

# Tobacco Advertising and the First Amendment: Striking the Right Balance

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# TOBACCO ADVERTISING AND THE FIRST AMENDMENT: STRIKING THE RIGHT BALANCE

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## ABSTRACT

*With the enactment of the Family Smoking Prevention and Tobacco Control Act of 2009, Congress launched a major expansion of its regulatory efforts regarding tobacco advertising and promotion. The Act restricts advertising in various ways, featuring a requirement for updated textual versions of health warnings long required for cigarette packages, as well as a requirement that cigarette advertisements must be accompanied by prominently displayed color graphic images to be designed by the U.S. Food and Drug Administration (FDA).*

*The Act's advertising restrictions and the color graphics requirement have been challenged on First Amendment grounds, as has an FDA regulation setting forth graphic images that tobacco companies were to use. A federal court of appeals struck down the FDA regulation and sent the agency back to the drawing board, but another federal court of appeals upheld the color graphics requirement and most of the advertising restrictions in the statute. This Article analyzes the decisions in light of the various, sometimes inconsistent strains of First Amendment principles that the Supreme Court has adopted, explores what Congress and the FDA should be able to do in regulating tobacco advertising and promotion without violating the First Amendment, and recommends analyses for use in the event that the Supreme Court agrees to decide a tobacco advertising case.*

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“[T]obacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States.”<sup>1</sup>

#### INTRODUCTION

Although one might reasonably assume that the U.S. Surgeon General, the Food and Drug Administration (FDA), the American Medical Association, or an organization of anti-tobacco activists made the statement quoted above, such an assumption would be incorrect. The observation came from the U.S. Supreme Court, which included it in two decisions from the not-too-distant past.<sup>2</sup>

Each time it made the quoted statement, however, the Court proceeded to nullify a governmental attempt to combat this public health danger by restricting tobacco advertising and marketing practices.<sup>3</sup> In a 2000 decision, *FDA v. Brown & Williamson Tobacco Corp.*,<sup>4</sup> the Court held that the FDA did not possess statutory authority to regulate tobacco products and that the federal agency’s tobacco regulations, which included advertising and marketing restrictions meant to protect minors, were therefore invalid.<sup>5</sup> A year later, in *Lorillard Tobacco Co. v. Reilly*,<sup>6</sup> the Court employed federal preemption and First Amendment grounds in striking down a state’s protection-of-minors-based regulations dealing with tobacco advertising.<sup>7</sup> The First Amendment analysis in *Lorillard* appeared to place significant limitations on governmental ability to regulate tobacco advertising to a greater extent than contemplated by longstanding federal statutes that mandate health-related warnings and prohibit televised advertisements for tobacco products.<sup>8</sup>

The one-two punch delivered by *Brown & Williamson* and *Lorillard*, though powerful in the short run, did not completely extinguish governmental efforts to regulate tobacco advertising and promotion. Continuing public

<sup>1</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

<sup>2</sup> *Id.*; *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 570 (2001).

<sup>3</sup> 529 U.S. 120, 128, 161; 533 U.S. 525, 533, 570–71.

<sup>4</sup> 529 U.S. 120.

<sup>5</sup> *Id.* at 125–27, 133, 155–56, 161.

<sup>6</sup> 533 U.S. 525 (2001).

<sup>7</sup> *Id.* at 546–51, 553, 561–67.

<sup>8</sup> Although the advertising restrictions at issue in *Lorillard* arose under state law, lessons from the Court’s First Amendment analysis are applicable to federal and state restrictions alike. *See id.* at 561–67. Federal law has long required that health warnings be placed on cigarette packages and in cigarette advertisements. *See* 15 U.S.C.A. § 1333 (West 2014). In addition, federal law has banned tobacco advertisements from the television and radio airwaves for more than forty years. *See id.* § 1335.

health concerns and political considerations converged, resulting in a renewed federal push to regulate tobacco advertising and marketing in order to safeguard the health of minors, if not the public generally.<sup>9</sup> Congress took a major step in 2009 by enacting the Family Smoking Prevention and Tobacco Control Act (TCA),<sup>10</sup> which provided the FDA the regulatory authority held lacking in *Brown & Williamson*.<sup>11</sup> The TCA also required the reissuance of nearly all of the FDA's earlier protection-of-minors-based tobacco advertising and marketing regulations, mandated the addition of graphic elements to the textual health warnings already required for cigarette packages and advertisements, and instructed the FDA to develop particular graphics-focused warning labels that cigarette producers would be required to use.<sup>12</sup>

No longer able to lodge a lack-of-regulatory-authority objection, tobacco companies invoked the First Amendment in challenging the FDA's tobacco advertising and promotion regulations as well as related TCA provisions.<sup>13</sup> Two 2012 federal court of appeals decisions concerning these challenges yielded divergent results.<sup>14</sup> In *Discount Tobacco City & Lottery, Inc. v. United States*,<sup>15</sup> the Sixth Circuit upheld the bulk of the regulations and related statutory provisions, including the TCA's requirement that graphic images be made a prominent part of the health-related warnings on packaging and in advertisements.<sup>16</sup> The Sixth Circuit did not rule on the constitutionality of the particular graphics-focused warning labels the FDA devised, however, because the labels were not developed until after the district court had ruled and thus could not be considered on appeal.<sup>17</sup> Later in 2012, however, the D.C. Circuit ruled in a case brought to challenge the actual labels.<sup>18</sup>

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<sup>9</sup> See Duff Wilson, *Senate Approves Tight Regulation Over Cigarettes*, N.Y. TIMES, June 12, 2009, at A1.

<sup>10</sup> Family Smoking Prevention & Tobacco Control Act of 2009, Pub. L. No. 111-31, 123 Stat. 1776 (codified in scattered sections of 15 U.S.C. and 21 U.S.C. (2012)).

<sup>11</sup> *Id.* § 101, 123 Stat. 1786 (codified at 21 U.S.C. § 387).

<sup>12</sup> *Id.* § 102(a), 123 Stat. 1830 (codified at 21 U.S.C. § 387a-1); § 201(d), 123 Stat. 1845 (codified at 15 U.S.C. § 1333(d)). See *id.* § 201(a)(2), 123 Stat. 1843 (codified at 15 U.S.C. § 1333(a)(2)); § 201(b)(2), 123 Stat. 1843 (codified at 15 U.S.C. § 1333(b)(2)).

<sup>13</sup> See generally *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012).

<sup>14</sup> See *Disc. Tobacco*, 674 F.3d 509; *R.J. Reynolds*, 696 F.3d 1205.

<sup>15</sup> 674 F.3d 509.

<sup>16</sup> *Id.* at 531, 537, 544, 548, 551, 569.

<sup>17</sup> *Id.* at 552–54.

<sup>18</sup> *R.J. Reynolds*, 696 F.3d at 1208.

In *R.J. Reynolds Tobacco Co. v. Food & Drug Administration*,<sup>19</sup> the court held that the labels violated the First Amendment.<sup>20</sup>

*Discount Tobacco* and *R.J. Reynolds* initially seemed to be good candidates for U.S. Supreme Court review, but matters did not play out that way. In April 2013, the Supreme Court denied certiorari in *Discount Tobacco*.<sup>21</sup> The FDA shortly thereafter ceased defending the labels tossed out in *R.J. Reynolds*.<sup>22</sup> Rather than seeking to persuade the Supreme Court to hear the case, the FDA announced that it would abandon those labels and develop a new response to the statutory directive regarding the inclusion of graphic components.<sup>23</sup>

After *Discount Tobacco* and *R.J. Reynolds*, important questions remain. Was the *Discount Tobacco* court correct in largely upholding the advertising and marketing restrictions and requirements contemplated by the TCA and, most importantly, in sustaining the requirement that prominent graphics components augment the mandated textual warnings? Was the *R.J. Reynolds* court correct in striking down the particular labels the FDA devised? What does the First Amendment permit the FDA to do in terms of designing graphics-focused labels? How should the Supreme Court rule if it later agrees to decide a case raising the sorts of issues *Discount Tobacco* and *R.J. Reynolds* would have presented? This Article takes up those questions and related ones.

Part I of the Article summarizes the history of federal efforts to regulate tobacco advertising and promotion, beginning with the cigarette label warning requirement instituted nearly fifty years ago and continuing through the TCA. Because government regulation of advertisements and product labels necessarily involves speech-related measures, Part II furnishes background on relevant First Amendment principles and especially Supreme Court decisions establishing that the First Amendment offers commercial speech an intermediate level of protection. As will be seen, the Court's commercial speech precedents distinguish between content *restrictions* and required *disclosures*, with the government having somewhat greater latitude to require advertising disclosures than it has to restrict what may be said in commercial settings.<sup>24</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1222.

<sup>21</sup> 674 F.3d 509, *cert. denied*, 133 S. Ct. 1996 (2013).

<sup>22</sup> U.S. Dep't of Health & Human Servs., *U.S. Abandons Effort to Place Graphic Labeling on Cigarettes*, HEALTHDAY NEWS (Mar. 20, 2013), <http://www.healthfinder.gov/News/Article.aspx?id=674641>.

<sup>23</sup> *Id.*

<sup>24</sup> Part II, *infra*, will also introduce related topics that are relevant to later sections of the Article: the Court's tendency in recent years to bolster the strength of the intermediate protection extended to commercial speech without officially changing the controlling

Part III discusses the decisions in *Discount Tobacco* and *R.J. Reynolds*. It also assesses those decisions in light of the commercial speech precedents examined in Part II. Part IV then turns to what the FDA and Congress can do, or should be able to do, regarding tobacco advertising and marketing regulation if the relevant Supreme Court precedents are adhered to and correctly applied. In addition, Part IV considers how the Supreme Court should resolve the key First Amendment issues if it hears a later challenge to tobacco advertising and marketing regulations of the sort required in or contemplated by the TCA. Part IV also adds cautionary notes about alternative rationales that some Justices might be tempted to put forth, but that the Court should reject, if it decides a tobacco advertising case or another case presenting similar issues.

#### I. FEDERAL REGULATION OF TOBACCO ADVERTISING AND PROMOTION: HISTORY AND OVERVIEW

##### A. *The FCLAA: Purpose; Warning Requirement; and Preemption*

After a 1964 report issued by a Surgeon General's advisory committee called cigarette smoking a significant health hazard, Congress responded in 1965 with the Federal Cigarette Labeling and Advertising Act (FCLAA).<sup>25</sup> The FCLAA's § 1331 originally read:

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.<sup>26</sup>

Approximately twenty years later, Congress replaced subsection (1) with a broader subsection that spoke of making “the public ... adequately informed

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commercial speech principles to which the Court has adhered for more than thirty-five years; and the sentiment among some Justices that longstanding commercial speech principles do not extend sufficient First Amendment protection to such speech.

<sup>25</sup> Federal Cigarette Labeling & Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282 (codified as amended at 15 U.S.C. §§ 1331–1341 (Supp. 1965)).

<sup>26</sup> *Id.* § 2, 79 Stat. at 282.



about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes....”<sup>27</sup> Congress did not change subsection (2), which remains as originally enacted.<sup>28</sup>

The FCLAA’s 1965 version required, in § 1333, that all cigarette packages carry this warning: “Caution: Cigarette Smoking May Be Hazardous to Your Health.”<sup>29</sup> In 1970, Congress strengthened the warning by requiring that packages prominently display this less equivocal statement: “Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.”<sup>30</sup> Later amendments extended the warning requirement to cigarette advertisements and billboards, and provided for a rotating set of warnings focused on particular smoking-related health risks such as lung cancer, heart disease, or potential harm to a pregnant woman’s fetus.<sup>31</sup> As will be seen, the 2009 TCA called for further changes in the warning requirement and the manner in which the warning must appear.<sup>32</sup>

Section 1334 of the FCLAA contains two measures that further § 1331’s stated purpose of avoiding “diverse [and] nonuniform” labeling and advertising requirements concerning the “relationship between smoking and health.”<sup>33</sup> First, § 1334(a) provides that “no statement relating to smoking and health, other than the [warning] statement required by section 1333 of this title, shall be required on any cigarette package.”<sup>34</sup> Second, § 1334(b) helps to establish the federal government as the primary regulator in the field by providing that “[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or

<sup>27</sup> Comprehensive Smoking Education Act of 1984, Pub. L. No. 98-474, § 6(a)(1), 98 Stat. 2200 (amending 15 U.S.C. § 1331(1) (1970)).

<sup>28</sup> Compare Federal Cigarette Labeling & Advertising Act of 1965, Pub. L. No. 89-92, § 2, 79 Stat. 282 (codified as amended at 15 U.S.C. § 1331 (Supp. 1 1965)), with 15 U.S.C.A. § 1331(2) (West 2014).

<sup>29</sup> 15 U.S.C.A. § 1333 (amended 1970, 1984, 1985, and 2009).

<sup>30</sup> Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (codified as amended at 15 U.S.C. §§ 1331–1335 (1970)). Although “1969” appeared in the law’s title, actual enactment occurred in 1970. *See id.*

<sup>31</sup> Comprehensive Smoking Education Act of 1984, § 4(b) (amending 15 U.S.C. § 1333); Act of Aug. 16, 1985, Pub. L. No. 99-92, § 11(c), 99 Stat. 403 (amending 15 U.S.C. § 1333). A similar warning requirement exists regarding smokeless tobacco packages and advertisements. *See* 15 U.S.C. § 4402 (a)–(d) (2012).

<sup>32</sup> *See infra* text accompanying notes 89–104.

<sup>33</sup> § 1331(2).

<sup>34</sup> § 1334(a). Language added to § 1334(a) by the TCA, Pub. L. No. 111-31, §§ 201(a), 202(b), 206, 123 Stat. 1842, 1845, 1849, created a limited exception to this prohibition for instances in which the Secretary of Health and Human Services requires a different formulation of the required warning. *See* § 1334(a).

promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.”<sup>35</sup>

In *Lorillard Tobacco Co. v. Reilly*,<sup>36</sup> the Supreme Court held that § 1334(b) preempted protection-of-minors-based Massachusetts regulations dealing with cigarette advertising and marketing.<sup>37</sup> Broadly reading § 1334(b), the Court concluded that the statute contemplated preemption regardless of whether the state provisions regulated cigarette advertisements’ *content* or restricted their *location*.<sup>38</sup> Among the Massachusetts regulations the Court struck down was a location restriction that prohibited placement of outdoor advertisements for cigarettes within 1000 feet of schools, public parks, and similar places.<sup>39</sup> In the TCA, Congress added subsection (c) to § 1334 and specified that notwithstanding subsection (b)’s preemption provision, states and localities “may enact statutes and promulgate regulations, based on smoking and health, that ... impos[e] specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes.”<sup>40</sup> Seemingly an attempt to limit the sweep of *Lorillard*’s preemption ruling, subsection (c) should give states somewhat more room to regulate without risking preemption,<sup>41</sup> though the First Amendment may still be a major obstacle.<sup>42</sup>

### B. The FCLAA: Electronic Media Advertising Ban

A now-familiar feature of the FCLAA—its ban on radio and television advertisements for cigarettes—did not appear in the statute’s 1965

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<sup>35</sup> § 1334(b).

<sup>36</sup> 533 U.S. 525 (2001).

<sup>37</sup> *See id.* at 532–36. The Massachusetts regulations also pertained to the advertising and promotion of other tobacco products such as smokeless tobacco. *Id.* At the time *Lorillard* was decided, federal law did not contain a preemption provision regarding state measures dealing with tobacco products other than cigarettes. *See id.* at 553. The TCA added a smokeless tobacco-related preemption provision that is similar to the cigarette-related preemption rule of § 1334(b). *See* 15 U.S.C.A. § 4406(b) (West 2014).

<sup>38</sup> *Lorillard*, 533 U.S. at 542, 548–51.

<sup>39</sup> *Id.* at 542, 548–51. The Court noted the broad language employed by Congress in § 1334(b) and classified it as expansive enough to apply to even the location restrictions set forth in the Massachusetts regulations. *Id.*

<sup>40</sup> 15 U.S.C.A. § 1334(a)–(c) (West 2014).

<sup>41</sup> *See id.*

<sup>42</sup> For discussion of *Lorillard*’s treatment of First Amendment issues and what it suggests for state and federal regulation of tobacco advertising and marketing, *see infra* text accompanying notes 188–217.

version.<sup>43</sup> Soon, however, a Federal Trade Commission report discussed the pervasiveness of broadcast media advertisements for cigarettes and the general influence of radio and television on young people. The report advocated banning cigarette commercials on radio and television.<sup>44</sup> Congress responded affirmatively with what became the FCLAA's § 1335.<sup>45</sup>

Shortly after the statute's enactment, broadcasters challenged the § 1335 ban on First Amendment grounds. In *Capital Broadcasting Co. v. Mitchell*,<sup>46</sup> a 1971 decision, a three-judge federal district court rejected the plaintiffs' constitutional challenge by a two-to-one vote.<sup>47</sup> The Supreme Court affirmed without opinion a year later.<sup>48</sup>

Tobacco companies were not among the plaintiffs in *Capital Broadcasting*. The fact that the Supreme Court had not yet recognized First Amendment protection for commercial speech as of the time of *Capital Broadcasting* may help to explain tobacco companies' decision not to challenge the electronic media advertising ban when it was enacted.<sup>49</sup> However, there is

<sup>43</sup> The ban appears at 15 U.S.C.A. § 1335 (West 2014). It was added to the FCLAA by the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 2, 84 Stat. 87 (codified as amended at 15 U.S.C. §§ 1331–1335 (1970)).

<sup>44</sup> See *Lorillard*, 533 U.S. at 543–44; *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582, 585–86 (D.D.C. 1971) (decision of three-judge court). At the same general time, the Federal Communications Commission offered indications that it was considering adopting a ban on electronic media advertisements for cigarettes. See *id.* at 588 (Wright, J., dissenting).

<sup>45</sup> 15 U.S.C. § 1335 (1970).

<sup>46</sup> 333 F. Supp. 582 (D.D.C. 1971).

<sup>47</sup> *Id.* at 585–86.

<sup>48</sup> *Capital Broad. Co. v. Kleindienst*, 405 U.S. 1000 (1972), *aff'g* *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971).

<sup>49</sup> As later discussion will reveal, the Supreme Court did not recognize First Amendment protection for commercial speech until 1976, well after *Capital Broadcasting*. See *infra* text accompanying notes 137–41. That explanation, though reasonable, is not wholly convincing. Circuit Judge J. Skelly Wright, who served by designation on the three-judge *Capital Broadcasting* court, dissented from the majority's rejection of the broadcasters' challenge and vigorously argued that the electronic media advertising ban violated the First Amendment because it effectively removed from the airwaves discussion of an important public controversy over the relationship between smoking and health. *Capital Broad.*, 333 F. Supp. at 587, 589–94 (Wright, J., dissenting). Judge Wright's argument rested on First Amendment principles usually applied outside the advertising context. See *infra* text accompanying note 133. Although his First Amendment argument did not carry the day, the fact he made the argument and the further fact that the challenging broadcasters would have offered some version of it indicate that the tobacco companies could have asserted at least a plausible First Amendment argument if they had been inclined to challenge the statute, even though commercial speech protection had not yet been recognized by the Supreme Court. Interestingly, Judge Wright put forth the First Amendment argument despite also making comments suggesting his disdain for the

another possible explanation: tobacco companies believed they could benefit if cigarette ads disappeared from television.<sup>50</sup> They actively sought to persuade Congress to pass a differently formulated statute from which the desired disappearance of televised ads would have resulted,<sup>51</sup> and they were content with the advertising ban Congress enacted instead.<sup>52</sup>

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marketing practices of tobacco companies. See *Capital Broad.*, 333 F. Supp. at 587–89, 590 (Wright, J., dissenting).

<sup>50</sup> This seemingly counter-intuitive explanation (after all, why would cigarette manufacturers want a government-imposed restriction on their speech?) can be found in Judge Wright's *Capital Broadcasting* dissent. 333 F. Supp. at 588–89 (Wright, J., dissenting). Judge Wright noted that two years prior to the 1969 enactment of the advertising ban, the Federal Communications Commission (FCC) concluded that cigarette advertisements amounted to statements about one side of a controversial issue of public importance: the relationship between smoking and health. *Id.* at 587. The FCC, therefore, ruled that in view of the agency's then-existing fairness doctrine and the public interest standard imposed on licensed broadcasters, television stations were required to broadcast anti-smoking messages if they aired cigarette advertisements. *In re Complaint Directed to Station WCBS-TV, N.Y.C., N.Y.*, 8 F.C.C.2d 381, 381–82 (1967) (letter ruling); *In re Television Station WCBS-TV, N.Y.C., N.Y.*, 9 F.C.C.2d 921, 938, 949 (1967) (memorandum opinion affirming letter ruling). The U.S. Court of Appeals for the District of Columbia Circuit later upheld the FCC's action. *Banzhaf v. FCC*, 405 F.2d 1082, 1097–99, 1101–04 (D.C. Cir. 1968). According to Judge Wright's *Capital Broadcasting* dissent, the required anti-smoking spots were so effective that they had “a devastating effect on cigarette consumption” during the late 1960s. 333 F. Supp. at 588 (Wright, J., dissenting). Cigarette companies thus found themselves in a difficult position. As Judge Wright put it, “the individual tobacco companies could not stop advertising for fear of losing their competitive position; yet for every dollar they spent to advance their product, they forced the airing of more anti-smoking advertisements and hence lost more customers.” *Id.*

<sup>51</sup> While Congress was considering cigarette-related legislation in 1969, a cigarette industry representative appeared before a Senate subcommittee and indicated that the industry desired an antitrust exemption under which tobacco companies could agree with each other not to advertise on electronic media. See *Cigarette Advertising and Labeling: Hearing on H.R. 6543 Before Consumer Subcomm. of S. Comm. on Commerce*, 91st Cong. 78 (1969) (testimony of Joseph F. Cullman III, Chairman, Philip Morris, Inc.). See also *Capital Broad.*, 333 F. Supp. at 588, 587 n.10 (Wright, J., dissenting). Because the FCC's fairness doctrine ruling “had clearly made electronic media advertising a losing proposition for the [tobacco] industry, ... a voluntary withdrawal [of electronic media advertising] would have saved the companies approximately \$250,000,000 in advertising costs ... and [would have] removed most anti-smoking messages from the air.” *Capital Broad.*, 333 F. Supp. at 588 (Wright, J., dissenting). Judge Wright asserted that Congress “quickly complied” with the tobacco industry's desires by making the broadcast advertising ban statutory in nature. See *id.*

<sup>52</sup> In Judge Wright's view, the tobacco industry must have been content with the electronic media advertising ban, given that “as both the cigarette advertisements and most anti-smoking messages left the air, the tobacco companies [were able to transfer] their advertising budgets to other forms of advertising such as newspapers and magazines

Even though Supreme Court decisions have recognized significant First Amendment protection for commercial speech since *Capital Broadcasting*,<sup>53</sup> tobacco companies have not challenged the electronic media advertising ban.<sup>54</sup> For more than forty years, therefore, § 1335 has proscribed the advertising of cigarettes “on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.”<sup>55</sup>

### C. The FDA’s Ill-Fated Efforts During the 1990s

As concerns continued regarding smoking and health and particularly the dangers to minors, the FDA mounted a significant regulatory effort during the mid-1990s.<sup>56</sup> This effort featured various regulations that restricted the advertising and marketing practices of tobacco companies.<sup>57</sup>

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where there was no fairness doctrine to require a response.” *Capital Broad.*, 333 F. Supp. at 589 (Wright, J., dissenting). Judge Wright characterized the electronic media advertising ban as a “dramatic legislative *coup* for the tobacco industry” because “the cigarette smoking controversy [had been] removed from the air.” *Id.* As a result, “the decline in cigarette smoking was abruptly halted and cigarette consumption almost immediately turned upward again.” *Id.* at 589, 589 n.18.

<sup>53</sup> See *infra* text accompanying notes 137–58.

<sup>54</sup> The Supreme Court’s commercial speech decisions, see *infra* text accompanying notes 137–263, would give tobacco companies plenty about which to argue if they were inclined to challenge the electronic media advertising ban. Although the ban’s longstanding nature would not deprive them of the ability to contest its constitutionality, that longstanding nature nevertheless may be part of a strategic calculus undertaken by tobacco companies. With the lack of televised advertisements for cigarettes and other tobacco products being a fact of life for so many years, a constitutional challenge to the ban—even a successful constitutional challenge—could be perceived by the government and the public as an overreach. If the constitutional challenge were to succeed, there might be a backlash in which the government and private interest groups could decide to sponsor more anti-smoking spots on television and otherwise engage in enhanced efforts to communicate anti-smoking messages. Therefore, tobacco companies may well have decided that the status quo, in which they cannot advertise on television or radio but can widely advertise otherwise, is acceptable.

<sup>55</sup> 15 U.S.C.A. § 1335 (West 2014). The ban took effect on Jan. 1, 1971. See Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 3, 84 Stat. 87 (1970). In 1973, Congress amended the radio and television advertising ban so that broadcast advertisements for “little cigars” were also prohibited. Little Cigar Act of 1973, Pub. L. No. 93-109, 87 Stat. 352 (1973) (amending 15 U.S.C. § 1335). A similar ban on television and radio ads for smokeless tobacco has existed since 1986. See 15 U.S.C.A. § 4402(c) (West 2014).

<sup>56</sup> See generally *Tobacco Settlement: Hearing Before the S. Comm. on Labor & Human Res.*, 105th Cong. 48–50 (1998) (statement of William B. Shultz, Deputy Comm’r for Policy, U.S. Food & Drug Admin.).

<sup>57</sup> C. STEPHEN REDHEAD & VANESSA BURROWS, RL32619, FDA REGULATION OF TOBACCO PRODUCTS: A HISTORICAL, POLICY AND LEGAL ANALYSIS, CONG. RESEARCH SERV. (2008), available at <http://wikileaks.org/wiki/CRS-RL32619>.

Tobacco companies challenged the regulations on lack-of-regulatory-authority and First Amendment grounds.<sup>58</sup>

In 2000, the Supreme Court decided *FDA v. Brown & Williamson Tobacco Corp.*,<sup>59</sup> holding that the FDA lacked authority to regulate tobacco products. The Court, therefore, invalidated the FDA regulations without reaching the First Amendment issues.<sup>60</sup> The regulations would eventually obtain new life, however, as the following subsection reveals.

#### *D. The Family Smoking Prevention and Tobacco Control Act of 2009*

Legislative efforts to provide the regulatory authority held lacking in *Brown & Williamson* bore fruit in 2009 when Congress enacted the Family Smoking Prevention and Tobacco Control Act of 2009 (TCA).<sup>61</sup> The statute expressly granted the FDA regulatory authority over tobacco products,<sup>62</sup> authorized and instructed the Secretary of Health and Human Services to promulgate regulations dealing with tobacco product advertising and marketing,<sup>63</sup> and amended the Federal Cigarette Labeling and Advertising Act in important respects.<sup>64</sup> The discussion here will focus on the TCA provisions dealing with tobacco product labeling, advertising, and marketing because those provisions have triggered First Amendment-based objections and are thus most relevant to this Article.<sup>65</sup> Before turning to those

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<sup>58</sup> See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

<sup>59</sup> *Id.* at 126.

<sup>60</sup> *Id.* at 126, 133, 155–56, 161. As will be seen in the immediately following subsection, the TCA resurrected the invalidated regulations. Therefore, discussion of what the regulations called for will be deferred until that subsection.

<sup>61</sup> Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended at 21 U.S.C. §§ 387–387t (2012)).

<sup>62</sup> 21 U.S.C.A. § 387a (West 2014). The TCA extended broad-ranging authority to the FDA, including, for instance, powers to develop tobacco product standards, regulate product ingredients, mandate submission of reports from tobacco companies, and require pre-market approval of new tobacco products that are not substantially equivalent to ones previously on the market. *Id.* §§ 387d, 387e, 387f, 387g, 387i, 387j, 387k. Congress specifically barred the FDA, however, from banning the sale of cigarettes and various other tobacco products. *Id.* § 387g(d)(3).

<sup>63</sup> *Id.* §§ 387a-1, 387f(d).

<sup>64</sup> See 15 U.S.C.A. § 1333(a)–(d) (West 2014); see also *id.* § 4402 (amending smokeless tobacco warning requirements).

<sup>65</sup> For examination of the cases in which portions of the TCA have been challenged on First Amendment grounds, see *infra* text accompanying notes 308–406. For a further overview of the TCA, see Clay Calvert, Wendy Allen-Brunner & Christina M. Locke, *Playing Politics or Protecting Children? Congressional Action & A First Amendment Analysis of the Family Smoking Prevention and Tobacco Control Act.*, 36 J. LEGIS. 201, 221–36 (2010).

provisions, however, it is useful to examine pertinent findings and statements of purpose that Congress included in the TCA.

### *1. Legislative Findings and Purposes*

In lengthy findings underlying the TCA,<sup>66</sup> Congress repeatedly noted the health risks associated with smoking and set forth its conclusions regarding the influence of tobacco companies' advertising and promotional activities on minors.<sup>67</sup> Congress called nicotine an "addictive drug"<sup>68</sup> and characterized minors' use of tobacco products as a "pediatric disease of considerable proportions that results in new generations of tobacco-dependent children and adults."<sup>69</sup> Congress also found that tobacco companies' advertising and marketing activities "contribute significantly" to adolescents' use of tobacco products containing nicotine,<sup>70</sup> that past efforts to restrict such advertising and marketing had not sufficiently curbed adolescents' use of tobacco products, and that "comprehensive restrictions on the sale, promotion, and distribution of such products are [therefore] needed."<sup>71</sup>

Continuing its findings, Congress expressed concern about tobacco companies' supposed practice of directing advertising toward minors<sup>72</sup> and observed that minors are regularly exposed to tobacco advertising and promotional activities.<sup>73</sup> Such exposure creates "favorable beliefs" regarding tobacco use and "increases the number of young people who begin to use tobacco."<sup>74</sup> Tobacco marketing, Congress maintained, influences children

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<sup>66</sup> See Pub. L. No. 111-31, § 2, 123 Stat. 1776 (2009) (codified as amended at 21 U.S.C. §§ 387–387t (2012)).

<sup>67</sup> See *id.* § 2(1), (2), (5), (6), (13)–(15), (17), (18), (22)–(24), (29), (33), (47), (48).

<sup>68</sup> *Id.* § 2(3).

<sup>69</sup> *Id.* § 2(1). Those users, Congress found, risk experiencing "cancer, heart disease, and other serious adverse health effects." *Id.* § 2(2).

<sup>70</sup> *Id.* § 2(5).

<sup>71</sup> *Id.* § 2(6).

<sup>72</sup> *Id.* § 2(15), (47), (48).

<sup>73</sup> *Id.* § 2(18). Congress observed that advertising "often misleadingly portrays" tobacco use as "socially acceptable and healthful to minors." *Id.* § 2(17). In addition, Congress concluded that tobacco ads during sporting events and tobacco companies' sponsorship of sporting events helped to create the impression that tobacco use could play a role in "the healthy lifestyle associated with rigorous sporting activity." *Id.* § 2(19).

<sup>74</sup> *Id.* § 2(20). Congress found that a fifty percent reduction in the use of tobacco by minors "would prevent well over 10,000,000 of today's children from becoming regular, daily smokers" and would save more than 3,000,000 of them from "premature death due to tobacco-induced disease." *Id.* § 2(14). The related savings in healthcare costs, Congress asserted, would be roughly \$75 billion. *Id.* Referring not merely to minors but to the public generally, Congress also noted that tobacco use is "the foremost preventable cause of death in America," that it causes more than 400,000 deaths annually in the

more than it does adults.<sup>75</sup> The findings reflected the legislative judgment that comprehensive advertising restrictions, including those in the previously invalidated FDA regulations, “will have a positive effect on the smoking rates of young people.”<sup>76</sup>

The findings discussed above relate directly to three of the legislative purposes identified in the TCA. First, in a list of purposes connected with the grant of regulatory authority to the FDA,<sup>77</sup> Congress sought to recognize the FDA as the primary federal regulator “with respect to the manufacture, marketing, and distribution of tobacco products....”<sup>78</sup> Second, Congress wished to ensure that the FDA possessed “the authority to address issues of particular concern to public health officials, especially the use of tobacco by young people and dependence on tobacco.”<sup>79</sup> Third, Congress sought to “promote cessation” of tobacco use and thereby “reduce disease risk and the social costs associated with tobacco-related diseases.”<sup>80</sup>

The TCA’s stated purposes must be considered alongside those set forth for many years in the Federal Cigarette Labeling and Advertising Act (FCLAA)<sup>81</sup> because the TCA amended certain aspects of the earlier law<sup>82</sup> but left its purposes section untouched.<sup>83</sup> As noted earlier, the FCLAA’s purposes section noted the objective of making the federal government the key regulator of cigarette labeling and advertising insofar as

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United States, and that approximately 8.6 million Americans suffer from chronic illnesses related to smoking. *Id.* § 2(13). The findings labeled these problems a “public health crisis created by actions of the tobacco industry.” *Id.* § 2(29).

<sup>75</sup> *Id.* § 2(23). Congress found that “more than 80 percent of youth smoke three heavily marketed brands, while only 54 percent of adults, 26 and older, smoke these same brands.” *Id.*

<sup>76</sup> *Id.* § 2(25). *See also id.* § 2(30)–(32). The FDA regulations alluded to here are the ones invalidated by the Supreme Court in 2000 on the ground that the FDA lacked authority to regulate tobacco products. *See supra* text accompanying notes 58–60. Congress also considered other nations’ use of tobacco advertising restrictions and found, as a lesson from international experience, that “stringent and comprehensive [advertising regulations] have a greater impact on overall tobacco use and young people’s use than weaker or less comprehensive ones.” Pub. L. No. 111-31, § 2(27), 123 Stat. at 1778.

<sup>77</sup> *Id.* § 3(1)–(10).

<sup>78</sup> *Id.* § 3(1).

<sup>79</sup> *Id.* § 3(2).

<sup>80</sup> *Id.* § 3(9). Another stated purpose has partial relevance to the issues addressed in this Article. Congress indicated it wanted to “ensure that consumers are better informed....” *id.* § 3(6), though the remainder of that stated purpose went on to refer to the authority granted to the FDA to require tobacco companies to inform the public of the results of “research ... relating to the health and dependency effects or safety of tobacco products.” *Id.*

<sup>81</sup> 15 U.S.C.A. §§ 1331–1341 (West 2014).

<sup>82</sup> *See infra* text accompanying notes 89–104.

<sup>83</sup> *See* § 1331, amended by Pub. L. 98-474, § 6(a), 98 Stat. 2204 (1984).



the relationship between smoking and health is concerned.<sup>84</sup> In addition, the purposes section stated that the FCLAA-required warning statement for cigarette packages and advertisements was meant to serve as a means of “adequately inform[ing]” the public “about any adverse health effects of cigarette smoking.”<sup>85</sup> Unsurprisingly, then, there exists considerable alignment between the FCLAA’s longstanding purposes and the objectives more recently articulated in the TCA.

## 2. Labeling and Advertising Provisions: Changes in § 1333

The FCLAA, as amended by the TCA, contains various provisions dealing with the labeling, advertising, and marketing of tobacco products.<sup>86</sup> As the following discussion will reveal, these provisions mix direct regulation in the form of stated requirements or commands with indirect regulation through grants of authority to the Secretary of Health and Human Services (HHS Secretary), whose department houses the FDA.<sup>87</sup>

In passing the TCA, Congress significantly changed the content and manner of display of the warning that must appear on cigarette packages and in cigarette advertisements.<sup>88</sup> Congress amended § 1333 of the FCLAA by mandating that cigarette packages and advertisements contain, on a rotating basis, one of these nine statements (each of which must be preceded by the word “Warning” in all capital letters):

- Cigarettes are addictive.
- Tobacco smoke can harm your children.
- Cigarettes cause fatal lung disease.
- Cigarettes cause cancer.
- Cigarettes cause strokes and heart disease.
- Smoking during pregnancy can harm your baby.
- Smoking can kill you.
- Tobacco smoke causes fatal lung disease in nonsmokers.
- Quitting smoking now greatly reduces serious risks to your health.<sup>89</sup>

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<sup>84</sup> See *id.*; *supra* text accompanying notes 25–26.

<sup>85</sup> 15 U.S.C.A. § 1331(1).

<sup>86</sup> *Id.* §§ 1333, 1335, 1335a.

<sup>87</sup> *Id.* §§ 1332(9), 1333, 1334, 1335a, 1341.

<sup>88</sup> *Id.* § 1333(a)(1)–(2), (b)(1)–(3), *amended by* Pub. L. No. 111-31, §§ 201(a), (b), 206 (2009).

<sup>89</sup> Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 201(a)(1), 123 Stat. 1776, 1842 (2009) (codified as amended at 15 U.S.C. § 1333(a)(1) (2012)). Subsection 1333(a)(2) describes the specific typography requirements for the

These warnings preserve the general thrust of the rotating warnings previously required, but the new list expands the number of warnings in the rotation.<sup>90</sup> The individual warnings in the new list tend to be shorter and less detailed than certain ones of the formerly required warnings<sup>91</sup>—perhaps to make them simpler and more understandable and perhaps in recognition of new manner-of-display requirements to which we now turn.

Section 1333's previous version required a conspicuous display of the warning and included other warning size and appearance directives,<sup>92</sup> but the TCA amendments establish even more specific and detailed manner-of-display provisions.<sup>93</sup> The amendments applicable to cigarette packages require that the warning appear in, and occupy, the upper fifty percent of the packages' front and rear panels.<sup>94</sup> Besides dictating that "Warning" appear in all capital letters prior to the remainder of the relevant text, the new version of § 1333 requires, as a general rule, the use of seventeen-point type for the warning.<sup>95</sup> The TCA amendments further call for the warning's text to appear in black on a white background or white on a black background, in a manner that contrasts with other printed material on the package.<sup>96</sup>

The new version of § 1333 established by the TCA reflects similarly detailed requirements concerning cigarette advertisements' display of the warning.<sup>97</sup> The warning and a statement regarding the tar, nicotine, and other similar content of the advertised cigarette, if such a statement is required by the HHS Secretary under authority granted elsewhere in the

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warnings in (a)(1). 15 U.S.C.A. 1333(a)(2) (West 2014). *See id.* § 201(c), 123 Stat. at 1844 (codified as amended at 15 U.S.C. § 1333(c) (2012)).

<sup>90</sup> Section 1333's previous version called for only four warnings to be in the rotation. *See* 15 U.S.C. § 1333(a), (c) (Supp. II 1984) (amended 1985, 2009).

<sup>91</sup> *Compare, e.g.*, § 1333(a) (2012) (listing among rotating warnings called for in current version, "WARNING: Cigarettes cause fatal lung disease," "WARNING: Cigarettes cause cancer," "WARNING: Cigarettes cause strokes and heart disease," and "WARNING: Smoking during pregnancy can harm your baby"), *with* § 1333(a) (Supp. II 1984) (listing among rotating warnings called for in superseded version, "SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy," and "SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight").

<sup>92</sup> *See* 15 U.S.C. § 1333(b) (Supp. II 1984) (amended 1985, 2009).

<sup>93</sup> *See* Pub. L. No. 111-31, § 201(a)(2), (b)(1)–(3), (c)(1)–(2), (d), 123 Stat. at 1843 (codified as amended at 15 U.S.C. § 1333(a)(2), (b)(1)–(3), (c)(1)–(2), (d) (2012)).

<sup>94</sup> *Id.* § 201(a)(2), 123 Stat. at 1843 (codified at 15 U.S.C. § 1333(a)(2) (2012)).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *See* 15 U.S.C.A. § 1333(a)(1)–(2), (b)(1)–(3), (c)(1)–(2), (d), (d) (e)(3) (West 2014) (original contains two subsections designated (d)).

statute,<sup>98</sup> must occupy at least twenty percent of the advertisement's physical area and must otherwise be displayed prominently at the top of the advertisement.<sup>99</sup> Capital letters must be used for the word "Warning," and the remainder of the warning's text must appear in conspicuous, legible type that is black if the background is white or white if the background is black.<sup>100</sup> The new § 1333 goes on to list other detailed display-related requirements, including provisions dealing with the width of a border in which the required warning must appear and provisions mandating the use of specified lettering sizes (which vary depending upon the type and dimensions of the particular advertisement).<sup>101</sup>

In another major change, the TCA amendments to § 1333 went beyond the previous version's focus on the text of the required warning and mandated inclusion of a graphics element.<sup>102</sup> Congress directed the HHS Secretary to issue, within twenty-four months of the TCA's enactment, regulations that "require color graphics depicting the negative health consequences of smoking" to accompany the warning's text.<sup>103</sup> Congress further stated that the Secretary would have the discretion to adjust the previously noted requirements regarding the warning's language, type size, and format, "so that both the graphics and accompanying [warning] label statements are clear, conspicuous, [and] legible, and appear within the specified area."<sup>104</sup>

### 3. FDA Regulations Concerning Graphic Images

In 2011, the Secretary issued regulations concerning nine graphic images devised in response to the congressional command to develop graphic

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<sup>98</sup> See *id.* § 1333(e).

<sup>99</sup> Pub. L. No. 111-31, § 201(b)(2), 123 Stat. at 1843 (codified as amended at 15 U.S.C. § 1333(b)(2) (2012)).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* Similar warning and display requirements apply to smokeless tobacco packages and advertisements. See *id.* § 204, 123 Stat. at 1846 (codified as amended at 15 U.S.C. § 4402 (2012)). However, the smokeless tobacco warning requirements do not mandate use of a graphics element as part of the warning. See *id.*

<sup>102</sup> *Id.* § 201(d), 123 Stat. at 1845 (codified as amended at 15 U.S.C. § 1333(d) (2012)).

<sup>103</sup> *Id.* The Secretary issued the called-for regulations in 2011. See *infra* text accompanying notes 105–09; see also *Cigarette Package and Advertising Warnings*, 21 C.F.R. §§ 1141.1–1141.16 (2012).

<sup>104</sup> Pub. L. No. 111-31, § 201(d), 123 Stat. at 1845 (codified as amended at 15 U.S.C. § 1333(d) (2012)); see *id.* § 201(b)(2), (4), 123 Stat. at 1843, 1844 (codified as amended at 15 U.S.C. § 1333(b)(2), (4) (2012)) (granting similar authority to HHS Secretary to vary display requirements); *id.* § 202(d), 123 Stat. at 1845 (codified as amended at 15 U.S.C. § 1333(e) (2012)) (granting similar authority to HHS Secretary to vary display requirements, warning text, and color graphics if Secretary believes changes would help public understand dangers of using tobacco products).

images for use on cigarette packages and in cigarette advertisements.<sup>105</sup> The nine graphic images were integrated with the TCA's nine required textual warnings<sup>106</sup> and were to be used on a rotating basis.<sup>107</sup> Each one also included a display of "1-800-QUIT-NOW," a help-line phone number for persons seeking to kick the smoking habit.<sup>108</sup> The graphic images featured these visual depictions (photographs except where noted):

- A crying woman (accompanying the text about tobacco smoke causing fatal lung disease in nonsmokers).
- An adult holding a small child with smoke visible in the air (accompanying the text about tobacco smoke harming children).
- A cigarette-smoking man who had smoke coming out of a tracheotomy opening (accompanying the text about cigarettes being addictive).
- Ugly-looking diseased lungs (accompanying the text about cigarettes causing fatal lung disease).
- A dead, apparently autopsied body with a lengthy stitched-up incision running down the chest (accompanying the text that "[s]moking can kill you").
- A baby receiving hospital care (a drawing accompanying the text that "[s]moking during pregnancy can harm your baby").
- A person with an oxygen mask over his mouth and nose as an apparent emergency measure (accompanying the text about cigarettes causing strokes and heart disease).
- A person's diseased-looking lips and rotted-out teeth (accompanying the text about cigarettes causing cancer).

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<sup>105</sup> 21 C.F.R. §§ 1141.1–1141.16; *see* 15 U.S.C.A. § 1331(d) (West 2014) (statutory directive to Secretary).

<sup>106</sup> *See supra* text accompanying notes 89–90.

<sup>107</sup> Pub. L. No. 111-31, § 201(c), 123 Stat. at 1844 (codified as amended at 15 U.S.C. § 1333(c)); *see* 21 C.F.R. §§ 1141.10, 1141.14 (2011).

<sup>108</sup> *See* Ann Simoneau, Office of Compliance & Enforcement Ctr. for Tobacco Prods., Compliance Training for Small Tobacco Manufacturers: Required Warnings for Cigarette Packaging & Advertising Final Rule 21 CFR 1141 (July 26, 2011), <http://www.fda.gov/downloads/tobaccoproducts/resourcesforyou/forindustry/retailer/ucm265299.ppt> (making graphic images in electronic files part of 21 C.F.R. §§ 1141.12 (2011) through incorporation by reference); *see also* 21 C.F.R. § 1141.16 (2011) (calling for smoking cessation-related disclosure to be part of required warnings).

- A man wearing a t-shirt that bore an “I Quit” inscription and a no-smoking symbol (accompanying the text that “[q]uitting smoking now greatly reduces risks to your health”).<sup>109</sup>

As will be seen, a federal court of appeals decision identifying what it regarded as First Amendment problems with the graphic images just described led the FDA to announce in 2013 that it would abandon those images and devise different ones.<sup>110</sup> Nevertheless, the abandoned images remain relevant to this Article’s analysis of the leading decisions dealing with the TCA and to this Article’s consideration of what the federal government can and should be able to do in regulating tobacco labeling and advertising without violating the First Amendment.<sup>111</sup>

#### 4. FDA Regulations Concerning Advertising and Marketing

Other TCA provisions dealing with tobacco product advertising and marketing included a section resurrecting the FDA regulations that the Supreme Court invalidated in 2000 in *Brown & Williamson*.<sup>112</sup> Of course, the TCA’s grant of regulatory authority to the FDA removed the basis for invalidation identified in that decision.<sup>113</sup> Congress, therefore, directed the HHS Secretary to reissue the earlier regulations with certain modifications outlined in the statute.<sup>114</sup> The Secretary complied with a 2010 set of regulations that reprised the earlier rules and restricted tobacco product advertising and marketing in various ways.<sup>115</sup>

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<sup>109</sup> See Simoneau, *supra* note 108; see also § 1141.12.

<sup>110</sup> See *infra* text accompanying notes 375–77.

<sup>111</sup> See *infra* text accompanying notes 414–84.

<sup>112</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 155–56, 161 (2000).

<sup>113</sup> Pub. L. No. 111-31, § 101, 123 Stat. at 1786 (2009) (codified as amended at 21 U.S.C. § 387a (2012)).

<sup>114</sup> See *id.* § 102(a), 123 Stat. at 1830–31 (codified as amended at 21 U.S.C. § 387a-1 (2012)).

<sup>115</sup> See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 75 Fed. Reg. 13,225, 13,230–32 (Mar. 19, 2010) (codified at 21 C.F.R. pt. 1140). The FDA preceded the regulations with background information and explanations that touched on health issues, smoking rates (especially among minors), and tobacco product advertising in ways similar to the findings and statements of purposes that Congress articulated in the TCA. See *id.* at 13,226–29 (discussing Background, Overview, and Scientific Information preceding rules in part 1140). For discussion of the congressional findings and statements of purpose, see *supra* text accompanying notes 66–85.

Product-distribution provisions in the 2010 regulations prohibited the sale of tobacco products to persons younger than eighteen years of age and generally required the checking of photographic identification to verify the age of purchasers other than those over the age of twenty-six.<sup>116</sup> The regulations also barred tobacco companies from distributing free samples of cigarettes and smokeless tobacco products except at adults-only facilities,<sup>117</sup> and prohibited the sale of cigarettes and smokeless tobacco products through vending machines and self-service displays except at facilities where persons under the age of eighteen are not allowed.<sup>118</sup>

Turning to cigarette and smokeless tobacco product advertising, the 2010 regulations listed permissible types of advertising<sup>119</sup> and mandated use of a text-only, black-and-white format in most instances.<sup>120</sup> The regulations also barred the use of tobacco product brand names, symbols, logos, and

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<sup>116</sup> 21 C.F.R. § 1140.14(a), (b) (2010).

<sup>117</sup> *Id.* § 1140.16(d)(1)–(2). The regulations contain a detailed list of conditions necessary for a facility to qualify for adults-only status. *See id.* § 1140.16(d)(2)(iii); *see also id.* § 1440.34(b) (prohibiting furnishing of gift of any non-tobacco item in consideration of purchase of cigarettes or smokeless tobacco).

<sup>118</sup> *Id.* §§ 1140.14(c), 1140.16(c)(1)–(2). Thus, a “direct, face-to-face exchange,” was to become the norm. *Id.* § 1140.14(c); *see id.* § 1140.16(c)(1)–(2). The regulations recognize a further exception, however, for mail-order sales. *Id.* § 1140.16(c)(2)(i).

<sup>119</sup> *See id.* § 1140.30(a)(1). The regulations listed these permissible advertising types: in newspapers, magazines, periodicals, or “other publications”; on “billboards, posters and placards”; in promotional material (whether point-of-sale or non-point-of-sale); and “in audio or video formats delivered at a point-of-sale.” *Id.* A tobacco seller intending to advertise in a medium other than those just listed must notify the FDA at least thirty days prior to the use of such advertising and must “discuss the extent to which the advertising ... may be seen by persons younger than 18 years of age.” *Id.* § 1140.30(a)(2).

<sup>120</sup> *Id.* § 1140.32(a). In requiring such advertising to employ “only black text on a white background,” the regulation would bar uses of different colors, visual depictions other than of words, and graphic images. *See id.* The regulation recognized two exceptions, however, to the text-only, black-and-white format. One was for facilities where vending machine and self-service displays would be allowed (places to which persons younger than eighteen would not be admitted), assuming that the advertising was not visible from outside the facility. *Id.* § 1140.32(a)(1). *See id.* § 1140.16(c)(1)–(2). The other exception was for newspapers, magazines, periodicals, or other publications that qualify as adult publications. To so qualify, the publication’s readers under the age of eighteen cannot comprise more than fifteen percent of the readership, and the readership must include fewer than two million persons under the age of eighteen. *Id.* § 1140.32(a)(2). As previously noted, *supra* note 119, the regulation states that audio or video advertising is allowed if it is “delivered at a point-of-sale.” *Id.* § 1140.30(a)(1). In such instances, the audio format (whether used with or without accompanying video) “shall be limited to words only with no music or sound effects.” *Id.* § 1140.32(b)(1). The video format “shall be limited to static black text only on a white background.” *Id.* § 1140.32(b)(2).

slogans on non-tobacco items,<sup>121</sup> and prohibited tobacco companies from using their products' brand names and logos when sponsoring sporting events, other events, and sports teams.<sup>122</sup> As will be seen, these advertising and marketing provisions have triggered First Amendment challenges.<sup>123</sup>

### 5. Other TCA Provisions Dealing with Advertising and Promotion

The TCA includes various other advertising- and promotion-related provisions. One such provision prohibits tobacco product manufacturers from making express or implied representations on product labels “or through the media or advertising,” that are likely to mislead consumers into believing that the FDA approved the relevant product, endorsed it, or deemed it to be safe for use by consumers, or that the manufacturer’s compliance with FDA requirements made the product less harmful.<sup>124</sup> In addition, the TCA authorizes the HHS Secretary to adopt regulations partially restricting access to, and advertising and promotion of, a tobacco product if the Secretary determines that such regulations would be “appropriate for the protection of the public health.”<sup>125</sup> The TCA also prohibits

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<sup>121</sup> *Id.* § 1140.34(a) (prohibiting the placement of tobacco product brands and other similar indicia on t-shirts, hats, and many other promotional items).

<sup>122</sup> *Id.* § 1140.34(c) (permitting Tobacco companies to sponsor such events and use their official corporate name in doing so if that name is not the same as a brand name of its products).

<sup>123</sup> *See infra* text accompanying notes 308–446. The 2010 regulations did not include restrictions on placement of outdoor advertising of tobacco products—restrictions that had appeared in the mid-1990s regulations—because similar restrictions imposed at the state level had been struck down by the Supreme Court on preemption and First Amendment grounds in a 2001 decision. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 532–36, 561–64 (2001); Regulation Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco To Protect Children and Adolescents, 75 Fed. Reg. 13,225, 13,226 (Mar. 19, 2010) (codified as amended at 21 C.F.R. pt. 1140). In a background explanation preceding the 2010 regulations, the FDA stated that it was considering whether outdoor advertising placement restrictions might be crafted to comply with First Amendment constraints outlined by the Supreme Court, but that the agency was not then proposing any such rule. Regulation Restricting the Sale and Distribution of Cigarettes, *supra*. In studying the outdoor advertising issue, the FDA was following up on a TCA provision that authorized the FDA to consider ways (if any) to fashion such a rule without violating the First Amendment. *See* 21 U.S.C.A. § 387a-1(2)(E) (West 2014).

<sup>124</sup> Pub. L. No. 111-31, § 103(b)(7)(tt), 123 Stat. at 1834 (2009) (codified as amended at 21 U.S.C. § 331(tt) (2012)).

<sup>125</sup> *Id.* § 906(d), 123 Stat. at 1796 (codified as amended at 21 U.S.C. § 387f(d) (2012)). This authority to restrict advertising and promotion extends, according to the statute, as far as the First Amendment permits. *Id.*

the making of false or misleading representations on tobacco product labels and in advertisements for such products,<sup>126</sup> and authorizes the HHS Secretary to promulgate a regulation requiring pre-approval of statements a tobacco company plans to include on product labels.<sup>127</sup>

Although the TCA does not require that the FDA pre-approve advertising statements regarding tobacco products generally, it does so regarding those of the modified-risk variety.<sup>128</sup> A modified-risk tobacco product is one in which the manufacturer:

- expressly or impliedly represents, through labeling or advertising, that the product is meant to reduce the harm or risk of disease associated with other tobacco products;
- represents that the product or its smoke contains less of a potentially harmful substance than other tobacco products do;
- uses the terms “‘light,’ ‘mild,’ or ‘low’ or similar descriptors” on the product label or in advertising; or
- takes action that is “directed to consumers through the media or otherwise” and would reasonably cause consumers to conclude that the product is less harmful or less likely to cause disease than are other tobacco products.<sup>129</sup>

If a tobacco product meets any of the above criteria for modified-risk status, the product cannot be sold without the HHS Secretary’s pre-market approval.<sup>130</sup> An application for such an order must include and describe “any proposed advertising and labeling.”<sup>131</sup>

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<sup>126</sup> *Id.* § 903(a), 123 Stat. at 1788–89 (codified as amended at 21 U.S.C. § 387c(a)(1), (a)(7)(A) (2012)).

<sup>127</sup> *Id.* § 903(b), 123 Stat. at 1789–90 (codified as amended at 21 U.S.C. § 387c(b) (2012)). Such a regulation would be designed to ensure compliance with the labeling requirements provided for in the TCA and relevant regulations. *Id.* However, Congress did not adopt a pre-approval rule regarding tobacco product advertisements, with the partial exception of advertisements for modified-risk products. *Id.*

<sup>128</sup> *Id.*; *see id.* § 911(d), 123 Stat. at 1813 (codified as amended at 21 U.S.C. § 387k(d)(1) (2012)).

<sup>129</sup> *Id.* § 911(b)(2), 123 Stat. at 1812–13 (codified as amended at 21 U.S.C. § 387k(b)(2) (2012)).

<sup>130</sup> *Id.* § 911(b)(1) (codified as amended at 21 U.S.C. § 387k(a) (2012)).

<sup>131</sup> *Id.* § 911(d), 123 Stat. at 1813 (codified as amended at 21 U.S.C. § 387k(d)(1) (2012)). As part of a decision to grant pre-market approval of a modified-risk tobacco product on the market, *see id.* § 911(g), 123 Stat. at 1814 (codified as amended at 21 U.S.C. § 387k(g) (2012)), the Secretary may also require that the product’s advertising and labeling enable the public to comprehend the relative health and disease risks



Because the TCA's advertising and promotion provisions and related FDA regulations set forth speech-based requirements and restrictions, they have been challenged on First Amendment grounds. The leading appellate decisions addressing those challenges will be discussed and analyzed later in this Article.<sup>132</sup> In order to lay a foundation for that analysis, this Article now examines relevant First Amendment principles as articulated and applied in Supreme Court decisions.

## II. FIRST AMENDMENT PROTECTION FOR COMMERCIAL SPEECH: HISTORY AND OVERVIEW

When interpreting the First Amendment, the Supreme Court has long distinguished between noncommercial speech and commercial speech. The former category, which receives "full" First Amendment protection, includes political speech and other noncommercial expression connected with literary, artistic, scientific, economic, or moral matters or with a broad range of subjects of public concern.<sup>133</sup> Commercial speech, on the other hand, receives no more than "intermediate" First Amendment protection.<sup>134</sup> The Court usually defines commercial speech as expression that "does no more than propose a commercial transaction."<sup>135</sup> Typical examples of commercial speech include advertisements for products, services, or businesses.<sup>136</sup>

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associated with the product and those associated with non-modified risk tobacco products. *Id.* § 911(h), 123 Stat. at 1816 (codified at 21 U.S.C. § 387k(h) (2012)).

<sup>132</sup> See *infra* text accompanying notes 308–446.

<sup>133</sup> *E.g.*, *Citizens United v. FEC*, 558 U.S. 310, 329, 340 (2010); *Texas v. Johnson*, 491 U.S. 397, 406, 412 (1989); *Abod v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977). A government restriction on the content of fully protected speech violates the First Amendment unless the government accomplishes the difficult task of demonstrating that the restriction is necessary to fulfill a compelling government purpose. *E.g.*, *Citizens United*, 558 U.S. at 340.

<sup>134</sup> *E.g.*, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 749–57, 763–65, 770–72 (1976).

<sup>135</sup> *E.g.*, *id.* at 776. Yet the definition of commercial speech has sometimes led to confusion and therefore may be in need of clarification. See Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 589–93, 605–15 (2012).

<sup>136</sup> *E.g.*, *Va. State Bd. of Pharmacy*, 425 U.S. at 762; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996). Functional equivalents of advertisements, such as product labels, also constitute commercial speech. *E.g.*, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478–80 (1995).

*A. Intermediate Protection and the Controlling Test*

Until approximately forty years ago, the Supreme Court classified commercial expression as falling outside the First Amendment's protective scope.<sup>137</sup> After three decisions over roughly a decade laid the groundwork for a doctrinal shift,<sup>138</sup> the Court held in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*<sup>139</sup> that commercial speech merits a role in the First Amendment's marketplace of ideas.<sup>140</sup> The Court declined, however, to give commercial speech the "full" First Amendment protection extended to political speech and other noncommercial expression.<sup>141</sup> Two key distinctions informed the Court's conclusion regarding the appropriate level of protection: when faced with government regulation, commercial speech is more durable than noncommercial speech; and commercial speech's accuracy or inaccuracy is more readily verifiable than is the accuracy or inaccuracy of noncommercial expression.<sup>142</sup> The Court, therefore, recognized an intermediate level of First Amendment protection for commercial speech and made that level a maximum by

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<sup>137</sup> See, e.g., *Valentine v. Chrestensen*, 316 U.S. 52, 54–55 (1942).

<sup>138</sup> See *Bigelow v. Virginia*, 421 U.S. 809, 821, 826 (1975); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 384–85, 389 (1973); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265–66 (1964). For discussion of these decisions' roles in laying the groundwork for the extension of intermediate First Amendment protection to commercial speech, 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, 593–96 (2000).

<sup>139</sup> *Va. State Bd. of Pharmacy*, 425 U.S. 748.

<sup>140</sup> See *id.* at 756–57, 759–61, 762–63, 765. *Virginia State Board of Pharmacy* justified placing constitutional limits on the government's ability to regulate commercial expression by noting that the First Amendment contemplates a right on the part of readers and listeners to receive information on matters of interest to them, that the information provided by commercial advertising may be of even greater interest to some persons than is information on political matters, and that if the First Amendment contemplates a right to receive information of interest, there must be a correlative right to speak regarding such matters. *Id.* at 753, 756–57, 762–63, 765. The law struck down in *Virginia State Board of Pharmacy* was one that prohibited pharmacists from advertising the prices they would charge for prescription drugs. *Id.* at 763, 765.

<sup>141</sup> *Id.* at 770–71. See *id.* at 760–63, 765, 769–70.

<sup>142</sup> *Id.* at 771 n.24. It is unclear to what extent the Court continues to place significant weight on these distinctions as a basis for the less-than-full First Amendment protection extended to commercial speech. Compare, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 498–99 (1996) (citing the distinctions), with *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367–68 (2002), and *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 183–92, 193–94 (1999) (finding no mention of the distinctions in either decision).

holding that it would apply to non-misleading commercial speech about lawful activities.<sup>143</sup>

In a 1980 decision, *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>144</sup> the Court began clarifying intermediate protection's meaning by announcing a still-utilized four-part test that applies when a government restriction on commercial speech is challenged on First Amendment grounds.<sup>145</sup> Part one of the test governs the determination of whether the relevant commercial expression may stake any claim to First Amendment protection by asking whether the commercial speech affected by the government regulation at issue pertains to a lawful activity and is non-misleading.<sup>146</sup> If this threshold question yields a conclusion that the affected commercial speech merits intermediate protection, parts two through four of the test must be applied.<sup>147</sup> The government's passage of parts two through four means that the commercial speech restriction does not violate the First Amendment, whereas the government's failure to clear any hurdle posed by parts two through four means that the restriction is unconstitutional.<sup>148</sup>

In part two, the *Central Hudson* test asks whether a substantial government interest underlies the commercial speech restriction.<sup>149</sup> The

<sup>143</sup> *Va. State Bd. of Pharmacy*, 425 U.S. at 760–63, 765, 769–70, 771 n.24. See *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring) (using the term “intermediate scrutiny” to refer to Court's analysis of restrictions on commercial speech). Misleading commercial speech would suffer the same fate to which all commercial speech formerly had been subjected: exclusion from the First Amendment's protective scope. *Virginia State Bd. of Pharmacy*, 425 U.S. at 771. The same would be true of commercial speech pertaining to an unlawful activity. *Id.*

<sup>144</sup> 447 U.S. 557 (1980).

<sup>145</sup> *Id.* at 563–64, 566. See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667–72 (2011) (applying the *Central Hudson* test but also suggesting an alternative analysis); *Thompson*, 535 U.S. at 367–68 (2002) (applying the *Central Hudson* test). The test survived even though some Justices expressed dissatisfaction with it or proposed that it be modified or replaced in order to enhance protection for commercial speech. See *Thompson*, 535 U.S. at 377 (Thomas, J., concurring); *44 Liquormart, Inc.*, 517 U.S. at 484, 496–500, 501–04, 507–08; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 431, 433–38 (1993) (Blackmun, J., concurring).

<sup>146</sup> *Cent. Hudson*, 447 U.S. at 566. This part of the test has its roots in *Virginia State Board of Pharmacy*, which recognized intermediate First Amendment protection for nonmisleading commercial speech about a lawful activity but denied protection to commercial expression that misleads or promotes something illegal. *Virginia State Bd. of Pharmacy*, 425 U.S. at 760–63, 765, 769–70, 771 n.24.

<sup>147</sup> *Cent. Hudson*, 447 U.S. at 566.

<sup>148</sup> *Id.* at 563–64, 566.

<sup>149</sup> *Id.* at 566.

government normally has little difficulty passing part two because the cases have indicated that almost any interest related to the public's health, safety, or welfare will suffice.<sup>150</sup> Indeed, part two is nearly a given for the government.

The same cannot be said, however, of parts three and four, which focus on the relationship—or “fit”—between the commercial speech restriction and the substantial interest the government seeks to further.<sup>151</sup> Part three requires the government to demonstrate that the challenged commercial speech regulation will directly advance the government's underlying interest.<sup>152</sup> To prove direct advancement, the government must show that the regulation will meaningfully contribute to the fulfillment of its interest.<sup>153</sup> A trivial or attenuated connection between regulation and government interest is insufficient.<sup>154</sup>

In part four, the *Central Hudson* test requires the government to show that the challenged commercial speech restriction is no more extensive than necessary to fulfill the underlying regulatory interest.<sup>155</sup> *Central Hudson* itself and early applications of its test suggested that part four contemplated a least-restrictive-means analysis, under which a commercial speech regulation could pass muster only if it restricted absolutely the least amount of speech possible.<sup>156</sup> A later decision instead established that the no-more-extensive-than-necessary formulation of part four requires only that the restriction be “narrowly tailored to achieve the desired objective.”<sup>157</sup> Part four thus contemplates a “reasonable” fit between

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<sup>150</sup> See, e.g., *Thompson*, 535 U.S. at 368–70 (finding substantial interests in both preserving effectiveness of federal drug approval process and ensuring availability of compounded drugs to persons needing them); *44 Liquormart, Inc.*, 517 U.S. at 504 (finding a substantial interest in reducing public's alcohol consumption); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995) (finding a substantial interest in guarding against alcohol “strength wars”); *Cent. Hudson*, 447 U.S. at 568–69 (finding a substantial interest in promoting energy conservation).

<sup>151</sup> *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); see *Cent. Hudson*, 447 U.S. at 563–64, 566.

<sup>152</sup> *Cent. Hudson*, 447 U.S. at 566.

<sup>153</sup> *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993).

<sup>154</sup> See *id.* at 770–71; *Cent. Hudson*, 447 U.S. at 566.

<sup>155</sup> *Cent. Hudson*, 447 U.S. at 563–64, 566.

<sup>156</sup> See *Cent. Hudson*, 447 U.S. at 566, 569–71; *Bolger v. Youngs Drugs Prods. Corp.*, 463 U.S. 60, 73–75 (1983).

<sup>157</sup> *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); see *id.* at 476–78, 480 (labeling as dicta earlier decisions' indications that part four of the test requires a least-restrictive-means analysis). *But see id.* at 486 (Blackmun, J., dissenting) (observing that, in order to conclude that part four does not require a least-restrictive-means analysis, the majority had to “recast[] a good bit of contrary language in our past cases”).

commercial speech restriction and underlying government interest, not necessarily a “perfect” fit.<sup>158</sup>

*B. Narrowing of the Gap Between Intermediate and Full Protection*

*Virginia Board of Pharmacy*’s basic principle, that commercial speech can receive First Amendment protection but at most an intermediate degree thereof, remains in force, as does the related *Central Hudson* test.<sup>159</sup> The rigor with which the Supreme Court applies parts three and four of the test serves as the key determiner of what intermediate First Amendment protection really means in relation to full protection.<sup>160</sup> In various pre-1995 applications of the test, the Court made intermediate protection appear significant by holding the government’s feet to the fire.<sup>161</sup> Yet sometimes

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<sup>158</sup> *Id.* at 480. Accordingly, a commercial speech restriction that is not absolutely the narrowest one possible may still clear the part-four hurdle as long as that restriction is not unreasonably broad in its prohibition of speech. *See id.* at 477, 480. It remains important to explore other steps that the government might have taken and that would have furthered the underlying regulatory interest just as well without restricting as much (or any) speech. *E.g.*, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 372–73 (2002); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490–91. *Fox*’s narrow-tailoring gloss seemed to be designed to make part four of the test easier for government to pass than if that part contemplated a least-restrictive-means analysis. *See Fox*, 492 U.S. at 477. As will be seen, however, the Court’s more recent decisions have applied the narrow-tailoring standard in a way that makes part four a difficult obstacle for the government to overcome. *See infra* text accompanying notes 164–263.

<sup>159</sup> *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667–72 (2011); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367–68 (2002); *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 183–92, 193–94 (1999) (all applying *Central Hudson* test). *But see Sorrell*, 131 S. Ct. at 2662–67 (suggesting an alternative analysis not dependent on the *Central Hudson* test). The *Central Hudson* test has survived even though some Justices have expressed reservations about it. *See infra* notes 174, 182.

<sup>160</sup> As will be seen, a stern application of parts three and four of the *Central Hudson* test makes the test more difficult for the government to pass, enhances the likelihood that the commercial speech restriction at issue will be invalidated, and makes the intermediate level of First Amendment protection significant. On the other hand, a loose application that defers to the government’s judgments regarding the fit between the restriction and the underlying government interest makes the restriction more likely to be upheld and causes the intermediate level of First Amendment protection to seem less meaningful. *See infra* text accompanying notes 161–64.

<sup>161</sup> *See Cent. Hudson*, 447 U.S. at 568–71 (striking down regulation that prohibited utility companies from advertising public power services because regulation prohibited significantly more speech than was necessary to further energy conservation interest); *Bolger*, 463 U.S. at 71–75 (striking down federal law that prohibited unsolicited mailings of advertisements for contraceptives because law would do little to further interest in helping parents control how and when children would be exposed to sensitive subjects and because the law restricted far more speech than was necessary to serve that interest); *City of*

the Court displayed little inclination to second-guess the government's regulatory choices.<sup>162</sup>

From 1995 on, however, the Court has consistently employed a stern analysis that carefully scrutinizes the relationship between the commercial speech regulation at issue and the underlying government interest.<sup>163</sup> As the following discussion will reveal, those decisions have made parts three and four of the *Central Hudson* test very formidable obstacles for the government to overcome and have effectively given commercial speech a level of protection not far removed from the full variety even though the level still carries the intermediate label.<sup>164</sup>

*Rubin v. Coors Brewing Co.*,<sup>165</sup> a 1995 decision, launched the current era in which the gap between intermediate and full First Amendment protection

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*Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417–18, 424–25, 428, 430 (1993) (invalidating a city ordinance requiring removal of racks devoted to commercial advertising publications because the ordinance would do little to advance the city's interests in safety and aesthetics and because other available regulatory options would have restricted less speech); *Edenfield v. Fane*, 507 U.S. 761, 763–64, 767, 768–73 (invalidating a Florida rule that barred CPAs from personal solicitation of potential clients because the government offered only speculation regarding whether rule would advance interests in preventing fraud and coercion and in enhancing auditor independence).

<sup>162</sup> For instance, in *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986), the Court upheld a Puerto Rico law that banned commercial advertisements for casino gambling if the advertisements were directed toward residents and citizens of Puerto Rico. *Id.* at 330–33, 344, 348. The Court so held even though casino gambling was a lawful activity in Puerto Rico. *Id.* In applying parts three and four of the *Central Hudson* test, the Court paid great deference to the government's regulatory judgments. The Court observed that it was in no position to second-guess the government's conclusion that the advertising ban would directly further the government's interest in protecting residents and citizens against the evils of casino gambling and would do so without restricting far too much speech. *Id.* at 341–44; *see* *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477–80 (1989) (expressing concern that the applicable test should not be made too difficult for government to pass, given that commercial speech receives intermediate, rather than full, protection); *United States v. Edge Broad. Co.*, 509 U.S. 418, 427–31 (1993) (displaying deference to congressional regulatory choices in enacting a lottery advertising statute meant to accommodate interests of states that permitted lotteries and states that did not permit them). As will be seen, the Court's more recent applications of the *Central Hudson* test neither display deference to the government's regulatory choices nor voice concern about making the test too difficult for the government to pass. *See infra* notes 165–263.

<sup>163</sup> *See infra* text accompanying notes 165–263.

<sup>164</sup> Recent years' decisions thus have gone a long way toward accomplishing, within the existing framework, the underlying objectives of those Justices who advocated changing the governing rules in order to provide greater protection to commercial speech. *See infra* notes 174, 182.

<sup>165</sup> 514 U.S. 476 (1995).

has been narrowing. In *Coors*, the Court struck down a federal statute and related regulations that prohibited disclosures of alcohol content on beer labels.<sup>166</sup> Justice Thomas's majority opinion acknowledged that in seeking to prevent "strength wars" among alcohol producers and guard against the negative public health effects that could result from such wars, the government possessed substantial interests for purposes of the *Central Hudson* test's second element.<sup>167</sup> However, the Court concluded that the ban on disclosing alcohol content on beer labels would not directly advance the prevention-of-strength-wars and public-health interests, in large part because the ban would be undercut by other federal regulations that permitted alcohol content disclosures in many advertisements and that even required such disclosures on some alcohol product labels.<sup>168</sup>

Turning to the *Central Hudson* test's final element, the *Coors* Court concluded that the commercial speech restriction at issue was not narrowly tailored.<sup>169</sup> The ban on disclosing alcohol content on labels prohibited far more speech than was reasonably necessary, including even disclosures that certain products would have a *lesser* alcohol content than others.<sup>170</sup> In addition, the Court thought the government could have taken other steps that would have furthered its interests just as well as or better than the label restriction and would have done so without prohibiting speech.<sup>171</sup> For instance, it could have guarded against strength wars by mandating limits on the alcohol content permitted for beers.<sup>172</sup> The government thus made a problematic choice, the Court indicated, in opting to regulate speech instead of the relevant product or activity.<sup>173</sup>

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<sup>166</sup> *Id.* at 478, 486–91.

<sup>167</sup> *Id.* at 482, 485, 491. The government did not want to see beer makers increase the alcohol content of their products and compete with each other on the basis of ever-increasing alcohol strengths. *See id.*

<sup>168</sup> *Id.* at 488. The Court regarded the government's regulatory regime as riddled by "overall irrationality" and as therefore unlikely to do anything meaningful to further the government's objectives. *Id.* The government's mere speculation about the possible effects of the commercial speech restriction was not enough to enable the government to carry its burden under part three of the applicable test. *Id.* at 488–90.

<sup>169</sup> *Id.* at 491.

<sup>170</sup> *See id.* at 490–91. Such information would be useful to those who might want a beverage containing less alcohol rather than more—presumably a good thing from a public health perspective. *See id.*

<sup>171</sup> *Id.* at 490–91.

<sup>172</sup> *Id.*

<sup>173</sup> *See id.* This same concern about using speech restrictions to effect desired changes regarding products, activities, or behaviors shows up in other decisions to be discussed. *See infra* notes 178–79, 186, 231–32.

A year after *Coors*, the Court considered a First Amendment-based challenge to a Rhode Island law that prohibited alcohol sellers from advertising the prices they would charge. Speaking through a principal opinion and three concurrences in the judgment, all nine Justices agreed in *44 Liquormart, Inc. v. Rhode Island* that the law could not stand.<sup>174</sup> Eight Justices concluded that the government had failed the “fit” portions of the *Central Hudson* test.<sup>175</sup> None displayed any inclination to defer to the government when determining the constitutionality of the advertising restriction at issue or of commercial speech restrictions in general.<sup>176</sup>

In *44 Liquormart*, Rhode Island failed part three of the applicable test because the Court saw nothing more than a tenuous, speculative relationship between the price advertising ban and the underlying government interest in

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<sup>174</sup> 517 U.S. 484, 489, 497–514 (1996) (opinion of Stevens, J., joined at times by Kennedy, Ginsburg, and Breyer, JJ., and at times by Kennedy, Souter, and Ginsburg, JJ.); *id.* at 517 (Scalia, J., concurring); *id.* at 518–28 (Thomas, J., concurring); *id.* at 528–32 (O’Connor, J., Rehnquist, C.J., Souter & Breyer, JJ., concurring). Justice Stevens’s opinion spoke for only a plurality rather than a majority because some Justices were unwilling to subscribe to a portion of the opinion in which Justice Stevens proposed to alter the commercial speech framework by subjecting certain restrictions to the *Central Hudson* test and others to a somewhat higher level of scrutiny. *See id.* at 496–508, 509–14; *id.* at 517 (Scalia, J., concurring); *id.* at 518–28 (Thomas, J., concurring); *id.* at 528–32 (O’Connor, J., concurring). For discussion and analysis of the framework changes Justice Stevens proposed in *44 Liquormart*, see Arlen W. Langvardt & Eric L. Richards, *The Death of Posadas and the Birth of Change in Commercial Speech Doctrine: Implications of 44 Liquormart*, 34 AM. BUS. L.J. 483, 518–34, 542–53 (1997). Justices Scalia and O’Connor premised their *44 Liquormart* opinions on the view that there was no need to re-work existing commercial speech analysis in order to decide the case at hand. *See* 517 U.S. at 517 (Scalia, J., concurring); *id.* at 528–32 (O’Connor, J., concurring). Although he concluded that the Rhode Island law should be invalidated, Justice Thomas did not join the majority opinion because he favored a complete scrapping of the *Central Hudson* test. *See id.* at 518–28 (Thomas, J., concurring).

<sup>175</sup> *See* 517 U.S. at 504–08; *id.* at 517 (Scalia, J., concurring); *id.* at 528–32 (O’Connor, J., concurring). For a listing of which Justices joined the majority opinion and which joined the O’Connor opinion, see *supra* note 174. In his concurrence in the judgment, Justice Thomas did not apply the *Central Hudson* test because he proposed to drop it entirely and devise a means of providing enhanced protection for commercial speech. *See* 517 U.S. at 518–28 (Thomas, J., concurring).

<sup>176</sup> *See* 517 U.S. at 496–514; *id.* at 517 (Scalia, J., concurring); *id.* at 518–28 (Thomas, J., concurring); *id.* at 528–32 (O’Connor, J., concurring). Most members of the Court voiced disapproval of a 1986 decision in which the Court’s application of parts three and four of the controlling test had involved paying great deference to the government’s regulatory choices. *See id.* at 508–14; *id.* at 531–32 (O’Connor, J., concurring). The 1986 decision was *Posadas*. *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986); *see supra* text accompanying note 162.



reducing alcohol consumption.<sup>177</sup> Moreover, Rhode Island failed part four because it could have furthered its interest in promoting temperance through various other ways that did not involve what the Court considered a sweeping speech restriction.<sup>178</sup> By listing non-utilized avenues that would have involved regulating alcohol sales without restricting speech, the *44 Liquor-mart* Court again appeared to indicate that challenged speech restrictions would likely trigger judicial concern if the government had not first attempted seemingly feasible regulation of the underlying product or activity.<sup>179</sup>

A 1999 decision, *Greater New Orleans Broadcasting Ass'n v. United States*,<sup>180</sup> featured unanimity on the outcome and near-unanimity on the rationale.<sup>181</sup> The Court held that a federal statute banning broadcast advertisements for gambling activities could not constitutionally be applied to casino gambling advertisements aired by radio and television stations that were located in a state where such gambling was lawful.<sup>182</sup> Again rigorously

<sup>177</sup> See 517 U.S. at 505–07; *id.* at 517 (Scalia, J., concurring); *id.* at 529–32 (O'Connor, J., concurring) (rejecting Rhode Island's argument that if price advertising were banned, alcohol prices would stay higher than they otherwise would be, that the higher prices would lead to less alcohol consumption by the public, and that public health would therefore be improved).

<sup>178</sup> *Id.* at 507; *id.* at 530 (O'Connor, J., concurring in the judgment). For instance, Rhode Island could have sought to further its temperance-promotion objective by increasing taxes on alcohol products, limiting quantities of alcohol that could be purchased, or launching enhanced educational campaigns regarding the dangers of excessive alcohol consumption. *Id.* at 507.

<sup>179</sup> See *id.* at 503–04, 507; *id.* at 517 (Scalia, J., concurring); *id.* at 526 (Thomas, J., concurring); *id.* at 530 (O'Connor, J., concurring). As Professor Stern has noted, “[t]he splintered opinions in *44 Liquormart* should not obscure the fact that this decision heralded a more protective attitude toward commercial speech.” Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 72 (1999). For further analysis of *44 Liquormart*, see Langvardt & Richards, *supra* note 174, at 518–58.

<sup>180</sup> 527 U.S. 173 (1999).

<sup>181</sup> *Id.* at 176.

<sup>182</sup> *Id.* at 176, 195–96. Justice Stevens, who had proposed altering the commercial speech framework in *44 Liquormart* and ended up with only a plurality opinion there, see *supra* note 174, authored the majority opinion in *Greater New Orleans Broadcasting*. After acknowledging that some members of the Court (himself included) had expressed views about how the commercial speech analysis might be modified in order to enhance First Amendment protection for commercial speech, Justice Stevens went on to disclaim any intent to make such proposals this time because the existing principles associated with the *Central Hudson* test were more than adequate to decide the case. 527 U.S. at 184. The more modest approach won Justice Stevens seven more votes for his opinion, *id.* at 175, with only Justice Thomas not joining it. Although Justice Thomas believed that the statute at issue should be invalidated, he merely concurred in the judgment because he could not put aside his contempt for the *Central Hudson* framework. *Id.* at 197 (Thomas, J., concurring).

applying the *Central Hudson* test, the *Greater New Orleans Broadcasting* Court concluded that even if the government possessed substantial interests in guarding against the social ills associated with casino gambling and in assisting states that have chosen not to make such gambling lawful, the government failed parts three and four of the test.<sup>183</sup> The Court questioned the soundness of the government's part-three argument that the advertising ban bore a direct relationship to the interests underlying it.<sup>184</sup> In addition, the Court observed that the advertising ban and the regulatory regime of which it was a part contained exceptions and inconsistencies that would tend to undermine whatever limited ability the ban might otherwise have had to advance the government's purposes.<sup>185</sup>

As for part four of the controlling test, the Court faulted the government for having chosen a sweeping speech restriction when regulatory courses of action not involving speech could have been employed in an effort to further the government's objectives.<sup>186</sup> Given the second-guessing of Congress in which the Court appeared quite willing to engage, *Greater New Orleans Broadcasting* offered added indications of a narrowing gap between intermediate and full First Amendment protection.<sup>187</sup>

### C. *The Lorillard Decision: Narrowing of the Gap Continues*

The Court's next commercial speech case, *Lorillard Tobacco Co. v. Reilly*,<sup>188</sup> served as its first, and still only, decision on whether restrictions on tobacco advertising and promotion violate the First Amendment.<sup>189</sup> The challenged Massachusetts regulations dealt with sales of and advertisements for cigarettes, smokeless tobacco, and cigars.<sup>190</sup> The regulations

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<sup>183</sup> 527 U.S. at 183, 185–96.

<sup>184</sup> *See id.* at 188–89.

<sup>185</sup> *Id.* at 190–95.

<sup>186</sup> *Id.* at 192–93. For instance, the government could have sought to combat the social ills associated with casino gambling by banning gambling on credit, restricting the use of cash machines on casino premises, limiting pot and bet sizes, restricting casino locations, or imposing certain licensing requirements. *Id.* at 192. The Court noted that although the “failure [of Congress] to institute ... direct regulation of private casino gambling does not necessarily compromise the constitutionality of [the advertising ban], it does undermine the asserted justifications for the restriction before us.” *Id.* Even if direct regulation of the underlying activity is not a mandatory prerequisite to implementation of a speech restriction, *Greater New Orleans Broadcasting* suggested a strong preference for trying direct regulation first. *See id.* at 192–93.

<sup>187</sup> *See id.* at 188–96.

<sup>188</sup> 533 U.S. 525 (2001).

<sup>189</sup> *See id.* at 553.

<sup>190</sup> *Id.* at 552.

reflected protection-of-minors purposes: to restrict underage consumers' access to tobacco products; and to lessen the prospect that advertisements would induce underage persons to use such products.<sup>191</sup>

Sales-practices regulations at issue in *Lorillard* prohibited retailers from using self-service displays of cigarettes, smokeless tobacco, or cigars, and required that tobacco products be located where consumers could obtain them only with assistance from a store clerk.<sup>192</sup> The regulations also imposed advertising restrictions, including a provision barring manufacturers, distributors, and retailers of tobacco products from using outdoor advertising in any location within 1000 feet of a public playground, playground area in a public park, or elementary or secondary school.<sup>193</sup> In addition, the regulations restricted point-of-sale promotion by providing that if advertising for tobacco products appeared inside a retail establishment within the requisite 1000-foot radius, no portion of the advertising could be placed lower than five feet from the floor.<sup>194</sup>

As noted earlier in the Article, the *Lorillard* Court devoted much of its attention to a determination that the Federal Cigarette Labeling and Advertising Act preempted most of the Massachusetts regulations insofar as they pertained to cigarette advertising.<sup>195</sup> The Court therefore found it necessary to conduct a First Amendment analysis only in regard to the state regulations' application to smokeless tobacco and cigar advertising and promotion.<sup>196</sup> With a five-Justice majority striking down nearly all of the regulations as so applied,<sup>197</sup> the decision left little doubt that the application of the restrictions to cigarette advertising also would have failed to pass First Amendment muster if the application to cigarette advertising had not already succumbed to preemption.<sup>198</sup>

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<sup>191</sup> 533 U.S. at 532–34. Manufacturers and retailers of tobacco products filed the constitutional challenge. *Id.* at 532.

<sup>192</sup> *Id.* at 534.

<sup>193</sup> *Id.* at 534–36. This prohibition also applied to advertising in enclosed stadiums and advertising within a retail establishment if the advertising was directed toward or visible from the area outside the establishment, assuming the stadium or establishment was located within the just-described 1000-foot radius. *Id.*

<sup>194</sup> *Id.* at 535–36.

<sup>195</sup> *Id.* at 540–53; see *supra* notes 36–42 and accompanying text.

<sup>196</sup> *Lorillard*, 533 U.S. at 553. As noted earlier, federal law then in existence did not contemplate a preemption argument concerning the state restrictions' application to tobacco products other than cigarettes. See *supra* note 37 and accompanying text.

<sup>197</sup> *Lorillard*, 533 U.S. at 561–66. The majority consisted of Chief Justice Rehnquist and Justices O'Connor (the author of the majority), Scalia, Kennedy, and Thomas. *Id.* at 532, 561, 561–66.

<sup>198</sup> See *id.* at 556–70.

Justice O'Connor began the First Amendment portion of the *Lo-rillard* majority opinion by emphasizing that the *Central Hudson* test, and especially its third and fourth parts, would control the analysis.<sup>199</sup> No issue arose concerning whether Massachusetts possessed a substantial underlying regulatory interest because none of the challenging parties disputed the significance of the government's interest in curtailing tobacco use by minors.<sup>200</sup> Later in its analysis, the Court labeled this interest as "substantial, and even compelling."<sup>201</sup>

Six Justices agreed that Massachusetts had passed part three of the applicable test in regard to the outdoor advertising restrictions.<sup>202</sup> Writing for the six-Justice group, Justice O'Connor approvingly noted "the theory that product advertising stimulates demand for products, while suppressed advertising may have the opposite effect."<sup>203</sup> The six Justices also agreed that Massachusetts had appropriately relied on National Cancer Institute statistics and on FDA studies regarding the extent of, and possible influences on, minors' uses of tobacco products.<sup>204</sup> Because the

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<sup>199</sup> *Id.* at 553–55 (rejecting an argument that strict scrutiny should control the analysis, the Court saw no need to break new analytical ground in order to resolve the case).

<sup>200</sup> *Id.* at 555.

<sup>201</sup> *Id.* at 564. Still later, in a concluding portion of the majority opinion subscribed to by the five Justices who invalidated nearly all of the Massachusetts regulations, the Court added the observation with which this Article began: that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *Id.* at 570 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000)).

<sup>202</sup> *Id.* at 557–61. Chief Justice Rehnquist and Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer concluded that Massachusetts had passed the third part of the controlling test. *Id.* at 556–61. Of those six Justices, only Chief Justice Rehnquist and Justice O'Connor were part of the five-Justice majority that ultimately struck down most of the advertising restrictions on the ground that Massachusetts had not passed part four of the test. *Id.* at 532, 561–66. Justices Scalia, Kennedy, and Thomas were the other three in the majority that held the government had failed part four. *Id.*; *see id.* at 571 (Kennedy & Scalia, JJ., concurring); *id.* at 572 (Thomas, J., concurring). Given what they regarded as the government's obvious failure to pass part four of the test, Justices Kennedy and Scalia saw no need for the Court to decide whether the government passed part three. They also noted "continuing concerns that the [*Central Hudson*] test gives insufficient protection to truthful, nonmisleading commercial speech," and cited those concerns as a reason not to agree with the Court's application of part three of the test. *Id.* at 571–72 (Kennedy & Scalia, JJ., concurring). Justice Thomas made no specific mention of part three. He noted only that the government had not met its burden under the *Central Hudson* test and went on to explain at length why he favored jettisoning that test in favor of applying strict scrutiny to restrictions on truthful commercial speech. *See id.* at 572 (Thomas, J., concurring).

<sup>203</sup> *Id.* at 557.

<sup>204</sup> *See id.* at 557–60.

state had furnished “ample documentation of the problem with underage use” of tobacco products, the Court held that the state’s “decision to regulate advertising ... in an effort to combat the use of tobacco products by minors” reflected a close enough relationship to satisfy the direct-advancement element of the controlling test.<sup>205</sup>

The government’s success in *Lorillard* stopped there, however, as a five-Justice majority largely different from the six-Justice group that had resolved the direct-advancement element in the government’s favor concluded that the outdoor advertising restrictions did not comply with the *Central Hudson* test’s final element.<sup>206</sup> Justice O’Connor and the four colleagues who joined this portion of her opinion emphasized that the disallowance of advertising within 1000 feet of schools and playgrounds, when coupled with local zoning regulations of general applicability, would result in an inability of tobacco manufacturers and other sellers to engage in outdoor advertising in approximately ninety percent of the geographic area in certain cities.<sup>207</sup> The outdoor advertising restrictions thus constituted “nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers.”<sup>208</sup>

Continuing with a part-four analysis that revealed a clear willingness to second-guess the government’s regulatory choices, the five-Justice majority stressed that the state had not made a “careful calculation of the speech interests involved.”<sup>209</sup> For instance, the Massachusetts regulations had not targeted “particular advertising and promotion practices that appeal to youth,” as supposedly identified in relevant studies.<sup>210</sup> In addition, the Court expressed concern that given the broad definition of advertising in the regulations, even a retailer’s oral communications with a would-be purchaser of tobacco products would violate the regulations if those communications occurred outdoors.<sup>211</sup> Hence, the outdoor advertising restrictions, rather than being narrowly tailored to the protection-of-minors

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<sup>205</sup> *Id.* at 561.

<sup>206</sup> For the relevant lineups of the Justices, see *supra* text accompanying note 202.

<sup>207</sup> *Lorillard*, 533 U.S. at 561–63.

<sup>208</sup> *Id.* at 562. The Court did not note that this “nearly ... complete ban” applied only to outdoor advertising and not to such avenues of truthful communication as newspaper and magazine advertisements.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 563.

<sup>211</sup> *Id.* In noting this example, the Court invoked what would seem an atypical application of a regulation designed mainly to address advertisements in signs and billboards. See *id.* at 534–35, 536 (discussing Massachusetts regulations). With such an example helping to support a conclusion that the regulations were not narrowly tailored, the Court appeared to apply part four of the controlling test with considerable rigor.

interest, prohibited too much speech that adults would be entitled to receive.<sup>212</sup> Those restrictions therefore violated the First Amendment.<sup>213</sup>

The regulations' point-of-sale advertising restrictions (the ones calling for in-store advertising to be placed at least five feet off the floor) fared even worse in *Lorillard*. The five Justices who agreed to strike down the outdoor advertising restrictions were joined by a sixth Justice in holding that the point-of-sale restrictions did not directly advance the government's underlying interest and were more extensive than necessary to further that interest.<sup>214</sup>

*Lorillard's* preemption and First Amendment-based rulings gutted the Massachusetts regulations except for the sales practices restrictions (the ban on retail outlets' use of self-service displays of cigarettes, smokeless tobacco, and cigars, and the related requirement that consumers not have access to such items without the assistance of store personnel).<sup>215</sup> Even assuming that those largely conduct-related provisions implicated speech interests sufficiently to warrant consideration of freedom of expression principles, the sales practices restrictions were held permissible under the First Amendment because they would directly further the government's interest in restricting underage users' access to tobacco products and were a suitably narrow means of doing so.<sup>216</sup> Although the sales practices restrictions survived, it would be disingenuous to characterize *Lorillard* as anything other than a resounding victory for the tobacco companies. Especially through the Court's rigorous application of part four of the *Central Hudson* test, *Lorillard* signaled that the intermediate protection for commercial speech might not be much different from the full protection extended to noncommercial expression.<sup>217</sup>

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<sup>212</sup> *Id.* at 564–65.

<sup>213</sup> *Id.* at 562–64. The Court emphasized that despite the “substantial, and even compelling” nature of the interest in protecting minors, the government is not free to go overboard in restricting speech that adults have an interest in receiving. *Id.* at 564. The four Justices who dissented from the Court's holding regarding part four would have remanded for further fact-finding regarding potential effects of the outdoor advertising restrictions and regarding other avenues of communication still available to sellers of tobacco products. *Id.* at 601–03 (Stevens, Ginsburg, & Breyer, JJ., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 590 (Souter, J., concurring in part and dissenting in part).

<sup>214</sup> *Id.* at 532, 566–67. Justice Souter provided the sixth vote on these issues. *Id.* at 590.

<sup>215</sup> *Id.* at 569–70.

<sup>216</sup> *Id.* at 567–70.

<sup>217</sup> *See id.* at 561–66, 570–71.

*D. Post-Lorillard Decisions: Greater Enhancement of Commercial Speech Protection*

A year after *Lorillard*, the Court decided *Thompson v. Western States Medical Center*.<sup>218</sup> There, en route to striking down an advertising restriction set forth in a federal statute, a five-Justice majority applied the *Central Hudson* test strictly against the government<sup>219</sup>—“too strictly,” according to the four dissenting Justices.<sup>220</sup> The advertising restriction at issue in *Western States* appeared in the compounded drugs sections of the Food and Drug Administration Modernization Act of 1997 (FDAMA).<sup>221</sup> Compounded drugs are produced by pharmacists who combine, mix, or alter ingredients in order to serve the particular needs of patients.<sup>222</sup> Unlike drugs produced and sold on a widespread basis by pharmaceutical companies, compounded drugs are made available only on a special-needs, and usually small-scale, basis.<sup>223</sup>

Because it would not be economically feasible for pharmacists who produce compounded drugs to complete the clinical trials necessitated by the usual requirement that drugs receive pre-market approval from the FDA, a requirement that compounded drugs receive FDA approval could lead many pharmacists to decide not to engage in compounding. Therefore, in an effort to keep compounded drugs available for those who need them but do so in a way that would not undermine the purposes of the generally applicable FDA approval requirement,<sup>224</sup> Congress provided in FDAMA that compounded drugs would not need FDA approval if pharmacists providing them adhered to several limitations.<sup>225</sup> Under one of these limitations, pharmacists could not advertise particular compounded drugs that they furnish, though they could advertise the more general fact

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<sup>218</sup> 535 U.S. 357 (2002).

<sup>219</sup> *Id.* at 360. Justices Scalia, Kennedy, Souter, and Thomas joined Justice O'Connor's majority opinion. *Id.* at 359. As she had done in her *Lorillard* majority opinion, Justice O'Connor noted that some Justices had expressed dissatisfaction with the *Central Hudson* test over the years but that the test would be adequate for resolution of the issues in *Western States*. *Id.* at 367–68; see *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554–55 (2001).

<sup>220</sup> *Western States*, 535 U.S. at 388 (Breyer, J., Rehnquist, C.J., Stevens & Ginsburg, JJ., dissenting).

<sup>221</sup> Pub. L. No. 105-115, sec. 127, § 503A(c), 111 Stat. 2296, 2330 (1997) (codified as amended at 21 U.S.C. § 353a(c) (Supp. I 1997)); *Western States*, 535 U.S. at 357.

<sup>222</sup> Pub. L. No. 105-115, sec. 127, § 503A(a), 111 Stat. 2296, 2328 (1997) (codified as amended at 21 U.S.C. § 353a(a) (Supp. I 1997)); *Western States*, 535 U.S. at 360–61.

<sup>223</sup> *Western States*, 535 U.S. at 360–61.

<sup>224</sup> See *id.* at 368–69.

<sup>225</sup> FDAMA sec. 127, § 503A(a), 111 Stat. at 2328; *Western States*, 535 U.S. at 364.

that they provide a compounding service.<sup>226</sup> Pharmacists who wished to advertise particular compounded drugs challenged this limitation as a First Amendment violation.<sup>227</sup>

Part four of the *Central Hudson* test would be the government's undoing in *Western States*.<sup>228</sup> The Court identified "non-speech-related means of drawing a line between compounding and large-scale manufacturing,"<sup>229</sup> and faulted the government for "not [having] offered any reason why [these] possibilities, alone or in combination, would be insufficient to prevent compounding from occurring on such a scale as to undermine the new drug approval process."<sup>230</sup> Making more explicit previous decisions' suggestion that the government must ordinarily try regulating the underlying activity before regulating speech concerning the activity,<sup>231</sup> the Court stated that "[i]f the First Amendment means anything, it means that regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try."<sup>232</sup>

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<sup>226</sup> *Id.* sec. 127, § 503A(c), 111 Stat. at 2330; *Western States*, 535 U.S. at 364–65.

<sup>227</sup> *Western States*, 535 U.S. at 365.

<sup>228</sup> *See id.* at 371–73. The Court conceded in *Western States* that, for purposes of part two of the controlling *Central Hudson* test, the government possessed sufficiently important public health and safety interests. *Id.* at 369–70. The Court also indicated that it would assume, without deciding, the soundness of the government's argument that the advertising restriction would help to keep compounded drugs services from becoming large-scale endeavors and would thus directly advance the government's interests in keeping such drugs available without creating a potentially huge exception to the FDA approval requirement. *See id.* at 371.

<sup>229</sup> *Id.* at 372.

<sup>230</sup> *Id.* at 373. The Court also expressed its disapproval of "the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information." *Id.* at 374.

<sup>231</sup> *See supra* text accompanying notes 179–80, 187.

<sup>232</sup> *Western States*, 535 U.S. at 373. In a forceful dissent joined by three other Justices, Justice Breyer stressed that Congress needed to be able to restrict drug-compounders' commercial speech to the extent it did in order to achieve its public health and safety goals. *Id.* at 378, 384 (Breyer, J., Rehnquist, C.J., Stevens & Ginsburg, JJ., dissenting). He listed the non-speech-related alternatives identified by the *Western States* majority and explained why each one would be either unfeasible or ineffective. *See id.* at 385–86. With the Court having "too readily assume[d] the existence of practical alternatives" to the advertising restriction, Justice Breyer faulted the Court for having "applie[d] the commercial speech doctrine too strictly." *Id.* at 388. Justice Breyer supplemented this criticism with a warning about what he saw happening in the Court's commercial speech decisions:

[T]he Constitution demands a more lenient application ... that ... distinguishes between commercial speech and other forms of speech demanding stricter constitutional protection. Otherwise, an overly rigid



The Court's most recent commercial speech decision, *Sorrell v. IMS Health Inc.*,<sup>233</sup> further illustrates the trend of enhancing commercial speech protection through pro-advertising, anti-regulation applications of the Court's precedents.<sup>234</sup> *Sorrell* involved an attack on a Vermont statute dealing with pharmacy records that contained information on physicians' individual histories of prescribing medications (referred to here as "prescriber-identifying information").<sup>235</sup> The statute established a general rule that restricted the sale, disclosure, and use of prescriber-identifying information, though this general rule was subject to exceptions.<sup>236</sup> In addition, the law barred pharmacies from disclosing prescriber-identifying information for marketing purposes and prohibited pharmaceutical companies from making marketing-related uses of such information.<sup>237</sup>

Justice Kennedy eliminated any suspense about how the Court would rule by noting in the first paragraph of his opinion for a six-Justice majority that the Vermont law targeted "[s]peech in aid of pharmaceutical marketing, ... a form of expression protected by the ... First Amendment."<sup>238</sup> This meant, according to the opening paragraph, that the statute "must be subjected to heightened judicial scrutiny"—a standard that the statute "cannot satisfy."<sup>239</sup>

The Court noted the Vermont law's impairment of "detailing," a practice in which pharmaceutical companies' sales representatives call on physicians in an effort to persuade them to prescribe particular medications.<sup>240</sup> Detailing is more effective, the Court noted, when the sales representative knows the relevant physicians' prescription histories and practices because the representative can then more readily determine which physicians are likely to be

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commercial speech doctrine will transform what ought to be a legislative or regulatory decision about the best way to protect the health and safety of the American public into a constitutional decision prohibiting the legislature from enacting necessary protections.

*Id.* at 389 (internal quotation marks omitted).

<sup>233</sup> 131 S. Ct. 2653 (2011).

<sup>234</sup> *See id.* at 2671; *see also supra* text accompanying notes 164–232 (discussion of earlier decisions illustrating same trend). As will be seen, *Sorrell* added a possible new wrinkle to the analysis of certain commercial speech cases. *See infra* text accompanying notes 245–50.

<sup>235</sup> *Sorrell*, 131 S. Ct. at 2653, 2656.

<sup>236</sup> *Id.* at 2656.

<sup>237</sup> *Id.* at 2659–60.

<sup>238</sup> *Id.* at 2659. Chief Justice Roberts and Justices Scalia, Thomas, Alito, and Sotomayor joined Justice Kennedy in the majority. *Id.* at 2658–59.

<sup>239</sup> *Id.* at 2659.

<sup>240</sup> *Id.*

interested in certain drugs and can tailor a sales message accordingly.<sup>241</sup> The prescriber-identifying information that is so useful to the sales representatives usually comes to them by way of data miners—companies that purchase prescriber-identifying information from pharmacies, analyze the information, and produce reports on which detailers rely in developing their sales pitches.<sup>242</sup> Vermont contended that the statute’s restrictions on marketing-related sales, disclosures, and uses of prescriber-identifying information were designed to protect medical privacy interests, to shield physicians from harassing sales behaviors by pharmaceutical representatives, and to lessen the likelihood that drug makers’ marketing efforts would lead to decisions to prescribe unnecessary or expensive medications.<sup>243</sup>

For the Court, the statute’s marketing-themed restrictions were problematic because the statute also contained exceptions to the general rule restricting sale, disclosure, and use of prescriber-identifying information.<sup>244</sup> Although marketing-related dissemination and uses of such information were prohibited, the statute permitted the information to be released and used for various other purposes (including research, educational, and law enforcement purposes, as well as purposes connected with a state program meant to provide physicians information on therapeutic, cost-effective generic alternatives to brand-name drugs).<sup>245</sup> According to the Court, these exceptions to the general rule, when considered alongside the statute’s ban on marketing-related dissemination and uses, meant that the statute restricted speech on the bases of content and speaker.<sup>246</sup> The statute “disfavors marketing, that is, speech with a particular content. More than that, [it] disfavors specific speakers, namely pharmaceutical manufacturers.”<sup>247</sup>

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<sup>241</sup> *Id.* at 2659–60. Because detailing is expensive, drug companies use it mostly to promote the sale of brand-name drugs that are still under patent protection and therefore are likely to be higher-priced and particularly profitable. *Id.* at 2660.

<sup>242</sup> *Id.* Data miners and an association of pharmaceutical manufacturers launched the First Amendment-based challenge to the Vermont statute. *Id.* at 2661.

<sup>243</sup> *Id.* at 2659, 2668–70. In findings that accompanied the statute, Vermont’s legislature concluded that detailing increases healthcare and health insurance costs and encourages overly extensive reliance on new brand-name drugs as opposed to less expensive generic alternatives with established track records. The findings also revealed an apparent legislative intent to make detailing less effective by restricting the use of prescriber-identifying information. *Id.* at 2661, 2663, 2671.

<sup>244</sup> *Id.* at 2663.

<sup>245</sup> *Id.* at 2660–61.

<sup>246</sup> *Id.* at 2663.

<sup>247</sup> *Id.* Elaborating on this point, the Court noted that “detailers cannot obtain prescriber-identifying information, even though the information may be ... acquired by other speakers with diverse purposes and viewpoints,” and that detailers “are likewise barred from using

The *Sorrell* majority concluded that the Vermont statute's disfavoring of marketing-motivated speakers and marketing-oriented messages should trigger "heightened scrutiny"—an analytical standard the First Amendment requires when the government regulates speech "because of disagreement with the message it conveys."<sup>248</sup> The Court cited mainly noncommercial speech cases for the heightened scrutiny proposition, but stated that "[c]ommercial speech is no exception."<sup>249</sup> Although the Court did not explain the specifics of the heightened scrutiny it had in mind, it cited another noncommercial speech decision for the proposition that "[i]n the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory."<sup>250</sup> However, after noting Vermont's argument that the statute burdened only commercial speech, the Court stated that it would apply the *Central Hudson* test for commercial speech restrictions because "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied."<sup>251</sup>

In applying the *Central Hudson* test, the *Sorrell* majority acknowledged that the government interests underlying the Vermont statute probably were sufficiently substantial to satisfy part two of the test, but concluded that the state failed the "fit" requirements established by the test's final two parts.<sup>252</sup> The statute's ban on marketing-related disclosures and uses of prescriber-identifying information would not be likely to advance the medical privacy interests asserted by the state, given that the statute provided for numerous

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the information for marketing, even though the information may be used by a wide range of other speakers." *Id.*

<sup>248</sup> *Id.* at 2664 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (internal quotation marks omitted).

<sup>249</sup> *Id.* *Discovery Network* contained statements dealing with the singling-out of disfavored commercial content, but the Court did not invoke a heightened scrutiny rationale in deciding the case. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418–19 (1993). Rather, the Court relied on the *Central Hudson* test in deciding *Discovery Network*. See *id.* at 417–18, 424–25, 428, 430–31.

<sup>250</sup> *Sorrell v. IMS Health Inc.*, 131 S. Ct. at 2667 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.")). This statement and the supporting citation of a noncommercial speech decision could be read as indicating that the heightened scrutiny the Court envisioned would afford protection comparable to the full First Amendment protection normally extended to noncommercial speech. See *id.* at 2667. For a discussion of full First Amendment protection, see *supra* note 133 and accompanying text.

<sup>251</sup> *Sorrell*, 131 S. Ct. at 2667 (suggesting that the heightened scrutiny the Court had been emphasizing would furnish potentially greater First Amendment protection than the intermediate protection contemplated in the commercial speech line of cases, even if the specific components of heightened scrutiny remain less than clearly defined).

<sup>252</sup> See *id.* at 2668–70.

exceptions under which such disclosures and uses of such information could take place.<sup>253</sup> Moreover, other means short of the ban on marketing-related uses and disclosures could guard against supposed harassment of physicians by sales representatives.<sup>254</sup> The government also failed to demonstrate a clear connection between the speech restrictions at issue and the state's goals of reducing health care costs and lessening the chances that unnecessary medications would be prescribed.<sup>255</sup> Finally, the Court expressed concern about the statute's effect of prohibiting marketing communications that would provide helpful information and noted that the government cannot legitimately restrict truthful speech simply because the government fears it would be persuasive.<sup>256</sup>

Justice Breyer, joined by Justices Ginsburg and Kagan, dissented in order to protest the *Sorrell* majority's heightened scrutiny discussion and to emphasize that the Vermont statute's effect on expression was "inextricably related to a lawful government effort to regulate a commercial enterprise."<sup>257</sup> He asserted that the Court had failed to distinguish between the "tight constraints" on government attempts to regulate noncommercial speech and the "looser constraints when the government seeks to restrict ... commercial speech ... or the regulation-related speech ... subject to a traditional regulatory program."<sup>258</sup> In addition, Justice Breyer worried that the heightened scrutiny approach called for by the majority could jeopardize many longstanding, highly detailed regulatory programs whose provisions contemplate speech oversight that is content-based or speaker-based.<sup>259</sup> He expressed the concern that "[a]t best the Court opens a Pandora's Box of

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<sup>253</sup> *Id.* at 2668.

<sup>254</sup> *Id.* at 2669. For instance, physicians could simply refuse to meet with sales representatives if they did not wish to meet with them. *Id.*

<sup>255</sup> *See id.* at 2670.

<sup>256</sup> *Id.* at 2670–71.

<sup>257</sup> *Id.* at 2673 (Breyer, Ginsburg, & Kagan, JJ., dissenting).

<sup>258</sup> *Id.* at 2673–74. Justice Breyer observed that "ordinary regulatory programs can affect speech, particularly commercial speech, in myriad ways." *Id.* at 2675. Therefore, he continued, "to apply a 'heightened' First Amendment standard of review whenever such a program burdens speech would transfer from legislatures to judges the primary power to weigh ends and to choose means, threatening to distort or undermine legitimate legislative objectives." *Id.*

<sup>259</sup> *Id.* at 2675–77. For instance, he noted, utility regulators typically oversee company statements regarding electricity or other utility-related services, the Federal Reserve Board reviews advertising and other statements by financial institutions, and the FDA "oversees the form and content of labeling, advertising, and sales proposals of drugs, but not of furniture." *Id.* at 2677.

First Amendment challenges to many ordinary regulatory practices that may only incidentally affect a commercial message.”<sup>260</sup>

*Sorrell* indicates that some commercial speech restrictions—those that prohibit using information to communicate certain messages or viewpoints while simultaneously permitting uses of the same information to communicate favored messages or viewpoints—should be subjected to an as-yet not clearly defined “heightened scrutiny.”<sup>261</sup> It is important to note, however, that the Court stopped short of mandating heightened scrutiny for all commercial speech restrictions. Although the particular content and viewpoint discrimination identified in *Sorrell* proved problematic, Justice Kennedy noted that the interest in protecting consumers may permit the government to regulate commercial speech more readily than noncommercial speech.<sup>262</sup> The Court presumably would not have included such a statement and would not have applied the *Central Hudson* test in deciding

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<sup>260</sup> *Id.* at 2685. Justice Breyer also offered an ominous warning about what the Court’s analysis might suggest:

[G]iven the sheer quantity of regulatory initiatives that touch upon commercial messages, the Court’s vision of its reviewing task threatens to return us to a happily bygone era when judges scrutinized legislation for its interference with economic liberty. History shows that the power was much abused and resulted in the constitutionalization of economic theories preferred by individual jurists.

*Id.* at 2679. He then provided a cautionary citation to Justice Holmes’s dissent in the long-discredited *Lochner* decision. *Id.* (citing *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting)). According to Justice Breyer, if the Court “[a]t best ... opens [the] Pandora’s Box” identified earlier, it “[a]t worst ... reawakens *Lochner*’s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue.” *Id.* at 2685. To decide *Sorrell*, Justice Breyer would have undertaken the less searching review applied to economic regulation that incidentally affects speech—a form of review less rigorous than the intermediate protection normally extended to commercial speech under *Central Hudson*. *Id.* at 2673, 2675, 2679. He added, however, his view that the Vermont statute would survive a *Central Hudson*–focused analysis, given the state’s regulatory interests and the requisite degree of fit shown to exist between the statute and those interests. *Id.* at 2681, 2683–85.

<sup>261</sup> *See id.* at 2664–65. As will be seen, the Court’s heightened scrutiny comments are potentially problematic if they are given a life after *Sorrell*. *See infra* text accompanying notes 480–82; *see also* Tamara R. Piety, “A Necessary Cost of Freedom”? *The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1, 48–51 (2012); Jennifer L. Pomeranz, *No Need to Break New Ground: A Response to the Supreme Court’s Threat to Overhaul the Commercial Speech Doctrine*, 45 LOY. L.A. L. REV. 389, 420–22, 424–30, 432–34 (2012) (each criticizing *Sorrell* and forecasting problems if its heightened scrutiny rationale takes hold).

<sup>262</sup> *Sorrell*, 131 S. Ct. at 2672. He also observed that Vermont “might have [had] a stronger position” if its statute had more narrowly defined the circumstances in which prescriber-identifying information could be used or disclosed. *Id.*

the case if it had intended to use the case as a vehicle for obliterating the First Amendment distinction between commercial speech and noncommercial speech.

Whatever one should make of *Sorrell*, it must be remembered that the commercial speech decisions discussed in this section of the Article—from *Virginia Board of Pharmacy* in 1976 through *Sorrell* in 2011—all dealt with *restrictions* on commercial speech.<sup>263</sup> Although those decisions have indicated that the intermediate level of protection for commercial speech is increasing in strength, there is another (and shorter) line of cases indicating that the government has more latitude to require commercial speech *disclosures* than to impose commercial speech restrictions.<sup>264</sup> Because the cases dealing with required commercial speech disclosures hold potential relevance to the tobacco advertising issues addressed in this Article, the following subsection considers those decisions.

#### *E. Commercial Speech Cases Dealing with Required Disclosures*

A 1985 decision, *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*,<sup>265</sup> was in part a case that could have been discussed in an earlier subsection because it signaled that the intermediate level of First Amendment protection operates as a significant check on government-imposed commercial speech *restrictions*. Applying the *Central Hudson* test in a pro-advertising manner,<sup>266</sup> the Court held in *Zauderer* that sanctions placed on an attorney could not constitutionally be based on his violation of advertising restrictions<sup>267</sup> set forth in Ohio bar disciplinary rules.<sup>268</sup>

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<sup>263</sup> See *supra* text accompanying notes 136–262.

<sup>264</sup> See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 230, 252 (2010); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 650–51 (1985); *Wooley v. Maynard*, 430 U.S. 705, 713–14, 717 (1977); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 755, 757, 762, 763, 765 (1976); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639, 645, 46 (1943).

<sup>265</sup> 471 U.S. at 626.

<sup>266</sup> See *id.* at 637. The Court also noted that the *Central Hudson* test formed part of “[o]ur general approach to *restrictions* on commercial speech”—an approach that “is ... by now well settled.” *Id.* at 638 (emphasis added).

<sup>267</sup> *Zauderer* violated a disciplinary rule that prohibited attorneys from offering unsolicited legal advice and from accepting employment that resulted from offering unsolicited advice. *Id.* at 633, 639. In addition, his advertisements contained information other than the designated items of information permitted under another disciplinary rule. *Id.* at 632–33. The advertisements also transgressed a rule that prohibited attorneys from using illustrations and other visual elements in their advertisements. *Id.* at 632.

*Zauderer's* main significance, with regard to the commercial speech doctrine, lies, however, in the part of the decision in which the Court outlined the appropriate analytical treatment of government-required disclosures in advertisements.<sup>269</sup> An Ohio bar disciplinary rule at issue in the case also required that if an attorney's advertisement referred to contingent-fee rates on which the attorney would take cases, the advertisement had to disclose that the client could still be liable for costs even if the client lost the case and therefore owed no attorney's fees under the contingent-fee arrangement.<sup>270</sup> *Zauderer* had failed to make such a disclosure in advertisements that made representations about contingent fees. The state maintained that absent the required disclosure, the advertisements were deceptive.<sup>271</sup>

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<sup>268</sup> *Id.* at 644, 649. The State attempted to justify the disciplinary rules at issue as prophylactic measures to prevent the deceptive, manipulative, and professionally unbecoming advertising that, in the State's view, would inevitably occur in the absence of such restrictions. *Id.* at 633, 643–44. Disagreeing with the State's inevitability premise, the Court concluded that the disciplinary restrictions swept far too broadly by prohibiting a great deal of advertising that would consist of truthful, non-deceptive, informative content. *Id.* at 646–47. Turning to the State's ban on the use of illustrations and visual elements in attorneys' advertisements, the Court classified such elements as important and protected aids in attracting attention to, and communicating the content of, the advertisements' message. *Id.* at 647. "Accordingly," the Court observed, "commercial illustrations are entitled to the First Amendment protections afforded verbal commercial speech"—meaning that "restrictions on the use of visual media of expression in advertising must survive scrutiny under the *Central Hudson* test." *Id.* The restrictions did not survive that scrutiny, as the Court rejected the State's argument that its application of the restriction to *Zauderer's* accurate, non-misleading illustrations should be permitted because other attorneys' uses of illustrations might be deceptive or manipulative. *Id.* at 648–49. In language of potential importance to resolution of some of the tobacco advertising issues addressed in this Article, the *Zauderer* Court stated that

[a]cceptance of the State's argument would be tantamount to adoption of the principle that a State may prohibit the use of pictures or illustrations in connection with advertising of any product or service simply on the strength of the general argument that the visual content of advertisements may, under some circumstances, be deceptive or manipulative .... We are not persuaded that identifying deceptive or manipulative uses of visual media in advertising is so intrinsically burdensome that the State is entitled to forgo that task in favor of the more convenient but far more restrictive alternative of a blanket ban on the use of illustrations.

*Id.* at 649.

<sup>269</sup> *Id.* at 651; see also *Milavetz, Gallop & Milavetz*, 559 U.S. at 230, 252 (relying on *Zauderer* as controlling precedent dealing with legal treatment to be given to required commercial speech disclosures).

<sup>270</sup> *Zauderer*, 471 U.S. at 631, 633.

<sup>271</sup> *Id.* at 631, 633. As such, the advertisements also violated a separate rule prohibiting attorneys from engaging in deceptive advertising. *Id.* at 633, 652.

Rejecting Zauderer’s argument that the disclosure requirement should trigger the *Central Hudson* test and the same intermediate scrutiny applied to the state’s restrictions on advertising, the Court noted that the argument “overlooks material differences between disclosure requirements and outright prohibitions on speech.”<sup>272</sup> The disclosure requirement did not prevent communication of information to the public; instead, the disclosure requirement “only required [advertising attorneys] to provide somewhat more information than they might otherwise be inclined to present.”<sup>273</sup> The Court acknowledged having “held that in some instances compulsion to speak may be as violative of the First Amendment as prohibitions on speech,”<sup>274</sup> citing *Wooley v. Maynard*<sup>275</sup> and *West Virginia State Board of Education v. Barnette*<sup>276</sup> as among the decisions with such a holding.<sup>277</sup> But those decisions did not apply, the *Zauderer* majority stressed, because “the interests at stake in this case are not of the same order as those discussed in *Wooley* ... and *Barnette*.”<sup>278</sup> Rather than “attempt[ing] to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein,’”<sup>279</sup> Ohio had “attempted only to prescribe what shall be orthodox in commercial advertising....”<sup>280</sup>

Given that the value of the information provided in advertising served as the key reason why First Amendment protection had been recognized for commercial speech,<sup>281</sup> the Court observed that Zauderer’s “constitutionally protected interest in *not* providing any particular factual information in his

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<sup>272</sup> *Id.* at 650.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> 430 U.S. 705, 714, 717 (1977).

<sup>276</sup> 319 U.S. 624, 646 (1943).

<sup>277</sup> *Zauderer*, 471 U.S. at 650.

<sup>278</sup> *Id.* at 651.

<sup>279</sup> *Id.* (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

<sup>280</sup> *Id.* Moreover, Ohio merely required that Zauderer include “purely factual and uncontroversial information” in his commercial advertisements. *Id.* The case therefore would not be governed by the compelled speech decisions, which dealt with compulsion as to *noncommercial* expression of an ideological nature. *See id.* In *Wooley v. Maynard*, for instance, the Court held that New Hampshire could not prosecute a resident for having covered up, on moral and religious grounds, the “Live Free or Die” motto on his car license plates. 430 U.S. at 714, 717. In *Barnette*, the Court held that the State could not compel objecting students to honor the flag with statements and salutes. 319 U.S. at 646.

<sup>281</sup> *Zauderer*, 471 U.S. at 651; *see Va. State Bd. of Pharmacy*, 425 U.S. at 755, 757, 762–63, 765.



advertising is minimal.”<sup>282</sup> The Court noted that “because disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech,” its previous decisions had approved the use of required warnings or disclaimers to guard against consumer confusion or deception.<sup>283</sup> In addition, the Court emphasized that its *Central Hudson*-guided decisions on commercial speech restrictions “have recommended disclosure requirements as one of the acceptable less restrictive alternatives to actual suppression of speech.”<sup>284</sup> Accordingly, the *Zauderer* majority concluded that the *Central Hudson* test would be ill-fitting in the disclosure requirements context.<sup>285</sup>

The Court observed that “unjustified or unduly burdensome” disclosure requirements might chill commercial speech and therefore raise First Amendment concerns, but went on to hold that “an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the [government’s] interest in preventing deception of consumers.”<sup>286</sup> This holding recognized that “the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed ....”<sup>287</sup> Accordingly, *Zauderer*’s disclosure requirements test is less difficult—potentially much less difficult—for the government to pass than is the *Central Hudson* test that applies when commercial speech restrictions are challenged.<sup>288</sup>

No current Justices were serving on the Court when *Zauderer* was decided.<sup>289</sup> With the intermediate level of protection against commercial speech restrictions having seemed to increase in strength during the years

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<sup>282</sup> *Zauderer*, 471 U.S. at 651. The Court also observed that “[t]he right of a commercial speaker not to divulge accurate information regarding his services is not ... a fundamental right” of the sort that should trigger strict scrutiny. *Id.* n.14. As the Court’s analysis made plain, not even the intermediate scrutiny contemplated by the *Central Hudson* test would be warranted. *See id.* at 650–51.

<sup>283</sup> *Id.* at 651.

<sup>284</sup> *Id.* at 651 n.14.

<sup>285</sup> *Id.* at 650–51, 651 n.14.

<sup>286</sup> *Id.* at 651–52 (finding the particular disclosure requirement at issue easily qualified under the test the court enunciated because the requirement was reasonably related to the interest in guarding against consumer deception and because the court saw it as neither unduly burdensome nor likely to chill protected expression).

<sup>287</sup> *Id.* at 651, 651 n.14.

<sup>288</sup> *See id.* at 650–52. *See also* *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010) (describing *Zauderer*’s disclosure requirements test as amounting to “less exacting scrutiny” than the scrutiny contemplated by the *Central Hudson* test).

<sup>289</sup> *Members of the Supreme Court of the United States*, SUPREME COURT OF THE U.S., [www.supremecourt.gov/about/members\\_text.aspx](http://www.supremecourt.gov/about/members_text.aspx) (last visited Feb. 24, 2014).

since *Zauderer*,<sup>290</sup> would the current Court adhere to *Zauderer*'s disclosure requirements test and the lesser degree of First Amendment protection that it contemplates for advertisers when the government mandates disclosures? The Court answered yes in a 2010 decision, *Milavetz, Gallop & Milavetz, P.A. v. United States*.<sup>291</sup>

In *Milavetz*, the Court resolved a key foundational issue by determining that attorneys are “debt relief agencies” for purposes of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.<sup>292</sup> Therefore, unless the First Amendment operated to nullify them, disclosure requirements imposed on debt relief agencies by § 528 of the statute would apply to attorneys who advertise their bankruptcy services or advertise that they will furnish assistance to persons struggling with credit or debt problems. The disclosure requirements for bankruptcy services advertisements mandated inclusion of statements that the advertised services concerned “bankruptcy relief” and that the advertiser was a debt relief agency.<sup>293</sup> Similar disclosure requirements applied to advertisements for help with credit or debt problems, with those advertisements also having to disclose that “the assistance may involve bankruptcy relief.”<sup>294</sup>

The *Milavetz* law firm failed not only in its attempt to persuade the Court that attorneys are not debt relief agencies but also in its First Amendment challenge to § 528's disclosure requirements.<sup>295</sup> Writing for all but one of her colleagues,<sup>296</sup> Justice Sotomayor began the disclosure requirements analysis by noting that “the challenged provisions regulate only commercial speech.”<sup>297</sup> *Milavetz* argued that the *Central Hudson* test should provide the controlling framework, but the Court disagreed.<sup>298</sup> Because § 528 was aimed at misleading commercial speech and set forth

<sup>290</sup> See *supra* text accompanying notes 164–262.

<sup>291</sup> 559 U.S. 229 (2010).

<sup>292</sup> *Id.* at 231–32, 235–36; see also Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, sec. 226, §§ 101(3), 101(12A), 119 Stat. 23, 66–67 (2005) (codified as amended at 11 U.S.C. §§ 101(3), 101(12A) (2006)).

<sup>293</sup> BAPACPA, sec. 229, § 528(a)(4), 111 Stat. at 71 (codified as amended at 11 U.S.C. § 528(a)(4) (2006)).

<sup>294</sup> See *Milavetz, Gallop & Milavetz*, 559 U.S. at 233 (quoting 11 U.S.C. § 528(b)(2)(A) (2006)).

<sup>295</sup> 559 U.S. at 235–36, 249–53.

<sup>296</sup> *Id.* at 231–32, 235–36, 255 (resolving the attorneys-as-debt-relief-agencies issue in a nine-Justice majority opinion). Eight of the nine joined the disclosure requirements portion of the opinion. *Id.* at 231. In a partial concurrence in the judgment, Justice Thomas offered a different rationale for why the disclosure requirements did not violate the First Amendment. *Id.* at 255 (Thomas, J., concurring in part and concurring in the judgment).

<sup>297</sup> *Id.* at 249 (majority opinion).

<sup>298</sup> *Id.*

“disclosure requirement[s] rather than an affirmative limitation on speech, ... the less exacting scrutiny described in *Zauderer* governs our review.”<sup>299</sup>

The *Milavetz* Court noted *Zauderer*’s statement that in the commercial speech setting, an advertiser has only a “minimal” constitutionally protected interest in not furnishing the relevant factual information required by law.<sup>300</sup> Observing that the required disclosures at issue resembled the required disclosures in *Zauderer*, Justice Sotomayor emphasized that in each case the government sought to “combat the problem of inherently misleading commercial advertisements” by requiring disclosures that called only for accurate statements of relevance to the services being advertised.<sup>301</sup> Congress had determined that absent a disclosure of the possible role of bankruptcy in the debt relief assistance being advertised, such advertisements could mislead consumers.<sup>302</sup> The Court, therefore, concluded that § 528’s disclosure requirements were “‘reasonably related to the [Government’s] interest in preventing deception of consumers’” and were constitutionally permissible under *Zauderer*.<sup>303</sup>

*Milavetz*’s reaffirmation of *Zauderer* holds considerable significance because *Milavetz* was a nearly unanimous decision in which all but one of the current Justices participated.<sup>304</sup> The “less exacting scrutiny”<sup>305</sup> called for by the two decisions therefore continues to apply when the government requires commercial speech disclosures in order to prevent deception of consumers.<sup>306</sup> As will be seen, the *Zauderer-Milavetz* test for required

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 250; see also *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (stating that “disclosure requirements trench much more narrowly on an advertiser’s interest than do flat prohibitions on speech....”).

<sup>301</sup> *Milavetz, Gallop & Milavetz*, 559 U.S. at 250. Although *Milavetz* argued that the firm’s advertisements had not been proven actually misleading, the Court stressed that *Zauderer* made such an argument unavailing and largely irrelevant. *Zauderer*, Justice Sotomayor explained, permits the government to adopt disclosure requirements in the commercial speech context in order to head off potential deception of consumers. *Id.* at 250–51.

<sup>302</sup> *Id.* at 251.

<sup>303</sup> *Id.* at 253 (alteration in original) (quoting *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)).

<sup>304</sup> See *supra* note 296. Justice Kagan is the only current Justice who was not on the Court when it decided *Milavetz*. See *Members of the Supreme Court of the United States*, *supra* note 289.

<sup>305</sup> *Milavetz, Gallop & Milavetz*, 559 U.S. at 249.

<sup>306</sup> *Id.* at 249, 253; *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

commercial speech disclosures will play an important role in resolving the tobacco advertising and promotion issues addressed in this Article.<sup>307</sup>

With the foundational aspects of commercial speech doctrine having been explored, the remainder of the Article will explore the First Amendment issues associated with current and possible future government efforts to regulate tobacco advertising and promotion. The immediately following section considers the two Court of Appeals decisions that have addressed the constitutionality of such provisions in the 2009 TCA and in related FDA regulations.

### III. FEDERAL APPELLATE DECISIONS REGARDING THE TCA AND FDA REGULATIONS

As this section will reveal, the government generally fared well in *Discount Tobacco City & Lottery, Inc. v. United States*, the first of the two appellate decisions resolving First Amendment-based challenges to TCA provisions and related FDA regulations.<sup>308</sup> The second decision, *R.J. Reynolds Tobacco Co. v. FDA*, marked a significant defeat for the government, however.<sup>309</sup> Although the two decisions do not constitute a circuit split because they addressed different issues, they reflect little similarity in philosophical underpinnings and First Amendment mindsets.<sup>310</sup> Discussion of the cases will proceed in the order in which they were decided.

#### A. *The Discount Tobacco Decision*

Tobacco companies and other tobacco sellers brought *Discount Tobacco* as a challenge of almost all of the TCA's advertising and promotion provisions.<sup>311</sup> After the district court granted summary judgment to the

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<sup>307</sup> See *infra* text accompanying notes 345–57, 425–29, 456–61, 465–69.

<sup>308</sup> 674 F.3d 509 (6th Cir. 2012), *cert. denied sub nom.* Am. Snuff Co. v. United States, 133 S.Ct. 1996 (2013).

<sup>309</sup> 696 F.3d 1205 (D.C. Cir. 2012).

<sup>310</sup> See *infra* text accompanying notes 324–64, 377–405.

<sup>311</sup> See 674 F.3d at 520, 552–54. The list of challenged provisions included the TCA's requirement that a to-be-devised graphics element be included as part of the health warning on cigarette packages and in cigarette advertisements. See *id.* The actual graphic images devised by the FDA were not at issue before the Sixth Circuit because those images were not developed until after the district court had ruled. *Id.* at 552–54. The D.C. Circuit's later decision in *R.J. Reynolds*, on the other hand, focused on the constitutionality of the particular graphic images. See *R. J. Reynolds*, 696 F.3d at 1208, 1222. The TCA's only marketing-related restrictions not challenged in *Discount Tobacco* appear to have been the distribution restrictions that generally barred retailers from using self-service displays of tobacco products and called for such products to be available only

government on various issues and summary judgment to the plaintiffs on certain questions, the Sixth Circuit issued a decision largely upholding the district court's rulings.<sup>312</sup> At the outset of its analysis, the appellate court stressed the federal government's extensive efforts to address the public health problems posed by minors' use of tobacco products, summarized the supporting studies relied on by the government, and observed that there could be "no doubt" about the government's "significant interest in preventing juvenile smoking and in warning the general public about the harms associated with the use of tobacco products."<sup>313</sup> The court cautioned, however, that manufacturers and other sellers of such products have a protected interest in furnishing truthful information to would-be purchasers and that adults have a corresponding interest in receiving such information.<sup>314</sup>

The *Discount Tobacco* court devoted considerable attention to the First Amendment principles that would govern the case and consistently rejected the plaintiffs' various arguments that strict scrutiny should be applied to some or all of the challenged TCA provisions.<sup>315</sup> The court instead concluded that the commercial speech thrust of those provisions ruled out the full First Amendment protection the plaintiffs sought.<sup>316</sup> For the TCA's restrictions on advertising and promotion, the previously discussed *Central Hudson* test and the intermediate scrutiny it contemplates would control the analysis.<sup>317</sup> For the statute's provisions amounting to disclosure

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with the aid of retail store personnel. *See supra* text accompanying notes 116–18. Two possible reasons come to mind for the *Discount Tobacco* plaintiffs' decision not to challenge those restrictions: first, they are primarily conduct restrictions that affect speech only incidentally; and second, the Supreme Court held in 2001 that very similar distribution restrictions imposed by Massachusetts did not transgress the First Amendment. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567–70 (2001).

<sup>312</sup> *Disc. Tobacco*, 674 F.3d at 517–18. The Sixth Circuit resolved most issues unanimously, but by a two-to-one vote on a key question. Judge Clay authored the majority opinion's sections to which all three judges subscribed. Judge Stranch wrote the majority opinion's section upholding the TCA's mandate that a graphics element be included as part of the required health warning, with Judge Clay dissenting from that ruling. *See id.* at 517.

<sup>313</sup> *Id.* at 519. The court also cited the Supreme Court's previous observation that the government's interest in curtailing minors' use of tobacco products is "substantial, and even compelling." *Id.* (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001)).

<sup>314</sup> *Id.* at 520.

<sup>315</sup> *Id.* at 522–26.

<sup>316</sup> *See id.* at 522, 525–26, 532–33, 549–50.

<sup>317</sup> *Id.* at 522–23, 534–37, 541–43.

requirements, the previously discussed *Zauderer* test and its less-than-intermediate scrutiny would furnish the guiding principles.<sup>318</sup>

### *1. Various TCA Provisions Upheld*

The Article's earlier summary noted that the statute restricted the marketing of modified-risk tobacco products by requiring pre-market approval for a tobacco product if its labeling or advertising represented that it was less harmful than other tobacco products or if the labeling or advertising employed descriptive terms such as "light" or "mild."<sup>319</sup> Disagreeing with the plaintiffs' argument that this requirement amounted to a prior restraint triggering strict scrutiny because it would sweep in not only commercial speech but also noncommercial speech on public health matters, the *Discount Tobacco* court noted Supreme Court precedent indicating that commercial expression is not rendered otherwise by the mere inclusion of comments on noncommercial issues.<sup>320</sup> The court reasoned that the modified-risk product provisions' references to labeling and advertising contemplated restrictions on commercial speech only and did not impair tobacco companies' ability to comment in noncommercial contexts on public health issues.<sup>321</sup>

Turning to the controlling *Central Hudson* test, the Sixth Circuit noted the government's substantial underlying interest in preventing consumers from being deceived by misleading claims about tobacco product safety.<sup>322</sup> To support its conclusion that the modified-risk product requirements would directly advance the prevention-of-deception interest in a narrowly tailored manner, the court cited evidence of tobacco companies' history of making misleading health-related claims about their products.<sup>323</sup> Although tobacco companies would have preferred that the government opt for "post-market review of deceptive claims" instead of the pre-market regime established by the modified-risk product rules, the court concluded that "the government

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<sup>318</sup> *Id.* at 523–24, 527, 554–69. The Supreme Court has described *Zauderer*'s test for required commercial speech disclosures as "less exacting scrutiny" than the intermediate scrutiny contemplated by the *Central Hudson* test. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010).

<sup>319</sup> See *supra* text accompanying notes 128–31.

<sup>320</sup> *Disc. Tobacco*, 674 F.3d at 532–33 (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67–68 (1983), for the proposition that statements linking a product to a matter of public debate do not turn speech that is otherwise commercial into fully protected noncommercial expression).

<sup>321</sup> *Id.* at 532–33, 537.

<sup>322</sup> *Id.* at 534–35.

<sup>323</sup> *Id.* at 535–37.

has made a reasonable determination that, in the context of a deadly and highly addictive product, it would be a virtual impossibility to unring the bell of misinformation after it has been rung.”<sup>324</sup> The Sixth Circuit, therefore, unanimously upheld the modified-risk product provisions.<sup>325</sup>

As noted earlier, the TCA also barred tobacco product manufacturers and sellers from making representations, in labeling, advertising, or through the media, that would mislead consumers into believing that the products being sold had FDA approval, that the FDA had deemed the products safe, or that the products were less harmful to users’ health by virtue of FDA regulation.<sup>326</sup> The plaintiffs argued for strict scrutiny because the provision’s reference to representations through “the media” could apply to non-commercial speech by persons outside the tobacco industry.<sup>327</sup> The Sixth Circuit disagreed, instead construing the statute as reaching only commercial speech by that industry.<sup>328</sup> Employing reasoning similar to its reasoning in upholding the modified-risk product rules, the court unanimously sustained this TCA provision as an appropriately tailored way of furthering the government’s interest in preventing deception of consumers.<sup>329</sup>

The *Discount Tobacco* plaintiffs also failed in their challenges to the TCA’s previously discussed restrictions on tobacco companies’ distribution of free samples of their products, on their use of tobacco product names, logos, or symbols on non-tobacco merchandise, and on their use of tobacco product names in event sponsorship.<sup>330</sup> The Sixth Circuit noted that those restrictions dealt with forms of advertising and either restricted speech directly or targeted an activity’s communicative impact.<sup>331</sup> But they were constitutionally permissible restrictions on commercial speech because they would directly advance the government’s interests in curtailing minors’ use of tobacco products and lessening inducements to engage in that unhealthy practice, and would do so in narrowly tailored ways.<sup>332</sup>

<sup>324</sup> *Id.* at 537.

<sup>325</sup> *Id.*

<sup>326</sup> See *supra* text accompanying notes 124–27.

<sup>327</sup> *Disc. Tobacco*, 674 F.3d at 533.

<sup>328</sup> *Id.* at 549–50.

<sup>329</sup> *Id.* at 551. In so holding, the Sixth Circuit reversed the district court, which had erroneously applied strict scrutiny to the measure in question. *Id.*

<sup>330</sup> *Id.* at 539–43. For earlier discussion of these restrictions, see *supra* text accompanying notes 116–22.

<sup>331</sup> See 674 F.3d at 538–39.

<sup>332</sup> See *id.* at 539–43 (holding that banning the distribution of free samples except at adults-only facilities was a logical way of keeping tobacco products out of the hands of minors). The prohibition on use of tobacco product names, logos, and symbols on non-tobacco items was appropriate as well, given the high percentages of adolescent smokers

In its conclusions regarding the above restrictions, the court refused to accept tobacco companies' argument that there is little meaningful relationship between advertising and consumer behavior.<sup>333</sup> Such an argument "stretches the bounds of credulity," the court scoffed, especially when one considers the billions of dollars spent on tobacco advertising each year.<sup>334</sup> Emphasizing tobacco companies' continued need to recruit new users of their products, the court indicated that the relationship between advertising and consumer behavior should be taken especially seriously when minors are exposed to tobacco advertising.<sup>335</sup>

## 2. *Color Graphics Mandate and Other Required Warning Provisions Upheld*

As discussed earlier, the TCA required that color graphics be included as a significant element of the rotating warnings mandated for use on cigarette packages and in cigarette advertisements.<sup>336</sup> The statute also specified size and appearance requirements for display of the warnings.<sup>337</sup> In sustaining the graphic images requirement and the related prominence-of-display commands, the *Discount Tobacco* court devoted greater attention to those provisions than to any of the other challenged TCA provisions.<sup>338</sup>

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who possess tobacco-branded merchandise and the reasonableness of the assumption that ongoing exposure to such brand-awareness efforts could make tobacco product use attractive to minors. *See id.* at 541–42. As for the ban on using tobacco product names in sponsoring events, the measure was a suitably crafted way of curtailing a very visible (to minors) brand-awareness device on which tobacco companies had spent huge sums of money. *Id.* at 542–43. Tobacco companies interested in sponsoring events could still use their corporate names in doing so, as long as those names were not the same as a tobacco brand. *Id.* at 543.

<sup>333</sup> *Id.* at 539–41.

<sup>334</sup> *Id.* at 539–40. The court noted that in the 2001 *Lorillard* decision, the Supreme Court recognized the soundness of a conclusion that advertising stimulates demand. *Id.* at 541; *see Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 557–61 (2001). The Sixth Circuit also refused to accept the tobacco companies' argument that the vast sums they spend on advertising are meant solely "to attract and retain adult consumers." *Disc. Tobacco*, 674 F.3d at 540. According to the court, "it is impossible to believe that promotion so successful in the adult context that it is valued by Plaintiffs at \$13 billion dollars [the amount spent on tobacco advertising during a recent year] had absolutely no effect on anyone below the age of eighteen." *Id.*

<sup>335</sup> *See id.* at 540–41.

<sup>336</sup> Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 201(d), 123 Stat. 1776, 1843 (2009) (codified as amended at 15 U.S.C. § 1333(d) (2012)); *see also supra* notes 102–04 and accompanying text.

<sup>337</sup> *See supra* text accompanying notes 92–101.

<sup>338</sup> *See Disc. Tobacco*, 674 F.3d at 554–69.



The court stressed that it was deciding only whether the TCA violated the First Amendment by requiring that the health warnings include a color graphics element to be devised by the FDA.<sup>339</sup> The court was not ruling on the constitutionality of the particular graphic images devised by the FDA in response to the TCA's instruction.<sup>340</sup>

All three judges on the *Discount Tobacco* panel agreed that strict scrutiny should not govern their analysis of the warning requirement and the textual and graphic content called for by the TCA, despite the plaintiffs' argument they supposedly were being made mouthpieces for the government's views in a subjective and controversial government-dictated marketing campaign against their products.<sup>341</sup> The court observed that the textual portions of the rotating warnings dealt with matters that experts widely accepted as fact regarding health risks of tobacco use and were, in any event, merely versions of warnings long required by federal law.<sup>342</sup> Moreover, the fact that the warnings must appear on product packages and in advertisements made the requirement a commercial speech matter (a conclusion not altered by the TCA's directive that a color graphics element accompany the textual warnings).<sup>343</sup> The court's unanimity disappeared, however, when discussion turned to which set of commercial speech principles—those coming from *Central Hudson* regarding restrictions or those coming from *Zauderer* regarding required disclosures—should control the case.<sup>344</sup> Judge Stranch wrote for a two-judge majority in holding that *Zauderer* not only controlled but also furnished a basis for sustaining the color graphics requirement.<sup>345</sup>

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<sup>339</sup> *Id.* at 529–30.

<sup>340</sup> *Id.* at 520, 552–54. The Sixth Circuit stressed that the plaintiffs had brought “only a facial challenge” in which they “argue that the [TCA's] graphic-warnings requirement is itself unconstitutional, not that the specific images the FDA chose to implement the requirement are unconstitutional.” *Id.* at 552. Because the actual images the FDA devised did not come into being until after the district court had ruled, the particular images were not part of the appeal. *Id.* at 552–54.

<sup>341</sup> *Id.* at 523–27. The court also rejected the plaintiffs' argument that the public already knows the health risks of tobacco product use and that the TCA's requirements made the mandatory warnings overly intrusive. Citing the government's showing that minors do not fully understand these risks and have a tendency to underestimate some of them, the court noted that the warning requirement was designed to lead to better understanding of the health risks. *Id.* at 524–25.

<sup>342</sup> *Id.* at 525–26.

<sup>343</sup> *See id.* at 526–27.

<sup>344</sup> *Id.* at 551–52.

<sup>345</sup> *Id.* at 551–69; *see also id.* at 527–30 (Clay, J., dissenting in part) (authoring most of the majority opinion and otherwise joining in it, but dissenting on the ground that the

Judge Stranch's portion of the *Discount Tobacco* majority opinion stated that the TCA's warning requirement was a disclosure requirement in its textual and graphic elements.<sup>346</sup> Although the textual elements could more readily be classified as required disclosures of factual matters, the graphic elements merited the same classification because the TCA contemplated that the graphic elements would complement and help explain the factual information in the textual elements.<sup>347</sup> This meant that *Zauderer*'s treatment of required disclosures furnished the governing framework.<sup>348</sup>

Under the test devised in *Zauderer* and recently reaffirmed by the Supreme Court, disclosures required by the government in the commercial speech context are permissible under the First Amendment if they are reasonably related to the prevention of consumer deception.<sup>349</sup> The *Discount Tobacco* majority concluded that the TCA-mandated warning (including its textual and graphics components) was meant to guard against the prospect that consumers could suffer from misconceptions regarding the nature and extent of the health risks associated with tobacco product use.<sup>350</sup> As such, the warning requirement served to prevent consumer deception or similar erroneous understandings regarding important health concerns.<sup>351</sup>

Having determined that the TCA's warning requirement was a disclosure requirement and that it was meant to prevent consumer deception or similar misimpressions regarding health risks, the court still needed to decide whether the requirement was *reasonably related* to the deception-prevention (or similar) purpose.<sup>352</sup> The court said it was related because the textual components of the rotating warnings called for statements of fact about health risks and because the graphic elements, besides offering

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*Central Hudson* test should have been applied and would have resulted in invalidation of the color graphics requirement).

<sup>346</sup> *Id.* at 551, 558.

<sup>347</sup> *See id.* at 558–59.

<sup>348</sup> *See id.* at 551, 558.

<sup>349</sup> *See* *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249–50 (2010); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

<sup>350</sup> *Disc. Tobacco*, 674 F.3d at 561–63.

<sup>351</sup> *See id.* at 558–63; *see also id.* at 556–58 (discussing a Second Circuit Court decision where the court used the *Zauderer* test when analyzing a similar warning). The court noted the record's considerable evidence indicating that the public does not fully and accurately understand the particular health risks posed by tobacco use even if there is widespread awareness that use of such products is not a healthful practice. *Id.* at 562–63. Moreover, the court noted that the *Zauderer* approach applies regardless of whether the disclosure requirement addresses actual deception or potential deception. *Id.* at 558.

<sup>352</sup> *See Zauderer*, 471 U.S. at 651. The *Discount Tobacco* court characterized the *Zauderer* test as contemplating “rational-basis” review. *Disc. Tobacco*, 674 F.3d at 561–62.

factual information, would augment the communication process by attracting attention to the warnings and making them more understandable.<sup>353</sup> The majority noted evidence of tobacco companies' past behaviors involving misleading consumers or conspiring to cover up negative health-related information, and observed that despite the longstanding presence of warnings on cigarette packages and in cigarette advertisements, the public still did not fully understand the health risks.<sup>354</sup> Therefore, it was reasonable for the government to sharpen the warnings and require use of graphic images to make the warnings less likely to be ignored and the messages communicated by them more likely to resonate with consumers.<sup>355</sup> The court also noted that other countries have required prominently displayed graphic elements in health warnings regarding tobacco products and presumably have thereby achieved greater effectiveness in communicating health risks.<sup>356</sup> This further evidence suggested that Congress had acted reasonably in enacting the TCA provisions at issue.<sup>357</sup>

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<sup>353</sup> See *Disc. Tobacco*, 674 F.3d at 562–64. Citing language from another part of *Zauderer* regarding the importance of the ability to use graphic elements in advertising as a communication aid, see *Zauderer*, 471 U.S. at 647, the court stressed that graphic elements can be just as accurate as textual elements. *Disc. Tobacco*, 674 F.3d at 559–60. See *Zauderer*, 471 U.S. at 647–49. These observations enabled the court to dispose of the plaintiffs' argument that in imposing the requirement of including graphic images, Congress was requiring tobacco companies to communicate opinions rather than facts. See *Disc. Tobacco*, 674 F.3d at 558–61. In an interesting aside that probably was unnecessary for resolution of the case but holds relevance for the issues addressed later in the Article, the court listed hypothetical examples of graphic images that would be factual in nature and therefore “would be scrutinized [under *Zauderer*] for a rational basis.” *Id.* at 559. It noted that “a graphic could consist of one of the required textual warnings—‘WARNING: Tobacco smoke can harm your children.’—written in what appears to be a child’s handwriting.” *Id.* The court went on to cite additional examples of graphic images amounting to factual disclosures:

[A] picture or drawing of a nonsmoker’s and smoker’s lungs displayed side by side; a picture of a doctor looking at an x-ray of either a smoker’s cancerous lungs or some other part of the body presenting a smoking-related condition; a picture or drawing of the internal anatomy of a person suffering from a smoking-related medical condition; [and] a picture or drawing of a person suffering from a smoking-related medical condition.

*Id.*

<sup>354</sup> See *Disc. Tobacco*, 674 F.3d at 562–64.

<sup>355</sup> *Id.* at 561–64.

<sup>356</sup> *Id.* at 565–66.

<sup>357</sup> *Id.* at 565–67; see *id.* at 531, 569. In a partial dissent in which he argued for application of the *Central Hudson* test rather than the *Zauderer* test, Judge Clay contended that the TCA’s requirement of a graphics element was unprecedented and not narrowly tailored to furtherance of the government’s interests. *Id.* at 527–30 (Clay, J., dissenting in part). Judge Stranch’s majority opinion on the graphics requirement asserted

The Sixth Circuit devoted more brief attention to the TCA's detailed manner-of-display requirements for the rotating warnings.<sup>358</sup> It concluded that in requiring the warnings to occupy the top half of the front and back of cigarette packages, approximately one-third of the front and back of smokeless tobacco packages, and twenty percent of an advertisement's space, Congress acted permissibly.<sup>359</sup> The court believed that the manner-of-display requirements were "reasonably tailored to overcoming the informational deficit regarding tobacco harms" and that the government had demonstrated that "larger warnings materially affect consumers' awareness of the health consequences of smoking and decisions regarding tobacco use."<sup>360</sup>

In addition, the court rejected as "unpersuasive" the tobacco companies' argument that the manner-of-display requirements were "unduly burdensome because the scale of the warning label drowns out their speech...."<sup>361</sup> The Sixth Circuit did not give credence to the plaintiffs' argument that such prominently displayed labels "might dissuade certain smokers from buying their product by making it appear unhealthy or otherwise unattractive."<sup>362</sup> Such an effect was not constitutionally problematic, the court seemed to suggest.<sup>363</sup> It saw nothing wrong with the government's requiring truthful, if unpleasant, information in labels and advertisements as part of an effort to curtail minors' use of tobacco products.<sup>364</sup>

### 3. TCA Provisions Struck Down

Although *Discount Tobacco* resulted in various wins for the government, the tobacco companies did prevail on certain issues.<sup>365</sup> They achieved a minor victory in the court's striking down of a TCA provision

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that in conducting his assessment of the graphics requirement, Judge Clay was not only relying on the wrong test but was allowing himself to be influenced by the particular graphic images chosen by the FDA—images whose constitutionality was not an issue before the court. *Id.* at 567–69 (majority opinion).

<sup>358</sup> *See id.* at 524–31.

<sup>359</sup> *Id.* at 524, 530–31.

<sup>360</sup> *Id.* at 530.

<sup>361</sup> *Id.* The tobacco companies had made no showing, the court observed, that the remaining portions of their packages and advertisements constituted insufficient room for the display of their product names, logos, and other information. *Id.* at 530–31; *see id.* at 567.

<sup>362</sup> *Id.* at 531.

<sup>363</sup> *See id.*

<sup>364</sup> *See id.*; *see also id.* at 569 (observing that even if a graphic image were to depict something unpleasant and therefore cause a "visceral" reaction on the part of those who see it, the image could still be a factual disclosure and therefore permissible under *Zauderer*).

<sup>365</sup> *See id.* at 537–39, 541–44.

that barred the furnishing of non-tobacco items in return for purchases of tobacco products.<sup>366</sup> This provision would have restricted tobacco companies' ability to continue so-called continuity programs involving adult purchasers of their products: programs in which regular purchasers would receive other merchandise as a reward for being good customers.<sup>367</sup> The court invalidated the restriction because, insofar as such programs are geared toward adult purchasers, the TCA provision did not bear a sufficient relationship to the statute's protection-of-minors purposes.<sup>368</sup>

The *Discount Tobacco* plaintiffs achieved a bigger victory concerning the TCA's previously discussed provision that restricted tobacco advertisers' use of color imagery. This provision permitted use of only a black-and-white format (black text on a white background, or vice-versa) in most forms of tobacco advertising.<sup>369</sup> The court rejected the government's argument that uses of color in tobacco advertisements are inherently misleading and thus properly subject to a prophylactic ban.<sup>370</sup> Instead, the government would have to follow a tougher route: proceeding after the fact against advertisers whose particular uses of color could be proven deceptive.<sup>371</sup>

Moreover, the court believed that the ban on color imagery swept far too broadly in restricting speech.<sup>372</sup> The court again invoked *Zauderer*, but this time to point out that decision's discussion of commercial speech restrictions and the Supreme Court's comments on the value to advertisers of being able to use color in order to attract interest and aid communication.<sup>373</sup> The Sixth Circuit therefore struck down the restriction on uses of color imagery.<sup>374</sup>

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<sup>366</sup> *See id.* at 537–38, 544.

<sup>367</sup> *Id.* at 537–38.

<sup>368</sup> *See id.* at 543–44. The invalidated restriction thus was different from the TCA's previously discussed no-free-samples provision, which the court upheld because of its direct connection to the interest in removing inducements for minors to use tobacco products. *Id.* at 541; *see* *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249–53 (2010).

<sup>369</sup> *See supra* note 120 and accompanying text.

<sup>370</sup> *Disc. Tobacco*, 674 F.3d 547–48.

<sup>371</sup> *See id.* at 546–48.

<sup>372</sup> *Id.*

<sup>373</sup> *See id.* at 547; *see also* *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 649 (1985). *Zauderer* thus played dual roles in *Discount Tobacco*: furnishing the controlling framework for assessing the TCA's disclosure requirements, *see supra* text accompanying notes 345–57, and shedding light on how to evaluate sweeping commercial speech restrictions. *See Disc. Tobacco*, 674 F.3d at 547.

<sup>374</sup> *Id.* at 548.

*B. The R.J. Reynolds Decision*

Whereas *Discount Tobacco* involved an attack on various TCA provisions, *R.J. Reynolds Tobacco Co. v. FDA*<sup>375</sup> focused much more narrowly on a government action related to the TCA but different from any restriction or requirement addressed in the earlier case. In *R.J. Reynolds*, tobacco companies challenged the particular graphic images devised by the FDA in response to the TCA's directive to develop graphic images for inclusion in the required warning on cigarette packages and in cigarette advertisements.<sup>376</sup> The D.C. Circuit held that the FDA-devised graphic images violated the First Amendment.<sup>377</sup>

Writing for a two-judge majority, Judge Brown sent early signals about the ultimate outcome of the case. In background information, the court stated that in a proposed regulation soliciting comment on thirty-six graphic images under consideration, the agency advocated "a dramatic expansion of the existing health warnings" and cited a supposed international consensus that health warnings featuring graphics were more effective than text-only warnings.<sup>378</sup> The court quickly reminded readers, however, that even though more than thirty nations required pictorial elements in health warnings for tobacco products and other nations were considering such requirements, "the constitutions of these countries do not necessarily protect individual liberties as stringently as does the United States Constitution."<sup>379</sup>

The D.C. Circuit noted that that the FDA selected the nine graphic images described earlier after reviewing the results of a commissioned study of 18,000 consumers and after reviewing and responding to more than a thousand comments.<sup>380</sup> The court then singled out comments to which, it suggested, the FDA had not paid sufficient heed.<sup>381</sup> These comments, as summarized by the court, faulted the FDA's study for not producing adequate evidence that the use of warnings with graphic elements would reduce smoking rates.<sup>382</sup> The reduction of smoking rates notion played a recurring role in the

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<sup>375</sup> *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012).

<sup>376</sup> *Id.* at 1211. For descriptions of the images, see *supra* text accompanying notes 105–09. Recall that in *Discount Tobacco*, the court upheld the TCA's requirement that a to-be-devised graphic element form part of the required rotating warnings, but that the actual images the FDA devised were not before the court. See *Disc. Tobacco*, 674 F.3d at 551–52.

<sup>377</sup> *R.J. Reynolds*, 696 F.3d at 1221–22.

<sup>378</sup> *Id.* at 1209.

<sup>379</sup> *Id.* at 1209 n.3.

<sup>380</sup> *Id.* at 1209.

<sup>381</sup> See *id.* at 1209–11.

<sup>382</sup> See *id.* at 1210.

majority opinion, as the court consistently came back to that notion as being the overriding, or perhaps only, purpose underlying the FDA regulation approving the particular images.<sup>383</sup>

Before identifying the appropriate First Amendment test to govern the case, the *R.J. Reynolds* court observed that “[t]he only question before us is whether FDA’s promulgation of the graphic warning labels—which incorporate the textual warnings, a corresponding graphic image, and the ‘1–800–QUIT–NOW’ cessation hotline number—violates the First Amendment.”<sup>384</sup> The court flirted with the possibility of analyzing the case under strict scrutiny and the full First Amendment protection it contemplates.<sup>385</sup> In that flirtation, the majority cited the Supreme Court’s compelled speech decisions regarding noncommercial settings,<sup>386</sup> and went on to observe that “[t]his case contains elements of compulsion and forced subsidization” of the government’s “ideological and not informational” message.<sup>387</sup> Although it acknowledged that the government may mandate warnings to consumers about dangerous products, the court contended that “this case raises novel questions about the scope of government’s authority to force the manufacturer of a product to go beyond making purely factual and accurate commercial disclosures and undermine its own economic interest” by making it communicate “the government’s anti-smoking message.”<sup>388</sup>

Just as it appeared poised to hold that strict scrutiny would govern the analysis, the D.C. Circuit court stepped back and noted that because the FDA’s graphic images pertained to tobacco companies’ marketing of their

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<sup>383</sup> See *id.* at 1216–21. In his dissent, Judge Rogers faulted the majority for ignoring another key purpose underlying the TCA and the FDA regulations that stemmed from it. See *infra* text accompanying notes 406–14.

<sup>384</sup> *R.J. Reynolds*, 696 F.3d at 1211. In addition, the court stated that the tobacco companies “do not dispute Congress’s authority to require health warnings on cigarette packages, nor do they challenge the substance of any of the nine textual statements mandated by the [TCA].” *Id.* When the court’s careful phrasing in identifying the issues and non-issues is considered alongside its later reasoning in invalidating the actual graphic images, one wonders whether the court might have struck down the TCA’s general requirement that graphic images be included in the health warnings if that requirement had been raised as an issue in the case.

<sup>385</sup> See *id.* at 1211–13. In granting summary judgment to the plaintiffs, the district court had applied strict scrutiny. *Id.* at 1212–13, 1217.

<sup>386</sup> *Id.* at 1211. *Wooley v. Maynard* was among the cases the court cited. *Id.*; see *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

<sup>387</sup> *R.J. Reynolds*, 696 F.3d at 1211.

<sup>388</sup> *Id.* at 1212. The court also observed that “[i]n effect, the graphic images are not warnings, but admonitions: ‘[D]on’t buy or use this product.’” *Id.* at 1211.

products, commercial speech principles apparently should control.<sup>389</sup> But as the Sixth Circuit had to do in *Discount Tobacco* when it ruled on the TCA's requirement that to-be-devised graphic images form part of the required warnings, the *R.J. Reynolds* court needed to decide *which set* of commercial speech principles would apply. Would it be *Zauderer's* test for required disclosures, or *Central Hudson's* test for restrictions?<sup>390</sup>

The *R.J. Reynolds* court concluded that the *Zauderer* framework did not apply.<sup>391</sup> *Zauderer*, the court noted, called for review “akin to rational-basis review”<sup>392</sup> if the commercial speech disclosures the government required were of factual, noncontroversial information and were reasonably related to prevention of consumer deception.<sup>393</sup> The court expressed doubt about whether the graphic images provided factual information, as opposed to communicating opinions or being mere devices for evoking emotional responses.<sup>394</sup> Moreover, returning to the notion that the FDA's graphic images were designed only to produce a reduction in smoking rates, the court concluded that because prevention of consumer deception supposedly was not an underlying purpose, the graphic images could not be treated as disclosures subject to review under *Zauderer*.<sup>395</sup> Accordingly, the court reasoned,

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<sup>389</sup> See *id.* at 1213, 1217. The court noted that in so concluding, it was following the lead of one of its own decisions in which commercial speech principles had been applied to required corrective disclosures. *Id.* at 1217; see *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1142–45 (D.C. Cir. 2009) (the government's civil RICO case against tobacco companies).

<sup>390</sup> See *R.J. Reynolds*, 696 F.3d at 1213, 1217. For discussion of this choice in *Discount Tobacco*, see *supra* text accompanying notes 345–57. Either way, the D.C. Circuit maintained in *R.J. Reynolds*, “a thorny question remains: how much leeway should ... the government [receive] when it seeks to compel a product's manufacturer to convey the state's subjective—and perhaps even ideological—view that consumers should reject this otherwise legal, but disfavored, product?” *R.J. Reynolds*, 696 F.3d at 1212.

<sup>391</sup> *R.J. Reynolds*, 696 F.3d at 1216–17. The D.C. Circuit thus resolved the *Zauderer*-or-*Central Hudson* question the opposite way the *Discount Tobacco* majority resolved it in its ruling on the TCA's graphic images provision. See *supra* text accompanying notes 345–57.

<sup>392</sup> *R.J. Reynolds*, 696 F.3d at 1212.

<sup>393</sup> *Id.*; see *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

<sup>394</sup> *R.J. Reynolds*, 696 F.3d at 1216–17.

<sup>395</sup> See *id.* at 1216–17. The court strained to reason that the graphic images could not be seen as designed to prevent consumers from having misimpressions about health risks because the TCA's sections other than the warning-requirement section (such as the provision restricting the use of terms such as “light” or “mild”) were designed to deal with, and apparently took care of, the problem of consumers being deceived or misled about health risks. See *id.* at 1214–15. Nor was the majority swayed by the argument that the graphic images should be evaluated against the backdrop of tobacco companies' history of misrepresentations of health risks. The court observed that the regulation



the usual commercial speech rules—those provided by *Central Hudson*—would have to control the analysis.<sup>396</sup>

Applying the *Central Hudson* test, the D.C. Circuit began by “assuming” that reducing smoking rates was a substantial government interest.<sup>397</sup> The court then criticized studies relied on by the FDA as presenting “questionable social science”<sup>398</sup> and stressed that the government’s evidence concerning other nations’ required pictorial health warnings did not demonstrate a direct link between those warnings and a smoking-rate reduction attributable to such a requirement.<sup>399</sup> Therefore, the court concluded, the government had not shown that the graphic images chosen by the FDA would result in a reduction of smoking rates.<sup>400</sup> This meant that the government had failed *Central Hudson*’s direct-advancement element and that the graphic images therefore violated the First Amendment.<sup>401</sup>

The *R.J. Reynolds* majority’s application of the *Central Hudson* test again featured the court’s insistence that reduction of smoking rates was the sole objective underlying the FDA-devised graphic images.<sup>402</sup> Perhaps only to respond to a key point in Judge Rogers’s dissent that effectively communicating health risks in order to correct misimpressions was also a government objective underlying the graphic images,<sup>403</sup> the majority acknowledged that the FDA had asserted such an objective during the litigation.<sup>404</sup> However, the court maintained, effective communication of health risks was “not an independent interest capable of sustaining” the FDA’s graphic images; rather, it was “merely a description of the means by which [the FDA] plans to accomplish its goal of reducing smoking rates.”<sup>405</sup>

Judge Rogers vigorously dissented. He maintained that with the exception of the “1-800-QUIT-NOW” element, the images devised by the FDA would pass First Amendment muster under either *Zauderer* or *Central*

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setting forth the graphic images did not specify that the images were meant to combat specific deceptive claims by the tobacco industry. *See id.* at 1215–16.

<sup>396</sup> *See id.* at 1217.

<sup>397</sup> *Id.* at 1218.

<sup>398</sup> *Id.* at 1219.

<sup>399</sup> *See id.*

<sup>400</sup> *See id.* at 1219–20.

<sup>401</sup> *See id.* at 1219–21.

<sup>402</sup> *See id.* at 1218.

<sup>403</sup> *Id.* at 1235–36 (Rogers, J., dissenting).

<sup>404</sup> *See id.* at 1221 (majority opinion).

<sup>405</sup> *Id.*

*Hudson*.<sup>406</sup> Judge Rogers chided the majority for its refusal to treat effective communication of health risks as a government interest underlying the graphic images.<sup>407</sup> That interest, he asserted, was consistent with a goal of preventing consumers from holding misimpressions regarding health risks and thus made the graphic images prevention-of-deception requirements for purposes of *Zauderer*.<sup>408</sup> In addition, Judge Rogers criticized the majority for evaluating the graphic images as if they stood on their own rather than as they would actually appear: in conjunction with the textual elements of the required warnings.<sup>409</sup> Viewed in conjunction with the textual elements, the graphic images communicated factual information or at least aided in communicating the factual information in the textual elements, a further reason for saying that the images should be sustained under the *Zauderer* test.<sup>410</sup>

Even if *Zauderer* did not apply and *Central Hudson* furnished the controlling framework, Judge Rogers continued, the graphic images should be sustained.<sup>411</sup> Again chastising the majority for not treating effective communication of health risks as a government interest to be considered, he stressed that such an interest is substantial in nature and that the graphic images would directly advance the interest in a narrowly tailored way.<sup>412</sup> Concerning the direct-advancement element, the FDA should be able to pass that hurdle on the basis of common sense, the studies the agency relied on, and other nations' perceptions of whether the pictorial images in their required health warnings more effectively communicated health risks than text-only warnings.<sup>413</sup> Regarding both the direct-advancement element and the narrow tailoring element, indications that longstanding textual warnings had not eliminated misimpressions about health risks should justify taking a new approach involving the graphic images.<sup>414</sup>

The following section considers the implications of existing interpretations of the First Amendment for the current TCA provisions and for possible

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<sup>406</sup> *Id.* at 1222–23 (Rogers, J., dissenting). Judge Rogers concluded that regardless of whether *Zauderer* or *Central Hudson* controlled, the inclusion of the “1–800–QUIT–NOW” statement in the graphic images could not be justified. *Id.* at 1223, 1236.

<sup>407</sup> *Id.*

<sup>408</sup> *Id.* at 1223, 1225, 1227–34. Judge Rogers also asserted that tobacco companies' past history of deception and covering-up of health risks should be kept in mind when evaluating the warning requirements. *See id.* at 1224, 1228–29.

<sup>409</sup> *Id.*

<sup>410</sup> *Id.* at 1230–34.

<sup>411</sup> *Id.*

<sup>412</sup> *Id.* at 1234–35.

<sup>413</sup> *Id.* at 1235–36.

<sup>414</sup> *Id.*

future statutory and administrative measures regulating tobacco advertising and promotion. It assesses the reasoning employed in the *Discount Tobacco* and *R.J. Reynolds* decisions discussed above, explores what Congress and the FDA should and should not be able to do in requiring and devising new graphic images for use in the required health warnings, and considers how the Supreme Court should rule if a *Discount Tobacco* or *R.J. Reynolds*-type case were to come before it.

#### IV. FIRST AMENDMENT LINE-DRAWING AND ITS IMPLICATIONS FOR CURRENT AND FUTURE REGULATORY EFFORTS

How did the *Discount Tobacco* and *R.J. Reynolds* courts do in regard to soundness of reasoning? Answering that question begins the process of determining what actions Congress and the FDA can and should be able to take in terms of regulating tobacco advertising and promotion without violating the First Amendment. As the following analysis will indicate, “generally quite well” should be the answer regarding the *Discount Tobacco* court, with the *R.J. Reynolds* court meriting an “on the whole, poorly” response.

##### A. Assessing Discount Tobacco

The range and different natures of the TCA provisions challenged in *Discount Tobacco* made the Sixth Circuit’s task a difficult one. Add the different lines of potentially applicable reasoning stemming from the Supreme Court’s First Amendment decisions,<sup>415</sup> and a court in the Sixth Circuit’s position has an even more difficult assignment. Throw in the not-always-clear suggestions from the Supreme Court that the relevant First Amendment rules and tests may need changing or may already be undergoing subtle shading,<sup>416</sup> and a task of the sort faced by the *Discount Tobacco* court becomes tougher yet.

Considering the just-noted factors, the Sixth Circuit produced a solid, well-reasoned, and well-supported decision in *Discount Tobacco*. In upholding most of the TCA provisions that amounted to restrictions on tobacco advertising and marketing, the court properly rejected the tobacco companies’ arguments that strict scrutiny should be applied to at least some of the restrictions.<sup>417</sup> If courts were to give credence to tobacco

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<sup>415</sup> See *supra* text accompanying notes 164–232, 263–307.

<sup>416</sup> See *supra* text accompanying notes 199–263.

<sup>417</sup> See *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 522, 525–26, 532–33, 549–50 (6th Cir. 2012), *cert. denied sub nom. Am. Snuff Co. v. United States*, 133 S. Ct. 1996 (2013). For a less favorable assessment of *Discount Tobacco* than

companies' argument that restrictions on what they may say in labeling and advertising should be subjected to strict scrutiny because comments on health issues outside the labeling and context would trigger very substantial First Amendment protection, the distinction between commercial speech and noncommercial speech would be all-but obliterated, and the government's ability to regulate in the interest of promoting public health would be severely impaired. There would also be a paradoxical and indefensible effect: the greater the health risks or dangers associated with a widely used product (and hence the greater the chance that major health concerns would be present), the lesser the ability of government to restrict reasonable amounts of speech in an effort to safeguard public health.

Moreover, accepting tobacco companies' strict scrutiny argument would run contrary to a longstanding line of Supreme Court decisions to which the Court still adheres despite hints about possible changes in the rules.<sup>418</sup> A federal court of appeals obviously cannot give Supreme Court hints primacy over actual Supreme Court holdings, especially when the Supreme Court itself has not permitted the hints to translate into new rules despite little check on its doing so except for an easy-to-get-around tradition of adherence to precedent.<sup>419</sup> In *Discount Tobacco*, the Sixth Circuit commendably stuck with the *Central Hudson* test for commercial speech restrictions and applied it both realistically and with appropriate rigor, not to mention evenhandedly.

The *Discount Tobacco* court should also be commended for how it dealt with the Supreme Court's 2011 *Sorrell* decision, which is to say that the Sixth Circuit for the most part *did not attempt* to deal with the puzzling Supreme Court decision. Recall that in *Sorrell*, the Supreme Court spent considerable time discussing a supposed need for "heightened scrutiny" of certain commercial speech restrictions. Which ones? Evidently those that bar a commercial speaker from disclosing or using certain information for marketing purposes when other speakers are permitted to use the very same information for non-marketing purposes, though the Court was less than clear about whether heightened scrutiny should be applied only then or perhaps more broadly.<sup>420</sup> In *Sorrell*, the Court worried that pharmaceutical companies had been singled out for adverse treatment regarding their

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the one offered here, see Danielle Weatherby & Terri R. Day, *The Butt Stops Here: The Tobacco Control Act's Anti-Smoking Regulations Run Afoul of the First Amendment*, 76 ALB. L. REV. 121, 140-43 (2012/2013).

<sup>418</sup> See *supra* notes 174, 182; *supra* text accompanying notes 245-51.

<sup>419</sup> Even if the Supreme Court's overruling of an earlier precedent is the exception rather than the rule, the exception has occurred with reasonable frequency over the years.

<sup>420</sup> See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2660-67 (2011).

marketing efforts.<sup>421</sup> But in the end the Court backed away from the heightened scrutiny rationale it floated, and officially relied on *Central Hudson* for the controlling framework.<sup>422</sup> Other courts would do well to follow the Sixth Circuit's *Discount Tobacco* example by applying *Sorrell* only for what it actually did in deciding the case under *Central Hudson*, by noting *Sorrell*'s mention of the need to be suspicious of governmental attempts to keep the public in the dark through speech restrictions,<sup>423</sup> and by then letting the sleeping *Sorrell* dog lie, pending clarification from the Supreme Court on what (if anything) to make of the heightened scrutiny analysis in commercial speech cases.

The *Discount Tobacco* court also provided a model for other courts, including the Supreme Court, to follow in distinguishing between commercial speech restrictions and required commercial speech disclosures and in properly applying the relevant Supreme Court precedents. The Sixth Circuit's appropriate applications of the *Central Hudson* test for evaluating commercial speech restrictions have already been noted. The court likewise insightfully applied *Zauderer*'s test for required commercial speech disclosures to the TCA's requirement that graphic images be part of the required health warning on cigarette packages and in cigarette advertisements.<sup>424</sup> As held in *Zauderer* and reaffirmed by the Supreme Court in the 2010 *Milavetz* decision, required disclosures of factual information in commercial speech settings do not violate the First Amendment if they are reasonably related to prevention of consumer deception.<sup>425</sup>

In sustaining the TCA's graphic images requirement, the *Discount Tobacco* court sensibly concluded that graphic images can be just as accurate as textual statements of fact and that, to the extent they accompany the indisputably accurate statements in the textual portions of the warning, the graphic images should be treated as conveying factual information.<sup>426</sup> Then, appropriately taking into account a key TCA purpose of more effectively communicating health risks of tobacco product use and thereby lessening the chances that consumers would suffer from misimpressions, the court concluded that the graphic image requirement was effectively a

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<sup>421</sup> *Id.* at 2663. The horror! Don't commercial speech restrictions commonly do this?

<sup>422</sup> *Id.* at 2667.

<sup>423</sup> *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 546 (6th Cir. 2012), *cert. denied sub nom. Am. Snuff Co. v. United States*, 133 S.Ct. 1996 (2013); *see Sorrell*, 131 S. Ct. at 2671.

<sup>424</sup> *Disc. Tobacco*, 674 F.3d 509 (6th Cir. 2012).

<sup>425</sup> *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249–50 (2010).

<sup>426</sup> *Disc. Tobacco*, 674 F.3d at 558–59.

prevention-of-deception requirement.<sup>427</sup> The court took what appeared to be a substance-over-form approach that correctly considered the TCA's purposes, and in particular, a purpose stated in the federal statute whose warning requirement the TCA amended, but whose statement of purpose remained unchanged.<sup>428</sup> Finally, the Sixth Circuit was equally on the mark in concluding that the graphic images requirement was reasonably related to the previously discussed purpose in light of the evidence indicating that minors and other members of the public still do not fully understand the nature and extent of the health risks despite the fact that textual warnings have been required for many years.<sup>429</sup>

One quarrel with the *Discount Tobacco* decision should be noted, however. It is a fairly small quarrel about a matter of a harmless-error nature, given how the case came out, but the error would not be so harmless if committed by another court in a future case. The *Discount Tobacco* court correctly noted that *Zauderer's* applicable test for required commercial speech disclosures furnishes less First Amendment protection than does the usual treatment of commercial speech.<sup>430</sup> Then, however, the court observed that if a required commercial speech disclosure does not qualify for *Zauderer* treatment (if, for instance, it does not deal with factual information or it is not meant to prevent consumer deception), the Supreme Court's compelled speech precedents control and strict scrutiny is applied.<sup>431</sup> Although the Supreme Court may have offered suggestions in that regard, it has not clearly held that the compelled speech decisions, which deal with noncommercial speech, automatically apply to required commercial speech disclosures that fall outside the *Zauderer* umbrella.<sup>432</sup> The supposed jump all the way to full First Amendment protection when *Zauderer* does not apply to a required commercial speech disclosure is

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<sup>427</sup> *Id.* at 558–61, 562–64.

<sup>428</sup> *See id.*; *see supra* text accompanying notes 25–28, 81–85 (discussing Federal Cigarette Labeling and Advertising Act's stated purpose of using warning requirement to inform public of health risks of smoking, and noting that purposes section of FCLAA has remained unchanged even after TCA's modifications of FCLAA's warning requirement).

<sup>429</sup> *See* 674 F.3d at 561–64. It is perhaps a bit surprising that the court did not devote more discussion to the tobacco companies' objection that the required size of the warnings amounted to an unreasonable and unduly burdensome requirement, but the court did note that the plaintiffs had made no showing that they could not get the marketing messages across in the spaces still available to them. *Id.* at 530–31. Moreover, the court no doubt was influenced by the legal reality that the government only had to prove a reasonable relationship to its purpose of more effectively informing consumers of health risks.

<sup>430</sup> *Id.* at 561–62.

<sup>431</sup> *Id.* at 554.

<sup>432</sup> *See infra* text accompanying notes 470–79.

either erroneous or should be erroneous. More logically, a required commercial speech disclosure to which *Zauderer* does not apply remains in the commercial speech realm and should be considered under the test constituting the next-higher level of protection: the *Central Hudson* test.

### B. Assessing R.J. Reynolds

The *R.J. Reynolds* decision includes far less of which to approve. Perhaps the best piece of advice to courts deciding tobacco advertising-related cases is this: read Judge Rogers's dissent and pay attention to his analysis. Lest the previous statement seem too harsh, a positive aspect of Judge Brown's majority opinion should be noted: its correct conclusion that if a required commercial speech disclosure does not qualify for *Zauderer* treatment, the *Central Hudson* test, not strict scrutiny, furnishes the controlling framework.<sup>433</sup> Otherwise, however, the *R.J. Reynolds* decision reflected flawed reasoning.

With a number of its initial comments summarized earlier, the D.C. Circuit seemed to prefer the idea of applying strict scrutiny to the FDA regulation setting forth the graphic images developed in response to the TCA directive.<sup>434</sup> Circuit precedent indicated, however, that commercial speech principles should control.<sup>435</sup> But commercial speech principles would serve well enough as a basis for invalidating the graphic images, the court seemed to suggest, if the right set of those principles were applied in a rigorous enough manner.<sup>436</sup> The court candidly referred to the *Zauderer* test for required commercial speech disclosures as rational-basis review<sup>437</sup> and then proceeded with a strained analysis that seemed calculated to make certain that the more lenient test would be disqualified.

As previous discussion noted, Judge Brown's majority opinion consistently invoked the notion that reduction of smoking rates was the only government purpose underlying the graphic images.<sup>438</sup> This insistence defied legal and factual reality, for the FDA expressly also relied on a second government interest: more effectively communicating with consumers to lessen

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<sup>433</sup> *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1217 (D.C. Cir. 2012). For a more charitable view of the *R.J. Reynolds* decision than the one offered here, see Weatherby & Day, *supra* note 417, at 140–43.

<sup>434</sup> See *supra* text accompanying notes 378–82. One suspects the court might have liked to tackle the TCA directive itself, but that requirement was not before the court. See 696 F.3d at 1211.

<sup>435</sup> 696 F.3d at 1216–17.

<sup>436</sup> *Id.*

<sup>437</sup> *Id.* at 1212.

<sup>438</sup> See *supra* text accompanying notes 382–83, 395, 402–05.

the likelihood that they would continue to experience misimpressions of the full nature and extent of the health risks associated with smoking.<sup>439</sup> Moreover, the *R.J. Reynolds* court's refusal to acknowledge this purpose on the part of the government ignored legal and factual reality in another sense: the clear statement of such a purpose in findings set forth in the TCA and in the previously discussed Federal Cigarette Labeling and Advertising Act (FCLAA). The TCA's provisions on required health warnings (including the requirements that the warnings contain both textual and graphic elements) amended the FCLAA's longstanding warning requirement but left the FCLAA's purposes section unchanged.<sup>440</sup> That purposes section spoke—and still speaks—in terms of effectively communicating health-risk information to consumers.<sup>441</sup>

Surely a purpose set forth in the TCA findings and in the federal statute whose warning requirement the TCA amended should be seen as a purpose relied on by the FDA when it devised the graphic images in response to the TCA's directive. But not for the *R.J. Reynolds* majority, whose strategy worked. If, as the majority maintained, more clearly communicating health risks information in order to prevent misimpressions among consumers was not a purpose underlying the graphic images, the required images could not qualify as deception-prevention disclosures under *Zauderer*.<sup>442</sup>

With *Zauderer* knocked out as a potential source of guiding principles, *Central Hudson*'s higher standard of review would have to control.<sup>443</sup> Even though it does not furnish the level of protection strict scrutiny does, the *Central Hudson* test would be adequate to invalidate the graphic images if a certain purpose would be identified as the only one and the test's final elements were applied rigorously. The *R.J. Reynolds* majority proceeded accordingly, again taking an artificially narrow view of the government's underlying purposes and applying the test very strictly against the government.<sup>444</sup> Again the court insisted that reducing smoking rates was the only purpose underlying the graphic images, but this time, perhaps

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<sup>439</sup> See 696 F.3d at 1223, 1225 (Rogers, J., dissenting).

<sup>440</sup> See *supra* text accompanying notes 25–28, 81–85.

<sup>441</sup> *Id.*

<sup>442</sup> See 696 F.3d at 1214–16. For good measure, the court asserted that the images did not really amount to factual disclosures anyway. *Id.* at 1216–17. However, as Judge Rogers pointed out in his dissent, considering the graphic images alongside the textual elements, something the majority did not do even though the TCA obviously contemplated that graphics and text would appear together, would lead to a contrary conclusion about whether the graphic elements presented accurate information. *Id.* at 1230 (Rogers, J., dissenting).

<sup>443</sup> *Id.* at 1217 (majority opinion).

<sup>444</sup> See *id.*



concerned about the dissenting judge's criticism that the court was ignoring the government's other underlying interest, the court added a further bit of contrived reasoning. The majority stated that more effectively communicating health risks information to consumers was only a *means* of serving the solitary interest in reducing smoking rates, and thus could not serve as a government interest in support of the statute.<sup>445</sup>

So, with reduction of smoking rates being the only underlying government interest it would acknowledge, the *R.J. Reynolds* court could then apply the direct-advancement element of the *Central Hudson* very strictly against the government and hold that the government failed it by not proving that the FDA's graphic images would actually produce lower smoking rates.<sup>446</sup> The court's approach would seem to pose an unreasonably high obstacle for the government to clear, in that doing so would likely require very long-term, elaborately-designed, and expensive studies of numerous possible graphic images in tightly controlled settings. In the meantime, the government would be spinning its protection-of-public-health wheels while a statutory command set forth in the TCA would go unfulfilled.

Conveniently for the court, refusing to recognize improved communication of health risks information as an underlying government interest would keep the court from having to assert that the FDA's judgment on what would likely be effective counts for naught despite the agency's supposed expertise. Similarly, it would have been more difficult for the court to argue that other nations' perceptions of how effectively pictorial images communicate health risks are irrelevant than it was for the court to point out that smoking rates had not necessarily declined in those countries.

### C. What Should Congress and the FDA Be Able to Do?

If the various strains running through the Supreme Court's previously discussed First Amendment precedents are properly applied, most of the tobacco advertising and marketing provisions Congress enacted in the TCA and its predecessor, the FCLAA, should stand on firm constitutional ground. The "[i]f the ... precedents are properly applied" qualifier in the previous sentence will be important, as this section will suggest and the following section will address more fully.

With the *Central Hudson* test, as applied with the degree of rigor demonstrated in *Discount Tobacco*, providing the controlling framework, these previously discussed TCA restrictions on advertising and promotion,<sup>447</sup>

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<sup>445</sup> *Id.* at 1221.

<sup>446</sup> *See id.* at 1219–22.

<sup>447</sup> *See supra* text accompanying notes 112–31.

below, make the First Amendment grade (as should corresponding FDA regulations that may be developed):

- The product distribution provisions restricting self-service displays of tobacco products and requiring retail store personnel to assist in purchases.
- The modified-risk products provisions, which require pre-market approval by the FDA if certain previously identified representations are made by tobacco manufacturers or other sellers.
- The prohibition on tobacco companies' labeling or advertising uses of such terms as "light" or "mild."
- The ban on tobacco companies' distribution of free samples of tobacco products.
- The ban on tobacco companies' placement of tobacco product names, logos, or symbols on non-tobacco merchandise.
- The ban on tobacco companies' use of tobacco brand names in sponsoring events.

Each of the above restrictions reflects some combination of interests in protecting minors' health, more effectively communicating health risks to minors and other members of the public in order to further better understanding of the full extent and nature of those risks, and reducing smoking levels among members of the public. Each restriction bears a sufficiently close relationship to the underlying government interests, without shutting off unreasonably large amounts of protected speech.

Of the types of restrictions that the government cannot justify under current commercial speech principles, the most significant is the TCA's general requirement that most tobacco advertising employ only a black-and-white format, without color images. The *Discount Tobacco* court correctly struck down this restriction,<sup>448</sup> which seems to bear only a speculative relationship to the underlying government interests and severely restricts advertising content and techniques that the Supreme Court has clearly said advertisers should be able to employ. The Court made such statements in *Zauderer*,<sup>449</sup> whose treatment of required commercial speech disclosures can work to the benefit of the government. If the government wishes to receive the benefit

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<sup>448</sup> *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 545–48 (6th Cir. 2012).

<sup>449</sup> *See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 649 (1985).

of the disclosure requirements aspect of *Zauderer*,<sup>450</sup> it does not seem unreasonable to expect the government to be bound by the decision's language favoring advertisers even if that language is not to the government's liking.

Although the TCA called for reissuance of various mid-1990s FDA regulations that the Supreme Court struck down on lack-of authority grounds eight years before the enactment of the TCA, Congress did not direct the FDA to reissue earlier regulations that restricted outdoor advertising of tobacco advertising within 1000 feet of schools, playgrounds, and other similar locations where minors would likely be present.<sup>451</sup> It is just as well, given that the Supreme Court's 2001 *Lorillard* decision struck down, on First Amendment grounds, very similar regulations imposed by the state of Massachusetts.<sup>452</sup>

The TCA did contain a provision authorizing the FDA to consider whether there might be ways of engaging in similar outdoor advertising regulation while remaining in compliance with the First Amendment analysis set forth in *Lorillard*.<sup>453</sup> "Good luck" should be the message to the FDA on this issue. *Lorillard* appears to leave little or no room for such regulation, even though the Court arguably was wrong in striking down what was a location restriction rather than a content restriction. Absent a very unlikely overruling of *Lorillard* by the Supreme Court, the FDA would more profitably apply its regulatory attention elsewhere.

What about a commercial speech restriction that tobacco companies have never challenged on First Amendment grounds: the more than four-decades-old statutory ban on television or radio advertisements for cigarettes?<sup>454</sup> Is this ban on solid ground? Perhaps it is, as a constitutional matter. As a practical matter, it almost certainly is.

As earlier discussion revealed, tobacco companies did not challenge the electronic media advertising ban when it was enacted, with one of the possible reasons being the tobacco industry's conclusion that ban was not such a bad deal because it also caused many anti-smoking messages to disappear from the airwaves.<sup>455</sup> Now, however, First Amendment protection for commercial speech appears to be intensifying under the Supreme Court's precedents. Therefore, tobacco companies would have at least a plausible argument that the electronic media advertising ban sweeps more broadly in restricting speech than would reasonably be necessary to further the underlying government interests. It is unclear

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<sup>450</sup> See *supra* text accompanying notes 269–307.

<sup>451</sup> See *supra* note 123.

<sup>452</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

<sup>453</sup> See *id.*

<sup>454</sup> For discussion of this longstanding law, see *supra* text accompanying notes 43–55.

<sup>455</sup> See *supra* notes 50–52.

whether tobacco companies would succeed with that argument. But what seems clearer is the probability that no such First Amendment challenge will be brought. The longstanding nature of the TV and radio ban would not deprive the tobacco companies of their ability to bring a constitutional challenge, but the ban's longstanding nature makes it such an institution that tobacco companies concerned about public relations would seem unlikely to institute the litigation. Similarly, a court ruling on such a challenge if one were filed might be inclined to find a way to uphold the well-entrenched ban in order to avoid the appearance of being an applecart-upsetting tool of the tobacco industry.

The warning requirements called for in the TCA and the FCLAA (the predecessor statute that the TCA amended) are consistent with the First Amendment, though for reasons different from those supporting the regulations discussed earlier. Unlike the *Central Hudson*-covered restrictions considered above, the warning mandates are of the *disclosure requirements* variety. As such, they are governed by the *Zauderer* test. Properly applied, *Zauderer* indicates that the warning requirements comply with the First Amendment. As the *Discount Tobacco* court concluded, this is true of the warnings' textual components as well as the color graphics components contemplated by the TCA because each component serves to provide accurate information regarding health risks in order to prevent misimpressions on the part of consumers.<sup>456</sup>

Of course, the constitutionality of the TCA's general requirement that the health warnings must include a to-be-devised color graphics element does not automatically mean that any graphic image the FDA adopts will automatically pass First Amendment muster. To qualify under *Zauderer*, graphic images must present accurate information consistent with the purpose of better educating consumers about health risks and thereby preventing misconceptions.<sup>457</sup> The *Discount Tobacco* court offered hypothetical examples that would be permissible under the First Amendment: an image showing the text of the warning in a child's handwriting; a

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<sup>456</sup> *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 561–64 (6th Cir. 2012). Concerning at least the textual elements of the warnings, the fact that warnings have been required for so long on cigarette packages and in cigarette advertisements might make a court look for a way to stick with the status quo and uphold the requirement. Moreover, assuming that the *R.J. Reynolds* court accurately represented the plaintiffs' position in the case before it, the tobacco companies do not dispute the government's power to require appropriate health warnings. See *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1215 (D.C. Cir. 2012).

<sup>457</sup> See *Disc. Tobacco*, 674 F.3d at 561–64; *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

picture or drawing a diseased lung alongside a healthy one; a picture of a physician reviewing an X-ray of a diseased lung, and so forth.<sup>458</sup>

Although the *R.J. Reynolds* court struck down all of the graphic images devised by the FDA and the government later decided to develop new images instead of appealing the decision, some of the images should have been upheld. Bringing back any of those images in the same form would cause the FDA to encounter the wrath of the D.C. Circuit and would result in success for the FDA only if it could convince the Supreme Court that the D.C. Circuit ruled incorrectly. Rather than pursue that time-consuming avenue, the FDA may wish to consider modifying certain currently abandoned images listed earlier in the Article:<sup>459</sup> the adult holding a small child with smoke visible in the air; the picture of the man with the tracheotomy; the picture of the diseased lungs; and the picture of the person with apparently diseased lips and rotted-out teeth. With modifications more clearly tying the images to the textual warnings to which they correspond, the images should be upheld. The other now-abandoned graphic images listed earlier in the Article should remain abandoned. As deficient and artificial as the *R.J. Reynolds* court's reasoning generally was, the court probably was right to strike down those other images. Also, the "1-800-QUIT-NOW" mantra cannot qualify under *Zauderer* for the reasons noted in the majority and dissenting opinions in *R.J. Reynolds*,<sup>460</sup> and therefore should not be employed.

Finally, though it is a relatively close call, the TCA's manner-of-display requirements for the required warning<sup>461</sup> should be considered permissible. The specifications concerning warning size and location have attributes of required *disclosures* because they are meant to make the warning's communication of health risks more noticeable and therefore more effective. Under a proper *Zauderer* analysis, the manner-of-display requirements would be upheld. But the manner-of-display requirements also operate as advertising *restrictions* because they limit the space tobacco manufacturers have to communicate messages they would prefer to communicate. In that sense, a *Central Hudson* analysis could be appropriate. Even if that test were applied, however, the manner-of-display requirements should be acceptable under the First Amendment, in light of the government interests at stake and the reality that the less prominently displayed warnings are likely often ignored and therefore less effective than they might be in communicating the extent of the relevant health risks.

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<sup>458</sup> See 674 F.3d at 559.

<sup>459</sup> See *supra* text accompanying notes 105–09.

<sup>460</sup> 696 F.3d at 1211, 1216–17 (majority opinion). *Id.* at 1236–37 (Rogers, J., dissenting).

<sup>461</sup> See *supra* text accompanying notes 92–101.

*D. Appropriate and Inappropriate Analyses if the Supreme Court Were to Rule*

If the Supreme Court hears a tobacco advertising and promotion case raising issues of the sort presented in *Discount Tobacco* and *R.J. Reynolds*, the key lines of cases, of course, will be those in the *Central Hudson* line (for commercial speech restrictions) and those in the *Zauderer* line (for required commercial speech disclosures). *Central Hudson* has survived for more than three decades despite various Justices' flirtations with scrapping it.<sup>462</sup> However imperfect it may be, it has continued to win out over other possible frameworks.

As earlier discussion revealed, the Supreme Court's applications of the *Central Hudson* test in recent years have effectively moved the intermediate level of First Amendment protection it contemplates closer to the full First Amendment protection extended to noncommercial speech.<sup>463</sup> It is probably too late in the game to reposition the intermediate level at a lower point, but the Court should be hesitant, particularly in a tobacco advertising case, to continue making commercial speech analysis ever more closely resemble noncommercial speech analysis. If the Court continues to do so, it risks what Justice Breyer has warned about in dissenting opinions: the danger that many well-established and important regulatory regimes could too readily be subjected to a First Amendment-based attack if they restrict speech in some incidental way.<sup>464</sup> Tobacco advertising restrictions of the sort discussed in this Article are not incidental restrictions, but they are far from arbitrary and are part of larger regulatory schemes that are designed to address public health matters. The Court must be careful not to let expanding protection for commercial speech unduly hamper the government's ability to regulate in the interest of the public.

When the Court reaffirmed *Zauderer* in the 2010 *Milavetz* decision, the Court sent an encouraging sign that it was continuing to evaluate certain commercial speech disclosure requirements differently from, and more leniently than, commercial speech restrictions.<sup>465</sup> The Court should not retreat if faced with assessing the textual and graphic warnings called for by the TCA. In applying *Zauderer*, the Court should recognize that graphic images can be factual and accurate and thus potentially sustainable under

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<sup>462</sup> See *supra* notes 174, 182.

<sup>463</sup> See *supra* text accompanying notes 164–263.

<sup>464</sup> For discussion of Justice Breyer's dissents, see *supra* notes 232 & 258–60, as well as *supra* text accompanying notes 257–60.

<sup>465</sup> For discussion of *Zauderer* and *Milavetz*, see *supra* text accompanying notes 269–307.

those decisions' test, as the *Discount Tobacco* court recognized but the *R.J. Reynolds* court failed to appreciate.<sup>466</sup> Particular graphic images should then be evaluated for whether they communicate accurate information by viewing them along with the textual messages to which they correspond—something the *R.J. Reynolds* court failed to do.<sup>467</sup>

With regard to the *Zauderer* test's element stating that the required disclosures must be for deception-prevention purposes,<sup>468</sup> the Court should apply this element in a substance-over-form manner that allows a purpose sufficiently similar to deception-prevention to qualify as well. In the tobacco advertising context, the TCA's objective of effectively communicating health risks information in order to prevent misconceptions should be seen as sufficiently close—as the *Discount Tobacco* court recognized.<sup>469</sup>

What if required commercial speech disclosures do not qualify for *Zauderer* treatment? In that event, the Court should hold that the *Central Hudson* test controls. In so holding, the *R.J. Reynolds* court displayed a rare bit of correct decision-making.<sup>470</sup> The Court should resist the temptation to invoke the compelled speech cases when *Zauderer* does not apply because the compelled speech decisions arose from noncommercial speech settings and involve principles of full First Amendment protection.<sup>471</sup> Further blurring of the commercial versus noncommercial line should be avoided.

In addition, the Court should avoid the temptation to resort to the so-called compelled subsidy cases if it has occasion to review the requirement

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<sup>466</sup> See *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559–60 (6th Cir. 2012); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216–17 (D.C. Cir. 2012); *id.* at 1231–32 (Rogers, J., dissenting).

<sup>467</sup> See *R.J. Reynolds*, 696 F.3d at 1230 (Rogers, J., dissenting).

<sup>468</sup> *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

<sup>469</sup> See *Disc. Tobacco*, 674 F.3d at 561–64.

<sup>470</sup> *R.J. Reynolds*, 696 F.3d at 1217. Other commentators are comfortable with the notion that if *Zauderer* does not apply to a required disclosure, some form of strict scrutiny should be triggered. See Weatherby & Day, *supra* note 417, at 154–58, 163; Calvert, Allen-Brunner, & Locke, *supra* note 65, at 236–43. However, too much application of what have historically been noncommercial speech principles to the commercial speech setting creates risks, as Justice Breyer has pointed out, that too many regulatory programs could be subject to hamstringing First Amendment challenges. See *supra* notes 258–60 and *supra* text accompanying notes 257–60.

<sup>471</sup> For discussion of the compelled speech cases and their noncommercial speech contexts, see *supra* text accompanying notes 274–80. Other commentators have advocated importing the compelled speech cases into the commercial speech realm. See Keighley, *supra* note 135, at 544–72; Calvert, Allen-Brunner, & Locke, *supra* note 65, at 236–43. Again, however, too much match-up in the analytical frameworks governing commercial and noncommercial speech risks the dangers referred to in the preceding note. See *supra* note 470.

for warnings featuring graphic elements. The compelled subsidy cases address the question of whether a company in a certain industry can be required, under a federal regulatory regime that extensively regulates the industry, to pay monetary assessments to support industry-promoting advertisements. In *Glickman v. Wileman Bros. & Elliott, Inc.*,<sup>472</sup> a 1997 decision, the Court held that there was no First Amendment violation in the requirement that fruit growers pay assessments to fund generic advertisements for fruit-growers as part of an extensive federal regulatory regime dealing with such fruit-growers.<sup>473</sup> Yet four years later, in *United States v. United Foods, Inc.*,<sup>474</sup> the Court held that there was a First Amendment violation when a mushroom grower was compelled to pay assessments to fund generic advertisements for mushroom growers generally.<sup>475</sup> The Court distinguished *Wileman Brothers* on the ground that the regulatory regime there was more extensive than in *United Foods* and on the further ground that in *United Foods*, the speech-affecting provision appeared to be the primary purpose of the regulatory efforts rather than a more incidental component.<sup>476</sup>

The warning requirements contemplated by the TCA seem different from the specific monetary assessments present in the compelled subsidy cases, though, of course, tobacco companies are expected to cover the costs of ensuring that their product packages and advertisements comply with the required warnings. If the Court were to apply the compelled subsidy cases, however, the highly detailed regulatory regime set forth in the TCA would be a complicating factor in the decision whether *Wileman Bros.* or, instead, *United Foods* would control. The Court probably should steer clear of the compelled subsidy cases if it is faced with evaluating the required health warnings for tobacco products because the compelled subsidy decisions are an uncertain mess, and a mess complicated by another decision invoking the *government speech* doctrine. In *Johanns v. Livestock Marketing Ass'n*,<sup>477</sup> a 2005 decision, the Court held that a monetary assessment imposed on beef producers in order to fund generic ads of the sort present in

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<sup>472</sup> 521 U.S. 457 (1997).

<sup>473</sup> *Id.* at 463, 475–77.

<sup>474</sup> 533 U.S. 405 (2001).

<sup>475</sup> *Id.* at 408, 412–16.

<sup>476</sup> *Id.* Notably, the Court mentioned that it was not considering the government's argument that it should prevail on the basis of the emerging *government speech* doctrine, because the government had not made such an argument in the Court of Appeals. *Id.* at 416–17. The government speech argument would soon surface in the arguably similar case referred to shortly in the text.

<sup>477</sup> 544 U.S. 550 (2005).



*Wileman Brothers* and *United Foods* did not violate the First Amendment because the ads funded by the assessment constituted *government speech*.<sup>478</sup>

Although the specific contours of the government speech doctrine remain less than clearly defined, active government control of the message to be communicated appears to be a necessary prerequisite for application of the doctrine.<sup>479</sup> If the Court were deciding a case dealing with the required health warnings for tobacco products, an opening of the door to consideration of the compelled subsidy cases would likely cause the Court to have to consider whether the government speech doctrine would apply. After all, the content of the mandatory warning is scripted by the government. The Court may very well want to stay out of the compelled subsidy-government speech thicket.

Previous discussion focused on the 2011 *Sorrell* decision, in which the Court floated a trial balloon regarding supposed “heightened scrutiny” for certain commercial speech decisions but ultimately came back to the *Central Hudson* case for the actually controlling principles.<sup>480</sup> If deciding a tobacco advertising case or, for that matter, any commercial speech case, the Court should not attempt to extend the heightened scrutiny approach to any situations other than the one present in *Sorrell* (a government restriction on marketing-related disclosures or uses of certain information where that very same information can be widely disclosed and used for other purposes).<sup>481</sup> Extending *Sorrell* any further would needlessly muddy the commercial speech waters and would, as Justice Breyer stressed in his *Sorrell* dissent, open up too many regulatory programs to First Amendment-based attacks.<sup>482</sup>

Finally, some members of the Court have at times stated or hinted that commercial speech should not be treated differently from noncommercial speech for First Amendment purposes.<sup>483</sup> Yet the distinction in levels of protection still exists, as it should. Abolishing the distinction and extending full protection to commercial speech would too drastically impair governmental ability to regulate on matters of public health, safety, and welfare. Moreover, using a tobacco advertising case as a vehicle for abolishing the distinction would seem especially inappropriate, given tobacco use’s regrettable status as “perhaps the single most significant

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<sup>478</sup> *Id.* at 553–55, 557–63.

<sup>479</sup> *See id.* at 560–62.

<sup>480</sup> *See supra* text accompanying notes 233–63.

<sup>481</sup> *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2660–64 (2011).

<sup>482</sup> *See id.* at 2673–85 (Breyer, J., dissenting). For further discussion of this dissent, see *supra* notes 258–60 and *supra* text accompanying notes 257–60.

<sup>483</sup> *See supra* notes 174, 182.

threat to public health in the United States.”<sup>484</sup> One doubts whether even those Justices who favor treating commercial speech and noncommercial speech alike would want to risk being perceived as residing in the pockets of the tobacco industry.

#### CONCLUSION

With the enactment of the Family Smoking Prevention and Tobacco Control Act of 2009 (TCA), the federal government launched a major effort to regulate the advertising and promotion of tobacco products. It was by no means the government’s first effort in that regard, because federally required health warnings have appeared on tobacco product packages and in advertisements for such products for more than four decades and televised advertisements for cigarettes have been banned for roughly the same length of time. But the TCA marked a significant expansion and ramping-up of the government’s regulatory regime. Through a combination of TCA measures directly regulating tobacco product promotion and directions to the FDA to develop appropriate rules, Congress sought more effective ways to communicate the health risks of tobacco use to the public—especially to minors. Congress also sought in the TCA to lessen the influence of tobacco companies’ promotional activities on minors and to lower smoking rates among minors as well as the public generally.

The new regulatory regime set up by the TCA restricted tobacco advertising and promotion in various ways. It also significantly modified the long-required health warnings that must appear on tobacco product packages and in advertisements by requiring the inclusion of color graphics along with the text of the warnings and by specifying that the text-and-graphics warning be very prominently displayed on packages and in advertisements. In addition, the TCA directed the FDA to develop particular graphic images that the tobacco industry would be required to use in their display of the federally mandated warnings. Tobacco companies have brought First Amendment-based challenges to the TCA’s various advertising and promotion provisions and to the FDA’s later-promulgated regulation setting forth particular graphic images for required use by the tobacco industry. One federal circuit upheld most, but not all, of the TCA’s advertising and promotion provisions. Another circuit invalidated the graphic images devised by the FDA and sent the agency back to the drawing board.

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<sup>484</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 570 (2001) (quoting *Brown & Williamson*, 529 U.S. at 161).

Proper resolution of the First Amendment issues associated with the TCA and related FDA regulations depends upon appropriate navigation of different free speech streams set forth in Supreme Court precedents. This Article's exploration of those streams and its analysis of the two key federal circuit decisions lead to the conclusion that if properly applied, relevant First Amendment principles should provide the government a fairly long but not limitless leash when it regulates tobacco advertising and promotion. The Article also furnishes guidance to courts and regulators on particular measures Congress and the FDA should and should not be able to employ in light of the First Amendment. The Article's cautionary remarks about First Amendment thickets to avoid should also be useful if the Supreme Court opts to decide a tobacco advertising case and seeks to rule in a way that does not inject further confusion into an already too-disjointed area of the law.