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ESSAYS

CONSTITUTIONAL QUALMS CONCERNING GOVERNMENTAL RESTRICTIONS ON TOBACCO PRODUCT ADVERTISING

*Barbara A. Noah**

I. INTRODUCTION

DESPITE its undoubted public health importance, the decision by the U.S. Food and Drug Administration (FDA) to assert jurisdiction over cigarettes and other tobacco products raises significant constitutional questions. Indeed, one of the stumbling blocks to current efforts by Congress to codify the tobacco industry's proposed settlement turns on precisely this issue—namely, to what extent can the government restrict advertising of a lawful product without running afoul of First Amendment protections for commercial speech. The Clinton administration, which had heartily endorsed the FDA's restrictions on tobacco advertising, later warned Congress that a federal statute imposing more sweeping limits would present serious constitutional problems.¹ It is likely that the broader restrictions contemplated by Congress will pose more troublesome constitutional obstacles than those already imposed by the FDA.

In August 1996, the FDA issued new rules designed to restrict the marketing of tobacco products.² Among other things, the regulations establish a federal minimum age for the purchase of tobacco products, prohibit some vending machine sales, and mandate the inclusion of certain information in labeling.³ More importantly, the new regulations restrict the placement of outdoor advertising for tobacco products,

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1. See David E. Rosenbaum, *White House Warns Congress Over Limiting Tobacco Ads*, N.Y. TIMES, Mar. 3, 1998, at A16; Jeffrey Taylor, *Sen. McCain and White House Attempt to Hammer Out Tobacco-Deal Details*, WALL ST. J., Mar. 4, 1998, at A4 (describing Federal Trade Commission Chairman Robert Pitofsky's warning to the Senate Commerce Committee that advertising restrictions contained in the proposed settlement are unlikely to survive court challenges from tobacco companies).

2. See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,616-18 (1996) (codified at 21 C.F.R. pt. 897 (1998)).

3. See *id.* at 44,396-97 (summarizing the new regulations). The FDA requires, for instance, that retailers verify the age of purchasers by demanding picture identification, and it prohibits vending-machine sales in certain locations, as well as the distribution of free samples of both cigarettes and smokeless tobacco products. See 21 C.F.R. §§ 897.14, 897.16 (1998).

including billboards and posters, within 1,000 feet of any playground or school.⁴ They also limit all tobacco product advertising in publications with an under eighteen-year-old target audience to black text on a white background, sometimes characterized as a "tombstone" format.⁵ Further, the regulations prohibit the marketing, distribution, sale, or gift of any items, other than the tobacco products themselves, bearing the product name, logo, selling message, or other "indicia of product identification," and they prevent tobacco product manufacturers, distributors, and retailers from sponsoring any sporting, musical, or other entertainment event using brand-names or other identifying information.⁶

The industry immediately challenged the FDA regulations, filing a declaratory judgment action in federal court in North Carolina.⁷ In 1997, the district court granted the plaintiffs partial summary judgment, agreeing that the agency could regulate tobacco products but deciding that the restrictions on advertising exceeded the FDA's statutory authority, thereby avoiding the need to rule on the industry's constitutional arguments.⁸ Judge Osteen certified his order for an interlocutory appeal, which is still pending before the U.S. Court of Appeals for the Fourth Circuit.⁹

Although the broad public health goals underlying the regulations seem unassailable, there are serious doubts about the FDA's assertion of legal authority to regulate tobacco products in the manner that it has selected.¹⁰ Moreover, even if the regulations comport with the terms of the FDA's enabling statute, some have argued that the agency exceeded First Amendment limitations in restricting advertising.¹¹ Although Congress is able to cure any statutory weaknesses in the FDA's position through legislation that explicitly delegates authority to the agency, Congress is no less subject to these constitutional obstacles in pursuing its legislative goals. In fact, given the wider variety of options available to it for reducing the use of tobacco products by minors, Congress may well face more searching constitutional scrutiny of its legislation than the FDA regulations would.

This essay will evaluate the constitutionality of a representative series of congressional proposals to limit tobacco advertising. Federal legislation codifying

4. See 21 C.F.R. § 897.30(b) (1998).

5. See *id.* § 897.32(a). This restriction applies when minors account for more than either 15% of a publication's readership or two million readers of a publication.

6. See *id.* § 897.34. The regulations would, however, permit such events to be sponsored in the name of the corporation that manufactures the products, provided that the corporate name had been registered before January 1, 1995. See *id.* § 897.34(c).

7. See Barnaby J. Feder, *Tobacco Curbs Face Legal Fight*, N.Y. TIMES, Aug. 24, 1996, at A8; Claudia MacLachlan, *Tobacco's Road is Smooth: FDA Regs Face Legal Fight*, NAT'L L.J., Sept. 9, 1996, at B1, B2.

8. See *Coyne Beahm, Inc. v. FDA*, 958 F. Supp. 1060, 1086 (M.D.N.C. 1997).

9. See Bob Van Voris, *Circuit Overdue on Tobacco Case*, NAT'L L.J., Feb. 16, 1998, at A6; *Judge's Death Puts Ruling in Question on FDA and Tobacco*, WALL ST. J., Feb. 27, 1998, at A6.

10. See, e.g., Lars Noah & Barbara A. Noah, *Nicotine Withdrawal: Assessing the FDA's Effort to Regulate Tobacco Products*, 48 ALA. L. REV. 1, 15-37 (1996); Lars Noah, *Regulating Cigarettes: (Non)sense and Sensibility*, 22 S. ILL. U. L.J. 677 (1998).

11. In fact, the FDA recently lost a similar battle over its restrictions on health claims for dietary supplements. See *Pearson v. Shalala*, 164 F.3d 650, 655 (D.C. Cir. 1999) (invalidating restrictions on First Amendment grounds).

the tobacco settlement might include restrictions on outdoor advertising, a prohibition on the use of cartoon images, permitting only tombstone format for advertisements in publications that target a youth audience, a prohibition on the sale or gift of promotional items bearing tobacco product names or logos, a ban on industry sponsorship of sporting and other cultural events, and restrictions on Internet promotions.¹² In seeking to prevent tobacco companies from encouraging illegal tobacco use by minors, the FDA's advertising restrictions, and any comparable legislation enacted by Congress, will limit a broad category of commercial speech.

II. THE CONSTITUTIONAL STANDARD FOR PROTECTION OF COMMERCIAL SPEECH

In 1971, at the tobacco industry's prompting, Congress prohibited all broadcast advertising of cigarettes.¹³ In a decision pre-dating any judicial recognition of special protection for commercial speech, a federal court upheld this legislation.¹⁴ In concluding that the statute did not violate the First Amendment rights of broadcasters, the district court noted that, because "nothing in the Act . . . precludes a broadcast licensee from airing its own point of view on any aspect of the cigarette smoking question, it is clear that petitioners' speech is not at issue."¹⁵ The court also held that Congress had a rational basis for prohibiting the advertising because substantial evidence demonstrated that radio and television reached a large audience of young people.¹⁶

Subsequently, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,¹⁷ the Supreme Court developed a four-part test to determine whether a restriction on commercial speech exceeds First Amendment limitations:

For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.¹⁸

12. See, e.g., S. 1415, 105th Cong. (Nov. 7, 1997); S. 1491, 105th Cong. (Nov. 8, 1997); S. 1530, 105th Cong. (Nov. 13, 1997). Many of the proposals in Congress closely mirror the FDA's regulations with regard to restrictions on tobacco product advertising. See, e.g., Gregory D. Bassuk, Note, *Advertising Rights and Industry Fights: A Constitutional Analysis of Tobacco Advertising Restrictions in a Federal Legislative Settlement of Tobacco Industry Litigation*, 85 GEO. L.J. 715, 717-19 (1997) (describing the contours of early proposed settlement plans).

13. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 6, 84 Stat. 87 (codified as amended at 15 U.S.C. § 1335 (1994)).

14. See *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd mem.*, 405 U.S. 1000 (1972). The Supreme Court first recognized special constitutional protection for commercial speech in 1976. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

15. See *Capital Broad. Co.*, 333 F. Supp. at 584.

16. See *id.* at 585-86.

17. 447 U.S. 557 (1980).

18. *Id.* at 566. The four-part analysis in *Central Hudson* was reaffirmed in the Court's decision to overturn a prohibition on the disclosure of alcohol content in the labeling of beer. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995). See also *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1508-10 (1996) (plurality) (striking down state prohibition against alcohol price advertising as

In other words, assuming that the speech does not relate to some unlawful activity and is not inherently misleading, the government may restrict commercial speech only to achieve a substantial interest, and then only to the extent necessary. The Supreme Court continues to grapple with the application of these standards in a variety of commercial speech contexts, and, as explained below, recent decisions suggest that the Court is moving generally in the direction of more protection for this kind of speech.

Although it is difficult to predict precisely what restrictions might be included in whatever legislation codifies the tobacco industry settlement, some advertising and promotional limitations that were part of the original FDA regulations appear repeatedly in a number of proposed tobacco settlement bills. The following sections will examine how each of these restrictions would fare under the constitutional standard.

A. *Government Interest in Controlling Tobacco Advertising*

The *Central Hudson* test first asks whether the speech in question is false or relates to some illegal activity; if so, it is not protected by the First Amendment and may be banned altogether.¹⁹ The government has not suggested that existing labeling and advertising of tobacco products is false, and tobacco companies have refrained from expressly urging underage use. Nonetheless, FDA officials and members of Congress take the position that certain types of tobacco advertising encourage unlawful use of these products by minors and are inherently misleading. Curiously, in defending the constitutionality of its proposed restrictions on tobacco advertising, the FDA did not initially argue that such advertising promotes an unlawful activity or is inherently misleading.²⁰ In the preamble accompanying the final regulations, the agency suggested, but did not rely on, this argument.²¹ Some tobacco company

unconstitutional under the *Central Hudson* test, and suggesting an even stricter test for scrutinizing such outright prohibitions on commercial speech); *id.* at 1522 (O'Connor, J., concurring in judgment) ("Because Rhode Island's regulation fails even the less stringent standard set out in *Central Hudson*, nothing here requires adoption of a new analysis for the evaluation of commercial speech regulation.").

19. See *Central Hudson*, 447 U.S. at 566. See also *United States v. Edge Broad. Co.*, 509 U.S. 418, 426-30 (1993) (upholding a federal statute restricting broadcast advertising of lotteries if unlawful within a state); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495-96 (1982) (rejecting First Amendment challenge to an ordinance regulating the sale of drug paraphernalia within a certain proximity of any literature encouraging the use of illegal drugs); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973) ("We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes.").

20. See *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents*, 60 Fed. Reg. 41,314, 41,354 (1995) ("The *Central Hudson* analysis begins with the second prong.").

21. See *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents*, 61 Fed. Reg. 44,396, 44,470-72 (1996). Cf. Vincent Blasi & Henry P. Monaghan, *The First Amendment and Cigarette Advertising*, 256 JAMA 502, 506 (1986) (arguing that cigarette advertising is deceptive and misleading); Kenneth L. Polin, *Argument for the Ban of Tobacco Advertising: A First Amendment Analysis*, 17 HOFSTRA L. REV. 99, 113 (1988) (arguing that tobacco product advertising is inherently misleading and, thus, can be banned without

documents suggest that these companies deliberately targeted minors in past advertising campaigns. Nevertheless, because any codification of the settlement will proscribe certain types of future advertising, the past motives of some tobacco manufacturers, however reprehensible, should be irrelevant under the first prong of the *Central Hudson* analysis.

For purposes of deciding the constitutionality of any prospective restrictions, the issue is simply whether the permitted future advertisements of a certain type promote an unlawful activity or are inherently misleading. Unless these advertisements explicitly urge underage smoking (or provide coupons or other incentives that have the same effect), they do not directly promote an unlawful activity. To the extent that they might do so indirectly, the advertising restrictions must satisfy the remaining prongs of the commercial speech test. If it were otherwise, then a variety of promotional campaigns (such as advertisements for sports cars) which indirectly encourage unlawful activities (such as violating posted speed limits) would receive absolutely no constitutional protection from governmental restrictions.

Assuming that the category of commercial speech is neither false nor misleading, the second prong of the *Central Hudson* test asks whether the government has asserted a substantial interest in imposing the restriction.²² The FDA simply noted that it has a significant interest in protecting the public health by reducing smoking among youngsters, proceeding to the third prong of the analysis.²³ The government undoubtedly has a legitimate interest in reducing the number of minors who begin smoking, both to protect the health of those individuals and to reduce the cost to society in caring for them when they suffer from tobacco-related illnesses.²⁴ It is doubtful that anyone, even the tobacco industry, can successfully rebut this claim.²⁵ As the investigation into the past advertising practices of the tobacco industry continues, evidence that the industry targeted teens as potential smokers continues

violating constitutional protections for commercial speech). *But see Dunagin v. City of Oxford*, 718 F.2d 738, 743 (5th Cir. 1983) (en banc) (arguing, in the context of liquor advertisements, that “[n]early all advertising associates the promoted product with a positive or alluring lifestyle or famous or beautiful people”).

22. *See Central Hudson*, 447 U.S. at 566. *See also* *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986) (holding that the legislature’s interest in promoting the health, safety, and welfare of its citizens by reducing their demand for gambling is substantial and justifies the regulation of gambling advertising).

23. *See* 61 Fed. Reg. at 44,472-73.

24. *See, e.g., id.* at 44,399; Jane E. Brody, *Study Finds Stunted Lungs in Young Smokers*, N.Y. TIMES, Sept. 26, 1996, at B10. To the extent that the FDA asserts a collateral goal of reducing consumption by adults exposed to the same types of advertising, the proposed restrictions may be harder to justify under the remaining prongs of the *Central Hudson* test. *See 44 Liquormart, Inc.*, 116 S. Ct. at 1508 (plurality) (“The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.”). *See also id.* at 1516 (Thomas, J., concurring in judgment) (concluding that such an interest is “*per se* illegitimate”).

25. In fact, one American cigarette manufacturer has admitted to several important facts underlying the government’s asserted interest in reducing adolescent tobacco use. The Liggett Group, Inc., has conceded that cigarette smoking is addictive and causes cancer, and that cigarette makers have targeted minors with their marketing efforts. *See* John M. Broder, *Cigarette Maker Concedes Smoking Can Cause Cancer*, N.Y. TIMES, Mar. 21, 1997, at A1.

to accumulate.²⁶ Thus, the real focus of the debate over the constitutionality of restrictions on the advertising of tobacco products will revolve around the nexus and narrow tailoring requirements of the *Central Hudson* test.

B. *The Nexus Between Means and Ends*

Assuming that a substantial government interest supports the tobacco advertising restrictions, the next question is whether the regulations directly advance the asserted interests.²⁷ Although the FDA took comfort in the Supreme Court's willingness in one recent case to accept anecdotal evidence in support of a restriction on commercial speech,²⁸ the Court generally has been reluctant to allow interference with protected speech on the basis of such a tenuous evidentiary foundation.²⁹ In *Rubin v. Coors Brewing Co.*,³⁰ for example, the Court emphasized that the government shoulders the burden of showing that a restriction advances its asserted interests "in a direct and material way."³¹

In the course of its rulemaking proceeding, the FDA gathered a wealth of evidence regarding the association between promotion and the use of cigarettes and smokeless tobacco products by minors.³² The agency also collected evidence, including reports

26. Evidence continues to mount that the tobacco industry purposefully targeted teenagers with advertising, and that this advertising increased rates of teen smoking. See Charles King III, et al., *Adolescent Exposure to Cigarette Advertising in Magazines*, 279 JAMA 516 (1998) (concluding that the cigarette brands that are most popular with adolescent smokers are more likely than adult brands to advertise in magazines with a high percentage of young readers); Jeffrey Taylor, *Tobacco Ads' Role in Teen Smoking Meets Criticism*, WALL ST. J., Feb. 18, 1998, at B10.

27. See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980) (explaining that "the regulatory technique must be in proportion to that interest" and must "be designed carefully to achieve the State's goal").

28. See 61 Fed. Reg. at 44,474 (1996). See also *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 627-28 (1995) ("The anecdotal record mustered by the Bar is noteworthy for its breadth and detail. . . . In any event, we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information."). The Court was sharply divided on this and other aspects of the case. See *id.* at 641 (Kennedy, J., dissenting) ("Our cases require something more than a few pages of self-serving and unsupported statements by the State to demonstrate that a regulation directly and materially advances the elimination of a real harm when the State seeks to suppress truthful and non-deceptive speech.").

29. See *Central Hudson*, 447 U.S. at 569 (noting that the link between the advertising prohibition and the utility's rate structure was tenuous, even if there was an "immediate connection" between the advertising at issue and the demand for electricity: "[T]he Commission's laudable concern over the equity and efficiency of appellant's rates does not provide a constitutionally adequate reason for restricting protected speech."). See also *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1509-11 (1996) (requiring the State to show that a ban on liquor price advertising "will significantly advance the State's interest in promoting temperance" and requiring "findings of fact" and "evidentiary support" that the State's restrictions would be effective); *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (explaining that the government's burden is not satisfied by "mere speculation or conjecture").

30. 514 U.S. 476 (1995).

31. See *id.* at 487; *44 Liquormart, Inc.*, 116 S. Ct. at 1509-10 (plurality) (finding inadequate evidence to support the state's claim that its ban on alcohol price advertising would promote temperance).

32. See *Regulations Restricting the Sale & Distribution of Cigarettes & Smokeless Tobacco Products to Protect Children & Adolescents*, 61 Fed. Reg. 44,396, 44,488-89 (1996) (summarizing the evidence); *id.* at 44,466-69, 44,475-88, 44,494-95 (detailing the evidence).

of success in other countries, to demonstrate that advertising restrictions reduce consumption.³³ Thus, it concluded that the restrictions directly advanced the government's legitimate interest in protecting the public health.³⁴ Similarly, Congress continues to gather information about the relationship between advertising and decisions by teenagers to try smoking; thus, the evidence supporting the government's assertion that restrictions on advertising will directly advance the governmental interest continues to grow.³⁵ Although critics of studies concerning the relationship between advertising and teen smoking question the validity of these conclusions,³⁶ courts typically accord substantial deference to congressional factfinding.³⁷

Overall, the proposed restrictions on advertising seem likely to reduce demand for cigarettes among the adolescent population to some extent,³⁸ though forced reductions in the billions of dollars spent annually by the tobacco industry for advertising could lead to greater price competition, which might actually increase purchasing by minors, unless counteracted with steep taxes on tobacco products.³⁹ Viewed individually, the likely effectiveness of the different restrictions seems more variable.

The various pending bills suggest a range of potential restrictions on outdoor advertising. At one extreme, the FDA's regulation restricts only advertising on billboards by prohibiting their placement within 1,000 feet of schools and playgrounds.⁴⁰ At the other extreme, one recent bill proposes to prohibit all forms

33. See *id.* at 44,489-93.

34. *Id.* at 44,495.

35. One study conducted by researchers at the University of California at San Diego's Cancer Center concluded that 34% of teenage experimentation with cigarette smoking is attributable to advertising and promotional activities. See John P. Pierce et al., *Tobacco Industry Promotion of Cigarettes and Adolescent Smoking*, 279 JAMA 511 (1998) (providing evidence that tobacco advertising has a causal connection with teenagers' decisions to begin smoking).

36. See Howard K. Jeruchimowitz, Note, *Tobacco Advertisements and Commercial Speech Balancing: A Potential Cancer to Truthful, Nonmisleading Advertisements of Lawful Products*, 82 CORNELL L. REV. 432, 454-55 (1997) (describing the evidentiary debate and concluding that the government may have difficulty proving a direct link between advertising and tobacco consumption).

37. See *United States v. Edge Broad. Co.*, 509 U.S. 418, 428 (1993). This special deference accorded to congressional factfinding has parallels in the Court's previous Equal Protection jurisprudence. See *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (Burger, C.J., concurring plurality) (noting that the Court is "bound to approach [its] task with appropriate deference to the Congress, a co-equal branch"). Cf. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491-92 (1989) (showing less deference in reviewing a municipal ordinance).

38. See Erica Sweicker, Note, *Joe Camel: Will "Old Joe" Survive?*, 36 WM. & MARY L. REV. 1519, 1522-25 (1995); Timothy Noah, *Study Says Minors Respond More to Cigarette Ads Than Do Adults*, WALL ST. J., Apr. 4, 1996, at B8 (summarizing a new study finding that advertising influenced adolescent smokers' preferences among cigarette brands). Cf. *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1509-10 (1996) (plurality) (discounting the value of evidence concerning the purported link between price advertising and the level of alcohol consumption).

39. See Daniel Helberg, Note, *Butt Out: An Analysis of the FDA's Proposed Restrictions on Cigarette Advertising Under the Commercial Speech Doctrine*, 29 LOY. L.A. L. REV. 1219, 1260 (1996). The FDA dismissed this possibility with little discussion. See 61 Fed. Reg. at 44,511 (1996). It conceded elsewhere that the industry would save money, but speculated that the unspent advertising budgets would be redirected as increased dividends for shareholders or investments in other product lines. See *id.* at 44,570.

40. See 21 C.F.R. § 897.30(b) (1998).

of outdoor advertising, including billboards, posters, and placards, in all locations.⁴¹ Recent constitutional challenges to billboard restrictions may offer useful guidance about this aspect of the proposed restrictions on outdoor tobacco advertising. In *44 Liquormart, Inc. v. Rhode Island*,⁴² the Supreme Court held that state statutes prohibiting the advertising of liquor prices other than at the point of sale were unconstitutional.⁴³ In the wake of this decision, however, the U.S. Court of Appeals for the Fourth Circuit⁴⁴ distinguished *44 Liquormart*, emphasizing that the ordinance did not amount to a complete prohibition and also was designed to protect underage consumers rather than adults.⁴⁵ By contrast, the Rhode Island law denied all adult consumers any information about alcoholic beverage prices. In distinguishing *44 Liquormart*, the Fourth Circuit's opinion emphasized Baltimore's goal of protecting children from advertisements that encourage the use of products that are harmful and illegal to sell to children. Based on the court's increasingly speech-protective position as described in *44 Liquormart*, it appears that only those restrictions on outdoor advertising that directly and materially advance the government's goal of protecting children will survive constitutional scrutiny.⁴⁶ To the extent that some of the congressional proposals restrict advertising that children ordinarily do not see, these restrictions do not have a direct effect on the number of minors who smoke. These broader prohibitions on outdoor advertising are far less likely to satisfy the *Central Hudson* test's third prong. The narrower restrictions, similar to those in the FDA's regulations, should survive a constitutional challenge if the government can provide the necessary evidence of a direct connection between such advertising and the incidence of teenage tobacco use.

The tombstone format restriction for advertisements in publications with a large teenage readership also seems likely to have a direct and material effect on adolescent demand for tobacco products. The FDA regulation, if codified in the legislation, would restrict tobacco advertisements in publications with a youth readership of fifteen percent or more to this black and white, text-only format.⁴⁷ As with the

41. See, e.g., S. 1415, 105th Cong. § 101(a)(1) (Nov. 7, 1997). This would prohibit "any form of outdoor tobacco product advertising, including billboards, posters, or placards."

42. 116 S. Ct. 1495 (1996) (plurality).

43. See *id.* at 1515.

44. See *Penn Adver. of Baltimore, Inc. v. Mayor of Baltimore*, 862 F. Supp. 1402 (D. Md. 1994), *aff'd*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 2575 (1996), *modified*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997); *Anheuser-Busch, Inc. v. Mayor of Baltimore*, 855 F. Supp. 811 (D. Md. 1994), *aff'd sub nom. Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 1821 (1996), *modified*, 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997).

45. See *Anheuser-Busch*, 101 F.3d at 328-29 (noting that children "deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media"). See also Donald W. Garner & Richard J. Whitney, *Protecting Children from Joe Camel and His Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation*, 46 EMORY L.J. 479, 551 (1997) (arguing that government action to control commercial speech that is harmful to children is "entitled to significantly greater deference by the courts than when [the government] act[s] to control commercial speech in general").

46. See *44 Liquormart, Inc.*, 116 S. Ct. at 1509.

47. See *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents*, 61 Fed. Reg. 44,396, 44,513 (1996). Other proposals would ban tobacco product advertising altogether in publications with this substantial youth readership. See

billboard restrictions discussed above, as long as the government can offer some substantial evidence that this restriction will reduce underage tobacco use in a direct and material way, it will probably survive scrutiny under the third prong of the *Central Hudson* test. Such evidence might include studies confirming that the text-only advertisements generate significantly less interest among readers than do full-color advertisements with drawings or photographs.⁴⁸ However, to the extent that Congress is considering a tombstone format restriction for print advertising in all publications without regard to their targeted readership, such limitations seem vulnerable.

Similarly, the ban on promotional items and programs would appear to relate directly to adolescent demand for tobacco products. Many of these programs are designed to increase the rate of tobacco products purchasing by requiring the consumer to collect coupons or proofs of purchase which they can then redeem for merchandise bearing a tobacco product brand name or logo. To the extent that the government can proffer evidence that such programs appeal particularly to adolescent consumers of tobacco products, a ban on these programs would likely advance the governmental interests in a direct and material way.

In contrast, restrictions on brand name sponsorship of sports events and other entertainment events seems less likely to produce a direct effect on teen demand for tobacco products, and the government may have more difficulty in proving a causal connection between attendance at industry-sponsored events and smoking. If, in fact, the evidentiary link between event sponsorship and adolescent tobacco use remains anecdotal, then this restriction may fail to satisfy the third prong of the *Central Hudson* test.

Finally, some bills to codify the tobacco settlement have included a proposed ban on Internet advertising of these products.⁴⁹ In *Reno v. ACLU*,⁵⁰ the Supreme Court considered the First Amendment's application to the Internet. In striking down a recent statute as an overbroad attempt to restrict minors' access to obscene materials on the Internet, the Court emphasized this medium's unique qualities.⁵¹ Noting that the Internet was a communications medium with no history of government regulation,⁵² the Court went on to criticize the vagueness of the statutory language.⁵³ A ban on Internet advertising of tobacco products would certainly be more explicit than the vague prohibition against permitting underage access to obscene and indecent materials, and would face weaker constitutional scrutiny as commercial speech, but such a limitation suffers from other flaws. It may not be technologically

Children's Health Preservation and Tobacco Advertising Compliance Act, S. 1755, 105th Cong. (1998). The same bill would ban the use of human images and cartoon figures in all tobacco advertising, no matter the target audience. *See id.*

48. *See* 61 Fed. Reg. 44,466-68, 44,508-13 (1996); 61 Fed. Reg. 49,475-82 (1996) (describing available evidence); 60 Fed. Reg. 41,333-34 (1995); 60 Fed. Reg. 41,335-56 (1995).

49. *See, e.g.*, Children's Health Preservation and Tobacco Advertising Compliance Act, S. 1755, 105th Cong. § 2 (1998) (conditioning a tax exemption on compliance with a prohibition of advertisements of tobacco products on the Internet "unless such advertisement[s] [are] inaccessible in or from the United States").

50. 117 S. Ct. 2329 (1997).

51. *See id.* at 2341-50.

52. *See id.* at 2342.

53. *See id.* at 2344.

feasible to limit access from the United States to advertisements posted on Internet sites that are maintained by American tobacco companies but that originate in other countries. Once companies receive warning of the consequences, however, they will likely comply, so the restriction will have an extraterritorial effect. The government may have some difficulty demonstrating that such a ban would directly advance its asserted interest in reducing adolescent tobacco product use as well, because minors would still be able to access foreign tobacco advertisements without difficulty. Because Congress could assert control only over those Internet sites worldwide that could carry U.S. tobacco company advertisements, the effectiveness of such a ban remains highly questionable.

C. *The Availability of Less Speech-Restrictive Alternatives*

1. *The Over-Inclusiveness of the Proposed Advertising Regulations*

The proposals seem most vulnerable under the final prong of the *Central Hudson* test,⁵⁴ which requires that a restriction be no more extensive than necessary to achieve the government's goal.⁵⁵ The FDA's preamble includes a detailed explanation to justify each of its advertising limitations.⁵⁶ Nevertheless, some of the restrictions fail to differentiate between advertisements directed at minors, in whose welfare the government asserts a substantial interest, and advertisements directed at adults.⁵⁷ The simple response to this concern is that, to the extent that a number of the proposals fail to draw a bright line between advertising targeted to teenagers and material intended for adults, such a line is both impractical and unnecessary.

54. See David Cole, *Muzzling Joe Camel*, LEGAL TIMES, May 6, 1996, at 22; Helberg, *supra* note 39, at 1258-66. Cf. Lars Noah & Barbara A. Noah, *Liberating Commercial Speech: Product Labeling Controls and the First Amendment*, 47 FLA. L. REV. 63, 99-104 (1995) (evaluating the FDA's food labeling restrictions on health claims).

55. See, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993) ("While we have rejected the 'least-restrictive-means' test for judging restrictions on commercial speech, so too have we rejected mere rational basis review [I]f there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."); *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

56. See 61 Fed. Reg. at 44,500-37, 44,610. The FDA repeatedly explained that adults will continue to have access to informational advertising through the text-only format (and to unrestricted advertising in adult publications and establishments) but that children will no longer be exposed to appealing colors and imagery. For an argument that such restrictions violate the Constitution, see Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 625-30, 638 (1996). According to Professor Redish, only the restrictions on tobacco advertising in the vicinity of schools or playgrounds pass First Amendment muster. See *id.* at 608.

57. Cf. *Sable Communications v. FCC*, 492 U.S. 115, 131 (1989) (invalidating restriction on phone-sex services that "has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear"); *Penn Adver. of Baltimore, Inc. v. Mayor of Baltimore*, 63 F.3d 1318, 1325-26 (4th Cir. 1995) (rejecting First Amendment challenge to a city's prohibition on all cigarette billboard advertising justified as a way to reduce underage smoking), *vacated*, 116 S. Ct. 2575 (1996), *modified*, 101 F.3d 325 (4th Cir., 1996), *cert. denied*, 117 S. Ct. 1569 (1997).

Undoubtedly, some of the advertising restrictions would have an impact on information that is of use to adult smokers—critics of the tombstone format limitation point out that the larger majority of adult readers of affected publications will be deprived of truthful, non-misleading information about a product that they may lawfully purchase and enjoy.⁵⁸ The same over-inclusiveness argument might apply to any billboard or Internet advertising restrictions because they will affect all tobacco users, not just minors. One less restrictive alternative would be to ban tobacco advertising from all Internet sites, but to allow tobacco companies to maintain corporate home pages where adult smokers can deliberately seek out “important information” about tobacco products. However, because the proposed ban on Internet advertising, unlike the speech restriction in *Reno*,⁵⁹ targets only a specific type of advertising rather than a whole category of speech, it may survive constitutional scrutiny in its proposed form. The proposed ban on sponsorship of all sporting and entertainment events, such as musical and cultural productions, appears to be overbroad as well because it will affect adults who attend these events, as well as minors. The problem is that these overlaps are unavoidable. If the government can pursue its objectives using more precise restrictions, then the broader rules are unconstitutional; if not, then the government can constitutionally restrict the commercial speech.

2. *Taxation of Tobacco Products*

The FDA originally had argued, among other things, that the government’s greater power to ban tobacco products includes the lesser power to regulate extensively the advertising of these products,⁶⁰ and that it has “greater leeway” to regulate “speech with regard to socially harmful activities.”⁶¹ In its latest commercial speech decision, however, the Supreme Court roundly rejected these arguments.⁶² Recognizing the weakness of its initial defense, the agency included in the final preamble a more sophisticated response to these constitutional objections, including an explanation

58. See Redish, *supra* note 56, at 627 (explaining that limitations on the use of color and pictures “significantly interfere with the communicator’s ability to reach the intended audience” and concluding that “a speaker’s ability to choose the manner of expression should not be viewed as uniquely tied to the speaker’s developmental interest, but to the listener’s free speech rights as well”).

59. 117 S. Ct. 2329 (1997).

60. See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed. Reg. 41,314, 41,355 (1995) (citing *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 345-46 (1986)).

61. 60 Fed. Reg. at 41,355 (1995).

62. See *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1511-13 (1996) (plurality) (“The reasoning in *Posadas* does support the State’s argument, but, on reflection, we are now persuaded that *Posadas* erroneously performed the First Amendment analysis,” including its significant deference to a state legislature’s choice of means, its “greater-includes-the-lesser” reasoning, and its supposed “vice” exception.); *id.* at 1513 (“As the entire Court apparently now agrees, the statements in the *Posadas* opinion on which Rhode Island relies are no longer persuasive.”); *id.* at 1522 (O’Connor, J., concurring in judgment) (“The closer look that we have required since *Posadas* comports better with the purpose of the analysis set out in *Central Hudson* . . .”). See also *Rubin v. Coors*, 514 U.S. 476, 482 n.2 (1995) (rejecting government’s suggestion that it has “broader latitude to regulate speech that promotes socially harmful activities”); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763 (1988).

that it lacked the power to tax the tobacco industry in order to discourage consumption through price increases.⁶³

The major difficulty with surmounting the fourth prong of the *Central Hudson* test lies in the fact that, unlike the FDA, Congress has the authority to implement approaches to reduce cigarette sales that would constitute less restrictive alternatives to the advertising restrictions described above. Legislation to increase taxes on tobacco products, or even more stringent restrictions on access, represent the most obvious non-speech related approaches.⁶⁴ In fact, lawmakers have proposed major price increases on the sale of cigarettes, which might be effective in reducing sales (especially among youngsters) without infringing on constitutionally protected speech.⁶⁵ Moreover, the revenues generated by such taxes might be used to fund educational campaigns aimed at adolescents. The existence of these alternatives may or may not translate into a successful challenge to advertising restrictions under the fourth prong of the *Central Hudson* test. And, in defending any general legislative action to limit tobacco advertising, Congress, unlike the FDA, cannot protest that its options were limited. In order to satisfy the fourth prong's narrow tailoring requirement, the government would have to offer evidence that the taxation approach (and other non-speech alternatives such as monitoring age restriction enforcement at retail, banning vending machines and mail order sales, and counter-advertising) will fail to accomplish the goal of reducing teenage tobacco product use, or at least, will fail to accomplish this goal as effectively.⁶⁶ It may be sufficient, however, for the

63. See 61 Fed. Reg. at 44,496-500 (1996).

64. See 44 *Liquormart*, 116 S. Ct. at 1510 (“[H]igher alcohol prices can be maintained either by direct regulation or by increased taxation.”); *id.* at 1522 (O’Connor, J., concurring in judgment). Other non-speech alternatives include government-sponsored education programs, and medical programs to treat tobacco addiction.

65. See John Schmeltzer & Michael Arndt, *Under Siege in Cigarette Wars, Tobacco Titans Counterattack*, CHI. TRIB., Mar. 25, 1994, at 1. Commentators on the proposed tax increase note that because minors have less disposable income than adults, there will be a greater reduction in overall tobacco consumption by minors. See David Bourne et al., *The Effect of Raising State and Federal Tobacco Tax*, 38 J. FAM. PRAC. 300 (1994). See also 60 Fed. Reg. at 41,324 (1995) (“Young people, who generally have little disposable income, can be particularly sensitive to the price of cigarettes and may choose not to smoke as the price increases.”). Cf. 61 Fed. Reg. at 44,453 (1996) (“The agency cannot act on these comments as it lacks the authority to levy taxes or mandate prices.”).

66. Educational campaigns sometimes are mentioned as a possible alternative to a restriction on commercial speech, but courts assume a government-sponsored campaign and, in any event, can only speculate about its likely effectiveness. See, e.g., 44 *Liquormart*, 116 S. Ct. at 1510 (“Even educational campaigns focused on the problems of . . . drinking might prove to be more effective.”). See also *id.* at 1522 (O’Connor, J., concurring in judgment); Noah & Noah, *supra* note 10, at 35 & nn.148-49 (describing the success of such programs in California and Massachusetts).

Some critics believe that the approach could, however, prove to be counterproductive. See Carlo DiClemente, *Will the Regulations Work?*, HEALTH L. NEWS, Sept. 1995, at 6 (arguing that “societal efforts must avoid increasing attention to cigarettes, even if in a negative manner, or creating restrictions that would increase black market demand. Efforts to curb smoking . . . can have a reverse effect by creating a rebellious, recalcitrant cohort of smokers.”). See also Robert S. Adler & R. David Pittle, *Cajolery or Command: Are Education Campaigns an Adequate Substitute for Regulation?*, 1 YALE J. ON REG. 159, 162-64 (1984); Lawrence O. Gostin & Allan M. Brant, *Criteria for Evaluating a Ban on the Advertisement of Cigarettes: Balancing Public Health Benefits with Constitutional Burdens*, 269 JAMA 904, 906 (1993); Alan Schwartz, *Views of Addiction and the Duty to Warn*, 75 VA. L. REV. 509, 556-57 (1989).

government to demonstrate that the advertising limits would marginally enhance the effectiveness of the other provisions. The courts have not explicitly considered this application of the fourth prong of *Central Hudson*, and this interpretation would effectively render the fourth prong redundant with the third prong, except in rare cases where non-speech alternatives are completely effective.

3. *The Value of Tobacco Product Advertising*

The Constitution protects commercial speech in order to ensure the free-flow of information so that adults can make rational, informed decisions about consumer products,⁶⁷ but such a rationale does not apply in the context of access by minors to information about a dangerous product that they have no legal right to purchase or use. Tobacco product advertising is simply less valuable than political speech, and, given the costs associated with such advertising, there is little reason to accord it the same protection that political speech, or even other commercial speech, deserves.

Although one may quibble with the wisdom of some of the advertising restrictions, a reviewing court would probably sustain their constitutionality on the strength of the evidentiary record amassed by the FDA and Congress, at least in the case of the restrictions on billboard placement, tombstone format in certain publications, and the ban on promotional items. The proposed prohibitions on industry sponsorship of sporting, cultural and other entertainment events appear somewhat less defensible under the third prong of the test. And, as stated above, any ban on Internet advertising, in light of the latest Supreme Court decisions, may be somewhat difficult to defend, though ultimately such a ban would probably survive constitutional scrutiny as well.

A few legal scholars argue forcefully that the constitutional protection of commercial speech remains inadequate. For instance, Professor Martin Redish remains dissatisfied with the constitutional protection afforded commercial speech, even after the Court's recent decision in *44 Liquormart*. Professor Redish argues that there is little or no reason to treat commercial speech any differently than other protected speech when evaluating First Amendment claims.⁶⁸ In particular, he decries the "ulterior result orientation" in the debate over the constitutionality of restricting tobacco product advertising.⁶⁹ Professor Redish argues that, to the extent that the application of First Amendment protection for commercial speech really reflects a judgment by those with political power about the societal value of the particular speech, the constitutional guarantee "degenerate[s] into nothing more than a manipulative tool of those who exercise [such] power."⁷⁰ In the case of tobacco advertising, the strong congressional and public support for the goals of the advertising restrictions might translate into the recognition of particularly weak constitutional protection for the commercial speech in question. However, at least

67. See *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1508 (1996) (plurality) (noting that commercial speech bans "not only hinder consumer choice, but also impede public debate over central issues of public policy").

68. See Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. KY. L. REV. 553, 578 (1997).

69. See *id.* at 556-57.

70. See *id.* at 557.

in the short term, recent commercial speech decisions suggest that the Supreme Court is not yet willing to take the final step, advocated by Professor Redish, of making commercial speech protections identical to those for political speech.

D. The Alternative of Imposing "Voluntary" Advertising Restrictions

Numerous members of Congress have expressed concern that, unless the tobacco industry voluntarily agrees to accept advertising restrictions, any codification of the settlement may be tied up in litigation for years.⁷¹ This position makes little sense. First, it presupposes that a constitutional challenge to the restrictions under commercial speech doctrine will succeed. As suggested above, this is far from apparent. Second, it assumes that implementation of other portions of the settlement package will necessarily be delayed for the duration of any constitutional challenge to the advertising restrictions. It may be possible to draft the legislation in such a way that the different provisions are severable. Finally, and most importantly, the position taken by Senator Hatch and others presumes that Congress can constitutionally negotiate in a "voluntary" settlement with the tobacco industry that which it may not constitutionally be able to require.⁷² If any of the legislation were thought to be unconstitutional under commercial speech standards, Congress may not be able to avoid that difficulty through the back-door.

The unconstitutional conditions doctrine will complicate any attempts at a "voluntary" agreement to restrict tobacco product advertising. The doctrine focuses on those situations where the government has impermissibly coerced someone into relinquishing a constitutional right.⁷³ In applying the doctrine, the U.S. Supreme Court frequently uses a nexus analysis to determine whether the right-sacrificing condition extracted by the government is "germane" to the benefit conferred on the recipient.⁷⁴ The Court has explained that "the government may not require a person

71. See David E. Rosenbaum, *Senators Jockey on Tobacco Agreement*, N.Y. TIMES, Feb. 11, 1998, at A20 (describing Senator Orrin Hatch's assertion that because advertising is protected by the First Amendment, Congress will have to offer liability limitations to tobacco companies in exchange for the industry's voluntary agreement to accept advertising restrictions, in order to avoid expensive and lengthy litigation). The most recent bill to receive significant support in Congress concedes much less, in terms of liability, to the tobacco industry. The McCain tobacco bill, approved by the Senate Commerce Committee on April 1, 1998, implicitly assumes that the industry's cooperation is needed to avert litigation over some of its potentially unconstitutional provisions. However, it contains none of the original measures from the June 20, 1997 deal designed to protect the industry against liability; instead it provides only for a \$6.5 billion yearly cap on industrywide liability. See Bob Van Voris, *Tobacco Bill May Undo Deal*, NAT'L L. J., Apr. 13, 1998, at A1, A15.

72. One presidential adviser has asserted that voluntary commitments to limit advertising "are of course constitutional," but that Congress could not force the industry into accepting those limits as a condition of protection from liability in tobacco-related lawsuits. See Rosenbaum, *supra* note 1, at A16 (summarizing comments made by Bruce N. Reed, President Clinton's chief adviser on domestic policy). Without using such leverage, it is difficult to imagine what would prompt the tobacco industry to agree voluntarily to restrictions that would significantly limit advertising.

73. See Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873, 914-15 (explaining that the doctrine may apply in situations where "even without coercion, individuals . . . face seriously constrained choices and . . . the government's offer may encourage persons to waive their rights without valid consent").

74. See, e.g., *United States v. National Treasury Employees Union*, 513 U.S. 454, 471-77 (1995);

to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the [condition] sought has little or no relationship to the property."⁷⁵ Commentators point out that the Supreme Court's "wildly inconsistent" application of the unconstitutional conditions doctrine makes it difficult to predict whether the Court will apply it in any given situation.⁷⁶

In the context of the tobacco settlement, the industry would be giving up its free speech rights in exchange for statutory limitations on its tort liability in pending (and perhaps also future) lawsuits. One bill proposes that the tobacco industry would have to waive its right to pursue any judicial challenges to the legislation or else lose the liability protections.⁷⁷ If the direct imposition of the advertising restrictions would pose constitutional problems, then an agreement by tobacco companies to accept the restrictions does not avoid the possibility of judicial scrutiny. If no logical relationship exists between the industry's First Amendment concessions and the government's conferral of liability protection against certain categories of lawsuits, then the "voluntary" agreement to limit advertising would be no more constitutional than if Congress directly imposed it by statute. Arguably, of course, a connection exists in this case—the tobacco industry might agree to give up some First Amendment rights in exchange for limitations on tort liability for tobacco-related illnesses that resulted from the now-restricted advertising practices. As a practical matter, moreover, such an approach would minimize the risk of judicial challenges by the advertising industry because the tobacco manufacturers, rather than the government, will have chosen to restrict promotional campaigns. Nonetheless, the manufacturers may file a lawsuit arguing that their waiver of commercial speech protections represented a non-germane, and therefore unconstitutional, condition imposed on a benefit offered by Congress in an attempt to purchase the industry's First Amendment rights.

A voluntary approach also poses some practical problems. One can imagine a company with a limited market share deciding to reject the proffered immunity, refusing to adhere to the "voluntary" advertising restrictions, and instead viewing defection as a short-term strategy to consolidate a larger market share by continuing to advertise aggressively. It remains to be seen whether this governmental offer of

Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

75. See *Dolan*, 512 U.S. at 385.

76. See, e.g., Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5, 10-11 (1988) (complaining that the doctrine "roams about constitutional law like Banquo's ghost, invoked in some cases, but not in others"); Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989, 995-96 (1995); Louis Michael Seidman, *Reflections on Context and the Constitution*, 73 MINN. L. REV. 73, 75 (1988). See also Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) (canvassing several competing theories based on notions of coercion, corruption, and commodification, and offering instead a "systemic" theory calling for strict scrutiny of rights-pressuring conditions on government benefits because they skew the distribution of power between and among the government and governed). "[U]nconstitutional conditions doctrine responds to a constant fear that government will tend to use the strategic manipulation of gratuitous benefits to aggrandize public power." *Id.* at 1493.

77. See Rosenbaum, *supra* note 71, at A20 (describing Senator Orrin Hatch's proposed limitations on tobacco industry tort liability in exchange for industry compliance with speech-restrictive tobacco advertising provisions); S. 1415, 105th Cong. (Nov. 7, 1997).

limited tort immunity, if it materializes, will constitute a sufficient enticement to all of the tobacco companies. One small company that has already broken ranks with the industry⁷⁸ would probably agree to limit its advertising practices according to a settlement agreement in exchange for immunity from liability in certain categories of lawsuits. Although all of the companies already have agreed to certain voluntary limitations in settling litigation in a few state lawsuits,⁷⁹ it is less clear whether *all* of the companies will find the proposed federal deal sufficiently appealing.

III. CONCLUSION

Unlike the FDA, Congress has the authority to enact a variety of provisions, such as increased prices, that will advance its goal of reducing underage tobacco product use. Some of these approaches would allow the federal government to achieve its goals without restricting commercial speech by the tobacco industry. Ultimately, Congress may conclude that it is wiser to sacrifice the effectiveness of restrictions on tobacco advertising in order to avoid litigation, and decide instead to pursue less effective non-speech approaches to reducing tobacco use by minors. However, the enormous congressional and public support for the important goals of this legislation, combined with the still flexible constitutional protection for commercial speech, suggest that the advertising restrictions would, in the end, withstand constitutional scrutiny and may, to some extent, reduce adolescent tobacco use.

78. See Barry Meier, *Liggett & Myers to Assist Tobacco Industry Inquiry*, N.Y. TIMES, Apr. 29, 1998, at A22 (describing the company's agreement to cooperate with the government in its investigation into "possible wrongdoing by the tobacco industry").

79. See generally Symposium Issue, 22 S. ILL. L.J. (Spring 1998) (discussing pending and settled state lawsuits).