

PERMISSIBLE BURDEN OR CONSTITUTIONAL VIOLATION?
A FIRST AMENDMENT ANALYSIS OF CONGRESS'
PROPOSED REMOVAL OF TAX DEDUCTIBILITY
FROM TOBACCO ADVERTISEMENTS

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I. INTRODUCTION

The medical problems associated with smoking in the United States have reached epidemic proportions.¹ Cigarettes are the nation's leading preventable cause of death and have given rise to the "most important public health issue of our time."² Despite the serious health risks inherent in smoking, however, it is on the rise among the nation's young people.³ This increase is largely attributed to advertising, which has been an effective means for the tobacco industry to maintain its customer base and to recruit new smokers.⁴ Because of

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¹ See Lawrence O. Gostin & Allan M. Brandt, *Criteria for Evaluating a Ban on the Advertisement of Cigarettes*, 269 JAMA 904, 905 ("[T]he state has a compelling interest in trying to reduce smoking.").

² Gilbert J. Botvin et al., *Smoking Behavior of Adolescents Exposed to Cigarette Advertising*, 108 PUB. HEALTH REP. 217, 217 (1993) (citation omitted).

³ See John P. Pierce et al., *Tobacco Industry Promotion of Cigarettes and Adolescent Smoking*, 279 JAMA 511, 514 (1998) ("[T]obacco promotional activities influenced 54,454 . . . adolescents (or 17% of the total population of this age) to experiment with cigarettes before they reached the age of 18 years."); John Schwartz, *Smoking Rises Among College Students*, PHILA. INQUIRER, Nov. 18, 1998, at A8 (stating that the number of college students who smoke grew by 28 percent between 1993 and 1997, with younger students being more likely to begin smoking than older ones).

⁴ See Botvin et al., *supra* note 2, at 218 ("Cigarettes are the most heavily promoted product in the country."); *id.* at 221 ("[R]esults indicate that exposure to cigarette advertising is significantly correlated with reported smoking behavior."); *id.* at 223 ("[E]vidence . . . suggests that there may be a causal relationship between cigarette advertising and smoking initiation.").

their power to promote smoking, tobacco ads provide an opportunity for the government to effectively combat this national health epidemic.

The Internal Revenue Code allows companies to deduct all of their advertising costs as business expenses.⁵ This provision is particularly beneficial to tobacco companies, who in 1998 spent \$4.6 billion on advertising.⁶ In order to mitigate the detrimental effects of tobacco ads, the Harkin Amendment—which decreased permissible deductions for tobacco ads to 50% of their total cost⁷—was introduced in the Senate in 1993.⁸ Because the Harkin Amendment was defeated, however, its constitutionality was never formally examined.

In 2000, Congress is again considering a limitation on the tax deductible status of tobacco advertisements, this time in the form of a complete removal of such status (hereinafter "Proposal").⁹ Despite the recent settlement of forty-six states' claims against the tobacco industry, lawmakers continue to stress the importance of adopting federal anti-smoking legislation.¹⁰ Indeed, the states' success in forcing tobacco com-

⁵ See I.R.C. § 162 (1993) (allowing tobacco companies to deduct from their gross income the cost of tobacco advertising and promotional expenses).

⁶ See Diane E. Stover, *Women, Smoking, and Lung Cancer*, CHEST, Jan. 1998, at 1 ("Presently, the tobacco industry spends \$4.6 billion yearly (that is, \$12.6 million a day) on tobacco advertising.").

⁷ See 139th CONG. REC. S. 3052-54 (daily ed. Mar. 17, 1993) (statement of Sen. Harkin). Harkin noted:

The amount allowable as a deduction under this chapter for expenses relating to advertising or promoting cigars, cigarettes, smokeless tobacco, pipe tobacco, or any similar tobacco product shall not exceed 50 percent of the amount of such expenses which would (but for this section) be allowable as a deduction under this chapter.

Id.

⁸ See S. Res. 609, 103d Cong., 1st Sess. (1993); Sally L. Venverloh, Note, *The Harkin Amendment: The Constitutionality of Limiting Deductions for Tobacco Advertising*, 13 ST. LOUIS U. PUB. L. REV. 787 (1994). The Harkin Amendment was just one step in a series of anti-tobacco legislation spanning the previous three decades. For example, in 1965, Congress passed legislation mandating warning labels on tobacco product packages. See MICHAEL G. GARTNER, *ADVERTISING AND THE FIRST AMENDMENT* 27 (1989). This was followed by the Public Health Cigarette Smoking Act of 1969 (15 U.S.C. § 1335), which changed the wording of warning labels and banned all cigarette advertisements from electronic media. See *id.* In 1984, Congress required that warnings appear in tobacco advertisements, and in 1986 it extended label requirements and the ban against electronic advertisements to smokeless tobacco. See RICHARD T. KAPLAR, *ADVERTISING RIGHTS: THE NEGLECTED FREEDOM* 11-12 (1991). Finally, Congress passed the Smoking Prevention Health and Education Act in 1988 as codified in 15 U.S.C. § 1333, which "strengthened the tone of warning labels and made them fifty percent larger than before." See Venverloh, *supra*, at 801.

⁹ See Henry Cohen, CRS Report for Congress: *Tobacco Advertising: The Constitutionality of Limiting its Tax Deductibility*, (Cong. Research Serv. Doc. 98-189A) (1998).

¹⁰ See Barry Meier, *Remaining States Approve the Pact on Tobacco Suits*, N.Y.

panies to assume financial responsibility for tobacco-related health problems has fostered a political climate more conducive to such legislation. Congress' Proposal is a timely effort to build on the modest but significant achievement of the recent tobacco settlement and to curb tobacco use in the United States through federal regulation.

On November 20, 1998, forty-six states accepted a settlement agreement with four of the nation's five largest tobacco companies.¹¹ The settlement prevents the states from bringing suit to recover Medicaid money spent treating smoking-related illnesses and grants the states a total of \$206 billion over the next twenty-five years.¹² The settlement eliminates tobacco advertisements on billboards and mass transit, and limits tobacco companies to one brand-name sponsorship per year, provided the event "does not involve a sports team, have paid participants who are underage or cater to a young audience."¹³ The settlement also requires tobacco companies to contribute \$1.45 billion over the next five years to national anti-smoking campaigns.¹⁴ The deal does not, however, limit print, in-store, or combination advertising,¹⁵ and was described as weak by former Surgeon General Dr. C. Everett Koop.¹⁶ Many opponents of the settlement, including former Food and Drug Administration commissioner David Kessler, have criticized the agreement for being too lenient on the tobacco industry.¹⁷ In addition to some of the settlement's sub-

TIMES, Nov. 21, 1998, at A1.

¹¹ See *id.* The four companies involved in the settlement were R.J. Reynolds Tobacco, Lorillard Tobacco, Brown & Williamson Tobacco, and Liggett & Myers. See *id.* Every state except Massachusetts also agreed to a settlement with U.S. Tobacco, a maker of smokeless tobacco products. See *id.*

¹² See *id.*

¹³ Stephanie Stapleton, *Tobacco Deal Doesn't Settle All the Issues*, AM. MED. NEWS, Dec. 7, 1998, at 6.

¹⁴ See Gail Gibson, *Tobacco Settlement: It's Unanimous*, PHILA. INQUIRER, Nov. 21, 1998, at A1. It should be noted that the industry currently spends roughly \$6 billion annually on advertising and marketing. The \$1.45 billion contribution over five years and four companies to anti-smoking campaigns is a relatively insignificant part of each company's budget. See *A Weak Tobacco Deal*, N.Y. TIMES, Nov. 17, 1998, at A24 ("Tobacco companies would have no trouble shifting the nearly \$6 billion a year they spend on marketing to formats that are not prohibited.").

¹⁵ Combination ads are defined here as ads in which an impermissible ad is included as part of an otherwise permissible advertisement. For example, a billboard for a convenience store that featured a sale price on cigarettes is herein considered a combination ad. The effect of the settlement on such advertisements will inevitably be a controversial matter of interpretation, and therefore is arguably a shortcoming of the agreement.

¹⁶ See Meier, *supra* note 10, at A1.

¹⁷ See *No Deal: Behind-the-Scenes Tobacco Settlement Falls Short. Get Congress and the President Back into the Act*, PHILA. INQUIRER, Nov. 18, 1998, at A22 ("There is

stantive inadequacies, many of its critics are also concerned that its presence will deter what they consider to be badly needed federal legislative treatment of the tobacco epidemic.¹⁶ President Clinton noted that "only the national government can take the full range of steps needed to protect our children from the dangers of tobacco."¹⁹

In light of the building consensus concerning the need for strong federal anti-smoking initiatives, the question of whether and to what degree the First Amendment permits the federal government to legislate against tobacco advertising becomes more important. As the number of young American smokers continues to increase,²⁰ the call for federal legislation limiting tobacco is likely to grow stronger. The constitutionality of restrictions on advertising and other forms of tobacco-related commercial speech are bound to come to the forefront of First Amendment jurisprudence.²¹

Although critics of the Proposal maintain that it violates tobacco companies' right to free speech, this Comment argues that Congress' Proposal to remove tax deductible status from tobacco advertisements is an effective, constitutional means of combating a dangerous national epidemic.

Tobacco companies and their supporters object to Congress' Proposal on the ground that it violates the companies' First Amendment right to freedom of speech.²² Specifically,

very little here for public health. There are more tobacco industry loopholes than you can imagine." (quoting David Kessler)); Saundra Torry, *More States, White House Endorse Tobacco Deal*, WASH. POST, Nov. 17, 1998, at A1 (quoting Connecticut Attorney General Richard Blumenthal, who said "the industry has shown it is extraordinarily skilled at exploiting loopholes . . . in laws and agreements").

¹⁸ See Gail Gibson & Raja Mishra, *More States Prodded on Tobacco Deal*, PHILA. INQUIRER, Nov. 17, 1998, at A1 (quoting Colorado Attorney General Gale Norton predicting that attorneys general all over the country will push for future accomplishments"); Stapleton, *supra* note 13, at 6 ("[Attorneys general] acknowledged [the settlement] is, at best, a single chapter in the tobacco-control movement and in no way diminishes the need for comprehensive legislation.").

¹⁹ Gibson & Mishra, *supra* note 18, at A1. In addition to the President, Matthew Myers, executive vice president for the Campaign for Tobacco-Free Kids, stated that "if Congress uses this agreement as an excuse not to enact tobacco legislation this coming year, it'll be a tragedy." Stapleton, *supra* note 20, at 6.

²⁰ See Schwartz, *supra* note 3, at A8 (noting increase in the number of young American smokers).

²¹ The Supreme Court recently struck down 18 U.S.C. § 1304 as unconstitutional under the First Amendment. See *Greater New Orleans Broad. Ass'n v. United States*, 119 S. Ct. 863 (1999). Section 1304 forbids certain broadcast advertisements for gambling establishments. The grant of certiorari and decision in this case is evidence of the Court's continued interest in commercial speech issues. Recent developments in national anti-tobacco policy will likely act in conjunction with decisions like *Greater New Orleans Broadcasting* to bring the relationship of advertising and the First Amendment into the foreground of American constitutional law.

²² See Memorandum from Jim Davidson for the Advertising Tax Coalition to the

opponents claim that the Proposal is unconstitutional in two ways. First, they maintain that it violates the First Amendment's protection of commercial speech that has "evolved over the past quarter century."²³ Second, they claim that the Proposal fails to provide this speech with the "protection from government taxation or regulation" that they insist is integral to free speech principles.²⁴ Proponents of the Proposal, however, contend that the restriction will be an effective means of curtailing tobacco advertisements and will therefore help reduce smoking.²⁵ They insist that the removal of tax deductibility is constitutional because it satisfies the Court's test for evaluating regulations of commercial speech²⁶ and because it is a constitutionally permissible use of the government's taxing power to burden such speech.²⁷

This Comment evaluates Congress' Proposal in light of this constitutional debate. Part II traces the development of commercial speech doctrine, outlining the current state of the doctrine as it pertains to advertisements, particularly those for tobacco products. Part III evaluates Congress' Proposal in light of modern commercial speech doctrine and demonstrates that the Proposal does not violate the controlling test for commercial speech regulation established in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.²⁸ More specifically, this Part addresses the Proposal's constitutionality with respect to two different "substantial government interests" and determines that the government interest in reducing smoking does not pass the *Central Hudson* test as clearly as an expressive government interest in condemning the tobacco industry's irresponsible business practices. Part IV considers taxation under the First Amendment, concluding that the current Proposal is not restricted by either free speech principles or Supreme Court precedent prohibiting the

Honorable Henry J. Hyde, Chairman, House Judiciary Committee 1 (May 26, 1998) (on file with *University of Pennsylvania Journal of Constitutional Law*) [hereinafter Memorandum]. The First Amendment to the Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press" U.S. CONST. amend. I.

²³ Memorandum, *supra* note 22, at 1.

²⁴ *Id.*

²⁵ See Cohen, *supra* note 9, at 5.

²⁶ See *id.* at 3-5.

²⁷ Proponents cite *Cammarano v. United States*, 358 U.S. 498 (1959), and *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983), to support their argument that reapplying tax liability to tobacco advertisements is not invidious content discrimination against speech and therefore is not subject to strict scrutiny. See Cohen, *supra* note 9, at 1-3.

²⁸ 447 U.S. 557, 569-70 (1980).

taxation of speech. Congress' Proposal represents a creative and constitutionally permissible device for diluting the tobacco industry's most effective means of promoting its products. It should therefore be upheld as a constitutionally permissible regulation of commercial speech and an appropriate use of Congress' taxing power.

II. THE DEVELOPMENT OF COMMERCIAL SPEECH DOCTRINE

The nation's Founders considered free speech a critical and defining characteristic of the new government, as evidenced in the First Amendment to the Constitution, which states that "Congress shall make no law . . . abridging the freedom of speech"²⁹ Since the adoption of the First Amendment, philosophers have echoed the Founders' sentiment that the freedom to express one's views and engage in open political and social debate is a cornerstone of American democracy.³⁰

A. *The History of Commercial Speech in the Supreme Court*

The Supreme Court has established varying degrees of protection for different categories of speech. Political speech, for example, has been afforded the strongest First Amendment protection, while other forms of speech, including com-

²⁹ U.S. CONST. amend. I.

³⁰ See, e.g., JOHN STUART MILL, ON LIBERTY 75 (Gertrude Himmelfarb ed., Penguin Books 1982 (1859)) ("No argument . . . can now be needed against permitting a legislature or an executive, not identified in interest with the people, to prescribe opinions to them and determine what doctrines or what arguments they shall be allowed to hear."). In his legendary dissent in *Abrams v. United States*, 250 U.S. 616 (1919), Justice Oliver Wendell Holmes argued:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Id. at 630; see also ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 26 (1965) ("As the self-governing community seeks, by method of voting, to gain wisdom in action, it can find it only in the minds of its individual citizens. If they fail, it fails. That is why freedom of discussion for those minds may not be abridged."). Some modern constitutional scholars have even advocated expanding the right of free speech to promote a goal of social equality. See R. GEORGE WRIGHT, SELLING WORDS: FREE SPEECH IN A COMMERCIAL CULTURE 16 (1997) ("Our best understanding of freedom of speech may emphasize . . . the need to protect the speech of the outcast and the relatively powerless."). This expansive view further demonstrates the degree of influence and authority afforded the principle of free speech in American government. See *id.* at 35-36.

mercial speech, have been denied such protection.³¹ After initially denying First Amendment protection to commercial speech, however, the Court later distinguished forms of speech that were not wholly commercial in nature,³² ultimately recognizing that even purely commercial speech merits some First Amendment protection.³³ In *Central Hudson*, the Court developed a four-part test that remains the controlling standard for determining the constitutionality of commercial speech regulations.³⁴ The validity of Congress' proposed removal of tax deductibility from tobacco ads depends on its surviving the *Central Hudson* test, an analysis that first requires an understanding of the development of modern commercial speech doctrine.

1. Commercial Versus Noncommercial Speech

The justification and scope of commercial speech doctrine depend on the validity of the distinction between commercial and noncommercial speech. As an initial matter, the text of the First Amendment does not distinguish between the two forms of expression, indicating that the Framers did not consider them separately.³⁵ Critics of commercial speech doctrine have accordingly characterized the Court's eventual distinction as "an artificial one,"³⁶ arguing that First Amendment protection should be granted equally to commercial and non-commercial speech.³⁷

³¹ See *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942). Obscenity, libel and slander, and incitement to violence all fall outside the realm of First Amendment protection. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974) (libel and slander); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (incitement to violence); *Roth v. United States*, 354 U.S. 476, 481 (1957) (obscenity). But see *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386, 392 (1992) (limiting regulations against "fighting words" to those that are facially neutral).

³² See *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (holding that paid nature of publication does not render it "commercial").

³³ See *Virginia State Bd. of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 765 (1976) (discussing the value of commercial speech).

³⁴ See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

³⁵ See, e.g., MICHAEL G. GARTNER, *ADVERTISING AND THE FIRST AMENDMENT* 8 (1989) ("Our framers understood that it makes no difference from the standpoint of free speech and self-government whether information appears in a news column or in a paid advertisement.") (internal quotation marks omitted); see also Brian J. Waters, Comment, *A Doctrine in Disarray: Why the First Amendment Demands the Abandonment of the Central Hudson Test for Commercial Speech* 27 SETON HALL L. REV. 1626, 1647 (1997) ("[T]here is little evidence to suggest that commercial speech was singled out [by the Framers] for separate treatment under the First Amendment.7).

³⁶ Waters, *supra* note 35, at 1647.

³⁷ See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 523 n.4 (Thomas, J.,

Despite the absence of a textual distinction between commercial and noncommercial speech, the historical circumstances surrounding the adoption of the First Amendment indicate that commercial speech was not the focus of the Framers' concern. In light of Madison's observation that the First Amendment is "the essential difference between the British Government and the American Constitutions,"³⁸ the Amendment seems to reflect the Colonists' adverse reaction to their lack of political influence over Britain before the Revolution, suggesting that the amendment's primary purpose was to protect an individual's freedom to engage in open political discourse.³⁹ According to Alexander Meiklejohn, "[a]s the self-governing community seeks, by method of voting, to gain wisdom in action, it can find it only in the minds of its individual citizens That is why freedom of discussion for those minds may not be abridged."⁴⁰ Note that both of these commentaries focus solely on the protection of political speech. In the absence of evidence that the Framers also considered commercial speech, there is little historical basis for reading the First Amendment to include commercial speech protection.

In addition to the historical argument, there is also a practical distinction between commercial and noncommercial, or political, speech.⁴¹ An individual's right to conduct business as he or she pleases has long been a source of legislative restrictions.⁴² Moreover, there are different social costs associated with the regulation of commercial and noncommercial speech: governmental restrictions on political speech are potentially more dangerous to the national welfare and iden-

concurring).

³⁸ 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 72 (Jonathan Elliot ed., William S. Hein & Co., Inc. 1996) (1891).

³⁹ See EDWIN ROME & WILLIAM H. ROBERTS, CORPORATE AND COMMERCIAL FREE SPEECH 36 (1985) ("Free speech is essential . . . to . . . decision making in a democratic system.").

⁴⁰ MEIKLEJOHN, *supra* note 30, at 26.

⁴¹ See WRIGHT, *supra* note 30, at 57 ("We should not be as distrustful of government's ability to regulate reasonably all commercial speech as of its ability to regulate fairly the speech of the government's own rival political parties, political movements, and political ideologies."); see also Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 606 (1996) ("One could argue, however, that governmental motivation for suppression is considerably more suspect when political speech is suppressed . . .").

⁴² See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398 (1937) (upholding a state minimum wage law and inaugurating the era of judicial deference regarding economic policy making).

tity than are limitations on commercial speech.⁴³ These differences support evaluating government regulations of commercial and noncommercial speech differently.

Finally, Martin Redish has offered a three-part justification that combines elements of various justificatory theories for the differential protection of commercial and noncommercial speech.⁴⁴ Redish maintains that commercial speech regulation is less problematic with respect to First Amendment principles because (1) "commercial speech does not foster First Amendment values in the same manner as do more traditional categories of expression;" (2) "commercial speech gives rise to regulatory problems not presented by other types of expression;" and (3) "commercial speech is less vulnerable to improper or abusive regulatory pressures than are other forms of expression."⁴⁵ Redish's third point captures the Court's reasoning in *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council*,⁴⁶ where the Court distinguished commercial speech as harder than noncommercial speech and therefore better able to withstand government regulation.⁴⁷ These historical, practical, and precedential justifications for treating commercial and noncommercial speech differently are reflected in modern commercial speech doctrine.⁴⁸

2. *Is Commercial Speech Worthy of First Amendment Protection?*

Since determining that commercial speech is distinct from noncommercial speech, the Court has struggled to identify an appropriate constitutional standard for evaluating commercial speech regulations. Initially, the Court provided no constitutional protection whatsoever for commercial speech. In *Valentine v. Chrestensen*,⁴⁹ a submarine owner distributed

⁴³ See Steven M. Cohen, Note, *A Tax on Advertising: First Amendment and Commerce Clause Implications*, 63 N.Y.U. L. REV. 810, 814-15 n.32 (1988) ("[T]he incentives and the resources to correct a commercial falsehood may not be as great as the motivation to counter a political falsehood.").

⁴⁴ See Redish, *supra* note 41, at 594.

⁴⁵ *Id.*

⁴⁶ 425 U.S. 748 (1976).

⁴⁷ See *id.* at 771-72 n.24 ("[T]he greater objectivity and hardness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.").

⁴⁸ See generally *id.*; *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n.*, 447 U.S. 557 (1980) (establishing a test for assessing the constitutionality of commercial speech regulations).

⁴⁹ 316 U.S. 52 (1942).

advertising fliers in violation of a sanitation code ordinance prohibiting public dissemination of commercial handbills. Although the opposite side of the fliers contained a noncommercial protest statement against the New York City Dock Department, the Court denied the advertisements First Amendment protection because it determined that the only reason for the inclusion of the political speech was to circumvent the ordinance.⁵⁰ In denying First Amendment protection for the handbills, the Court focused not on the expressive interests of the speaker, as in cases involving political speech, but on the value of the information to its intended audience.⁵¹ This focus is consistent throughout the Court's development of its commercial speech doctrine and distinguishes it from standard First Amendment analysis.

The importance of commercial speech's value to its audience was emphasized in *New York Times Co. v. Sullivan*,⁵² a case in which the City Commissioner of Montgomery, Alabama claimed that he had been libeled by an advertisement in the *New York Times*.⁵³ The Court held that the advertisement, which was primarily political in content, was noncommercial, despite the fact that it had been purchased from the *Times*.⁵⁴ The Court protected the ad without specifically overruling *Valentine*, focusing on the value of the political content of the advertisement—which was sufficient to justify protecting the speech under the First Amendment—rather than on the commercial content of the speech.⁵⁵

⁵⁰ See *id.* at 55 (finding that the "Constitution imposes no such [First Amendment] restraint on government as respects purely commercial advertising . . . [because] the affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose, of evading the prohibition of the ordinance").

⁵¹ See Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 779 (1999) ("[J]ustification for the [First Amendment] protection is based not on the expressive liberty of the speaker, but on the importance of the information to the audience.").

⁵² 376 U.S. 254 (1964).

⁵³ See *id.* at 256.

⁵⁴ See *id.* at 266 ("[I]f the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement."). The Court later narrowed slightly its position in *New York Times* when it ruled that paid ads promoting illegal commercial activity are not protected by the First Amendment. See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). The *Pittsburgh Press* ruling can be distinguished from *New York Times* because it focused on the commercial content of the advertisement, not simply the fact that it had been paid for, to characterize the speech as commercial for purposes of the First Amendment.

⁵⁵ See *New York Times*, 376 U.S. at 266; see also Halberstam, *supra* note 51, at 780 (interpreting the holding of *New York Times* to mean that "commercial speech would be protected as long as there was sufficient interest in its content").

The Court first extended First Amendment protection to purely commercial speech in *Bigelow v. Virginia*.⁵⁶ In analyzing an ad for abortions, the Court justified some constitutional protection for commercial speech, determining that "[t]he relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."⁵⁷ Specifically, the Court focused on the value of the information in the advertisement and determined that it was worthy of First Amendment protection despite its commercial qualities.⁵⁸ *Bigelow* did not, however, explicitly overrule *Valentine*.⁵⁹ The Court instead distinguished *Valentine* and justified protecting commercial speech on the grounds that the audience had a right to the specific information in the advertisement.

3. Commercial Speech Is Worthy of First Amendment Protection

A year after *Bigelow*, the Court in *Virginia State Board of Pharmacy* recognized a common-sense difference between commercial and noncommercial speech⁶⁰ and adapted its holding in *Valentine*, stating that "in some circumstances speech of an entirely private and economic character enjoys the protection of the First Amendment."⁶¹ The Court granted commercial speech some constitutional protection because it determined that the listener has a First Amendment right to receive commercial as well as political information;⁶² it re-

⁵⁶ 421 U.S. 809 (1975); see also Halberstam, *supra* note 51, at 781 (1999) (stating that *Bigelow* was "the first time the Court held that a legislative prohibition on commercial speech violated the First Amendment").

⁵⁷ *Bigelow*, 421 U.S. at 826.

⁵⁸ See *id.* at 829; see also Halberstam, *supra* note 51, at 781 ("[T]he Court held that the valuable opinion and information accompanying th[e] proposal in *Bigelow* were entitled to First Amendment protection.").

⁵⁹ Compare *Bigelow*, 421 U.S. at 822 (holding that the statute was unconstitutional because it restricted speech that did more than propose a commercial transaction), with *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (holding that the First Amendment does not protect "purely commercial advertising").

⁶⁰ See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 n.24 (1976).

⁶¹ *Id.* at 763 n.17.

⁶² See *id.* at 763-64 (stating that society may have a strong interest in the dissemination of commercial information); see also *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (emphasizing the listener's right to hear as an important part of First Amendment analysis). The listener's interest in protecting commercial speech is the only justifiable grounds for the Court's decision in *Virginia Pharmacy* because other defensible motivations for protecting speech, such as political utility and personal dignity, are not threatened by commercial speech restrictions. See KAPLAR, *supra* note 8, at 55.

tained the distinction between commercial and noncommercial speech, however, determining that commercial speech is more objective and durable than noncommercial speech and is therefore less likely to be silenced by regulation.⁶³

After *Virginia Board*, the Court used the distinction between commercial and noncommercial speech to deny commercial speech First Amendment protection in a variety of contexts. Recognizing that commercial speech is incidental to commercial activity,⁶⁴ the Court determined that, since commercial activity is subject to regulation, commercial speech should likewise be subject to governmental restrictions.⁶⁵ The Court did not, however, entirely abandon consideration of the value of commercial speech to its audience. In *Bates v. State Bar of Arizona*,⁶⁶ the Court struck down as overbroad a restriction on attorney advertising, despite findings that the advertising at issue was inherently misleading,⁶⁷ because the value of the information to the consumer was seen to outweigh the potential social damage from misleading advertising.⁶⁸

Although by 1979 the Court had established that commercial speech was generally worthy of at least some First Amendment protection, it was unable to establish clear and consistent standards for determining when and to what extent protection should be granted. The uncertainty of these standards led to the development of the four-part test articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*⁶⁹ to determine the constitutionality of commercial speech regulations.

4. The Central Hudson Test

In *Central Hudson*, the Court struck down a statute prohibiting advertising and other promotional activities designed

⁶³ See *Virginia Pharmacy*, 425 U.S. at 771-72 n.24.

⁶⁴ See *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979) ("[C]ommercial speech is linked inextricably to commercial activity . . .").

⁶⁵ See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978) (recognizing the "distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech").

⁶⁶ 433 U.S. 350 (1977).

⁶⁷ See *id.*

⁶⁸ See *id.* at 381-82; see also *NAACP v. Button*, 371 U.S. 415, 437 (1963) (holding that Virginia's limitation on attorney solicitation violated the First and Fourteenth Amendments).

⁶⁹ 447 U.S. 557 (1980).

to increase electricity consumption.⁷⁰ The Court followed precedent establishing that commercial speech is deserving of something less than the full First Amendment protection afforded noncommercial speech⁷¹ and developed a four-part test to evaluate the constitutionality of commercial speech regulations.⁷² The test stated that regulation of (1) non-misleading, legal, commercial speech requires (2) a substantial government interest; if such an interest exists, the regulation must (3) directly advance that government interest, and (4) be no more extensive than necessary to serve that interest.⁷³

The *Central Hudson* test has been interpreted in various ways. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,⁷⁴ the Court considered a First Amendment challenge to a regulation banning gambling advertisements aimed at Puerto Rican residents.⁷⁵ After establishing that the advertisements were neither illegal nor misleading,⁷⁶ the Court deferred to Congress' judgment, applying a reasonableness test and finding that the statute satisfied the fourth prong of the *Central Hudson* test.⁷⁷ The Court reasoned that because Congress has the power to ban gambling altogether, it must also be able to take the less drastic measure of banning gambling advertisements.⁷⁸

The *Central Hudson* test was reinterpreted in *44 Liquormart, Inc. v. Rhode Island*,⁷⁹ which involved a First Amendment challenge to a Rhode Island statute banning alcohol price advertisements.⁸⁰ Writing for a plurality,⁸¹ Justice Stev-

⁷⁰ See *id.* at 571-72.

⁷¹ See *id.* at 562 (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978)). The Court rejected the strict scrutiny standard for laws affecting commercial advertising. See *id.* at 563-66.

⁷² See *id.* at 566. The Court defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Id.* at 561.

⁷³ See *id.* at 564. Misleading speech does not fall within the scope of the *Central Hudson* test. See Sean P. Costello, Comment, *Strange Brew: The State of Commercial Speech Jurisprudence Before and After 44 Liquormart, Inc. v. Rhode Island*, 47 CASE W. RES. L. REV. 681, 741-42 (1997) ("Justice Blackmun wrote that commercial speech restrictions that keep consumers in ignorance serve to keep 'the State's policy choices . . . insulated from the *visibility* and *scrutiny* that direct regulation would entail.'" (quoting *Central Hudson*, 447 U.S. at 575 (Blackmun, J. concurring))).

⁷⁴ 478 U.S. 328 (1986).

⁷⁵ See *id.* at 333-34.

⁷⁶ See *id.* at 340-41.

⁷⁷ See *id.* at 342 ("[T]he legislature's belief [that advertising would increase the demand for gambling] is a reasonable one . . .").

⁷⁸ See *id.* at 345-46.

⁷⁹ 517 U.S. 484 (1996).

⁸⁰ See *id.* at 489-90. A number of commercial speech cases were decided between *Posadas* and *44 Liquormart*. Each of them applied the *Central Hudson* test to a

ens explained that neither the common sense distinction between commercial and noncommercial speech nor the increased durability of commercial information could justify the deferential standard of review applied in *Posadas*.⁸² According to Stevens, a complete *ban* on alcohol advertising could be justified only by "strong evidence" that the ban would substantially advance the government's interest in promoting temperance.⁸³ Stevens thus called for a "more stringent constitutional review . . . appropriate for the complete suppression of truthful, nonmisleading commercial speech."⁸⁴ The plurality rejected the greater-includes-the-lesser logic from *Posadas*⁸⁵ and determined that the regulation was not a "reasonable fit" with the government's interest under *Central Hudson*'s fourth prong.⁸⁶ The plurality's opinion in *44 Liq-*

commercial speech regulation, but interpreted the test differently. These cases are not relevant to an overview of the commercial speech doctrine because they do not represent a significant doctrinal departure from earlier cases, and they are considered in the following Part's application of *Central Hudson* to Congress' Proposal. See discussion *infra* Part III.

⁸¹ Plurality opinions do not carry the full force of precedent. When a divided Court rules on a case, "the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds." See *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). "Consequently, under *Marks* the decision [in *Posadas*] may be viewed as being based on *Central Hudson*'s fourth prong and nothing more." Costello, *supra* note 73, at 689 n.31.

⁸² See *44 Liquormart, Inc.*, 517 U.S. at 502 (deciding that despite its greater durability, bans on commercial speech should not be treated with "added deference").

⁸³ See *id.* at 505.

⁸⁴ *Id.* at 508. It is important to note that *44 Liquormart* did not overrule *Posadas*' finding that the government had a substantial interest in protecting the health and well-being of its residents. See Costello, *supra* note 73, 721 n.245. Furthermore, "the more demanding application of the third prong [as used in *44 Liquormart*] is not triggered unless there is a *total* or *blanket* prohibition on commercial speech." *Id.* at 732. Commentators have connected this application to the goals of the Court:

When the government regulates, but does not completely ban, commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices or requires the disclosure of beneficial consumer information, the Supreme Court uses a less stringent, more deferential standard of review. Here, the government is not seeking to censor relevant consumer information, but is helping assure that the message conveyed informs, rather than deceives, consumers about health risks.

Lawrence O. Gostin et al., *FDA Regulation of Tobacco Advertising and Youth Smoking: Historical, Social, and Constitutional Perspectives*, 277 JAMA 410, 413 (1997) (internal quotation marks omitted).

⁸⁵ See *44 Liquormart*, 517 U.S. at 511-12.

⁸⁶ See *id.* at 507. The "reasonable fit" language to describe the fourth prong of the *Central Hudson* test was first used in *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). *44 Liquormart* did not address the standard of review to be used for various restrictions on commercial speech, except to affirm the *Central Hudson* test as the standard of constitutional review in commercial speech cases. See Diane Ritter, *The First Amendment, Commercial Speech and the Future of Tobacco*

uormart, however, was only one of many opinions in the case and created considerable confusion about the future application of *Central Hudson*.⁸⁷

The Court alleviated some of the confusion created by 44 *Liquormart* in *Greater New Orleans Broadcasting Ass'n v. United States*,⁸⁸ which reconciled a split in the lower courts⁸⁹ concerning the constitutionality of 18 U.S.C. § 1304, a statute that "prohibit[ed] radio and television broadcasting . . . of 'any advertisement of . . . any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance . . .'"⁹⁰ In a per curiam decision, the Court applied the *Central Hudson* test and found the statute too broad and riddled with exceptions to pass First Amendment scrutiny. Section 1304, according to the Court, did not directly or materially advance the government's interest in curtailing gambling,⁹¹ nor was it a reasonable fit with that goal.⁹² Adopting a stricter, less deferential standard of review

Advertising After 44 Liquormart, Inc. v. Rhode Island, 47 WAYNE L. REV. 1505, 1527 (1997).

⁸⁷ Justice Scalia filed a concurring opinion in which he urged the Court to look to state legislative practices at the time of the ratification of the First Amendment in order to determine whether Rhode Island's statute violated the right to free speech. See 44 *Liquormart*, 517 U.S. at 517-18 (Scalia, J., concurring). Justice O'Connor, also concurring, offered direct regulation of alcohol as an alternative means of achieving the state's goal. See *id.* at 530 (O'Connor, J., concurring) (finding that the regulation was not narrowly tailored because there were less restrictive measures available, such as the direct regulation of alcohol). Justice Thomas, concurring in part, strongly advocated the equal treatment of commercial and noncommercial speech. He argued that because banning the product itself is always a more narrowly tailored means of furthering the state's interests, prohibiting advertising is always unnecessary and therefore unconstitutional under *Central Hudson*. See *id.* at 518 (Thomas, J., concurring); see also Kathleen Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123, 141 ("Justice Thomas would hold that suppressing advertising is always an impermissible means of suppressing demand for a good or service.").

⁸⁸ 119 S. Ct. 1923 (1999).

⁸⁹ Compare *Greater New Orleans Broad. Ass'n v. United States*, 149 F.3d 334 (5th Cir. 1998) (holding that a statute prohibiting broadcast of ads for gambling was a valid limitation on speech even after 44 *Liquormart*), with *Valley Broad. Co. v. United States*, 107 F.3d 1328 (9th Cir. 1997) (finding that broadcast ban on gambling ads violates the First Amendment), cert. denied, 522 U.S. 1115 (1998), and *Players Int'l, Inc. v. United States*, 988 F. Supp. 497 (D.N.J. 1997) (holding that a statutory ban on the broadcast of casino gambling ads violates the First Amendment).

⁹⁰ *Greater New Orleans Broad. Ass'n*, 119 S. Ct. at 1927.

⁹¹ See *id.* at 1934 ("[T]here was 'little chance' that the speech restriction could have directly and materially advanced its aim, 'while other provisions of the same Act directly undermine[d] and counteract[ed] its effects.'" (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995))).

⁹² See *id.* at 1935 (finding that "decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment").

than that employed in *Posadas*, the Court in *Greater New Orleans Broadcasting* invalidated § 1304 as a violation of the First Amendment and helped clarify the scope of the *Central Hudson* test after 44 *Liquormart*.⁹³

Greater New Orleans Broadcasting did not diminish the importance of *Central Hudson* in evaluating commercial speech regulations. While it implied a stricter standard for reviewing commercial speech restrictions than *Central Hudson*, *Greater New Orleans Broadcasting* spoke specifically to a broad statute laden with exceptions and internal contradictions.⁹⁴ Statutes that are narrower or free from such contradictions remain subject to the *Central Hudson* test as interpreted before *Greater New Orleans Broadcasting*, particularly the third and fourth prongs of the test—the most closely and frequently analyzed by the Court in determining the constitutionality of commercial speech regulations.

B. Application of Central Hudson's Third and Fourth Prongs

1. Central Hudson's "Materially Advance" Standard

The third prong of the *Central Hudson* test originally required that, in order to pass First Amendment review, a regulation must "directly advance" a substantial government interest.⁹⁵ In the first cases to apply *Central Hudson*, however, the original language was interpreted to articulate a reasonableness test for determining the validity of commercial speech regulations.⁹⁶ In *Metromedia, Inc. v. San Diego*,⁹⁷ for example, the Court deferred to local lawmakers' determination that a ban on billboard advertising would enhance traffic safety, upholding the statute on the basis that "[t]here is nothing [in the statute] to suggest that these [lawmakers'] judgments are unreasonable."⁹⁸ This deferential standard was echoed in *Posadas*⁹⁹ and welcomed by scholarly com-

⁹³ See *id.*

⁹⁴ For instance, § 1307 of the statute contained a long list of gambling advertisements that were not subject to § 1304's legislative ban. See *id.* at 1927-28 (excepting, among others, Indian gaming and state lotteries from § 1304's scope). The presence of these exceptions indicated that the statute did not constitute a "reasonable fit" with Congress' stated goal of discouraging gambling. See *id.*

⁹⁵ See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

⁹⁶ See, e.g., *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341-42 (1986); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509 (1981).

⁹⁷ 453 U.S. 490 (1981).

⁹⁸ *Id.* at 509.

⁹⁹ See *Posadas*, 478 U.S. at 342 ("[T]he legislature's belief [that advertising would

mentators.¹⁰⁰

The Court has recently begun to retract the *Posadas* standard, however, in favor of demanding a closer relationship between a challenged regulation and an asserted government interest. In *Edenfield v. Fane*,¹⁰¹ a statute forbidding in-person solicitation by accountants was struck down because the government did not prove on the record that the prohibition "materially advance[d]" the government's interest in protecting accountants' professional integrity.¹⁰² The Court found that purely prophylactic rules, that is, rules that fail the "materially advance" standard, are only appropriate where commercial speech is likely to mislead.¹⁰³

Despite the Court's apparent desire, evidenced in *Edenfield* and *44 Liquormart*,¹⁰⁴ to scrutinize commercial speech regulations more carefully, it distinguished advertising restrictions from other commercial speech regulations in *United States v. Edge Broadcasting Co.*,¹⁰⁵ observing that "the Government may be said to advance its purpose [of reducing gambling] by substantially reducing lottery advertising, even where it [the advertising] is not wholly eradicated."¹⁰⁶ Notwithstanding *Edenfield*'s finding that purely prophylactic rules do not satisfy *Central Hudson*'s third prong, *Edge Broadcasting* found that restricting gambling ads directly affects demand, thereby materially advancing the government's interest in reducing gambling. *Edge Broadcasting* thus rep-

increase residents' desire to gamble] is a reasonable one").

¹⁰⁰ See, e.g., WRIGHT, *supra* note 30, at 72 ("We have every reason to believe that commercial speakers can generally take care of their own interests without rigorous free speech protection, beyond a requirement that the regulation be reasonable.").

¹⁰¹ 507 U.S. 761 (1993).

¹⁰² See *id.* at 770-71 ("[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."); *Ibanez v. Florida Dept. of Bus. and Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 143 (1994) (same).

¹⁰³ See *Edenfield*, 507 U.S. at 774 (stating that a "preventative rule was justified only in situations inherently conducive to overreaching and other forms of misconduct") (internal quotations omitted).

¹⁰⁴ As indicated above, Justice Stevens attempted to raise the standard for upholding commercial speech regulations even further when he interpreted *Central Hudson*'s third prong to require "strong evidence" that a ban on alcohol price ads will advance the State's goal of promoting temperance. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996); see also discussion *supra* Part II.A.4. Justice Stevens' opinion, however, represented only a plurality of the Court and was not based on the issue of material advancement. See *Costello*, *supra* note 73, at 687-88 n.31. Given *44 Liquormart*'s questionable authority, it would be premature to consider it controlling in a case involving a mere restriction, rather than a complete ban, on commercial speech.

¹⁰⁵ 509 U.S. 418 (1993).

¹⁰⁶ *Id.* at 434.

resented an exception to the strict review promoted in *Edenfield* and 44 *Liquormart* for the evaluation of advertisements for socially disfavored activities.

After establishing that advertising regulations are sometimes due more deference under *Central Hudson*, the Court tightened its scrutiny of statutes whose enforcement was deemed suspect under *Edenfield*'s material advancement standard. In *Rubin v. Coors Brewing Co.*,¹⁰⁷ the Court determined that a ban on the inclusion of alcohol content on beer labels did not materially advance the government interest in frustrating strength wars among breweries because the statute was replete with exceptions and internal contradictions.¹⁰⁸ In *Rubin*, and again in *Greater New Orleans Broadcasting*,¹⁰⁹ the Court implied that not only must a regulation be aimed at a substantial government interest in order to be considered constitutional, it must also have some probability of achieving that interest.¹¹⁰ Such statements represent a significant departure from the "reasonableness" standard of *Metromedia* and *Posadas*.

The combined effect of *Edge Broadcasting*, *Edenfield*, and *Rubin* suggests that, while a regulation designed to restrict advertising for a socially disfavored activity will receive a more lenient standard of review, a regulation rife with exceptions and internal contradictions will be invalidated under *Central Hudson*'s "materially advance" standard.

2. Central Hudson's Fourth Prong

The fourth prong of *Central Hudson* was dramatically altered by the Court's decision in *Board of Trustees of the State University of New York v. Fox*.¹¹¹ The Court in *Fox* interpreted *Central Hudson*'s "not more extensive than is necessary" language to require "a fit [between the regulation and the interest it purports to serve] that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'"¹¹²

¹⁰⁷ 514 U.S. 476 (1995).

¹⁰⁸ See *id.* at 489. ("There [was] little chance that [the speech restriction could have] directly and materially advance[d] its aim, while other provisions of the same Act directly undermine[d] and counteract[ed] its effects.").

¹⁰⁹ 119 S. Ct. 1923 (1999).

¹¹⁰ See *id.* at 1934 (stating that there must be more than a "little chance" that the restriction could advance the asserted interest); see also *Rubin*, 514 U.S. at 489.

¹¹¹ 492 U.S. 469 (1989).

¹¹² *Id.* at 480 (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

Fox's deferential standard of review was challenged in *City of Cincinnati v. Discovery Network*,¹¹³ where the Court struck down a city ban on newsracks displaying particular publications. The ban was adopted on the premise of improving the aesthetics and safety of city sidewalks, but was struck down as an unreasonable means of achieving the City's stated goals. In a very narrow holding, the Court determined that "the fact that the regulation 'provided only the most limited incremental support for the interest asserted,' that it achieved only a 'marginal degree of protection' for that interest—supported [the Court's] holding that the prohibition was invalid."¹¹⁴ The Court invalidated the regulation because it bore virtually no relation to the asserted government interest, raising doubts about whether mere reasonableness would be sufficient to satisfy *Central Hudson's* fourth prong.¹¹⁵

The reasonable fit standard of Fox was reaffirmed, however, in *Florida Bar v. Went For It, Inc.*¹¹⁶ The Court in *Florida Bar* upheld a statute banning attorneys from participating in direct mail solicitation of accident victims. Despite the harsh implications for commercial speech inherent in a regulatory ban, the Court nonetheless found that the statute was a reasonable fit with the state's interest in protecting accident victims from unnecessary stress and invasions of privacy, noting that it had "made clear that the 'least restrictive means' test has no role in the commercial speech context."¹¹⁷ Although seemingly just a reaffirmation of established doctrine, *Florida Bar* proved significant to the future of regulatory limitations on commercial speech. While the Court in *44 Liquormart* seemed inclined to alter the reasonable fit test to mirror something like a more stringent "least restrictive means" test,¹¹⁸ *Florida Bar's* clear support for a reasonable fit stan-

¹¹³ 507 U.S. 410 (1993).

¹¹⁴ *Id.* at 427 (emphasis added) (citations omitted).

¹¹⁵ See *id.*

¹¹⁶ 515 U.S. 618 (1995).

¹¹⁷ *Id.* at 632 (citing Fox, 492 U.S. at 480).

¹¹⁸ See *44 Liquormart, Inc.*, 517 U.S. at 507 ("The State also cannot satisfy the requirement that its restriction on speech be no more extensive than necessary. It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance.").

The Court in *44 Liquormart* seemed to imply that the presence of any means of achieving the state's goals other than restricting speech would obviate any justification for a speech restriction. This "exhaustion of alternative means" theory is directly analogous to the "least restrictive means" test denounced in *Florida Bar*. However, the fact that *44 Liquormart* was a plurality decision eliminates the problem of determining whether the Court intended to overrule *Florida Bar*. Instead, the regulation at issue in *44 Liquormart* can be distinguished from the Proposal because it

dard for regulatory bans on speech forces the Court to maintain at least the principle of deference to the legislature.

Lower court decisions since 44 *Liquormart* have emphasized the importance of the distinction between legislative bans and mere restrictions on commercial speech under the fourth prong of *Central Hudson*. Lower courts have adopted an even more deferential standard than the one applied in *Fox* for determining whether a reasonable fit exists between a regulation and a substantial government interest, upholding various statutes imposing restrictions on alcohol and tobacco advertisements.¹¹⁹ The restrictions were found to be a reasonable fit under *Central Hudson* because they limited advertisements geographically, primarily to areas where children were unlikely to see them, and, unlike the ban on commercial speech in 44 *Liquormart*, did not interfere with the exchange of important information.¹²⁰ The circuit courts distinguished 44 *Liquormart* and refrained from applying strict First Amendment scrutiny to the challenged regulations because they were restrictions rather than bans on commercial speech.¹²¹

Central Hudson's fourth prong has not changed significantly since *Fox*, but has yet to be applied to a restriction such as that suggested in Congress' anti-tax deduction Proposal.

dealt with a prohibition, rather than merely a restriction, on commercial speech, a distinction that has proven to be important within commercial speech doctrine.

The Court in *Rubin v. Coors Brewing Co.* also used language that seemed to imply the adoption of a least restrictive means test, but this reasoning did not factor into the final decision, and therefore is not clearly instructive with regard to the Proposal. See Redish, *supra* note 41, at 623 (claiming that the Court in *Rubin* seemed to be moving the fourth prong of the *Central Hudson* test, the "reasonable fit" analysis, back toward a "least restrictive means" test). In addition, *Rubin*, like 44 *Liquormart*, involved a prohibition of speech rather than the type of restriction being contemplated by the Proposal. Both of these differences make the reasoning in *Rubin* less helpful in analyzing the Proposal's constitutionality.

Both *Rubin* and 44 *Liquormart* should be considered with caution by proponents of Congress' Proposal, however, because they indicate exactly how, in the future development of the commercial speech doctrine, "[t]he narrow tailoring inquiry can be continued indefinitely by unsympathetic courts." WRIGHT, *supra* note 30, at 100.

¹¹⁹ See *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995) (alcohol ads), *aff'd*, 101 F.3d 325 (4th Cir. 1996); *Penn Adver. of Baltimore, Inc. v. Mayor of Baltimore*, 63 F.3d 1318 (4th Cir. 1995) (tobacco ads), *aff'd*, 101 F.3d 332 (4th Cir. 1996).

¹²⁰ See *Anheuser-Busch, Inc.*, 101 F.3d at 327-28; *Penn Adver. of Baltimore, Inc.*, 101 F.3d at 333.

¹²¹ See *Anheuser-Busch, Inc.*, 101 F.3d at 328; *Penn Adver. of Baltimore, Inc.*, 101 F.3d at 333.

III. THE ANTI-TAX DEDUCTION PROPOSAL UNDER *CENTRAL HUDSON*

Congress' Proposal to withdraw tax-deductible status from tobacco advertisements comports with constitutional standards for permitting commercial speech restrictions. To the extent that tobacco ads are misleading, they may be ineligible for First Amendment protection.¹²² Alternatively, even if tobacco ads are not misleading, Congress' Proposal still satisfies the *Central Hudson* test for evaluating the constitutionality of regulations aimed at nonmisleading commercial speech.¹²³

The Court has consistently treated advertising as purely commercial speech¹²⁴ and has recognized as substantial the government's interest in protecting the health, safety, and welfare of its citizens.¹²⁵ Congress' proposed advertising restriction "materially advances" this interest by frustrating the activity being advertised¹²⁶ and represents a "reasonable fit" with the government's interest in combating smoking.¹²⁷ Moreover, because the Proposal is a restriction rather than a ban on commercial speech, it is a rational means of achieving the government's desired ends.¹²⁸ Finally, even if Congress'

¹²² See *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980) ("The government may ban forms of communication more likely to deceive the public than inform it.").

¹²³ See *id.* (explaining that the test requires (1) that the speech at issue be non-misleading, lawful, commercial speech, and (2) that the government have a substantial interest in regulating that speech; if such an interest exists, then the regulation must (3) directly advance the government interest, and (4) be no more extensive than is necessary to serve that interest).

¹²⁴ See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (ads for legal services); *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (ads for submarine tours).

¹²⁵ See *Greater New Orleans Broad. Ass'n v. United States*, 119 S. Ct. 1923, 1931 (1999); *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1988).

¹²⁶ See *United States v. Edge Broad., Inc.*, 509 U.S. 418, 434-35 (1993).

¹²⁷ Cf. *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993).

¹²⁸ This sentiment was echoed in recent lower court decisions in which restrictions on commercial speech were treated more deferentially than bans on such speech. See, e.g., *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995), *aff'd*, 101 F.3d 325 (4th Cir. 1996); *Penn Adver. of Baltimore, Inc. v. Mayor of Baltimore*, 63 F.3d 1318 (4th Cir. 1995), *aff'd*, 101 F.3d 332 (4th Cir. 1996).

Critics of commercial speech regulations may claim that 44 *Liquormart* is indicative of the Court's interest in reinterpreting or even overruling *Central Hudson*, especially its fourth prong, in an attempt to treat commercial speech more like non-commercial speech under the First Amendment. See Costello, *supra* note 73, at 687-88 n.31 ("Consequently, under *Marks* the decision may be viewed as being based on *Central Hudson's* fourth prong and nothing more."); see also WRIGHT, *supra* note 30, at 100 ("The narrow tailoring inquiry can be continued indefinitely by unsympathetic courts."). This interest surfaced in *Greater New Orleans Broadcasting*, when the Court moved further from *Posadas's* deferential standard by overturning a restriction

Proposal fails to satisfy the *Central Hudson* test with respect to the government's interest in discouraging smoking, however, it can nonetheless survive First Amendment scrutiny by asserting a different government interest—an expressive interest in publicly condemning tobacco companies' irresponsible marketing practices. With this substantial government interest as its goal, the Proposal is likely to meet even the strictest standards of review under *Central Hudson* and therefore be upheld under the First Amendment.

A. Tobacco Advertisements Are Misleading

The Court has clearly stated that misleading advertising is not protected in the same way as non-misleading commercial speech.¹²⁹ Deceitful information frustrates the First Amendment's purpose of encouraging open discourse, and may even do affirmative damage to consumers who rely on such information to make economic decisions.¹³⁰ Tobacco advertisements, such as those regulated by the Congress' Proposal, are frequently misleading forms of communication and therefore have little claim to First Amendment protection under *Central Hudson*. For example, tobacco ads portray smoking as a glamorous and athletic pursuit, without adequately representing the extreme danger inherent in tobacco consumption. In a recent issue of a national magazine, an advertisement for a popular brand of cigarettes depicted three rodeo cowboys posing for what appeared to be a post-contest victory picture.¹³¹ The ad unfolded to reveal another cowboy

on commercial speech due to its internal contradictions and exceptions. See *Greater New Orleans Broad. Ass'n*, 119 S. Ct. at 1935. Congress' anti-tax deduction Proposal, however, does not suffer from the same internal inconsistencies, and therefore remains just as likely to survive First Amendment scrutiny after *Greater New Orleans Broadcasting* as before.

¹²⁹ See *Central Hudson Gas & Elec. Corp. v. Public. Serv. Comm'n*, 447 U.S. 557, 563 (1980) ("The government may ban forms of communication more likely to deceive the public than to inform it."); see also *In re R.M.J.*, 455 U.S. 191, 217 (1982) (holding that professional advertisements by attorneys can be misleading and therefore may be regulated under the *Central Hudson* test).

¹³⁰ See Costello, *supra* note 73, at 736 ("[S]ome advertising might be more analogous to 'incitement' than to 'advocacy.'"); see also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763 (1976) ("[T]he particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate."). There is also a strong state interest in ensuring that private economic decisions are properly informed. See Costello, *supra* note 73, at 765. The Court has held that the state is in no way prevented from "insuring that the stream of commercial information flow cleanly as well as freely." *Id.* at 772.

¹³¹ See MAXIM, Oct. 1998, at 16-20.

riding a bucking bronco above the caption "just warming up."¹³² The mandatory Surgeon General's Warning in the bottom corner of the ad simply stated that "Cigarette Smoke Contains Carbon Monoxide."¹³³ As a result of this advertisement, a consumer who is not aware of the medical effects of carbon monoxide on the body remains uninformed as to the true consequences of using cigarettes, and is left with the impression that smoking is associated with a daring and exciting lifestyle. Similarly, an ad for a different brand of cigarettes promotes "Mighty Tasty Lifestyles."¹³⁴ The Surgeon General's Warning in the corner of this ad indicated that "Quitting Smoking Now Greatly Reduces Serious Risks to Your Health."¹³⁵ This warning is also insufficient to convey the actual risks of smoking to the consumer, downplaying smoking's dangers and allowing it to be falsely associated with a glamorous lifestyle.

These examples represent the dominant trend in tobacco advertisements: a denial of the unquestionably dangerous and addictive nature of tobacco in hopes of appealing to adults and young children to begin smoking in pursuit of a more exciting and glamorous life.¹³⁶ The warnings required by law are woefully deficient representations of the dangers of smoking: they neglect to inform an often misguided smoking public about the probable negative consequences of their actions.¹³⁷ Tobacco advertisements, because of their failure to communicate accurate information to their audience, are not worthy of First Amendment protection under the *Central Hudson* test.¹³⁸ They are of low informational value because they are typically misleading.¹³⁹

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 40-44.

¹³⁵ *Id.*

¹³⁶ See Vincent Blasi & Henry Paul Monaghan, *The First Amendment and Cigarette Advertising*, 256 JAMA 502, 506 (1986). These authors note that:

no cigarette advertising gives adequate warning of the wide range of serious and life threatening diseases induced by the ordinary use of the product. Quite to the contrary, the effect of this advertising is to conceal or to minimize these facts. Smoking is portrayed as not harmful, by associating it with traditionally young, healthy, athletic, and virile activities. Moreover, no cigarette advertising gives even the remotest suggestion that cigarettes are strongly addictive.

Id. (citation omitted).

¹³⁷ See *id.* at 503 ("The overriding fact is that many smoking adults . . . are not in any position to make a reasoned and informed judgment about smoking.").

¹³⁸ See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980).

¹³⁹ See Blasi & Monaghan, *supra* note 136, at 505 ("But current cigarette advertising, appealing as it does to subconscious and nonrational associations simply to

Despite evidence that tobacco ads are misleading, denying First Amendment protection to such ads could serve as a dangerous precedent justifying the denial of First Amendment protection for other forms of socially disfavored speech. In the case of tobacco advertising, however, the government's strong interests in regulating tobacco ads provide additional support for the constitutionality of such regulations.¹⁴⁰

B. Tobacco Advertisements Are Commercial Speech Under *Central Hudson*

Advertisements are a classic example of commercial speech, and the tobacco ads regulated by Congress' Proposal are no exception. In *Central Hudson*, which involved the prohibition of advertisements for public utilities, the Court defined commercial speech as "expression related solely to the economic interests of the speaker and its audience."¹⁴¹ In *Bolger v. Youngs Drug Products Corp.*,¹⁴² which involved a ban on unsolicited contraceptive ads, the Court defined commercial speech as communication that "does 'no more than propose a commercial transaction.'"¹⁴³ Other ways to distinguish commercial speech have also been developed, defining speech as noncommercial when the speaker "comes as close as reasonably and inexpensively possible under the circumstances to presenting it as noncommercial."¹⁴⁴ Despite these various definitions of commercial speech, advertisements have remained the paradigmatic example of commercial discourse under the First Amendment.¹⁴⁵ In particular, tobacco and alcohol ads have been uncontroversially treated as commercial speech in many recent Supreme Court and circuit court cases.¹⁴⁶ As a result, the tobacco advertisements targeted by

sell a product, has little or no such 'informational function.' This is centrally true even of those advertisements with some recognizable informational content, such as . . . tar content."); David C. Vladeck & John Cary Sims, *Why the Supreme Court Will Uphold Strict Controls on Tobacco Advertising*, 22 S. ILL. U.L.J. 651, 673 (1998) (discussing the "very low informational value of [tobacco] advertisements").

¹⁴⁰ See *infra* III.C.

¹⁴¹ *Central Hudson*, 447 U.S. at 561.

¹⁴² 463 U.S. 60 (1983).

¹⁴³ *Id.* at 66 (citation omitted).

¹⁴⁴ See WRIGHT, *supra* note 30, at 61.

¹⁴⁵ See generally *City of Cincinnati v. Discovery Network, Inc.* 507 U.S. 410, 421-22 n.17 (1993) ("[Advertisements] are well calculated to enlarge and enlighten the public mind, and are worthy of being enumerated among the many methods of awakening and maintaining the popular attention, with which more modern times . . . abound." (quoting DANIEL BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 328, 415 (1958)) (internal citations omitted)).

¹⁴⁶ See, e.g., *Greater New Orleans Broad. Ass'n v. United States*, 119 S. Ct. 1923

Congress' Proposal are properly defined as commercial speech.

C. Congress' Proposal Under Central Hudson's Means/Ends Analysis

A commercial speech regulation must address a "substantial government interest" in order to pass First Amendment scrutiny.¹⁴⁷ It is widely accepted that the government has "a compelling interest in trying to reduce smoking,"¹⁴⁸ as tobacco use can be directly connected to a wide variety of both medical and non-medical life risks,¹⁴⁹ and that advertising contributes to the negative impact of tobacco by playing a significant role in the recruitment of new smokers, many of whom are children or young adults.¹⁵⁰ The limitations of current non-legislative attempts to curb smoking further support Congress' "substantial interest" in adopting legislation to combat this epidemic.¹⁵¹

(1999); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Bad Frog Brewery, Inc. v. New York State Liquor Auth., 134 F.3d 87 (2d Cir. 1998); Anheuser-Busch, Inc. v. Schmoke, 101 F.3d 325 (4th Cir. 1996); Penn Adver. of Baltimore, Inc. v. Mayor and City Council, 101 F.3d 332 (4th Cir. 1996).

¹⁴⁷ Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980).

¹⁴⁸ *Benefits of Cigarette Ad Ban Would Outweigh Costs*, *supra* note 1, at 1. See Botvin et al., *supra* note 2, at 217; Jean Kilbourne, *Cigarette Ads Target Women, Young People*, ALCOHOLISM & ADDICTION MAG., Dec. 1988, at 22 ("Cigarettes are the only product advertised which is lethal when used as intended.").

¹⁴⁹ See Carl T. Bartecchi et al., *The Human Costs of Tobacco Use (First of Two Parts)*, 330 NEW ENG. J. MED. 907, 907-08 (1994) ("In the United States in 1990, smoking caused 179,820 deaths from cardiovascular disease. . . . [S]moking is . . . associated with cancers of the mouth, pharynx, larynx, esophagus, stomach, pancreas, uterine cervix, kidney, ureter, and bladder and accounts for about 30 percent of all deaths from cancer.") (citation omitted); Botvin et al., *supra* note 2, at 217 ("Cigarette smoking is the leading preventable cause of mortality and morbidity in the United States and has been described as the 'most important public health issue of our time.'") (citation omitted); Thomas D. MacKenzie et al., *The Human Costs of Tobacco Use (Second of Two Parts)*, 330 NEW ENG. J. MED. 975, 975 (1994) ("Fires related to cigarette smoking are the leading cause of civilian fire deaths in the United States."); Mohammad R. Torabi et al., *Cigarette Smoking as a Predictor of Alcohol and Other Drug Use by Children and Adolescents: Evidence of the "Gateway Drug Effect,"* 63 J. SCH. HEALTH 302, 302-05 (1993).

¹⁵⁰ See Botvin et al., *supra* note 2, at 221, 223. These authors report that: [t]he results indicate that exposure to cigarette advertising is significantly correlated with reported smoking behavior. [E]vidence . . . suggests that there may be a causal relationship between cigarette advertising and smoking initiation. . . . [T]here would appear to be ample evidence to warrant more careful scrutiny by legislators of the impact of cigarette advertising on children and adolescents.

Id. (emphasis added).

¹⁵¹ See generally Thomas N. Robinson & Joel D. Killen, *Do Cigarette Warning Labels Reduce Smoking?: Paradoxical Effects Among Adolescents*, 151 ARCHIVES OF

In order to survive constitutional scrutiny, however, Congress' Proposal must do more than invoke a worthy cause. The First Amendment requires that a commercial speech regulation both materially advance and be a reasonable fit with whatever substantial government interest it is meant to address.¹⁵² Congress' Proposal satisfies these criteria with respect to two distinct government interests: (1) discouraging people from smoking to promote public health; and (2) expressing governmental disdain for tobacco companies' unethical business practices.

1. *The Government's Interest in Promoting Public Health*

There are a number of substantial smoking-related interests that the government may promote by removing tax deductibility from tobacco advertisements. The most obvious of these is "protecting the health, safety, and welfare of [American] citizens" by discouraging tobacco advertising and thereby curbing smoking nationally.¹⁵³ These interests were found to satisfy the *Central Hudson* test in *Posadas*,¹⁵⁴ and were again recognized as valid in *44 Liquormart*¹⁵⁵ and *Greater New Orleans Broadcasting*.¹⁵⁶ The constitutionality of Congress' Proposal, therefore, can be evaluated by applying the third and fourth prongs of *Central Hudson* to the government's interest in promoting the health and welfare of its citizens.

a. The Proposal Materially Advances the Government's Interest in Promoting Public Health

Central Hudson's third prong requires that a commercial

PEDIATRICS & ADOLESCENT MED. 267, 271-72 (1997) ("Sizable proportions of adolescents are not seeing, reading, and remembering cigarette warning labels on cigarette packages and advertisements, and knowledge of warning labels was not associated with subsequent decreased smoking."); Stapleton, *supra* note 13, at 6.

¹⁵² See *Greater New Orleans Broad. Ass'n v. United States*, 119 S. Ct. 1923, 1930 (explaining the *Central Hudson* test for determining the constitutionality of commercial speech regulations).

¹⁵³ *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995); see also *Posadas de P.R. Ass'n v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986) ("[T]he Puerto Rico Legislature's interest in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest.").

¹⁵⁴ See *Posadas*, 478 U.S. at 341-43.

¹⁵⁵ See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 491 n.4 (1996) ("We . . . have little difficulty in finding that the asserted governmental interests, herein described as the promotion of temperance . . . are substantial.").

¹⁵⁶ 119 S. Ct. 1923, 1931-32 (1999) (accepting the government's interest in curtailing gambling as substantial).

speech regulation "materially advance" an asserted government interest. Congress' Proposal removes the tax deductible status from tobacco ads in order to reduce tobacco advertising, and, in turn, tobacco consumption. *Edge Broadcasting* recognized that a connection between advertising and consumption is sufficient to satisfy the third prong of *Central Hudson*, concluding that the government was able to "materially advance" its interest in reducing gambling by reducing lottery advertising. Similarly, burdening tobacco ads by eliminating their tax-deductibility will "materially advance" the government's interest in reducing smoking.¹⁵⁷ Moreover, because Congress' Proposal does not contain any of the internal contradictions that proved fatal to the regulation in *Rubin*, enforcement of the Proposal will be uniform and consistent with regard to all tobacco advertisements. In short, the Proposal satisfies the material advancement standard because of its effectiveness in discouraging smoking.

b. Reasonable Fit

In order for a regulation to pass the fourth prong of *Central Hudson*, it must also be a "reasonable fit" with the asserted government interest. The Court recently reaffirmed this deferential standard of review in *Greater New Orleans Broadcasting*, but has yet to articulate the appropriate application of *Central Hudson*'s fourth prong with respect to regulations that are mere restrictions, rather than complete bans, on commercial speech.¹⁵⁸

¹⁵⁷ Although the statute upheld in *Edge Broadcasting*—18 U.S.C. § 1304—was later invalidated in *Greater New Orleans Broadcasting*, the *Greater New Orleans Broadcasting* Court did not reject the theory presented in *Edge Broadcasting* that advertising is directly proportional to consumption. See *Greater New Orleans Broad. Ass'n*, 119 S. Ct. at 1932 ("[I]t is no doubt fair to assume that more advertising would have some impact on overall demand for gambling . . .").

¹⁵⁸ The Court in *Greater New Orleans Broadcasting* did not apply the fourth prong of *Central Hudson* to the commercial speech restriction at issue in that case; the validity of the statute could be determined solely on the third prong analysis. See *Greater New Orleans Broad. Ass'n*, 119 S. Ct. at 1934-35 (referring only to the fact that the statute does not directly and materially advance the government's stated interests). Similarly, although the Court's *Discovery Network* decision addressed "reasonable fit," it spoke primarily to regulations with "absolutely no bearing on the [government] interests . . . asserted," finding no reasonable fit in a regulation that arbitrarily singled out certain newsracks in order to combat a problem created collectively by all newsracks. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993). While this decision is instructive to drafters of commercial speech regulations, it is not relevant to an analysis of Congress' anti-tax deduction Proposal. The Proposal affects all tobacco ads uniformly and is therefore sufficiently broad and nonarbitrary to serve as a reasonable, nonincremental means of achieving the government's interest in reducing smoking.

Florida Bar provided some insight into how commercial speech restrictions would fare under *Central Hudson*. The Court employed a lenient standard for evaluating the constitutionality of bans on commercial speech and thus implied that a similar or even more deferential standard should be applied to mere restrictions which do not jeopardize a speaker's rights as significantly as outright bans. As a result, such restrictions are more likely to satisfy the *Central Hudson* test.¹⁵⁹

Some lower courts have emphasized the importance of this restriction/ban distinction in their treatment of commercial speech regulations. While they generally apply a very strict standard of review, making it nearly impossible for a ban on commercial speech to satisfy either the third or fourth prong of *Central Hudson*, lower courts have tended to defer to legislatures in determining the constitutionality of commercial speech restrictions.¹⁶⁰ The relaxed standard of review applied to speech restrictions by many federal courts suggests that Congress' tax-deduction Proposal will not be subject to the more rigorous standard applied to advertising bans such as those in *Florida Bar* and *44 Liquormart*.¹⁶¹

To an important degree, the viability of Congress' Proposal—justified in terms of the goal of reducing smoking—depends upon the resolution of this ban/restriction issue. The question of whether a commercial speech regulation is a reasonable fit with such an interest is generally a factual one, and the degree of deference afforded to the legislature can

¹⁵⁹ See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 502 (1996) (referring to the "special dangers that attend complete bans on truthful, nonmisleading commercial speech").

¹⁶⁰ See, e.g., *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 90 (2d Cir. 1998) (holding that a complete prohibition of a particular beer label neither materially advances the substantial state interest, nor is narrowly tailored to do so). The challenged prohibition did not materially advance the state's interest. It was "more extensive than necessary to serve the asserted state interest . . . [and it] lack[ed] a 'reasonable fit' with [that] . . . interest." *Id.* at 101.

¹⁶¹ The remaining question, however, is whether the Supreme Court will adopt the lower courts' distinction between restrictions and bans on commercial speech. Although *44 Liquormart* dealt exclusively with a regulatory ban on commercial speech, it is unclear whether the plurality opinion was meant to be read narrowly—allowing greater deference to commercial speech restrictions in accord with lower court precedent—or more broadly—as in Justice Thomas' concurrence—affording commercial speech the same strict First Amendment scrutiny applied to noncommercial speech. Similarly, because the Court in *Greater New Orleans Broadcasting* relied solely on the third prong of *Central Hudson* in evaluating a commercial speech restriction, it remains unclear whether the Court will recognize the ban/restriction distinction favored by the lower courts. See *Greater New Orleans Broad. Ass'n*, 119 S. Ct. at 1934-35.

often be determinative of the regulation's constitutionality.¹⁶² In this climate of uncertainty, it is appropriate to evaluate Congress' Proposal with respect to the government's second interest in removing the tax-deductible status of tobacco advertising: publicly condemning tobacco companies' irresponsible business practices.

2. *The Government's Expressive Interest*

The government has a substantial interest in condemning tobacco companies' irresponsible and deceitful business practices.¹⁶³ Cigarette manufacturers contribute to the serious health risks and social costs of smoking by irresponsibly producing misleading and uninformative advertising campaigns designed to attract new smokers and encourage current smokers to continue.¹⁶⁴ Congress' Proposal, by imposing a substantial financial burden on tobacco advertising, expresses the government's disapproval of tobacco marketing methods and provides a strong incentive for cigarette manufacturers to amend their business practices.

A government interest in condemning tobacco advertisements by removing their tax deductibility satisfies the "substantial interest" prong of *Central Hudson* by effectively addressing a serious social problem in a way that benefits the nation as a whole.¹⁶⁵ This expressive government interest is not in the suppression of commercial speech per se, but in the apportionment of government funds in a way that symbolizes government concern with the dangers of smoking and with the national welfare.

Congress' anti-tax deduction Proposal embodies Congress' condemnation of tobacco companies' irresponsible business

¹⁶² The significance of different standards of legislative deference is also evidenced in the Court's equal protection doctrine under the Fourteenth Amendment, where graduated levels of constitutional review were first developed. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (distinguishing the various levels of review appropriate for different legislative classifications under the Equal Protection clause); *Craig v. Boren*, 429 U.S. 190, 210 (1976) (Powell, J. concurring) (same).

¹⁶³ See WRIGHT, *supra* note 30, at 88-89.

¹⁶⁴ See Blasi & Monaghan, *supra* note 136, at 503 ("[T]he [tobacco] industry's current advertising is inherently deceptive and misleading."); Botvin et al., *supra* note 2, at 221, 223 ("[R]esults indicate that exposure to cigarette advertising is significantly correlated with reported smoking behavior . . . evidence . . . suggests that there may be [a] causal relationship between cigarette advertising and smoking initiation."); see also *supra* Part III.A (describing misleading tobacco ads).

¹⁶⁵ See *Posadas de P.R. Ass'n v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986) (explaining that promoting the general welfare of the people is itself a substantial government interest under *Central Hudson*).

practices.¹⁶⁶ The government's condemnation represents a substantial expressive interest under *Central Hudson* because it targets "the marketing practices or commercial speech or conduct that . . . government is reasonably justified in considering risky or socially irresponsible, in the sense of marketing that may involve frequent, extremely serious—if undemonstrable—harms with no proportionate social benefit."¹⁶⁷ The social harms which result from smoking clearly represent "frequent, extremely serious . . . harms with no proportionate social benefit."¹⁶⁸ Smoking is the nation's leading preventable cause of death;¹⁶⁹ it is responsible for causing a wide variety of potentially fatal illnesses¹⁷⁰ and is the leading cause of civilian fire deaths in the United States.¹⁷¹ Cigarette manufacturers are implicated in smoking's social harms because of their deceptive advertising and under-inclusive warnings to consumers.¹⁷² Congress is justified in considering tobacco companies' misrepresentations socially irresponsible and, therefore, an appropriate target of expressive legislation;¹⁷³ the product is extremely harmful and the potential benefits of consumer education about tobacco substantial. In short, the social dangers of smoking are sufficient to justify a substantial government interest in declining to fund the irresponsible acts of the tobacco industry in promoting their harmful product.

¹⁶⁶ See WRIGHT, *supra* note 30, at 88-89 ("An expressive public policy expresses the public endorsement or condemnation of some idea, practice, or state of affairs. . . . [A]dvertising can be irresponsible even if the effects allegedly flowing from that advertising are themselves not certain.").

¹⁶⁷ *Id.* at 91.

¹⁶⁸ *Id.* See also Botvin et al., *supra* note 2, at 217 ("Cigarette smoking is the leading preventable cause of mortality . . . in the United States and has been described as the 'most important public health issue of our time.'").

¹⁶⁹ See *id.*

¹⁷⁰ See Charles S. Fuchs et al., *A Prospective Study of Cigarette Smoking and the Risk of Pancreatic Cancer*, 156 ARCHIVES OF INTERNAL MED. 2255, 2258 (1996) (explaining a "consistent, independent positive association between cigarette smoking and the risk of pancreatic cancer . . . among current smokers"); J.W.G. Yarnell, *Smoking and Cardiovascular Disease*, 89 Q.J. MED. 493 (1996) ("[S]moking has been closely linked with ischaemic heart disease, stroke, peripheral arterial disease, aortic aneurysm and pulmonary heart disease in numerous . . . studies.").

¹⁷¹ See MacKenzie et al., *supra* note 149, at 75.

¹⁷² See Blasi & Monaghan, *supra* note 136, at 506 ("[N]o cigarette advertising gives even the remotest suggestion that cigarettes are strongly addictive."); Thomas N. Robinson & Joel D. Killen, *supra* note 151, at 267 (1997) ("Sizable proportions of adolescents are not seeing, reading, and remembering cigarette warning labels on cigarette packages and advertisements . . .").

¹⁷³ See WRIGHT, *supra* note 30, at 89 ("Even if the causal relationships between advertising and tobacco consumption are unclear, it is irresponsible for tobacco sellers to risk the basic health, or possible addiction to an unhealthy substance of large numbers of even voluntary consumers . . .").

A potential problem arises, however, with the recognition of expressive interests under *Central Hudson*. Simply intending to condemn a particular form of speech could justify regulations beyond the scope of what the Court has established as appropriate limits on commercial speech. For example, in the interest of condemning excessive television watching by children, Congress may want to ban television advertisements directed at minors. While the passage of this regulation would clearly express the government's desire that kids watch less television, it offends the intuition that speech should not be silenced by government intervention; merely claiming such an expressive interest should not be sufficient to justify such a harsh regulation.

Finding an expressive governmental interest in regulating commercial speech, however, does not necessarily create a slippery slope toward government censorship of such speech. Although it may seem easier for a regulation motivated by an expressive governmental interest to overcome the *Central Hudson* requirement that the government have a substantial interest in limiting speech, such a regulation must still satisfy the two remaining *Central Hudson* prongs in order to pass constitutional muster. A regulation that is overly restrictive or unreasonably tailored to achieve an expressive interest will fail to pass First Amendment scrutiny under *Central Hudson* regardless of the expressive interest the government claims as its justification.

The Court's evaluation of the statute in *44 Liquormart*—banning all alcohol price ads appearing outside of liquor stores—perfectly illustrates the vitality of *Central Hudson* regardless of the character of the governmental interest at issue. The Court struck down the ban on alcohol ads because it was not a reasonable fit with the government's interest in decreasing alcohol consumption. This result would be the same even if the government had relied on an expressive interest in condemning drinking to justify the regulation. The complete ban on commercial speech in *44 Liquormart* is not a reasonable means of expressing disdain for a particular activity or social practice because it unduly burdens speech under the First Amendment. Therefore, while partial restrictions on commercial speech, such as Congress' anti-tax deduction Proposal, may be a constitutional means of achieving an expressive government interest, more intrusive statutes, such as the advertising ban at issue in *44 Liquormart*, will be invalidated because they cannot satisfy *Central Hudson*'s reasonable fit requirement.

Consideration of the government's expressive interest in

removing tax deductibility from tobacco ads does not dramatically alter the Court's commercial speech doctrine or pave the way for complete governmental control over commercial speech. Recognizing the expressive interest inherent in Congress' Proposal simply shifts more emphasis to the third and fourth prongs of *Central Hudson* in evaluating the Proposal's constitutionality.

a. The Proposal Materially Advances the Government's Interest in Condemning the Tobacco Industry

The inherent differences in evaluating expressive government interests under the *Central Hudson* test render much of the Court's interpretation of the material advancement prong of that test inapplicable to Congress' Proposal. For example, the Court in *Edenfield v. Fane*¹⁷⁴ overturned a statute because the government could not prove "on the record" that banning commercial speech in that case would materially advance the asserted government interest.¹⁷⁵ This standard is not applicable to the Proposal's expressive government interest, however, because there is no way to prove *on the record* whether Congress' Proposal successfully expresses the government's message, or whether a sufficient number of people understand it. Proof that an expressive interest is actually furthered is too elusive to provide a means of deciding a regulation's constitutionality.

Similarly, the Court's finding in *Rubin v. Coors Brewing Co.*,¹⁷⁶ that a commercial speech regulation containing numerous exceptions cannot materially advance its purported interest,¹⁷⁷ is not applicable to the present analysis. Congress' Proposal conveys a consistent sentiment: tobacco companies behave irresponsibly by recruiting new smokers and promoting their products with deceptive advertising. The Proposal does not include any exceptions to its goal of expressing its anti-tobacco position, nor is it likely that an expressive government interest would ever include such exceptions. The unique character of an expressive interest, therefore, requires a different method for evaluating commercial speech regulations motivated by government disdain for

¹⁷⁴ 507 U.S. 761 (1993).

¹⁷⁵ *Id.* at 777 (holding that banning in-person solicitation by CPAs would not materially advance the government's interest in protecting accountants' professional integrity).

¹⁷⁶ 514 U.S. 476 (1995).

¹⁷⁷ *See id.* at 489 (noting that the labeling ban has certain provisions that materially advance its aim, and other provisions that undermine and counteract its effects).

"the socially irresponsible behavior of the seller, in this case the tobacco companies."¹⁷⁸

A more appropriate standard for determining material advancement in cases involving expressive government interests is the "alternate channels" analysis used in evaluating time, place, and manner restrictions under the First Amendment.¹⁷⁹ Valid time, place, and manner restrictions must satisfy two criteria: (1) they must leave open "alternative channels" for the communication of the regulated speech; and (2) those alternative channels cannot be "prohibitively more expensive, not markedly more inconvenient, and not significantly less effective as a means of broadcasting the message."¹⁸⁰

These criteria can be combined to establish a third prong of the *Central Hudson* test appropriate for regulations motivated by an expressive government interest. The alternative channel test is not overly restrictive because it applies almost exclusively to regulations that eradicate a particular message altogether, namely, complete bans on commercial speech. The Supreme Court in *44 Liquormart* implied that striking down total bans on commercial speech is not constitutionally problematic or overreaching because such bans impair a speaker's constitutional right to free speech severely enough to require close First Amendment scrutiny.¹⁸¹ At the same time, the alternate channel test is not so lax as to allow the government to silence speakers otherwise deserving of First Amendment protection under the pretext of expressing the government's own message. Preventing such an abuse of power protects against government censorship.¹⁸² The alternative channel test provides an effective means of evaluating expressive government interests under *Central Hudson's* third prong by recognizing both the policy-making role of govern-

¹⁷⁸ WRIGHT, *supra* note 30, at 90.

¹⁷⁹ The Supreme Court has permitted regulations limiting the time, place, and manner of speech, provided that "alternate channels" of expression remain available to the speaker. See, e.g., *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding a city limit on the use of loudspeakers as a permissible time, place, and manner restriction of speech). In the context of noncommercial speech, a time, place, and manner restriction must also be justified without reference to the content of the regulated speech and must be narrowly tailored to further a substantial government interest. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The content-based character of Congress's Proposal is discussed *infra* Part V.

¹⁸⁰ ROME & ROBERTS, *supra* note 39, at 152.

¹⁸¹ See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 508 (stating that a ban on advertising must survive "more stringent constitutional review than was appropriate for the complete suppression of truthful, nonmisleading commercial speech").

¹⁸² See ROME & ROBERTS, *supra* note 39, at 36 (deriving "the necessity for open discussion [reflected in the First Amendment] from . . . [a] fundamental program of self-government defined in . . . the Constitution").

ment and the potential for it to be abused.

Congress' Proposal materially advances a substantial government interest under the alternate channel test. Removing tax deductibility from tobacco ads does not close any channels of communication. While it does make advertising more costly, consistent consumer demand for cigarettes¹⁸³ and the enormous industry-wide budget for tobacco advertising¹⁸⁴ indicate that the loss of tax deductions for advertising expenses will not make tobacco ads "prohibitively expensive," "markedly more inconvenient," or a "significantly less effective" means of communication.¹⁸⁵ Moreover, the alternate channels test preserves the power of listeners to influence the message and methods of speakers—tobacco companies in this case—without gaining the power to silence those speakers in a way that is irreconcilable with the First Amendment. The government will thus be able to use its regulatory power to call attention to the tobacco companies' irresponsible business practices, but will be prevented under the alternative channels standard from committing clear First Amendment violations, such as eradicating altogether the rights of tobacco companies to dispense commercial messages.

b. The Proposal Represents a Reasonable Fit With the Government's Expressive Interest in Condemning Tobacco Industry Practices

Central Hudson's fourth prong requires that a commercial speech regulation represent a "reasonable fit" with the asserted government interest.¹⁸⁶ Congress' Proposal is a reasonable means of achieving the government's interest in expressing its dissatisfaction with tobacco companies' irresponsible business practices.

The Proposal is "in proportion to the interest served," as it is neither an excessively restrictive means of conveying the government's sentiments regarding tobacco ads, nor so limited as to be entirely ineffectual in achieving this purpose. The Proposal will not eradicate tobacco companies' ability to

¹⁸³ See Pierce et al., *supra* note 3, at 514 (reporting that "54,454 . . . adolescents (or 17% of the total population of this age) . . . experiment with cigarettes before they reached the age of 18 years").

¹⁸⁴ See Stover, *supra* note 6, at 1 ("[A]dvertising is a potent weapon for tobacco companies in their war to win young smokers.").

¹⁸⁵ ROME & ROBERTS, *supra* note 39, at 152.

¹⁸⁶ See, e.g., *Greater New Orleans Broad. Ass'n v. United States*, 119 S. Ct. 1923, 1932 (1999); *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

convey their commercial message, nor will it make it appreciably more inconvenient for them to do so. Singling out tobacco ads for the removal of tax deductibility is a clear and reasonable method of expressing the government's lack of support for the industry's deceptive advertising practices. Finally, unlike the regulation invalidated in *Discovery Network*, Congress' Proposal is sufficiently uniform in its application to pass scrutiny under *Central Hudson*'s fourth prong. The Proposal should therefore be upheld as a valid restriction on commercial speech under the First Amendment.

IV. FIRST AMENDMENT DOCTRINE REGARDING CONTENT-BASED SPEECH RESTRICTIONS ON GOVERNMENT FUNDING

Congress' Proposal is a valid government funding decision, rather than an unconstitutional content-based restriction on speech, under the First Amendment.¹⁸⁷ Although a "statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech,"¹⁸⁸ Supreme Court decisions regarding First Amendment taxation have concentrated solely on the constitutionality of taxes on noncommercial speech; the Court has never evaluated taxes levied on commercial speech. Moreover, the Court's treatment of First Amendment challenges to selective congressional funding establish that Congress may selectively allocate government funds without violating the constitutional rights of the funds' recipients.¹⁸⁹ The

¹⁸⁷ For a discussion of another objection to Congress' Proposal, see *supra* Part III.C. (explaining the Proposal's validity under the Court's commercial speech doctrine).

¹⁸⁸ See *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991). Because the point of Congress' Proposal is to combat the effects of tobacco advertisements that *promote* the use of tobacco products, it arguably represents not only content discrimination, but viewpoint discrimination as well. Content-based regulations target speech because of its subject matter, regardless of the point of view the speech reflects (e.g., a law prohibiting any discussion of abortion, pro or con). Viewpoint-based regulations, however, are the most constitutionally suspect form of content discrimination because they restrict the expression of particular points of view. See *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is . . . an egregious form of content discrimination."). Thus, however unlikely it is that Congress would wish to impose a tax burden on *anti-smoking* ads, the Proposal does not distinguish between ads that promote tobacco use and those that discourage it. Accordingly, the focus of the present analysis is limited to content-based speech regulations.

¹⁸⁹ See *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (upholding a "decency" requirement imposed on federal arts funds on the grounds that subjective funding decisions are within Congress' spending power); *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding Congress' exclusion of abortion counseling from Title X funding on the grounds that Congress has the discretion to decide the scope of gov-

Proposal is not an impermissible content-based restriction on speech, but is instead an exercise of Congress' authority to preferentially fund particular programs. Accordingly, Congress' Proposal represents a valid economic policy decision within the bounds of the First Amendment more closely analogous to the regulations at issue in the Court's selective funding cases than to those invalidated on the basis of content discrimination.

*A. The Anti-Tax Deduction Proposal Is Not
an Unconstitutional Content-Based Restriction of Speech*

Although the Court has yet to decide a case involving the constitutionality of commercial speech taxation, the same considerations that led the Court to extend less constitutional protection to commercial speech justify a more relaxed standard of review for taxes levied against such speech. While generally applicable taxes on noncommercial speech have routinely been upheld under the First Amendment, content-based taxes on noncommercial speech have been consistently invalidated. The Court's decisions involving content-based taxes on speech, however, have only addressed government regulation of noncommercial speech; it thus remains uncertain whether a purely commercial speech regulation such as Congress' Proposal will face equally strict constitutional scrutiny.

The federal government is vested with the power to levy taxes on different forms of speech,¹⁹⁰ including noncommercial speech, provided such taxes are content-neutral¹⁹¹ and not "aimed at the suppression of dangerous ideas."¹⁹² In *Cammarano v. United States*,¹⁹³ the Court upheld a uniform

ernment programs). The removal of tax deductibility from tobacco ads is, for purposes of the First Amendment, tantamount to an additional tax on such advertisements. See *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 789-94 (1973) (dismissing as constitutionally insignificant the inquiry as to whether the financial burden being imposed is an additional tax or the denial of a tax deduction).

¹⁹⁰ See U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises . . .").

¹⁹¹ See Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543, 569 (1996) ("[I]t is appropriate to draw a line that allows government to subsidize speech in a categorical manner but simultaneously denies it the power to subsidize on the basis of viewpoint.").

¹⁹² *Speiser v. Randall*, 357 U.S. 513, 519 (1958) (citation omitted).

¹⁹³ See *Cammarano v. United States*, 358 U.S. 498 (1959) (upholding regulation that denies tax deduction uniformly for business expenses spent on lobbying); see also *University of Pa. v. EEOC*, 493 U.S. 182, 201 (1990) (stating that "the First Amendment does not invalidate every incidental burdening . . . that may result from

denial of tax deductions to lobbying organizations on the premise that the financial burden was not imposed due to the specific content of the speech being regulated.

However, in *Grosjean v. American Press Co.*,¹⁹⁴ the Court struck down a Los Angeles sales tax aimed specifically at large newspapers primarily because the tax was discriminatory,¹⁹⁵ but also because it involved "a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties."¹⁹⁶ The tax was invalidated, therefore, not only because it was content-based, but also because it was born of an invidious legislative motive.

Nearly fifty years later, in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,¹⁹⁷ a tax on ink and paper was invalidated because it only affected a small number of large newspapers. Instead of simply striking down the statute as a facially content-based speech regulation in violation of the First Amendment, the Court relied on *Grosjean* to emphasize the importance of an invidious legislative motive in assessing constitutionality.¹⁹⁸ The Court extended its holding in *Minneapolis Star* in *Regan v. Taxation with Representation of Washington*¹⁹⁹ when it "reject[ed] the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'"²⁰⁰ This statement seemed to give legislatures much more leeway to levy taxes against certain forms of speech, provided there was no "explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes."²⁰¹

the enforcement of civil . . . statutes of general applicability") (citation omitted).

¹⁹⁴ 297 U.S. 233 (1936).

¹⁹⁵ See *id.* at 250 (holding that a tax "single in kind, with a long history of hostile misuse against the freedom of the press" is unconstitutional); see also *City of Baltimore v. A.S. Abell Co.*, 145 A.2d 111, 120 (Md. 1958) (finding that since 90-95% of a tax's impact fell on newspapers, radio, and television, the tax was "single in kind" and therefore unconstitutional).

¹⁹⁶ *Grosjean*, 297 U.S. at 250.

¹⁹⁷ 460 U.S. 575, 591 (1983). The Court also invalidated the tax because it singled out the press. See *id.*

¹⁹⁸ See *id.* at 580 ("We think that the result in *Grosjean* may have been attributable in part to the perception on the part of the Court that the State imposed the tax with an intent to penalize a selected group of newspapers."). *Minneapolis Star's* requirement that a statute must contain an invidious motive in order to be found unconstitutional was inconsistent with *Speiser v. Randall*, 357 U.S. 513 (1958), an earlier case in which a statute was invalidated because it was a *prima facie* content-based restriction on speech.

¹⁹⁹ 461 U.S. 540 (1983) (quoting *Cammarano v. United States*, 388 U.S. 498, 515 (1959) (Douglas, J. concurring)).

²⁰⁰ *Id.* at 546 (quoting *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940)).

²⁰¹ *Id.* at 547.

In *Arkansas Writers' Project, Inc. v. Ragland*,²⁰² however, the Court retreated from the legislative intent-based analysis of *Grosjean* and *Minneapolis Star*, focusing instead solely on whether the challenged tax exemption discriminated on the basis of the regulated speech's content.²⁰³ In invalidating the tax, the Court required the state to provide a "compelling justification" in order to retain a differentiated tax.²⁰⁴ Justice Scalia, in dissent, argued in favor of a rational basis test for review of differential tax exemptions, noting that a "wide variety of [content-based] tax preferences and subsidies" already exist, and "that denial of participation in a tax exemption . . . does not necessarily infringe a fundamental right . . . such a denial does not, as a general rule, have any significant coercive effect."²⁰⁵

Justice Scalia's reasoning in his *Arkansas Writers'* dissent took hold in *Leathers v. Medlock*,²⁰⁶ in which the Court indicated that tax exemptions would be presumed constitutional absent some explicit demonstration of the statute's hostile and oppressive discrimination against particular thoughts or ideas.²⁰⁷ The Court found that differentiated tax exemptions should be invalidated only if they can be characterized as a "penalty for the few."²⁰⁸ Congress' Proposal, while seemingly content-based, is significantly different from the taxes invalidated in *Minnesota Star*, *Regan*, and *Arkansas Writers'* in that it only taxes commercial speech. Because commercial speech has historically been granted less constitutional protection

²⁰² 481 U.S. 221 (1987).

²⁰³ See *id.* at 229 (holding the tax unconstitutional because "the Arkansas sales tax scheme treats some magazines less favorably than others"). The Court's holding in *Arkansas Writers'* was a return to the standard developed in *Spelser*. See *Spelser*, 357 U.S. at 518.

²⁰⁴ *Arkansas Writers'*, 481 U.S. at 234.

²⁰⁵ *Id.* at 237 (Scalia, J., dissenting). The rational basis standard referred to here is analogous to the test used in equal protection analysis under the Fourteenth Amendment. See, e.g., *Williamson v. Lee Optical*, 349 U.S. 483, 488 (1955) (rejecting an equal protection claim because although the challenged statute treated opticians and optometrists differently, it reflected a "rational" means of addressing a legitimate state interest).

²⁰⁶ 499 U.S. 439 (1991).

²⁰⁷ See *id.* at 448-49 (holding that a general tax with exceptions for some members of the press but not others, such as cable TV, is not unconstitutional).

²⁰⁸ *Id.* at 448 ("[E]xtension of its sales tax to cable television hardly resembles a 'penalty for the few.'" (citation omitted)). In *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992), however, the Court struck down a statute forbidding racially or religiously-motivated fighting words on the basis that the regulation was an impermissible content-based restriction of free speech. This suggests that Justice Scalia and other members of the current Court view differentiated tax exemptions as a less critical infringement on the principles of free speech than direct regulations on the content of public speech.

than noncommercial speech, it is unclear to what extent the taxation cases involving noncommercial speech apply to Congress' Proposal. Moreover, none of the Court's previous commercial speech cases address the potentially discriminatory nature of commercial speech regulations. These facts, together with the Court's selective funding decisions, make it unlikely that Congress' Proposal will qualify as an impermissible, content-based speech restriction.

*B. The Proposal Is a Valid
Selective Government Funding Decision*

Congress' anti-tax deduction Proposal is a permissible selective funding decision under the First Amendment. In *Rust v. Sullivan*,²⁰⁹ the Court recognized Congress' power to make content-based funding decisions regarding government programs. *Rust* addressed whether the exclusion of programs involving abortion from Title X funding²¹⁰ amounted to an unconstitutional attempt by the government to silence a particular viewpoint, or a constitutionally permissible means of discouraging abortion.²¹¹ The Court held that:

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.²¹²

The expressive interest embodied in Congress' anti-tax deduction Proposal resembles the government's use of financial incentives to discourage abortion upheld in *Rust*: just as Title X's selective funding was a constitutionally permissible expression of the government's lack of support for abortion, the Proposal's removal of tax deductibility is a constitutionally permissible expression of congressional disdain for the

²⁰⁹ 500 U.S. 173 (1991).

²¹⁰ See Title X of the Public Health Service Act, 42 U.S.C.S. § 300-300a-41 (1991).

²¹¹ See Redish & Kessler, *supra* note 191, at 575 ("According to the Court in *Rust*, the regulations constituted not an improper government 'carrot' designed to silence expression of a particular viewpoint, but rather a self-defined governmental program the purpose of which was to deter abortions, or at least promote alternatives to abortion."); see also *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980) ("A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity."); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (holding that the government may "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds").

²¹² See *Rust*, 500 U.S. at 193.

tobacco industry's objectionable business practices.

Since *Rust*, the Court has decided two cases that cast doubt on its commitment to the selective funding principle. In *Simon & Schuster v. Members of the New York State Crime Victims Board*,²¹³ the Court invalidated a statute requiring a convicted criminal to forfeit the proceeds from any reenactment of his crime or the associated story. The Court found that the law unconstitutionally "singles out income derived from expressive activity for a burden the state places on no other income, and it is directed only at works with a specified content."²¹⁴ This statute is distinguishable from Congress' Proposal regarding the tax deductibility of tobacco ads. The speech at issue in *Simon & Schuster* was noncommercial; the Court never addressed the consequences of a law placing a similar financial burden on commercial speech. Given the historical distinction between commercial and noncommercial speech, the Court is likely to evaluate Congress' Proposal under a less demanding constitutional standard than that employed in *Simon & Schuster*.

Similarly, in *Rosenberger v. Rector & Visitors of the University of Virginia*,²¹⁵ the Court invalidated a decision by the University to deny funding to a student group intending to publish a Christian periodical. The University's decision was inconsistent with the First Amendment, according to the Court, because it singled out the publication based on its content, denying it a grant it was otherwise qualified to receive.²¹⁶ Distinguishing between the funding of governmental and private speech, the Court held that selective funding is permissible for speakers with a "governmental message," but not for speakers, such as the Christian group, engaged in private speech.²¹⁷

Congress' Proposal satisfies the standard set forth in *Rosenberger*. First, the speech which the University refused to fund was noncommercial. The recognized constitutional difference between commercial and noncommercial speech distinguishes Congress' regulation of tobacco advertising from a public university's restriction of private speakers. Second, Congress' Proposal is aimed at speech that is comparable to a governmental message. Unlike the religious speech at issue

²¹³ 502 U.S. 105 (1991).

²¹⁴ *Simon & Schuster*, 502 U.S. at 116.

²¹⁵ 515 U.S. 819 (1995).

²¹⁶ See *id.* at 837 (holding that the "regulation invoked to deny . . . [financial] support is a denial of [petitioner's] right of free speech guaranteed by the First Amendment").

²¹⁷ *Id.* at 833-34.

in *Rosenberger*, tobacco advertisements implicate a government interest by posing a threat to the national welfare.

When subsidized speech, even by a private actor, is directly contrary to a government message, such speech must be amenable to government regulation as something greater than (exclusively) private speech. Thus, despite *Rosenberger's* apparent limitation on the selective funding doctrine, Congress' Proposal is still valid because it satisfies *Rosenberger's* "governmental message" requirement.

The Court recently reaffirmed its selective funding doctrine in *National Endowment for the Arts v. Finley*,²¹⁸ upholding a requirement that federal arts funding be available only to those artists adhering to tenets of "decency and respect for the diverse beliefs and values of the American public."²¹⁹ The Court determined that the statute did not require unconstitutional content-based discrimination in funding decisions because it did not eliminate specific means of expression, but simply increased the subjectivity of the selection process. The Court implied, however, that the statute would not have survived First Amendment scrutiny if it had been designed to "drive 'certain ideas or viewpoints from the marketplace.'"²²⁰ Congress' Proposal is more akin to the subjective selection process upheld in *Finley* than to an intentional act of censorship. The government's interest in expressing its distaste for the tobacco industry does not require or entail decimating tobacco companies' promotional efforts. Instead, Congress merely declines to encourage tobacco ads in the interest of public welfare. The removal of tax deductible status from tobacco ads is thus not an act of censorship, but a subjective policy decision within the bounds of Congress' funding authority.

A further consideration in assessing the constitutionality of Congress' Proposal is the Court's unique treatment of federal funding for advertising. Federal funding of advertisements has been virtually immune from First Amendment scrutiny. In *Glickman v. Wileman Brothers & Elliott, Inc.*,²²¹ the Court evaluated a federal advertising program as a matter of economic policy to be decided by "producers and administrators"²²² of the program, rather than as a First Amendment

²¹⁸ 524 U.S. 569 (1998).

²¹⁹ *Id.* at 572 (quoting 20 U.S.C. § 954(d)(1), the 1990 amendment to the National Foundation of the Arts Act of 1965).

²²⁰ *Id.* at 587 (quoting *Simon & Schuster v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

²²¹ 521 U.S. 457 (1997).

²²² *Id.* at 476.

issue to be decided by the courts. The Court stated that:

The First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm's advertising budget. The fact that a regulation may indirectly lead to a reduction in a handler's individual advertising budget does not itself amount to a restriction on speech.²²³

This reasoning, like that in *Rust*, suggests that Congress' Proposal implicates Congress' economic policy-making authority rather than the First Amendment. If the Proposal is analyzed as an economic policy decision, and not as a content-based speech regulation, it will thus not be subject to the rigorous First Amendment scrutiny that dooms most content-based regulations of speech.

Congress' Proposal is comparable to these government funding cases for three reasons. First, the Court has gone to great lengths to establish the difference between commercial and noncommercial speech, even developing an independent test for the constitutionality of commercial speech restrictions.²²⁴ As a result, it is inappropriate to analogize a Proposal dealing with purely commercial speech to First Amendment taxation cases, all of which deal solely with regulations of noncommercial speech.²²⁵ Second, the Court has regularly heard cases involving advertising restrictions without ever addressing the problem of content-based discrimination.²²⁶ Finally, the Court has already addressed the propriety of a regulation designed to alter the advertising budgets of particular taxpayers and has upheld that regulation against a First Amendment challenge.²²⁷ Since Congress' Proposal does not represent the type of impermissible content-based speech restrictions that have been struck down in the past, it should be permitted under the First Amendment.²²⁸

²²³ *Id.* at 470.

²²⁴ See *supra* Part II.C-D; see also *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.* 447 U.S. 557, 566 (1980).

²²⁵ See, e.g., *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Speiser v. Randall*, 357 U.S. 513 (1958); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

²²⁶ See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Posadas De P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986); *Central Hudson*, 447 U.S. at 557; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

²²⁷ See *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997).

²²⁸ See David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government Funded Speech*, 67 N.Y.U.L. REV. 675, 737 (1992) ("Where . . .

V. CONCLUSION

Congress' Proposal to remove the tax-deductible status of tobacco advertisements is constitutional because it satisfies both the *Central Hudson* test and First Amendment standards regarding differential taxation of speech. Because tobacco ads are typically misleading, they may be regulated without violating the First Amendment. Indeed, even if tobacco ads are not found to be misleading, Congress' Proposal nonetheless satisfies the *Central Hudson* test for evaluating commercial speech regulations. Whether the government claims it has a substantial interest in the welfare of its citizens or, alternatively, in publicly condemning the irresponsible behavior of the tobacco industry, Congress' Proposal is permissible because it both materially advances an important government interest and represents a reasonable fit with that interest.

The Proposal is also a permissible government funding decision under the First Amendment. The Court has only struck down content-based taxes on noncommercial speech. In commercial speech cases—specifically those involving limits on advertising—the Court has never raised the question of whether a tax on commercial speech is impermissibly content-based, but instead has consistently relied on the *Central Hudson* test to determine a statute's constitutionality. Moreover, the Court has consistently found that the government may, in accord with the rational basis standard, tax speech and other activities at its discretion. Accordingly, Congress' Proposal to remove the tax deductible status of tobacco advertisements represents a permissible regulation of commercial speech and an appropriate exercise of congressional taxing power under the First Amendment.

government non-neutrality does not pose a substantial risk of skewing or indoctrinating, it should be permitted." Cole presents a three-part test to determine if the government should interfere with certain "spheres" of speech. He asks "whether government control of the content of speech in the institution would be threatening to a vigorous public debate . . . whether the internal operation of the institution is consistent with a first amendment neutrality mandate . . . whether the independence of speakers can be structurally accommodated in some intermediate fashion." *Id.* at 736. All three of Cole's criteria are satisfied by the tax-deduction Proposal.