PATERNALISTIC MANIPULATION THROUGH PICTORIAL WARNINGS: THE FIRST AMENDMENT, COMMERCIAL SPEECH, AND THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT

INTRODUCTION

Imagine visiting your neighborhood grocery store to buy snacks and beer for a special occasion. On the snack aisle, you select a box of Oreos from the middle shelf. On the cookie package, you see an image of a pallid male cadaver, his autopsy incision bound together by thick staples and black thread. Looking further down the aisle, you notice Twinkie boxes displaying prominent images of damaged and diseased hearts and Cheetos bags depicting the morbidly obese. Virtually every guilty pleasure you observe displays the diseased, the dead, or the dying. Next, you go to the liquor department to pick up a six-pack of beer. The case of Budweiser you select displays two images: a dead fetus and a car mangled into a heap of glass, metal, and rubber. Have you been warned that your sweet treat may thicken the cholesterol building in your arteries, causing atherosclerosis, and ultimately a heart attack? That your favorite beer may kill an unborn child, a loved one, or even yourself? Or, in contrast, have you been manipulated? Beginning in 2012, tobacco companies must implement pictorial warnings similar to those described above on all cigarette and smokeless tobacco products.[1] The warnings attempt to

[1] A federal district court recently found that the possible implications of the Family Smoking Prevention and Tobacco Control Act [hereinafter Act] were indeed frightening. The court discussed in dicta that:

> when one considers the logical extension of the Government's defense of its compelled graphic images to possible graphic labels that the Congress and

paternalistically manipulate consumers and should be held unconstitutional under Supreme Court commercial speech precedent, including: (1) the "reasonable relation" standard of *Zauderer v. Office of Disciplinary Counsel*[2]; (2) the strict scrutiny standard of *Wooley v. Maynard*[3]; and (3) the intermediate scrutiny standard for commercial speech disclosure and suppression articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[4]

Signed by President Obama on June 22, 2009, the Family Smoking Prevention and Tobacco Control Act—codified in relevant part in 15 U.S.C. § 1333—purports to give the U.S. Food and Drug Administration the authority to require graphic images accompanied by textual warning statements on tobacco packages.[5]

> the FDA might wish to someday impose on various food packages (*i.e.,* fast food and snack food items) and alcoholic beverage containers (from beer cans to champagne bottles), it becomes clearer still that the public's interest in preserving its constitutional protections—and, indeed, the Government's concomitant interest in not violating the constitutional rights of its citizens—are best served by granting injunctive relief at this preliminary stage.

R.J. Reynolds Tobacco Co. v. FDA, No. 11–1482, 2011 U.S. Dist. LEXIS 128372, at *45 (D.C. Cir. Nov. 7, 2011). "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

[2] 471 U.S. 626 (1985).

[3] 430 U.S. 705 (1977).

[4] 447 U.S. 557 (1980). Although the Supreme Court in *Wooley* did not label its heightened level of scrutiny as "strict scrutiny," scholars have argued that the Court actually applied strict scrutiny. *See, e.g.*, Fred H. Cate, *Principles of Internet Privacy,* 32 CONN. L. REV. 877, 880 n.18 (2000); Kara O'Connor Gansmann, *Government Speech. It's What's For Dinner: Navigating First Amendment Assertions and Generic Commercial Advertisements Funded by Checkoff Subsidies*, 82 N.D. L. REV. 519, 529 n.80 (2006); Sarah A. Juster, *Free Exercise—Or the Lack Thereof?* Employment Division v. Smith, 24 CREIGHTON L. REV. 239, 245 n.62 (1990).

[5] Press Release, PR Newswire, American Lung Association Celebrates U.S. Food and Drug Administration's Final Rule Requiring Graphic Warning Labels on Cigarette Packs (June 21, 2011), *available at* http://www.prnewswire.com/news-releases/american-lung-association-celebrates-us-food-and-drug-administrations-final-rule-requiring-graphic-warning-labels-on-cigarette-packs-124268099.html; *see also R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *5. *See generally* Cigarette Labels and Advertising, Pub. L. No. 111-31, § 201, 123 Stat. 1776, 1842 (2009) (amending 15 U.S.C. § 1333 (2006)). The Act also:

> bars tobacco manufacturers from promoting their brands through sponsorship of 'athletic, musical, artistic, or other social or cultural event[s]'; from distributing any nontobacco good in exchange for purchase of a tobacco

In small part, the Act provides that "[i]t shall be unlawful for any person to manufacture, package, or import for sale or distribution within the United States any cigarettes" or smokeless tobacco package which fails to bear the appropriate label.[6] Under the pretext of protecting consumers and through power allegedly given by the Act, the FDA has approved nine color images for placement on "cigarette [and smokeless tobacco] packages manufactured on or after September 22, 2012, and for all cigarette [and smokeless tobacco] packages introduced into commerce on or after October 22, 2012."[7] The images include, but are not limited to, an African American man blowing a puff of smoke out of his tracheotomy cavity, a male cadaver with its "Y" autopsy incision fastened together by steel staples, and a jaundiced nodule-covered pair of lungs shown in stark contrast to a healthy set of lungs.[8]

Unlike previous warnings, these images will not appear on the sides of tobacco packages, but instead will cover the top fifty percent of the front and rear panels of cigarette packages, as well as thirty percent of the front and rear panels of smokeless tobacco products.[9] Within the warning labels are statements to consumers

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> product; from distributing any brand-name promotional items; from making an 'express or implied' statement 'through the media or advertising' that 'conveys' that the product is 'less harmful' because it is regulated by the FDA or complies with the FDA's prescribed standards; from distributing free samples of their cigarettes; from distributing free smokeless tobacco samples except in very limited circumstances; and from jointly marketing tobacco with any other product regulated by the FDA.

Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512, 520 (W.D. Ky. 2010) (citation omitted).

[6] 15 U.S.C. § 1333(a)(1).

[7] *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *13; *see also Cigarette Health Warnings*, FDA, http://www.fda.gov/TobaccoProducts/Labeling/CigaretteWarningLabels/default.htm (last visited May 4, 2012) [hereinafter *Health Warnings*].

[8] *Id.* The remaining images include the following: a woman holding a small child surrounded by smoke; diseased gums and decaying teeth; an old man with an oxygen mask covering his face; an illustration of a crying baby attached to health-monitoring machines; the symbol for stop: a triangle with a red exclamation mark inside of it; and a man wearing a t-shirt that reads "I quit." *Id.*

[9] *Overview of the Family Smoking Prevention and Tobacco Control Act*, FDA, http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/ucm246129.htm (last visited May 4, 2012). The new warnings are supposed to replace what the American Lung Association and the FDA deem to be twenty-five-year-old ineffective warnings buried on the sides of tobacco packages. PR Newswire, *supra* note 5.

that include: "WARNING: Cigarettes cause fatal lung disease"; "WARNING: Smoking can kill you"; and "WARNING: SMOKING DURING PREGNANCY CAN HARM YOUR BABY."[10] Each image also "prominently displays '1-800-QUIT-NOW': a telephone number the FDA selected to fulfill its own regulatory obligation to offer smoking cessation assistance on each package."[11]

In requiring the new warnings, the government has neither defended consumers from manipulative advertising nor informed them in unbiased facts about the dangers of products they have chosen to use. As of March 2012, two federal district courts differ on what Supreme Court analysis to apply to determine the constitutionality of the warnings, while the Sixth Circuit Court of Appeals is divided 2-1 over the constitutionality of the graphic labels.[12] In an attempt to create uniformity among courts

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[10] *Health Warnings*, *supra* note 7.

[11] *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *13; *Health Warnings*, *supra* note 7. Other warning statements include: "WARNING: Cigarettes are addictive."; "WARNING: Cigarettes cause strokes and heart disease"; "WARNING: TOBACCO SMOKE CAN HARM YOUR CHILDREN"; "WARNING: Cigarettes cause cancer"; "WARNING: Tobacco smoke causes fatal lung disease in nonsmokers"; and "WARNING: Quitting smoking now greatly reduces serious risks to your health." *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *6.

[12] Two federal district courts have come to conflicting conclusions regarding the warnings. In *R.J. Reynolds*, five of the largest tobacco product manufacturers in the United States argued that the Act unconstitutionally compelled commercial speech. *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *26. The court applied strict scrutiny and awarded the plaintiffs a preliminary injunction against the warning requirements. *Id.* at *4-5, 26. In *Commonwealth Brands, Inc. v. United States,* six tobacco manufacturers brought suit challenging the constitutionality of the Act "on free speech, due process, and takings grounds." Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512, 512 (W.D. Ky. 2010). In part, the plaintiffs in *Commonwealth Brands* contended that the Act's warning label requirement "unjustifiably and unduly burden[ed] Plaintiff's commercial speech . . . [and] unconstitutionally compel[led] Plaintiffs to disseminate the Government's anti-tobacco message." *Id.* at 528 (footnote omitted) (internal quotation marks omitted). The court ultimately found "the warning requirement . . . [to be] sufficiently tailored to advance the government's substantial interest under *Central Hudson*." *Id.* at 532. Unlike *R.J. Reynolds*, *Commonwealth Brands* "was briefed and decided *after* the Act was passed, but *before* the FDA's Rule was promulgated." *R.J. Reynolds,* 2011 U.S. Dist. LEXIS 128372, at *19-20 n.17. As a result, the plaintiffs in *Commonwealth Brands* "made a facial challenge to the constitutionality of graphic warnings in general," but "were incapable of challenging any of the nine graphic warnings the FDA ultimately selected." *Id.* In February of 2012, the District Court for the District of Columbia once again ruled on the graphic warnings by permanently enjoining the FDA. *R.J. Reynolds*, No. 11–1482, 2012 U.S. Dist. LEXIS 26257, at *4 (D.C. Cir. Feb. 29, 2012). In March of 2012, however, the

considering the constitutionality of the warnings, Parts II and III of this article delve into the complicated area of commercial speech disclosure and propose that courts should apply the *Zauderer* "reasonably related" standard and the *Wooley* strict scrutiny standard as two Supreme Court exceptions to the four-part analysis of *Central Hudson*.[13] Part II of this Comment explains why the pictorial warnings fail under what this Comment proposes as the first exception to the application of the *Central Hudson* analysis, the "reasonable relation" standard of *Zauderer*.[14] Part III explains how the warnings also fail under the proposed second exception to *Central Hudson*, the strict scrutiny standard of *Wooley*.[15] Part IV explains how the warnings both unconstitutionally compel and suppress commercial speech under *Central Hudson*.[16] Finally, Part V discusses other options better suited to prevent consumer deception and educate consumers about the dangers of tobacco use. This Comment attempts to protect consumers from paternalistic manipulation by the government and ensure the protection of all free speech, regardless of its popularity. In the oft misquoted words of Voltaire, "I disapprove of what you say, but I will defend to the death your right to say it."[17]

Sixth Circuit heard *Commonwealth Brands* on appeal and upheld the constitutionality of the warnings. Disc. Tobacco City & Lottery v. United States, Nos. 10-5234/10-5235, 2012 U.S. App. LEXIS 5614, at *3 (6th Cir. Mar. 19, 2012). The Sixth Circuit appears, however, to base its decision on the importance of preventing underage smoking. *Id.* at *7-8. The court of appeal's reliance on preventing underage tobacco consumption is problematic, as the Constitution requires more than just looking at whether one particular group "will be affected by the challenged legislation." Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 646 (7th Cir. 2006). The warnings also fail under tailoring requirements, since other reasonable options like taxation and educational campaigns exist to educate consumers about the dangers of using tobacco products.

[13] *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980); Wooley v. Maynard, 430 U.S. 705 (1977).

[14] *See Zauderer*, 471 U.S. at 651; *Cent. Hudson*, 447 U.S. at 566.

[15] *See Wooley*, 430 U.S. at 705.

[16] *See Cent. Hudson*, 447 U.S. at 566.

[17] *People & Politics Top 10 Famous Historic Misquotes*, LISTVERSE (May 15, 2008), http://listverse.com/2008/05/15/top-10-famous-historic-misquotes/. Voltaire actually said "'Think for yourselves and let others enjoy the privilege to do so too.'" *Id.* This misquote can be accredited to "a 1907 book called *Friends of Voltaire*, by Evelyn Beatrice Hall." *Id.* (emphasis added).

I. BACKGROUND

A. An Overview of the Commercial Speech Doctrine

The Supreme Court has long recognized that tobacco advertising qualifies as commercial speech.[18] Commercial speech serves the speaker's economic interests and assists in the education of consumers by promoting the greatest possible dissemination of information.[19] Commercial compelled disclosure, in particular, provides state and federal governments with the ability to warn unsuspecting consumers about the potential dangers of certain products.[20] In *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, the Supreme Court held for the first time that the First Amendment, which pertains to states through the Fourteenth Amendment, shields commercial speech from unjustified governmental regulation.[21]

Both images and the choice to not speak are afforded the same constitutional protections as traditional commercial speech, but commercial speech that is false, misleading, or about illegal

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[18] *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 533-34 (2001); Consol. Cigar Corp. v. Reilly, 218 F.3d 30, 37-38 (1st Cir. 2000); Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512, 520 (W.D. Ky. 2010).

[19] *Cent. Hudson*, 447 U.S. at 561-62.

[20] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 641 (1985). For a brief explanation of compelled disclosure law, see HENRY COHEN, CONG. RESEARCH SERV., RL95-815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT (2009), *available at* http://fpc.state.gov/documents/organization/110843.pdf. The constitutionality of nutritional posting requirements has also been debated. For an article discussing compelled disclosure of nutritional values, see Charles R. Yates III, *Trimming the Fat: A Study of Mandatory Nutritional Disclosure Laws and Excessive Judicial Deference*, 67 WASH. & LEE. L. REV. 787 (2010). In the future, commercial speech will likely be an issue in high fructose corn syrup regulation since scholars have argued that the title of "corn sugar" manipulates consumers. *See, e.g.*, Emily Fredrix, *Corn Syrup Producers Want Sweeter Name: Corn Sugar*, USA TODAY, Sept. 17, 2010, http://www.usatoday.com/money/advertising/2010-09-14-corn-syrup_N.htm; Thomas Watkins, *'Corn Sugar' is False Advertising, FDA Warns*, ASSOCIATED PRESS, Sept. 15, 2011, http://www.msnbc.msn.com/id/44543271/ns/business-retail/t/corn-sugar-false-advertising-fda-warns/#.Tzg7uYHfUrU.

[21] *Cent. Hudson*, 447 U.S. at 561 (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761-762 (1976)).

activities is not constitutionally protected.[22] Although commercial advertising is not afforded protection as great as other forms of speech—such as social, religious, or political speech—the Court has expressly rejected the paternalistic view that the government has the complete power to suppress commercial speech.[23] Even when commercial speech communicates only a partial version of the relevant facts, the First Amendment assumes that an incomplete version of truthful information is superior to no information at all.[24]

B. First Amendment Limitations on Commercial Speech, Compelled Disclosure, and Suppression

In evaluating the tobacco warnings, two federal district courts and the Sixth Circuit Court of Appeals have divided over which Supreme Court compelled disclosure analysis to apply: the "reasonable relation" standard of *Zauderer*, the strict scrutiny standard of *Wooley*, or the intermediate scrutiny standard of *Central Hudson*.[25] Under *Zauderer*, a compelled disclosure is

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[22] *Zauderer*, 471 U.S. at 648; R.J. Reynolds Tobacco Co. v. FDA, No. 11–1482, 2011 U.S. Dist. LEXIS 128372, at *21 (D.C. Cir. Nov. 7, 2011). For commercial speech to be protected by the First Amendment, "it at least must concern lawful activity and not be misleading." *Lorillard Tobacco Co.*, 533 U.S. at 554 (citing *Cent. Hudson*, 447 U.S. at 566). "The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading . . . or that proposes an illegal transaction." *Zauderer*, 471 U.S. at 638. The Eleventh Circuit noted:

> If actually misleading, such speech would not be protected by the first amendment, but if only potentially misleading, the state must craft some narrow restriction on the speech—short of the current outright ban—which will directly advance its interest in protecting the public while encouraging a free flow of commercial information.

Abramson v. Gonzalez, 949 F.2d 1567, 1576-77 (11th Cir. 1992).

[23] *Lorillard Tobacco Co.*, 533 U.S. at 577; *Cent. Hudson*, 447 U.S. at 557 & 562. "The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Cent. Hudson*, 447 U.S. at 563 (citation omitted).

[24] *Id.* (citing Bates v. State Bar of Ariz., 433 U.S. 350, 374 (1977)).

[25] *See, e.g.*, Disc. Tobacco City & Lottery v. United States, Nos. 10-5234/10-5235, 2012 U.S. App. LEXIS 5614, at *3 (6th Cir. Mar. 19, 2012) (dividing 2-1 over what commercial speech standard to apply); *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *26 (applying strict scrutiny to analyze the warnings); Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512, 532 (W.D. Ky. 2010) (applying *Central Hudson* to analyze the constitutionality of the warnings). *See generally Zauderer*, 471 U.S. at 651; *Cent. Hudson*, 447 U.S. at 566; Wooley v. Maynard, 430 U.S. 705, 706 (1977).

constitutional if it is "reasonably related to the State's interest in preventing deception of consumers."[26] When strict scrutiny is required under *Wooley*, however, the government must demonstrate that the regulation "is narrowly tailored to achieve a compelling governmental interest."[27] In contrast, *Central Hudson* applies an intermediate scrutiny standard that requires the court to determine: (1) whether the disclosure concerns a lawful activity; (2) if the "governmental interest is substantial"; (3) if "the regulation directly advances" the state's interest; and (4) if the regulation is more than "necessary to serve" the government's interest.[28]

The Supreme Court has made two distinctions concerning when to apply *Zauderer* versus when to apply *Central Hudson*: (1) one distinction requires a *Zauderer* analysis for regulation of "misleading commercial speech," but a *Central Hudson* analysis for the regulation of "[non-]misleading speech," while (2) the other applies *Zauderer* to mandatory disclosures and *Central Hudson* to the suppression or restriction of speech.[29] Many state and lower federal courts have rejected the misleading versus non-misleading distinction, and instead have accepted the distinction between whether the regulation is a compelled disclosure or speech suppression.[30] In addition, federal courts have articulated differing standards concerning when to apply *Wooley* versus *Zauderer*: (1) some courts apply *Wooley* strict scrutiny to "subjective and highly controversial information"[31] and *Zauderer*

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[26] *Zauderer*, 471 U.S. at 651. For examples of the application of *Zauderer*, see N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 132 (2d Cir. 2009); Bellsouth Adver. & Publ'g Corp. v. Tenn. Regulatory Auth., 79 S.W.3d 506, 519 (Tenn. 2002).

[27] *Wooley*, 430 U.S. at 706; *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *27.

[28] *Cent. Hudson*, 447 U.S. at 566.

[29] Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1339 (2010) (emphasis omitted) (applying *Zauderer* to a disclosure requirement directed at misleading commercial speech); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 508 (1996) (recognizing *Central Hudson* as applicable to suppression of nonmisleading commercial speech); Edenfield v. Fane, 507 U.S. 761, 768-69 (1993) (applying *Central Hudson* to the suppression of nonmisleading commercial speech).

[30] "[W]e have found no cases limiting Zauderer [to 'potentially deceptive advertising directed at consumers']." Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 310 n.8 (1st Cir. 2005); *see also N.Y. State Rest. Ass'n*, 556 F.3d at 114; *BellSouth Adver. & Publ'g Corp.*, 79 S.W.3d at 519.

[31] Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 651 (7th Cir. 2006). "The sticker ultimately communicates a subjective and highly controversial message—that

to "purely factual and uncontroversial information,"[32] while (2) others apply *Wooley* only if the government "prescribe[s] what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[33] Building upon the already complex and confusing distinctions of when to apply *Zauderer*, *Central Hudson*, or *Wooley*, a federal district court in Kentucky—in evaluating the warnings—applied *Central Hudson*, rejected strict scrutiny, and did not state why *Zauderer* was inapplicable, while a federal district court for the District of Columbia applied strict scrutiny, rejected *Zauderer*, and did not explain why *Central Hudson* was considered inapplicable.[34]

In an attempt to clarify commercial disclosure doctrine, this Comment posits a test for determining the constitutionality of the pictorial warnings. Further, this Comment suggests that commercial compelled disclosure law should be thought of as consisting of the main *Central Hudson* standard, with two exceptions to the application of *Central Hudson*: (1) *Zauderer*'s "reasonable relation" standard and (2) *Wooley*'s strict scrutiny standard.[35] Under this Comment's proposal, disclosures of "purely factual and uncontroversial information" should require application of the *Zauderer* standard, through which a compelled disclosure is constitutional if "it's reasonably related to the state's interest in preventing [consumer] deception."[36] Unlike the

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the game's content is sexually explicit. This is unlike a surgeon general's warning of the carcinogenic properties of cigarettes." *Id.* at 652.

[32] *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *22 (citing Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651(1985)).

[33] *Zauderer*, 471 U.S. at 651 (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)). However, the 2006 smoking warnings that the Seventh Circuit draws its distinction from are unlike those going into place in 2012—textual, non-controversial, and meant simply to inform the reader about the dangers of using tobacco products.

[34] *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *20-26; Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512, 532 (W.D. Ky. 2010).

[35] *See Zauderer*, 471 U.S. at 651; Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980); *Entm't Software Ass'n*, 469 F.3d at 652. An argument could be made that a recent Supreme Court decision, *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011), has affected commercial disclosure standards. However, in *Sorrell*, the Court failed to define its heightened level of judicial scrutiny and did not explain why the pharmaceutical information qualified as commercial speech. *Sorrell*, 131 S. Ct. at 2658.

[36] *Zauderer*, 471 U.S. at 651.

disclosure of "purely factual and uncontroversial information," disclosures of "subjective and highly controversial" information should require the application of strict scrutiny under *Wooley*.[37] When strict scrutiny is required, however, the state must demonstrate that the regulation "is narrowly tailored to achieve a compelling governmental interest."[38]

If a court determines that the disclosure is neither "purely factual and uncontroversial" nor purely "subjective and highly controversial," the court should instead adopt the *Central Hudson* standard to determine the constitutionality of the regulation.[39] *Central Hudson* consists of a four-part test through which the court must determine if the disclosure: (1) concerns a lawful activity and is not misleading; (2) if "the asserted governmental interest is substantial"; (3) "whether the regulation directly advances" the government's asserted interest; and (4) if the regulation is not more extensive than "necessary to serve" the state's interest.[40] If all factors are positive, the compelled disclosure is constitutional under *Central Hudson*.[41] *Central Hudson* should also apply if a court determines that the warnings require a defendant to limit or suppress an advertisement's message, rather than disclose certain information.[42]

This Comment's proposal attempts to balance countervailing policy considerations: the free choice of consumers from paternalistic manipulation by the government with the government's interest in ensuring that consumers receive the factual information necessary to make informed decisions. The Supreme Court's high regard for consumer free choice absent governmental manipulation should be given significant deference by using the lowest standard available, the *Zauderer* "reasonable relation" standard on disclosures of "purely factual" information.[43]

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[37] *Zauderer*, 471 U.S. at 651; *Entm't Software Ass'n*, 469 F.3d at 652. For an example of the application of strict scrutiny, see *Barnette*, 319 U.S. at 639.

[38] *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *27.

[39] *Zauderer*, 471 U.S. at 651; *Entm't Software Ass'n*, 469 F.3d at 652. *See generally* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

[40] *Cent. Hudson*, 447 U.S. at 566.

[41] *Id.*

[42] Edenfield v. Fane, 507 U.S. 761, 768-769 (1993).

[43] *See generally* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

Since the government has an important interest in protecting consumers by "prevent[ing] the dissemination of commercial speech that is false . . . or misleading," information that is non-factual and subjective should require analysis under the most severe standard: strict scrutiny of *Wooley*.[44] Likewise, information that is neither purely factual nor subjective should require *Central Hudson* intermediate scrutiny as a balance between the policy consideration of promoting consumer free choice with the government's interest in ensuring that consumers receive the facts necessary to make informed decisions.

The intricacy of the "subjective and highly controversial,"[45] "purely factual and uncontroversial," and neither entirely subjective nor entirely factual categories of commercial disclosure requires representative examples of each classification.[46] Specifically, in regards to the pictorial warnings, the "purely factual and uncontroversial" disclosure category should apply only to textual statements based entirely in fact, such as "Warning: Second-hand smoking causes approximately 443,000 deaths each year" and "Warning: Smoking can lead to premature aging and obesity."[47] The "subjective and highly controversial" category should include the use of any image, since images inherently elicit emotional responses—as proven by researchers world-wide, including scientists at the University of Wisconsin, the Institute of Psychiatry at the University of London, the University of Waterloo in Canada, and the Ontario Institute for Cancer Research—as well as statements which have no factual foundation, such as "Warning: Second-hand smoke will kill your children" and "Warning: Smoking will make you ugly."[48] Disclosures that do not

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[44] *Zauderer*, 471 U.S. at 638.

[45] Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006).

[46] *Zauderer*, 471 U.S. at 651.

[47] *Id.* Note that smoking actually does cause approximately 443,000 deaths each year. *Smoking & Tobacco Use: Fast Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/#toll (last visited May 4, 2012).

[48] For a medical perspective of the cognitive effects of viewing images, see R. Borland et al., *Impact of Graphic and Text Warnings on Cigarette Packs: Findings from Four Countries over Five Years*, 18 TOBACCO CONTROL 358 (2009); Daren C. Jackson et al., *Suppression and Enhancement of Emotional Responses to Unpleasant Pictures*, 37 PSYCHOPHYSIOLOGY 515-22 (2000); John D. Teasdale et al., *Functional MRI Study of*

fit neatly into the *Zauderer* or *Wooley* categories should require *Central Hudson* analysis and include the use of images (which alone would require *Wooley*) accompanied by purely factual statements (which alone would require *Zauderer*), as well as statements based in fact, but subjective in application through the use of personal pronouns like "you" and "your," such as "Warning: Second-hand smoke may harm your children" and "Warning: Smoking may cause you to have wrinkles and age spots."[49]

Alone, the images of cadavers, tracheotomy cavities, and crying children are "subjective and highly controversial" and therefore should require application of *Wooley* strict scrutiny.[50] Most of the textual statements accompanying the warnings—including "WARNING: Cigarettes are addictive" and "WARNING: Cigarettes cause strokes and heart disease"—are "purely factual and uncontroversial," hence requiring application of *Zauderer*.[51] In order to test the entire compelled disclosure, courts should utilize the *Central Hudson* standard since the images with the accompanying textual statements are neither entirely subjective nor factual. Even if the proposed distinctions of when to apply the *Central Hudson*, *Zauderer*, and *Wooley* standards are rejected, Parts II through IV illustrate that the warnings are unconstitutional under every available Supreme Court standard, and thus under any circumstance should be held unconstitutional.

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the Cognitive Generation of Affect, 156 AM. J. PSYCHIATRY 209 (1999). *See generally* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

[49] *See generally Zauderer*, 471 U.S. at 651; Wooley v. Maynard, 430 U.S. 705 (1977).

[50] *Entm't Software Ass'n*, 469 F.3d at 652; *Health Warnings*, *supra* note 7. *See generally Wooley*, 430 U.S. at 705.

[51] *Zauderer*, 471 U.S. at 651; *Health Warnings*, *supra* note 7.

II. THE UNCONSTITUTIONALITY OF THE FDA'S WARNINGS UNDER *ZAUDERER*'S "REASONABLE RELATION" STANDARD

A. First Requirement of Zauderer*: The State's Interest is Not to Prevent Consumer Deception*

Even though this Comment's proposed standard requires a *Central Hudson* analysis, the warnings—if analyzed under *Zauderer*—should be deemed unconstitutional. In accordance with *Zauderer*, a compelled disclosure of "purely factual and uncontroversial information" is constitutional if it is "reasonably related to the state's interest in preventing" consumer deception because then the restriction is not "unjustified or unduly burdensome" under the First Amendment.[52] The warnings must first fail under *Zauderer* because the state's interest is not in preventing consumer deception, either for children or adults, as proven by the FDA's own statements. The FDA's self-professed purpose of the Act is to "help tobacco users quit and prevent young people from starting" by requiring the warnings to "serve as [a] reminder of the negative health consequences of smoking every time someone picks up a pack of cigarettes."[53] It is unlikely from the FDA's statements that their intention is purely to prevent consumer deception.[54] Even in their selection of the warnings, the FDA cited the "images' 'salience'—defined . . . as a warning's ability to evoke emotion—as a primary selection criterion" and used an "emotional reaction scale (*e.g.*, disgusted, worried)" to decide what warnings to choose.[55] Through their statements, the FDA has made clear that the warnings' purpose is not to prevent deception by providing factual information, but rather to manipulate consumers into not purchasing tobacco products.[56]

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[52] *Zauderer*, 471 U.S. at 651.

[53] *Health Warnings*, *supra* note 7.

[54] *Zauderer*, 471 U.S. at 651.

[55] R.J. Reynolds Tobacco Co. v. FDA, No. 11–1482, 2011 U.S. Dist. LEXIS 128372, at *11 (D.C. Cir. Nov. 7, 2011); JAMES NONNEMAKER ET AL., CTR. FOR TOBACCO PRODS., USA 2010—EXPERIMENTAL STUDY OF GRAPHIC CIGARETTE WARNING LABELS—FINAL RESULTS REPORT AND APPENDICES (2010), *available at* http://www.tobaccolabels.ca/healt/usa-2010-experimental-study-of-graphic-cigarette-w~7.

[56] Consumer manipulation or "neuromarketing" is a thriving international business. *See* NEUROMARKETING SCIENCE & BUSINESS ASSOCIATION, http://www.nmsba.com/neuromarketing-science-business-association (last visited May

The sheer size of the warning labels also undermines the FDA's potential argument that the warnings are intended to prevent consumer deception. The warnings will cover the top fifty percent of the front and rear of cigarette packages, and thirty percent of the front and rear of smokeless tobacco products.[57] If the government's sole interest is to prevent the deception of consumers, then why would not a larger textual warning be sufficient? Likewise, the mandated surgeon general's warnings illustrating the dangers of smoking arguably already protect consumers from possible tobacco company manipulation and warn consumers about what they already know—smoking kills, is dangerous, and creates serious risks to the smoker's health.[58] Rather than prevent consumer deception, the FDA's interest, in their own words, is to promote "smokers to quit" and "youth to say no to smoking."[59]

4, 2012). For general information about the impact of neuromarketing on consumers, see Laurie Burkitt, *Neuromarketing: Companies Use Neuroscience for Consumer Insights*, FORBES (Nov. 16, 2009, 2:00 PM), http://www.forbes.com/forbes/2009/1116/marketing-hyundai-neurofocus-brain-waves-battle-for-the-brain.html.

[57] PR Newswire, *supra* note 5.

[58] *Vital Signs: Current Cigarette Smoking Among Adults Aged ≥ 18 Years—-United States, 2009*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 10, 2010) http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5935a3.htm. This CDC report found the following:

> In 2009, 20.6% of U.S. adults aged ≥ 18 years were current cigarette smokers. Men (23.5%) were more likely than women (17.9%) to be current smokers. The prevalence of smoking was 31.1% among persons below the federal poverty level. For adults aged ≥ 25 years, the prevalence of smoking was 28.5% among persons with less than a high school diploma, compared with 5.6% among those with a graduate degree.

Id. In 2010, the Centers for Disease Control and Prevention estimated that 31.4% of American Indian / Alaska Natives (non-Hispanic) adults in the United States were smokers, 9.2% of Asian American adults were smokers, 29.6% of African American (non-Hispanic) adults were smokers, 12.5% of Hispanic American adults were smokers, and 21.0% of Caucasian American adults were smokers. *Smoking & Tobacco Use: Adult Cigarette Smoking in the United States: Current Estimate*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm (last visited May 4, 2012). The CDC also estimates that "45.3 million people, or 19.3% of all adults (aged 18 years or older), in the United States smoke cigarettes." *Id.*

[59] *Health Warnings*, *supra* note 7. Note that the economic impact on the U.S. government of citizens using tobacco products has been debated. For competing views compare Stephanie Saul, *Government Gets Hooked on Tobacco Tax Billions*, N.Y. TIMES, Aug. 30, 2008, *available at* http://www.nytimes.com/2008/08/31/weekinreview/31saul.html (discussing the tobacco industry's multi-billion dollar revenue

B. Second Requirement of Zauderer*: The Warning Requirement is Not Reasonably Related to the Alleged State Interest in Preventing Consumer Deception*

Even if the FDA could demonstrate that its interest is to prevent consumer deception, the warnings would still fail under *Zauderer*'s requirement that the disclosure be "reasonably related" to the state's interest for two reasons: the images elicit an emotional response rather than inform and other options not restricting commercial speech are available.[60] Images of cadavers and cancer are not "reasonably related" to the state's interest in preventing consumer deception because, as proven by researchers world-wide, they elicit a purely emotional response rather than provide unbiased information.[61] Even if the FDA were to argue that the warnings are meant to caution an illiterate or non-English speaking audience (an argument they have not made), the warnings would still fail under *Zauderer* because there are other reasonable options available to the FDA, such as bilingual warnings for non-English speaking citizens or a picture of the world-renowned symbol for danger, a skull and crossbones, for illiterate citizens.[62] Arguably, however, implementing new warnings solely for a bilingual or illiterate audience is also unconstitutional, since the "Constitution . . . requires us to ask whether [the] legislation unduly burdens the First Amendment rights of" all individuals and groups affected by the regulation, not just illiterate or bilingual citizens.[63]

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impact on the state and federal governments), with WORLD HEALTH ORG., ECONOMICS OF TOBACCO TOOLKIT, ASSESSMENT OF THE ECONOMIC COSTS OF SMOKING (2011) (discussing the impact of healthcare costs, indirect morbidity costs, and indirect mortality costs associated with smoking).

[60] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

[61] *See* Borland, *supra* note 48; Jackson, *supra* note 48.

[62] The symbol of skull and crossbones is used by both the United States and the United Nations to symbolize dangerous, toxic, or hazardous material. *See, e.g.*, *Pesticides: International Activities, Skull and Crossbones*, EPA, http://www.epa.gov/oppfead1/international/ghs/skull-crossbones.htm (last visited May 4, 2012); *Red triangle with skull and crossbones is for danger—new UN radiation symbol*, UN NEWS Serv. (Feb. 15, 2007), http://www.un.org/apps/news/story.asp?NewsID=21578&Cr=iaea&Cr1=.

[63] Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 646 (7th Cir. 2006) (citation omitted).

If the FDA's concern is that consumers will not see the textual warnings, they could instead enlarge the already mandatory surgeon general warnings or move the warnings from the sides of packages to the front of tobacco packages. Instead, the FDA has chosen to use the pictorial warnings to "serve as a [constant] reminder of the negative health consequences" of using tobacco products.[64] Other reasonable options discussed in Part V that prevent consumer deception without infringing on First Amendment Rights, such as the use of an educational health campaign, also illustrate the unreasonableness of the proposed warnings.

III. THE UNCONSTITUTIONALITY OF THE FDA'S WARNINGS UNDER *WOOLEY*'S STRICT SCRUTINY STANDARD

A. First Requirement of Wooley*: The Government's Failure to Demonstrate a Compelling State Interest*

Wooley applies a strict scrutiny standard whereby the regulation is unconstitutional if it is not "narrowly tailored to achieve a compelling government interest."[65] The first prong of strict scrutiny, which requires the government to demonstrate "a compelling government interest," is "normally a *perfunctory* step in the strict-scrutiny [commercial speech] analysis."[66] However, the FDA's commission of an "18,000 consumer study . . . to help determine which of the 36 proposed graphic images it would ultimately select" undermines its argument that it has a compelling state interest.[67] "[T]he study was *not* designed to assess whether the proposed graphic images would have a statistically significant impact on consumer awareness of smoking risks, but rather to" advocate a change in consumer behavior.[68] The warning labels were "calculated to provoke the viewer to quit, or never start, smoking: an objective wholly apart from [the

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[64] *Health Warnings*, *supra* note 7.

[65] R.J. Reynolds Tobacco Co. v. FDA, No. 11–1482, 2011 U.S. Dist. LEXIS 128372, at *27 (D.C. Cir. Nov. 7, 2011). *See generally* Wooley v. Maynard, 430 U.S. 705 (1977).

[66] *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *27.

[67] *Id.* at *28.

[68] *Id.* at *28-29.

compelling state interest of] disseminating purely factual and uncontroversial information" to prevent consumer deception.[69] Attempting to manipulate both adult and adolescent consumer behavior is not a compelling governmental interest; therefore, the new warnings should fail under the first prong of strict scrutiny.[70]

B. Second Requirement of Wooley*: The Warning Requirement is Not Narrowly Tailored*

Under the second prong of strict scrutiny, the "compelling governmental interest" must be "narrowly-tailored,"[71] meaning "'a less restrictive alternative [that] would serve the Government's purpose'" must not be available.[72] The warnings fail under this prong for three reasons: (1) the size of the warnings; (2) the government's failure to consider the First Amendment rights of all groups affected by the regulation; and (3) the fact that other reasonable means exist to prevent consumer deception and inform consumers about the dangers of using tobacco products. "[T]he sheer size and display requirements for the graphic images are anything but narrowly tailored."[73] By covering the top fifty percent of both the front and rear panels of cigarette packages, as well as the top thirty percent of the front and rear of smokeless tobacco packages, the government has failed to meet the "narrowly-tailored" prong.[74] A Seventh Circuit case, *Entertainment Software Association v. Blagojevich*, supports this finding.[75]

In *Blagojevich*, the Seventh Circuit determined that the "State of Illinois . . . [went] too far in its attempt to protect minors from the allegedly dangerous impact of certain video games," even though—as the Supreme Court explained in *Sable*

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[69] *Id.* at *23 ("[W]here these emotion-provoking images are coupled with text extolling consumers to call the phone number '1-800-QUIT[-NOW]'—the line seems *quite clear*." (emphasis added)).

[70] *Id.* at *27-29.

[71] *Id.* at *29.

[72] Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 646 (7th Cir. 2006) (quoting United States v. Playboy Entm't Grp., 529 U.S. 803, 813 (2000); FCC v. Pacifica, 438 U.S. 726, 751 (1978)).

[73] R.J. Reynolds Tobacco Co. v. FDA, 2011 U.S. Dist. LEXIS 128372, at *31.

[74] *Id.*

[75] *Id.* at *32.

Communications of California, Inc. v. FCC—the state may have "a compelling interest in protecting the physical and psychological well-being of minors."[76] In an effort to protect children, the Illinois law required "video game retailers to place a four square-inch label with the numerals '18' on any 'sexually-explicit' video game."[77] The "four-square-inch sticker '*literally* fail[ed] to be narrowly-tailored' because it 'cover[ed] a substantial portion of the box.'"[78] Similarly, the pictorial tobacco warnings will cover approximately thirty percent of all useful surface area on a typical cigarette package, taking over "a substantial portion"[79] of tobacco packages as well as "affirmative[ly] limit[ing]" tobacco manufacturers' ability to speak.[80]

In addition to failing under the narrowly tailored prong because of the size of the warnings, the warnings also fail because the Constitution requires more than just looking at whether one particular group "will be affected by the challenged legislation."[81] Instead, the court must examine how the legislation will affect all groups that "have First Amendment rights."[82] Therefore, even if the FDA can successfully argue that the warnings protect

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[76] Sable Commc'ns of Cal. v. FCC, 492 U.S. 115, 126 (1989); *Entm't Software Ass'n*, 469 F.3d at 643.

[77] *Entm't Software Ass'n*, 469 F.3d at 643.

[78] *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *32 (citing *Entm't Software Ass'n*, 469 F.3d at 652) ("The State has failed to even explain why a smaller sticker would not suffice. Certainly we would not condone a health department's requirement that half of the space on a restaurant menu be consumed by the raw shellfish warning. Nor will we condone the State's unjustified requirement of the four square-inch '18' sticker.").

[79] *Id.*

[80] Disc. Tobacco City & Lottery v. United States, Nos. 10-5234/10-5235, 2012 U.S. App. LEXIS 5614, at *27-28 (6th Cir. Mar. 19, 2012). According to the author's limited mathematical skills, the surface area of a regular Marlboro cigarette package of twenty Class A cigarettes is as follows (in centimeters): 2 (8.2 cm {front panel height} x 5.6 cm {front panel width}) +2 (2.3 cm {top panel height} x 5.6 cm {top panel width}) + 2 (8.2 cm {side panel height} x 2.3 cm {side panel width}). This calculates as follows: 91.84 cm^2 (combined surface area of front and rear panels) + 25.76 cm^2 (combined surface area of top and bottom panels) + 37.72 cm^2 (combined surface area of both side panels), equaling a total surface area of approximately 155.32 cm^2. The FDA's warnings, requiring fifty percent surface area on the front and rear panels, amount to 0.50 x 91.84 cm^2, totaling 45.92 cm^2 total in graphic warnings. This illustrates that the warning labels alone will take up approximately 30% [(45. 92 cm^2/ 155.32 cm^2) x 100] of all useful advertising space on a typical tobacco package.

[81] *Entm't Software Ass'n*, 469 F.3d at 646.

[82] *Id.* (citation omitted).

children, the warnings would again fail because a compelling governmental interest in protecting one group of citizens is not enough to constitutionally validate the regulation. Furthermore, the warnings are not narrowly tailored because there are other "reasonable means of disseminating accurate information."[83] A reasonable option for the government to prevent consumer deception would be to publish a graph that depicts the types of health ailments that befall people who use tobacco products.[84] The state could also prevent consumer deception while educating consumers about the dangers of tobacco products through the use of a "broader educational campaign."[85] In conclusion, the government cannot meet either prong of strict scrutiny: (1) a compelling governmental interest that is (2) narrowly tailored.[86]

C. The Unconstitutionality of Using Tobacco Packages as Billboards and Other Narrowly Tailored Means Available

The warnings infringe upon the First Amendment rights of both consumers and tobacco manufacturers by requiring—as the FDA commissioner stated—that "every single pack of cigarettes in our country" serve as a "mini-billboard."[87] Through the warnings, the FDA has violated the choice to not speak, a First Amendment right recognized by the Supreme Court in such cases as *West Virginia v. Barnette* and *Wooley v. Maynard*.[88] In *Wooley*, the Court considered whether the state's interest was "sufficiently compelling to justify requiring appellees [drivers of the Jehovah's

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[83] R.J. Reynolds Tobacco Co. v. FDA, 2011 U.S. Dist. LEXIS 128372, at *33.

[84] *Id.* at *33-34.

[85] *Entm't Software Ass'n*, 469 F.3d at 652.

[86] The court in *R.J. Reynolds* found that "the Government has neither carried its burden of demonstrating a compelling interest, nor demonstrated how the Rule is narrowly tailored to achieve a constitutionally permissible form of compelled commercial speech." *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *35.

[87] *Id.* at *31 (citation omitted). In *Wooley*, Justice Rehnquist, with whom Justice Blackmun joined in dissention, argued that "[f]or First Amendment principles to be implicated, the State must place the citizen in the position of either apparently to, or actually 'asserting as true' the message." Wooley v. Maynard, 430 U.S. 705, 721 (1977). Even if the dissent is correct in this regard, they failed to take into account that even when the government has a purpose that is both "legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.* at 716. Therefore, the FDA's requirements still must fail because the ends "can be more narrowly achieved." *Id.*

[88] *Id.* at 705; W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

Witness faith] to display the state motto ("Live Free or Die") on their [vehicle] license plates."[89] The issue was whether New Hampshire could "constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."[90] The Court found that "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such a message."[91] New Hampshire had essentially forced the drivers to "use their private property as a 'mobile billboard' for the State's ideological message—or suffer a penalty."[92]

In the present situation, tobacco companies are forced to print and citizens are forced to carry the government's "ideological message" (e.g., "tobacco use has horrific consequences too gruesome to comprehend without images").[93] Under *Wooley*, such a limitation on "fundamental personal liberties" is unconstitutional.[94] Neither tobacco manufacturers nor consumers can be forced to carry the ideological message of the state, and *Wooley* illustrates that forcing tobacco companies and consumers to do so is an unreasonable restraint on personal liberties guaranteed by the First Amendment.[95]

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[89] *Wooley*, 430 U.S. at 716.

[90] *Id.* at 713.

[91] *Id.* at 717.

[92] *Id.* at 715.

[93] Although the Court in *Wooley* declined to define what it considers to be "ideological," Merriam-Webster defines the term as "the integrated assertions, theories and aims that constitute a sociopolitical program." *Ideology Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/ideology?show=0&t=1319734417 (last visited May 4, 2012).

[94] *Wooley*, 430 U.S. at 716.

[95] *Id.* at 715-17.

IV. THE UNCONSTITUTIONALITY OF THE FDA'S WARNINGS UNDER *CENTRAL HUDSON*'S INTERMEDIATE SCRUTINY STANDARD

In accordance with this Comment's standard, the warnings together with their accompanying textual messages should be evaluated under *Central Hudson* since the entire disclosure is neither "purely factual and uncontroversial" (requiring *Zauderer* analysis) nor "subjective and highly controversial" (requiring *Wooley* analysis).[96] *Central Hudson* should also apply when evaluating the constitutionality of commercial speech suppression: its traditional use in commercial speech doctrine.[97] Due to the size of the warnings, the labels amount to a commercial speech suppression in addition to a compelled disclosure, since the "warnings . . . 'confiscate' the front and back portions of [all] cigarette packag[es]."[98] Application of the *Central Hudson* standard illustrates, however, that regardless of whether the regulation is considered to be a disclosure or suppression, the warnings must be considered unconstitutional. In accordance with *Central Hudson*, for a commercial speech regulation to be constitutional, it must survive a four-part test of which the government bears the burden.[99] The court must first determine if the regulation (1) concerns a lawful activity and is not misleading, and then (2) if "the asserted governmental interest is substantial."[100] If both of the previous factors are positive, then the court must (3) "determine whether the regulation directly advances" the government's asserted interest, and (4) if it is more extensive than "necessary to serve" the government's interest.[101] Under the third prong, the government must prove by more than "mere speculation or conjecture . . . that the harms it recites are

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[96] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985); Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006).

[97] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 508 (1996); Edenfield v. Fane, 507 U.S. 761, 768-769 (1993).

[98] *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *17; *see, e.g.*, *Entm't Software Ass'n*, 469 F.3d at 641.

[99] *Cent. Hudson*, 447 U.S. at 566.

[100] *Id.*

[101] *Id.*

real and that its restriction will in fact alleviate them to a material degree."[102]

Although the regulation does not have to be the "least-restrictive-means" available of achieving the governmental interest, there must be a "reasonable fit" between the regulation and the state interest.[103] A paternalistic assumption by the state that consumers will harm themselves by using "truthful, nonmisleading . . . information unwisely" cannot be the basis for the regulation.[104]

A. The Second Prong of Central Hudson*: The Government's Failure to Demonstrate a Substantial State Interest*

Under the first prong of *Central Hudson*, the regulation easily falls within the First Amendment's scope because it "concern[s] lawful activity and [is] not . . . misleading."[105] The government, however, cannot demonstrate that its interest in manipulating "the viewer to quit, or never to start, smoking" is substantial in order to fulfill the second prong of *Central Hudson*.[106] Even if the government were to argue that its interest is in "preventing underage tobacco use"—an interest recognized as "substantial, and even compelling" by the Supreme Court—a regulation must not unduly burden the rights of all people affected by it.[107] In addition, the FDA requirements clearly violate

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[102] *Edenfield*, 507 U.S. at 770-71.

[103] Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989); *Cent. Hudson*, 447 U.S. at 566.

[104] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 497 (1996).

[105] *Cent. Hudson*, 447 U.S. at 566.

[106] *Id.*; *see also* R.J. Reynolds Tobacco Co. v. FDA, No. 11-1482, 2011 U.S. Dist. LEXIS 128372, at *23 (D.C. Cir. Nov. 7, 2011). The government may also seek to counteract manipulation by tobacco companies since historically tobacco companies have not been innocent bystanders in consumer manipulation. From the Marlboro Man to Joe Camel, tobacco companies are not known for their honesty in advertising. For example, from the 1920s to the 1950s, tobacco companies ran advertisements featuring doctors, dentists, Mickey Mantle, and even Santa Clause endorsing cigarettes. Stuart Elliot, *When Doctors, and Even Santa, Endorsed Tobacco*, N.Y. TIMES, Oct. 7, 2008, at B3, *available at* http://www.nytimes.com/2008/10/07/business/media/07adco.html?partner=permalink&exprod=permalink; *In Old Ads, Doctors and Babies Say "Smoke,"* N.Y. TIMES, http://www.nytimes.com/slideshow/2008/10/06/business/media/20081006_CigaretteAd_Slideshow_ready_index.html (last visited May 4, 2012).

[107] Disc. Tobacco City & Lottery v. United States, Nos. 10-5234/10-5235, 2012 U.S. App. LEXIS 5614, at *8 (6th Cir. Mar. 19, 2012) (citing Lorillard Tobacco v. Reilly, 533

commercial free speech guaranteed by the First Amendment because the regulation fails to "directly advance" the state interest under the third prong and is "more extensive than necessary" under the fourth prong of the *Central Hudson* analysis.[108]

B. The Third Prong of Central Hudson*: The Warning Requirement Fails to Directly Advance the State's Interest*

The regulation fails under the third prong of *Central Hudson* because the governmental interest is not "directly advance[d]."[109] The Court has consistently rejected the idea of creating a "vice exception" to the application of the *Central Hudson* test, and *44 Liquormart, Inc. v. Rhode Island* illustrates how regulations that attempt to deter people from what the government views as an unhealthy vice consistently fail to advance the government's interest "to a material degree." [110] In *44 Liquormart*, the Court found a ban on showing the prices of alcohol in advertisements to be unconstitutional since "evidence suggest[ed] that the abusive drinker . . . [would] probably not be deterred by a marginal price increase, and that the true alcoholic . . . [might] simply reduce his purchases of other necessities" to feed his habit.[111] In its determination, the Court relied on the fact that the state had failed to offer any evidence "to suggest that its speech prohibition

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U.S. 525, 564 (2001)); Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 646 (7th Cir. 2006).

[108] Arguably the warnings might fail under the state interest prong of *Central Hudson* since members of the Supreme Court have distinguished between broad and narrow interpretations of a state's interest. In *Emp't Div. v. Smith*, 494 U.S. 872 (1990), which concerned Native American ceremonial use of peyote, Justice Blackmun, Justice Brennan, and Justice Marshall—as the dissent—distinguished levels of a state's interest and stated that the government's interest should not be broadly defined as "fighting the critical war on drugs," but rather as a narrow interest "in refusing to make an exception for the religious, ceremonial use of peyote." *Id.* at 910 (internal quotation marks omitted). In the present situation, the broad governmental interest would be to prevent consumer deception, while the narrow interest would be the refusal to accept consumer free-choice to use tobacco products despite awareness of the health risks.

[109] *Cent. Hudson*, 447 U.S. at 566.

[110] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 505 (1996) (quoting Edenfield v. Fane, 507 U.S. 761, 771 (1993)); Rubin v. Coors Brewing Co., 514 U.S. 476, 478 (1995).

[111] *44 Liquormart*, 517 U.S. at 506.

[would] *significantly* reduce marketwide consumption."[112] The FDA's commercial speech regulation on tobacco companies has the same enervations as Rhode Island did in *44 Liquormart*, since the FDA has not proven that the regulation "will *significantly* reduce marketwide consumption."[113] Therefore, the government has failed to meet the third prong of *Central Hudson* by failing to prove that the regulation will advance the state's interest to a direct and material degree.[114]

C. Fourth Prong of Central Hudson*: The Warning Requirement is More Extensive than Necessary to Serve the State's Interest*

The regulations also fail under the fourth prong of *Central Hudson* and hence are unconstitutional since they are "more extensive than . . . necessary to serve" the government's interest.[115] "A speech regulation cannot unduly impinge the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products."[116] In *44 Liquormart*, the Supreme Court refused to uphold a commercial speech regulation because "alternative forms of regulation . . . would not involve any commercial speech restriction . . . [such as] increased taxation . . . [and] the use of educational campaigns."[117] One example of a reasonable option that would not infringe upon commercial speech rights would be for the government to publish charts and graphs depicting the increased risk of diseases and health ailments in people who use

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[112] *Id.*

[113] *Id.* The FDA "could 'not reject, in a statistical sense, the possibility that the rule will not change the U.S. smoking rate,' it also could not reject the possibility that the rule would lead to significant reductions in tobacco use and thus savings to the American public." Memorandum of Amici Curiae American Academy of Pediatrics et al. at 20, R.J. Reynolds Tobacco Co. v. FDA, No. 11-1482, 2012 WL 664010 (D.C. Cir. Feb. 29, 2012); *see also* E.J. Strahan, *Enhancing the Effectiveness of Tobacco Package Warning Labels: A Social Psychological Perspective*, 11 TOBACCO CONTROL 183 (Mar. 1, 2002), *available at* http://tobaccocontrol.bmj.com/content/11/3/183.short (discussing the potential for the warnings to influence consumer tobacco habits).

[114] *Cent. Hudson*, 447 U.S. at 566.

[115] *Id.*

[116] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 529 (2001).

[117] *44 Liquormart*, 517 U.S. at 486.

tobacco products.[118] As discussed in Part V, the government also has many other reasonable options available to promote smoking cessation without infringing on the First Amendment rights of tobacco companies or consumers, such as the taxation of tobacco products or the banning of tobacco use in public places.

V. AVAILABLE OPTIONS TO PREVENT CONSUMER DECEPTION

A. Taxation of Tobacco Products

Under Article I, Section 8 of the U.S. Constitution, Congress has the power "to lay and collect taxes" upon corporations, while states have the power to tax out-of-state corporate entities as long as a sufficient nexus exists between the business and the state.[119] With the power to tax, of course, comes the inherent authority to increase taxes. By lobbying for increased federal taxes on tobacco products (or encouraging states to tax tobacco products at a higher rate), the FDA would promote their purpose of dissuading non-smokers, especially children, from starting to smoke while encouraging current smokers to quit. "Sin taxes," such as taxes on tobacco and alcohol, have been widely endorsed as a critical tool in decreasing tobacco use by renowned anti-smoking organizations such as the World Health Organization, the Campaign for Tobacco-Free Kids, the Centers for Disease Control and Prevention, and the Office of the Surgeon General.[120] The Centers

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[118] R.J. Reynolds Tobacco Co. v. FDA, No. 11–1482, 2011 U.S. Dist. LEXIS 128372, at *33-34 (D.C. Cir. Nov. 7, 2011).

[119] Quill Corp. v. North Dakota, 504 U.S. 298, 304 (1992). "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imports and Excises shall be uniform throughout the United States." U.S. CONST. art. I, §8.

[120] DISEASE CONTROL PRIORITIES PROJECT, TAX AND SPEND FOR BETTER HEALTH: OFTEN OVERLOOKED, FISCAL POLICIES ARE POWERFUL TOOLS (2009), http://www.dcp2.org/file/241/dcpp-fiscalpolicies-web.pdf; *see, e.g.*, ANN BOONN, CAMPAIGN FOR TOBACCO-FREE KIDS, RAISING CIGARETTE TAXES REDUCES SMOKING, ESPECIALLY AMONG KIDS (AND THE TOBACCO COMPANIES KNOW IT) (Aug. 26, 2011), http://www.vctc.org.au/downloads/CTFK_RaisingCigTaxes.pdf; *Smoking & Tobacco Use: Smoke-Free Policies Reduce Smoking*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/protection/reduce_smoking/index.htm#studies (last visited May 21, 2011); U.S. DEP'T OF HEALTH AND HUMAN SERVS., HOW TOBACCO SMOKE CAUSES DISEASE, THE

for Disease Control and Prevention estimated that alone "a 10% increase in price . . . [would] reduce overall cigarette consumption among adolescents and young adults by about 4%."[121] Although it is arguable that severe addicts, just as the Court in *44 Liquormart* discussed, would not be affected by a "marginal price increase" on tobacco products and instead choose to forego necessities to feed their habit, this method of regulating tobacco products is a viable alternative to infringing upon the First Amendment rights of both consumers and tobacco manufacturers.[122] The Supreme Court has recognized that "the maintenance of higher prices either [b]y direct regulation or by increased taxation . . . would be more likely to . . . promot[e] temperance" of what are considered to be vice activities.[123] More than 315 billion cigarettes and approximately 121.4 million pounds of smokeless tobacco were purchased in the United States in 2009, which generated approximately 17 billion dollars in state and local revenue.[124] Besides discouraging tobacco use, taxation would benefit states and the federal government by the generation of much needed income for government coffers.[125]

B. Banning of Tobacco Products

No court in the United States has ever found that smokers have a privacy right or a substantive due process right under the Fifth or Fourteenth Amendments to smoke.[126] Rather, cities in

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BIOLOGY AND BEHAVIORAL BASIS FOR SMOKING-ATTRIBUTABLE DISEASE 647 (2010), *available at* http://www.surgeongeneral.gov/library/reports/tobaccosmoke/full_report.pdf; Brian Tumulty, *Tobacco tax increase expected to reduce smoking*, USA TODAY, Mar. 27, 2009, http://www.usatoday.com/news/health/2009-03-27-tobacco-tax_N.htm.

[121] *Smoking & Tobacco Use: Economic Facts About U.S. Tobacco Production and Use,* CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 21, 2011), http://www.cdc.gov/tobacco/data_statistics/fact_sheets/economics/econ_facts/index.htm.

[122] *44 Liquormart*, 517 U.S. at 506.

[123] *Id.* at 486.

[124] *Tax Facts: Tobacco Tax Revenue*, TAX POLICY CTR. (Dec. 5, 2011), http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=403; *see also* Saul, *supra* note 59; *Smoking & Tobacco Use*, *supra* note 121.

[125] See *Tax Facts: Cigarette Rates 2001-2011*, TAX POLICY CTR. (Apr. 1, 2011), http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=433, which gives a state-by-state analysis of tax charges per cigarette package.

[126] For further information about the limits of personal smoking liberties, see SAMANTHA K. GRAFF, TOBACCO CONTROL LEGAL CONSORTIUM, THERE IS NO CONSTITUTIONAL RIGHT TO SMOKE: 2008 (Mar. 2008), *available at*

many states including Maine, Texas, Oregon, New York, and Michigan, have already enacted laws banning smoking in places such as work offices, in public, at restaurants, and in public housing.[127] In an effort to curb smoking, the federal government could encourage municipalities and states to ban tobacco use in public places. For example, in New York City, citizens who get caught smoking "in a park, on [a] beach, in [a] pedestrian mall or a sports stadium" are subject to a fifty dollar fine.[128] In addition, encouraging smokers to quit by banning smoking in public places has been proven effective overseas. In 2008, a London ban on smoking in public places encouraged over 400,000 London smokers to quit.[129] Even the Campaign for Tobacco Free Kids recognizes the powerful implications of local and nationwide bans on public smoking and has stated that smoke-free laws "[p]rompt more smokers to try to quit; . . [i]ncrease the number of successful quit attempts"; and "[d]iscourage kids from ever starting to smoke."[130] Smoke-free laws are but one of many options in the government's fight against tobacco use. This option, however, requires the government to consider the economic implications of

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http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-constitution-2008_0.pdf. For an interesting article about the balance between personal constitutional liberties and government interest in protecting public health, see Michele L. Tyler, *Blowing Smoke: Do Smokers Have A Right? Limiting The Privacy Rights Of Cigarette Smokers*, 86 GEO. L.J. 783 (1998).

[127] Katharine Q. Seelye, *Increasingly, Smoking Indoors Is Forbidden at Public Housing,* N.Y. TIMES, Dec. 18, 2011, at A25, *available at* http://www.nytimes.com/2011/12/18/us/public-housing-authorities-increasingly-ban-indoor-smoking.html?page wanted=all; *Report: Ban Smoking in Public Places—Surgeon General says 126 Million Nonsmokers Exposed to Tobacco Hazards*, MSNBC (June 26, 2006, 4:11 PM), http://www.msnbc.msn.com/id/13569976/ns/health-addictions/t/report-ban-smoking-public-places/#.TzMPo4HfUrU.

[128] Maria Diamond, *NYC Taking 'Inform On Your Friends' Approach To Outdoor Smoking Ban, If You Light Up You Better Look Around, But Not For A Cop*, CBS NEWS (May 23, 2011, 9:16 PM), http://newyork.cbslocal.com/2011/05/23/nyc-smokers-now-prohibited-from-lighting-up-in-many-public-places/.

[129] *Smoking Bans Spurs 400,000 People to Quit the Habit*, DAILY MAIL REP. (July 4, 2008, 4:23 PM), http://www.dailymail.co.uk/health/article-1030575/Smoking-ban-spurs-400-000-people-quit-habit.html.

[130] CAMPAIGN FOR TOBACCO-FREE KIDS, SMOKE-FREE LAWS ENCOURAGE SMOKERS TO QUIT AND DISCOURAGE YOUTH FROM STARTING (Dec. 2010), http://www.tobaccofreekids.org/research/factsheets/pdf/0198.pdf. For an article opposing smoking bans, see Thomas A. Lambert, *The Case Against Smoking Bans*, REG. (Winter 2006-2007), *available at* http://www.cato.org/pubs/regulation/regv29n4/v29n4-4.pdf.

banning tobacco products, since tobacco product sales generate billions in revenue annually for states and the federal government. The banning of tobacco products would, however, save the U.S. government lost productivity and health care expenditures related to tobacco use, which amount to approximately 193 billion dollars annually.[131]

C. Use of Removable Package Inserts

Canada and Australia, as well as other countries, already use removable warning stickers on tobacco packages and removable cards inside tobacco packages to warn consumers about the dangers of using tobacco products.[132] By placing removable warnings inside or on tobacco packages, Canada has avoided the problem of *Wooley v. Maynard*, where Rhode Island made consumers act as private billboards for the state's ideological message.[133] Under this method, however, the FDA would still have to constitutionally validate the use of graphic images in accordance with Supreme Court precedent.

D. Consumer Health and Wellness Educational Programs

Just as in *Entertainment Software Association v. Blagojevich,* "the [FDA] has not demonstrated that it could not accomplish . . . [its] goal with a broader educational campaign."[134] If the goal is—as the FDA claims it is—to educate consumers about the dangers of smoking and to deter young adults from beginning to smoke, then the government could use health campaigns similar to the "Truth" or "D.A.R.E." programs to educate consumers.[135] The

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[131] *Fast Facts: Smoking & Tobacco Use*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/#toll (last visited May 4, 2012).

[132] *See Canada*, TOBACCO LABELING RES. CTR., http://www.tobaccolabels.ca/currentl/canada (last visited May 4, 2012); *Marketing of Tobacco in the Age of Advertising Bans*, TOBACCO IN AUSTRALIA, http://www.tobaccoinaustralia.org.au/chapter-11-advertising/11-6-marketing-of-tobacco-in-the-age-of-advertisin (last visited May 4, 2012).

[133] *See* Wooley v. Maynard, 430 U.S. 705, 716 (1977).

[134] Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006).

[135] See TRUTH, http://www.thetruth.com (last visited May 4, 2012); D.A.R.E., http://dare.com/home/default.asp (last visited May 4, 2012); FOUNDATION FOR A SMOKEFREE AMERICA, http://www.anti-smoking.org (last visited May 4, 2012); and CAMPAIGN FOR TOBACCO-FREE KIDS, http://tobaccofreekids.org (last visited May 4,

power of anti-tobacco educational campaigns has already been endorsed by many well-respected smoking cessation advocates. For example, according to the Campaign for Tobacco-Free Kids, "[p]ublic education campaigns are a vital component of a comprehensive tobacco use prevention and cessation program."[136] In addition, the Centers for Disease Control and Prevention concluded "that public education . . . campaigns are an integral part of efforts to . . . encourage tobacco cessation," while the National Cancer Institute has found "that anti-tobacco media campaigns are effective in reducing smoking among youth and adults."[137]

E. Raising the Penalties for Adolescent Tobacco Sales

The Supreme Court has recognized that "[t]he governmental interest in preventing underage tobacco use is substantial, and even compelling."[138] The government may not, however, unduly burden the rights of others affected by the regulation solely on the basis of a "substantial, and even compelling" interest.[139] Even though the FDA's own statements illustrate that its interest is in manipulating consumers not to smoke, rather than to discourage adolescent tobacco use, preventing the sale of tobacco to underage individuals should be considered when evaluating how the FDA may be able to effectively regulate tobacco.[140] One way for the FDA to limit underage tobacco use would be for the FDA to encourage stricter federal and state statutory penalties for the sale of tobacco to underage individuals, as endorsed by the

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2012), for just four out of multiple examples of current anti-smoking campaigns across the United States.

[136] *Public Education Campaigns: Overview*, CAMPAIGN FOR TOBACCO-FREE KIDS, http://tobaccofreecenter.org/resources/public_education (last visited May 4, 2012).

[137] MEG RIORDAN, CAMPAIGN FOR TOBACCO-FREE KIDS, PUBLIC EDUCATION CAMPAIGNS REDUCE TOBACCO USE (Feb. 18, 2011), http://www.tobaccofreekids.org/research/factsheets/pdf/0051.pdf (footnote omitted); *see also* CTRS. FOR DISEASE CONTROL & PREVENTION, BEST PRACTICES FOR COMPREHENSIVE TOBACCO CONTROL PROGRAMS (Oct. 2007), http://www.cdc.gov/tobacco/stateandcommunity/best_practices/pdfs/2007/BestPractices_Complete.pdf; NAT'L CANCER INST., THE ROLE OF THE MEDIA IN PROMOTING AND REDUCING TOBACCO USE (June 2008), http://cancercontrol.cancer.gov/tcrb/monographs/19/m19_complete.pdf.

[138] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 528 (2001).

[139] *Id.*; Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 646 (7th Cir. 2006).

[140] *Health Warnings*, *supra* note 7.

American Lung Association, Campaign for Tobacco Free Kids, and American Cancer Society.[141] As the Campaign for Tobacco-Free Kids stated, "strong enforcement of youth access laws [has] substantially reduced illegal sales to minors" in many states already, including California and Massachusetts.[142]

CONCLUSION

Under any Supreme Court standard for evaluating the constitutionality of commercial compelled disclosure or commercial speech suppression, the warnings imposed by the FDA violate the First Amendment. The new warnings fail under: the "reasonable relation" standard of *Zauderer*, the strict scrutiny standard of *Wooley*, and the intermediate scrutiny test of *Central Hudson*. Rather than tax tobacco products, ban tobacco products, use removable warnings, or implement educational campaigns, the FDA has instead chosen to paternalistically manipulate consumers and infringe upon the First Amendment rights of tobacco manufacturers. Although this Comment addresses the First Amendment free speech arguments available to tobacco manufacturers, it does not address other possible constitutional issues like takings clause or property rights claims.[143] The gravity

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[141] *Report Shows State & Federal Gov'ts Not Doing Enough to Stop Cigarette Sales to Children—FDA Oversight of Tobacco Needed*, CAMPAIGN FOR TOBACCO-FREE KIDS (Dec. 7, 2001), http://www.tobaccofreekids.org/press_releases/post/id_0424; JESSICA GUILFOYLE, CAMPAIGN FOR TOBACCO-FREE KIDS, PENALIZING KIDS FOR BUYING, POSSESSING, OR SMOKING CIGARETTES, http://www.tobaccofreekids.org/research/factsheets/pdf/0074.pdf (last visited May 4, 2012).

[142] JESSICA GUILFOYLE, CAMPAIGN FOR TOBACCO-FREE KIDS, ENFORCING LAWS PROHIBITING CIGARETTE SALES TO KIDS REDUCES YOUTH SMOKING (Nov. 11, 2010), *available at* http://www.tobaccofreekids.org/research/factsheets/pdf/0049.pdf.

[143] For information on possible tobacco company Takings Clause claims, see TOBACCO CONTROL LEGAL CONSORTIUM, TOBACCO CONTROL AND THE TAKINGS CLAUSE (Sept. 2011), *available at* http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-tobacco-takingsclause-2011_0.pdf (discussing tobacco control and Takings Clause implications) and U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation*." (emphasis added)).

of the possible implications of the FDA's warning requirement is severe. Vices, sins, and guilty pleasures will be subject to regulation for as long as the government attempts to balance its interest in protecting consumers with fundamental free liberties. We should, however, ask ourselves if our democracy should be permitted to undergo a metamorphosis in the coming years from a nation where facts inform, but consumers have free will, to a society where images manipulate and consumers feel guilty every time they decide to light a cigarette, drink alcohol, or engage in an activity disapproved of by public health officials.

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* Stephanie received her Bachelor of Arts in English and International Studies from Emory University in 2010. She is a May 2013 Juris Doctor candidate at the University of Mississippi School of Law and is currently a staff editor on the *Mississippi Law Journal*. She would like to thank Professor Jack Wade Nowlin, without whom this Comment would not be possible, for his constitutional law insight into the often-confusing and misapplied doctrine of commercial speech. She also gives special thanks to Professor Christopher R. Green for his time, advice, and support, as well as Professor George Cochran whose adverse and challenging arguments strengthened her Comment. Finally, she would like to thank Kristen Kyle who informed her about the international use of removable package inserts in cigarette packages. Although she finds the FDA's warnings to be unconstitutional, Stephanie is a life-long and avid non-smoker. She dedicates this Comment in memory of her father, Stephen Upthegrove Bennett, who fundamentally believed in the heart of this nation, the Constitution of the United States.