Tobacco Advertising in the United States
A Proposal for a Constitutionally Acceptable Form of Regulation

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The Supreme Court has recently drawn attention to the complex issues associated with the role of advertising and the means by which it may be regulated to protect the public’s health, particularly relating to tobacco. Lorillard Tobacco Co. v Reilly1 is the latest in a series of Supreme Court cases striking down public health regulation as a violation of the First Amendment.2 This case involved tobacco advertising, whereas earlier cases involved alcoholic beverages3,4 and gambling.5 In a 5 to 4 decision, the Supreme Court held that Massachusetts regulations designed to curtail young people’s use of smokeless tobacco or cigars violated the First Amendment. The regulations had prohibited outdoor advertising within 1000 ft of a school or playground and indoor, point-of-sale advertising lower than 5 ft from the floor of a retail establishment. The Supreme Court also invalidated these regulations as applied to cigarettes, but for a different reason—it held that the Federal Cigarette Labeling and Advertising Act (FCLAA) preempted state law.

Specifically, the Supreme Court found that the regulation of outdoor advertisements was more extensive than necessary to achieve its objectives, noting that the effect of the regulations would be to prohibit outdoor advertisements throughout large areas of Massachusetts cities. This was problematic, in the Supreme Court’s view, because “so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in receiving that information.”6 The Supreme Court also found that the regulation of indoor, point-of-sale advertisements did not directly advance the government’s interest, pointing out that not all children are shorter than 5 ft, and those who are can look up and take in their surroundings.

The Supreme Court, of course, could have reviewed the Massachusetts regulations more sympathetically. Although the regulations did cover large areas of major cities, the state be-

See also pp 2983 and 3001.
lieved that it had no choice but to target places where young people congregate if it was to have an effect on youth smoking. Furthermore, Massachusetts enacted the regulations as a consumer protection measure to “eliminate deception and unfairness” in tobacco advertising, but the Supreme Court gave short shrift to these arguments. Similarly, although the limit on the height of advertising might not have been fully effective, the state had determined that it was a reasonable regulation of tobacco sales practices. The Supreme Court did uphold regulations that required retailers to place tobacco products behind counters and required customers to have contact with a salesperson. The decision reflects the current social and political climate for regulation in the United States and therefore provides a backdrop for considering how to implement antismoking measures more effectively.

The reduction of tobacco use would represent a critically important public health achievement. Tobacco is the greatest preventable cause of morbidity in the United States, causing approximately 430,000 deaths annually, and it is highly addictive. The economic costs associated with tobacco use range from $53 billion to $73 billion per year in medical expenses and $47 billion in lost productivity. The Supreme Court in the Lorillard case wrestled with one of the most pivotal dilemmas in contemporary America—the role of advertising and its regulation vis-a-vis public health and social welfare problems of enormous significance. The debate has been divisive, resulting in unlikely alliances—civil libertarians, businesses, and the media against medical and public health professionals.

TOBACCO ADVERTISING IN US HISTORY

The debate about the role of advertising and its appropriate regulation is not new. Indeed, going back to the early 20th century, considerable concern was expressed about the nature of aggressive advertising and the recruitment of young smokers. During this period, in which tobacco consumption increased significantly, the increasing popularity of the cigarette was widely associated with intensive national advertising campaigns. Central, enduring questions emerged. How much could advertising shape consumer behavior? Could advertising potentially be deployed in ways that would compromise rational choice and individual agency? In the late 1920s, critics accused the tobacco industry of attempting to “transform the school girls, the growing boys and the youth of the country into confirmed cigarette addicts, regardless of established medical and health findings.” They charged that “a more flagrant assault against public welfare has never been witnessed in the United States.” Although the Better Business Bureau and the Federal Trade Commission (FTC) often warned the industry to adhere to basic principles of truth and fairness in its campaigns, regulation was very limited throughout the first half of the 20th century.

Following the scientific confirmation of the harms of smoking that occurred in the 1950s and early 1960s, concern about the role of advertising rose again. The tobacco industry responded to increasing criticism by establishing a “Cigarette Advertising Code” that would forbid celebrity testimonials, free school samples, and advertising directed to minors. The industry promised that “cigarette advertising shall not represent that smoking is essential to social prominence, distinction, success, or sexual attraction.” Yet despite the industry’s appointment of a “cigarette czar” to oversee its code, as advertising expenditures expanded in the 1960s, critics noted few discernible changes in tobacco promotion.

The 1964 Surgeon General’s Report on Smoking and Health also created a new resolve to institute advertising regulation by government. The FTC sought to expand its regulatory authority to require disclosure that smoking is dangerous for health on cigarette packages and advertising. Simultaneously, many states and cities began to consider new tobacco regulations. In this context, federal legislation became an increasingly desirable goal for the tobacco industry compared with potentially more far-reaching local regulation. Their highly effective lobbying arm, the Tobacco Institute, vigorously promoted federal intervention. Although the FCLAA of 1965 was widely perceived as a public health regulatory initiative, it accomplished several critical industry goals: FTC regulatory action was forestalled, state and local regulation was preempted, and weaker health warnings (“Caution: Cigarette Smoking May Be Hazardous to Your Health”) replaced stronger ones proposed by public health advocates. The preemption provisions later would be used to protect the industry from tort liability. As an observer noted at the time, “The bill is not, as its sponsors suggested, an example of congressional initiative to protect public health; it is an unashamed act to protect private industry from government regulation.”

Advertising and marketing are critical aspects of the industry’s strategy, which have expanded as the tobacco industry’s image has been tarnished during the late 20th century. In 1999, advertising expenditures were $8.24 billion, an increase of 22.3% compared with the previous year. As the industry pulled outdoor advertising (in anticipation of the Master Settlement Agreement with the state attorneys general), spending in newspapers increased by 73%, magazines by 34.2%, and direct mail by 63.8% (Figure). These increases clearly point to the importance the industry places on advertising to maintain or increase sales.

Throughout the last century, social commentators have discussed the power of advertising and the rational consumer. Nowhere has this debate been so forcefully aired as with the cigarette. The industry asserted that advertising focuses solely on brand loyalty, whereas public health advocates insisted that advertising plays a critical role in new smoker recruitment, particularly in the youth market.

A CONSTITUTIONAL HISTORY OF COMMERCIAL SPEECH REGULATION

The Supreme Court’s current staunch defense of commercial speech represents a relatively recent departure from precedent. During the past 3 decades, the Supreme Court has...
struggled with the question of whether, and to what extent, the First Amendment protects commercial expression. Its views on the subject have been neither stable nor consistent over time, and its recent decisions in support of greater protections for this class of speech have revealed deep divisions among the justices.

The term commercial speech did not appear in Supreme Court case law until the early 1970s. Before that time, the Supreme Court stated that the First Amendment did not impose any limits on government’s ability to restrain “purely commercial advertising.” In keeping with this stance, the courts upheld 2 major regulatory efforts against tobacco advertising. First, the Federal Court of Appeals for the DC Circuit upheld the Fairness Doctrine in 1968 (a Federal Communications Commission [FCC] requirement to air, without modification, a “significant amount” of antitobacco advertisements). Next, the Supreme Court upheld a congressional ban of cigarette advertising on the airwaves in 1971. Concerning the Fairness Doctrine, DC Circuit Court Judge Bazelon was dismissive of tobacco industry claims that the new regulations represented a threat to the right to free expression: “Where, as here, one party to a debate has financial clout and a compelling economic interest in the presentation of one side unmatched by its opponent, and where the public stake in the argument is no less than life itself, we think the purpose of rugged debate is served, not hindered, by an attempt to redress the balance.”

However, when a ban on all television and radio advertising was imposed, those committed to an expansive notion of free expression gave voice to concerns that would find repeated expression during the next decades as public health advocates continued to press for tighter restrictions and even total bans. As Federal District Court Judge J. Skelley Wright stated in dissent from an opinion upholding the federal airwaves ban, “The First Amendment does not protect only speech that is healthy or harmless.” Even so, during the mid-1970s, when the Supreme Court first said that commercial speech was not “valueless in the marketplace of ideas,” it emphasized that advertising operated as a category of “lower value” expression, deserving of less exacting constitutional protection than social or political discourse. The early commercial speech cases concerned promotion of abortion services, contraceptives, and pharmaceuticals. These were cases in which protection of free commercial expression was consonant with protection of personal liberties and health promotion.

In 1980, the Supreme Court adopted a framework for deciding commercial speech cases known as the “Central Hudson test.” Instead of the usual “strict scrutiny” standard applied to other types of expression, the Supreme Court used a balancing test that was permissive of state regulation. First, for commercial speech to be protected by the First Amendment, it had to concern a lawful activity and not be false or misleading. Second, the government interest to be served by restricting speech had to be substantial. Third, the regulation of commercial speech had to directly advance the governmental interest asserted. Fourth, there had to be a reasonable fit between the type of regulation imposed and the government’s objectives.

The Supreme Court’s deference to public health and welfare regulation of commercial speech extended well into the 1990s. The high-water mark came in Posadas de Puerto Rico Associates v Tourism Company of Puerto Rico in 1986, in which the Supreme Court upheld a complete ban on gambling advertisements to Puerto Rican residents. In a decision that would provoke a bitter dissent on the Supreme Court and protest from civil libertarians, Chief Justice Rehnquist made a powerful statement about the rationality of public health and welfare regulation: “It would surely...be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity.” Since states have virtually plenary power to regulate the sale of cigarettes, alcoholic beverages, gambling, and firearms, this reasoning would give them the authority to curtail advertising. The Supreme Court reiterated this deferential approach in 1989 and as recently as 1993 in a case involving regulation of lottery advertising.

Buttressed by such language, those who believed that tobacco advertising was hazardous to the nation’s health pressed for extensive restrictions, even total bans, in the mid-1980s. Among the proponents for a total ban were the American Medical Association, the American Heart Association, the American...
can Lung Association, the American Public Health Association, and Surgeon General C. Everett Koop. Civil liberties advocates responded to such proposals with alarm. Thus did a representative of the New York Civil Liberties Union assert that restrictions on advertising represented “a paternalistic manipulation...a vote of no confidence in the capacity of ordinary Americans to judge for themselves how to react to tobacco advertising.” For those who saw an inseparable relationship between commercial speech and political expression, freedom itself was at stake. “If society elects to use censorship for dealing with one social evil, it is only a matter of time until pressure builds to use censorship again and again.”

During the last decade, the Supreme Court has all but repudiated its holding in the Posadas case and has embarked on a robust defense of commercial speech.32 In 1995, the Supreme Court invalidated a federal ban on labeling the alcoholic content of beer; the Supreme Court rejected the government’s contention that it wanted to prevent a “strength war” among brewers.3 In 1996, the Supreme Court found unconstitutional a state law prohibiting liquor-price advertisements other than in retail establishments.4 Similarly, the Supreme Court held in 1999 that the FCC could not ban broadcast advertisements by private gambling casinos.5 The lower courts have also defended commercial speech, for example, by striking down a Food and Drug Administration regulation of dietary supplements.33

The decision in the Lorillard case is but the most recent example of the Supreme Court’s new trend to defend commercial speech. In its recent mode, the Supreme Court appears to be motivated by the same antipaternalistic sentiments espoused by civil libertarians. For example, Justice Thomas, who has repeatedly argued that commercial speech should be afforded full First Amendment protection, has asserted that government’s effort to “keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace” is “per se illegitimate.”34

THE EMPIRICAL EVIDENCE

Central to the debate on the public health and constitutional significance of advertising restrictions is the still unsettled question of the impact of advertising on cigarette consumption. Rigorous scientific studies of the relationship between advertising and consumption are difficult because there are so many confounding variables. Absent a major social experiment, the precise effects of advertising restrictions will be difficult to ascertain.

A recent article35 that reviewed prior studies and analyzed new data on 22 Organisation for Economic Co-Operation and Development nations, which acknowledges that there is a “significant empirical literature that finds little or no effect of advertising on smoking,” concludes that whereas “comprehensive advertising bans can reduce tobacco consumption, ... a limited set of advertising bans will have little or no effect.” This is because bans on only certain forms of advertising tend to lead to a shift to other media and not to a reduction in overall advertising. Despite the methodologic difficulties, additional scientific investigations are needed to fully understand the association between advertising and consumption of hazardous products. Without convincing evidence, it will be difficult to persuade the current Supreme Court to support significant advertising restrictions. Public health advocates, therefore, need to more fully explore policy initiatives to reduce tobacco use that do not rely solely on curtailing advertising.

The evidence of the potential effectiveness of countermarketing campaigns strongly suggests that even without comprehensive advertising bans it may be possible to use the powerful impact of the media to affect patterns of smoking. More than 2 decades ago, evidence suggested that counteradvertising on television and radio, which had been required by the FCC, had had an impact on smoking, an impact that was lost when advertisements and counteradvertisements were removed from the broadcast media.46 More recent analyses from Massachusetts,37,38 California,39 and Canada40 have underscored the critical contribution that can be made by media messages designed to “denormalize” smoking. Reviewing the literature, Slade41 concluded that counteradvertising “can be effective at preventing tobacco use from being established among the young...can reduce use of tobacco products among adults...and it can promote quitting.” Complex methodologic challenges, however, make a determination of the extent and duration of the impact difficult to specify (P. Messeri, C. Healton, A. Schultz, et al, unpublished data, 1996).

RETHINKING TOBACCO REGULATION

There is good reason for thinking of advertising as less vital to democratic ideals than social, artistic, or political speech. Despite rhetorical flourishes, the marketplace of ideas is not the equivalent of the economic marketplace. Strong financial incentives drive corporate efforts to reach potential consumers regardless of the restrictions imposed on advertising. Furthermore, it is worth noting that the United States is unique among constitutional democracies on the significance of commercial speech protections. In other nations committed to liberty and popular sovereignty, severe limits and even total bans on forms of commercial expression are not viewed as inimical to democratic life. Indeed, as we have noted, this was the case in the United States until relatively recently. The contrast between the United States and other democracies may well reflect the special force and history of the First Amendment in our political culture. To be sure, commercial messages should be purchasable in a constitutional democracy. However, it is equally true that regulation of advertising has been a staple of public policy to protect consumer health and safety.42

The Supreme Court’s strong protection of commercial speech should be seen within the social and political context of late 20th-century America. This was a time of increased hostility to government regulation and the celebration of unfettered entrepreneurship. Defense of commercial
speech is seen as facilitating a free-commodity market and consumer autonomy, without paternalistic limitations. This perspective stood in radical contrast to the public health community’s skepticism, even hostility, to advertising of products that could be injurious to health. From that vantage point, advertising did not result in informed choices, but rather misled or manipulated consumers into thinking that dangerous or addictive products were healthful, glamorous, and socially desirable.

The Supreme Court’s jurisprudence has created an almost insoluble dilemma for public health authorities. If they impose narrowly tailored restrictions on tobacco advertising, it will be difficult to provide clear evidence of effectiveness, thus failing Central Hudson’s third prong. If, on the other hand, they enact broad-sweeping (more effective) restrictions, the scope may be viewed as too extensive, thus failing Central Hudson’s fourth prong. The Supreme Court, in effect, has left public health authorities with little room to craft tobacco advertising restrictions that are both demonstrably effective and likely to be deemed constitutionally acceptable by the current Supreme Court.

Those committed to reducing the patterns of cigarette-related morbidity and mortality have long acknowledged that restrictions on advertising were but one element of the overall campaign against smoking. Increasing the price of cigarettes through taxes and limiting the settings within which smoking could occur were also vital components of that strategy. At this juncture, we believe it is critical to broaden the strategy involving the role of advertising and consider the role that more compelling disclosure (involving information conveyed in a forceful manner) of the health harms of tobacco can have on reducing consumption. Rethinking tobacco regulation will be all the more difficult given the decades of commitment to the important role of advertising in the campaign against tobacco and the fierce resistance those efforts have encountered from the tobacco industry. Nevertheless, a change in strategy need not signal a defeat. Rather, it may represent an opportunity to intensify a critically important aspect of the campaign to protect public health.

The Supreme Court has consistently stated that commercial speech must be truthful and nonmisleading to receive First Amendment protection, but it has never focused on manufacturers’ obligations under this requirement. Tobacco advertising should be regarded as deceptive and misleading because it fails to adequately disclose the full measure of the devastating health harms wrought by use of the product and its addictive nature. Advertising is also misleading when it associates tobacco use with a successful, glamorous, and socially desirable lifestyle.

Whether current advertising practices meet the technical strictures regarding truthful, nonmisleading speech established by the Supreme Court, the tobacco industry certainly strives to maintain the culturally normative status of smoking. The public health challenge is to transform the way in which smoking is viewed in society. This will require, as many public health and antitobacco advocates have argued, a sustained national antismoking social marketing campaign with the same sophistication now used by those who seek to promote tobacco use.

The appropriate remedy for the deceptive and harmful behavior of tobacco manufacturers is to require the industry to support more compelling messages about the demonstrable health hazards of smoking. We therefore propose a comprehensive system of taxation and regulation designed to increase public appreciation of the health risks of cigarettes. In a departure from recent regulatory attempts, applying the sophisticated marketing techniques used by the industry, we would establish a publicly funded national campaign that would supplement but not supplant the strategies already adopted by a number of states, including California and Massachusetts, and the Truth Campaign of the American Legacy Foundation funded by the Master Settlement Agreement.

First, we propose that a federal tax be levied on tobacco advertising and promotion. Such a tax would admittedly impose a burden on free expression but to a lesser extent than one represented by the outright restrictions unacceptable to the Supreme Court. The Supreme Court has never addressed the constitutionality of a content-based tax on commercial speech, and there are no lower court decisions bearing on this matter. The Supreme Court did, however, hold that selective taxation on some media outlets could pose constitutional issues: “Differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or view points.”

What scant legal commentary exists on content-based economic burdens on commercial speech, for example, eliminating business expense tax deductions for tobacco advertising, suggests that such a policy might be constitutional. However, such analyses are hardly definitive. Although we prefer a tax on advertising because of its transparent link to the promotion of smoking (those who encourage smoking should, we believe, pay for the cost of health promotion), we recognize that such a tax would almost certainly receive a chilly response from the Supreme Court. As an alternative, we suggest a federal excise tax, the proceeds of which, like the tax on advertising, would be reserved exclusively to create a fund that would underwrite the cost of a national antitobacco campaign to be coordinated by the Centers for Disease Control and Prevention (CDC). The potential impact of such a levy can be demonstrated by recognizing that a $0.10 per pack excise tax would generate approximately $2.1 billion a year, almost a 10-fold increase over the funds currently available to the American Legacy Foundation for its campaigns.

Second, we propose that all print advertising be required to carry public health warnings equivalent to 50% of the ad-
vertising space. Such warnings, endorsed by the Bush Administration in the remedies it proposes as part of its lawsuit against the tobacco industry, would go beyond the current form and would use social marketing–informed messages designed to neutralize the seductive impact of the advertisements themselves. If manufacturers can associate their product with vital images, public health authorities should be able to forcefully depict the hazards of smoking. The content of such messages would be the responsibility of the CDC and would not be subject to censorship by the tobacco industry. Undertaking such an effort would require a significant amendment to the FCLAA; which now specifies the warning labels contained on both cigarette packages and print advertisements. Almost certainly such a requirement would be challenged by the tobacco industry and its political allies, who would characterize it as constitutionally impermissible “compelled speech.” We believe that such messages fall well within the bounds of what fair labeling, consumer protection legislation, and regulation have long been held to permit.

Finally, extending the logic of effective truth in labeling to each pack of cigarettes, we propose that one full side of each cigarette package be devoted to a graphic depiction of the dangers of smoking. In so doing, we take note of the remarkable regulations implemented in Canada in 2001 and that have now been subject to challenge by the tobacco industry in the courts.

This set of proposals, designed to combat bad speech with more speech, will without doubt evoke the full resistance of the tobacco industry and its allies in the Congress, although they might find some support within the Bush Administration, which has indicated its interest in imposing radical limits on cigarette promotion. However intense the political controversy might be, these measures should enlist the commitment of the public health and medical communities as they confront the continuing toll of tobacco-related morbidity and mortality.

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Funding/Support: Dr Bayer’s work was supported by grants from the Robert Wood Johnson Foundation and the American Legacy Foundation.

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(Reprinted) JAMA, June 12, 2002—Vol 287, No. 22 2995

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