.

Thus, based on First Amendment principles and social scientific research, the appropriate government response to cigarette advertisements should not be another set of advertising restrictions, such as an amended FSPTCA. Instead, the government should implement a comprehensive system of taxation or compulsory fees to fund a broad, effective counter-marketing campaign designed to increase youth appreciation of the health risks of tobacco products used in conjunction with narrowly tailored advertising regulations. Proceeds from a federal tax on the production of tobacco products or a compulsory fee paid by tobacco companies could create a fund that could be used to continue the truth[®] campaign or pay for a national counter-marketing campaign based on the successful campaign. While other scholars have suggested a tax on tobacco advertising and promotion because of its "transparent link to the promotion of [tobacco products],"²⁸⁴ such a tax is both unrealistic and undesirable. While the Supreme Court has never directly ruled on the constitutionality of a content-based tax on commercial speech, several cases have held that the selective taxation of speakers is unconstitutional.²⁸⁵ In addition, taxation of speech does not add to the marketplace of ideas, which is the core principle of counterspeech. A tax on the production of products or a compulsory fee would generate significant revenue²⁸⁶ and would most likely be deemed constitutional under the Supreme

280. *Id.*

281. Farrelly et al., *supra* note 219, at 901.

282. *See supra* note 246-69 and accompanying text.

283. *See* Truth FAQ Page, <http://www.thetruth.com/faq/> (last visited July 22, 2011).

284. Bayer et al., *supra* note 15, at 2994.

285. *See* *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) ("Differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or view points."); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Fin.*, 460 U.S. 575 (1983) (contending that any differential taxation of the media would have to meet a heavy constitutional burden); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 297 (1936) (describing a tax on large newspapers in Louisiana as a "deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled").

286. In 2001, it was estimated that a \$0.10 per pack excise tax would generate approximately \$2.1 billion a year, a sum far greater than the annual budget of the national "truth cam-

Court's government speech doctrine.

Although one author examining alcohol consumption and advertising suggested that “compelled [commercial speech] [is] not [a] viable alternative to restricting advertising and would in fact violate the First Amendment rights of those who wish to promote the sale of alcohol products,”²⁸⁷ the article only examined “traditional” compelled speech cases²⁸⁸ and failed to consider the impact of the government speech doctrine.²⁸⁹ Although the doctrine has its roots in earlier cases, the government speech doctrine was solidified by the Supreme Court in the 2005 case *Johanns v. Livestock Marketing Association*.²⁹⁰ In *Johanns*, the Court held that a government-compelled subsidy for generic advertising that promoted beef constituted government speech, and was not subject to a First Amendment challenge by beef producers who disagreed with the content of the campaign. The case involved the Beef Promotion and Research Act of 1985, which empowered the Secretary of Agriculture to create the Cattleman's Beef Promotion and Research Board²⁹¹ and imposed a \$1-per-head assessment on all sales or importation of cattle and a comparable assessment on imported beef products.²⁹² The money was used to fund “beef-related projects, including promotional campaigns, designed by the Operating Committee and approved by the Secretary.”²⁹³

In the Court's majority opinion, Justice Scalia began by distinguishing between “true ‘compelled speech’ cases” and “compelled-subsidy” cases.²⁹⁴ Scalia wrote that the two lines of cases consisted of ones in which “an individual is obliged personally to express a message he disagrees with, imposed by the government,”²⁹⁵ while the other consisted of those “in which an individual is required by the government to subsidize a message he disagrees with, ex-

paign.” Bayer, et al. *supra* note 15, at 2994. Thus, a similar targeted tax or compulsory fee paid for by tobacco companies would generate revenue in excess of the budget of the national “truth” campaign.

287. Kathryn Murphy, *Note: Can the Budweiser Frogs Be Forced to Sing a New Tune? Compelled Commercial Counter-speech and the First Amendment*, 84 VA. L. REV. 1195, 1196 (1998).

288. See e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233-34 (1977) (holding that compelled funding of union activities violated the First Amendment); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding a right-to-reply statute which required newspapers to print replies of any political candidate was unconstitutional under the First Amendment); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding compulsory flag salutes were a violation of the First Amendment).

289. Murphy, *supra* note 287, at 1211 (noting the “Supreme Court has developed doctrine in the areas of commercial speech and compelled speech, but it has not provided any clear guidance as to what to expect when these two doctrine converge” and discussing the possible ramifications of the Supreme Court's decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997)).

290. 544 U.S. 550 (2005).

291. 7 U.S.C. § 2904(1).

292. 7 U.S.C. § 2904(8).

293. *Johanns*, 544 U.S. at 553 (citing 7 U.S.C. §§ 2904(4)(B), (C)).

294. See *id.* at 557-59 (discussing the difference between the two types of cases).

295. *Id.* at 557.

pressed by a private entity.”²⁹⁶ Scalia noted that the present case differed from both lines of previous cases in that the Court was being asked to consider “the First Amendment consequences of government-compelled subsidy of the government’s own speech.”²⁹⁷ Although the beef producers argued that the speech was private speech based on the role of the Cattleman’s Beef Promotion and Research Board and Operating Committee²⁹⁸ and the targeted nature of the funding mechanism,²⁹⁹ the Court did not agree. Scalia reasoned that even though the Secretary of Agriculture did not “write ad copy himself,” because the message was “effectively controlled” by the federal government, the speech was considered government speech.³⁰⁰ Next, Scalia wrote that because “compelled-*subsidy* analysis [was] altogether unaffected by whether the funds for the promotions [were] raised by general taxes or through a targeted assessment,”³⁰¹ the speech remained government speech even though it was not funded by a general tax on all members of society. Scalia wrote, “Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object.”³⁰²

Therefore, under *Johanns*, a compulsory fee on tobacco companies would not violate the First Amendment rights of the companies, so long as the message was being controlled by government-employed health communication professionals, or health communication professionals working with government officials. Control over the message would transform the speech into government speech. Thus, the speech would survive a First Amendment challenge even if the tobacco industry ultimately disagreed with the message it was being forced to subsidize. As Scalia wrote:

“Compelled support of government”—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position. “The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.”³⁰³

Under this doctrine, compelled commercial speech is a viable alternative

296. *Id.*

297. *Id.*

298. *Id.* at 560-62.

299. *Id.* at 562-66.

300. *Id.* at 560-61.

301. *Id.* at 562 (emphasis in original).

302. *Id.*

303. *Id.* at 559 (quoting *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000)).

to overbroad restrictions on tobacco advertising and would not violate the First Amendment rights of tobacco companies opposed to such a funding mechanism. In addition, the tactics behind the campaign could be shaped by public health professionals from a variety of entities, so long as the campaign was “effectively controlled” by the federal government.

However, it is important to note that the government speech doctrine—as applied to a targeted tax or compulsory fee that could support counter-marketing campaigns—has two important limits that would have to be met in order to survive First Amendment scrutiny. First, because the Court has struck down compelled fees when the only regulatory purpose was the funding of advertising,³⁰⁴ any regulatory scheme would have to include programs other than counter-marketing campaigns. For example, in *Johanns*, at least some of the funds collected went to both funding *and* research.³⁰⁵ With a regulatory scheme regarding tobacco regulations, this would not be a problem because a successful campaign to prevent youths from smoking would include programs, research, and regulations that went beyond counter-marketing advertisements. Second, as Scalia noted, the Court has struck down compelled subsidies because the compulsory fees were not “germane to the regulatory interests.”³⁰⁶ Therefore, compelled fees violated the First Amendment rights of those who disagreed with the compelled fees.³⁰⁷ This, of course, would not apply to taxes or compulsory fees charged to tobacco companies to fund the government’s regulatory interest in protecting youths from the harms of tobacco advertisements.

Despite the advantages of compelled fees to fund counter-marketing campaigns, it is also important to note that the doctrine of government speech has its limits and should not be taken too far. As one critic rightly noted, the “specter of government prescription of orthodoxy lurks not only in regulation of private speech but also in the government’s own speech.”³⁰⁸ Legal scholar Edward L. Carter wrote, “If ‘government speech’ is defined broadly . . . it may encompass viewpoint-based messages on controversial social issues, privately funded advocacy on behalf of certain industries, and official endorsement of certain ideologies.”³⁰⁹ A limited government-controlled anti-tobacco campaign, however, would not raise these concerns. First, preventing children from smoking is hardly controversial. Second, tobacco counter-marketing campaigns—such as the truth® and Think! Don’t Smoke campaigns—are simply attempts to promote public health by adding information to the marketplace of ideas, simi-

304. *United States v. United Foods*, 533 U.S. 405, 413, 415-16 (2001) (holding that a mandatory fee for generic mushroom advertising violated the First Amendment because the only regulatory purpose of the fee was the funding of advertising).

305. 7 U.S.C. §§ 2904(B), (C).

306. *Johanns*, 544 U.S. 550, 558 (550).

307. *Id.*

308. Edward L. Carter, *Defining Government Speech: Recent Approaches and the Germaneness Principle*, 82 JOURNALISM & MASS COMM. Q. 398, 398 (2005).

309. *Id.* at 399 (citations omitted).

lar to the numerous public service announcements involving drinking and driving or early cancer detection. Counter-marketing campaigns, as Justice Thomas noted, are attempts to advance the government's compelling interest in protecting children's health with more speech rather than enforced silence. Furthermore, rather than being official endorsements of ideologies, counter-marketing campaigns are attempts to educate youths about the reality of the dangers associated with tobacco products. Although Carter correctly warned that when applied to speech unrelated to the government's role, the government speech doctrine could be improperly and dangerously applied and could "pose[] a significant risk of infringing private speech rights protected by the First Amendment,"³¹⁰ government has a substantial, if not compelling interest in protecting children from the harms of tobacco use.³¹¹ Finally, although there is a real danger that government speech could "overwhelm private speech" in some areas,³¹² advertisements that promote tobacco products certainly are not going to disappear anytime soon and counter-marketing campaigns would truly only be adding to the marketplace of ideas.

V. CONCLUSION

This article examined the legal issue of tobacco advertisement restrictions and counter-marketing to determine if counter-marketing campaigns could supplement narrowly tailored tobacco advertising regulations and effectively protect the health of children. In sum, when used in combination with narrowly tailored regulations designed specifically to advance the government's interest, counter-marketing campaigns have the potential to serve the government's interest in protecting the health of children *and* to advance First Amendment values. As two First Amendment scholars noted, "when used *wisely*, counter-speech may prove to be a very effective solution for harmful . . . expression."³¹³ As it stands, research-based, strategic counter-marketing campaigns and partial tobacco advertising restrictions that are narrowly tailored both have a place in the fight to prevent youth from initiating smoking. As Justice Holmes wrote ninety years ago, the best test of truth is the ability to be accepted in the marketplace of ideas.

310. *Id.* at 408.

311. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001).

312. Carter, *supra* note 308, at 408 (writing that government speech "almost certainly has overwhelmed private speech in the area of compelled subsidies for generic advertising for mushrooms, beef, California tree fruits, and other products").

313. Richards & Calvert, *supra* note 19, at 553 (emphasis added).