

FEDERAL COMMUNICATIONS LAW JOURNAL



VOLUME 65 ISSUE 1

JANUARY 2013

A FIRST AMENDMENT LOOK AT THE STATUTORY BAN ON
TOBACCO ADVERTISEMENTS AND THE SELF-REGULATION OF
ALCOHOL ADVERTISEMENTS

Hugh Campbell

FEDERAL COMMUNICATIONS LAW JOURNAL



VOLUME 65 ISSUE 1

JANUARY 2013

Editor-in-Chief
DENNIS HOLMES

Senior Managing Editor
JONATHAN MCCORMACK

Senior Production Editor
JESSICA KRUPKE

Senior Articles Editor
AVONNE BELL

Senior Notes Editor
JOHN COX

Articles Editors
RHONDA ADATO
ROBERT HOPKINS
ROBERT VORHEES

Managing Editors
N. JAY MALIK
KATHERINE MANTHEI
EMILY SILVEIRO-ALLEN

Notes Editors
ALLARD CHU
BETSY GOODALL
JOSHUA KRESH
CHARLES POLLACK

Journal Staff
KEENAN ADAMCHAK
ANDREW ERBER
MATHEW HATFIELD
EVIN LUONGO
MELISSA MILCHMAN
MEREDITH SHELL
TOM STRUBLE
CARLA VOIGT

Journal Staff
BEN ANDRES
ADETOKUNBO FALADE
ADAM HOTTELL
JAMI MEVORAH
CLAYTON PREECE
MICHAEL SHERLING
HOLLY TROGDON
BRANDON WHEATLEY
JARUCHAT SIRICHOKCHATCHAWAN

Journal Staff
JAMES CHAPMAN
DAVID HATEF
DARREL JOHN JIMENEZ
MILENA MIKAILOVA
SEETA REBBAPRAGADA
MARY SHIELDS
MARGOT VANRIEL
MICHAEL WILLIAMS

Faculty Advisors
PROFESSOR JEROME BARRON PROFESSOR KAREN THORNTON
PROFESSOR DAWN NUNZIATO

Adjunct Faculty Advisors
MATTHEW GERST ETHAN LUCARELLI
NATALIE ROISMAN RYAN WALLACH

Published by the GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
and the FEDERAL COMMUNICATIONS BAR ASSOCIATION

**A First Amendment Look at the
Statutory Ban on Tobacco
Advertisements and the Self-
Regulation of Alcohol Advertisements**

Hugh Campbell*

TABLE OF CONTENTS

I. INTRODUCTION..... 100

II. OVERVIEW OF THE FIRST AMENDMENT AND
COMMERCIAL SPEECH..... 102

III. HISTORY AND HEALTH EFFECTS OF TOBACCO
AND ALCOHOL IN THE U.S. 107

A. Tobacco in the U.S. 107

B. Alcohol in the U.S...... 109

IV. REGULATION OF COMMERCIAL SPEECH OF HARMFUL PRODUCTS. 112

A. Deference to Congress and Broadcast Regulation 112

B. Tobacco Advertisement Regulation Under Central Hudson 113

C. Distinguishing Alcohol Advertising Under Central Hudson 117

V. CONCLUSION 118

* J.D. Candidate, Indiana University Maurer School of Law, May 2013.

I. INTRODUCTION

In 1970, Congress passed the Cigarette Labeling and Advertising Act which prohibited advertising of cigarettes on “any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.”¹ The Federal Communications Commission (“FCC”) “regulates interstate and international communications by radio, television, wire, satellite and cable in all 50 states, the District of Columbia and U.S. territories.”² The prohibition was later amended to include a ban on advertising little cigars.³ Unlike tobacco, alcohol advertisements are not prohibited.⁴ Instead, broadcast alcohol advertising is only subject to self-regulation by private organizations.⁵

When the Cigarette Labeling and Advertising Act was passed, the Supreme Court was less than sympathetic to commercial speech First Amendment claims.⁶ Since the passage of this Act, the Court has changed

1. Cigarette Labeling and Advertising Act, 15 U.S.C. § 1335 (2006).

2. *What We Do*, FCC, <http://www.fcc.gov/what-we-do> (last visited Aug. 19, 2012).

3. Little Cigar Act of 1973, Pub. L. No. 93-109, § 3, 87 Stat. 352 (codified as amended at 15 U.S.C. § 1335 (2006)).

4. David Oxenford, *Will You Drink to That? – Advertising Liquor on Broadcasting Stations*, BROAD. L. BLOG (Nov. 30, 2007), <http://www.broadcastlawblog.com/2007/11/articles/advertising-issues/will-you-drink-to-that-advertising-liquor-on-broadcast-stations/> (“Note that, though there are not FCC regulations on alcohol advertising there are still some limits on those ads. Like the beer ads about which we recently wrote, there are voluntary guidelines from alcohol trade groups (often used as a guide by the FTC in making a determination as to whether an ad is unfair or deceptive) that restrict alcohol advertising to stations and programs where children are less likely to be in the audience (shootings for audiences where at least 70% of the listeners or viewers are above legal drinking age). FTC decisions and the trade association voluntary rules also stress showing safe, not abusive, drinking in ads. Many states also have restrictions through law or regulation on certain types of alcohol ads (e.g. happy hour ads, two for one specials, even liquor-by-the-drink ads), so broadcasters and other electronic media companies should do a little research before taking every ad that comes their way. But, for the most part, the acceptance now of these ads by network-owned stations show that any bar to such ads is close to completely falling.”) (emphasis omitted).

5. FED. TRADE COMM’N, SELF-REGULATION IN THE ALCOHOL INDUSTRY 2 (2008), available at <http://www.ftc.gov/os/2008/06/080626alcoholreport.pdf>.

6. See *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942) (“This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with,

its Commercial Speech Doctrine and has become friendlier to parties challenging a regulation based on the First Amendment.⁷ Currently, the Court's commercial speech test comes from *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.⁸ The Court set out a four-prong test, henceforth referred to as the *Central Hudson* test, for First Amendment claims in the commercial speech setting:

If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.⁹

Because tobacco advertising regulations were enacted by Congress¹⁰ and deal with the broadcast medium,¹¹ the Court will be more deferential in its First Amendment analysis. After taking a closer look at the Court's First Amendment Doctrine, it becomes clear why the Supreme Court would uphold the ban on tobacco advertising in the broadcast medium but would overturn a similar ban on alcohol advertising. The regulation of these two vices can be distinguished based on the substantial governmental interest prong of the *Central Hudson* test.¹² Due to the destructive nature of tobacco,¹³ the government has a much stronger interest in banning its advertisement compared to alcohol.

Part I is a summary of this note. Part II provides an overview of current First Amendment Commercial Speech Doctrine and how the Court evolved to this point. In Part III of this note, the social and legal history of tobacco and alcohol, as well as the health effects of each, are discussed. In

the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated.”).

7. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 569-70 (1980).

8. *Id.* at 564.

9. *Id.*

10. *Blodgett v. Holden*, 275 U.S. 142, 148, (1927).

11. *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582, 584 (D.D.C. 1971).

12. *Cent. Hudson*, 447 U.S. at 564.

13. See, e.g., World Health Org. [WHO], *WHO Report on the Global Tobacco Epidemic, 2011*, at 8 (2011), available at http://whqlibdoc.who.int/publications/2011/9789240687813_eng.pdf.

Part IV, the Commercial Speech Doctrine is applied to tobacco and alcohol, showing how the ban on alcohol and tobacco advertising would be treated under the Court's current First Amendment Doctrine. Part V concludes that a complete ban on tobacco advertising in broadcasting would be held constitutional while a similar ban on alcohol would be found unconstitutional due to the severe health effects from any amount of smoking.

II. OVERVIEW OF THE FIRST AMENDMENT AND COMMERCIAL SPEECH

The First Amendment of the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech, or of the press"¹⁴ In 1942, the Supreme Court was faced with a First Amendment claim to commercial speech.¹⁵ This was the first case in which the Supreme Court reached the conclusion that the Constitution does not impose any restraint on government regulation of purely commercial advertising.¹⁶

In *Valentine v. Chrestensen*, the owner of a United States Navy submarine moved to New York, where he set up the submarine as an attraction.¹⁷ To promote this attraction, the owner printed out handbills for distribution.¹⁸ He was advised by the Police Commissioner that distribution of commercial handbills was not allowed on city streets.¹⁹ To avoid this law, the owner of the submarine printed two-sided handbills, one side had an advertisement and the other a criticism of city rules.²⁰ After the submarine owner was stopped from distributing the handbills, he brought suit in order to enjoin the city from stopping his distribution.²¹

The suit reached the Supreme Court after the lower federal courts granted an injunction in favor of the submarine owner.²² The Court reversed the Circuit Court decision and held that commercial speech is outside of the protection granted by the First Amendment.²³ The Court held:

We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial

14. U.S. CONST. amend. I.

15. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

16. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 2 (2000).

17. *Valentine*, 316 U.S. at 52-53.

18. *Id.*

19. *Id.*

20. *Id.* at 53.

21. *Id.* at 54.

22. *Id.*

23. *Id.* at 55.

advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated.²⁴

In 1976, the Supreme Court repudiated *Valentine v. Chrestensen*.²⁵ The Court was given the chance to change the Commercial Speech Doctrine in a case brought by prescription drug consumers, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*²⁶ The Virginia State Board of Pharmacy regulated pharmacists through a licensing system.²⁷ The Board restricted price advertising of prescription drugs to preserve the professional standards of pharmacists.²⁸

The Court held that the First Amendment protects commercial speech.²⁹ The Court held that a category of speech must be distinguished by content, not its commercial character, to fall outside the protection of the First Amendment.³⁰

The Court also found that the prescription drug consumers had standing to bring suit due to their First Amendment interest in receiving drug information.³¹ The Court then weighed the consumer's right to receive information against the Board's justification in restricting price advertising.³² The Board believed that price advertisements would "make it impossible" for pharmacists to supply professional services and would cause consumers to make bad choices by going to lower quality

24. *Id.* at 54-55.

25. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 776 (1976).

26. *Id.* at 748.

27. *Id.* at 751.

28. *Id.* at 752.

29. *Id.* at 770 ("Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.").

30. *Id.* at 761.

31. *Id.* at 763 ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate.").

32. *Id.* at 763-65.

pharmacists.³³ The Court found that the regulation protected citizens by keeping the consumers ignorant.³⁴ The Court overturned this paternalistic regulation, holding that the best way to protect the consumer is through the free flow of information.³⁵

Finally, in bringing commercial speech within the area of protection of the First Amendment, the Court gave states the power to restrict advertisements if the advertisements are false or misleading, if illegal transactions are being advertised, or if the state is leaving open ample alternative channels of communication.³⁶ The Court also noted the complications arising from advertisements in broadcast media.³⁷

Four years later, the Supreme Court set up a clearer four-part test for its new Commercial Speech Doctrine in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.³⁸ The Court reiterated that commercial speech is protected by the First Amendment, but to a lesser extent than non-commercial speech.³⁹

The commercial speech standard set up by the Court begins by determining whether the speech is protected by the First Amendment.⁴⁰ To be given First Amendment protection, the speech must concern a lawful activity and not be misleading.⁴¹ If the speech is protected by the First Amendment, the government must show a substantial governmental interest for the speech restrictive regulation.⁴² This substantial governmental interest must be directly advanced by the regulation, and the regulation must be no "more extensive than is necessary to serve that interest."⁴³

During a time when the energy supply was a concern, New York enacted a law that completely banned Central Hudson, a utility company, from advertising use of its electricity.⁴⁴ Using the new *Central Hudson* test, the Court held that the total ban was more extensive than necessary to promote the State's interest in conservation.⁴⁵ Thus, the total ban on promotional advertising was unconstitutional under the First and Fourteenth Amendments.⁴⁶

33. *Id.* at 767-68.

34. *Id.* at 769.

35. *Id.* at 770, 784.

36. *Id.* at 771-72.

37. *Id.* at 770-72.

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

39. *Id.* at 562-63.

40. *Id.* at 566.

41. *Id.*

42. *Id.* at 564.

43. *Id.*

44. *Id.* at 571-72.

45. *Id.* at 566-71.

46. *Id.* at 572.

First, the Court determined that advertisements promoting energy use are protected under the First Amendment because they endorse a legal activity by means that are neither false nor misleading.⁴⁷ Second, the Court found that the two interests of the state, conservation of energy and fair and efficient energy rates, were both substantial.⁴⁸ Even though both interests were substantial, the Court found that only the interest in energy conservation was directly advanced by the advertising ban.⁴⁹ Finally, the Court held that the advertising ban was unconstitutional because the regulation was “more extensive than necessary.”⁵⁰ The Court ruled that the regulation prohibited speech that would not promote energy use and that the state did not prove that less restrictive means would be less effective.⁵¹

Six years after the current commercial speech test was set up in *Central Hudson*, the Supreme Court applied the *Central Hudson* test to hold that the government’s power to ban an activity outright includes the lesser power to ban its advertisement,⁵² detracting from First Amendment protection of commercial speech. In *Posadas de Puerto Rico Associates v. Tourism Co.*, the Court upheld a ban on casino advertising to locals.⁵³ This paternalistic advertising ban was found to be outside the protection of the First Amendment.⁵⁴ The advertising ban was held to be constitutional because while it concerned a lawful activity and was not misleading or fraudulent, the legislature’s interest in preventing gambling was substantial.⁵⁵ Furthermore, the substantial interest was directly advanced by the regulation,⁵⁶ and the regulation was no more extensive than necessary.⁵⁷

47. *Id.* at 566.

48. *Id.* at 568-69.

49. *Id.* at 569 (“There is an immediate connection between advertising and demand for electricity. *Central Hudson* would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission’s order”).

50. *Id.* at 570-71.

51. *Id.*

52. *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 345-46 (1986) (“Here, on the other hand, the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether. In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling, and *Carey* and *Bigelow* are hence inapposite.”).

53. *Id.* at 344.

54. *Id.*

55. *Id.* at 341 (“These are some of the very same concerns, of course, that have motivated the vast majority of the 50 States to prohibit casino gambling. We have no difficulty in concluding that the Puerto Rico Legislature’s interest in the health, safety, and welfare of its citizens constitutes a ‘substantial’ governmental interest.” (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986))).

56. *Id.* at 341-42 (“The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature’s belief is a reasonable one, and the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature’s view.”).

The Court distinguished this case from two prior cases striking down total advertising bans because those cases involved conduct that was constitutionally protected.⁵⁸ The Court held that since Puerto Rico had the power to make gambling illegal, it also had the power to make the advertising of gambling illegal.⁵⁹ This greater-power-includes-the-lesser argument seemed to allow the Court to apply a more deferential form of the *Central Hudson* test to uphold the ban on casino advertising to locals.⁶⁰

A decade after the deferential approach was used in *Posadas de Puerto Rico Associates v. Tourism Co.*, the Court returned to the more vigorous version of the *Central Hudson* test in *44 Liquormart, Inc. v. Rhode Island*.⁶¹ The Court in *44 Liquormart* invalidated two Rhode Island statutes.⁶² These statutes completely banned price advertisements of alcohol outside stores selling alcohol, as well as alcohol advertisements on any form of broadcast media.⁶³ Once again, the First Amendment favored the free flow of information over paternalistic bans on the dissemination of speech.⁶⁴

57. *Id.* at 344 (“We think it is up to the legislature to decide whether or not such a ‘counterspeech’ policy would be as effective in reducing the demand for casino gambling as a restriction on advertising. The legislature could conclude, as it apparently did here, that residents of Puerto Rico are already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct.” (citing *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582, 585 (D.D.C. 1971))).

58. *Id.* at 345-46 (“In *Carey* and *Bigelow*, the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the State. Here, on the other hand, the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether. In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling, and *Carey* and *Bigelow* are hence inapposite.”).

59. *Id.*

60. *Id.* at 346 (“As we noted in the preceding paragraph, it is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising.”).

61. 517 U.S. 484, 510 (1996).

62. *Id.* at 516.

63. *Id.* at 489-50.

64. *See id.* at 503 (“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. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products.”).

III. HISTORY AND HEALTH EFFECTS OF TOBACCO AND ALCOHOL IN THE U.S.

A. Tobacco in the U.S.

The American Indians used tobacco, an indigenous plant, for many purposes.⁶⁵ Upon discovering the Americas, Christopher Columbus was introduced to the plant.⁶⁶ Tobacco became popular among Europeans because they believed it was a cure-all drug.⁶⁷

The first commercial cigarettes were made in 1865.⁶⁸ Soon after, in 1881, a tobacco-rolling machine was invented.⁶⁹ By 1901, 3.5 billion cigarettes and six billion cigars were being sold worldwide.⁷⁰ In 1950, the first study that conclusively linked smoking to negative health effects was issued.⁷¹

In 2010, the United States had 13.3% of worldwide retail tobacco sales, totaling \$95.6 billion.⁷² Of this, \$87.9 billion was from sales of cigarettes.⁷³ Twenty-seven percent of adults in the United States smoked tobacco in 2010, with 15.2% smoking daily.⁷⁴

Tobacco is the leading cause of preventable deaths, killing nearly six million people a year.⁷⁵ In the U.S. alone, smoking causes 443,000 premature deaths per year, amounting for one out of every five premature deaths.⁷⁶ “Half of all those who continue to smoke will die from smoking-

65. Vernellia R. Randall, *History of Tobacco*, UNIV. OF DAYTON (Aug. 31, 1999), <http://academic.udayton.edu/health/syllabi/tobacco/history.htm>.

66. *Id.*

67. *Id.*

68. See MARJORIE JACOBS, FROM THE FIRST TO THE LAST ASH: THE HISTORY, ECONOMICS & HAZARDS OF TOBACCO 8 (1997), available at <http://healthliteracy.worlded.org/docs/tobacco/Tobacco.pdf> (noting that the first commercial cigarette company was started by Washington Duke in North Carolina).

69. *Id.* (describing this machine’s ability to roll 120,000 cigarettes a day).

70. Randall, *supra* note 65.

71. Gene Borio, *Tobacco Timeline: The Twentieth Century 1950 - 1999--The Battle is Joined*, TOBACCO.ORG, http://archive.tobacco.org/resources/history/Tobacco_History20-2.html (last updated Nov. 20, 2010).

72. DATAMONITOR, INDUSTRY PROFILE: TOBACCO IN THE UNITED STATES 2, 7-8 (2011) (“The tobacco market consists of the retail sale of cigarettes, loose tobacco, chewing tobacco, and cigars and cigarillos. The market is valued according to retail selling price (RSP) and includes any applicable taxes. Over 90% of the US tobacco sales come from three tobacco companies.”).

73. *Id.*

74. WHO Report on the Global Tobacco Epidemic, 2011, *supra* note 13, app. V at 106.

75. WHO Report on the Global Tobacco Epidemic, 2011, *supra* note 13, at 8.

76. AM. CANCER SOC’Y, CANCER FACTS & FIGURES 2011, at 35 (2011), available at <http://www.cancer.org/acs/groups/content/@epidemiologysurveillance/documents/document/acspc-029771.pdf> (“The risk of developing lung cancer is about 23 times higher in male smokers and 13 times higher in female smokers, compared to lifelong nonsmokers.”).

related diseases.”⁷⁷ In addition, 8.6 million smokers experience chronic conditions related to smoking.⁷⁸ Any amount of smoking is harmful to the body.⁷⁹ Smoking in the U.S. costs ninety-six billion dollars in healthcare fees per year.⁸⁰

Smoking tobacco also causes harm to nonsmokers.⁸¹ Tobacco smoke contains sixty-nine cancer causing chemicals.⁸² Exposure to secondhand smoke causes almost 50,000 nonsmoker deaths per year from lung cancer and heart disease alone.⁸³ Children exposed to high levels of secondhand smoke have the greatest chance of negative health effects.⁸⁴

In 1955, the Federal Trade Commission (“FTC”) first started regulating cigarette advertising by eliminating health references from advertisements.⁸⁵ In 1965, the Federal Cigarette Labeling and Advertising Act was enacted.⁸⁶ The FCC further regulated tobacco advertisements by applying the Fairness Doctrine to cigarette advertisements in 1967.⁸⁷ The Fairness Doctrine required stations broadcasting cigarette commercials to give equal air time to smoking prevention messages.⁸⁸ While the Fairness Doctrine is no longer FCC policy, federal law has banned all cigarette advertising on “any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.”⁸⁹ This law went into effect on January 2, 1971.⁹⁰ The ban has since been amended to include advertising of little cigars.⁹¹

77. *Id.*

78. *Id.*

79. See AM. CANCER SOC’Y, CANCER PREVENTION AND EARLY DETECTION FACTS AND FIGURES 2012, at 6 (2012), available at <http://www.cancer.org/acs/groups/content/@epidemiologysurveillance/documents/document/acspc-033423.pdf> (“Use of tobacco in any form may induce nicotine dependence and harm health.”).

80. AM. CANCER SOC’Y, *supra* note 76, at 38 (from the years 2000 to 2004).

81. U.S. DEP’T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE, at i (2006), available at <http://www.surgeongeneral.gov/library/reports/secondhandsmoke/fullreport.pdf>.

82. *Id.* at 30.

83. *Id.* at 8.

84. *Health Effects of Exposure to Secondhand Smoke*, ENVTL. PROT. ADMIN., <http://epa.gov/smokefree/healtheffects.html> (last updated Nov. 30, 2011).

85. See Borio, *supra* note 71.

86. 15 U.S.C. § 1331 (2006).

87. Borio, *supra* note 71.

88. *Id.*

89. Cigarette Labeling and Advertising Act, 15 U.S.C. § 1335 (2006).

90. *Id.*

91. *Id.*

B. Alcohol in the U.S.

Before Europeans came to the Americas, alcohol was relatively unknown to the Native Americans.⁹² The early settlers drank mostly rum and home-brewed ales and ciders.⁹³ American's drinking tastes changed to whiskeys and lagers due to patriotism, British taxes, and German immigrants.⁹⁴ Alcohol was a large part of American life due to the lack of safe drinking water.⁹⁵ By the end of the eighteenth century, the United States drank 3.5 gallons of pure alcohol per capita annually.⁹⁶ By 1830, this increased to 3.9 gallons of pure alcohol.⁹⁷ This way of life came into tension with a large movement trying to ban alcohol in the United States.⁹⁸

In 1919, the United States ratified the Eighteenth Amendment of the Constitution, which prohibited the manufacture, sale, or transportation of intoxicating liquors for beverage purposes.⁹⁹ The prohibition of alcohol was repealed in 1933.¹⁰⁰ Once again, the ability to regulate alcohol was given back to the states.¹⁰¹ Currently, the United States drinks 9.4 liters of pure alcohol per person per year.¹⁰²

In 2009, there were \$153.9 billion in retail alcohol sales in the United States.¹⁰³ This represented only 15.9% of worldwide alcohol sales.¹⁰⁴ Alcohol beverage sales in the United States were portioned as follows: spirits consisted of 29.5%; wine consisted of 17.9%; and beer, ciders, and flavored alcoholic beverages consisted of 52.6% of retail sales.¹⁰⁵ Three companies control over sixty-six percent of the United States market,¹⁰⁶ and over \$3 billion was spent on alcohol advertising in 2005 in the United States.¹⁰⁷ Of this \$3 billion, 25.97% was spent on television advertising and 5.01% was spent on radio advertising.¹⁰⁸

92. Jack S. Blocker, Jr., *Kaleidoscope in Motion: Drinking in the United States, 1400-2000*, in *ALCOHOL: A SOCIAL AND CULTURAL HISTORY* 225, 225 (Mack P. Holt ed., 2006).

93. See *id.* at 225, 227.

94. *Id.* at 227.

95. *Id.*

96. *Id.*

97. *Id.* at 228.

98. *Id.* at 229-30.

99. U.S. CONST. amend. XVIII.

100. Blocker, *supra* note 92, at 234.

101. *Id.* at 234.

102. WHO, *Global Status Report on Alcohol and Health*, at 140 (2011), available at http://whqlibdoc.who.int/publications/2011/9789241564151_eng.pdf (study is from 2003 to 2005 of people fifteen and above).

103. DATAMONITOR, *INDUSTRY PROFILE ALCOHOLIC DRINKS IN THE UNITED STATES* 2. (2010).

104. *Id.*

105. *Id.* at 12.

106. *Id.* at 14 (explaining that Anheuser-Busch held 41.8% of the market, SABMiller held 15.7% of the market, and Molson Coors Brewing Company held 8.9% of the market).

107. FED. TRADE COMM'N, *supra* note 5, at 4.

108. *Id.* at 5.

Alcohol advertising is self-regulated in the United States.¹⁰⁹ Self-regulation codes were created by three main bodies: the Beer Institute, Wine Institute, and Distilled Spirits Council of the United States.¹¹⁰ Additionally, alcohol advertising is self-regulated by individual alcohol companies and other organizations.¹¹¹

The Beer Institute, Wine Institute, and Distilled Spirits Council of the United States all have similar purposes.¹¹² Each code discourages depictions of irresponsible drinking.¹¹³ Furthermore, the codes require that a majority of expected viewers to be above the legal drinking age.¹¹⁴ Finally, each requires that advertisements do not depict drinking and driving.¹¹⁵ While these requirements have similar themes, the codes vary in strictness.¹¹⁶

Private companies and organizations also implement their own advertising policies.¹¹⁷ Anheuser Busch's code is stricter than the Beer Institute's because Anheuser Busch aims to allow beer advertising only when seventy percent of the program's viewers are above the drinking

109. *Id.* at 4.

110. *See* DISTILLED SPIRITS COUNCIL OF THE U.S., CODE OF RESPONSIBLE PRACTICES FOR BEVERAGE ALCOHOL ADVERTISING AND MARKETING (2009) [hereinafter DISCUS], available at <http://www.pernodabsinthe.com/about/Responsibility.pdf>; BEER INST., ADVERTISING AND MARKETING CODE (2011), available at <http://www.beerinstitute.org/BeerInstitute/files/ccLibraryFiles/File/000000001166/BI%20Ad%20Code%20Text%20w-Logo%20-%20FINAL%202011a%20-%20Updated%20Census.pdf>; *Code of Advertising Standards*, WINE INST., <http://www.wineinstitute.org/initiatives/issuesandpolicy/adcode/details> (last updated June 2008).

111. *See, e.g., Alcohol Advertising*, NAT'L COLLEGIATE ATHLETIC ASS'N (Dec. 2, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Basketball+Resources/Basketball+alcohol+advertising>; ANHEUSER BUSCH, CODE OF COMMERCIAL COMMUNICATIONS 12 (2010), available at <http://www.anheuser-busch.com/s/index.php/our-responsibility/alcohol-responsibility-our-families-our-roads/advertising-policy/>.

112. *See* DISCUS, *supra* note 110; BEER INST., *supra* note 110; WINE INST., *supra* note 110.

113. *See, e.g., DISCUS*, *supra* note 110, at 6 (prohibiting depictions of intoxicated individuals); BEER INST., *supra* note 110, at 2, 6-7 (prohibiting depictions of excessive drinking, lack of control, or illegal activity while drinking); WINE INST., *supra* note 110 (prohibiting depictions of excessive drinking, reckless behavior, or references to alcohol strength.).

114. *See, e.g., DISCUS*, *supra* note 110, at 4 (prohibiting advertisements unless at least seventy percent of the viewers are expected to be over the drinking age); BEER INST., *supra* note 110, at 7 (prohibiting advertising when less than 71.6% of viewers are expected to be over the drinking age); WINE INST., *supra* note 110 (requiring that models must be at least twenty-five years old, prohibiting the use of cartoons or child-like symbols, and prohibiting advertising when more than 28.4% of the audience is below drinking age).

115. DISCUS, *supra* note 110, at 9; BEER INST., *supra* note 110, at 7; WINE INST., *supra* note 110.

116. *See* DISCUS, *supra* note 110, at 9; BEER INST., *supra* note 110, at 7; WINE INST., *supra* note 110.

117. *See, e.g., NAT'L COLLEGIATE ATHLETIC ASS'N*, *supra* note 111.

age.¹¹⁸ Unlike the Beer Institute's code, this code is mandatory for all Anheuser Busch operations.¹¹⁹ Other private organizations not in the business of alcohol production or sales also have alcohol advertising policies.¹²⁰ The National Collegiate Athletic Association ("NCAA") has a stricter alcohol advertising policy than the alcohol institutes and companies.¹²¹

The NCAA's Advertising and Promotional Standards applicable to all NCAA championships limits alcohol advertising in any form (e.g., television, radio, Internet, game publications) in association with any NCAA championship to malt beverages, beer and wine products that do not exceed six percent alcohol by volume. Further, such advertisements shall not compose more than 60 seconds per hour of any NCAA championship programming nor compose more than 14 percent of the space in the NCAA publication (e.g., game program) devoted to advertising. Also, such advertisements or advertisers shall incorporate "Drink Responsibly" educational messaging, and the content of all such advertisements shall be respectful (e.g., free of gratuitous and overly suggestive sexual innuendo, no displays of disorderly, reckless or destructive behavior) as determined by the NCAA on a case-by-case basis.¹²²

A recent study by the FTC showed that over ninety-two percent of all alcohol commercials complied with the requirement that seventy percent of viewers be above the drinking age.¹²³

Alcohol is the cause of over sixty diseases and injuries, accounting for 2.5 million deaths per year worldwide.¹²⁴ These health risks are caused by frequent and excessive alcohol use.¹²⁵ Moderate drinking, however, can actually have health benefits.¹²⁶ These health benefits include reductions in the risk of heart disease, heart attack, stroke, or diabetes.¹²⁷ Moderate

118. ANHEUSER BUSCH, *supra* note 111, at 6.

119. *Id.* at 10.

120. NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 111.

121. *See id.*

122. *Id.*

123. FED. TRADE COMM'N, *supra* note 5, at ii.

124. *Global Status Report on Alcohol and Health*, *supra* note 102, at 20.

125. *Id.* (explaining that health issues are caused by volume consumed and pattern of drinking).

126. *Alcohol Use: If You Drink, Keep It Moderate*, MAYO CLINIC (March 15, 2011), <http://www.mayoclinic.com/health/alcohol/SC00024>.

127. *Id.*

drinking is considered one drink a day for women and two drinks a day for men.¹²⁸

IV. REGULATION OF COMMERCIAL SPEECH OF HARMFUL PRODUCTS

A. Deference to Congress and Broadcast Regulation

There are two main reasons why the advertising of tobacco on television and radio should be treated differently than commercial speech in previous First Amendment cases. First, the ban on advertising was enacted by Congress. Second, this ban only reaches broadcast television and radio.

In 1980, the Supreme Court decided *Fullilove v. Klutznick*.¹²⁹ The Petitioners facially challenged the “minority business enterprise” rule of the Public Works Enjoyment Act of 1977.¹³⁰ Under this statute, contractors who received federal funds were required to hire or buy from a certain percentage of minority owned businesses.¹³¹ The Petitioners claimed that the statute violated the Equal Protection Clause of the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment, and various antidiscrimination statutes.¹³² When examining these constitutional claims, Chief Justice Burger explained the deference that the Supreme Court must give to Congress:

When we are required to pass on the constitutionality of an Act of Congress, we assume “the gravest and most delicate duty that this Court is called on to perform.” A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to “provide for the . . . general Welfare of the United States” and “to

128. *Id.*

129. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

130. *Id.* at 454-55.

131. 42 U.S.C. § 6705 (2006) (“[N]o grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term ‘minority business enterprise’ means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.”).

132. *Fullilove*, 448 U.S. at 455.

enforce, by appropriate legislation,” the equal protection guarantees of the Fourteenth Amendment.¹³³

Chief Justice Burger further explained that the Court would defer to Congress.¹³⁴ The Court will only overrule a statute created by Congress when “Congress has overstepped the bounds of its constitutional power.”¹³⁵

Additionally, deference is given to Congress when regulating electronic communications.¹³⁶ In *Capital Broadcasting Co. v. Mitchell*, the District Court for the District of Columbia denied a petition to a challenge of the Public Health Cigarette Smoking Act of 1969.¹³⁷ This petition, brought by the broadcasters, was denied because the statute did not impede their free speech rights.¹³⁸ Broadcasters still had a right to disseminate information and give opinions on cigarettes.¹³⁹ In the District Court’s analysis, Judge Gasch stated that “[t]he unique characteristics of electronic communication make it especially subject to regulation in the public interest.”¹⁴⁰

Deference to congressional statutes and to regulation of electronic media distinguishes other First Amendment commercial speech cases in favor of allowing speech restrictive regulation. Although such deference is not determinative, this could help a court in deciding a close case such as the total ban on tobacco advertising from television and radio.

B. Tobacco Advertisement Regulation Under Central Hudson

Under the *Central Hudson* test, the Court first determines whether the activity is protected by the First Amendment.¹⁴¹ Some have argued that tobacco advertising should not be protected by the First Amendment because it is misleading and proposes an illegal transaction (sale of tobacco to minors).¹⁴² For the purposes of this paper, it will be assumed that tobacco

133. *Id.* at 472 (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.), and U.S. CONST. art. I, § 8, cl. 1; U.S. CONST. amend. XIV, § 5).

134. *Id.* at 473.

135. *Id.* (citing *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 103 (1973)).

136. *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582, 585-86 (D.D.C. 1971).

137. *Id.* at 587.

138. *Id.* at 584.

139. *Id.*

140. *Id.*

141. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980) (clarifying that “[f]or commercial speech to come within [the protections of the First Amendment], it at least must concern lawful activity and not be misleading.”).

142. Kenneth L. Polin, *Argument for the Ban of Tobacco Advertising: A First Amendment Analysis*, 17 HOFSTRA L. REV. 99, 118-19 (1988) (“In order to constitute criminal solicitation, the crime solicited need not be committed. Solicitation only requires that the commission of a crime be promoted. The crime at issue is the sale of tobacco to minors. Tobacco advertising may or may not directly promote vendors to sell tobacco to

advertising is protected by the First Amendment. The last three prongs of the *Central Hudson* test will be the focus of this paper.

The government has two possible justifications for a ban on tobacco advertising: protection of children and protection of the health of all citizens. Protecting children from the influences of tobacco advertisements was a government interest discussed in *Lorillard Tobacco Co. v. Reilly*.¹⁴³ The statute being challenged in that case regulated outside advertisements within five feet of the ground, advertisements within 1,000 feet of schools, and advertisement and placement of tobacco in stores.¹⁴⁴ This state statute was overruled in part because the regulation did not directly advance the governmental interest and was not narrowly tailored:

A careful calculation of the costs of a speech regulation does not mean that a State must demonstrate that there is no incursion on legitimate speech interests, but a speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products. After reviewing the outdoor advertising regulations, we find the calculation in these cases insufficient for purposes of the First Amendment.¹⁴⁵

The stronger governmental interest supporting a complete ban is the interest in public health. This governmental interest would be perfectly legitimate if the Court applied its reasoning from *Posadas de Puerto Rico Associates v. Tourism Co.*¹⁴⁶ Unfortunately for those in support of a tobacco advertisement ban, the Court has become more speech protective when paternalistic advertisements are challenged.¹⁴⁷

In *44 Liquormart*, the Court explained its view on paternalistic regulations: "[t]he First Amendment directs us to be especially skeptical of

minors, but if the advertising encourages minors to purchase tobacco, it must necessarily also promote the manner of purchase (i.e. the sale).

The first amendment affords no protection to speech whose intent, objective meaning, and effect is to promote crime. Despite the industry's public denial, their marketing plans explicitly target the young. Each year, as 1,000,000 smokers quit and another 350,000 die from tobacco use, the product, in order to continue sales success, must attract droves of new, young consumers. To date, this is precisely what the product has achieved—ninety percent of smokers in the United States start smoking before age twenty; sixty percent start before age fifteen; and each year 100,000 persons under the age of twelve start to smoke. Simply put, the continued strength of the market is dependent upon a market to whom the product may not legally be sold.”)

143. 533 U.S. 525, 564 (2001).

144. *Id.* at 561-62.

145. *Id.* at 565-66.

146. See 478 U.S. 328, 345-46 (1986) (upholding the regulation based on a greater-includes-the-lessor argument).

147. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510 (1996).

regulations that seek to keep people in the dark for what the government perceives to be their own good.”¹⁴⁸ Even under a stricter review, the Court should find that the government’s interest in public health is substantial. Tobacco causes 443,000 premature deaths per year, which amounts to one out of five total premature deaths yearly, and smoking-related medical costs are ninety-six billion dollars in healthcare costs every year.¹⁴⁹ Not only does smoking harm the smokers themselves, but second-hand smoke also causes 50,000 deaths per year.¹⁵⁰ Tobacco is a uniquely harmful product because it is harmful to the body when used in any amount.¹⁵¹

Due to the paternalistic nature of the advertising ban, the prong of the *Central Hudson* test requiring direct advancement of the governmental interest should also be subjected to heightened scrutiny.¹⁵² In *44 Liquormart*, the Court found there was not enough evidence to hold that the government’s interest was being advanced: “without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State’s interest in promoting temperance.”¹⁵³

This regulation should be viewed differently than the price advertisement ban in *44 Liquormart*¹⁵⁴ because it completely bans the advertisement of the activity rather than the price. The Court in *44 Liquormart* agreed with the State that a ban in price advertising would reduce demand for alcohol, but it would not concede that the effect would be significant. “Although the record suggests that the price advertising ban may have some impact on the purchasing patterns of temperate drinkers of modest means, the State has presented no evidence to suggest that its speech prohibition will *significantly* reduce marketwide consumption.”¹⁵⁵ A total ban on advertisements could have a much more substantial effect than a ban on price advertising alone. According to the 2011 World Health Organization *WHO Report on the Global Tobacco Epidemic*, a complete ban on tobacco advertisement “could decrease tobacco consumption by about 7%, independent of other tobacco control interventions.”¹⁵⁶ This

148. *Id.* at 503.

149. AM. CANCER SOC’Y, *supra* note 79, at 3.

150. See DATAMONITOR, *supra* note 72; U.S. DEP’T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE 8 (2006), available at <http://www.surgeongeneral.gov/library/reports/secondhandsmoke/fullreport.pdf>.

151. See U.S. DEP’T OF HEALTH & HUMAN SERVS., HOW TOBACCO SMOKE CAUSES DISEASE: THE BIOLOGY AND BEHAVIORAL BASIS FOR SMOKING-ATTRIBUTABLE DISEASE 9 (2010), available at http://www.surgeongeneral.gov/library/reports/tobaccosmoke/full_report.pdf.

152. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980).

153. *44 Liquormart*, 517 U.S. at 505.

154. *Id.*

155. *Id.* at 506.

156. WORLD HEALTH ORG., *supra* note 13, at 62.

decrease in consumption should be considered a sufficient advancement of the government's interest in protecting children or the health of all people.

The government also has the burden of proving that its actions are no more extensive than necessary to achieve its objectives.¹⁵⁷ This requirement will be more problematic with respect to the government's interest in protecting children than its interest in public health. The government could ban tobacco advertisement during certain hours when children are most likely to view the programs. Also, a rule similar to the voluntary codes adopted by alcohol companies requiring a percentage of viewers to be above eighteen could achieve the government's interest in protecting children.¹⁵⁸ Because of the options available to the government that would be less speech restrictive, the Court would most likely find that a total ban on broadcast tobacco advertising is overly restrictive and more extensive than necessary.

The interest in protecting children could be struck down just as in *Reno v. ACLU*.¹⁵⁹ In *Reno*, Communications Decency Act (CDA) provisions were challenged.¹⁶⁰ These restrictions aimed to protect children from "'indecent' and 'patently offensive' communications on the Internet" by criminalizing the "knowing transmission of obscene or indecent messages to any recipient under 18 years of age."¹⁶¹ The government did not prove that the statute was narrowly tailored to further the interest of protecting children:

The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA. It has not done so. The arguments in this Court have referred to possible alternatives such as requiring that indecent material be "tagged" in a way that facilitates parental control of material coming into their homes, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet-such as commercial Web sites-differently from others, such as chat rooms. Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all.¹⁶²

157. *Cent. Hudson*, 447 U.S. at 557.

158. *DISCUS*, *supra* note 110.

159. *See* 521 U.S. 844 (1997).

160. *Id.* at 858-61.

161. *Id.* at 849, 859.

162. *Id.* at 879.

Although a complete ban on tobacco advertising based on an interest in protecting the health of all individuals could also be judged as overly restrictive of speech, the interest in public health has a better chance of being accepted by the Court as no more extensive than necessary. A complete ban based on general public health would be more effective than a regulation based on protecting children by limiting the hours or programming of the ban.

The total ban based on health would still be problematic because there are other ways to reduce tobacco consumption. It could be argued that the ban should be replaced with more extensive health warnings or a requirement of anti-tobacco advertising in proportion to the tobacco advertising.

Although other methods could reduce tobacco consumption, the Court should allow the complete ban on tobacco advertising. According to the WHO report, “[b]ans must be comprehensive: partial bans have little or no effect . . . well-drafted and well-enforced legislation is required because the tobacco industry will circumvent advertising bans.”¹⁶³ While this is only one study, the Court should give some deference to Congress because the ban is a statute that only affects broadcasting.¹⁶⁴

In analyzing the last three prongs of the *Central Hudson* test, the Court should conclude that the governmental interest in protecting the health of citizens is a substantial interest directly advanced in a way that is no more extensive than necessary. Even when viewed under heightened scrutiny, the interest in reducing tobacco use outweighs the First Amendment interest in promoting the free flow of information.

C. Distinguishing Alcohol Advertising Under *Central Hudson*

Although a ban on alcohol advertising would be very similar to a ban on tobacco advertising, the differences in the governmental interests could lead the Court to invalidate a complete ban on alcohol advertising. The two main governmental interests would be protection of children and prevention of abusive drinking.

The government interest in protecting children would run into the same problems as the interest in banning tobacco advertising. The interest could be alternatively served by limiting the hours of alcohol advertising or by only allowing advertisements during programs with high percentages of viewers over the age of twenty-one. Just like the complete ban on tobacco, a complete ban on alcohol to protect children would be more extensive than necessary.

Unlike the ban of tobacco advertising, the ban of alcohol advertising would not be found constitutional if its purpose is protecting the health of

163. WHO Report on the Global Tobacco Epidemic, 2011, *supra* note 13, at 62.

164. See *Fullilove v. Klutznick*, 448 U.S. 448, 455 (1980); *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582, 585 (D.D.C. 1971).

all individuals. This government purpose would not be to prevent the drinking of any alcoholic beverages; it would only aim to prevent alcohol abuse. Unlike tobacco, alcohol can be consumed in moderate amounts without negative health effects.¹⁶⁵ This severely weakens the governmental interest. Although the ban could possibly have the same effect as the similar ban of tobacco advertisements, the Court would still find the ban too speech restrictive.

V. CONCLUSION

Congress treats alcohol and tobacco advertising completely differently.¹⁶⁶ For over forty years, Congress has prohibited the advertisement of tobacco on both television and radio.¹⁶⁷ Currently, beer, wine, and liquor companies are free to advertise on both radio and television.¹⁶⁸ The only regulation of alcohol advertisement comes from alcohol institutions and private companies.¹⁶⁹

The Supreme Court currently evaluates First Amendment challenges to commercial speech restrictions under the four-prong test set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.¹⁷⁰ Under that test, the Court would uphold the ban on tobacco advertising but find that a similar ban on alcohol advertising is unconstitutional because tobacco always has negative health effects while the same is not the case for alcohol.

165. MAYO CLINIC, *supra* note 126.

166. *Compare* Cigarette Labeling and Advertising Act, 15 U.S.C. § 1335 (2006) (“[I]t shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.”), *with* FED. TRADE COMM’N, *supra* note 5, at i (noting that the alcohol industry is self-regulated).

167. Cigarette Labeling and Advertising Act, 15 U.S.C. § 1335 (2006).

168. Oxenford, *supra* note 4.

169. *See, e.g.*, DISCUS, *supra* note 110.

170. 447 U.S. 557 (1980).