ARTICLES

STATE AND LOCAL REGULATION OF CIGARETTE ADVERTISING

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I. INTRODUCTION

Smoking kills. Of this, we can be sure. If the question were simply whether restricting cigarette advertising to protect the health of citizens is within the "police power" of local governments, the answer would be easy, at least as far as limitations imposed by federal law is concerned.[1] States and cities would have broad discretion to regulate cigarette advertising as they saw fit. However, the question is not so simple. There are two principal hurdles local government must overcome in order to regulate the marketing of cigarettes — the First Amendment and preemption. The purpose of this article is to discuss the impact of these two barriers to regulation — what they prohibit and what they allow.

Determining the power of state and local governments to regulate cigarette advertising is important because the politics of tobacco are often dramatically different at the level of Congress and local government. The public in some states — and even more, the public in some cities — is quite willing to regulate the tobacco industry's advertising and marketing practices. If states and localities have the power to regulate, there will be substantial restrictions on the advertising and marketing of cigarettes, particularly to children. On the other hand, if federal policies exclusively regulate the marketing of cigarettes, history has shown that the tobacco industry will have much more leeway in selling their products.

On August 28, 1996, the Food and Drug Administration (FDA) published a final rule, which substantially restricts certain types of cigarette advertising that might have a particular effect on children.[2] For example, the final rule prohibits cigarette vending machines, free samples, mail order sales, and self-service displays. It also regulates the content of advertising to which children and adolescents are exposed and bans the distribution of promotional items such as hats and tee shirts. The basis of the FDA's

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1. Municipalities may also be restricted by state law embodied in state statutes or constitutions. In fact, there are signs that the tobacco industry has adopted a strategy of lobbying state legislatures to prevent cities from regulating the sale and marketing of cigarettes. *See* Russ Freyman, *Butting In*, REG., Nov. 1995, at 55. These state law limitations are outside the scope of this article.

2. *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents*, 61 Fed. Reg. 44,396 (August 28, 1996).

jurisdiction is the determination that nicotine is a drug and, therefore, the FDA has the authority to regulate the sale and marketing of cigarettes under the Federal Food, Drug and Cosmetic Act.[3] However, states and localities may wish to regulate local advertising in areas not covered by the FDA Rule or in ways that are different from the Rule's requirements. Moreover, the rule has been challenged by various industry groups and awaits judicial review.[4] Thus, it remains important to determine the extent of state and local authority over cigarette advertising.

As of today, there have been few cases testing the limitations of federal law on state and local authority, and the law remains in a state of flux. The cases decided thus far suggest a rather odd array of local powers. States and cities may bar the sale of cigarettes entirely, but they cannot bar its advertising. They can restrict advertising in order to protect their citizens' aesthetic sensibilities, but they cannot restrict advertising in order to protect their citizens' health. They can protect children from advertising that has a tendency to encourage them to purchase cigarettes illegally, but they cannot protect adults from inadequate warnings. They can probably regulate the location and types of cigarette advertising displays, commercial appeals that are blatantly aimed at minors, and other advertising particularly likely to affect minors. In short, it appears that states and cities can exercise some authority over cigarette marketing and advertising, though there are substantial limits to their power. These limitations stem from the relatively unique way the law of preemption has developed in this area as well as how the Supreme Court has applied the First Amendment to restrictions on commercial speech.

The article proceeds in the following way. Parts II and III provide a general overview of the current framework for preemption and First Amendment analysis. Parts IV and V apply this framework to restrictions on advertising that promotes the illegal purchase of cigarettes by minors.

II. PREEMPTION — AN OVERVIEW

The extent of federal preemption of state regulation of cigarette advertising stems from the Federal Cigarette Labeling and Advertising Act[5] [hereinafter the 1969 Act]

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3. 21 U.S.C. §§ 301-394 (1994). The FDA has published a lengthy analysis of the factual basis for the original proposed rule as well as the basis for its jurisdiction. U.S. Food and Drug Administration, *Nicotine in Cigarettes and Smokeless Tobacco Products Is a Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug and Cosmetic Act* (1995); *reprinted in* 60 Fed. Reg. 41,453 (1995). The FDA Rule preempts state and local regulations of cigarette advertising to the extent that they are different from, or in addition to, the requirements of the Rule. *See* 61 Fed. Reg. 44,548. However, the Rule also provides for a waiver provision whereby a local regulation could remain in effect. *Id.* at 44,549. In the event that a state or city chooses to seek such a waiver, the other limitations of federal law discussed in this article will still need to be considered.

4. *Industry Sues in Attempt to Block FDA Regulation of Tobacco*, Mealey's Litigation Reports: Tobacco, Aug. 17, 1995.

5. The original Act was passed in 1965, Pub. L. No. 89-92, 79 Stat. 282 (1965). The 1969 amendments were known as the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1969). The Act is now codified, as amended, at 15 U.S.C. §§ 1331-40 (1994). Section 1334, the preemption section, provides:

> (a) Additional Statement
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> No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) State Regulations
>
> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which

as interpreted by the Supreme Court in *Cipollone v. Liggett Group, Inc.*[6] The *Cipollone* decision was based on a personal injury action brought on behalf of a woman who died from lung cancer. Because some of her theories of recovery were based on claims in cigarette advertising, the defendant argued that they were preempted. A plurality of the Court decided that certain of her claims were preempted and others were not. Most significantly, the plurality found that the preemptive effect of the 1969 Act is limited to the express terms of its language.[7]

Specifically, the "central inquiry" in deciding whether a state law is preempted is "whether [a] legal duty. . .constitutes a 'requirement or prohibition based on smoking and health. . .imposed under State law with respect to advertising or promotion. . . . "[8] The Court emphasized that not all state law claims involving advertising, including personal injury claims, were preempted. Rather, each type of claim must be analyzed to determine whether it fits within the express terms of the preemption provision. A claim that can be said to be based on a "general duty," one that extends beyond the protection of health, is not preempted.[9]

Thus, under *Cipollone*, the question of whether an advertising restriction is preempted turns on the goal of the law. If it is based on protecting health, it is preempted. If it can fairly be said to be based on some other policy goal, it is not preempted. This approach to preemption, while not completely unique, is unlike most conventional preemption analysis. Today, the most promising non-health basis for states and localities to restrict advertising is advancing the goal of preventing children from purchasing illegal products. Parts IV applies the *Cipollone* framework to this important state goal, but first it is useful to set out an overview of how preemption works under *Cipollone*.

The case law since *Cipollone* suggests four basic guides in determining whether a restriction on cigarette advertising or marketing will survive a preemption challenge. The underlying issue is whether the restriction can fairly be said to be based on a goal other than protecting health. In making that determination, however, the analysis only begins with the state's identification of a plausible non-health basis for the restriction. The court is likely to decide whether a restriction is preempted based on an overall examination of four questions: 1) has the state identified a non-health goal that serves as the basis of the restriction? 2) is there a legitimate connection between the restriction and the non-health goal? 3) is the restriction reasonably tailored to accomplish the non-health goal? and 4) is the restriction likely to lead to costly, inconsistent state regulations? The case law since *Cipollone* indicates that this four-pronged analysis can be applied to determine the likely prospects of a wide array of restrictions surviving a preemption attack. The following discussion addresses each of these questions.

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are labeled in conformity with the provisions of this chapter.

6. Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

7. *Id.* at 517. Justices Scalia and Thomas would have applied the preemption section even more broadly. *Id.* at 544-46 (Scalia, J., concurring in the judgment in part and dissenting in part).

8. *Id.* at 524.

9. *See id.* at 524-31. In particular, claims based on an alleged failure to warn are preempted. Claims based on an obligation to avoid manufacturing defects, claims that rely solely on testing or research practices, claims that involve actions unrelated to advertising or promotion, claims based on breach of express warranties, claims based on fraudulent misrepresentations, and claims based on conspiracies to misrepresent or conceal material facts are not preempted. *Id.*

A. Has the State Identified a Non-health Goal that Serves as the Basis of the Restriction?

In order to avoid preemption, a state or local restriction must be based on some policy goal of the state that can be analytically distinguished from the goal of protecting the public's health. The policy may be a specific one set out in a statute or ordinance, or it may be an application of a broader policy goal set out in a statute or recognized by the state's common law. For example, the plaintiffs in *Mangini v. R.J. Reynolds Tobacco Co.*[10] and *Penn Advertising, Inc. v. Mayor of Baltimore*[11] were successful in characterizing restrictions as based on the goal of preventing the promotion of illegal products to minors.[12]

A preemption analysis that turns on the goal of a state law inherently raises conceptual problems because it requires a court to parse its way through a number of goals that may be advanced by any particular policy. Most laws advance a number of goals and impose a multiplicity of different costs at the same time. The legislative process is largely a process of balancing all these competing benefits and burdens in the crucible of political bargaining to produce some policy outcome. The need to identify the goals of a state law, however, is mandated by *Cipollone*. In effect, the Court in *Cipollone* concluded that Congress intended the preemptive effect of the Act to extend only to attempts by states and cities to protect their citizens' health.

The problem of determining the preemptive effect of a federal law based on the policy goal of the state arises whenever a state law has a "dual impact," i.e., it advances one goal of the state but it also has an impact in a different policy area. Thus, it is useful to discuss briefly the Supreme Court's approach in these cases. When preemption is based on federal "occupation of the field," a court is called upon to determine precisely what field has been occupied. Once that field has been identified, all state laws in that field are completely displaced.[13]

If Congress has occupied a particular field, and the scope of the state law is quite similar, the question of preemption is usually easy. However, even though state and federal law may overlap in subject matter, the state may assert that its policy is not preempted because it is aimed at accomplishing a different policy goal. For example, the state may assert that its policy is based on economic considerations, while federal law is based on the goal of protecting health and safety. Moreover, the state may make this claim even though its policy has some effect in the occupied field. The

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10. Mangini v. R. J. Reynolds Tobacco Co., 21 Cal. Rptr. 2d 232 (Cal. App. 1st. 1993); *aff'd*, 875 P.2d 73 (Cal. 1994); *cert. denied*, R. J. Reynolds Tobacco Co. v. Mangini, 115 S. Ct. 577 (1994).

11. Penn Advertising, Inc. v. Mayor of Baltimore, 862 F. Supp. 1402 (D. Md. 1994), *aff'd*, 63 F.3d 1318 (4th Cir. 1995), *cert. granted and judgment vacated by* Penn Advertising, Inc. v. Schmoke, 116 S. Ct. 2575, *aff'd on remand*, 101 F.3d 322 (4th Cir. 1996).

12. The Supreme Court vacated the decision of the Fourth Circuit in *Penn Advertising* for reconsideration in light of *Liquormart*. 116 S. Ct. 2575 (1996). At the same time, it vacated a closely related decision by the Fourth Circuit dealing with a restriction on alcohol advertising. Anheuser-Busch, Inc. v. Schmoke, 116 S. Ct. 1821 (1996). On remand, the Fourth Circuit Court of Appeals upheld both ordinances. Penn Advertising, Inc. v. Schmoke, 101 F.3d 322 (4th Cir. 1996); Anheuser-Busch, Inc. v. Schmoke, 101 F.3d 325 (4th Cir. 1996). The reasoning for both decisions on remand appears in the *Anheuser-Busch* opinion. These cases are discussed more extensively in Parts IV and V.

13. *See Cipollone*, 505 U.S. at 516; Gade v. National Solid Waste Management Ass'n, 505 U.S. 88, 98 (1992); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

Supreme Court has not had an easy time deciding whether the state policy is preempted when this "dual impact" situation has occurred. In theory, the preemptive effect of any federal law is to be determined by reference to Congressional intent.[14] In practice, Congress may not have thought about preemption at all.

In general, the Court has followed two different approaches to preemption in dual impact cases when Congress has occupied a particular policy field. The first has a narrow preemptive effect, the second a broader one. The narrow preemptive approach is to uphold a state law based on a different policy goal as long as there is no actual conflict between federal and state policy.[15] Moreover, the Court does not inquire into the actual motive of the state policy-makers, but it will accept the stated purpose.[16] Even under this narrower approach, however, simply stating a different goal does not save a statute from preemption. The state law may not frustrate the federal policy by creating an actual conflict regardless of the asserted purpose.[17]

In a recent case, *Gade v. National Solid Waste Management Association*,[18] the Court discussed a broader preemptive approach in cases where a state law not only affected an area occupied by federal policy but where the law was primarily limited to this area. In that case, the Court said that a state law is preempted if it "directly, substantially and specifically regulates" the area occupied by federal policy.[19] However, the Court commented that "laws of general applicability" are not preempted as long as they do not create an actual conflict with federal law.[20] In other words, the narrow preemptive approach — based on a finding of an actual conflict — applies in dual impact cases if the state law extends beyond the field occupied by federal policy. A similar distinction appears in *Cipollone* where the Court distinguished between "general" laws that are not based on smoking and health, such as a bar on deception, and more specific laws that are targeted to protecting public health.[21]

But what makes a law "general," or at least not based on smoking and health? The case law since *Cipollone* suggests that the identification of a non-health goal by the state is only a starting point. In order to reach a sensible accommodation with preemption concerns and the state's legitimate interests, courts have considered the nature of the state's goal, the state law's effect and scope, and the degree to which it threatens to create costly, conflicting state regulations before making a final determina-

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14. *Gade*, 505 U.S. at 96.

15. *See, e.g.*, Pacific, Gas & Elec. v. State Energy Resources Conservation Comm'n, 461 U.S. 190 (1983). In this case, California claimed that the non-safety purpose (requiring disposal of toxic waste to allow economic planning) was not preempted, even though the federal policy occupied the field of nuclear safety. *Id.* at 213-16. The Court upheld the California law on the grounds that the state law advanced a non-safety goal and it was not in irreconcilable conflict with the safety policy of the NRC. *Id.* at 216 & n.28.

16. *Id.* at 216 ("[I]nquiry into legislative motive is often an unsatisfactory venture. . . . What motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it.") (citation omitted).

17. *Gade*, 505 U.S. at 105-06. *See also* Perez v. Campbell, 402 U.S. 637 (1971). In *Perez*, the Court reviewed a state law preventing the discharge in bankruptcy of debts arising from judgments relating to automobile accidents. The state argued that the statute advanced a different goal than the federal bankruptcy laws by deterring irresponsible driving. *Id.* at 653-54. The Court found the law was preempted because it created an actual conflict with the Federal Bankruptcy Act. *Id.* at 651-54. *See also Pacific Gas & Elec.*, 461 U.S. at 216, n.28.

18. Gade v. National Solid Waste Management Ass'n, 505 U.S. 88 (1992).

19. *Id.* at 107.

20. *Id.*

21. *Cipollone*, 505 U.S. at 528-29.

tion about preemption. All these factors will be considered before concluding whether or not a law is "based on smoking and health."

B. Is There a Legitimate Connection Between the Restriction and the Non-health Goal?

Usually, the effectiveness of a state policy is not an issue in preemption analysis. For example, if preemption is based on a conflict in law or policy, the question is simply whether there is an actual conflict, not whether the state policy accomplishes its goal. However, because *Cipollone* creates a somewhat unique form of express preemption, one which is based on the purpose of the law, courts must determine the basis of the state's law. It is not enough simply for a state to declare that its policy advances a non-health purpose.[22] The court will consider the purpose asserted by the state, but it will also examine the substance, effect and scope of the law.[23] By making these kinds of inquiries, a court has a more solid basis for concluding that the state's restriction should not more fairly be characterized as a health-based policy.

The need to show a genuine connection between the restriction and the non-health goal does not present an additional burden for the state since a showing that the restriction is likely to have some effect in advancing the non-health goal will be required as a matter of First Amendment analysis. In fact, the First Amendment burden on the state to show the law's effect is likely to be greater than that required under a preemption analysis.[24] As a matter of preemption analysis, courts will simply require some connection between the restriction and the non-health goal in the sense that it is reasonable to assume that the restriction will advance the non-health objective.

C. Is the Law Reasonably Tailored to Accomplish the Non-health Goal?

An important consideration in determining the policy basis of a restriction is its scope. The scope of the law is significant, not only because it provides an indicator of the actual purpose of the state, but it goes to the heart of the underlying point of preemption analysis. For better or worse, Congress appears to have reserved exclusively for federal policy the regulation of the content of cigarette advertising in order to protect the public's health. While states and cities may adopt policies that have some

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22. *See, e.g.*, Vango Media, Inc. v. City of New York, 34 F.3d 68 (2d Cir. 1994). In *Vango*, the City of New York had adopted an ordinance requiring that one public health message be displayed for every four tobacco advertisements on certain property licensed by the city including taxicabs. A company in the business of displaying signs in taxicabs argued that the ordinance was preempted. The city claimed that the basis of the law was economic since it was intended to prevent the costs of health care benefits and lost productivity. *Id.* at 73. The court of appeals found that "almost all matters touching on matters of public concern have an associated economic impact on society. But such economic concern does not displace a local government's primary interest — whether it be public safety, the common good, or in this case public health." *Id.* In other words, economic costs were simply one undesirable effect of the underlying concern — the effect of smoking on the public's health.

23. In *Vango*, the statement of purpose by the city did recite the health risks of smoking. *Id.* at 72. The court of appeals commented that both the purpose and the effect of a state law must be considered in determining whether it is preempted. *Id.* (citing *Gade*, 505 U.S. at 105). *See also* Chiglo v. City of Preston, 909 F. Supp. 675 (D. Minn. 1995). The court concluded that an ordinance regulating cigarette advertising was primarily intended to protect the health of minors. Therefore, the ordinance was preempted even if the city was pursuing an additional permissible goal, such as reducing illegal purchases. *See id.* at 677.

24. See the discussion of First Amendment considerations in cases involving restrictions on advertising aimed at protecting minors in Part V.

effect on this advertising, a court will ask whether the scope of the law is consistent with protecting health or some other goal.

The breadth of the restriction will be analyzed based on the products covered and the type of advertising affected. If the scope of the law is consistent with some goal other than protecting public health, a court is more likely to conclude that it is based on a non-health goal. To take a simple example, a ban on all billboards within a city is presumably based on aesthetic or environmental considerations. While such a law might raise First Amendment concerns,[25] it would not be preempted. Similarly, a ban on all deceptive advertising is based on a general "duty not to deceive" while a requirement of health warnings in advertising would clearly be aimed at protecting the public's health.[26]

D. Does the Law Impose Substantial Costs from a Multitude of Conflicting State Regulations?

A fourth consideration is whether upholding the restriction will lead to a welter of conflicting rules regarding the content of advertising across the country. To the extent that it may, a court is more likely to find that a restriction is preempted. Courts give weight to this consideration because the Congressional concern about conflicting content regulations was the principal rationale for the preemption provision in the 1965 Act[27] and the 1969 Act.[28] Consequently, a restriction that might be characterized as based on a non-health goal is, nevertheless, more likely to be preempted if it substantially undermines this core rationale.

III. FIRST AMENDMENT ANALYSIS — AN OVERVIEW

Commercial speech has some constitutional protection.[29] Courts are to apply more than rational basis review, which asks only whether there is a rational argument that any legitimate governmental interest is served.[30] On the other hand, commercial

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25. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), *cert. denied*, 453 U.S. 922 (1981). In *Metromedia*, the Court reviewed a city ordinance regulating billboards. A majority of the Court appeared prepared to uphold a broad ban on billboards. However, the ordinance suffered from certain content-based restrictions which made it objectionable. *See infra* note 208.

26. *Cipollone*, 505 U.S. at 528-29 ("[P]etitioner's fraudulent misrepresentation claims that do arise with respect to advertising and promotions (most notably claims based on allegedly false statements of material fact made in advertisements) are not pre-empted by § 5(b). Such claims are predicated not on a duty 'based on smoking and health' but rather on a more general obligation — the duty not to deceive.").

27. *Id.* at 519 ("These regulatory actions [of the FTC and the states] animated the passage of § 5 [in the 1965 Act], which reflected Congress' effort to prevent a 'multiplicity of State and local regulations pertaining to labeling of cigarette packages.'") (citing H.R. REP. No. 449, 89th Cong., 1st Sess. 4 (1965)).

28. S. REP. No. 566, 91st Cong., 1st Sess. 12 (1969), *reprinted in* 1970 U.S.C.C.A.N. 2652, at 2663 [hereinafter 1969 Senate Report] ("In some instances, counties or municipalities exercise their authority over advertising by local ordinances, or regulations, or even occasionally by resolution. In order to avoid the chaos created by a multiplicity of conflicting regulations, however, the bill preempts State requirements or prohibitions with respect to the advertising of cigarettes based on smoking and health.").

29. The Court first stated that commercial speech is entitled to some First Amendment protection in the 1970s. Bigelow v. Virginia, 421 U.S. 809 (1975) (error for lower courts to assume that commercial speech has no First Amendment protection); Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (state bar on truthful advertising of prescription drug prices violates First Amendment).

30. Florida Bar v. Went for It, Inc., 115 S. Ct. 2371, 2376 (1995). Under rational basis review,

speech is subject to less demanding review than non-commercial speech.[31] As is often the case with laws that invoke medium scrutiny, outcomes of constitutional challenges are hard to predict.

Since 1980, this intermediate scrutiny has been embodied in the four-part test of *Central Hudson Gas & Electric Corporation v. Public Service Commission.*[32] The Court has frequently cited *Central Hudson* as the standard for analyzing all restrictions on commercial speech, even speech that might be said to promote "socially harmful activities."[33] The *Central Hudson* analysis asks four questions: 1) does the speech qualify for constitutional protection? 2) is the asserted governmental interest substantial? 3) does the restriction directly further the state's interest; and 4) is there is a reasonable fit between the restriction and the state's goal?[34] Each of these is discussed below.

Despite the resilience of *Central Hudson*, the Court's most recent commercial speech decision, *44 Liquormart, Inc. v. Rhode Island*,[35] shows that several members of the Court are prepared to apply a different analysis if the state is attempting to reduce consumption of legal products by restricting advertising to adults. Moreover, depending on how it is applied, *Liquormart* may lead courts to apply more demanding scrutiny to many types of commercial speech restrictions. Thus, before I turn to the basic First Amendment framework, it is useful to examine closely this important deci-

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the Court traditionally has upheld a law based on interests that were not even asserted at the time the law was enacted. *See, e.g., Edenfield*, 507 U.S. at 767; United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) ("Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision'. . . because this Court has never insisted that a legislative body articulate its reasons for enacting a statute.") (citation omitted). Moreover, as long as the connection between the law and a legitimate interest is "at least debatable," the very deferential rational basis test is met. *See, e.g.*, United States v. Carolene Products, 304 U.S. 144, 154 (1938); Williamson v. Lee Optical, 348 U.S. 483, 487-88 (1955).

31. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1506 (1996); *Florida Bar*, 115 S. Ct. at 2375. The Court has noted various justifications for commercial speech receiving less protection than non-commercial speech. One consideration is that attempting to apply the same standards to both categories could dilute the protection of political and other non-commercial speech. *Id.* at 2375; Board of Trustees v. Fox, 492 U.S. 469, 479-80 (1989). Another is that commercial speech is a "hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'" Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 n.6 (1980) (quoting Bates v. State Bar of Arizona, 433 U.S. 350, 381 (1977)). A third consideration is that advertisers are well-suited to evaluate the "accuracy of their messages and the lawfulness of the underlying activity." *Id. See also* Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 350 (1986).

32. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980).

33. *See* Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1590-91, n.2 (1995). In this case, the government argued that speech promoting alcohol consumption or other socially harmful activities should receive less protection than other commercial speech. The Court had appeared to endorse this idea in two cases in which bans on some types of gambling advertising had been upheld. Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986); United States v. Edge Broadcasting, 509 U.S. 418 (1993). However, the Court in *Coors Brewing Co.* specifically rejected this argument. *Coors Brewing Co.*, 115 S. Ct. at 1590, n.2 ("Neither *Edge Broadcasting* nor *Posadas* compels us to craft an exception to the *Central Hudson* standard, for in both of those cases we applied the *Central Hudson* analysis."). *See also Liquormart*, 116 S. Ct. at 1513-14 (1996) (rejecting a special standard for "vice" activity).

34. The original *Central Hudson* formulation required that the restriction was not "more extensive than necessary" to serve the state's interest. *Central Hudson*, 447 U.S. at 566. This requirement was relaxed in later cases to require only "a reasonable fit between the restriction and the government interest that is "not necessarily perfect but reasonable." Board of Trustees v. Fox, 492 U.S. 469, 480 (1989).

35. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996).

sion.

A. The Impact of Liquormart

In *Liquormart*, the Court reviewed Rhode Island's sweeping ban on liquor price advertising. The statute barred all references to price except for price tags or signs in stores. A discount retailer advertised low prices for mixer and snack foods, and alongside these displays it included the word "WOW" next to pictures of vodka and rum bottles with identified brand names. This ad promoted enforcement proceedings by the state liquor control authority, which fined the retailer.[36]

The Justices were unanimous in striking down the statute. Eight Justices stated expressly that the restriction failed one or more prongs of the *Central Hudson* test.[37] However, the Court divided into two basic groups, one group that would abandon *Central Hudson* when the state was not pursuing traditional consumer protection goals, and the other group reserving judgment on whether to limit the reach of *Central Hudson*.

The principal opinion, written by Justice Stevens, distinguished between two types of restrictions on commercial speech. This discussion, which is Part IV of his opinion, was joined only by Justices Kennedy and Ginsburg. Restrictions in the first category are intended "to protect consumers from misleading, deceptive or aggressive sales practices or [to require] the disclosure of beneficial information."[38] Restrictions in the second category prohibit the dissemination of "truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process."[39] The first category includes, for example, a prohibition on unfair solicitations by attorneys or a requirement that manufacturers disclose information about their products. The second category includes state attempts to reduce consumption of a product by depriving "consumers of accurate information about their chosen products."[40]

According to Justice Stevens, the first category warrants "less than strict review." The second category does not.[41] Moreover, bans in the second category are especially troubling if they completely suppress speech by failing to leave open alternative ways to disseminate a commercial message.[42] Stevens would limit *Central Hudson*'s applicability to the first category and apply conventional strict scrutiny to the second category.[43] Justice Thomas agreed with the distinction but argued that a ban on speech in the second category should be per se unconstitutional.[44] It is clear that both Justice

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36. *Id.* at 1501-03.

37. *Id.* at 1510 (Part V of the opinion by Stevens, J., joined by Kennedy, Souter and Ginsburg, JJ.); *id.* at 1515 (Scalia, J., concurring); *id.* at 1522 (O'Connor, J., concurring, joined by Rehnquist, CJ., Souter and Breyer, JJ.). Justice Thomas did not expressly apply *Central Hudson* to the facts.

38. *Id.* at 1507.

39. *Id.*

40. *Id.* at 1508.

41. *Id.* at 1507.

42. *See id.* at 1507-08.

43. "When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart form the rigorous review that the First Amendment generally demands." *Id.* at 1507.

44. "In cases such as this, in which the government's asserted interest is to keep legal users of a

Stevens and Justice Thomas were worried about what they saw as paternalistic, state attempts to change behavior by withholding information.

After advocating this partial abandonment of *Central Hudson*, Justice Stevens went on to apply a traditional *Central Hudson* analysis to the Rhode Island law. He concluded that it failed two prongs of the *Central Hudson* test. First, the state offered insufficient evidence that the law substantially furthered the state's asserted interest of reducing alcohol consumption.[45] In particular, the state had to show that consumption would be reduced "significantly."[46] Second, there were alternative ways of reducing consumption without restricting speech, such as regulating or raising prices through taxation.[47] Thus, there was not a "reasonable fit" between the state's goal and the restriction.[48]

Four Justices, O'Connor, Chief Justice Rehnquist, Souter, and Breyer, concurred with the result but saw no need to re-examine *Central Hudson*, since the statute failed the *Central Hudson* test.[49] The O'Connor opinion focused on the fourth prong of the test — the requirement of a "reasonable fit" between the state's goal and its method. Like Justice Stevens, O'Connor concluded that there were less restrictive ways to reduce consumption, including raising prices through taxation, limiting per capita purchases, or conducting an educational campaign.[50] Both the Stevens and O'Connor opinions expressly reject the principle, endorsed in *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, that the legislature has the discretion to choose between an approach restricting speech and an equally effective alternative that does not restrict speech.[51] Both opinions also reject the theory espoused in *Posadas* that, since a state can bar the sale of a product, it can take the "lesser" step of barring advertising about it.[52]

Liquormart shows that the Court may be poised to modify its approach to analyzing commercial speech. At least three Justices are highly skeptical of any attempt to modify adult behavior by barring truthful advertising, and one is prepared to adopt a rule flatly prohibiting it. Moreover, *Liquormart* can be read to endorse a more demanding scrutiny of advertising restrictions than some prior cases have suggested.[53] I turn

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product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in [*Central Hudson*] should not be applied. . . rather such an 'interest' is per se illegitimate and can no more justify regulation of 'commercial speech' than it can justify regulation of 'noncommercial speech.'" *Id.* at 1515-16.

45. *Id.* at 1509.

46. *Id.*

47. The opinion suggests, for example, maintaining higher prices through regulation or increased taxation. *Id.* at 1510.

48. *Id.*

49. *Id.* at 1522 ("Because Rhode Island's regulation fails even the less stringent standard set out in Central Hudson, nothing here requires adoption of a new analysis for the evaluation of speech commercial speech regulation."). Justice Scalia also (albeit unenthusiastically) retained the *Central Hudson* test on the grounds that none of the parties had shown in their briefs why it should be abandoned. *Id.* at 1515.

50. *Id.* at 1521-22.

51. *Id.* at 1511; *id.* at 1522 (O'Connor, J., concurring). The Court endorsed the idea of legislative discretion in Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 344 (1986).

52. *Id.* at 1512. The O'Connor opinion does not make this point expressly, but it is implied from its conclusion. *See id.* at 1522 (O'Connor, J., concurring).

53. Part V argues that *Liquormart* should not affect the analysis of restrictions on cigarette advertising that affects minors.

now to the *Central Hudson* framework, and how it is likely to be applied in the future.

B. Does the Speech Qualify for Constitutional Protection?

The *Central Hudson* formulation applies only to speech that is not deceptive and concerns lawful activities.[54] In practice, most cigarette advertising will meet these requirements and, therefore, qualify for constitutional protection.[55]

C. Is the Restriction Intended to Further a Substantial State Interest?

The burden on the state to show that a restriction is intended to further a substantial state interest is the least difficult of *Central Hudson*'s requirements. Generally, any legitimate interest asserted by the state will be accepted as substantial. For example, in *Rubin v. Coors Brewing Co.*, the Court found that the federal government's interest in preventing "strength wars" between brewers of beer was substantial.[56] In *Penn Advertising*, the court concluded that the governmental interest in preventing minors from making illegal purchases of cigarettes was substantial.[57]

However, there are still some potential pitfalls in the state's identification of a substantial interest. First, the Court will not uphold a law based on interests that were not considered by the state.[58] In contrast, the Court will uphold a law based on any legitimate interest under rational basis review, even if the legislature did not consider the interest at the time the law was enacted.[59] In addition, in reviewing restrictions on commercial speech, the Court will look to the actual interests served, that is, the actual purpose of the statute, not simply the purpose asserted by the state.[60] This last requirement makes it particularly important that states and cities ensure that restrictions on speech are genuinely aimed at non-health objectives.

D. Does the Restriction Directly Advance the Governmental Interest?

The Court has wavered in its description of the burden on the state to show that a restriction on commercial speech accomplishes the state's goal. In some cases, the Court appears to have adopted a more deferential approach, requiring little in the way of an evidentiary showing that the law will be effective.[61] On the other hand, some

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

55. *See infra* notes 156-58 and accompanying text.

56. Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1591 (1995). However, the federal law at issue, a regulation of the Treasury Department, failed other elements of the analysis. *See infra* notes 63-65, 83-84 and accompanying text.

57. *Penn Advertising*, 862 F. Supp. at 1406.

58. Edenfield v. Fane, 507 U.S. 761, 768 (1993) ("In undertaking the [inquiry about the State's interest], we must identify with care the interest the State itself asserts. Unlike rational basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions.") (citing *Fox*, 492 U.S. at 480).

59. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 487-88 (1955); United States v. Carolene Products, 304 U.S. 144, 152-53 (1938).

60. *Edenfield*, 507 U.S. at 768 ("Neither will we turn away if it appears that the stated interests are not the actual interests served by the restriction."). For this point the Court cited Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982), where the Court's concern was that the state, despite its professed goal of separate and equal educational opportunities for men and women, might simply intend to perpetuate a stereotype that nursing is a primarily female-dominated profession. These comments suggest that the Court will look to the actual purpose of the legislature or other policy-making body in reviewing a challenge based on the First Amendment. On the other hand, preemption analysis has typically not attempted to assess the actual purpose of the legislature, but has been willing to rely on the asserted purpose. *See supra* note 16.

61. *See, e.g.*, Posadas de Puerto Rico Ass'n. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986)

cases have been more demanding.[62]

Recent cases illustrate the tension. In *Rubin v. Coors Brewing Co.*,[63] the Court overturned a Treasury Department regulation barring the disclosure of alcoholic content on beer labels. A unanimous Court agreed that the regulation violated the First Amendment because it did not directly advance the government's objective.[64] This conclusion was heavily influenced by the seeming irrationality of the scheme as well as the lack of evidence of its effect.[65] On the other hand, the Court took a more deferential approach in *Florida Bar v. Went For It, Inc.*[66] In that case, a divided Court upheld a Florida Bar Association rule prohibiting attorneys from sending targeted direct-mail solicitations to accident victims and their families for thirty days after the accident.[67] In *Liquormart*, the Court again signaled a more demanding approach. Justice Stevens' opinion made a point of saying that the state must show the restriction advances the state's interest "to a material degree."[68]

Despite some inconsistency in these cases, some common themes emerge. A state must ordinarily present some kind of evidence in the form of studies or surveys to support a claim that its policy is effective.[69] The Court does not demand statistical precision, as long as the study is a reasonable, good faith attempt to obtain information.[70] However, the Court has also said that some conclusions are warranted based

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(upholding a ban on certain gambling advertising); United States v. Edge Broadcasting, 509 U.S. 418 (1993) (upholding a ban on certain lottery advertising).

62. *See Edenfield*, 507 U.S. at 761.

63. *Coors Brewing Co.*, 115 S. Ct. 1585 (1995).

64. *Id.* at 1592; *id.* at 1594 (Stevens, J., concurring).

65. The regulation appeared to conflict with other federal policies. For example, alcohol content was allowed to be displayed in advertising in most states and alcohol content was allowed on labels of wines and distilled spirits, which have much higher percentages of alcohol. *Id.* at 1592-93.

66. Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995).

67. *Id.* at 2381.

68. *Liquormart*, 116 S. Ct. at 1509 ("In evaluating the ban's effectiveness in advancing the State's interest, we note that a commercial speech regulation 'may not be sustained if it provides only ineffective or remote support for the government's purpose.' *Central Hudson*, 447 U.S. at 564. For that reason, the State bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so 'to a material degree.' *Edenfield*, 507 U.S. at 771.").

69. In *Edenfield*, for example, where the state's restriction was struck down, the Court noted that the state had presented no studies that personal solicitation by accountants created the danger of fraud or overreaching. *Edenfield*, 507 U.S. at 771-72. On the other hand, in *Florida Bar*, where the restriction was upheld, the state presented a study which purported to show that the public was losing confidence in the legal profession from unseemly solicitations after accidents. *Florida Bar*, 115 S. Ct. at 2377-78. The Court expressly contrasted this evidence with the lack of a study in *Edenfield*. *Id.* at 2377 ("[In *Edenfield*, we] observed that the State Board of Accountancy had 'presented no studies that suggest personal solicitation of prospective business clients by CPAs creates the dangers of fraud, overreaching or compromised independence that the Board claims to fear'. . . . Moreover, 'the record [did] not disclose any anecdotal evidence, either from Florida or another state that validated the Board's suppositions.'") (citations omitted). The Court in *Florida Bar* also distinguished the empirical support offered by Florida in support of its direct-mail ban from the lack of empirical evidence offered by Kentucky in support of a direct-mail solicitation ban reviewed in Shapero v. Kentucky Bar Ass'n., 486 U.S. 466 (1988). "[T]he State in *Shapero* assembled no evidence attempting to demonstrate any actual harm caused by targeted direct mail. The Court rejected the State's effort to justify a prophylactic ban on the basis of blanket, untested assertions of undue influence and overreaching." (citations omitted). *Florida Bar*, 115 S. Ct. at 2378-79.

70. Justice Kennedy's dissent in *Florida Bar* claimed that the sample survey and other evidence assembled by the Bar Association were methodologically unsound and insufficient. "[The documents submitted by the state] include no actual surveys, few indications of sample size or selection procedures, no explanation of methodology, and no discussion of excluded results. There is no description of the statistical universe or scientific framework that permits any productive use of the informa-

on accepted theories of human behavior and common sense.[71] No empirical studies are needed, for example, to conclude that advertising increases consumption to some extent.[72] In *Liquormart*, Justice Stevens was willing to assume that a bar on price advertising will reduce consumption to some extent.[73] However, at least in the case of the Rhode Island statute, he would require the state to go further and show that an advertising restriction "significantly" reduces consumption.[74]

Even if the government presents evidence in support of the effectiveness of the restriction, the Court does not accept it at face value. Instead, the Court has relied on the trial court to sift through the evidence and weigh conflicting testimony.[75] The Court continues to criticize government claims based on "anecdotal evidence and educated guesses."[76]

There is clearly some disagreement among members of the Court about how much evidence of effect is required. The split in *Florida Bar* is a good illustration of the tension. The majority was content with a survey prepared by the state bar association, though it was far from being methodologically sound. The dissent would have demanded a survey that was closer to meeting the standards of social science research.[77] *Coors Brewing Co.* shows that the more illogical and self-contradictory the regulatory scheme, the more skeptical the Court will be about the government's evidence of effectiveness. Thus, the regulation in *Coors Brewing Co.* fell because of the combination of what seemed to be an incoherent policy and thin empirical evidence of effects.[78] *Liquormart* shows that several Justices will demand more than common sense behavioral assumptions in order to establish that at least some restrictions on commercial speech significantly further the state's interest.[79]

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tion. . . . " *Florida Bar*, 115 S. Ct. at 2384 (Kennedy, J., dissenting). In response, the majority stated that "we believe the evidence adduced by the Bar is sufficient to meet the standard elaborated in *Edenfield*. . . . We do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether. . . or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense'. . . . Nothing in *Edenfield*. . . requires more." *Florida Bar*, 115 S. Ct. at 2378 (citations omitted).

71. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 211 (1992).

72. *See, e.g.*, *Central Hudson*, 447 U.S. at 569 ("There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase sales.").

73. *Liquormart*, 116 S. Ct. at 1509.

74. *Id.*

75. *See, e.g.*, *Coors Brewing Co.*, 115 S. Ct. at 1593 (commenting on the district court's review of the conflicting testimony presented).

76. *Id.* at 1593; *see also Edenfield*, 507 U.S. at 770-71 ("[The government's] burden is not satisfied by mere. . . conjecture; rather a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.") (citations omitted).

77. *See supra* note 70.

78. *See Coors Brewing Co.*, 115 S. Ct. at 1593 ("These various tidbits [of evidence offered by the government]. . .cannot overcome the irrationality of the regulatory scheme and the weight of the record.").

79. I discuss below whether this more demanding scrutiny applies to restrictions on cigarette advertising that affects minors. *See infra* notes 178-81 and accompanying text.

E. Is There a Reasonable Fit Between the State's Regulation and the Interest to Be Advanced?

The fourth prong of *Central Hudson* asks whether there is a reasonable fit between the restriction and the government's interest. The concern about "reasonable fit" in commercial speech cases is related to the Court's overbreadth analysis in non-commercial speech cases. The Court has frequently applied the doctrine of overbreadth to strike down restrictions on non-commercial speech.[80] The overbreadth doctrine is a powerful tool for striking down laws since it is often possible to come up with a "less restrictive alternative" to the one that emerged from the political process. No doubt in part because of a concern about limiting the discretion of government policy-makers, the Court substantially relaxed the "least restrictive alternative" test in *Fox* and required only that there be a "reasonable fit" between the restriction and the state's goal.[81] The Court reaffirmed this relaxed standard in *Edenfield*.[82]

However, the "reasonable fit" standard can still be applied to overturn a restriction on speech. In fact, it can make the state's burden an exceedingly difficult one. In *Coors Brewing Co.*, the Court concluded that a Treasury Department regulation violated the First Amendment in part because it was "not sufficiently tailored to its goal."[83] The Court concluded that there were other ways to prevent "strength wars" besides prohibiting the disclosure of alcoholic content on beer labels.[84] Similarly in *Liquormart*, both the Stevens and O'Connor opinions concluded that there were policy alternatives that did not require restrictions on speech.[85]

IV. APPLYING THE PREEMPTION FRAMEWORK

The non-health goal that is the most promising basis for state and local regulation of cigarette advertising is preventing minors from engaging in the illegal purchase of cigarettes. This part applies the *Cipollone* preemption framework to this important state goal. Part V applies the First Amendment framework.[86]

A. Is Preventing the Purchase of Illegal Products by Minors a Non-health Goal?

The first question in a *Cipollone* preemption analysis is whether the state has

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80. In *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973), the Court made clear that it would strike down a law on this ground only if it was substantially overbroad.

81. *See supra* note 34.

82. *See Edenfield*, 507 U.S. at 767 ("[L]aws restricting commercial speech, unlike laws burdening other forms of protected expression, need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny.") (citations omitted).

83. *Coors Brewing Co.*, 115 S. Ct. at 1593.

84. In particular, the Court commented that "directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing alcohol strength. . .or limiting the labeling ban only to malt liquors could "advance the Government's interest in a manner less intrusive to First Amendment rights." *Id.* The Court cited no evidence for these assertions, nor did it discuss whether there were serious advantages to them. They simply appear to have been suggestions by the beer manufacturers, which the Court found appealing.

85. *See supra* notes 47-52 and accompanying text.

86. It is possible that other non-health goals might serve as the basis for restricting cigarette advertising, such as a concern about safety, litter, or even competitive considerations. For example, many states have laws regulating pricing and price advertising of cigarettes. However, essentially the same framework as discussed in this paper would be applicable to laws in these other areas.

identified a non-health goal. The identification of a non-health goal is only the first step in the preemption analysis. However, it is a crucial one since the court must be convinced that the goal is not simply another way of stating the goal of protecting health or an interest that stems directly from harmful effects on health.[87] The legislative body's statement of purpose is relevant but not dispositive.[88]

1. The Industry's Arguments

In order to see how these issues will arise in litigation, it is useful to review the industry's arguments that these restrictions are preempted. The tobacco industry rejects the idea that discouraging minors from purchasing cigarettes illegally is a non-health goal. In effect, the industry argues that there is no reason that the state would discourage the illegal purchase of cigarettes other than its concern about the effects of cigarettes on minors' health. Since federal policy is exclusive in this area, state laws are preempted.[89]

The industry concedes that a state could bar the sale of cigarettes to minors outright without violating preemption standards.[90] It also concedes that a "general" bar on advertising, e.g., a bar on advertising of all products on school grounds, would not be based on smoking and health because it applies to all products. Since such a law applies to products that do not endanger health, the state's goal must be to protect the aesthetics of the school grounds, prevent the commercial exploitation of minors, or advance some other non-health goal.

In addition, the industry concedes (as it must under *Cipollone*) that a general bar on fraudulent misrepresentations is not preempted.[91] However, according to the industry, once the state enacts any restriction on advertising or marketing limited to cigarettes, or regulates cigarette advertising on the grounds that it is unfair or exploits minors, the law is preempted. This is so because the underlying concern is still the health of minors, and the preemptive effect of the Act extends even to restrictions on advertising that reaches only minors.[92] In support of this argument, the industry often points to statements made during the enactment of a restriction, which indicate that supporters of a restriction are concerned about minors' health.

A second argument that these restrictions are preempted is that Congress intended to preempt them along with other forms of cigarette advertising regulation. Since restrictions on advertising aimed at protecting minors could result in burdensome, conflicting requirements, they undermine the core rationale of the preemption provision just as regulation of advertising aimed at protecting adults does. Moreover, so the argument goes, the Congressional floor debate at the time of the 1969 amendments indicates that Members of Congress were aware that the preemption provision in the

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87. *See, e.g., Vango*, 34 F.3d at 73, where the court concluded that the city's professed concern about the economic consequences of smoking was in substance a concern about one of the effects of cigarettes on health.

88. *See supra* notes 22-23 and accompanying text.

89. *See, e.g.*, Respondents' Reply Brief on the Merits, at 14-15, Mangini v. R.J. Reynolds Tobacco Co., 875 P.2d 73 (Cal. 1994) (No. S034603) [hereinafter RJR Reply Brief].

90. *See id.* at 11.

91. *See id.* at 12.

92. *See id.* at 12, n.12. This position is supported by some commentators. *See, e.g.*, Kimberly K. Kuhlengel, Note, *A Failure to Preempt an Unfair Advertising Claim May Result in Undue Restrictions on Cigarette Manufacturers*, 19 S. ILL. U. L. J. 405 (1995).

Act would prevent states from making certain disclosures aimed at children.[93] For example, an amendment was offered which would have allowed states to include disclosures that it is illegal for minors to purchase cigarettes.[94] The rejection of this amendment meant that Congress expressly considered the possibility that states and cities might regulate cigarette advertising to protect minors and chose to preclude it.

2. Responses to the Industry's Arguments

There are several responses to these arguments. First, the state goal of discouraging the illegal purchase of cigarettes by minors is analytically distinct from the goal of protecting their health. The Court in *Cipollone* distinguished between "general" duties, not specific to smoking and health, and a duty to avoid endangering health. Although this concept is not terribly precise, it captures the idea that there is some principal objective that determines the scope and substance of a state policy.[95] While the policy may accomplish other goals, legislators have in mind some principal objective when they adopt a policy. For example, when a legislature (or a court making common law) adopts a bar on fraudulent statements, the underlying goal is to stop fraud, even though it also accomplishes the secondary goal of barring false ads that might risk someone's health.[96] Thus, a restriction on advertising that discourages minors from engaging in illegal purchases is not necessarily based on smoking and health, even if it has the secondary effect of protecting health. The question is — what was the principal goal underlying the policy when it was adopted.[97]

Seen in this light, it is clear that state laws barring minors from purchasing cigarettes stem historically from a different primary goal than those that underlie disclosure requirements intended to protect health. Cigarettes fall within a category of products and activities, which, though lawful for adults, have been viewed as raising traditional moral and ethical concerns. Most states, for example, prohibit minors from gambling, purchasing pornography, purchasing alcoholic beverages, or entering places of entertainment where nudity occurs. Such restrictions, including those on purchasing cigarettes, were enacted long before cigarettes were recognized as a health hazard.[98]

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93. *See* RJR Reply Brief, *supra* note 89, at 3-5.

94. *See* 115 CONG. REC. 16,291 (1969) (amendment by Rep. Adams rejected by vote of 44-79).

95. *Cipollone* refers to this principal objective as the "legal duty that is the predicate" of a law. *See Cipollone* 505 U.S. at 523-24 ("The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of [the claim] constitutes a 'requirement or prohibition based on smoking and health. . .imposed under State law with respect to. . .advertising or promotion,' giving that clause a fair but narrow reading.").

96. *See id.* at 529 ("Thus, we conclude that the phrase 'based on smoking and health' fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements.").

97. Any law could be said to be based on some duty other than protecting health if one characterized it as a specific application of some more general duty. To push the point to the limit, all laws could be said to be specific applications of some very general principle — e.g., a duty to be fair or a duty to use resources efficiently. Thus, there will be disagreements as to the appropriate level of generality at which one should view the restriction. Justice Blackmun in *Cipollone*, for example, argued that a failure to warn claim was not specific to the protection of health. Instead, it "could just as easily be described as based on a 'more general obligation' to inform consumers of known risks. . . . " *Id.* at 543 (Blackmun, J., concurring in part, and dissenting in part). Consequently, the scope and overall effect of the law must be examined to identify the level of generality that is most appropriate.

98. See, for example, the discussion of the origins of California law in *Mangini*, 875 P.2d at 81. The restriction on the sale of tobacco to minors was enacted in 1891 and appears in the same chapter of the California code as the restrictions on admitting minors to houses of prostitution and admitting a minor to a cockfight. As the court commented, this history "shows the state's protective role, and not

While some of these laws also protect minors' health, it is fair to say that the protection of health was not the principal objective at the time they were adopted — or in *Cipollone's* terms, the "legal duty that is the predicate" of the law.[99]

As a practical matter, a law prohibiting the advertising of cigarettes to minors protects their health as well as discourages illegal purchases. Thus, it is not surprising that the Court of Appeals in *Mangini* commented extensively on the connection between the alleged unfair practice and the effect on minors' health.[100] R.J. Reynolds seized on these comments to claim that the whole point of the state law restriction was to protect minors' health.[101] The California Supreme Court rejected this argument on the grounds that the original bar on the sale of cigarettes was based on the state's "protective role," not on protecting health, and that *Cipollone* had concluded restrictions based on these general duties were not preempted.[102]

The statements made by legislators or others at the time of enactment have also not been dispositive in determining the basis of the law. For example, when the Baltimore City Council considered the bar on billboard advertising of cigarettes and alcohol, which was reviewed in *Penn Advertising*, a number of comments were made about the beneficial health effects of the proposed ordinance.[103] The industry pointed to these comments to argue that the basis of the ordinance was protecting health. The district court rejected the argument on the grounds that the purpose of the law must be determined based on its language, not on the basis of statements by individual legislators.[104]

In effect, the district court in *Penn Advertising* concluded that simply reciting health concerns as one of the underlying motivations for a law is not synonymous with identifying the "basis" of the law. Instead, the basis of the law is most fairly determined by the purpose asserted in the text of the law, its substance and its scope. This approach is consistent with the Supreme Court's approach to statutory interpretation in preemption cases, which has cautioned against attempting to divine the actual purpose of legislators.[105]

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primarily health concerns, motivated the prohibition against selling cigarettes to minors." *Id.* Similarly, in *Penn Advertising*, the restriction on the sale of cigarettes to minors was originally enacted in 1886. *Penn Advertising*, 862 F. Supp. at 1417. The court commented on the fact that medical studies linking smoking and health were not published until the 1920's. *Id.*

The district court in *Penn Advertising* commented that, even if the 1886 bar on purchasing cigarettes was based on smoking and health, a law designed to effectuate the law was not. *Id.* This line of reasoning is more doubtful since it draws a rather artificial line between laws protecting health and laws intended to effectuate laws protecting health. However, a court does not have to go that far to conclude that a law enacted to effectuate a law intended to protect the morals of minors is not based on smoking and health.

99. *See supra* note 95.

100. *See Mangini*, 21 Cal. Rptr. 2d at 241-42. For example, the court of appeal commented that the "targeting of minors is oppressive and unscrupulous, in that it exploits minors by luring them into an unhealthy and potentially life-threatening addiction before they have achieved the maturity necessary to make an informed decision whether to take up smoking despite its health risks." *Supra* note 9, at 241-42.

101. *See* RJR Reply Brief, *supra* note 89, at 14-15.

102. *Mangini*, 875 P.2d at 81.

103. For example, the Chairman of the Council and the Commissioner of Health both commented on the relationship of the proposal to health. *Penn Advertising*, 862 F. Supp. at 1418.

104. *Id.* at 1419. ("The City clearly stated what its purpose was in promulgating Ordinance 307: to effectuate § 404. Therefore, this Court need look no further that the language of Ordinance 307.")

105. The district court relied on Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs, 506 U.S. 153 (1993), for the proposition that the text of a statute is dispositive when

3. Legislative History

The legislative history of both the original Federal Cigarette Labeling and Advertising Act,[106] enacted in 1965, and the 1969 amendments, were responses to initiatives by federal agencies, and to a lesser extent, the states. In both cases, there was a legislative compromise. Opponents of regulation managed to put some limits on initiatives to regulate cigarette advertising, but Congress also codified other restrictions, including warning labels on packages in 1965 and a ban on radio and television advertising in 1969.[107]

The original federal effort to regulate cigarette advertising began in 1964 when the FTC adopted a rule requiring warnings, not only on packages, but in advertising as well.[108] The 1965 Act was an effort to limit the impact of the FTC's actions on the industry, particularly to preclude a rule requiring disclosures in advertising. However, the Act's provisions terminated in 1969, and the FTC once again considered a rule on advertising disclosures.[109] In addition, the Federal Communications Commission announced that it would consider a rule banning all forms of cigarette advertising on radio and television. Some states also appeared ready to begin regulation of cigarette advertising.[110] The 1969 Act was concerned primarily with efforts by the federal agencies, and to a lesser extent, efforts by the states. The Act's response to federal efforts was to ban electronic advertising altogether and to postpone the FTC's rulemaking proceedings.[111]

The Congressional response to state efforts was more ambiguous. The bill amending the 1965 Act, H.R. 6543, did not modify the 1965 Act's preemption provision when it reached the floor of the House. Thus, it simply continued to preclude additional federal or locally-mandated disclosures on packages or in advertising.[112] The industry points to the rejection of an amendment offered in the House by Rep. Adams to argue that Congress intended to preempt state regulations intended to protect minors.[113] The amendment offered by Rep. Adams would have allowed states and cities to require a disclosure in advertising that purchase of cigarettes by minors is illegal.[114] The floor comments in opposition to this amendment focused on the concern

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it is unambiguous on the point at issue. *Penn Advertising*, 862 F. Supp. at 1418. As discussed earlier, the Court has not looked to the actual purpose of policy-makers in preemption cases, but instead has accepted their asserted purpose. *See supra* note 15 and accompanying text.

106. *See supra* note 4. The Act is now codified at 15 U.S.C. §§ 1331-40 (1994).

107. The industry probably favored the 1969 Act's ban on advertising on radio and television over possible anti-smoking commercials required by the FCC under the Fairness Doctrine. *See, e.g.*, Kenneth L. Polin, *Argument for the Ban of Tobacco Advertising: A First Amendment Analysis*, 17 HOFSTRA L. REV. 99, 102 (1988).

108. *See Cipollone*, 505 U.S. at 513.

109. *Id.* at 513-15.

110. The California Senate, for example, had passed a total ban on print and electronic cigarette advertisements. The regulatory initiatives preceding the 1969 Act are described in *Cipollone*. *See id.* at 514-15, n.11.

111. *See id.* at 515.

112. The 1969 amendments embodied in H.R. 6543 did not modify the preemption provision in the original 1965 Act other than to further postpone the termination date of the provision as it related to federal regulation of cigarette advertising until July 1, 1975. *See* H.R. REP. NO. 289, 91st Cong., 1st Sess. 7 (1969) [hereinafter 1969 House Report]. The Court in *Cipollone* concluded that the 1965 preemption provision "merely prohibited state and federal rulemaking bodies from mandating particular cautionary statements on cigarette labels (§ 5(a)) or in cigarette advertising (§ 5(b))." 505 U.S. at 518.

113. *See, e.g.*, RJR Reply Brief, *supra* note 89, at 4.

114. The amendment provided:

that it could lead to conflicting disclosures in national or regional advertising. Advertisers could not disseminate advertising copy, which would reach the entire nation or at least more than one state.[115] Thus, the objection was similar to the traditional concern about burdening interstate commerce by subjecting national sellers to conflicting local requirements.[116] The Adams amendment was an attempt to create a single exception to this bar on additional disclosure requirements.[117]

Thus, at the very most, the rejection of the Adams amendment meant that the House intended to preclude states from requiring additional warnings in advertising to protect minors. The amendment did not address non-content regulations, such as restrictions on location, nor did it address highly localized promotional practices such as the distribution of free samples or billboards. Moreover, the entire discussion took place in the context of a debate about mandatory advertising disclosures. It did not address other efforts by the states to protect minors that do not require affirmative advertising disclosures, including those which might affect the content of advertising.

The Senate adopted a broader preemption provision, which was described in the Senate Commerce Committee report accompanying H.R. 6543 when it was reported to the Senate.[118] The conference committee adopted the Senate version.[119] Both the House and Senate debates on H.R. 6543, as well as the debates on the conference report, show that the principal concern was that states and cities would enact conflicting regulations regarding the content of advertising, particularly conflicting disclosure requirements.[120] Conflicting requirements would make it difficult, if not impossible,

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> [The preemption subsection] does not prevent any State or political subdivision thereof, which prohibits the sale of cigarettes to persons below certain ages, from requiring that any cigarette advertisement within its jurisdiction set forth the fact that persons below a certain age are prohibited by such State or political subdivision from purchasing cigarettes.

115 CONG. REC. 16,290 (1969).

115. *See, e.g.*, 115 CONG. REC. at 16,291 (1969) ("This amendment, if added to this bill, would create utter chaos, and virtually make impossible nationally broadcast programs or the dissemination of nationally published magazines, and indeed many locally published newspapers. Imagine 50 different advertising formats in a nationally broadcast program . . . . Variations in State laws prohibiting sales to minors are well known . . . . These same variations would render it impossible to have printed cigarette advertisements in national publications, and in most local newspapers which enjoy any substantial out-of-state circulation.") (comments of Rep. Fountain).

116. *See id.* ("To put this burden on the advertising of a product that may be lawfully sold is not only punitive but also wholly unwarranted. In fact, it would be an undue burden on interstate commerce.") (comments of Rep. Fountain).

117. The amendment was offered in Committee as well. See the comments of opponents of the bill in the 1969 House Report at 32-33 ("One of the most objectionable parts of H.R. 6543 is that it continues the present law which prevents any of the government agencies, Federal, State, or local, from requiring health warnings [in] cigarette advertising . . . [A]n amendment was offered [in Committee] so that the States and localities might require that advertising contain a warning that it is a crime to sell cigarettes to minors . . . . The reported bill would prevent the States from giving notice in advertising that the State criminal law is being violated through the sale and use of cigarettes by minors.") (Minority views of Mr. Jarman, Mr. Dingell and Mr. Adams).

118. *See* 1969 Senate Report, 1970 U.S.C.C.A.N. at 2663 ("In order to avoid the chaos created by a multiplicity of conflicting regulations . . . the bill preempts State requirements or prohibitions with respect to the advertising of cigarettes based on smoking and health.").

119. CONF. REP. No. 897, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.C.C.A.N. 2676, 2677 [hereinafter 1969 Conf. Rep.] ("The Senate preemption [provision] applied only to States and their political subdivisions. They were prevented from imposing any requirement or prohibition based on smoking and health on advertising and promotion of cigarettes in packages labeled in accordance with the Act. With minor technical amendments the conference version is the same as the Senate amendment.").

120. *See, e.g.*, 115 CONG. REC. 38,738 (1969) ("The committee [bill] preempts all State and local

to engage in national advertising or to disseminate advertising copy to regional advertising media.[121] On the other hand, most of the floor comments do not indicate a broad-based concern about all forms of advertising regulations, including regulations on local advertising that do not raise costs to advertisers because it must already be tailored to local markets.[122] Thus, the predominant concern in 1969, as in 1965, is stated in the preamble section of the 1965 Act, which was not changed by the 1969 amendments.[123]

There are other reasons to conclude that Congress did not have all forms of state advertising restrictions in mind when it adopted the preemption provision in the 1969 Act. The Senate Report expressly affirms the power of states to regulate the "sale of cigarettes to minors."[124] Arguably, this phrase refers to regulations of the promotion of cigarettes to minors as well as the sale itself.[125] The industry's counter-argument is that the phrase is limited to the prohibition of sale of cigarettes, not the advertising of the sale.[126]

A stronger argument is the failure of any mention during the Congressional debates about preventing the states from regulating blatant commercial appeals to minors even though at least one state at the time had laws restricting cigarette advertising directed to minors. For example, a Utah statute barring all billboards and public displays of tobacco advertising had been in existence for half a century at the time of the

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health-related regulation of cigarette advertising, based upon the principle of national uniformity in regulating the marketing of nationally marketed products.") (Comments of Senator Magnuson, Chairman of the Senate Commerce Committee).

121. *See, e.g.*, 116 CONG. REC. 7920 (1970) ("The [Conference Committee] agreement contains [a] preemption [provision] applicable to States and their political subdivisions in recognition of the fact that the labeling, advertising, promotion and sale of cigarettes insofar as they are related to smoking and health are matters of national concern. The legislation makes clear that in order to make the legislation effective, States and their local divisions are not to interfere with the scheme of regulation provided for in the legislation.") (Comments of Rep. Staggers, Chairman of the House Committee on Interstate and Foreign Commerce); *id.* at 7921 ("In order the preserve the effectiveness of Federal legislation, State and local jurisdictions are not by regulation or prohibition to expand, duplicate, change Federal regulation in any way or to reduce the legal or practical effectiveness of the warning statement imposed by section 4, or to otherwise interfere with this legislation.") (Comments of Rep. Satterfield, a member of the Conference Committee, regarding the Conference Committee Report).

122. This issue is discussed further below. *See infra* notes 145-53 and accompanying text.

123. *See* 15 U.S.C. § 1331 (1995):

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby . . . (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

124. *See* S. REP. NO. 566, 91st Cong., 2d Sess. 12 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2652, 2663. The excerpt states:

> The State preemption of regulation or prohibition with respect to cigarette advertising is narrowly phrased to preempt only State action based on smoking and health. It would in no way affect the power of any State or political subdivision of any State with respect to the taxation or sale of cigarettes to minors, or the prohibition of smoking in public buildings, or similar police regulations. It is limited entirely to State or local requirements or prohibitions in the advertising of cigarettes.

125. This was the conclusion of the California Supreme Court in *Mangini*. *Mangini*, 875 P.2d at 81. The court also was impressed by the fact that the cigarette industry during the hearings preceding the 1969 amendments pledged to avoid advertising directed to young persons. *Id.* at 81-82.

126. *See* RJR Reply Brief, *supra* note 89, at 5-6.

1969 amendments.[127] There is reference during the Congressional debates to the extraordinary step of overturning such a state law.[128] The Supreme Court has sometimes stated that a failure of Congress to comment on what would amount to a drastic change in law suggests that it did have this change in mind.[129]

Finally, it is unreasonable to assume that Congress believed that advertising disclosures would be the exclusive method of preventing unfair promotion of cigarettes to minors. Minors are assumed to be unable to evaluate the complex, conflicting messages in advertising, which simultaneously glamorize smoking and warn of its serious hazards to health. Disclosures are made in advertising that, even according to the industry, has its primary effect on adults. No sensible government policy would rely exclusively on such disclosures to protect minors from blatant commercial appeals. Such a limitation would mean that cigarette manufacturers could distribute coupons for free cigarettes next to school grounds, on the theory that minors would see disclosures of health hazards when they read news magazines. Thus, while Congress may have wished to preclude states from burdening manufacturers with additional mandated disclosures in advertising, it is unreasonable to assume that Congress intended to preclude the states from doing anything else.

The industry has argued that Congress intended that the exclusive authority to protect minors from such blatant appeals was left with the Federal Trade Commission.[130] This is, of course, an appealing result to the industry since it allows the industry to concentrate its lobbying and political efforts at restraining a single agency, rather than engaging in political battles with fifty state legislatures and hundreds of city councils. There are some general comments in the legislative history, which suggest a broad-brush intent to preempt all state regulation.[131] Nevertheless, it is doubtful Congress intended that the FTC would be the exclusive repository of authority to regulate all cigarette advertising, including localized, blatant commercial appeals to minors.[132]

The extreme implications of the tobacco industry's position have made it difficult for courts to accept its arguments. For example, the California Supreme Court in

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127. The statute's constitutionality was upheld in Packer Corp. v. Utah, 285 U.S. 105 (1932). However, the Court did not address First Amendment issues. *See Metromedia*, 453 U.S. at 498.

128. One of the strongest opponents of H.R. 6543 as it emerged from the Senate Commerce Committee was Senator Frank Moss of Utah. One of his objections to the bill focused on the delay in the date at which the ban on broadcast advertising of cigarettes would go into effect. *See* S. REP. NO. 566, 91st Cong., 2d Sess. 17-24 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2652, 2668-75 (individual views of Mr. Moss). It is almost inconceivable that he could have assumed that his state's long-standing bar on other forms of advertising was to be preempted without mentioning this possibility.

129. *See, e.g.*, City of New York v. FCC, 486 U.S. 57, 68 (1988); United Savings Ass'n v. Timbers of Inwood Forest Ass'n, 484 U.S. 365, 380 (1988); Church of Scientology v. IRS, 484 U.S. 9, 17-18 (1987).

130. *See* RJR Reply Brief, *supra* note 89, at 6-7.

131. *See, e.g.*, a colloquy involving Senator Magnuson, Chairman of the Senate Commerce Committee:

> Mr. Cooper: Mr. President, I wish to ask [Senator Magnuson], the manager of the report, questions for interpretation. As I understand the conference report, it preempts the States from any action restricting advertising.
>
> Mr. Magnuson: Yes.

116 CONG. REC. 6640 (1970).

132. As the Court has frequently stated, Congress should not be presumed to have displaced state authority. *See, e.g.*, Maryland v. Louisiana, 451 U.S. 725, 746 (1981); Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 780 (1947) ("Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity when in chooses to assure full federal authority, completely displacing the States.") (Frankfurter, J., sep. opinion).

Mangini concluded that the industry's position would mean that the state could not regulate blatant commercial appeals to children.[133] The industry, in fact, has not been anxious to state the full implications of its arguments.[134]

4. Achieving a Sensible Accommodation

There are a number of strong arguments that state regulation of unfair practices, including advertising of cigarettes directed to minors, is not based on protecting health. On the other hand, the courts are not likely to accept the argument that any regulation of advertising is not preempted as long as it is intended to discourage children from making illegal purchases. To push the argument to the limit would mean that a state could require affirmative disclosures in advertising if the asserted goal was to discourage minors from buying cigarettes. While such a policy might legitimately be said to be based on a non-health goal, it also raises serious conflicts with the core rationale of the preemption provision in the 1969 Act.

Thus, courts are likely to search for a sensible accommodation of these competing concerns. Although it may not be analytically precise, courts are likely to intertwine their analysis of whether a restriction is based on the non-health goal of protecting minors with the other factors suggested in Part II, above: whether there is a legitimate connection between the restriction and the non-health goal, whether the restriction is reasonably tailored to accomplish the goal, and whether it raises a serious risk of conflicting regulations. The ultimate decision about preemption will turn on a consideration of all these factors.

B. Is There a Legitimate Connection between the Restriction and the Non-Health Goal of Protecting Minors?

In assessing whether a particular restriction on the promotion of illegal products to minors can fairly be said to be based on a non-health objective, a court will ask whether there is a legitimate connection with this objective. This assessment requires at least some examination of the reasoning of the state or city in enacting the restriction. The cases so far suggest that courts are likely to require only some legitimate connection between the restriction and the asserted governmental interest. Courts have not required evidence of effectiveness for purpose of a preemption analysis in part because some showing of likely effectiveness will have to be met under a First Amendment analysis in any event. If the state law survives First Amendment scrutiny, it will surely meet any requirement of a legitimate connection or nexus for purposes of preemption analysis.

In determining whether there is a legitimate connection, courts will look at the

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133. *Mangini*, 875 P.2d at 79. ("Reynolds contends that, in effect, that if it had used billboards depicting Old Joe Camel stating in huge block letters, 'Kids, be the first in your fourth grade class cool enough to smoke Camels;' or, to use the example of the Court of Appeal, if 'Reynolds had . . . presented Teenage Mutant Ninja Turtles on children's lunch boxes to promote cigarette smoking,' California could do nothing about it . . . . As we will indicate, Reynolds is incorrect. California may, consistently with section 1334(b), shield minors from cigarette advertising inducing them to smoke.")

134. For example, the plaintiffs in *Mangini* argued that the industry's position would mean that a state could not bar cigarette advertising on or near schoolgrounds. Reynold's response was only that no commercial signs of any kind are allowed under a San Francisco ordinance. *See* RJR Reply Brief, *supra* note 89, at 11. Reynolds did not directly address the result in a case where there was no such ordinance.

purpose of the law as stated by the legislative body that enacted it, the substance and scope of the law, and the state's theory of why it will accomplish the stated objective. The district court in *Penn Advertising* pointed to the stated purpose of the ordinance, the scope and the data showing the prevalence of underage smoking to find a legitimate connection.[135] The court of appeals apparently viewed the connection between the protection of minors and the bar on outdoor signs in residential areas as obvious. Its comments about the effects of the law were confined to its First Amendment analysis.[136]

In *Mangini*, the California Supreme Court addressed only whether the plaintiff's claim was not preempted as a matter of law.[137] Thus, for purposes of the opinion, it assumed that the plaintiff's claim — the use of the Joe Camel character in advertising "targets" minors — was true. Therefore, the nexus between the restriction on such advertising and the non-health goal was obvious, at least for purposes of summary judgment.[138]

In other cases, the connection between the non-health goal of protecting minors and the restriction may not be so obvious. For example, a court may question whether a ban on advertising at sporting events or a ban on advertising in places where alcohol is served has a significant connection. This inquiry is likely to focus on the scope of the law and the extent to which it is tailored to protect minors, which are discussed below.

C. Is the Restriction Reasonably Tailored to the Non-health Goal?

The third consideration in the preemption analysis is whether the restriction is reasonably tailored to the non-health goal of protecting minors. The more the policy appears to interfere with an area that is governed exclusively by federal policy — the health effects of cigarette advertising — the more it intrudes upon the federal prerogatives and the more likely it is to be pre-empted. Thus, a law can be preempted if it appears to regulate the content of cigarette advertising directed to adults. It can also be preempted if it appears simply intended to protect children's health from the effect of cigarettes. The literal breadth of the policy is not conclusive. Each policy must be analyzed from the point of view of the purpose for which it is adopted.

For example, compare a ban on cigarette billboards overlooking a schoolground, a ban on cigarette billboards in an entire city, and a ban on all billboards in the city. The ban on cigarette advertising overlooking a schoolground is almost precisely tailored to prevent the marketing of illegal products to minors since the overwhelming majority of persons who see the billboards will be children. Even this kind of restriction may not be viewed as based on a non-health goal, however, since a court might ask why the ban doesn't extend to other illegal products, such as alcohol. On the other hand, a court is more likely to uphold a restriction on advertising targeted to minors if

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135. *Penn Advertising*, 862 F.Supp. at 1417 ("It is clear that Ordinance 307 is [not based on smoking and health]. The purpose of Ordinance 307 is to further effectuate § 404, a valid State law. The Preamble to Ordinance 307 cites § 404 as the impetus for its promulgation along with abundant statistics concerning the prevalence of underage smoking to demonstrate the necessity of Ordinance 307 as a means to increase the effectiveness of § 404.").

136. *Penn Advertising*, 63 F.3d at 1325.

137. *Mangini*, 875 P.2d at 74.

138. On remand, the burden on the plaintiffs to prove effect, particularly for purposes of a First Amendment analysis, is unclear. *See supra* note 136 and accompanying text.

it is a specific application of a more "general" bar on the promotion of illegal products. The scope of the law would be assessed on the basis of the general bar, not the specific application.[139]

The ban on all cigarette billboards in the city also protects children from the promotion of illegal products, but it raises two problems. First, if it is truly limited to cigarette advertising, and does not address other illegal products, it may appear to be based only on the goal of protecting health. Second, to the extent that it prevents adults from seeing the billboards, the effect of the restriction extends beyond the asserted state goal. Finally, the ban on all billboards in the city would not be preempted, though it might raise First Amendment concerns.[140] Its very breadth indicates that it is based on a concern other than health, such as aesthetics or environmental considerations. In short, the literal breadth of the law is not dispositive, since the bar on all billboards in the city in this example is the broadest restriction of all. Rather, the question is whether the law is based on a non-health goal.

In *Mangini*, the relief requested by the plaintiff was a specific application of a general bar on unfair practices. Therefore, the court was able to conclude that the plaintiff's theory was fairly tailored to this non-health goal. The court's focus then was on the scope of the general bar, not the scope of the specific application.[141] The Court of Appeal in *Mangini* also concluded that plaintiff's theory was a specific application of the general bar, which was based on a non-health goal.[142]

In *Penn Advertising*, the specific ordinance at issue was limited to cigarette advertising. The ordinance more clearly restricted advertising aimed at adults since adults are probably the principal targets of billboard advertising. Thus, *Penn Advertising* presented a harder case than did *Mangini*. Nevertheless, both lower courts concluded that the ordinance was reasonably tailored to the non-health goal of discouraging illegal purchases by minors. It represented a reasonable attempt to restrict advertising that was particularly likely to reach children and to avoid restricting advertising that would not.[143] While it was not discussed expressly in either opinion, it was also significant that the city had enacted a parallel ordinance aimed at alcohol advertising.[144] Thus, the city did not have to deal with the argument that such an ordinance should extend

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139. This is the case in *Mangini*. *See supra* notes 114-15 and accompanying text.

140. *See, e.g., Metromedia*, 453 U.S. 490 (1981). In *Metromedia*, a majority of the Court appeared prepared to uphold a ban on commercial billboards, but the ordinance under review was struck down because it created certain classifications between permissible and impermissible messages based on their content. *See infra* note 157 and accompanying text.

141. *Mangini*, 875 P.2d at 80. ("[I]t is unlawful in California to sell cigarettes to minors or for minors to buy them. Advertising aimed at such unlawful conduct would assist vendors in violating the law. The predicate duty is to not engage in unfair competition by advertising illegal conduct or encouraging others to violate the law.").

142. *Mangini*, 21 Cal. Rptr.2d at 243.

143. *See Penn Advertising*, 63 F.2d at 1323. The district court stressed that the ordinance was limited to "billboards in neighborhoods in which children would typically be found such as the areas in which they live, attend school, and recreate." *Penn Advertising*, 862 F. Supp. at 1414. In addition, the ordinance was "narrowly tailored in that it applies only to a narrow medium, billboards, which are particularly problematic in that they are easily accessible to children and parents lack control over their children's exposure to such advertising. [The ordinance] has no effect upon other mediums which do not cause these specific problems, such as newspapers, magazines, and signs inside licensed premises. [Thus, the ordinance] is clearly aimed at the illegal sale of cigarettes to minors." *Id.* at 1417.

144. This ordinance was reviewed in Anheuser-Busch, Inc. v. Mayor of Baltimore, 855 F. Supp. 811 (D. Md. 1994), *aff'd*, 63 F.3d 1305 (4th Cir. 1995), *cert. granted and judgment vacated by* Anheuser-Busch, Inc. v. Schmoke, 116 S. Ct. 1821, *aff'd on remand*, 101 F.3d 325 (4th Cir. 1996).

beyond only one illegal product.

D. Does the Restriction Risk Substantial Costs from Conflicting Regulations?

A final question in applying the *Cipollone* framework is whether the State's restriction threatens to impose substantial costs on the industry from conflicting state and local requirements. Congress certainly had this concern in mind when it passed the 1969 Act. This was most clearly reflected in a desire to avoid a multiplicity of stand-mandated affirmative disclosures, which might make national advertising impossible as a practical matter.[145] Thus, the Court in *Cipollone* assumed that tort theories based on an alleged failure to include warning disclosures would fly in the face of Congressional intent. In contrast, state restrictions on outright fraud would not raise the same risk because there is "only a single, uniform standard: falsity."[146]

Guided by *Cipollone*, every court that has considered a preemption challenge to a state or local restriction has placed significant weight on whether upholding it would lead to conflicting regulations of the content of advertising. In *Mangini*, the California Supreme Court acknowledged the Congressional concern about conflicting regulations of cigarette advertising.[147] However, it concluded that the remedy sought by the plaintiff would not lead to conflicting regulations within the meaning of the preemption provision.[148]

On this issue, *Penn Advertising* presented an easier case than *Mangini*. Arguably, a ban on cartoon characters places a burden on national advertisers because it prevents national or regional dissemination of particular advertising copy.[149] In contrast, a ban on the location of signs in a local area results in additional costs to advertisers. Thus, both courts in *Penn Advertising* easily concluded that a ban on billboard advertising in certain areas did not impose any costs from conflicting regulations on the content of advertising.[150]

The industry has argued that State standards based on unfairness would result in a multitude of conflicting policies and, thus, undermine the core Congressional rationale underlying the preemption provision. For example, the industry has argued that states might apply different standards of proof in deciding what is unfair. Some might require proof of intentional targeting of minors, some might require only proof that minors might be affected by certain advertising, and so on. Similarly, some states might bar cartoon characters while others might focus on littering, safety or other

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145. *See supra* notes 85-96 and accompanying text.

146. *Cipollone*, 505 U.S. at 529.

147. *Mangini*, 875 P.2d at 80.

148. *Id.* at 80 ("State law prohibitions against advertisements targeting minors do not require Reynolds to adopt any particular label or advertisement 'with respect to any relationship between smoking and health'; rather, they forbid any advertisements soliciting unlawful purchases by minors. The prohibitions do not create 'diverse, nonuniform, and confusing' standards.") (quoting *Cipollone*, 505 U.S. at 512). Reynolds also argued that at least remedies that threatened more serious conflicts, such as a requirement of additional warnings, would be preempted. *Id.* at 83. The court commented that the issue of the precise form of relief was not yet before it. *Id.*

149. *Cipollone* makes clear that a flat prohibition is less costly to advertisers than inconsistent affirmative requirements. *Cipollone*, 505 U.S. at 529.

150. *Penn Advertising*, 63 F.3d at 1324; 862 F. Supp. at 1420 ("Ordinance 307 does not require any message at all, let alone a message that conflicts with one mandated by Congress.").

concerns.[151]

The type of state restriction that raises the clearest potential for conflict with Federal policy is a requirement of affirmative disclosures in advertising prepared for mass circulation. This is true even if the affirmative disclosure is aimed only at children. A multiplicity of inconsistent State-mandated disclosures would make it difficult for a manufacturer to disseminate any advertisement in a national publication. An analogous concern arises in determining whether a State restriction places an "undue" burden on interstate commerce. State laws may impose substantial costs on national manufacturers by requiring them to tailor product or other standards to numerous conflicting, local requirements.[152]

On the other hand, restrictions aimed at local advertising and marketing practices, for example, flyers, promotional handouts, billboard advertising, etc., already must be tailored for local markets. Thus, different state laws do not substantially raise the costs to manufacturers. Similarly, restrictions that are framed as prohibitions, rather than affirmative obligations, are less likely to impose burdens on manufacturers, because they can more easily comply with the requirements imposed by several states.[153]

Cipollone suggested that there is a bright line between policies that lead to conflicting state standards and those that do not. In particular, it suggested that a bar on deception would not lead to conflicting standards, while state-mandated affirmative disclosures would.[154] Such an analysis substantially oversimplifies the law of deception. Traditionally, there is no clear line between an advertisement that is deceptive because it fails to contain a disclosure and one that is deceptive because it makes an affirmative misrepresentation.[155] Moreover, state bars on deception may be implemented in many different ways. For example, states may have quite different views about what ads represent in the first place. Two states may evaluate the same advertisement and reach different conclusions about whether it is deceptive. In short, there is some potential for conflicts among state policies in imposing a "general duty not to deceive" just as there may be in barring unfair practices.

The most sensible reconciliation of these conflicting arguments is that a state's bar on unfair practices is not automatically preempted even if state restrictions vary somewhat. On the other hand, states cannot mandate additional disclosures in advertising since inconsistent regulations in this area have the greatest potential for increasing the costs to manufacturers. In contrast, certain restrictions, such as the location regulations in *Penn Advertising*, the bar on cartoon characters proposed in *Mangini*, and regulations of local promotions, clearly do not raise the specter of a multiple disclosure

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151. *See, e.g.*, the discussion in the RJR Reply Brief, *supra* note 89, at 13-14.

152. *See, e.g.*, Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) (conflicting truck length standards); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (conflicting standards for truck mudguard flaps); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) (conflicting standards for railroad car lengths).

153. *See, e.g.*, Toy Mfrs. of America, Inc. v. Blumenthal, 806 F. Supp. 336 (D. Conn. 1992) *aff'd*, 986 F.2d 615 (2d Cir. 1992) (upholding a state-mandated safety label). "A nondiscriminatory state statute will be invalidated under the Commerce Clause only if it is impossible to comply with it and other regulations." *Id.* at 348.

154. *Cipollone*, 505 U.S. at 529.

155. This has been the traditional position of the Federal Trade Commission in evaluating the deceptiveness of advertising. *See, e.g.*, Carter Products, Inc. v. FTC, 323 F.2d 523, 528 (5th Cir. 1963); American Home Products Corp. v. F.T.C., 695 F.2d 681 (3d Cir. 1983).

requirements in advertising. While there might be some conflicts among the states, these are probably no greater than those that arise under acknowledged "general" duties — such as the prohibition on deception. In each case, the court must consider the degree to which there is a potential for imposing significant costs on advertisers, along with the other factors already discussed.

V. APPLYING THE FIRST AMENDMENT FRAMEWORK

As discussed earlier, First Amendment analysis of commercial speech asks four questions: 1) does the speech qualify for Constitutional protection at all? 2) is the state's goal in restricting the speech a substantial interest? 3) does the restriction directly further that interest? and 4) is there a reasonable "fit" between the policy and the State's goal? This part applies this analysis to a state or local restriction based on the goal of protecting minors from advertising that promotes illegal purchases.

A. Does the Speech Qualify for Constitutional Protection?

Central Hudson provides that commercial speech warrants no Constitutional protection if it is deceptive or if it promotes illegal activities.[156] A court might conclude that cigarette advertising targeting minors does not concern legal activities and is, therefore, entitled to no constitutional protection. If it could be established that the advertising reached exclusively minors, for example, a court might conclude that the speech warranted no constitutional protection at all.[157] However, perhaps because the advertising almost always reaches adults too, courts have assumed that *Central Hudson* applies.[158]

B. Is the State's Interest Substantial?

This prong of *Central Hudson* has typically been easy to meet. In *Rubin v. Coors Brewing Co.*,[159] the Supreme Court concluded with little discussion that the government's interest in reducing "strength wars" by beer brewers was substantial.[160] In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, the Supreme Court found that reducing the public's demand for gambling was a substantial interest.[161] Perhaps the most relaxed application of the standard came in *Florida Bar v. Went for It, Inc.*, where the Supreme Court found that protecting the "flagging reputa-

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

157. *See, e.g.*, Bystom v. Fridley High School, 822 F.2d 747 (8th Cir. 1987). This case involved a challenge to a restriction on the content of a student newspaper. One of the restrictions barred advertisements of "any product or service not permitted to minors law." *Id.* at 755. Since the newspaper reached almost exclusively minors, the court concluded that such advertisements would necessarily promote illegal purchases and, therefore, found the restriction was permissible. *Id.* at 753.

158. *See Penn Advertising*, 862 F. Supp. at 1406 (indicating that the parties agreed that the "advertising in question is neither unlawful nor misleading").

159. *Coors Brewing Co.*, 115 S. Ct. 1585 (1995).

160. *Id.* at 1590. On the other hand, the Court found that the "[Federal Government's] interest in preserving state authority is not sufficiently substantial to meet the requirements of *Central Hudson*. Even if the Federal Government possessed broad authority to facilitate state powers, in this case the Government has offered nothing that suggests that States are in need of federal assistance." *Id.* at 1591.

161. *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986). The Court's comments *in Coors Brewing Co.* suggest that, as in *Posadas*, any good faith claim by the government that it hopes to protect the health, safety and welfare of its citizens satisfies the substantial interest requirement. *See Florida Bar*, 115 S. Ct. at 1590.

tions of Florida lawyers" was a substantial interest.[162]

The courts that have considered the issue have easily concluded that preventing minors from purchasing illegal products is a substantial interest.[163] The district court in *Penn Advertising* found that reducing the illegal purchase and consumption of cigarettes by minors was a substantial interest.[164] The Fourth Circuit, characterizing the goal as promoting "compliance with the state prohibition of the sale of cigarettes to minors," agreed.[165] For this purpose, it appears there is little significance in whether the interest is stated as protecting minors from purchasing illegal products, promoting compliance with a state bar on the purchase of cigarettes, or simply protecting minors. The formulation of the interest, of course, must be consistent with the formulation of the interest for purposes of preemption analysis.

C. Does the Restriction Directly Further the Governmental Interest?

The most difficult prong of *Central Hudson* is the requirement that the State show the restriction "advances the [governmental] interests in a direct and material way . . . ."[166] The point of this requirement is sensible enough — speech should not be restricted unless the state's policy actually accomplishes something significant. On the other hand, if the burden on the state is unrealistically high, a state will rarely be able to justify its policy. As a practical matter, commercial speech would have almost absolute constitutional protection despite the Court's statements that commercial speech receives intermediate scrutiny.[167] Thus, the way this prong of *Central Hudson* is applied is critical to the fate of state policies regulating commercial speech.

The Supreme Court has not been particularly clear or consistent in stating how the lower courts are to go about reviewing evidence of effectiveness. Several key questions remain open: 1) to what degree does a reviewing court assess the validity of the empirical evidence considered by the state when the restriction was adopted; 2) to what extent can the State rely on "common sense" propositions about human behavior, for example, the notion that advertising increases consumption by those who see it, or, more specifically, advertising which children tend to remember has a significant effect on their behavior; and 3) how does a court weigh conflicting evidence, e.g., testimony and studies presented by the state versus similar evidence presented by the industry.

In the ideal case, a state would have conducted a study showing that a certain

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162. *Florida Bar*, 115 S. Ct. at 2376. The Court also made clear that the state may assert more than one interest, and this aspect of *Central Hudson* will be satisfied if one of the interests is substantial. *Id.* at n.1.

163. In *Mangini*, neither the court of appeals, 21 Cal. Rptr.2d 232 (Cal. Ct. App. 1993), nor the California Supreme Court, 875 P.2d 73, 76 (Cal. 1994), dealt with the merits of the First Amendment claims. The court of appeals, in explaining that factual issues were implicated in the First Amendment claim, commented: "[W]hether there is a substantial governmental interest in restriction depends on the link between the Old Joe Camel advertisements and the consumption of cigarettes by minors. Thus, resolution of the First Amendment issue must await the development of a factual record." (footnote omitted) *Mangini*, 21 Cal. Rptr.2d at 240. Although the court's comment was addressed to whether the interest is substantial, what the court probably had in mind was really another prong of *Central Hudson* — whether the restriction directly furthers the governmental interest.

164. *Penn Advertising*, 862 F. Supp. at 1406.

165. *Penn Advertising*, 63 F.3d at 1325 ("In the context of the current public concern over the dangers of cigarette consumption by minors, there can be little opposition to the assertion that the City's objective in reducing cigarette consumption by minors constitutes a substantial public interest.").

166. *Edenfield*, 507 U.S. at 771.

167. *See supra* notes 29-31 and accompanying text.

restriction on commercial speech has advanced a policy goal. Such a study would be "backward-looking," that is, it would be based on actual experience after the restriction was put into place. Often, however, there is no significant evidence of actual effects. Judicial review occurs before there is much experience with a policy, or evidence of effectiveness is difficult to obtain. Proof must then consist of evidence that similar policies in other states have proven effective or that common sense presumptions about human behavior mean that the policy will have some effect in the future. Actual evidence of past effects is probably rare.[168]

In a case where the state restricts cigarette advertising affecting minors, the state's ultimate goal is to reduce minors' purchase of cigarettes. Since all states restrict sales of cigarettes to minors, the point of the advertising restriction is to make these already-existing bans more effective.[169] It certainly should be sufficient for the state to show that a certain advertising practice has increased unlawful purchases by minors. It could then be assumed that barring or restricting the practice would reduce consumption. In practice, however, direct proof of causation is difficult to obtain.

Evidence about the effect of advertising on the behavior of minors consists of studies that attempt to directly link advertising and smoking, and those that attempt to establish the link more indirectly.[170] A full description of this research is beyond the scope of this article. However, there is clearly substantial evidence that at least some advertising practices promote purchases by minors.[171] Are such studies sufficient to uphold restrictions? In large part, the answer depends upon how the Court decides to impose this prong of *Central Hudson.*

Some Justices, particularly Chief Justice Rehnquist and Justice O'Connor, have advocated a less demanding burden in commercial speech cases. For example, in *Posadas*,[172] written by then-Justice Rehnquist, the Court was willing to assume that

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168. In many cases where the Court has upheld a restriction, the states have not presented actual evidence of past effects. Sometimes the Court has relied on the "common sense" assumption that advertising increases consumption. *See, e.g.*, United States v. Edge Broadcasting, 509 U.S. 418, 428 (1993); *Posadas*, 478 U.S. at 344; *see also infra* notes 172-77 and accompanying text. Sometimes the Court has concluded it is sufficient for the state to present evidence that there is a problem without showing that the policy will actually help solve it. *See, e.g., Florida Bar*, 115 S. Ct. at 2378 (accepting anecdotal survey of editorials as basis for concluding that a bar on attorney's solicitation will improve the reputation of Florida attorneys in the future).

169. All fifty states ban sales of cigarettes to minors. *See* STATE TOBACCO CONTROL HIGHLIGHTS 1996, U.S. Dep't of Health and Human Services, Center for Disease Control 10-110 (1996). Section 1926 of the Public Health Service Act requires states to enact legislation restricting the sale and distribution of tobacco products to minors as a condition of receiving federal substance abuse prevention and treatment block grant funds. This section also requires states to enforce these laws in a "manner that can reasonably be expected to reduce the extent to which tobacco products are available to individuals under the age of 18." 42 U.S.C. 300x-26 (1993). Section 897.14 of the recently issued FDA rule also prohibits sales to persons under 18. *See FDA Rule, supra* note 2, at 44,616.

170. For example, some researchers have studied the frequency with which minors recall advertising messages. *See* Appendix I.

171. A list of recent studies of the relationship between advertising and smoking is included as Appendix I. There are also some studies of consumption patterns outside the United States in response to bans on advertising by various countries. Two surveys of the studies on consumption patterns outside the United States are Smith, *The Effect of Advertising on Juvenile Smoking Behavior*, 9 INT'L J. ADVERTISING 57 (Winter 1990) and Michael J. Stewart, *The Effect on Tobacco Consumption of Advertising Bans in OECD Countries*, 12 INT'L J. ADVERTISING 155 (1993). Some of the data regarding consumption outside the United States do not show a link between increased advertising and consumption. The FDA proceeding regarding its rule regulating marketing of cigarettes has produced an extensive administrative record, which is available to the public. *See FDA Rule, supra* note 2, at 44,396.

172. *Posadas*, 478 U.S. 328 (1986).

advertising increases consumption as a general proposition.[173] This approach significantly reduces the state's burden in litigation since empirical evidence of reduced consumption need not be submitted.[174] In *Florida Bar,* written by Justice O'Connor, the Court upheld an attorney-solicitation rule based on a modest showing by the state.[175] The opinion suggests that state restrictions can be based on studies or surveys that do not conform to high standards of social science research.[176] The state may rely on experience from other areas of the country, anecdotal evidence, or simply common sense.[177]

On the other hand, some Justices, particularly Justice Kennedy and Justice Stevens, have argued for a more demanding evidentiary burden. The opinion by Justice Kennedy in *Edenfield v. Fane* emphasized the need for solid evidence.[178] The Stevens' opinion in *Liquormart* also emphasized the need for empirical evidence of effectiveness.[179] Justice Stevens was willing to assume that a bar on price advertising will raise prices and that consumption will, therefore, be "somewhat lower."[180] However, he stated that Rhode Island had to show that the restriction "significantly" reduced consumption.[181] No doubt, these differences over the degree of proof required

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173. *See Posadas,* 478 U.S. at 342. *See also Edge Broadcasting,* 509 U.S. at 434 ("Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments . . . . Here, as in *Posadas de Puerto Rico,* the Government obviously legislated on the premise that the advertising of gambling serves to increase the demand for the advertised product . . . . Congress clearly was entitled to determine that broadcast of promotional advertising of lotteries undermines North Carolina's policy against gambling.") (citations omitted); *Central Hudson,* 447 U.S. at 569 ("There is an immediate connection between advertising and demand for electricity. *Central Hudson* would not contest the advertising ban unless it believed that promotion would increase its sales."); Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490, 501 (10th Cir. 1983), *rev'd on other grounds sub nom* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); Cal-Almond, Inc. v. United States Dep't of Agric., 14 F.3d 429, 439 (9th Cir. 1993) ("[T]he Supreme Court assumes as a matter of law that advertising increases consumption of the product or service being advertised . . . .").

174. The link, then would be an example of a "legislative fact" — a proposition about human behavior that is familiar but that does not lend itself to proof in the context of litigation. *See, e.g.,* Fed. R. Evid. 201 advisory committee's note ("Legislative facts . . . are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body . . . . [This view] renders inappropriate any limitation in the form of indisputability, any formal requirement of notice . . . and any formal requirement of findings at any level. It should, however, leave open the possibility of introducing evidence through regular channels in appropriate situations.").

175. *Florida Bar,* 115 S. Ct. at 2381.

176. In *Florida Bar,* the Court referred to a "106 page study." *Id.* at 2377. However, this study appears to have been primarily a collection of newspaper editorials and anecdotal information. There was a survey of the attitudes of Florida citizens, but it fell far short of accepted norms for social science research. *See supra* notes 69-70.

177. *See id.* at 2378 ("[W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether . . . or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense' . . . . Nothing in *Edenfield* . . . requires more.") (citations omitted).

178. *See Edenfield,* 507 U.S. at 770-71 ("[The state's burden] is not satisfied by mere speculation or conjecture; rather a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree.") Justice Kennedy also dissented in *Florida Bar,* arguing that the state should have presented more evidence. *See supra* note 70.

179. *See* 116 S. Ct. at 1509. The O'Connor opinion in *Liquormart* assumed for purposes of the analysis that the state had met its burden in showing that the restriction was effective. Therefore, it did not comment on the type of degree of proof needed to sustain the state's burden. *See id.* at 1521.

180. *Id.* at 1509.

181. *See id.* ("We can agree that common sense supports the conclusion that a prohibition against price advertising, like a collusive agreement among competitors to refrain from such advertising, will

reflect deeper conflicts over the degree of protection to be afforded commercial speech.

Disagreements on the Supreme Court spill over into arguments before the lower courts. In *Penn Advertising*, the plaintiff made the argument that the Supreme Court in *Edenfield* had increased the state's burden to show the effect of a restriction and now requires that the link between advertising and increased consumption must be established in each case.[182] The district court rejected this contention and concluded that the link could be assumed.[183] The court of appeals in *Penn Advertising* also appears to have assumed that the causal link could be established without empirical proof.[184]

No doubt, the Stevens opinion in *Liquormart* will revive the argument that there must be empirical proof of effects in evaluating restrictions aimed at minors. Moreover, opponents of restrictions will also argue that the state must now prove a *significant* reduction in consumption.[185] However, *Liquormart* itself does not mandate these requirements. In fact, *Liquormart* says very little about the unique nature of restrictions on cigarette advertising that affects minors.

The first reason that Justice Stevens' discussion of the evidentiary burden may not apply is that it represents the view of only four Justices.[186] No other Justice took a position on the degree of empirical proof required to support a restriction.[187] Sec-

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tend to mitigate competition and maintain prices at a higher level than would prevail in a completely free market. Despite the absence of proof on the point, we can even agree with the State's contention that it is reasonable to assume that demand, and hence consumption throughout the market, is somewhat lower . . . However, without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance.") (citations omitted).

182. *Penn Advertising*, 862 F. Supp. at 1407.

183. *Id.* at 1410 ("This Court holds that it remains appropriate in the wake of *Edenfield* to accept the judicially-recognized proposition that advertising increases consumption. Furthermore, if advertising increases consumption among the general population, it is also reasonable to accept the proposition that advertising increases consumption among youths. If anything, this statement may be more applicable to the youthful population than to the adult population due to the impressionable nature of youngsters.") The district court relied particularly on *Cal-Almond*, 14 F.3d 429 (9th Cir. 1993). *See Penn Advertising*, 862 F. Supp. at 1410.

184. *See Penn Advertising*, 63 F.3d at 1325. The court of appeals pointed to its own findings in a related case involving a municipal restriction on alcohol advertising, Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305 (4th Cir. 1995). In the case of the alcohol ordinance, the city had relied on numerous studies to show the link between alcohol advertising and consumption by minors. These were clearly helpful to the city in persuading the court of appeals to uphold the ordinance. *Id.* at 1325. The court of appeals in *Penn Advertising*, however, did not rely on any evidence of the effect of cigarette advertising, nor did it appear to conclude that the studies of the effect of alcohol advertising could be extended to cigarette advertising. It simply assumed that the legislature's conclusion was reasonable. "There is a logical nexus between the City's objective and the means it selected for achieving that objective, and it is not necessary, in satisfying *Central Hudson*'s third prong, to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem. If that were required, communities could never initiate even minor steps to address their problems, for they could never be assured of the success of their efforts. The proper standard for approval must involve an assessment of the reasonableness of the legislature's belief that the means it selected will advance its ends." *Id.* (quoting *Anheuser-Busch*, 63 F.3d at 1316).

185. Requiring a greater degree of proof that a state policy will reduce consumption is different from requiring proof that a state policy will reduce consumption by a greater degree. Justice Stevens seemed to say that the state's burden is to show the latter. *See supra* note 68. Thus, a modest evidentiary showing that an advertising practice could effect a very large number of minors may be sufficient.

186. Three other Justices joined Part V of the opinion, which discusses the evidence required to justify a restriction — Justices Kennedy, Souter and Ginsburg. *Liquormart*, 116 S. Ct. at 1499.

187. Justice Thomas expressly declined to weigh the evidence in support of the state's policy. *See*

ond, Justice Stevens stated that a particularly strong showing is required in the case of complete restrictions on speech.[188] In contrast, local cigarette advertising restrictions typically leave open alternative avenues for disseminating commercial messages to adults such as magazines and newspapers.[189] Arguably, when ample alternatives are available, Justice Stevens himself would endorse applying less demanding scrutiny.

In addition, the more demanding scrutiny in *Liquormart* was applied to a state restriction aimed at withholding information from adult decision-makers.[190] Both the Stevens and Thomas opinions were clearly concerned about paternalism — attempts by the state to discourage lawful behavior by adults.[191] This concern about paternalism also animated Justice Stevens' opposition to a special rule for lawful "vice" activity.[192] A different analysis should apply when the state attempts to change the behavior of minors. Lawful behavior by adults, which might simply be considered "vices," can be unlawful when practiced by minors. The states then face the difficult dilemma of discouraging unlawful activity by one group while allowing speech about the same activity to reach the group for which it is lawful. Greater deference to the states is warranted when they attempt to strike this difficult balance.[193]

The Court has frequently recognized that minors are not prepared to evaluate potentially harmful speech in the same way that adults can. As a result, speech that the state cannot keep from adults can be kept from minors.[194] In those cases, the First

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Liquormart, 116 S. Ct. at 1518.

188. *See, e.g., id.* at 1509 ("In evaluating the ban's effectiveness in advancing the State's interest, we note that a commercial speech regulation 'may not be sustained if it provides only ineffective or remote support for the government's purpose.' [T]he State bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so 'to a material degree.' The need for the State to make such a showing is particularly great given the drastic nature of its chosen means — the wholesale suppression of truthful, nonmisleading information.") (citations omitted); *see also id.* at 1506, 1507.

189. *See infra* notes 211-13 and accompanying text.

190. Justice Stevens' examples of bans on advertising unrelated to consumer protection all involved cases where the state was attempting to modify the purchasing decisions of adults. They included: Bates v. State Bar of Ariz., 433 U.S. 350, 355 (1977) (ban on lawyer advertising); Carey v. Population Servs., Int'l, 431 U.S. 678, 700 (1977) (a ban on contraceptive advertising); Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85, 92-94 (1977) (a ban on "For Sale" signs in neighborhoods undergoing racial change); Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (ban on prescription drug price advertising); and Bigelow v. Virginia, 421 U.S. 809, 825 (1975) (ban on abortion advertising). *See Liquormart*, 116 S. Ct. at 1505, n.8.

191. *See, e.g., id.* at 1511 ("[I]n keeping with our prior holdings, we conclude that a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes . . . .") (opinion of Justice Stevens); *See also id.* at 1518 ("I do not join the principal opinion's application of the *Central Hudson* balancing test because I do not believe that such a test should be applied to a restriction of 'commercial' speech, at least when, as here, the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark.") (footnote omitted) (opinion of Justice Thomas).

192. *See id.* at 1513 ("Almost any product that poses some threat to the protection afforded by the First Amendment would be difficult, if not impossible to define . . . . Such characterization . . . is anomalous when applied to products such as alcoholic beverages, lottery tickets, or playing cards, that may be lawfully purchased on the open market.").

193. The *Central Hudson* formulation provides that commercial speech must "concern lawful activity" for it to receive any constitutional protection. *Central Hudson*, 447 U.S. at 566. *See also Virginia Bd. of Pharmacy*, 425 U.S. at 772-73 (stating that there is no First Amendment protection for speech that proposes an illegal transaction). The Court has not yet had to analyze a restriction on speech that promotes both lawful and unlawful transactions.

194. The Court has consistently applied a different standard in evaluating policies aimed at preventing harmful speech from reaching minors. *See, e.g.*, Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2386 (1996) (government has a compelling interest in protecting

Amendment concern is not about paternalism at all, but about minimizing the degree to which restrictions unnecessarily prevent speech from reaching adults.[195]

A final question is whether a court is to somehow weigh the evidence for and against the effectiveness of a restriction, or whether the court need only determine if the state has a significant body of evidence supporting its policy.[196] The latter approach would be similar to the "substantial evidence" standard applied in judicial review of administrative decisions.[197] The Court has historically insisted on the need for an independent review of the record in cases where speech restrictions are at issue.[198] However, this tradition evolved in the context of highly politicized cases where there was ample reason to distrust the fact-finding process.[199]

Commercial speech restrictions are inherently less likely to be attempts to oppress an ideological minority or to squelch controversial points of view. Consequently, there is less justification for courts to engage in a de novo review of the factual findings of lower courts or legislative bodies. Thus, a substantial evidence scope of review is more consistent with the intermediate scrutiny given to restrictions on commercial speech.[200] Moreover, it is a more realistic burden to place on local legislative bodies, which must make policy decisions in the real-life context of the political process. In fact, that is the approach the Court seems to use.[201] In short, the question should be whether the policy-making body has substantial evidence that its policy will discourage illegal purchases, not whether a preponderance of the evidence shows such an effect.

In summary, there are several reasons to conclude that *Liquormart* does not modify the traditional *Central Hudson* analysis as applied to restrictions on cigarette advertising that affects minors. In particular, states should be able to rely on the common sense presumption that advertising promotes consumption.[202] Even if a traditional analysis of *Central Hudson* is applied to these kinds of restrictions, however, proof of the effect of advertising restrictions is complicated by a dispute about the audience itself. In cases where the Supreme Court was willing to accept a presumption about effects (e.g., *Posadas* and *Edge Broadcasting*), the advertising was concededly

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children from exposure to patently offensive sexually related material); Sable Communications of California, Inc., v. FCC 492 U.S. 115, 126 (1989) (government may act to prevent indecent messages from reaching minors); Ginsberg v. New York, 390 U.S. 629, 639-41 (1968) (state may prohibit sale of material to minors even though it is not obscene). On remand, the court of appeals emphasized this point in upholding ordinances regulating alcohol and cigarette advertising in order to protect minors. *See* Anheuser-Busch v. Schmoke, 101 F.3d 325, 329 (4th Cir. 1996).

195. *See, e.g., Denver Area Educ. Telecom. Consortium, Inc.*, 116 S. Ct. at 2391-92 (even though protection of minors is a compelling interest, strict scrutiny requires the government to adopt the least restrictive alternative).

196. The latter position seems to have been the view of the court of appeals in *Penn Advertising*. *See supra* note 184.

197. *See, e.g.*, Finzer v. Berry, 798 F.2d 1450, 1460 (D.C. Cir. 1986).

198. *See, e.g.*, Bose Corp. v. Consumers Union of United States. 466 U.S. 485, 505-08 (1984).

199. For example, the Court emphasized the need for an independent review of the record in a number of cases where civil rights demonstrators had been arrested for threatening a breach of the peace. *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229, 235 (1963); Cox v. Louisiana, 379 U.S. 536, 546-52 (1965). The core concern is that the fact finder may not be neutral in assessing the actions of controversial minorities. *See Bose Corp.*, 466 U.S. at 570; New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

200. The Court has offered a number of reasons why commercial speech should be subject to less demanding scrutiny than restrictions on non-commercial speech. *See supra* note 31.

201. *See supra* notes 173-81 and accompanying text.

202. *See supra* notes 168, 173-74 and accompanying text.

aimed at adults, and the state's concern was about the effect on adults.[203] The advertisers in those cases were hard-pressed to claim that such advertising had no effect since they were willing to spend substantial sums for it.[204] A claim that certain cigarette advertising affects minors will inevitably be more controversial. The tobacco industry will surely argue that the advertising is aimed only at adults and that its exclusive effect (if any) is on them. Thus, lower courts may be hesitant to accept a presumption that an advertising restriction will reduce illegal purchases by minors in the absence of any proof that a particular campaign practice is likely to affect minors.[205] Therefore, a state or city should be prepared to present some evidence of the likely effect on minors, even if it relies on inferences and even if it is based on experience in other localities.

D. Is there a Reasonable Fit Between the State's Goal and the Means Chosen to Achieve It?

The last prong of *Central Hudson* concerns the degree to which the restriction is "tailored" to the State's goal. As discussed earlier, the State need not carry the very demanding burden that there is no less restrictive alternative. Instead, the fit needs only to be reasonable. Thus, this "tailoring" standard is less demanding than the one applied to non-commercial speech.[206]

The Court asks two kinds of questions in applying this "reasonable fit" requirement. First, does the state's policy restrict the least amount of speech possible while still accomplishing its goal? In the case of a restriction intended to prevent advertising that presents products to minors, for example, the question would be whether the restriction unnecessarily restricts speech that affects only adults. The second question is related, but it raises quite different issues: are there alternative policies that can accomplish the state's goal as effectively without restricting speech at all? For example, if the state's goal is to reduce consumption, would alternative approaches such as regulating prices or banning a product entirely be just as effective?

E. Reasonable Fit and the Preemption Analysis

The "reasonable fit" analysis is related to the preemption inquiry about the scope of a restriction, but there are some important differences. First, the point of the preemption inquiry about scope is to determine the true basis of the state's policy. In that context, the problem of lack of fit is that it undermines the State's asserted rationale.

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203. *See Central Hudson*, 447 U.S. at 560; *Posadas*, 478 U.S. at 341; *Edge Broadcasting*, 509 U.S. at 429.

204. *See Central Hudson*, 447 U.S. at 567 ("Most businesses — even regulated monopolies — are unlikely to underwrite promotional advertising that is of no interest or use to consumers.").

205. On the other hand, the district court in *Penn Advertising* thought the presumption was even stronger in the case of children. *See supra* note 183.

206. *See Liquormart*, 116 S. Ct. at 1521 (O'Connor, J., concurring); *see also supra* notes 80-82 and accompanying text. The less demanding "reasonable fit" requirement was originally stated in Board of Trustees v. Fox, 492 U.S. 469, 480-81 (1989). A second difference involves the application of the overbreadth doctrine to restrictions that are overly broad on their face. In non-commercial speech cases, the Court will strike down an overly broad restriction even though the speech to which it is applied can constitutionally be prohibited. *See e.g.*, Gooding v. Wilson, 405 U.S. 518, 521-22 (1972). However, this "strong medicine" is not applied to commercial speech on the grounds that commercial speech is less "susceptible to being crushed by overbroad regulation." *See Bates*, 433 U.S. at 380-81.

The point of the First Amendment inquiry about scope is ordinarily whether the restriction goes too far in restricting speech. In that context, the problem of lack of fit is that some speech is unnecessarily restricted in light of the state's goal.

Several implications follow from these differences. For example, an exceedingly broad restriction on speech (e.g., a ban on all outdoor advertising within a city) would survive preemption analysis because it would be consistent with a non-health goal, such as the preservation of an aesthetically pleasing environment or improving traffic safety.[207] The point of the preemption inquiry is not how narrow or how broad the restriction is, but whether it is consistent with a non-health goal. On the other hand, such a restriction might be viewed as overly broad for purposes of First Amendment analysis because it goes too far in restricting speech.[208] In determining whether restrictions are overly broad, First Amendment cases have traditionally considered whether there are still other channels for conveying the same message.[209] The existence of other channels has no particular relevance in the preemption inquiry.

A second difference is that the preemption inquiry does not require the State to show that there are less restrictive alternatives. In fact, it is not obvious what "less restrictive" would mean in the preemption context, since the question is simply whether the restriction is based on a non-health goal. First Amendment analysis, however, does require at least some consideration of less restrictive alternatives since there is always an underlying value at stake — freedom of speech.

F. Unreasonably Broad Restrictions

The primary concern about a commercial speech regulation should be whether it unnecessarily restricts too much speech. Thus, the more a restriction is targeted to a particular type of advertising practice, the less should be the concern that the restriction is unreasonably broad. Neither court in *Mangini* dealt with the merits of the First Amendment issues.[210] Thus, we do not yet have a court opinion specifically analyzing the problem of overbreadth raised by a restriction on the use of a cartoon character. Nevertheless, it seems clear that such a narrow restriction should not raise overbreadth concerns. First, the restriction appears narrowly tailored to accomplish the goal of protecting minors. Second, advertisers are left with ample alternative channels to

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207. Both of these interests were advanced by the City of San Diego in support of its ordinance banning certain types of outdoor advertising. *See Metromedia*, 453 U.S. at 507-08.

208. For example, some small outdoor signs might be viewed as presenting no risk to aesthetics or safety and, therefore, a ban on all outdoor advertising of whatever kind might be too broad. *See, e.g., Metromedia*, 453 U.S. at 528-30 (Brennan, J., concurring). Seven Justices were prepared to conclude that San Diego could ban all offsite commercial billboard advertising. *See id.* at 512-17 (White, J., op. of the Court, joined by Stewart, J., Marshall, J., and Powell, J.); *Id.* at 555 (Stevens, J., dissenting in part); *id.* at 555-69 (Burger, C.J., dissenting); and *id.* at 570 (Rehnquist, J., dissenting); *see also Discovery Network*, 507 U.S. at 444 (Rehnquist, C.J.) (summarizing the views of various Justices in *Metromedia*). However, the ordinance was struck down in part because it barred certain non-commercial messages when commercial messages were allowed in the same location. *Metromedia*, 453 U.S. at 512-15.

209. *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2468 n.8 (1995); City of Ladue v. Gilleo, 114 S. Ct. 2038, 2045 (1994); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981). On the other hand, the Court has said that the existence of alternative channels will not save a restriction on commercial speech, if there is no valid justification for treating it differently from other speech. This is one point of *Discovery Network*, 507 U.S. at 427. *See also* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 79-80 (1983) (Rehnquist, J., concurring).

210. *See supra* note 136.

convey their message. A ban on a particular image in advertising leaves all other types and locations of advertising media open to the advertiser. In fact, it is hard to believe that such a restriction significantly burdens a manufacturer's ability to convey its message unless the message *is* aimed at children.

A ban on billboard advertising of cigarettes presents a more difficult case, since manufacturers are precluded from at least one major channel of advertising. The district court in *Penn Advertising*, however, concluded that a bar on certain types of billboard advertising was not overly broad.[211] First, the court was persuaded that the city had done a reasonable job of crafting the ordinance to restrict advertising that would reach minors.[212] In fact, billboard advertising was viewed as having a particularly significant effect on minors.[213] Second, there were ample alternative channels available for advertisers to reach their adult audience. In addition to billboards in commercial and some residential areas, tobacco manufacturers had access to newspapers, magazines, signs inside stores which sell cigarettes, storefronts of businesses that sell cigarettes, and the inside and outside of busses.[214] The court of appeals agreed with the reasoning of the district court.[215]

G. Underinclusive Restrictions

The plaintiff in *Penn Advertising* also argued that the ordinance was underinclusive, that is, in some respects it did not go far enough. In particular, the plaintiff pointed to the fact that the ordinance did not cover other forms of similar advertising, such as newspapers and magazines.[216] For example, the ordinance exempted signs outside retail stores selling cigarettes though it barred other outdoor signs. An attack based on underinclusiveness is conceptually different from one based on overbreadth since the claim is that it restricts too little speech, not too much.

The Supreme Court has made clear that underinclusiveness is not fatal under rational basis review. The traditional rationale is that the State need not address the

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211. The ordinance reviewed in *Penn Advertising* barred advertising in residential areas of Baltimore. Outdoor signs were permitted outside retail stores that sold cigarettes. *Penn Advertising*, 862 F. Supp. at 1414.

212. "The City has limited the ban on cigarette advertising to billboards in neighborhoods in which children would typically be found such as the areas in which they live, attend school and church and recreate. In those residential and business zones in which children would not normally be found, the ordinance has no effect." *Id.* at 1414 (footnote omitted).

213. "[T]here are legitimate justifications related to the city's substantial interest for distinguishing between billboards and other types of mediums which the ordinance does not affect. The distinction between permitted and prohibited forms of advertising rests on the effect that different mediums have on adolescents." *Id.* at 1411. The court quoted with approval the comment by Judge Hargrove in the related case dealing with alcohol advertising. ("[A] billboard is a constant fixture in a neighborhood. It looms over children every day while they walk to school, and every time they play in their neighborhood, thus forming an inescapable part of their daily life.") *Id.* (quoting *Anheuser-Busch*, 855 F. Supp. at 822).

214. *Penn Advertising*, 862 F. Supp. at 1414.

215. "If there were some less restrictive means of screening outdoor advertising from minors, or of reducing the area of billboard regulation in a manner that would have it focus more efficiently on reaching minors, the City would have to consider those alternatives. But it is not an acceptable response to the approach taken by the City of limiting advertising exposure to say that the City must abandon altogether an approach that directly advances its goal. In the face of a problem as significant as that which the City seeks to address, the City must be given some reasonable latitude." *Penn Advertising*, 63 F.3d at 1325-26 (quoting *Anheuser-Busch*, 63 F.3d at 1316). *See also* Anheuser-Busch v. Schmoke, 101 F.3d 325, 329 (4th Cir. 1996).

216. *Penn Advertising*, 862 F. Supp. at 1411.

entire scope of a problem, if it wants to address part of it.[217] It is not obvious that a claim of underinclusiveness should be given any weight in First Amendment cases either, since the core value to be protected — freedom of speech — is not threatened when the law is underinclusive.[218] Nevertheless, the Court has sometimes struck down a speech restriction based on what might loosely be described as underinclusiveness.

In *Discovery Network*, for example, the city barred the use of sidewalk newsracks used to disseminate commercial handbills but did not ban newsracks disseminating non-commercial newspapers.[219] The Court stated that it would reach the same conclusion, even if it were assumed that the city could ban all newsracks on public property.[220] The Court overturned the ordinance because it concluded that there was no legitimate justification for distinguishing between newsracks that contained commercial speech and those that contained non-commercial speech. Newsracks containing both types of speech caused the same problem the city claimed it was trying to solve — protecting safety and aesthetics.[221]

An attack based on underinclusiveness is more directly related to the second prong of *Central Hudson* — the requirement that the restriction directly advance the government's interest. Underinclusiveness can appear to undermine the rationality of the regulatory scheme or suggest that the scope of a regulation is so narrow that its effect is de minimis. Thus, a court may conclude that the scheme has no significant effect, that the government is actually trying to accomplish some other goal, or simply that the government does not know what it is doing. In any case, the government has failed to show that the restriction directly furthers a substantial interest. Similar reasoning appears in *Rubin v. Coors Brewing Co.*, where the Court criticized the federal regulatory scheme of barring alcohol content on beer labels on the ground that it did not go further.[222] The Court seemed to believe that the narrowness of the restriction showed that the government really had another goal in mind besides preventing "strength wars," or that it did not believe that preventing strength wars was a significant goal in the first place.[223]

If the state can show that there is a legitimate justification for limiting the reach of a restriction, the underinclusiveness claim should be rejected. In *Discovery Network*,

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217. *See, e.g.*, Williamson v. Lee Optical of Okla., 348 U.S. 483, 489 (1955).

218. See, for example, the Court's comment in *Edge Broadcasting*, regarding a Federal statute that prevented a radio station in Virginia from broadcasting lottery advertising that reached North Carolina, a state that barred gambling. "Nor do we require that the Government make progress on every front before it can make progress on any front. If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced. Accordingly, the Government may be said to advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated." *Edge Broadcasting*, 509 U.S. at 434.

219. *Discovery Network*, 507 U.S. at 413-14.

220. *Id.* at 427-28.

221. *See id.* at 426 ("[T]he city's primary concern . . . is with the aggregate number of newsracks on its streets. On that score, however, all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at fault.").

222. *Coors Brewing Co.*, 115 S. Ct. 1585 (1995).

223. *See id.* at 1592-93 ("If combatting strength wars were the goal, we would assume that Congress would regulate disclosure of alcohol content for the strongest beverages as well as for the weakest ones . . . . One would [also] think that if the Government sought to suppress strength wars by prohibiting numerical disclosures of alcohol content, it also would preclude brewers from indicating higher alcohol beverages by using descriptive terms.").

the city claimed that the distinction was based on the fact that commercial speech was entitled to less constitutional protection than non-commercial speech.[224] A majority of the Court viewed a different level of constitutional protection as inadequate to uphold the distinction.[225] In contrast, in *Penn Advertising* there were two justifications for the limitations on the scope of the ordinance: the commercial interest of businesses in communicating location and the lower likelihood that these kinds of signs would affect children.[226] There is ample precedent for making these kinds of distinctions in advertising regulation. In particular, a closer analogy to this type of distinction is the ban on certain types of offsite billboards reviewed in *Metromedia*.[227] The opinion of the Court expressly stated that a distinction between offsite and onsite advertising could be justified.[228]

The majority was probably wrong in *Discovery Network* in recognizing an underinclusiveness claim when there was a basis offered for the city's classification scheme. In fact, the district court in *Penn Advertising* suggested that the state does need to justify a decision to regulate only certain types of speech. In the view of the district court, it is enough to say that the state "need not make progress on all fronts before attempting to make progress on any."[229] While this view may be the most sensible one, a majority of the Supreme Court seems prepared to insist that the state justify both the breadth and narrowness of its regulation. Ordinarily, there will be a

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224. *Discovery Network*, 507 U.S. at 415.

225. *Id.* at 426-27. It is not obvious why the different levels of constitutional protection are insufficient to justify such a distinction. In *Discovery Network*, the Court relied on *Bolger*, 463 U.S. 60 (1983), to conclude that the lower level of protection for commercial speech would not justify different treatment by the government. *Id.* at 427. However, the Court in *Bolger* simply found that there was no substantial state interest in preventing persons from being offended who received unsolicited contraceptive advertising. *Bolger*, 463 U.S. at 72. The distinction between commercial and noncommercial speech was beside the point since the restriction would fail under the test for commercial or non-commercial speech. *See Discovery Network*, 507 U.S. at 416, n.11.

226. "The City seeks to prevent the exposure of minors to advertisements that will increase their demand for cigarettes. They do not seek to hide the locations of establishments that sell cigarettes, thereby placing obstacles in the way of adult smokers seeking to purchase cigarettes and harming local businesses . . . . Ordinance 307 accomplishes this while not unnecessarily interfering with local businesses or adult smokers by prohibiting the smaller on-site advertisements that likely have less influence on youngsters and serve a commercial and public interest by informing adult smokers of where cigarettes may be purchased." *Penn Advertising*, 862 F. Supp. at 1413.

227. *Metromedia*, 453 U.S. 490 (1981).

228. *Id.* at 511-12 ("It is . . . argued that the city denigrates its interest in traffic safety and beauty and defeats its own case by permitting onsite advertising and other specified signs . . . . [T]his argument has been rejected, at least implicitly, in all of the cases sustaining the distinction between offsite and onsite commercial advertising . . . . [W]hether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising. Second, the city may believe that offsite advertising, with is [sic] periodically changing content, presents a more acute problem than does onsite advertising . . . .Third, San Diego has obviously chosen to value one kind of commercial speech—onsite advertising—more than another kind of commercial speech—offsite advertising.") *Id.* at 510-12 (citations omitted). See also the Court's discussion of *Metromedia* in *Discovery Network* ("[T]he offsite-onsite distinction involved disparate treatment of two types of commercial speech. Only the onsite signs served both the commercial and public interest in guiding potential visitors to their intended destinations . . . ") *Discovery Network*, 507 U.S. at 425 n.20. *See also* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 810-11 (1984) (city's bar on posting of signs on public property upheld even though it did not extend to private property); Dunagin v. City of Oxford, 718 F.2d 738, 751 (5th Cir. 1983) (upholding a ban on intrastate liquor advertising even though interstate advertising allowed).

229. *Penn Advertising*, 862 F. Supp. at 1413.

justification for excluding certain categories of advertising based on the relative importance to adults and to affected business, and conversely, the relatively lesser impact on minors.

H. Non-speech Restricting Alternatives

The most difficult hurdle for states in justifying advertising restrictions may be the requirement that the state pursue policy alternatives that do not restrict speech at all. Unfortunately, the Court has been willing to give credence to alternatives casually suggested by parties during litigation. For example, in *Coors Brewing Co.*, the Court was willing to accept direct price regulation as a credible alternative to limitations on content labeling in order to prevent strength wars.[230] Not a single word was said about the administrative difficulties of this approach.

In *Liquormart*, both the Stevens and O'Connor opinions required the state to pursue non-speech restricting approaches to reducing alcohol consumption, including price or consumption regulation.[231] No attention was paid to the formidable — one might even say insurmountable — problems a state would face in monitoring beer purchases by millions of persons. As Justice Thomas commented, these non-speech restricting alternatives can be more restrictive than a regulation of speech.[232] The willingness of the Court to seize upon non-speech alternatives with little or no analysis represents a serious flaw in its current approach to commercial speech cases. An irony in some of the Court's recent commercial speech cases has been the tendency to impose a heavy evidentiary burden on the state while imposing no evidentiary burden on those who suggest alternatives. Granting automatic plausibility to non-speech restricting alternatives can effectively preclude any alternative that involves restricting speech.[233]

A second flaw in the requirement that the state must choose a non-speech restricting alternative is that it may foreclose the only politically acceptable approach to a serious social problem. In the case of restrictions on cigarette advertising, for example, a social policy of reducing consumption by limiting advertising attracts considerable political support because it imposes costs on only a small number of groups compared to the groups that may benefit. The tobacco industry and persons who want access to unrestricted advertising lose out while parents, smoking opponents, and teenagers benefit. In contrast, banning cigarettes entirely or regulation of consumption, would provoke opposition by a much greater array of groups. Committed users would incur substantial costs, along with the costs to industry, whose very existence would be

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230. *See supra* note 84 and accompanying text.

231. *See supra* notes 47-50 and accompanying text.

232. *See Liquormart*, 116 S. Ct. at 1519.

233. Justice Thomas took the position in *Liquormart* that a state can never justify barring truthful advertising to reduce consumption. *See id.* at 1518-19. He concluded that the practical effect of the Stevens and O'Connor opinions was apparently the same as his proposed rule of per se illegitimacy. *See id.* at 1519 ("[The Stevens and O'Connor opinions] would appear to commit the courts to striking down restrictions on speech whenever a direct regulation (i.e., a regulation involving no restriction on speech regarding lawful activity at all) would be an equally effective method of dampening demand by legal users. But it would seem that directly banning a product (or rationing it, taxing it, controlling is price, or otherwise restricting its sale in specific ways) would virtually always be at least as effective in discouraging consumption as merely restricting advertising regarding the product would be, and thus virtually all restrictions with such a purpose would fail the fourth prong of the *Central Hudson* test.")

threatened. In addition, substantial costs would be imposed on all taxpayers because of the massive administrative burden of implementing such a policy. In large part for these reasons, there is no significant political support for banning the sale of cigarettes. A tax increase provokes opposition by committed users and the industry. Moreover, the opposition "spills over" to include persons who may be non-smokers because of a generalized opposition to higher taxes.[234]

In short, restrictions on advertising will often represent a natural political equilibrium, which discourages consumption by occasional, uncommitted smokers, while posing less threat to the industry and preserving freedom of choice for habitual smokers.[235] Applying the First Amendment in a way that drastically constrains the choices the public can make in a very real sense undermines a broader First Amendment value — democratic decision-making itself.

The Court should reconsider its casual acceptance of non-speech restricting alternatives. At the very least, there should be some burden on the parties suggesting alternatives to show that they will be equally effective. Moreover, the Court should consider the administrative costs of implementing such alternatives along with the burden on individuals. However, the willingness of the Court to seize upon these alternatives with no real evidentiary showing suggests that states should be prepared to show why alternatives that do not restrict speech are inadequate.

Even if the Court continues to require non-speech restricting alternatives, the requirement should have little applicability to restrictions on advertising that affect minors. These restrictions supplement already-existing bans on purchases by minors.[236] In fact, states and cities only adopt advertising restrictions because prohibitions on sales are not completely successful. Thus, these are not situations where the states have failed to attempt non-speech restrictive alternatives. The most intrusive approach of all — a flat ban on sales — has proven only partly effective. Advertising restrictions are necessary to make the states' other approaches work better.

VI. CONCLUSION

States and localities do have some authority to regulate cigarette advertising, though the precise parameters of this authority must await further development by the courts. The 1969 Act, as interpreted by *Cipollone*, is not easy to apply. As is often the case, political compromises in Congress have left a regulatory framework that is neither a model of clarity nor even particularly sensible. Nevertheless, until the political equilibrium in Congress changes, or FDA actions make much of the preceding discussion unnecessary, the *Cipollone* preemption framework will remain the principle hurdle to state and local law, at least regarding limitations of federal law. First Amendment considerations also pose a challenge to local regulation, but a well-crafted law accompanied by evidentiary support has a good chance of overcoming this difficulty.

The preceding discussion suggests that the kinds of laws most likely to survive the twin hurdles of preemption and First Amendment analysis fall into two categories:

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234. *See, e.g.*, Andrea Neal, *Low Taxes, High Death Rates for Smokers*, INDIANAPOLIS STAR, Feb. 1, 1996, at A-8 (commenting that defeat of a proposal to raise cigarette excise taxes was based on the broader dislike of tax hikes).

235. *See, e.g.*, Alison Mitchell, *Clinton Set to Approve Curbs on Cigarette Sale to Youths*, N.Y. TIMES, Aug. 22, 1996, at A-3 (discussing polls that show widespread support for restrictions on advertising that may encourage minors to smoke).

236. *See supra* note 169.

1) flat prohibitions on particular advertising practices, including those involving the content of advertising, as long as they do not mandate affirmative disclosures; and 2) restrictions on the location and types of advertising that already must be tailored to local markets, such as the use of billboards or promotional handouts. In all cases, *Cipollone* requires that the state or local restriction must be grounded on a different basis than protecting minors from the dangerous health effects of smoking. At the same time, the restrictions should be reasonably tailored to go only as far as necessary to advance this goal. States should assemble evidence supporting the likely effectiveness at the time of enactment and be prepared to make a strong evidentiary case for their policy when it is challenged. These latter requirements follow from *Central Hudson* and the Court's analysis of restrictions on commercial speech.

The industry has argued that even a restriction narrowly tailored to prevent minors from making illegal purchases is preempted since the only reason to protect minors is to protect their health. This may prove to be the most vulnerable part of the industry's position. Courts are unlikely to accept the bald proposition that states are helpless to prevent even the most blatant commercial attempts to encourage children to buy products that the state has declared are illegal. There is a particular irony, in fact, in the tobacco industry, which has historically denied the dangerous health effects of its products, claiming that the only reason a state would regulate cigarette advertising is a concern about death and disease.

APPENDIX I: RECENT STUDIES OF THE RELATIONSHIP BETWEEN CIGARETTE ADVERTISING AND SMOKING BY MINORS

Pierce, et al., *Influence of Tobacco Marketing and Exposure to Smokers on Adolescent Susceptibility to Smoking*, 87 J. NAT'L CANCER INST. 538 (1995) (children with high susceptibility to cigarette advertising are more likely to start smoking).

Changes in the Cigarette Brand Preferences of Adolescent Smokers — United States, 1989-1993, 11 JAMA 843 (1994) (brands most commonly purchased by teenagers corresponded to most heavily advertised brands).

Pierce, et al., *Smoking Initiation by Adolescent Girls, 1944 Through 1988: An Association With Targeted Advertising*, 8 JAMA 608 (1994) (growth in initiation rates of smoking among teenage girls coincided with introduction of advertising targeting female smokers).

Botvin, et al., *Smoking Behavior of Adolescents Exposed to Cigarette Advertising*, 108 PUB. HEALTH REP. 217 (1993) (adolescent smokers with high exposure to advertising are more likely to be smokers).

Pierce, et al., *Does Tobacco Advertising Target Young People To Start Smoking? Evidence From California*, 266 JAMA 3154 (1991) (perception of advertising higher among young smokers; changes in market-share resulting from advertising occur mainly among younger smokers).

DiFranza, et al., *R.J.R. Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children*, 266 JAMA 3149 (1991) (Old Joe Camel cartoon figure more effective at marketing cigarettes to children than to adults).

Fischer, et al., *Brand Logo Recognition By Children Aged 3 to 6 Years: Mickey Mouse and Old Joe the Camel*, 266 JAMA 3145 (1991) (Old Joe Camel figure as well recognized by children as Mickey Mouse).

Klitzner, et al., *Cigarette Advertising and Adolescent Experimentation With Smoking*, 86 BRIT. J. ADDICTION 287 (1991) (adolescents who experimented with cigarettes are better able to recognize advertised products).