

PLAYING POLITICS OR PROTECTING CHILDREN?

CONGRESSIONAL ACTION & A FIRST AMENDMENT ANALYSIS OF THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT

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INTRODUCTION

A battle of the “big” erupted in the U.S. House of Representatives when the Family Smoking Prevention and Tobacco Control Act¹ drew debate in 2009.² On one side was “Big Tobacco,” playing its archetypal villainous role as peddler of deadly cigarettes to the nation’s youth.³

“Big Tobacco claims they don’t market to kids. Yet, they continue to do a pretty good job of getting kids to use their product. This has got to change,” declared Rep. Jared Polis (D-Colo.).⁴ Polis, whose mother died of cancer, contended that tobacco “receive[s] less regulation than a head of lettuce.”⁵

On the other side stood “Big Government,” playing its patently

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1. Pub. L. No. 111-31, 123 Stat. 1776 (2009) (to be codified as amended at 15 U.S.C. § 1333 (2009), 15 U.S.C. § 4402 (2009) and 21 U.S.C. § 387a-1 (2009), as certain provisions do not take immediate effect).

2. 155 CONG. REC. H4310 (daily ed. Apr. 1, 2009).

3. The editors of the *St. Louis Post-Dispatch* neatly encapsulated, in a single sentence, the evil image of Big Tobacco when they opined that “it’s tough to feel even the tiniest twinge of sympathy for an industry that profits handsomely from selling highly addictive, cancer-causing products, that tries to get kids hooked on them and that has repeatedly lied about their health risks.” Editorial, *Call for Philip Morris: Off the Hook . . . For Now*, ST. LOUIS POST-DISPATCH, Dec. 19, 2005, at D8.

4. 155 CONG. REC. H4310, 1416 (daily ed. Apr. 1, 2009).

5. *Senate Fight Looms on Tobacco Bill*, CHATTANOOGA TIMES FREE PRESS (Tenn.), Apr. 3, 2009, at A3.

paternalistic part⁶ and riding in to rescue minors from cancer. Texas Republican Ted Poe derided the Act as little more than “feel-good legislation that makes Big Government bigger and costlier.”⁷ Beyond the overhead of administering and enforcing the new law, the prospect of protracted litigation over the First Amendment⁸ implications of it loomed large.⁹ Rep. Steve Buyer (R-Ind.) quipped of finding himself in the awkward position of being “a conservative Republican aligned with the ACLU”¹⁰ in questioning the constitutionality of the measure’s speech restrictions.¹¹ Buyer went so far during the debate to claim the country was “truly on the wave of socialism.”¹²

6. *Black’s Law Dictionary* defines paternalism as a “government’s policy or practice of taking responsibility for the individual affairs of its citizens, [especially] by supplying their needs or regulating their conduct in a heavy-handed manner.” BLACK’S LAW DICTIONARY 1148 (7th ed. 1999).

7. 155 CONG. REC. H4310, 4313 (daily ed. Apr. 1, 2009) (statement of Rep. Ted Poe (R-Tex.)). The Act was also described as a “de facto prohibition of tobacco” that would “legislate a Big Tobacco monopoly,” increase taxes, expand bureaucracy, increase activity on the black market and eliminate Federal preemption of tobacco advertising restrictions. *Id.* at 4311.

8. The First Amendment to the United States Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than eight decades ago through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

9. Cf. Duff Wilson, *Tobacco Regulation Is Expected To Face a Free-Speech Challenge*, N.Y. TIMES, June 16, 2009, at B1 (reporting that “the marketing and advertising restrictions in the tobacco law that Congress passed last week are likely to be challenged in court on free-speech grounds. But supporters of the legislation say they drafted the law carefully to comply with the First Amendment”).

10. 155 CONG. REC. H4310, 4312 (daily ed. Apr. 1, 2009). Buyer noted that the tobacco industry in 1996 voluntarily submitted to advertising restrictions and alluded to a Supreme Court decision finding certain restrictions on tobacco advertising to be unconstitutional. *Id.* at 4311–12. Presumably, he was referring to *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), which held unconstitutional state regulations banning most point-of-sale and outdoor ads by tobacco companies.

Buyer, who proposed alternative legislation that focused on harm reduction (in particular, using supposedly less harmful nicotine products such as the Swedish smokeless tobacco Snus) rather than advertising or packaging restrictions, said that “to put that [the advertising restrictions] back in this legislation just throws this right back to the Supreme Court. To me as a lawyer, that’s unconscionable . . . So when we legislate these advertising restrictions, we should never, never violate the First Amendment.” *Id.* at 4312.

11. In a June 1, 2009 letter sent to members of the U.S. Senate after the measure was passed by the House of Representatives, officials from the ACLU’s legislative office in Washington, D.C., asserted that the Act’s restrictions on advertising “are not drawn narrowly to achieve the stated public purpose and, as such, fail to comply with the free speech protections of the First Amendment.” Letter from Caroline Frederickson, Director of the ACLU Legislative Office, and Michael Macleod-Ball, Chief Legislative/Policy Counsel for the ACLU, to United States Senate (June 1, 2009) (on file with author), available at <http://www.aclu.org/free-speech/aclu-letter-senate-family-smoking-prevention-and-tobacco-control-act> The ACLU’s letter reasoned that:

regulating commercial speech for lawful products only because those products are widely disliked – even for cause – sets us on the path of regulating such speech for other products that may only be disfavored by a select few in a position to impose their personal preferences through misuse of the regulatory process.

Id.

12. S.A. Miller, *Tobacco Regulation Bill Heads to Obama*, WASH. TIMES, June 13, 2009, at A1. The *Washington Times*, in fact, intimated this same sentiment in an article regarding President Barack Obama’s signing of the measure into law when it observed that Big Tobacco is “yet another special

Given such contentiousness, it is not surprising the Act was more than a decade in the making.¹³ Its ostensible goal is to reduce tobacco usage among minors by, among other things, further restricting tobacco industry advertising.¹⁴ But its opponents questioned the measure's effectiveness and urged against handing over regulation of tobacco products to an already beleaguered Food and Drug Administration,¹⁵ which the Supreme Court in 2000 held did not have congressional authority to regulate tobacco-specific legislation.¹⁶

"Big Government" eventually prevailed, with President Barack Obama signing the Act into law in June 2009.¹⁷ Obama, himself an occasional smoker,¹⁸ boasted that the law would "save American lives"¹⁹ and protect kids from the "constant and insidious barrage of advertising where they live, where they learn and where they play."²⁰ The President also took issue with flavored tobacco products, calling them "even more tempting"²¹ to minors.

Obama wasn't, of course, the only Democrat on Capitol Hill to gloat. When the bill cleared the House in April by a 298 to 112 vote, Energy and Commerce Committee Chairman Henry Waxman of California, the legislator who sponsored the measure in the House, called it "truly a historic day in the fight against tobacco"²² and proclaimed, in pun-intended fashion, that "now we all can breathe a little easier."²³

While Obama and Waxman won the legislative fight and are

interest he and fellow Democrats have brought to heel so far in his young administration – joining credit card companies, home mortgage lenders and defense contractors as businesses that needed stricter government oversight." Stephen Dinan, *Tobacco Law Called a Loss for 'Special Interest,'* WASH. TIMES, June 23, 2009, at A6.

13. See Duff Wilson, *Foe Throws in the Towel on Tobacco Regulation Bill*, N.Y. TIMES, June 6, 2009, at B4 (describing how it has become easier in the past decade to pass regulation targeting tobacco than it previously was).

14. See Stephen Foley, *US Senate Passes Law to Toughen Tobacco Control*, INDEP. (London), June 12, 2009, at 36.

15. 155 CONG. REC. H4310, 4315 (daily ed. Apr. 1, 2009). Rep. Buyer, in an earlier debate, described the potential FDA takeover as "a new government bureaucracy which will inevitably be underfunded and ill-equipped to effectively regulate the tobacco market." 154 CONG. REC. H7546, 7571-72 (daily ed. July 30, 2008).

16. See *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (holding that "it is plain that Congress has not given the FDA the authority that it seeks to exercise here").

17. See Philip Elliott, *Obama Signs Strong Anti-Smoking Bill*, BOSTON GLOBE, June 23, 2009, at 6.

18. See Jeff Zeleny, *For Obama, Tough Grip by Tobacco*, N.Y. TIMES, June 24, 2009, at A12 (describing how Obama admits to smoking); *House Approves Federal Regulation of Tobacco*, RICHMOND TIMES-DISPATCH (Va.), Apr. 3, 2009, at A1 (reporting that "President Barack Obama has spoken publicly about his own struggles to kick a smoking habit").

19. Elliott, *supra* note 17, at 6.

20. *Id.*

21. *Id.*

22. Erica Werner, *Anti-Smoking Forces Win Key Victory in House*, VIRGINIAN-PILOT (Norfolk, Va.), Apr. 3, 2009, at A6.

23. *Id.*

breathing a tad easier at the moment, the real question is whether they will prevail in the judicial war now being waged over the speech-related elements of the Act in a federal courthouse in tobacco-rich Kentucky.²⁴ That is the timely research question at the heart of this Article.

This question is crucial because the law arrives at a time when, as Northwestern University Professor Martin Redish observed in 2007, “in every recent commercial speech case decided by the Supreme Court, the First Amendment argument prevailed.”²⁵ Thus, while laws targeting tobacco are in vogue,²⁶ the new one may constitute a futile, unconstitutional exercise conducted at taxpayer expense. Were the lawmakers just playing politics in passing the bill and, perhaps, passing the buck to taxpayers?

Just as Rep. Buyer predicted, the Act drew immediate fire to its unprecedented advertising and marketing restrictions.²⁷ In August 2009, some two months after Obama signed the bill, some key tobacco industry players sued²⁸ in federal court in Kentucky, challenging several of the Act’s provisions, primarily on First Amendment grounds.²⁹

Martin L. Holton III, senior vice president and general counsel for plaintiff R.J. Reynolds Tobacco Co., claimed that “the law contains provisions that severely restrict the few remaining channels we have to communicate with adult tobacco consumers and, in our opinion, cannot be justified on any basis consistent

24. JON VAN WILLIGEN & SUSAN C. EASTWOOD, *TOBACCO CULTURE: FARMING KENTUCKY’S BURLEY BELT* 1-3 (1998) (explaining the critical economic significance of the tobacco crop in Kentucky).

25. Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 *LOY. L.A. L. REV.* 67, 67-68 (2007).

26. Wilson, *supra* note 13, at B4 (describing how it has become easier in the past decade to pass regulation targeting tobacco than it previously was).

27. See Complaint for Declaratory Judgment and Injunctive Relief, *Commonwealth Brands, Inc. v. United States*, No. 1:2009 CV 00117 (W.D. Ky. Aug. 31, 2009) [hereinafter “Complaint”], available at <http://static.mgnetwork.com/rtd/pdfs/complaint.pdf>.

28. *Id.* The six plaintiffs are: Commonwealth Brands, Inc.; Conwood Company, LLC; Discount Tobacco City & Lottery, Inc.; Lorillard Tobacco Co.; National Tobacco Company, L.P.; and R.J. Reynolds Tobacco Co. *Id.* at 1.

Noticeably absent from the list of plaintiffs was Philip Morris USA, which actually supported the legislation. Philip Morris is the nation’s biggest tobacco manufacturer, with its Marlboro brand holding a 41.2 percent share of the U.S. cigarette market. See Michael Felberbaum, *Major Cigarette Makers Sue Over New Law*, *ASSOC. PRESS*, Aug. 31, 2009. R.J. Reynolds Tobacco Co. and Lorillard Tobacco Co. claim that the advertising restrictions will preserve Philip Morris’ current market advantage. See Wendy Koch, *Senate Could Vote Today on Tougher Tobacco Laws*, *USA TODAY*, June 9, 2009, at 5A.

29. The Complaint also alleged due process violations and an unconstitutional taking under the Fifth Amendment. See Complaint, *supra* note 27, at 44. An analysis of these issues is beyond the scope of this Article, which concentrates on the First Amendment questions raised by the law.

with the demands of the First Amendment.”³⁰

In fact, the opening sentence of the complaint in *Commonwealth Brands, Inc. v. United States*³¹ sends a metaphorical free-speech shot across the bow of the government. It quotes the Supreme Court’s 2001 opinion in *Lorillard Tobacco Co. v. Reilly*³² for the proposition that “so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in receiving that information.”³³ In *Lorillard*, the Court declared unconstitutional, on First Amendment grounds, parts of a Massachusetts law banning both outdoor advertising for smokeless tobacco or cigar products within 1,000 feet of schools and playgrounds³⁴ and indoor, point-of-sale ads for those same products.³⁵

Remarkably, the federal government’s new law seems to have been crafted behind a veil of legal ignorance – or, perhaps, a willful blindness – of *Lorillard* and pertinent academic scholarship surrounding it. As University of North Carolina Professor Michael Hoefges, who has published extensively on commercial speech,³⁶ cogently observed in a 2003 article:

[t]he *Lorillard Tobacco* Court clearly continued a trend of providing strong First Amendment protection for non-misleading advertising including tobacco advertising. In addition, the Court made it clear that the First Amendment will not allow the government to substantially disrupt the flow of lawful commercial information to adult consumers even when a compelling regulatory goal of protecting children from the harms of tobacco usage exists. The pragmatic effect for advertisers and marketers is that government has little constitutional leeway to broadly restrict non-misleading

30. Press Release, R.J. Reynolds Tobacco Co., R.J. Reynolds Tobacco Company, Other Tobacco Manufacturers, Retailer, File Suit Challenging Provisions of FDA Tobacco Act (Aug. 31, 2009), available at http://files.shareholder.com/downloads/RAI/722685765x0x315691/1ad6e56f-4b90-4662-89ba-3e33de4e9882/2009-06_RJRT_Co_other_tobacco_manufacturers_retailer_file_suit_challenging_provisions_of_FDA_Tobacco_Act.pdf.

31. See Complaint, *supra* note 27, at 1.

32. 533 U.S. 525 (2001).

33. *Id.* at 571.

34. See *id.* at 565–66 (concluding that “after reviewing the outdoor advertising regulations, we find the calculation in this case insufficient for purposes of the First Amendment”).

35. See *id.* at 566 (holding “that the point-of-sale advertising regulations fail both the third and fourth steps of the *Central Hudson* analysis” that applies to commercial speech cases).

36. See R. Michael Hoefges, *Regulating Professional Services Advertising: Current Constitutional Parameters and Issues Under the First Amendment Commercial Speech Doctrine*, 24 CARDOZO ARTS & ENT. L.J. 953 (2007); R. Michael Hoefges, *Telemarketing Regulation and the Commercial Speech Doctrine*, 32 J. LEGIS. 50 (2005); Michael Hoefges & Milagros Rivera-Sanchez, “Vice” Advertising Under the Supreme Court’s Commercial Speech Doctrine: The Shifting Central Hudson Analysis, 22 HASTINGS COMM. & ENT. L.J. 345 (2000).

commercial communication about lawful products and services.³⁷

Other scholars too have stressed that “smoking is far too complex a behavior to blame on the media”³⁸ and that lawmakers cannot simply assume that minors’ smoking behavior will be reduced “because of changes in billboard and magazine advertisements.”³⁹ To put it all into perspective, “if kids really want cigarettes or cigars, they’ll find them.”⁴⁰

Nonetheless, Congress forged ahead in 2009 with restrictions on such tobacco ads. Among other items affecting freedom of expression, the Family Smoking Prevention and Tobacco Control Act of 2009 requires that:

warning labels comprise the top 50 percent of the front and back of cigarette packages, with 17-point type and black and white colors only;

at least 20 percent of poster and print advertisements contain a warning, to be set forth with specific typesetting and color limitations; and

color graphics depicting the negative health consequences of smoking to go with the warning statements.⁴¹

In addition to this trio of compelled-speech requirements⁴² – regulations that force tobacco companies to convey messages they

37. Michael Hoefges, *Protecting Tobacco Advertising Under the Commercial Speech Doctrine: The Constitutional Impact of Lorillard Tobacco Co.*, 8 COMM. L. & POL’Y 267, 311 (2003).

38. Clay Calvert, *Excising Media Images to Solve Societal Ills: Communication, Media Effects, Social Science, and the Regulation of Tobacco Advertising*, 27 SW. U. L. REV. 401, 471 (1998).

39. *Id.*

40. Katie Zezima, *Boston Ponders Even Tougher Regulations on Tobacco*, N.Y. TIMES, Oct. 26, 2008, at A18 (quoting Dan Loperfido, a 20-year-old sophomore at Boston University, about his feelings on whether tobacco regulations are effective).

41. See Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended at 15 U.S.C. § 1333, 15 U.S.C. § 4402 and 21 U.S.C. § 387a-1 (2009)); 21 U.S.C. § 387a-1 (2009) (calling for the Secretary of Health and Human Services to adopt rules, with some specified exceptions, identical to those “promulgated by the Secretary of Health and Human Services in the August 28, 1996, issue of the Federal Register”); and 61 Fed. Reg. 44,396, 44,615-18 (Aug. 28, 1996) (setting forth the August 28, 1996 rules referred to in 21 U.S.C. § 387a-1 (2009)).

In addition to the bullet-pointed items identified in the text of this Article, the Act grants the FDA authority to regulate the sale, distribution and marketing of tobacco products; allows the FDA to lower the amount of nicotine in tobacco products; bans flavored cigarettes; prohibits event sponsorship; assesses user fees of up to \$712,000,000 per year on the tobacco industry; and bans distribution of product samples unless in a “qualified adult-only facility.” Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended at 15 U.S.C. § 1333 (2009), 15 U.S.C. § 4402 (2009) and 21 U.S.C. § 387a-1 (2009)).

42. The Supreme Court has interpreted the First Amendment to include an unenumerated right not to speak, which prohibits the government from compelling expression in which the speaker does not wish to engage. Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 481, 483 (1995).

otherwise would not communicate – the Act prohibits tobacco companies from:

speaking about FDA approval or regulation of tobacco products;

using words such as “light” or “low tar” to suggest reduced consequences from smoking; and

engaging in outdoor advertising, such as billboards, near schools and playgrounds.⁴³

Although the First Amendment speech rights of the tobacco industry and adult consumers were recognized by the Supreme Court in *Lorillard*,⁴⁴ restrictions on the advertising of tobacco products have been in place for decades. First came the Federal Cigarette Labeling and Advertising Act of 1965, requiring cigarette packs to carry a health warning.⁴⁵ Then, after Congressional action in 1969 and under heavy government pressure, all television and radio ads for tobacco products were gone from the airwaves by 1971.⁴⁶ In 1984, additional legislation

43. 21 U.S.C. § 387a-1 (2009).

The new law provides that within 180 days of its enactment, the Secretary of Health and Human Services shall publish in the Federal Register a final rule regarding cigarettes and smokeless tobacco that will “include such modifications to section 897.30(b), if any, that the Secretary determines are appropriate in light of governing First Amendment case law, including the decision of the Supreme Court of the United States in *Lorillard Tobacco Co. v. Reilly* (533 U.S. 525 (2001)).” 21 U.S.C. § 387a-1 (2009). Section 897.30(b) was a 1996 rule adopted by the Food & Drug Administration – but never enforced due to the decision in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) – providing that “no outdoor advertising for cigarettes or smokeless tobacco, including billboards, posters, or placards, may be placed within 1,000 feet of the perimeter of any public playground or playground area in a public park (e.g., a public park with equipment such as swings and seesaws, baseball diamonds, or basketball courts), elementary school, or secondary school.” 61 Fed. Reg. 44502, 44617 (Aug. 28, 1996) (to have been codified at 21 C.F.R. § 897.30(b)). When linked together, the new law requires Kathleen Sebelius, the Secretary of Health and Human Services, to try to rework, at her discretion, the original 1,000-foot proposal in such a way as to make it constitutional.

See Jim Abrams, *FDA Gets Its Hands on Tobacco*, VIRGINIAN-PILOT (Norfolk, Va.), June 12, 2009, at A1 (reporting the bill “bans billboards close to schools”); Janet Hook, *FDA Set to Get Tobacco Powers*, L.A. TIMES, June 12, 2009, at A1 (reporting the bill “bans billboards close to schools”); Wilson, *supra* note 9 (discussing the measure).

44. See *Lorillard*, *supra* note 32, at 571; see also Hoefges, *supra* note 37, at 267 (analyzing the constitutional impact of *Lorillard* and suggesting lawmakers use caution when developing laws such as those restricting tobacco advertising).

45. Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92 (1965) (codified as amended at 15 U.S.C. §§ 1331-1340 (2009)). See Donald W. Garner & Richard J. Whitney, *Protecting Children from Joe Camel and His Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation*, 46 EMORY L.J. 479, 563 (1997) (observing that the Federal Cigarette Labeling and Advertising Act of 1965 “required cigarette packaging to carry warnings that smoking may be hazardous to health”).

46. See Sylvia A. Law, *Addiction, Autonomy, and Advertising*, 77 IOWA L. REV. 909*, 915* n.28 (1992) (explaining that the Public Health Cigarette Smoking Act of 1969 that was passed by Congress to ban cigarette advertising from radio and television “became effective January 1, 1971. A 1973 amendment banned the advertisement of ‘little cigars’ as well.”); Bruce Ledewitz, *Corporate Advertising’s Democracy*, 12 B.U. PUB. INT. L.J. 389, 426 (2003) (observing that “the last cigarette

was passed that extended cigarette health warning requirements to advertisements and billboards.⁴⁷ The “war on smoking”⁴⁸ ratcheted up over the next quarter century, culminating in the Master Settlement Agreement of 1998 (“MSA”).⁴⁹ In the MSA, Big Tobacco voluntarily agreed to specific restrictions designed, in large part, to curtail minors’ exposure to tobacco advertising and marketing.⁵⁰ The problem is that “after the settlement went into effect in 1998, the companies almost immediately began to evade and violate various prohibitions against joint activities and false statements.”⁵¹

This extended history of regulating tobacco advertising must be considered in the context of the First Amendment and, specifically, the commercial speech doctrine that has evolved since the Supreme Court first gave constitutional protection to advertising in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*⁵² Although commercial speech does not receive the full protection of the First Amendment,⁵³ the Supreme

advertisement appeared on television on January 1, 1971. Since that time, generations of voters have grown up without constant exposure to positive images of smoking on television”); and Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J.L. SCI. & TECH. 1, 70 (2004) (noting that “tobacco companies were pressured by the Federal government to voluntarily cease television advertising in 1971”).

47. Comprehensive Smoking Education Act, Pub. L. No. 98-474, 4, 98 Stat. 2201, 2201-02 (1984) (codified as amended at 15 U.S.C. § 1333 (2009)). See Patricia A. Davidson, *Cigar Warnings: Proceed with Caution*, 33 J. MARSHALL L. REV. 521, 540, n.121 (2000) (noting that with this legislation, “Congress added the warning in advertisement requirements to the federal statute governing cigarette warning labels”).

48. See Kathleen Sablone, Note, *A Spark in the Battle Between Smokers and Nonsmokers: Johannesen v. New York City Department of Housing Preservation & Development*, 36 B.C. L. REV. 1089, 1091 (1995) (explaining that the “war on smoking” began with the Surgeon General’s report in 1964 that first linked smoking to cancer, emphysema, heart disease and other serious health conditions).

49. See Master Settlement Agreement, State Tobacco Information Center Settlement Library, available at <http://stic.neu.edu/settlement/index.html> (last visited Nov. 8, 2009).

50. See *id.* See also Alan E. Scott, *The Continuing Tobacco War: State and Local Tobacco Control in Washington*, 23 SEATTLE U. L. REV. 1097, 1102-05 (2000) (discussing provisions of the Master Settlement Agreement, including discontinued use of cartoon characters, limitations on the size of outdoor ads and a general agreement not to target children in advertising or marketing).

51. Editorial, *A Rogue Industry*, N.Y. TIMES, May 31, 2009, at WK7.

52. 425 U.S. 748 (1976). In this case, the Supreme Court concluded that “commercial speech, like other varieties, is protected.” *Id.* at 770. In reaching this decision, it recognized the “consumer’s interest in the free flow of commercial information.” *Id.* at 763. The Court also agreed that “society also may have a strong interest in the free flow of commercial information.” *Id.* at 764. It, however, added that “untruthful” commercial speech was not protected by the First Amendment. *Id.* at 771. As the high court wrote:

Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State’s dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.

Id. at 771-72.

53. The nation’s high court openly acknowledges that it has “afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.” *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978). A federal

Court ruled nearly thirty years ago that limits on commercial speech must be narrowly tailored to directly advance the government's allegedly substantial interests in suppressing it.⁵⁴

Does the Family Smoking Prevention and Tobacco Control Act clear these constitutional hurdles? Does a corporation's right *not* to speak⁵⁵ – in particular, not to be forced to convey warnings that encompass half of cigarette-pack space and 20 percent of poster and print ads⁵⁶ – trump concerns about protecting minors from tobacco-related ads?⁵⁷ This Article addresses these questions.

In particular, Part I provides an overview of the commercial speech doctrine and, more specifically, the Supreme Court's decisions in *Lorillard* and other key cases relating to the regulation of so-called vice products.⁵⁸ Part II then turns to the Family Smoking Prevention and Tobacco Control Act, exploring its legislative history, including a discussion of the First Amendment concerns that took place during its drafting.⁵⁹ Part II also includes an overview of the current lawsuit challenging the Act in *Commonwealth Brands, Inc. v. United States*. Next, Part III examines the Act's constitutional viability in the face of the First Amendment challenges raised in the complaint in *Commonwealth Brands* and in light of the rules of the commercial speech doctrine articulated in Part I.⁶⁰

The practical implications of the Act, including its cost to taxpayers and potential for achieving the stated goal of reducing tobacco use among minors, are considered in Part IV.⁶¹ In particular, this part suggests that the new Act is yet another example of lawmakers' willingness to pass a seemingly unconstitutional law and likely spend years of time and countless taxpayer dollars in litigation defending it, despite considerable doubt as to the law's ability to achieve the government's interest.⁶² The move, in brief, is akin to the repeated efforts by state and local governments across the country to pass laws targeting minors'

appellate court observed in 2007 that "other forms of expression are entitled to more protection under the First Amendment than is commercial speech." *Pagan v. Fruchey*, 492 F.3d 766, 770 (6th Cir. 2007), *cert. denied*, 552 U.S. 1062 (2007).

54. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980) (articulating a four-part test to determine when regulations targeting commercial speech pass constitutional muster).

55. *See, e.g.*, Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147 (2006) (examining case law and the related harms and implications of compelled speech).

56. *See supra* note 41 and accompanying text.

57. *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009). The Act provides very specific guidelines for text, color and graphic display formatting on tobacco product packaging, thus compelling commercial speech from the manufacturers.

58. *See infra* notes 67–151 and accompanying text.

59. *See infra* notes 152–233 and accompanying text.

60. *See infra* notes 234–343 and accompanying text.

61. *See infra* notes 344–367 and accompanying text.

62. *See infra* notes 356–367 and accompanying text.

access to violent video games that, invariably, are held unconstitutional.⁶³ Part IV also points out how the “Big Government” expansion feared in the House debate at the start of this Article⁶⁴ is playing out with the Act, with the FDA already creating a multi-million dollar bureaucratic structure around the Act with its Center for Tobacco Products.⁶⁵ Ultimately, the Article concludes that while Congress won the legislative battle in 2009, it is highly likely to lose the judicial war in 2010 or thereafter, at least when it comes to some speech-restricting provisions of the new Act.⁶⁶ The courtroom combat, while it will inevitably fiscally burden an already financially strapped federal government, may be valuable if ultimately it serves as a catalyst for a long-awaited clarification of the commercial speech doctrine.

THE COMMERCIAL SPEECH DOCTRINE AND REGULATION OF TOBACCO ADVERTISING

This part of the Article initially provides, in Section A, an overview of the commercial speech doctrine. Section B then focuses on prior cases that directly address the regulation of ads for vice products such as tobacco and alcohol. A review of the legal scholarship is incorporated directly into both sections, rather than being set forth its own literature review section.

A. *The Commercial Speech Doctrine*

The emergence of commercial speech as a distinct category of expression protected by the First Amendment is relatively new,⁶⁷ with the Supreme Court first stating in 1976 that “commercial speech, like other varieties, is protected . . . we of course do not

63. See generally Clay Calvert & Robert D. Richards, *Precedent Be Damned – It’s All About Good Politics & Sensational Soundbites: The Video Game Censorship Saga of 2005*, 6 TEX. REV. ENT. & SPORTS L. 79 (2005) (contending that states have repeatedly enacted unconstitutional legislation limiting minors’ access to violent video games, and arguing that “[a] reasonable person might think that the politicians would be called out by their constituents for wasting taxpayer dollars on unconstitutional laws or, at the very least, that the politicians would themselves call for a legislative ceasefire against the video game industry”).

64. *Supra* notes 6–12 and accompanying text.

65. See Tobacco Products, U.S. Food and Drug Administration, <http://www.fda.gov/TobaccoProducts/default.htm> (last visited Nov. 10, 2009). In 2009 alone, the FDA devoted \$5 million “to establish the necessary administrative functions for the Center.” U.S. Food and Drug Administration, FDA Launches New Center for Tobacco Products (Aug. 19, 2009), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm179410.htm>.

66. See discussion *infra* last paragraph of Part III. and accompanying text.

67. See DANIEL A. FARBER, *THE FIRST AMENDMENT* 151 (2d. ed. 2003) (observing that commercial advertising once “fell completely outside the scope of the First Amendment” and that it was not until the mid-1970s that “commercial speech was brought firmly under First Amendment protection”).

hold that it can never be regulated in any way.”⁶⁸ Although commercial speech receives some protection under the First Amendment, it is treated as “second class”⁶⁹ expression and is not provided with the same safeguards as other types of expression, such as political speech,⁷⁰ which is subject to the heightened strict scrutiny standard of judicial review.⁷¹

The commercial speech doctrine that has emerged since 1976 has been derided as “unsettled legal terrain”⁷² and “[an] impending jurisprudential train wreck,”⁷³ due in no small part to the lack of a clear definition of commercial speech.⁷⁴ This is problematic, for instance, when a tobacco company purchases a newspaper ad to defend itself in the public sphere charges that it markets cigarettes to kids or to argue against further government regulation. Is this commercial speech or political speech?

As Professor Michael R. Siebecker notes in a 2008 article, “when corporate speech includes a mix of commercial and political speech, knowing which branch of corporate speech jurisprudence to apply becomes difficult, if not impossible, to discern.”⁷⁵ The high court has poorly defined commercial speech⁷⁶

68. *Va. State Bd. Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (striking on First Amendment grounds a Virginia statute that prohibited pharmacists from advertising prices for prescription drugs).

69. FARBER, *supra* note 67, at 151.

70. See *supra* note 53 and accompanying text (addressing how commercial speech does not receive full First Amendment protection). See also Tamara R. Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem that Won't Go Away*, 41 LOY. L.A. L. REV. 181, 182 (2007) (observing that “the commercial speech doctrine creates a category of speech subject to intermediate scrutiny under the First Amendment”).

71. As the Supreme Court has observed, “when a law burdens core political speech, we apply ‘exacting scrutiny,’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995). See *Burson v. Freeman*, 504 U.S. 191, 197 n.3 (1992) (observing that “a content-based regulation of political speech in a public forum is valid only if it can survive strict scrutiny”).

72. Samuel A. Terilli, *Nike v. Kasky and the Running-But-Going-Nowhere Commercial Speech Debate*, 10 COMM. L. & POL’Y 383, 432 (2005) (describing commercial speech as “an unnecessary and ill-defined doctrine that turns the First Amendment on its head”).

73. Michael R. Siebecker, *Building a “New Institutional” Approach to Corporate Speech*, 59 ALA. L. REV. 247, 250 (2008). Siebecker adds that “the core of the problem lies in the Supreme Court’s failure to define adequately what constitutes commercial speech, political speech, or the boundary between them.” *Id.* at 250.

74. *Id.* at 250. See Bruce E. H. Johnson, *First Amendment Commercial Speech Protections: A Practitioner’s Guide*, 41 LOY. L.A. L. REV. 297, 303 (2007) (describing commercial speech jurisprudence as varying “from case to case in ways that make utterly no sense”); Charles Fischette, *A New Architecture of Commercial Speech Law*, 31 HARV. J.L. & PUB. POL’Y 663, 664, 714 (2008) (noting that the “commercial speech doctrine is the constant subject of reinterpretation and revision” and proposing that “with minimal doctrinal change, commercial speech law can be simplified and made coherent”).

75. Siebecker, *supra* note 73, at 250. See also James J. Barney, *The Mixed Message: The Supreme Court’s Missed Opportunity to Address the Confused State of Commercial Speech in Nike, Inc. v. Kasky?*, 37 UWLA. L. REV. 1, 3–4 (2004) (concluding “that the Court’s failure to reconstruct the application of the analytic framework currently utilized in commercial speech cases will diminish the effect of the Court’s present stance that truthful, non-coercive commercial speech as articulated in *Virginia State Board of Pharmacy* is of high First Amendment value”).

76. See Redish, *supra* note 25, at 74 (writing that “the Supreme Court has cryptically offered a

simply as speech that “proposes a commercial transaction”⁷⁷ and “expression related solely to the economic interests of the speaker and its audience.”⁷⁸

Despite such threshold definitional difficulties, the Supreme Court in 1980 in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*⁷⁹ forged a four-part test to address the constitutionality of laws limiting advertising.⁸⁰ The *Central Hudson* test requires courts to examine four factors to determine if a regulation targeting commercial speech is constitutional:

1. Is the speech deceptive, false or for an unlawful activity?
2. Is the government’s asserted interest(s) in regulating the speech substantial?
3. Does the regulation directly advance the governmental interest(s)?
4. Is the regulation no more extensive than necessary to serve the interest(s)?⁸¹

Under the first part of this test, speech that is false or misleading does not receive any First Amendment protection, as the Court observed that “for commercial speech to come within that provision, it at least must concern lawful activity and not be misleading.”⁸² It made this clear in 1976, writing:

Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State’s dealing effectively with this problem. The First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.⁸³

In terms of the second prong of the test, a substantial interest is one that is less than a “compelling interest”⁸⁴ that the government typically must prove when it adopts a content-based regulation of

number of different – and not always consistent – definitions of commercial speech . . .”).

77. See *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989) (observing that “speech that proposes a commercial transaction” constitutes “what defines commercial speech”).

78. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561 (1980).

79. 447 U.S. 557 (1980).

80. *Id.* at 566.

81. *Id.*

82. *Id.*

83. *Virginia State Board*, 425 U.S. 748, 771–72 (1976).

84. See *Sable Commc’ns of Cal. v. Fed. Commc’ns Comm’n*, 492 U.S. 115, 126 (1989) (observing that the government may “regulate the content of constitutionally protected speech in order to promote a *compelling interest* if it chooses the least restrictive means to further the articulated interest”) (emphasis added).

expression. Professor Hoefges observes that the Supreme Court has liberally interpreted this standard, seldom rejecting asserted government interests for a lack of substantiality.⁸⁵

Other elements of the test are problematic. As Professor Hoefges observed in a 2003 article, “the Supreme Court remains divided on how to apply the *Central Hudson* analysis in commercial speech cases, especially when it comes to the sufficiency of evidence needed to establish ‘direct advancement’ under the third factor and ‘narrow tailoring’ under the fourth factor.”⁸⁶ For instance, the Supreme Court in *Central Hudson* stated that, under the fourth factor, the regulation in question is “not more extensive than is necessary.” Yet, as Professor Edward O. Correia wrote, this isn’t as stringent a requirement as it sounds, as the government “need not carry the very demanding burden that there is no less restrictive alternative. Instead, the fit needs only to be reasonable.”⁸⁷ A further discussion of how these factors played out in the tobacco-related case of *Lorillard* is set forth in more detail in Section B.

Despite inherent problems with the commercial speech doctrine and the fact that some Supreme Court justices today, such as Clarence Thomas, believe that advertising should receive greater First Amendment protection,⁸⁸ the *Central Hudson* test likely will provide the framework for judicial analysis of the claims in *Commonwealth Brands, Inc. v. United States* challenging the Family Smoking Prevention and Tobacco Control Act. With this in mind, the next section addresses commercial speech case law where the government has sought to regulate the advertising of “vice” products such as tobacco and alcohol.

B. Commercial Speech and the Advertising of Vice Products⁸⁹

A subset of commercial speech cases addresses the quandary that arises when the product being promoted is lawful for adults

85. See Hoefges, *supra* note 37, at 275 (observing that “typically, once the Court has determined that a regulation restricts protected commercial speech under the first *Central Hudson* factor, it has been fairly liberal in finding that an asserted government interest is sufficiently ‘clear and substantial’ under the second factor”).

86. *Id.* at 311.

87. Edward O. Correia, *State and Local Regulation of Cigarette Advertising*, 23 J. LEGIS. 1, 34 (1997).

88. See Arlen W. Langvardt, *The Incremental Strengthening of First Amendment Protection for Commercial Speech: Lessons from Greater New Orleans Broadcasting*, 37 AM. BUS. L.J. 587, 622 (2000) (describing how Justice Clarence Thomas used his concurring opinion in 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), “to attack the *Central Hudson* test and to advocate enhanced First Amendment status for certain commercial speech”).

89. The authors do not discuss advertising for vice activities like gambling but focus, instead, on vice products because it is a product—tobacco—that is regulated in the Act that is the centerpiece of this Article. For an excellent analysis of regulations on commercial speech targeting the activity of gambling, see Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at “The Greater Includes the Lesser,”* 55 VAND. L. REV. 693 (2002).

but unlawful for children, such as alcohol or tobacco.⁹⁰ These cases involve advertising of vice or sin products, and the Supreme Court has largely rejected an exception from the commercial speech doctrine for bans on vice advertising.⁹¹ Therefore, these decisions will be essential in analyzing the First Amendment viability of the speech restrictions in the Family Smoking Prevention and Tobacco Control Act.

1. Alcohol-Content Regulations

In 1995 in *Rubin v. Coors Brewing Co.*,⁹² Coors challenged a federal ban on the disclosure of alcohol content on labels or in advertisements as inconsistent with the First Amendment.⁹³ The government claimed the ban was necessary to prevent “strength wars”⁹⁴ among brewers, fearing they might compete to produce increasingly potent beer.⁹⁵ The Supreme Court, invoking *Central Hudson*, declared the labeling restrictions unconstitutional.⁹⁶ In particular, the restrictions failed the third and fourth steps of the test. The government’s irrational regulatory framework did not directly advance the asserted interest in preventing “strength wars.”⁹⁷ Nor was the ban on alcohol content disclosure for beer sufficiently tailored, as alternative methods existed to advance the government’s interest.⁹⁸

Significantly, for the government’s assertion today that the Family Smoking Prevention and Tobacco Control Act of 2009 actually will reduce smoking by minors, the high court in *Rubin* made it clear that, under the third prong of *Central Hudson*, mere speculation and conjecture about such a reduction won’t cut it.⁹⁹ The Court in *Rubin* stressed that the government, instead, “must demonstrate that the harms it recites are real *and that its restriction*

90. See, e.g., *Anheuser-Busch v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

91. See, e.g., *Rubin*, 514 U.S. at 491, 44 *Liquormart*, 517 U.S. at 507, and *Lorillard*, 533 U.S. at 525. But see *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (applying the *Central Hudson* test to uphold restrictions on casino advertising in Puerto Rico, where gambling was a lawful activity). See also Emily Erickson, *Disfavored Advertising: Telemarketing, Junk Faxes and the Commercial Speech Doctrine*, 11 COMM. L. & POL’Y 589, 628 (2006) (stating that “[i]n terms of vice advertising, the Court has already returned to its *Virginia Pharmacy* prohibition of paternalistic regulations and the classic precedent has been sufficiently re-adopted as the prevailing paradigm”).

92. 514 U.S. 476 (1995).

93. *Id.* at 478.

94. *Id.* at 479.

95. *Id.*

96. *Id.* at 478.

97. *Id.* at 488–89.

98. *Id.* at 490–91.

99. *Id.* at 486–87.

will in fact alleviate them to a material degree."¹⁰⁰

2. Alcohol-Price Advertising

The First Amendment prevailed again when the Court struck down restrictions on alcohol price advertising in *44 Liquormart, Inc. v. Rhode Island*.¹⁰¹ At issue was a state law prohibiting the advertising of retail prices of alcoholic beverages.¹⁰² Initially describing the Rhode Island law as "a blanket prohibition against truthful, nonmisleading speech about a lawful product" purportedly aimed at advancing the government's substantial interest in promoting temperance, the Court proceeded to apply the remaining two factors of the *Central Hudson* test.¹⁰³ It held that, due to a lack of evidence, it was mere "speculation or conjecture"¹⁰⁴ that banning price advertising would directly advance the government's interest. Finally, on the fourth prong, the Court determined that it was "perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance."¹⁰⁵ Specifically, it noted that "educational campaigns"¹⁰⁶ focused on excessive drinking, as well as higher prices for alcohol through increased taxation, were better alternatives.¹⁰⁷

*Rubin*¹⁰⁸ and *44 Liquormart*¹⁰⁹ established that the government would not be awarded a more lenient analysis under the *Central Hudson* test just because it sought to regulate advertising for harmful products. The Supreme Court in *44 Liquormart* wrote that "we find unpersuasive the State's contention that . . . the price advertising ban should be upheld because it targets commercial speech that pertains to a 'vice' activity."¹¹⁰ It thus squarely rejected the existence of "any 'vice' exception to the protection afforded by the First Amendment."¹¹¹

As Professors Michael Hoefges and Milagros Rivera-Sanchez observed in a 2000 article:

100. *Id.* at 487 (emphasis added).

101. 517 U.S. 484 (1996).

102. *Id.* at 489.

103. *Id.* at 504.

104. *Id.* at 507 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)). "Such speculation certainly does not suffice when the State takes aim at accurate commercial information for paternalistic ends." *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

109. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

110. *Id.* at 513.

111. *Id.* at 514.

The decisions in *Rubin* and 44 *Liquormart* taken together significantly tightened the third and fourth *Central Hudson* factors. *Rubin*, in particular, stands for the proposition that irrational and inconsistent regulations of protected commercial speech will not likely pass constitutional muster. In addition, the *Rubin* Court refused to relax the *Central Hudson* analysis for regulations of “vice” advertising. Instead, the Court demanded evidence under the third (direct advancement) factor and crafted a direct-means analysis under the fourth (narrowly tailored) factor.¹¹²

In summary, the high court is unwilling to extend the government deference simply because the advertised product is one that minors cannot purchase. That, of course, is not good news for the new Act.

3. Tobacco Advertising Restrictions

With *Rubin* and 44 *Liquormart* going “a long way toward strengthening commercial speech protection under the First Amendment,”¹¹³ at least in the context of the vice product of alcohol, the Court then addressed the constitutionality of Massachusetts’ tobacco advertising restrictions in 2001 in *Lorillard Tobacco Co. v. Reilly*.¹¹⁴ The regulations banned self-service displays, as well as outdoor ads within 1,000 feet of parks, playgrounds or schools, and it required point-of-sale ads to be no lower than five feet from the ground in retail outlets within 1,000 feet of parks, playgrounds or schools.¹¹⁵

The Court employed the *Central Hudson* test in analyzing the First Amendment challenge to these restrictions as they applied to smokeless tobacco and cigars.¹¹⁶ It initially recognized that neither party disputed the first two steps regarding lawfulness and government interest.¹¹⁷ As now is the case in *Commonwealth Brands*, the government interest underlying Massachusetts’ law was “preventing the use of tobacco products by minors.”¹¹⁸

In analyzing the third step of the test (requiring a direct link between the government’s interest and its regulation), the Court found that the Massachusetts Attorney General provided “ample documentation of the problem with underage use of smokeless tobacco and cigars.”¹¹⁹ The Attorney General primarily relied on FDA evidence used in its prior failed attempt to regulate the

112. Hoefges & Rivera-Sanchez, *supra* note 36, at 372.

113. *Id.* at 375.

114. 533 U.S. 525 (2001).

115. *Id.* at 534–36.

116. *Id.* at 554–67.

117. *Id.* at 555.

118. *Id.*

119. *Id.* at 561.

tobacco industry, such as:¹²⁰

Advertising plays a key role in the decision to use tobacco products, a decision generally made prior to adulthood.¹²¹

Cigarette brands children smoke directly correlate with the most heavily advertised brands.¹²²

Following the introduction of “Joe Camel” ads for Camel cigarettes, R.J. Reynolds’ share of the youth market shot from 4 percent to 13 percent.¹²³

In light of this evidence, the Court held that both the outdoor advertising restrictions and the ban on self-service displays were directly linked to the government’s interest in preventing underage tobacco use. However, it rejected the government’s argument that the placement of in-store ads at least five feet from the ground would prevent underage tobacco use, pointing out that “[n]ot all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings.”¹²⁴

As the Court approached the fourth *Central Hudson* prong, it noted that this part of the analysis required “a reasonable fit between the means and ends of the regulatory scheme.”¹²⁵ The 1,000-foot outdoor ad restriction on billboards was held too prohibitive, constituting an almost total ban in some geographical areas, and therefore more extensive than necessary to prevent underage tobacco use.¹²⁶ They thus were unconstitutional.

The self-service displays of tobacco products, however, were reasonable, with the Court noting that the self-service prohibition leaves “open ample channels of communication” and does not have a significant impact on accessibility of tobacco products for adults.¹²⁷ The Court aptly described the interests at stake with government attempts at regulating tobacco advertising:

The State’s interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity. We must consider that tobacco retailers and manufacturers have an interest in conveying

120. *Id.* at 557.

121. *Id.* at 558.

122. *Id.*

123. *Id.*

124. *Id.* at 566.

125. *Id.* at 561.

126. *Id.* at 562–63.

127. *Id.* at 569–70.

truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products. . . . As the State protects children from tobacco advertisements, tobacco manufacturers and retailers and their adult consumers still have a protected interest in communication.¹²⁸

In brief, protecting minors is not a free pass to trump the flow of information to adults.

4. Baltimore's Billboards for Alcoholic Beverages and Tobacco

In addition to the Supreme Court's trio of rulings in *Rubin*,⁴⁴ *Liquormart* and *Lorillard*, the 1996 opinion by the U.S. Court of Appeals for the Fourth Circuit in *Anheuser-Busch, Inc v. Schmoke*,¹²⁹ which upheld a Baltimore ordinance restricting the location of billboards that advertise alcoholic beverages, may also be relevant in the current *Commonwealth Brands* case. Importantly, the Fourth Circuit's 1996 *Schmoke* ruling occurred after the Supreme Court's decision in *44 Liquormart*, and the Fourth Circuit observed that "we have read the opinion in *44 Liquormart* and have considered its impact on the judgment in this case."¹³⁰

The Fourth Circuit ruled in favor of Baltimore's billboard law, affirming its own 1995, pre-*44 Liquormart* ruling.¹³¹ The law generally banned outdoor ads for alcoholic beverages in "publicly visible locations"¹³² in the city of Baltimore.¹³³ It permitted, however, outdoor signs for alcoholic beverages in "certain commercially and industrially zoned areas"¹³⁴ and it carved out 10 exceptions where outdoor advertising for such beverages was permissible, including on "buses, taxicabs, commercial vehicles used in the transportation of alcoholic beverages, and signs at businesses licensed to sell alcoholic beverages, including professional sports stadiums."¹³⁵

The measure was designed "to promote the welfare and temperance of minors exposed to advertisements for alcoholic beverages by banning such advertisements in particular areas where children are expected to walk to school or play in their neighborhood."¹³⁶ In the 1995 ruling, which it expressly re-

128. *Id.* at 564 (internal citations omitted) (quoting *Reno v. ACLU*, 521 U.S. 844, 875 (1997)).

129. 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).

130. *Id.* at 327.

131. *Anheuser-Busch, Inc. v. Schmoke* (*Schmoke I*), 63 F.3d 1305 (4th Cir. 1995).

132. *Id.* at 1308.

133. *Id.*

134. *Id.* at 1309.

135. *Id.* at 1308.

136. *Schmoke II*, 101 F.3d 325, 327 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).

adopted in 1996,¹³⁷ the Fourth Circuit not surprisingly applied *Central Hudson* and focused its inquiry on the third and fourth prongs, noting that the principal challenge to the law was that it “(1) does not directly advance the stated governmental purpose and (2) is not narrowly tailored to accomplish that purpose. These prongs focus on the fit between Baltimore’s statutory objective and the means it selected to achieve that objective.”¹³⁸

Applying what the authors believe was a very relaxed version of these prongs, the Fourth Circuit in *Schmoke I* stated that the third prong of *Central Hudson* “seeks to elicit whether it was *reasonable* for the legislative body to conclude that its goal would be advanced in some material respect by the regulation.”¹³⁹ In ruling for Baltimore on this prong, the appellate court held that “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.”¹⁴⁰

It similarly ruled in favor of Baltimore on the fourth prong. It again seemed to water down *Central Hudson*, writing that Baltimore “must be given some reasonable latitude.”¹⁴¹ The Fourth Circuit then opined that:

although no ordinance of this kind could be so perfectly tailored as to all and only those areas to which children are daily exposed, Baltimore’s efforts to tailor the ordinance by exempting commercial and industrial zones from its effort renders it not more extensive than is necessary to serve the governmental interest under consideration.¹⁴²

In re-adopting this logic and reasoning in 1996, the Fourth Circuit wrote that “Baltimore does not ban outdoor advertising of alcoholic beverages outright but merely restricts the time, place, and manner of such advertisements. And Baltimore’s ordinance does not foreclose the plethora of newspaper, magazine, radio, television, direct mail, Internet, and other media.”¹⁴³ While such government-friendly reasoning clearly helped Baltimore in its second time before the appellate court, the critical language in the second ruling lay elsewhere.

Professor Donald Garner points out that the Fourth Circuit’s

137. See *id.* (writing that “we affirm the district court’s judgment for the reasons previously given and *readopt our previous decision*”) (emphasis added).

138. *Schmoke I*, 63 F.3d 1305, 1311 (4th Cir. 1995).

139. *Id.* at 1313 (emphasis added).

140. *Id.* at 1314.

141. *Id.* at 1316.

142. *Id.* at 1317.

143. *Schmoke II*, 101 F.3d 325, 329 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).

1996 *Schmoke* decision contains very favorable rhetoric for government entities seeking to restrict billboards in the name of protecting minors,¹⁴⁴ as the appellate court wrote that its decision “conforms to the Supreme Court’s repeated recognition that *children deserve special solicitude* in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media.”¹⁴⁵ In light of the fact that the Supreme Court denied a petition for a writ of certiorari in the 1996 *Schmoke* opinion,¹⁴⁶ Professor Garner queried whether “the commercial speech doctrine [should] bend to the needs of children or should children be treated as adults under the Constitution in cases involving regulation of advertising?”¹⁴⁷

All of this is particularly significant for the current battle in *Commonwealth Brands* because, on the same day as its decision in *Schmoke II*, the Fourth Circuit in perfunctory fashion – the majority opinion is one paragraph long – applied the same logic to uphold an identical ban on tobacco ads in Baltimore.¹⁴⁸ As Professor Garner observed, the Fourth Circuit “wrote its principal opinion in the alcohol billboard case and then applied it summarily to the tobacco case.”¹⁴⁹ The Supreme Court denied certiorari in the tobacco-billboard case as well.¹⁵⁰

In summary, the competing interests of the First Amendment rights of both tobacco companies and adults to, respectively, convey and receive speech about lawful products and the government’s desire to reduce smoking (particularly among minors) are now at the forefront of litigation over the speech-restricting provisions of the Family Smoking Prevention and Tobacco Control Act in *Commonwealth Brands, Inc. v. United States*.¹⁵¹ *Central Hudson* and vice-product case law discussed above will provide the legal framework in which the Act is scrutinized. The next part of this Article turns to the Act.

144. See Donald W. Garner, *Advertising: Fighting The Tobacco Wars On First Amendment Grounds*, 27 Sw. U. L. REV. 379, 393 (1998) (noting that the passage that is quoted at the end of this sentence “may foretell the judicial response to the more comprehensive bans proposed at the federal level”).

145. *Schmoke II*, 101 F.3d 325, 329 (4th Cir. 1996) (emphasis added).

146. *Anheuser-Busch, Inc. v. Schmoke (Schmoke III)*, 520 U.S. 1204 (1997).

147. Garner, *supra* note 144, at 394.

148. *Penn Advert v. Mayor of Baltimore*, 101 F.3d 332 (4th Cir. 1996).

149. Garner, *supra* note 144, at 393.

150. *Penn Advert v. Schmoke*, 520 U.S. 1204 (1997).

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

THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT:
LEGISLATIVE HISTORY AND LEGAL CHALLENGES

In this part of the Article, Section A discusses the legislative history behind the new Act, paying particular attention to First Amendment concerns raised during Congressional debate. Section B then provides a closer examination of *Commonwealth Brands, Inc. v. United States*, the 2009 case challenging the Act's speech restrictions.

A. *Legislative History of the Act*

"Hollywood Henry"¹⁵² heralded June 12, 2009 a "historic moment"¹⁵³ for America. What was so special about it?

It was the day he and fellow members of the U.S. House of Representatives ratified the Senate's version of House Bill 1256, the Family Smoking Prevention and Tobacco Control Act,¹⁵⁴ and sent it to the desk of the President.¹⁵⁵ The nickname "Hollywood Henry" was bestowed upon Rep. Henry Waxman (D-Calif.), the bill's primary sponsor, years ago by the tobacco industry.¹⁵⁶ Waxman, representing Beverly Hills and adjacent areas for more than three decades, gained fame for convincing celebrities to testify before Congress about the dangers of smoking.¹⁵⁷ The hearings, Waxman claims, helped to change public opinion about smoking.¹⁵⁸

A former three-pack-a-day smoker,¹⁵⁹ Waxman has pushed anti-tobacco legislation since the early 1980s.¹⁶⁰ Initially unsuccessful in obtaining a total ban on tobacco advertising, he later advocated laws that would restrict tobacco ads to a black-and-white, text-only "tombstone"¹⁶¹ format, among other measures.¹⁶² "Although this legislation was not enacted into law,

152. Dan Koeppel, 'Hollywood Henry' Takes a Leading Role in Smoke Wars, *ADWEEK*, July 2, 1990, at 5.

153. Press Release, Rep. Harry A. Waxman, Congress Passes Landmark Tobacco Bill (June 12, 2009), available at <http://waxman.house.gov/News/DocumentSingle.aspx?DocumentID=132136>.

154. Family Smoking Prevention & Tobacco Control Act, H.R. 1256, 111th Cong. (2009).

155. See Press Release, Rep. Harry A. Waxman, *supra* note 153.

156. Koeppel, *supra* note 152 at 5.

157. *Id.* Barbra Streisand and Norman Lear were among the celebrities Waxman recruited to testify. *Id.*

158. Tobacco, <http://waxman.house.gov/IssueList/Internal/tobacco.htm> (last visited Nov. 8, 2009).

159. Koeppel, *supra* note 152 at 5.

160. See, e.g., David Hoffman, *White House Censored Koop, Rep. Waxman Says; Lawmaker Criticizes Refusal to Allow Surgeon General to Testify Against Tobacco Ads*, *WASH. POST*, July 18, 1986, at A3.

161. Tobacco, *supra* note 158.

162. *Id.* See also Leon E. Wynter, *Minorities Play the Hero in More TV Ads As Clients Discover Multicultural Sells; Tobacco Ad Proposal*, *WALL ST. J.*, Nov. 24, 1993, at B1, B6 (reporting "that Rep.

many of its provisions were incorporated in the FDA's landmark 1996 tobacco regulation," states Waxman's website.¹⁶³

The FDA's 1996 regulation,¹⁶⁴ although never taking effect due to the Supreme Court's 2000 ruling that the FDA lacked authority to regulate tobacco products,¹⁶⁵ was finally codified in 2009 by the Family Smoking Prevention and Tobacco Control Act.¹⁶⁶ The Act requires that the FDA promulgate rules "identical"¹⁶⁷ to those issued in 1996, with seven enumerated exceptions, including one targeting billboards.¹⁶⁸

In its most recent incarnation, ¹⁶⁹ tough restrictions on tobacco advertising and marketing were introduced by Waxman in March 2009 as House Bill 1256.¹⁷⁰ The purpose behind the bill was "[t]o protect the public health"¹⁷¹ and to give the FDA "authority to address issues of particular concern to public health officials, especially the use of tobacco by young people and dependence on tobacco."¹⁷² A March 2009 report by the House Committee on Energy and Commerce that Waxman chaired claimed that approximately 80 percent of tobacco users began while underage, with 1,000 children becoming new smokers each day in America.¹⁷³ The report pointed to advertising as the culprit:

Tobacco advertising and marketing contribute significantly to the use of tobacco products by children and adolescents, who are more influenced by tobacco marketing than adults, and are exposed to substantial and unavoidable advertising that leads to favorable

Henry Waxman has introduced a [measure] . . . that will require tobacco companies to devote the top fourth of their print ads to health warnings").

163. Tobacco, *supra* note 158 (last visited Nov. 15, 2009).

164. See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,617 (Aug. 28, 1996) (to be codified at 21 C.F.R. § 897.30).

165. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 126 (2000).

166. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009).

167. *Id.*

168. *Id.* One exception requires the FDA to include in the new rules "such modifications to section 897.30(b), if any, that the Secretary determines are appropriate in light of governing First Amendment case law, including the decision of the Supreme Court of the United States in *Lorillard Tobacco Co. v. Reilly* (533 U.S. 525 (2001))." *Id.* at 102(a)(2)(E).

169. The Family Smoking Prevention and Tobacco Control Act was presented several times in Congress prior to its passage. Notably, in 2004 the Senate passed the bill but it did not succeed in the House. See S. 2974, 108th Cong. (2004).

170. Family Smoking Prevention and Tobacco Control Act, H.R. 1256, 111th Cong. (2009).

171. *Id.*

172. *Id.* § 3. See also Rep. Henry Waxman (D-Calif.), *Why I'm Backing the Family Smoking Prevention and Tobacco Control Act*, THE HILL, Mar. 27, 2007, available at http://waxman.house.gov/UploadedFiles/Oped_antismoking_3-28-2007.pdf (stating that the Act "would help protect children from one of the greatest threats to their health and survival"). Waxman asserted that although prohibition of tobacco wouldn't work, "meaningful oversight on the manufacture, promotion and sale of tobacco" would. *Id.*

173. H.R. REP. NO. 111-58, at 3 (2009).

attitudes about tobacco use. . . . H.R. 1256 provides FDA with the authority it needs to promulgate comprehensive restrictions on the sale, promotion, and distribution of tobacco products, actions that most public health experts agree can significantly reduce the number of people who start to use tobacco . . .¹⁷⁴

The Committee's report concluded that the bill was "fully consistent with the First Amendment"¹⁷⁵ and the restrictions on advertising and marketing were "necessary and narrowly tailored to protect a compelling federal interest."¹⁷⁶

Dissenting views in the Committee's report, however, argued that some provisions violated the First Amendment, pointing out that "numerous legal experts have stated that the broad restrictions . . . are in effect a de facto ban on tobacco advertising and violate the First Amendment."¹⁷⁷ The minority cited *Lorillard*¹⁷⁸ and *Central Hudson*¹⁷⁹ and fretted about the possible failure of the Act to pass constitutional scrutiny as established by those cases.¹⁸⁰

The tension between the First Amendment and the government's interest in protecting children from smoking was raised during House debate on April 1, 2009. Rep. Steve Buyer, who proposed a substitute bill focusing on supposedly less harmful products, expressed concerns about the constitutionality of the ad restrictions, which were "discussed during the last two markups . . . before the Energy and Commerce Committee."¹⁸¹ Rep. Ted Poe called the advertising restrictions "more speech control by the Feds."¹⁸² He questioned the font-specific requirements and scoffed, "[d]oesn't the government have better things to do than regulate the type of font used in tobacco advertising?"¹⁸³ Texas Rep. Lamar Smith questioned how the

174. *Id.*

175. *Id.* at 32.

176. *Id.*

177. *Id.* at 129.

178. See *supra* Part I, Section B, Sub-section 3 and accompanying text (discussing *Lorillard*).

179. See *supra* Part I, Section A accompanying text (discussing *Central Hudson*).

180. H.R. REP. NO. 111-58, at 129-31.

181. 155 CONG. REC. H4310, 4312 (daily ed. Apr. 1, 2009) (statement of Rep. Buyer). Rep. Buyer's competing legislation, the Youth Prevention and Tobacco Harm Reduction Act, was co-sponsored by Mike McIntyre (D-N.C.). The Buyer-McIntyre substitute proposed establishing a new harm-reduction agency within the Department of Health and Human Services that would focus on moving tobacco users from the most dangerous tobacco products (such as unfiltered cigarettes) towards less risky alternatives, such as Swedish smokeless tobacco Snus. *Id.* Buyer contended that the MSA, Federal Trade Commission regulations and state laws all provided adequate safeguards for tobacco advertising. *Id.* at 4315. See also Press Release, Rep. Steve Buyer, Buyer Targets Prevention and Harm Reduction Approaches for Tobacco Reform (Apr. 2, 2009), available at <http://stevebuyer.house.gov/News/DocumentSingle.aspx?DocumentID=143132>.

182. 155 CONG. REC. H4310, 4313 (daily ed. Apr. 1, 2009) (statement of Rep. Poe).

183. *Id.*

restrictions would align with *Lorillard* and *Central Hudson*, concluding that bill raised “serious First Amendment concerns . . . [that] will create a swarm of lawsuits.”¹⁸⁴

Despite opposition, House Bill 1256 passed in April 2009 by a 298-112 vote.¹⁸⁵ This “historic move”¹⁸⁶ shifted eyes to the Senate, where the late Sen. Ted Kennedy (D-Mass.) was a staunch advocate for tobacco legislation but where Sen. Richard Burr (R-N.C.) threatened to filibuster the bill.¹⁸⁷ The Senate previously passed similar legislation in 2004, but it failed in the House.¹⁸⁸

In considering the new bill, the Senate also weighed a substitute amendment focused on harm reduction, introduced by Burr and Kay Hagan, both hailing from tobacco-rich North Carolina.¹⁸⁹ Burr was virtually the only senator during floor debate to discuss the First Amendment issues raised by the legislation.¹⁹⁰ He took issue with a provision forbidding tobacco manufacturers from making statements about the FDA.¹⁹¹ Burr called the bill unconstitutional, urging his colleagues not to pass it:

I know it is the inclination of some Members of the Senate to wait and have it passed and somebody refer it to the Supreme Court so the Supreme Court can tell us it is unconstitutional. When scholars tell us it is unconstitutional, I believe our responsibility is then: don't pass it, don't do it.¹⁹²

Despite Burr's exhortation, the bill passed the Senate on June 11, 2009.¹⁹³ The House ratified the Senate's version by a 307 to 97 vote the next day.¹⁹⁴ By June 22, President Obama had signed it.

184. 155 Cong. Rec. H4318, 4340 (daily ed. Apr. 1, 2009) (statement of Rep. Smith). Smith also mentioned *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), which struck Ohio's ban on illustrations in attorney advertisements.

185. See Press Release, Rep. Henry Waxman, House Passes Landmark Bill to Regulate Tobacco Products (Apr. 2, 2009), [available at](http://waxman.house.gov/News/DocumentSingle.aspx?DocumentID=117682) <http://waxman.house.gov/News/DocumentSingle.aspx?DocumentID=117682>.

186. Liz Szabo, *FDA Regulation of Tobacco Gets House OK*, USA TODAY, Apr. 3, 2009, at 5A.

187. Duff Wilson, *A Vote Nears for a Tobacco Bill That Philip Morris Can Live With*, N.Y. TIMES, Apr. 1, 2009, at B3. “Passage, if it comes, may be politically impossible without the negotiated support of Philip Morris, whose Marlboro brand helps make it the American tobacco industry's biggest player.” *Id.*

188. See S. 2974, 108th Cong. (2004).

189. 155 CONG. REC. S6335, 6339 (daily ed. June 9, 2009) (statement of Sen. Burr).

190. *But see* 155 CONG. REC. S5994, 5994 (daily ed. June 3, 2009) (statement of Sen. Whitehouse) (stating that “[t]his legislation finally enacts tough but constitutionally sound regulations on advertising towards young people”).

191. 155 CONG. REC. S6335, 6339 (daily ed. June 9, 2009) (statement of Sen. Burr).

192. *Id.*

193. See Family Smoking Prevention and Tobacco Control Act, H.R. 1256, 111th Cong. (2009); S. Amdt. 1247, 111th Cong. (2009). The Senate changes, presented by Sen. Christopher Dodd (D-Conn.), focused on tougher civil penalties for companies who violate the law and enhanced reporting requirements for the FDA. See 155 CONG. REC. S6017, 6018 (daily ed. June 3, 2009) (statement by Sen. Dodd).

194. Waxman hailed it as a “day when Americans can begin to truly kick the habit.” Press

The *New York Times* noted that the Act's speech restrictions were likely to be attacked on First Amendment grounds, focusing on a key issue of whether there was a direct causal link between tobacco ads and increased youth smoking.¹⁹⁵ As predicted, the Act was targeted for a free-speech challenge, with the complaint in *Commonwealth Brands, Inc. v. United States* filed in August 2009.¹⁹⁶

B. Challenges to the Act in *Commonwealth Brands v. United States*

Three of the nation's largest tobacco companies¹⁹⁷ joined forces to stop the Act from taking effect, filing suit on Big Tobacco's home turf in the Western District of Kentucky.¹⁹⁸ Commonwealth Brands and its fellow litigants are challenging the law on more than a dozen grounds, most involving the First Amendment.¹⁹⁹ As the complaint alleges, the Act "imposes unprecedented restrictions on Plaintiffs' First Amendment rights by limiting their ability to disseminate truthful information about tobacco products to adult consumers."²⁰⁰

This Article focuses on four specific provisions at issue in *Commonwealth Brands* that concern speech related to:

cigarette packs;²⁰¹

periodical and poster ads;²⁰²

Release, Rep. Harry A. Waxman, *supra* note 153.

195. Duff Wilson, *Tobacco Regulation Is Expected To Face a Free-Speech Challenge*, N.Y. TIMES, June 16, 2009, at B1. Michael Macleod-Ball of the ACLU said that tobacco advertising and marketing restrictions have "not been shown to have a sufficiently close nexus with youth smoking." On the other hand, law professor Kathleen Dachtler told the *Times* that since the *Lorillard* decision in 2001, additional reports and court rulings have sufficiently linked youth smoking to tobacco advertising. *Id.*

196. Complaint, *supra* note 27.

197. The plaintiffs include, "R.J. Reynolds Tobacco, Lorillard and Commonwealth Brands, the second, third and fourth-largest manufacturers of tobacco products in the United States." Duff Wilson, *Tobacco Firms Sue to Block Marketing Law*, N.Y. TIMES, Sept. 1, 2009, at B1. See *supra* note 28 (identifying all six plaintiffs and noting the absence of Altria's Philip Morris from the litigation).

198. Kentucky is known for tobacco, but the United States Court of Appeals for the Sixth Circuit, which includes Kentucky, may be responsive to commercial speech issues, according to First Amendment attorney Floyd Abrams who is representing plaintiff Lorillard Tobacco Co. See Wilson, *supra* note 195, at B1 (reporting that "Abrams said Lorillard's lawyers believed the United States Court of Appeals for the Sixth Circuit, which covers Kentucky, Tennessee, Ohio and Michigan, has been more supportive than some other circuits to commercial speech issues").

199. The complaint does not challenge the FDA's authority to regulate tobacco products or advertising, nor does it take issue with the "portions of the Act that materially and directly address tobacco sales to minors." Complaint, *supra* note 27, at 2, 44-45. Fifth Amendment violations are alleged but are beyond the scope of this Article. *Id.* at 44-45.

200. *Id.* at 12.

201. See Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, §§ 201 (a), (d), 123 Stat. 1775, 1842-45 (2009).

202. See 21 C.F.R. § 987.30(b) (1999).

outdoor ads;²⁰³ and

modified-risk products and the FDA's regulation of tobacco.²⁰⁴

Each of these provisions is described separately in greater detail below, along with the specific arguments against it.

1. Cigarette Packs: Massive Warnings and Graphic Images

The Act requires all cigarette packs to carry a black-and-white warning label that comprises a whopping "[fifty] percent of the front and rear panels"²⁰⁵ of each pack, with the word "WARNING" set forth in all capital letters in large, [seventeen-point] type.²⁰⁶ The warning statement must appear on the top half of the packs.²⁰⁷ What's more, the new law requires packs to feature "color graphics depicting the negative health consequences of smoking."²⁰⁸

These provisions are blasted by the *Commonwealth Brands* plaintiffs as forcing them to "stigmatize their own products."²⁰⁹ The complaint emphasizes that consumers typically must view cigarette packs from across a countertop, leaving only the bottom half of packages (presumably obscured by shelving) for brand logos and trademarks.²¹⁰ The plaintiffs contend this virtually eliminates their point-of-sale communication with consumers,²¹¹ as all product information must be shrunk to the point that it is nearly impossible for consumers to identify one brand from another or to notice "the existence of a new brand or a competitive brand."²¹² Requiring the graphic images, the plaintiffs assert, is "plainly intended to deliver a visually striking, attention-grabbing anti-smoking message."²¹³

203. See Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 102(a), 123 Stat. at 1775, 1830 (adopting 21 C.F.R. § 987.30(b) (1999)); *id.* §§ 6(c)(1), 102(a)(2)(E), 123 Stat. 1775, 1783, 1831.

204. Pub. L. No. 111-31, sec. 101(b), § 911, 123 Stat. 1775, 1784, 1812-19 (amending the FDCA to insert 21 U.S.C. § 387k).

205. Pub. L. No. 111-31, § 201(a), 123 Stat. 1775, 1843 (amending 15 U.S.C. § 1333).

206. *Id.*

207. *Id.*

208. Pub. L. No. 111-31, § 201, 123 Stat. 1775, 1845 (amending 15 U.S.C. § 1333).

209. Complaint, *supra* note 27, at 3.

210. *Id.* at 16-17.

211. *Id.*

212. *Id.* at 17.

213. *Id.* at 16.

2. Newspaper, Magazine and Poster Ads for Cigarettes:

Tombstone Ads with Large Warnings

When it comes to newspaper and magazine ads, as well as posters, the new law generally requires that black-and-white warning labels “comprise at least 20 percent”²¹⁴ of the space of each ad and be located at the top “in a conspicuous and prominent format.”²¹⁵ Similar provisions apply to ads for smokeless tobacco products.²¹⁶ What’s more, the advertisements themselves must be in a tombstone, black-and-white format if more than fifteen percent of a periodical’s readership is comprised of minors (defined as a person under age eighteen) or if it has more than two million readers who are minors.²¹⁷

The plaintiffs allege that the government is hijacking their “packaging and advertising to carry a clear and unequivocal Government-dictated message that is in direct conflict with Plaintiffs’ commercial interests.”²¹⁸ In brief, the government is compelling the tobacco companies to convey messages with which they disagree. In addition, the companies complain that the “black-and-white text provision also bans [them] from using established trademarked logos in advertising and labeling.”²¹⁹ They also point out that magazines like *Sports Illustrated* and *People* are subject to the ban because, while less than fifteen percent of their readership is comprised of minors, they are both read by more than two million minors.²²⁰

3. Outdoor Advertising: Banning Billboards Near Parks & Schools

The Act requires the Secretary of Health and Human Services to adopt the following 1996 rule promulgated (but never enforced) by the Food and Drug Administration, subject to any modifications that the Secretary feels are necessary to improve its odds of passing constitutional muster:²²¹

No outdoor advertising for cigarettes or smokeless tobacco, including

214. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 201, 123 Stat. 1775, 1843 (amending 15 U.S.C. § 1333).

215. *Id.*

216. Pub. L. No. 111-31, § 204, 123 Stat. 1775, 1847 (amending 15 U.S.C. § 4402).

217. Pub. L. No. 111-31, § 102(a), 123 Stat. 1775, 1830 (adopting 61 Fed. Reg. 44,617, § 897 (Aug. 28, 1996)); 21 C.F.R. § 897.30(b) (1999) (setting forth the black-and-white ad requirement).

218. Complaint, *supra* note 27, at 20.

219. *Id.* at 15.

220. *Id.* at 13.

221. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1775, 1831 (codified as amended in scattered sections of 15 and 21 U.S.C.).

billboards, posters, or placards, may be placed within 1,000 feet of the perimeter of any public playground or playground area in a public park (e.g., a public park with equipment such as swings and seesaws, baseball diamonds, or basketball courts), elementary school, or secondary school.²²²

The plaintiffs were quick to point out that “in *Lorillard*,²²³ the Supreme Court invalidated under the First Amendment a Massachusetts prohibition almost identical to the first option.”²²⁴ To the extent this sweeps up on-premises outdoor ads for stores selling cigarettes, the plaintiffs argue it is particularly burdensome because “on-site advertising of tobacco products constitutes an important means by which convenience stores, gas stations, and other small retail stores that sell tobacco products generate sales, not only of tobacco products, but also of non-tobacco items.”²²⁵ Finally, the plaintiffs object to the “unfettered discretion”²²⁶ given to the Secretary of Health and Human services to modify the 1996 rule without any input from retailers or tobacco companies.²²⁷

4. Modified-Risk Products and FDA Regulation

The Act prohibits manufacturers of modified-risk tobacco products²²⁸ from communicating with consumers about such products unless:

- the FDA approves the statements in advance *and*
- the products actually will “significantly reduce harm and the risk of tobacco-related disease to individual tobacco users”²²⁹ and “benefit the health of the population as a whole.”²³⁰

The Act also prohibits the tobacco industry from making references to the FDA, even those regarding compliance with FDA standards.²³¹

According to the complaint, the prohibition of dissemination of

222. 21 C.F.R. § 897.30(b) (1999).

223. See *supra* Part I, Section B, Sub-section 3 and accompanying text (discussing *Lorillard*).

224. Complaint, *supra* note 27, at 23.

225. *Id.* at 24.

226. *Id.*

227. *Id.*

228. This designation sweeps up products that are labeled with terms like “light,” “mild,” or “low” and similar descriptors. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1812 (codified as amended in scattered sections of 15 and 21 U.S.C.) (amending the FDCA to insert new 21 U.S.C. § 387k).

229. *Id.* at 1814.

230. *Id.*

231. *Id.* at 1834-35 (2009) (amending the FDCA to add insert 21 U.S.C. § 331).

truthful information “chills [p]laintiffs’ scientists and executives from participating in these public debates because they can easily be accused of directing their comments to consumers merely by participating in the public scientific debates.”²³² The complaint describes truthful, non-misleading information regarding their products as “core First Amendment speech [that] is subject to strict scrutiny review and cannot pass muster under such review.”²³³ Strict scrutiny is a more rigorous test for the government to clear compared to the commercial speech doctrine.²³⁴

The tobacco industry’s First Amendment challenge to the Family Smoking Prevention and Tobacco Control Act is based on the government’s restrictions on its speech, as well as its compulsion of speech with which it disagrees. It is likely that the Act’s challenged speech provisions will be scrutinized under the *Central Hudson* analysis. The next part of this Article analyzes each of the four aspects of the Act set forth above under the *Central Hudson* test.

SMOKING OUT THE FIRST AMENDMENT ISSUES: WILL THE NEW LAW PASS CONSTITUTIONAL MUSTER?

This part analyzes the First Amendment allegations in *Commonwealth Brands*. First, the four categories of restrictions that are the focus of this Article—packaging, print ads, billboard ads, and statements about modified-risk products and the FDA—are analyzed using the *Central Hudson* test.²³⁵ Next, Section B examines these allegations under the compelled-speech doctrine. Finally, the potential for a strict scrutiny analysis is analyzed in Section C.

A. The *Central Hudson* Analysis

The four-part *Central Hudson* test for determining whether commercial speech regulations comport with the First Amendment²³⁶ was employed in *Lorillard* in 2001 to analyze tobacco advertising restrictions²³⁷ and likely will be used today in

232. Complaint, *supra* note 27, at 23.

233. *Id.*

234. See *supra* notes 69–71 and accompanying text.

235. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980). For a discussion of the *Central Hudson* test, the commercial speech doctrine and vice advertising, see *supra* Part I and accompanying text.

236. *Cent. Hudson*, 447 U.S. at 566.

237. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). For a discussion of *Lorillard*, see *supra* Part I, Section B, Sub-section 2 and accompanying text.

Commonwealth Brands. To recap, the four questions posed in the test are:

1. Is the speech deceptive, false or for an unlawful good/service?
2. Is the government's asserted regulatory interest(s) substantial?
3. Does the regulation directly advance the interest(s)?
4. Is the regulation no more extensive than is necessary to serve that interest(s)?²³⁸

With these four prongs of *Central Hudson* in mind, the Article now applies them to the key provisions of the new law.

1. The "Easy Part": Steps 1 and 2 of the Central Hudson Test

As applied to the packaging, print advertising, billboard and industry statement provisions of the Act, the first two prongs of this test will probably be of little consequence to the overall First Amendment analysis.²³⁹ In fact, during the last tobacco advertising battle in *Lorillard* between cigarette companies and the government, both parties agreed that the advertising was not deceptive, false or related to an unlawful activity, and that the government had a substantial interest in preventing youth smoking.²⁴⁰ However, the FDA asserted in its 1996 rule that advertising regulations would not pass the first prong because, "at least to the extent that it is related to sale of these products to children under 18,"²⁴¹ it proposes an illegal transaction.²⁴² But it is doubtful a court would accept the argument that *all* tobacco advertising proposes the illegal transaction of selling tobacco products to minors. On the second prong of *Central Hudson*, even though the parties stipulated a substantial government interest in *Lorillard*, the Supreme Court nonetheless remarked that the government had a "compelling"²⁴³ interest in protecting minors

238. *Cent. Hudson*, 447 U.S. at 566.

239. See, e.g., Hoefges, *supra* note 37, at 275 (observing that "[t]ypically, once the Court has determined that a regulation restricts protected commercial speech under the first *Central Hudson* factor, it has been fairly liberal in finding that an asserted government interest is sufficiently 'clear and substantial' under the second factor").

240. *Lorillard*, 533 U.S. at 555.

241. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,472 (Aug. 28, 1996). The FDA's final rule includes a lengthy analysis of the First Amendment concerns raised by its regulations and includes summaries of the comments received by the agency on this issue.

242. *Id.*

243. See *supra* note 84 (differentiating between *compelling* interest and *substantial* interest in terms of judicial scrutiny). A compelling interest would satisfy analysis under the more rigorous strict scrutiny standard of judicial review. See *supra* note 71 and accompanying text (discussing the strict

from smoking.²⁴⁴ Thus, the provisions in question would likely pass the first two prongs of *Central Hudson*.

2. Number Crunching: Finding a Direct Link between the Government's Interest and the Act's Speech Restrictions

The third *Central Hudson* step requires a direct link between the government's speech restrictions and its interest.²⁴⁵ The packaging,²⁴⁶ print and poster advertising,²⁴⁷ and billboard restrictions²⁴⁸ in the Act are all advertising techniques. The government will thus need to prove that these advertising restrictions directly advance its interest in protecting minors from smoking.²⁴⁹ To do this, the government will probably offer "studies, anecdotes, history, expert consensus documents, and empirical data,"²⁵⁰ just as the FDA did in support of its 1996 rule.²⁵¹ There was no shortage of that type of evidence available to the FDA then, as illustrated by its exhaustive First Amendment analysis spanning more than seventy pages of the Federal Register.²⁵² Similarly, the *Lorillard* Court in 2001 found sufficient evidence,²⁵³ and since that time the cumulative body of knowledge linking advertising to youth consumption of tobacco products has grown.²⁵⁴ This "link has been reinforced in recent years by reports of the Institute of Medicine, the National Cancer Institute, a federal appeals court ruling on a tobacco-company fraud case, and at least a dozen peer-reviewed studies,"²⁵⁵ according to University

scrutiny test).

244. *Lorillard*, 533 U.S. at 555, 564.

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

246. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 201(a), 123 Stat. 1776, 1842-45 (2009) (to be codified at 15 U.S.C. § 1333).

247. 61 Fed. Reg. 44,396, 44,617 (Aug. 28, 1996).

248. *Id.*

249. *See, e.g., id.* at 44,475.

250. *Id.* Categories of evidence presented by the FDA in its 1996 defense of the advertising restrictions included "[e]vidence regarding young people's exposure to, recall of, approval of, and response to advertising[.]" *id.* at 44,476, "[e]vidence concerning overestimation of smoking prevalence[.]" *id.*, "[t]he effects of selected advertising campaigns that were effective with children[.]" *id.*, and "[e]vidence that youth brand choices are related to advertising[.]" *id.* at 44,482.

251. *Id.* at 44,475.

252. *See id.* at 44,469-539.

253. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 557-58 (2001).

254. *See, e.g.,* M.A. Wakefield, D. Germain & S.J. Durkin, *How Does Increasingly Plain Cigarette Packaging Influence Adult Smokers' Perceptions About Brand Image? An Experimental Study*, 17 *TOBACCO CONTROL* 416, 416, 421 nn.8-10 (2008); David Hammond & Carla Parkinson, *The Impact of Cigarette Package Design on Perceptions of Risk*, 31 *J. PUB. HEALTH* 345, 351, 352 n.9, 353 nn.42-44 (2009).

255. Duff Wilson, *Tobacco Regulation Is Expected to Face a Free-Speech Challenge*, *N.Y. TIMES*, June 16, 2009, at B1; *see also* NATIONAL CANCER INST., *THE ROLE OF THE MEDIA IN PROMOTING AND REDUCING TOBACCO USE* (2008), available at http://cancercontrol.cancer.gov/tcrb/monographs/19/m19_complete.pdf; PRESIDENT'S CANCER PANEL, *NAT'L CANCER INST., PROMOTING HEALTHY LIFESTYLES: POLICY, PROGRAM, AND PERSONAL RECOMMENDATIONS FOR REDUCING CANCER RISK* (2007), available at

of Maryland law Professor Kathleen Dachille, who is also the director of the Legal Resource Center for Tobacco Regulation, Litigation and Advocacy.²⁵⁶ Therefore, based on the availability of studies linking advertising and youth smoking, courts analyzing the *Commonwealth Brands* allegations are likely to find that the advertising restrictions satisfy the third part of the *Central Hudson* test.

The limits on statements from tobacco companies regarding modified-risk products will require a separate analysis under the third prong of *Central Hudson*. That, too, will require similar types of evidence to establish a link between the government's interest and its restrictions. Studies addressing the impact of tobacco statements on these types of products are readily available, and thus this speech restriction is likely to pass the third part of the test.²⁵⁷ As the government put it in a preliminary filing in the *Commonwealth Brands* case, it is "beyond dispute that the sale of 'light' cigarettes and other tobacco products that imply a reduced risk has contributed significantly to tobacco's toll on the public health, and the corresponding health care costs."²⁵⁸

More problematic, however, is the evidence of a direct link between the government's stated interest in protecting minors and its prohibition of any statements referring to the FDA's regulation of tobacco.²⁵⁹ How will preventing tobacco companies from discussing FDA regulations keep children from smoking? Will preventing tobacco industry representatives from explaining their views about FDA regulation on shows like *Meet the Press* or in the pages of *The New York Times* really reduce teen smoking? Granted, there is evidence of the tobacco industry's history of misleading statements regarding modified-risk products that would speak to the tobacco industry's history of misleading

<http://deainfo.nci.nih.gov/advisory/pcp/pcp07rpt/pcp07rpt.pdf>; INST. OF MED., ENDING THE TOBACCO PROBLEM: A BLUEPRINT FOR THE NATION (2007).

256. Wilson, *supra* note 255.

257. As the government noted in a preliminary motion in the *Commonwealth Brands* case:

Congress determined that "[t]he only way to effectively protect the public health from the dangers of unsubstantiated modified risk tobacco products is to empower the Food and Drug Administration to require that products that tobacco manufacturers sold or distributed for risk reduction be reviewed in advance of marketing, and to require that the evidence relied on to support claims be fully verified."

Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction at 14-15, *Commonwealth Brands, Inc. v. United States*, No. 1:09CV-117-M, 2010 WL 65013 (W.D. Ky. Jan. 5, 2010, amended Jan. 14, 2010) (No. 43-2) [hereinafter *Memorandum in Opposition*] (quoting the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 2(43), 123 Stat. 1776, 1780 (2009)).

258. *Id.* at 23; *see also* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 2(37), (43), 123 Stat. 1776, 1780 (2009).

259. Family Smoking Prevention and Tobacco Control Act § 103(b) (to be codified at 21 U.S.C. § 331) (amending FDCA section 301).

consumers.²⁶⁰ But banning truthful discussion of FDA regulations has not been proven to affect consumers one way or another and, as a preventative measure, would be “speculation or conjecture”²⁶¹ that does not satisfy the third part of the *Central Hudson* test. The FDA has never before regulated the tobacco industry, so there is obviously no evidence directly linking a ban on discussion of FDA regulations with preventing youth smoking. However, even if a court addressing the issue was to determine that a direct link *did* exist, this provision would face the same pitfalls as the others discussed in this section: being sufficiently narrowly tailored to satisfy the fourth part of the *Central Hudson* test.

3. Striking a Balance: Do the Means Narrowly Serve the Ends?

The fourth prong of *Central Hudson* requires “a reasonable fit between the means and ends of the regulatory scheme.”²⁶² The cigarette packaging restrictions that require the top half of packs to consist of graphic warnings,²⁶³ when coupled with the fact that the bottom half likely is obscured by opaque in-store display racks,²⁶⁴ results in a near-total ban on tobacco manufacturers’ ability to distinguish their product packaging.²⁶⁵ The only thing visible for a consumer standing across the clerk’s counter at a 7-11, for instance, would be the warning and graphic images. Thus, a court analyzing this part of the *Commonwealth Brands* case is likely to find that the fit between the packaging restrictions and the reduction of youth smoking is not reasonable. Just as the *Lorillard* Court did not permit billboard restrictions resulting in a virtual ban of that mode of advertising,²⁶⁶ the ban on distinctive cigarette packs may not survive due to the near complete foreclosure of this channel of communication.

It follows, then, that the billboard provision of the Family Smoking Prevention and Tobacco Control Act,²⁶⁷ unless radically altered if the FDA promulgates a new rule on outdoor

260. See, e.g., *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 146 (D. D.C. 2006), *aff’d in relevant part*, 566 F.3d 1095 (D.C. Cir. 2009) (finding that tobacco companies had violated the Racketeer Influenced and Corrupt Organizations Act (RICO) by conspiring to deceive the public about the dangers of smoking); see also Del Quentin Wilber, *Big Tobacco Loses in Appeals Court*, WASH. POST, May 23, 2009, at A5 (noting that tobacco “manufacturers will no longer be allowed to label brands ‘light’ or ‘low tar’ and will have to purchase ads on television and in major newspapers that explain the health dangers and addictiveness of their products”).

261. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486 (1995).

262. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001) (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980)).

263. Family Smoking Prevention and Tobacco Control Act § 201 (amending 15 U.S.C. § 1333).

264. Complaint, *supra* note 27, at 16.

265. *Id.* at 17.

266. *Lorillard*, 533 U.S. at 565-66.

267. Family Smoking Prevention and Tobacco Control Act § 102(a) (adopting 61 Fed. Reg. 44,396, 44,617 (Aug. 28, 1996)); *id.* §§ 6(c)(1), 102(a)(2)(E).

advertising,²⁶⁸ will also fail this *Central Hudson* step. Why? Because it will result in a near-total ban on outdoor advertising if the FDA's proposed 1996 rules take effect.²⁶⁹

The billboard regulations remain an open question at this time, however, because the Act mandates that Secretary of Health and Human Services Kathleen Sebelius include any modifications to the 1996 FDA billboard rules that she may or may not feel are necessary "in light of governing First Amendment case law, including the decision of the Supreme Court of the United States in *Lorillard Tobacco Co. v. Reilly*."²⁷⁰ Although she need not make any revisions, it would seem to be a very wise move on her part, not to simply adopt the 1996 billboard rules in wholesale fashion, but to attempt to more carefully craft them in light of *Lorillard*. Sebelius actually has quite a long time to decide what to do, as the rules will not take effect until June 22, 2010 – precisely one year after signage of the new law by President Obama.²⁷¹

On this point, the Court of Appeals for the Fourth Circuit's tobacco advertising decision in *Penn Advertising*,²⁷² along with the recognition "that *children deserve special solicitude* in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media,"²⁷³ could provide a hopeful frame of analysis—hopeful, at least, for the law's supporters—for a federal court looking to keep the restrictions in place.

The print ad restrictions for magazines and newspapers seem more carefully tailored than either the packaging or billboard provisions.²⁷⁴ However, as the *Commonwealth Brands* plaintiffs argue, the law's readership requirements will close off the tobacco industry's ability to advertise in major adult-g geared

268. Congress directed the FDA to examine the 1996 outdoor advertising rules and to make modifications in accord with First Amendment concerns and *Lorillard*, if it deemed them necessary. Family Smoking Prevention and Tobacco Control Act §102(a).

269. As is, the outdoor advertising provision of the Family Smoking Prevention and Tobacco Control Act prohibits outdoor advertising for tobacco products within 1,000 feet of schools or parks. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,617 (Aug. 28, 1996) (to have been codified at 21 C.F.R. § 897.30(b)).

270. 21 U.S.C.A. § 387a-1 (West 2009).

271. *Id.*

272. *Penn Adver. v. Mayor & City Council of Baltimore*, 63 F.3d 1318 (4th Cir. 1995), readopted as modified by *Penn Advertising v. Mayor & City Council of Baltimore*, 101 F.3d 332 (4th Cir. 1996). In *Penn Advertising*, the outdoor advertising restriction was distinct because (1) it was a local ordinance rather than a state law, which weakens any federal pre-emption argument; and (2) it contained exceptions for advertising that included commercial and industrial areas, sports stadiums, public transportation, and businesses that sell cigarettes. *Penn Advertising*, 63 F.3d at 1321.

273. *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 329 (4th Cir. 1996) (emphasis added).

274. See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,617.

publications.²⁷⁵ Therefore, the print and poster restrictions will likely also fail the fourth and final *Central Hudson* step due to the broad sweep of publications that will be off limits to the tobacco industry's advertising.

Taken together, the advertising restrictions of the Act will likely face the same fate as the *Lorillard* billboard law—being struck down at the fourth step of the commercial speech test—because they are not sufficiently tailored.²⁷⁶ As the *Lorillard* Court emphasized, tobacco retailers and adult consumers have a protected interest in receiving truthful information that will not automatically be trumped by the government's interest in protecting minors.²⁷⁷ What is more, the Act's advertising restrictions do not "leave open ample channels of communication"²⁷⁸ in which the tobacco industry can convey information to adult consumers.²⁷⁹

As to the provisions regarding speech about "light" or "low-tar" products,²⁸⁰ tobacco companies cannot market these modified-risk products without the FDA's approval.²⁸¹ This could be deemed reasonable by a court but for the requirement that the FDA determines that such products "benefit the health of the population as a whole."²⁸² Considering that tobacco products are widely recognized today as being harmful,²⁸³ meeting this standard seems improbable, if not impossible.²⁸⁴ Further, to the extent that the provision construes statements by tobacco companies in press releases, scientific debates and related methods as communications to consumers, the industry's voice on these types of products would be silenced. Thus, the speech

275. Complaint, *supra* note 27, at 13. Advertising in magazines such as *People* and *Sports Illustrated* would be prohibited under the new standards. *Id.* It thus should be clear that adult-gear does not mean the type of sexual content associated with so-called adult publications like *Hustler* or *Playboy*.

276. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565–66 (2001).

277. *Id.* at 564 (quoting *Reno v. ACLU*, 521 U.S. 844, 875 (1997)). In *Reno v. ACLU*, which involved a federal law that criminalized sexually explicit online speech unsuitable for minors but not for adults, the Supreme Court noted that "regardless of the strength of the Government's interest in protecting children, [t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (internal quotation marks and citation omitted).

278. *Lorillard*, 533 U.S. at 569.

279. *Id.*

280. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 101(b), 123 Stat. 1776, 1812–19 (amending the FDCA to insert new 21 U.S.C. § 387k).

281. *Id.*

282. *Id.*

283. See, e.g., *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 146 (D.D.C. 2006), *aff'd in relevant part*, 566 F.3d 1095 (D.C. Cir. 2009) (noting that "[c]igarette smoking causes disease, suffering, and death. . . . The scientific and medical community's knowledge of the relationship of smoking and disease evolved through the 1950s and achieved consensus in 1964" and setting forth evidence of the harm of tobacco products).

284. "The Act thus allows the sale of reduced-risk tobacco products but prohibits truthful description of them as such absent prior Government approval." Complaint, *supra* note 27, at 21.

restriction on statements regarding “light,” “low-tar” and other modified-risk products will likely be found insufficiently tailored for the fourth *Central Hudson* step.

Finally, the speech restrictions prohibit tobacco companies from “[m]aking any express or implied statement or representation directed to consumers with respect to a tobacco product, in a label or labeling or through the media or advertising, that either conveys, or misleads or would mislead consumers into believing,” among other things, that tobacco products are endorsed by the FDA or otherwise less harmful due to FDA regulation.²⁸⁵ One lawmaker²⁸⁶ described the provision as “a clause . . . that prohibits the cigarette companies from even informing the public that cigarettes are regulated by the FDA or that the companies are in compliance with the FDA regulations.”²⁸⁷ To the extent that this would sweep up *only* misleading statements, there would be no constitutional problems with it, as false and misleading statements do not receive any protection under the commercial speech doctrine. However, due to the vagueness of the statute and the possibility of it sweeping up important political and scientific speech within its ambit, it is unreasonable within the meaning of the fourth prong of the *Central Hudson* test. The restrictions on speech discussed in this section will likely fail on the fourth prong due to their overbreadth (and therefore unreasonableness).

B. *The Compelled-Speech Doctrine & Its Relevance to the Act*

With the First Amendment right to speak freely also flows an unenumerated right *not* to speak, which gives rise to the compelled-speech doctrine.²⁸⁸ In the landmark case of *West Virginia Board of Education v. Barnette*,²⁸⁹ the Supreme Court held

285. Family Smoking Prevention and Tobacco Control Act sec.103(b)(13), § 301(tt) (amending section 301 of the FDCA).

286. 155 CONG. REC. S6335 (daily ed. June 9, 2009) (statement of Sen. Burr).

287. *Id.* at S6339 (quoting Boston University School of Public Health Professor Michael Siegel); see also Michael Siegel, *Blowing Smoke with Legislation: A Bill to Put Tobacco Products Under FDA Supervision Is a Gift to Cigarette Companies; It Ignores Everything We Know About the Dangers of Smoking*, L.A. TIMES, June 3, 2009, at 21A. Siegel stated:

In fact, the bill’s crafters . . . have written a clause into the bill that prohibits the cigarette companies from even informing the public that cigarettes are regulated by the FDA or that the companies are in compliance with FDA regulations. This is clearly an unconstitutional provision, as it violates the free speech rights of the tobacco companies; nevertheless, it suggests that even the supporters of the legislation are aware that the bill creates a false perception of the increased safety of cigarette smoking.

Id.

288. See David W. Ogden, *Is There a First Amendment “Right to Remain Silent?”: The Supreme Court’s “Compelled Speech” Doctrine*, 40 FED. B. NEWS & J. 368 (1993).

289. 319 U.S. 624 (1943).

that public-school students cannot be compelled to speak in the form of recitation of a pledge of allegiance to the American flag.²⁹⁰ The students, who were Jehovah's Witnesses, argued that compulsory recitation of the pledge was tantamount to forced acceptance of state-mandated ideology, which conflicted with their religious convictions.²⁹¹ The high court in *Barnette* held that the government lacked authority to compel expression abhorrent to the speaker, because the First Amendment protected "freedom of mind."²⁹²

Similarly, the Supreme Court held that a New Hampshire driver, who also was a Jehovah's Witness, could not be compelled to be a "mobile billboard"²⁹³ for the state's ideology by being forced to display a license plate emblazoned with the motto "Live Free or Die."²⁹⁴

In both of those cases, the plaintiffs' objections stemmed from religious beliefs, but protection from government-mandated speech has been applied to other First Amendment issues as well. For example, Florida's right-of-reply law for candidates seeking public office who were disparaged by newspapers was struck down by the Supreme Court in *Miami Herald Publishing Co. v. Tornillo*.²⁹⁵ Chief Justice Warren Burger famously opined that free press is jeopardized once the state starts dictating content:

The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.²⁹⁶

That evolution extended the compelled speech doctrine to apply to businesses²⁹⁷ even though, as noted by Professor Brent White, unlike individuals, corporations "lack a conscience or the

290. *Id.* at 642.

291. *Id.* at 629.

292. *Id.* at 637.

293. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

294. *Id.* at 713–14.

295. 418 U.S. 241 (1974). Florida's right-of-reply statute was designed to provide access to the print newspaper medium for any candidate for public office who was "assailed regarding his personal character or official record." *Id.* at 244. It was a compelled-speech case, as the Court wrote that "[c]ompelling editors or publishers to publish that which 'reason' tells them should not be published" is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter." *Id.* at 256.

296. *Id.* at 258.

297. *See Pac. Gas & Elec. v. Pub. Utils. Comm'n*, 475 U.S. 1, 8 (1986).

capacity for thought.”²⁹⁸ Regardless of whether the speaker is a lone voice or the voice of many, Professor Laurent Sacharoff compares the government to a “super-editor”²⁹⁹ of the marketplace of ideas when given the power to compel speech from anyone.³⁰⁰ “The government artificially amplifies its own message through the mouths of unwilling citizens, giving listeners a mix of information skewed to the government viewpoint.”³⁰¹

In an article examining the development of the compelled speech doctrine, current U.S. Deputy Attorney General David Ogden describes such cases as generally fitting into one of two types.³⁰² The first are those requiring a speaker to agree with or to affirm a particular position with which he or she either disagrees or does not want to be associated.³⁰³ The second concerns legislation that deters a speaker from engaging in otherwise protected forms of expression.³⁰⁴ The advertising and packaging requirements of the Family Smoking Prevention and Tobacco Control Act³⁰⁵ may contain directives that fall into at least one, if not both, of those categories.

First, requiring large and ostentatious warning messages from tobacco companies is forcing them to deliver government-designed and government-mandated messages that they certainly do not want to convey.³⁰⁶ What company, after all, wants to send a message to consumers deterring them from buying its product? Second, the ban on discussing FDA regulations³⁰⁷ certainly falls into the category of deterring otherwise protected speech, as discussed later.

Recently, compelled-speech lawsuits have returned full-circle from *Wooley* back to the topic of license plates,³⁰⁸ and there are parallels between tags and tobacco that are worthy of note. The root issue at the heart of many of these battles has been whether the text of specialty or vanity tags constitutes an expression of state speech or private speech. Some states have claimed the

298. Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1298.

299. Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 333 (2008).

300. *Id.*

301. *Id.*

302. Ogden, *supra* note 288, at 370.

303. *Id.* at 371.

304. *Id.* at 370.

305. See *supra* note 41 and accompanying text (describing individual provisions of the Tobacco Control Act).

306. See Complaint, *supra* note 27, at 23.

307. See *supra* note 43 and accompanying text.

308. See, e.g., *Lewis v. Wilson*, 253 F.3d 1077 (8th Cir. 2001); *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV*, 305 F.3d 241 (4th Cir. 2002); *Sons of Confederate Veterans v. Glendening*, 954 F. Supp. 1099 (D. Md. 1997).

messages displayed on specialty license plates, such as “Choose Life,” as their own expression, which would constitute government speech within the state’s power to control.³⁰⁹ However, other federal court rulings have characterized the same kinds of specialty or vanity plates as private expression.³¹⁰

The similarity between the tag and tobacco issues is essentially compulsion of viewpoint-based speech.³¹¹ If the government wants to impose its viewpoint onto such large portions of tobacco companies’ packaging and advertisements, then arguably the government should be forced to compensate the companies to carry its messages. That issue actually could have been addressed in a recent tobacco lawsuit if, as a federal appellate court noted, it had been raised with a more appropriate First Amendment challenge.³¹²

In particular, R.J. Reynolds and Lorillard Tobacco challenged a California surtax to fund anti-tobacco advertisements, conceding that although neither the tax nor the advertisements were unconstitutional, the link between them was.³¹³ The court rejected that argument, but Judge Raymond Fisher pointed out that any “government tax designed to suppress the speech of a targeted group would raise serious First Amendment concerns.”³¹⁴ Because the plaintiffs’ argument focused on the nexus between the excise tax and government speech, the court dismissed the suit, although Judge Fisher made very clear his concern that “the government not use its taxation power to suppress the free expression of disfavored groups.”³¹⁵ State use of surtaxes is obviously well beyond the scope of this Article, but the authors would be remiss in not mentioning the case because, like the Family Smoking Prevention and Tobacco Control Act, it presents another example of a constitutionally questionable stab at compelling speech from Big Tobacco.

309. *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 379–80 (6th Cir. 2006).

310. *Roach v. Stouffer*, 560 F.3d 860, 867–68 (8th Cir. 2009); *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 793 (4th Cir. 2004).

311. The general rule against viewpoint-based discrimination is indicative of “a fundamental First Amendment principle—that government may not proscribe speech or expressive conduct because it disapproves of the ideas expressed.” *Esperanza Peace & Just. Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433, 444 (W.D. Tex. 2001). Conversely, “it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.” *FCC v. Pacifica Found.*, 438 U.S. 726, 74546 (1978).

312. *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 924 (2004).

313. *Id.*

314. *Id.* at 923–24.

315. *Id.* at 924.

C. A Higher Standard of Review than *Central Hudson*?

The Potential for Strict Scrutiny Analysis of the Act

Due to the unsettled state of the commercial speech doctrine described earlier,³¹⁶ it is not clear whether a corporate speaker such as a tobacco company is capable of engaging in core political speech or whether all speech by a for-profit, capitalistic enterprise ultimately is tied to the monetary bottom line and therefore deserves a lesser degree of protection.³¹⁷ Two provisions of the Family Smoking Prevention and Tobacco Control Act evoke scenarios that could stretch an analysis in *Commonwealth Brands* beyond the realm of commercial speech: (1) the modified-risk products portion of the Act;³¹⁸ and (2) the restrictions on any speech regarding the FDA.³¹⁹

Presumably, these restrictions are justified, at least in part, by the tobacco industry's alleged longstanding deception of consumers.³²⁰ But just like evidence of past bad acts typically is not admissible as character evidence to prove current conduct in conformity with character, past behavior doesn't factor into a First Amendment analysis, and the potential for these provisions to chill political speech could well warrant greater constitutional protections.

The Act restricts *any* speech by tobacco companies about "light" or "low-tar" products to consumers without FDA pre-approval—a system of prior restraint on speech, as it were—and only then if the so-called modified-risk products benefit "the population as a whole."³²¹ The breadth of this restriction sweeps in speech that is both political and scientific in nature, according to the *Commonwealth Brands* plaintiffs.³²² For example, what if tobacco company scientists want to publish their research on modified-risk products?³²³ What about tobacco executives who want to speak out in political arenas, perhaps on op-ed pages or at conferences, about these products?³²⁴ Under the Act's broad

316. See *supra* notes 67–68 and accompanying text (discussing current problems with the commercial speech doctrine).

317. See *supra* notes 67–68 and accompanying text.

318. Family Smoking Prevention and Tobacco Control Act § 101(b) (amending the FDCA to insert new 21 U.S.C. § 387k).

319. *Id.* § 103(b) (to be codified at 21 U.S.C. § 331) (amending FDCA section 301).

320. See, e.g., *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D. D.C. 2006), *aff'd in relevant part*, 566 F.3d 1095 (D.C. Cir. 2009) (finding that tobacco companies had violated RICO by conspiring to deceive the public about the dangers of smoking).

321. Family Smoking Prevention and Tobacco Control Act § 101(b) (amending the FDCA to insert new 21 U.S.C. § 387k).

322. See Complaint, *supra* note 27, at 20–23.

323. See *id.* at 22–23.

324. See *id.* at 23.

language, these scenarios would be prohibited.

The restriction on FDA-related statements by tobacco makers also encompasses situations where political speech could be chilled.³²⁵ The Act prohibits tobacco companies from making statements to consumers regarding FDA regulation, approval, and compliance. Just like the modified-risk product speech restriction, this provision seems to make it illegal for tobacco companies to participate in political debates regarding their own regulation.³²⁶ Given the discretion afforded to the FDA by Congress in the Act, including the wholesale adoption of rules promulgated in 1996³²⁷ and new provisions that direct the FDA to do as it sees fit,³²⁸ industry voices are important to a balanced rule-making process.

Tobacco companies possess a First Amendment right to try to persuade the public and the government on political issues.³²⁹ What's more, as one court recently observed, "the First Amendment does not tolerate viewpoint-based discrimination by the government."³³⁰ This means that "may not discriminate between speakers who will speak on the topic merely because it disagrees with their views."³³¹ The Supreme Court, in particular, has deemed viewpoint-based discrimination "an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."³³² It further has emphasized that "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."³³³

The Act's restrictions on FDA-related statements by tobacco makers smack of viewpoint-based discrimination, as they bar them from expressing their views and opinions on the topics of the FDA's regulation of tobacco products. In a nutshell, the government can say *anything* what it wants, but the tobacco companies can say *nothing*. The latter's constitutional right to persuade simply is denied.

325. *See id.* at 25–27.

326. *See id.*

327. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 102(a)(2), 123 Stat. 1776, 1830 (2009).

328. *See, e.g., id.* § 102(a)(2)(E) (directing the FDA to include in the new rules "such modifications to section 897.30(b), if any, that the Secretary determines are appropriate in light of governing First Amendment case law, including the decision of the Supreme Court of the United States in *Lorillard Tobacco Co. v. Reilly* . . .").

329. *See Hill v. Colorado*, 530 U.S. 703, 717 (2000) (observing that a "right to persuade" is recognized by the First Amendment).

330. *Sons of Confederate Veterans, Inc. v. Holcomb*, 129 F. Supp. 2d 941, 946 (W.D. Va. 2001).

331. *Searcey v. Harris*, 888 F.2d 1314, 1324 (11th Cir. 1989).

332. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

333. *Id.*

The modified-risk product and FDA statement provisions, to the extent that they are content-based regulations that chill political speech, would be subject to a strict scrutiny standard of review. As described earlier in this Article, strict scrutiny is a tougher standard than the requirements of *Central Hudson*.³³⁴ Under the strict scrutiny standard, the law restricting speech must further a *compelling* government interest and be narrowly tailored to achieve that interest.³³⁵

While the Court in *Lorillard* alluded to the government's compelling interest in protecting youth from smoking,³³⁶ it was less clear on whether the government has a compelling interest in protecting adults from smoking. The modified-risk product and FDA provisions of the Act appear to be aimed at protecting adults from the influence of tobacco companies. However, the right of adults to *receive* information, rather than be protected by a paternalistic government, is well established³³⁷ and could prevent the government from establishing a compelling interest under the strict scrutiny standard of review. In fact, the *Lorillard* Court commented on such a situation: "Applied to adults, an interest in manipulating market choices by keeping people ignorant would not be legitimate, let alone compelling."³³⁸

Even if a compelling interest were to exist, the modified-risk and FDA statement restrictions would fail on the second prong, which requires that the "least restrictive means"³³⁹ be utilized to advance the interest.³⁴⁰ As articulated above in this Article's analysis of the fourth *Central Hudson* step,³⁴¹ the speech restrictions of the Act are not sufficiently tailored.³⁴² Obviously, if the speech restrictions are not sufficiently tailored, they also would fail to meet the more rigorous standard of being narrowly tailored, as required under strict scrutiny. As for less restrictive alternatives that the government might utilize to protect minors from smoking, the *Commonwealth Brands* plaintiffs suggest several

334. See *supra* note 71 and accompanying text (discussing the strict scrutiny test).

335. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 582 (2001) (stating that "[u]nder strict scrutiny, the advertising ban may be saved only if it is narrowly tailored to promote a compelling government interest").

336. *Id.* at 584.

337. See, e.g., *id.* (noting that "adults have a corresponding interest in receiving truthful information about tobacco products. . . . As the State protects children from tobacco advertisements, tobacco manufacturers and retailers and their adult consumers still have a protected interest in communication.").

338. *Id.* at 582.

339. See, e.g., *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (observing that "[t]he Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest").

340. See *id.*

341. See *supra* notes 261-86 and accompanying text.

342. See *supra* notes 261-86 and accompanying text.

means, including: (a) criminalizing underage tobacco possession; (b) more funding for anti-smoking ads; and (c) targeting manufacturers who actually seek to deceive consumers.³⁴³ Thus, the two parts of the Act that have the greatest potential for strict scrutiny review seemingly would fail to meet this standard and, as a result, be declared unconstitutional.

In summary, the four speech-related provisions of the new law analyzed above are likely to be declared unconstitutional under any combination of: (a) the commercial speech doctrine; (b) the compelled-speech doctrine; (c) the viewpoint-based discrimination doctrine; and/or (d) the strict scrutiny standard of judicial review.

CONCLUSION

The Family Smoking Prevention and Tobacco Control Act of 2009 resuscitated the FDA's failed effort to enforce stringent restrictions on the advertising of cigarettes that it first proposed back in 1995.³⁴⁴ The FDA never had the opportunity to enforce those rules, as the Supreme Court held in 2000 that "Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products."³⁴⁵

The *Wall Street Journal* captured well in a September 2009 editorial the political machinations behind the Act, asserting that

343. Complaint, *supra* note 27, at 31. The *Commonwealth Brands* plaintiffs contend that:

The Act, moreover, ignores numerous (and obvious) conduct-based restrictions that could have advanced the Government's asserted interests. For example, Congress could have increased enforcement of existing state laws prohibiting the sale of tobacco products to minors, criminalized possession of tobacco products by underage users, increased funding for anti-smoking educational campaigns, increased funding for smoking cessation programs, initiated legal action against manufacturers who market products in a false or misleading way, or imposed federal restrictions on possessing or selling cigarettes.

Id.

344. See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed. Reg. 41,314 (proposed Aug. 11, 1995); Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,617 (Aug. 28, 1996) (to have been codified at 21 C.F.R. § 897.30).

As summarized in a law journal article that analyzed the constitutionality of the rules, the FDA in August 1996 announced:

The [FDA] is . . . making strenuous efforts to reduce demand by minors for tobacco products. The regulations include sweeping restrictions on the use of outdoor advertising, the distribution of promotional items such as T-shirts or tote bags emblazoned with the name, selling message or logo of a tobacco product, the sponsorship of athletic, musical or other events using the brand-name of any tobacco product, and publishing anything other than black and white, text-only advertisements in periodicals, newspapers, magazines and other publications that have a significant under-[eighteen] readership.

David C. Vladeck & John Cary Sims, *Why the Supreme Court Will Uphold Strict Controls on Tobacco Advertising*, 22 S. Ill. U. L.J. 651, 651-52 (1998).

345. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126 (2000).

"[l]awmakers wanted to make a show of coming down hard on cigarette makers. It polls well."³⁴⁶ Not surprisingly for the conservative-leaning newspaper, the *Journal* also opined about the Act's effect on a free-market economy, emphasizing that "imposing overly broad commercial speech restrictions that impede competition from safer alternatives is the wrong way to advance public health."³⁴⁷ President Obama and the law's supporters are getting their payback now, the *Journal* suggested, noting that when "Obama signed a law in June that limits the ability of tobacco companies to advertise, he was all but inviting a [c]onstitutional challenge."³⁴⁸ This suggests, of course, in answer to the query posed in the title of this Article, that politics was indeed being played.

In his 1992 book *Free Speech in an Open Society*, current Washington and Lee University School of Law Dean Rodney A. Smolla identified what he called "the perplexing problem"³⁴⁹ of "whether the First Amendment should permit controls on the speech of adults to adults in the general marketplace merely because children may also be exposed to the message."³⁵⁰ But precedent has established that all speech cannot be reduced to only that which is appropriate for the "sandbox"³⁵¹ for fear that minors will be harmed; adults have a constitutional right to—and a protected interest in—the free flow of information.³⁵²

For example, courts have consistently refused to permit restrictions on violent video games.³⁵³ And the Child Online Protection Act (COPA), after a protracted, decade-long legal battle, was struck down in part due to the potential for restriction

346. Editorial, *Tobacco Blow Back*, WALL ST. J., Sept. 14, 2009, at A14.

347. *Id.*

348. *Id.*

349. RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 329 (1992).

350. *Id.*

351. *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (stating that "[r]egardless of the strength of the government's interest in protecting children, the level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox") (internal quotation marks and citation omitted).

352. *See Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (opining that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, [and] the right to read . . .") (emphasis added).

353. *See Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 953 (9th Cir. 2009); *James v. Meow Media, Inc.*, 300 F.3d 683, 698 (6th Cir. 2002); *Am. Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 574-75 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 691 (8th Cir. 1992).

Upon the Ninth Circuit's decision in *Schwarzenegger*, Entertainment Software Association President and CEO Michael D. Gallagher called the state's pursuit of anti-violent video game legislation "an exercise in wasting taxpayer money, government time, and state resources." Press Release, Entm't Software Ass'n, Video Game Publishers and Retailers Respond to Court Ruling Overturning California Video Game Restriction Law (Feb. 20, 2009), available at http://www.theesa.com/newsroom/release_detail.asp?releaseID=49.

of Internet information available to adults.³⁵⁴ In the tobacco arena, the Supreme Court also has made it obvious that overbroad speech restrictions aimed at protecting children will not pass constitutional muster.³⁵⁵

These examples do not just provide legal precedent; they also illustrate the inefficient and wasteful results of feel-good legislation that flies in the face of constitutional concerns and leaves taxpayers picking up the tab.³⁵⁶ There is, indeed, a great deal of playing politics at taxpayers' expense in such efforts. As Professor Mark Alexander writes about the battle over COPA:

Political failure and expediency have resulted in a situation where many clamor for action, but Congress has failed to provide a constitutional solution. Members of Congress must understand that the First Amendment protects some speech that is offensive to many; they have a duty to protect and respect that. If they seriously want to regulate Internet pornography, *they must stop acting as politicians in search of soundbites and instead must act as lawmakers seeking innovative responses to difficult challenges of the twenty-first century.* The challenge before Congress is to avoid the simplistic and symbolic top, down regulation.³⁵⁷

Likewise, the lead author of this Article has argued elsewhere regarding the rinse-and-repeat cycle of legislators passing violent video game laws that inevitably are declared unconstitutional that

354. In 2009, ten years of litigation over COPA, which would have criminalized protected online speech in an effort to protect minors, finally ended. Press Release, Am. Civil Liberties Union, Supreme Court Refuses to Revive Online Censorship Law (Jan. 21, 2009), *available at* <http://www.aclu.org/free-speech/supreme-court-refuses-revive-online-censorship-law>.

In an exclusive e-mail correspondence with the authors of this Article, ACLU senior staff attorney and lead counsel in the COPA litigation Chris Hansen offered a very conservative estimate of three million dollars in expenditures by the federal government in defending the unconstitutional law. E-mail from Chris Hansen, Senior Staff Attorney, ACLU, to author (Nov. 3, 2009, 08:53:32 EST) (on file with authors and the Journal of Legislation). The ACLU had submitted a request for attorney's fees of eight million dollars but later settled for much less. *Id.*

355. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 582–83 (2001).

356. Taxpayers pay the cost when First Amendment rights are violated because:

[f]ederal statutes entitle the prevailing plaintiff in civil rights litigation to recover attorney's fees from the defendant. The recovery of attorney's fees under these so-called "fee-shifting provisions" constitutes a deliberate departure from the usual American rule that each litigant must bear her own legal costs.

A civil rights plaintiff acts not just for herself alone, but also as a "private attorney general," vindicating national policy. The fee-shifting provisions enable the plaintiff who cannot pay a private attorney, and whose potential recovery is not sufficient for a contingency fee arrangement, to perform this private attorney general function.

Laura Sager & Stephen Cohen, *How the Income Tax Undermines Civil Rights Law*, 73 S. CAL. L. REV. 1075, 1076 (2000) (citations omitted); see 42 U.S.C. § 1988(b) (2006) (describing the key federal fee-shifting provision for civil rights litigation).

357. Mark C. Alexander, *The First Amendment and Problems of Political Viability: The Case of Internet Pornography*, 25 HARV. J.L. & PUB. POL'Y 977, 1030 (2002) (emphasis added).

[j]ust as kids surely will continue to play video games in the near future, politicians surely will continue to play political games with this incredibly popular form of new media that they neither play nor understand. What the politicians do appear to understand, however, is the political hay and headlines that can be made by promoting legislative initiatives targeting video game content. To the old aphorism, then, that the only things one can count on in life as inevitable are death and taxes, the authors propose the addition of video game legislation.³⁵⁸

For instance, a federal judge echoed these concerns in a 2007 opinion assessing \$92,000 in attorney fees against the state of Louisiana after its violent video game statute was declared unconstitutional, as he openly wondered “why nobody objected to the enactment of this statute. In this court’s view, the taxpayers deserve more from their elected officials.”³⁵⁹ Judge James J. Brady was “dumbfounded”³⁶⁰ by the government’s passage of the law and ensuing litigation, especially in light of the plethora of attorneys present during the legislative process.³⁶¹

Judge Brady’s concerns could easily be applied to the Family Smoking Prevention and Tobacco Control Act, which not only conflicts with legal precedent, but also went through the hands of many attorneys prior to passage.³⁶² The key distinction is that somebody did object to the enactment of the speech restrictions in the Act—several people, in fact, raised concerns.³⁶³ Yet it became law, and now taxpayers will be left to pay for Department of Justice attorneys and expensive experts to litigate the case, and the government may even be responsible for the plaintiff’s attorney fees and expenses. One can only hope that the *Commonwealth Brands* litigation will not be protracted for a decade, but as the

358. Calvert & Richards, *supra* note 63, at 153.

359. *Entm’t Software Ass’n v. Foti*, No. 06-431-JJB-CN, 2007 U.S. Dist. LEXIS 46381, at *17 (M.D. La. Apr. 10, 2007).

360. *Id.* at *16.

361. *Id.* at *16–17. Judge Brady blasted Louisiana lawmakers with the equivalent of a judicial slap down, writing:

The [Louisiana violent video game statute] . . . passed through committees in both the State House and Senate, then through the full House and Senate, and to be promptly signed by the Governor. There are lawyers at each stage of this process. Some of the members of these committees are themselves lawyers. Presumably, they have staff members who are attorneys as well. The State House and Senate certainly have staff members who are attorneys. The Governor has additional attorneys—the executive counsel. Prior to the passage of the Act, there were a number of reported cases from a number of jurisdictions which held similar statutes to be unconstitutional (and in which the defendant was ordered to pay substantial attorney’s fees).

Id.

362. See *supra* notes 6–12 and accompanying text (describing objections to the measure during House debate).

363. See *supra* notes 6–12 and accompanying text.

COPA litigation illustrated, this can and does happen.

If all or some of the speech-restricting provisions of the Act are found unconstitutional, making the government pay is good public policy for several reasons. As Professor Mark Brown writes:

Forcing government and its officials to pay damages for constitutional wrongs encourages them to act more carefully. It also deters future violations both specifically and generally. Additionally, compensation paid by the offending government or official restores the victim to his "original" position. The loss falls where it properly lies, on the party causing the harm.³⁶⁴

Perhaps the authors of this Article believe in happy endings, but there might just be a silver lining to the cloud of political irresponsibility if the litigation becomes a catalyst to clarify the troubled commercial speech doctrine. It remains unsettled whether corporate entities are capable of core political speech that is not somehow tainted by commercial concerns. The Act, and specifically the modified-risk and FDA statement restrictions, could force courts to finally resolve this question, even though the speech-restricting provisions are likely to be declared unconstitutional.

Indeed, in January 2010, U.S. District Judge Joseph H. McKinley, Jr. entered judgment in favor of the plaintiffs on their First Amendment challenges to both the ban on color and graphics in labels and advertising and the ban on claims implying that a tobacco product is safer because of FDA regulation.³⁶⁵ But in March 2010, the FDA went ahead and published its new rules, which take effect in June 2010.³⁶⁶ The new FDA rules, among other things, require that: (a) audio ads for cigarettes or smokeless tobacco do not include music or sound effects; (b) video ads for cigarettes or smokeless tobacco do not use color, but rather are limited to static black text on a white background; and (c) ads in teen magazines or similar publications do not use color, but rather must use black text on a white background.³⁶⁷ Litigation will likely continue for years to come, with taxpayers footing the bill on behalf of the government. As Anthony Hemsley, Vice President of Corporate and Government Affairs for

364. Mark R. Brown, *The Demise of Constitutional Prospectivity: New Life for Owen?*, 79 IOWA L. REV. 273, 289 (1994).

365. *Commonwealth Brands, Inc. v. United States*, No. 1:09-CV-117-M, 2010 U.S. Dist. LEXIS 6316 (W.D. Ky. Jan. 14, 2010).

366. *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents*, 75 Fed. Reg. 13,225 (Mar. 19, 2010) (to be codified at 12 C.F.R. pt. 1140).

367. *Id.* at 13,232.

Commonwealth Brands, queried in response to the FDA rules in March 2010, "How many times must we resolve these constitutional issues in the courtroom? How much taxpayers' money must the FDA waste before a judge?"³⁶⁸

368. Press Release, Commonwealth Brands, Inc., Commonwealth Brands, Inc. in Disbelief over FDA (Mar. 18, 2010), http://www.luxefile.com/pr/3-19-10_FDA_Regulations_Released.pdf.