

*LORILLARD TOBACCO CO. V. REILLY*:<sup>1</sup> THE  
SUPREME COURT SENDS FIRST AMENDMENT  
GUARANTEES UP IN SMOKE BY APPLYING THE  
COMMERCIAL SPEECH DOCTRINE TO CONTENT-  
BASED REGULATIONS

“But I would have thee remember that if thou should'st become a non-smoker, it will be because thou hadst decided for thyself. . . for every man has a free will to accept or reject tobacco unless it has, by its very nature, taken such a hold on him as to compel him to make a choice in its favour.”<sup>2</sup>

I. INTRODUCTION

Perhaps every man does have a free will either to accept or reject tobacco, but the fact tobacco is addictive is undeniable.<sup>3</sup> Add to that the fact tobacco claims hundreds of thousands of lives each year<sup>4</sup> and costs the United States millions of dollars,<sup>5</sup> and it is easy to see why

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1. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

2. ESTHER WANNING, *MEDITATIONS FOR SURVIVING WITHOUT CIGARETTES* 7 (1994) (citing A.A. WILLIAMS, *A SMOKER'S PILGRIM'S PROGRESS* (1922)).

3. *American Lung Association Fact Sheet: Smoking*, at [http://www.lungusa.org/tobacco/smoking\\_factsheet99.html](http://www.lungusa.org/tobacco/smoking_factsheet99.html) (last modified June 2002) (on file with the Akron Law Review). “Nicotine is an addictive drug, which when inhaled in cigarette smoke reaches the brain faster than drugs that enter the body intravenously. Smokers become not only physically addicted to nicotine; they also link smoking with many social activities, making smoking a difficult habit to break.” *Id.* Moreover, nicotine is not the only chemical found in cigarettes; they are known to contain “at least 43 distinct cancer-causing chemicals.” *Id.*

4. *Id.* According to the American Lung Association, tobacco is responsible for the deaths of approximately 440,000 Americans each year. *Id.* Included in this figure are the deaths of babies born prematurely to mothers who smoke, and those whose diseases are the result of secondhand smoke. *Id.* While lung cancer is the disease that most comes to mind when cigarettes are mentioned, tobacco is responsible for a host of other diseases including emphysema, chronic bronchitis, coronary heart disease, and stroke. *Id.* Smoking has also “been linked to a variety of other conditions and disorders. . .” *Id.*

5. *Id.* “Smoking costs the United States approximately \$150 billion each year in health-care costs and lost productivity.” *Id.* However, in 1998, the gross domestic product for tobacco manufacturers was 17.9 billion dollars. U.S.CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES* 452 (2000). Tobacco is also a major export. *See generally* Susan M. Marsh, *U.S. Tobacco Exports: Toward Monitoring and Regulation Consistent with Acknowledged Health Risks*,

government regulation has become widespread in this area.<sup>6</sup> Nevertheless, while Congress may legislate tobacco advertising to some extent,<sup>7</sup> not all legislation has been found constitutional.<sup>8</sup> This is due, in

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15 WIS. INT'L L.J. 29, 29-33 (1996) (discussing the conflicting goals between discouraging tobacco because of its health risks and promoting it because of its value as an export). See also Andrea J. Hageman, Note, *U.S. Tobacco Exports: The Dichotomy Between Trade and Health Policies*, 1 MINN. J. GLOBAL TRADE 175, 175 (1992) ("The conflicting goals of promoting tobacco exports and discouraging smoking have created a dichotomy in U.S. policy.").

6. *Centers for Disease Control, Select Actions of the U.S. Government Regarding the Regulation of Tobacco Sales, Marketing, and Use*, at <http://www.cdc.gov/tobacco/overview/regulate.htm> (last updated August 12, 2002) (listing the important tobacco regulations beginning with the Food and Drug Act of 1906 and ending with recent regulations) (on file with the Akron Law Review).

7. Several legislative acts have shaped the way tobacco has been advertised in this country for roughly 30 years. The first important act was the Federal Cigarette Labeling and Advertising Act of 1965. Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-1340 (1994)). This act required cigarette labels to carry the warning "Caution: Cigarette Smoking May Be Hazardous to Your Health." *Id.* In 1969, the Public Health Cigarette Smoking Act required a new warning label which required the statement "Warning: The Surgeon General Has Determined that Cigarette Smoking is Dangerous to Your Health." Pub. L. No. 92-222, 84 Stat. 87 (1970) (codified as amended at 15 U.S.C. §§ 1331-1340 (1994)). At this time, there was also an electronic ban, which prohibited cigarette advertising on the radio and television. *Id.* This act also prohibited the states from regulating cigarette advertising for health-related reasons. *Id.* In 1973, the Little Cigar Act extended the electronic ban to include little cigars. Pub. L. No. 93-109, 87 Stat. 352 (1973) (codified as amended at 15 U.S.C. §§ 1331-1340 (1994)). In 1984, the Comprehensive Smoking Education Act established four warnings, which were to be rotated on cigarette packages and advertisements. Pub. L. No. 98-474, 98 Stat. 2200 (1984) (codified as amended at 15 U.S.C. §§ 1331-1340 (1994)). These warnings stated: (1) Smoking Causes Lung Cancer, Heart Disease and May Complicate Pregnancy; (2) Quitting Smoking Now Greatly Reduces Serious Risks to Your Health; (3) Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight; and (4) Cigarette Smoke Contains Carbon Monoxide. *Id.* In 1986, the Comprehensive Smokeless Tobacco Health Education Act established three warnings similar to those instituted for cigarettes, which were to be placed on smokeless tobacco packages and advertisements. Pub. L. No. 99-252, 100 Stat. 30 (1986) (codified as amended at 15 U.S.C. § 4406 (1994)). These warnings stated: (1) This Product May Cause Mouth Cancer; (2) This Product May Cause Gum Disease and Tooth Loss; and (3) This Product is not a Safe Alternative to Cigarettes. *Id.*

8. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). In *Brown & Williamson*, the Supreme Court held that the FDA does not have the authority to regulate the marketing of tobacco products. *Id.* at 126. This decision came as the result of regulations issued in 1996, that attempted to address the problem of tobacco use by adolescents. *Id.* at 127. The 1996 regulations, some of which were mirrored in *Lorillard*, would have prohibited the sale of cigarettes and smokeless tobacco to minors, required retailers to check the ages of purchasers with photo identification, prohibited the sale of packages containing less than twenty cigarettes, prohibited free samples of cigarettes, prohibited the sale of cigarettes in vending machines in locations accessible to minors, required black and white only advertising in areas accessible to minors, prohibited outdoor advertising in areas within one-thousand feet of public playgrounds and schools, prohibited the distribution of promotional items containing a brand name, and prohibited the tobacco manufacturers from sponsoring events. *Id.* See generally Gerald W. Griffin, Note, *Looking Past a Smoke Screen: A First Amendment Analysis of the Food and Drug Administration's Rule Restricting Tobacco Advertising*, 6 J.L. & POL'Y 363 (1997) (arguing that the 1996 regulations violate the First

large part, to the First Amendment's protection against government interference with advertising.<sup>9</sup>

In *Lorillard Tobacco Co. v. Reilly*, the Supreme Court examined the extent to which the First Amendment protects tobacco advertising.<sup>10</sup> With teenage smoking on the rise,<sup>11</sup> the focus and blame is often on advertising.<sup>12</sup> In fact, even tobacco manufacturers have attempted to institute programs designed to curb youth smoking.<sup>13</sup> Yet, *Lorillard* demonstrates that while tobacco companies may be willing to join the

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Amendment because they restrict commercial speech); Lars Noah & Barbara A. Noah, *Nicotine Withdrawal: Assessing the FDA's Effort to Regulate Tobacco Products*, 48 ALA. L. REV. 1 (1996) (discussing the FDA's authority generally and the government's interest in controlling the use of tobacco products); Kathleen M. Paralusz, *Ashes to Ashes: Why FDA Regulation of Tobacco Advertising May Mark the End of the Road for the Marlboro Man*, 24 AM. J.L. & MED. 89, 101 (1998) (discussing in depth the federal legislation which was subsequently invalidated by the *Brown & Williamson* decision).

9. See *infra* Parts II–IV.

10. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 532 (2001).

11. ADOLESCENT HEALTH CHARTBOOK, CENTERS FOR DISEASE CONTROL AND PREVENTION 76 (2000). "Smoking among adolescents has increased in recent years. In 1999 the prevalence of current cigarette smoking was 27 percent higher than in 1991; current cigarette smoking increased 56 percent among black students, 29 percent among Hispanic students, and 25 percent among white students." *Id.* More importantly, it is estimated that over 80 percent of adults who smoke began doing so when they were adolescents. *Id.* It is thought that while adolescents are aware that there are risks to smoking, they do not think that the risks apply to them. Paralusz, *supra* note 8, at 89.

12. AMERICAN LUNG ASSOCIATION, *supra* note 3 (stating that tobacco advertising encourages adolescents to begin smoking before they are capable enough to understand the associated health risks). See also Jon D. Hanson & Douglas A. Kysar, Article, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999) (discussing the impact of market manipulation in selling products); Paralusz, *supra* note 8, at 91 (noting the causal connection between cigarette advertisements and teen smoking). It is thought that teens are more attentive than adults to cigarette advertising. Michael Schudson, *Symbols and Smokers: Advertising, Health Messages, and Public Policy*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 208, 216 (Robert L. Rabin & Stephen D. Sugarman eds., 1993). The fact teens smoke the most heavily advertised brands seems to prove this. Paralusz, *supra* note 8, at 92 (citing David A. Kessler et al., *The Food and Drug Administration's Regulation of Tobacco Products*, 335 NEW ENG. J. MED. 998, 992 (1996)). The volume of such advertising can be illustrated by the fact that in 1999 the tobacco industry spent approximately \$481,200,000 on tobacco related advertising. U.S. CENSUS BUREAU, *supra* note 5, at 579.

13. See, e.g., Lorillard Tobacco Co., *Youth Smoking Prevention*, at <http://www.lorillard.net/card.html> (last visited Aug. 24, 2001) (on file with the Akron Law Review). Lorillard Tobacco Company sponsors a Youth Smoking Prevention Program. *Id.* The company believes "that the most effective way to encourage kids not to smoke is through responsible and thoughtful programs . . . . In addition to the consumer-directed initiatives, [Lorillard believes] one of the most effective ways of reducing underage smoking is [by] restricting access to tobacco products." *Id.* Along with other tobacco companies, Lorillard sponsors the "We Card" retail program, which can be seen in both print and media broadcast advertising. *Id.* This, however, is a marked change in position by the tobacco manufacturers. See Paralusz, *supra* note 8, at 94 (noting that at one time tobacco companies had strongly denied marketing their products to children, but that evidence in response to litigation proved otherwise).

fight against youth smoking, they are not willing to give up their First Amendment rights.<sup>14</sup> *Lorillard* also illustrates that while the First Amendment is not easily displaced, its guarantees are continually wearing away.<sup>15</sup>

This note examines why the Supreme Court's application of the commercial speech doctrine to purely "content-based"<sup>16</sup> regulations erodes First Amendment guarantees.<sup>17</sup> Section II provides a brief history of the First Amendment and discusses the different levels of judicial scrutiny applied in First Amendment cases.<sup>18</sup> Section III provides the statement of facts, the procedural history, and the United States Supreme Court's decision in *Lorillard*.<sup>19</sup> Finally, Part IV examines the decision in *Lorillard* and discusses why the Court should have applied strict scrutiny to the regulations at issue.<sup>20</sup> It further discusses how the Court's refusal to apply strict scrutiny to content-based commercial regulations is in direct contravention of First Amendment principles.<sup>21</sup>

## II. BACKGROUND

### *A. The First Amendment — History and Overview of Protected Forms of Speech*

#### 1. The Intent of the Framers

The First Amendment guarantees freedom of speech.<sup>22</sup> However,

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14. See *Lorillard*, 533 U.S. at 540. See generally DAVID KESSLER, A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY (2001) (exploring in depth the inner workings of the tobacco industry and its political struggles against the United States government).

15. *Lorillard*, 533 U.S. at 572 (Thomas, J. concurring in part and concurring in judgement) (maintaining that strict scrutiny is necessary when regulations seek to restrict speech based on the ideas conveyed).

16. Technically, all regulations subject to the commercial speech doctrine are content-based. See *infra* notes 29-44 and accompanying text. However, the use of the term "content-based" throughout this Note refers to those regulations, or types of regulations, which are normally subject to strict judicial scrutiny in order to uphold First Amendment guarantees.

17. See *infra* Parts II-IV.

18. See *infra* notes 22-74 and accompanying text.

19. See *infra* notes 75-140 and accompanying text.

20. See *infra* notes 141-272 and accompanying text.

21. *Id.*

22. U.S. CONST. amend. I. In pertinent part, the First Amendment states "Congress shall make no law . . . abridging the freedom of speech." *Id.* The First Amendment became applicable to the states by way of the Fourteenth Amendment, which states "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States . . ." U.S. CONST. amend. XIV, § 1. See also *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938) (noting that

the Framers did not provide much guidance as to the First Amendment's meaning.<sup>23</sup> As a result, much of its significance must be inferred from legislative history,<sup>24</sup> from the writings of those who drafted the Constitution,<sup>25</sup> and from the time period in general.<sup>26</sup> Even though not much concrete information about the First Amendment's meaning exists, free speech is "considered by many to be the cornerstone of [a] democratic society"<sup>27</sup> where the search for truth is paramount.<sup>28</sup>

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the First Amendment is applicable through the Fourteenth Amendment).

23. ZECHARIAH CHAFFEE, *FREE SPEECH IN THE UNITED STATES* 16 (1941) (discussing that the drafters of the First Amendment found free speech important, but that they do not say much about the exact meaning). See also Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 *TEX. L. REV.* 747, 749 (1993) (discussing that the First Amendment does not explain such critical words as speech, freedom, and abridging). It is surprising there is not more information on the exact meaning of the First Amendment because a substantial controversy surrounded its creation. See Mark P. Denbeaux, *The First Word of the First Amendment*, 80 *NW. U. L. REV.* 1156 (1986) (examining in detail the history and process of the drafting of the First Amendment).

24. Denbeaux, *supra* note 23, at 1171. Moreover,

The only sustained consideration of the meaning of the [F]irst [A]mendment by anyone with authority to speak was by Madison in response to the Alien and Sedition Acts – almost ten years after the drafting of the amendment. Madison said of the [F]irst [A]mendment: "The article of amendment, instead of supposing in Congress a power that might be exercised over the press, provided its freedom was not abridged, was meant as a positive denial to Congress of any power whatsoever on the subject . . . ."

*Id.* (citing Letters from James Madison to Edmund Pendleton (Sept. 23, 1789), in 4 *J. MADISON, LETTERS AND OTHER WRITINGS OF JAMES MADISON* 506, 545 (Philadelphia 1865)).

25. See Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?* 76 *VA. L. REV.* 627, 632 (1990) ("One searches in vain for an indication from any of the people involved with the drafting of the [F]irst [A]mendment that they were concerned with anything besides politically oriented speech.") In fact, James Madison stressed to the House of Representatives that freedom of speech was "necessary to protect the rights of citizens to criticize government officials." *Id.* (citing 1 *ANNALS OF CONG.* 434-36, 440-43 (J. Gales ed., 1789), reprinted in 5 *THE FOUNDERS' CONSTITUTION* 141, 145 (P. Kurland & R. Lerner eds., 1987)).

26. See generally Scott Sullivan, Note, *Tobacco Talk: Why FDA Tobacco Advertising Restrictions Violate the First Amendment*, 23 *WM. MITCHELL L. REV.* 743, 747-49 (1997) (discussing the history of the First Amendment as gathered from the popular opinion of colonial America). However, "[t]he persistent image of colonial America as a society that cherished freedom of expression is a sentimental hallucination that ignores history." LEONARD W. LEVY, *INTRODUCTION TO FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON*, xxix (Leonard W. Levy ed., 1966). There is little evidence that colonists would receive "advocates of obnoxious or detestable ideas." *Id.* In fact, when opinions that did not conform were expressed, they were likely to be in violation of the seditious libel laws. *Id.* at xxx.

27. Diane Ritter, Note, *The First Amendment, Commercial Speech, and the Future of Tobacco Advertising After 44 Liquormart, Inc. v. Rhode Island*, 43 *WAYNE L. REV.* 1505, 1505 (1997) (citing THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 3 (1966)).

28. Benjamin Franklin's "Marketplace of Ideas" theory stressed the concept that if all opinions were expressed, the truth would overcome error. Benjamin Franklin, *An Apology for Printers*, in *FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON*, *supra* note 26 at 4-6. However, it has been stated that Franklin was not really a proponent of free speech. Leonard W. Levy, *Ben Franklin's Creed for Colonial Printers*, in *FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON*,

## 2. Protected Forms of Speech

The Supreme Court has divided speech into classes — each of which is given a different level of protection.<sup>29</sup> Speech is classified as either content-based<sup>30</sup> or content-neutral.<sup>31</sup> Content-neutral speech is subject to intermediate judicial scrutiny.<sup>32</sup> Content-based speech is subject to different levels of judicial scrutiny depending on whether the speech is low-value, high-value, or commercial.<sup>33</sup>

### *B. Content-Based Regulations – Strict Scrutiny for the Most Protection*

Speech that is regulated based *solely* on its content is generally given the most First Amendment protection.<sup>34</sup> However, even certain

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*supra* note 26, at 3. In fact, “his few essays on freedom of the press . . . [w]ere derivative, flaccid, and unanalytical, almost anti-intellectual.” *Id.*

29. Kathleen J. Lester, Student Article, *Cowboys, Camels, and Commercial Speech: Is the Tobacco Industry’s Commodification of Childhood Protected by the First Amendment?* 24 N. KY. L. REV. 615, 635 (1997) (citing GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1086 (1996)). *But see* THE FRAMING AND RATIFICATION OF THE CONSTITUTION 345 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) (stating that the Framers of the Constitution are often seen as antidemocratic because of the type of government that they created).

30. *See infra* notes 33-40 and accompanying text. *See also* R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992) (holding regulations that prohibit speech based on the subject matter are content-based and invalid).

31. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 570 (1991) (finding ordinance that regulated public nudity was content-neutral because the state’s interest was in regulating nudity and not expression).

32. *Id.* Content-neutral speech restrictions are those that regulate without reference to the content of the speech. *Boos v. Barry*, 485 U.S. 312, 320 (1988). They regulate the time, place, and manner of the speech at issue, even though the regulations may have an incidental effect on the speakers. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Content-neutral regulations must pass the intermediate judicial scrutiny test that was set forth in *United States v. O’Brien*. 391 U.S. 367 (1968). The *O’Brien* Court stated that a government regulation passes constitutional muster if (1) it is within the constitutional powers of the government, (2) it furthers an important or substantial governmental interest, (3) the governmental interest is unrelated to the suppression of free speech, and (4) the incidental restriction on free speech is no greater than essential. *Id.* at 377. The Court has recently added a fifth prong to the test, which requires that the regulation must leave open ample alternative means of communication. *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994). *But see* Richard A. Seid, Article, *A Requiem for O’Brien: On the Nature of Symbolic Speech*, 23 CUMB. L. REV. 563, 576 (1993) (arguing intermediate scrutiny is little more than a slightly heightened rational basis review).

33. Lester, *supra* note 29, at 635 (discussing how the Supreme Court has divided speech into low value and high value speech). *See also* Scott D. Matthews, Note, *Will NASCAR Have to Put on the Brakes?: The Constitutionality of the FDA’s Ban on Brand-Name Tobacco Sponsorship in Motor Sports*, 31 IND. L. REV. 219, 235 (1998) (discussing the level of judicial scrutiny reserved for commercial speech).

34. *But see* Toni Elizabeth Gilbert, Note, *Economic Regulation of the Cable Television Industry: Reigning in a Giant at the Expense of the First Amendment*, 45 CATH. U. L. REV. 615, 621-23 (1996) (noting certain forms of speech, such as obscenity and fighting words can be

content-based restrictions may be upheld.<sup>35</sup> For instance, low-value speech is entitled to no First Amendment protection.<sup>36</sup> Some examples of low-value speech are fighting words,<sup>37</sup> incitements-to-riot,<sup>38</sup> and obscenity.<sup>39</sup> High-value speech, which includes political, literary, artistic, and scientific speech, is given the most protection.<sup>40</sup>

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restricted even if the statutes are content-based). Statutes that are content-based are “subjected to a more rigorous judicial inquiry” because of the great importance placed on free speech. Elizabeth Buroker Coffin, Casenote, *Schuster, Inc. v. New York State Crime Victims Board*, 18 U. DAYTON L. REV. 593, 612 (1993). See also Karl E. Robinson, Comment, *Content is in the Eye of the Beholder: The Supreme Court Upholds the Constitutionality of the 1992 Cable Act’s “Must-Carry” Provisions*, 20 J. CORP. L. 691 (1995) (discussing the significance of the free speech clause as it relates to content-based regulations). But see Laura V. Farthing, Note, *Arkansas Writers’ Project v. Ragland: The Limits of Content Discrimination Analysis*, 78 GEO. L.J. 1949, 1960 (1990) (stating the Supreme Court has failed to clearly articulate the definition of “content-based”). Farthing argues:

The Court uses a functional test to make this “content-based” determination: if one has to look at the content of the communication in order to decide whether the communication falls into one category rather than another, then the distinction is “content-based.” Superficially, the definition is clear; on closer examination, however, the definition blurs. The Court uses the term “content-based” to denote several distinctions, without analyzing whether all pose equal dangers to the values protected by the [F]irst [A]mendment.

*Id.* (citations omitted).

35. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

36. *Id.* at 572. In *Chaplinsky*, the defendant was convicted of violating a statute that prohibited a person from addressing another person with offensive words in public. *Id.* at 569. The Court affirmed the appellant’s conviction, finding “fighting words” are low value speech and are not entitled to First Amendment protection. *Id.* at 571-72. According to the Court:

[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

*Id.* at 571-72 (citations omitted).

37. *Id.* at 572.

38. *Whitney v. California*, 274 U.S. 357, 379 (1927) (Brandeis, J. concurring) (finding speech that is likely to cause imminent, immediate, or serious harm is not entitled to First Amendment protection), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (increasing the standard for incitement to riot to more than mere advocacy).

39. *Miller v. California*, 413 U.S. 15 (1973). In *Miller*, the Court stated that:

[T]he basic guidelines for the trier of fact must be: (a) whether “the average person applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Id.* at 24 (citations omitted). If the work meets the above-stated guidelines, it is considered obscenity and entitled to no First Amendment protections. *Id.* at 26.

40. See *id.* However, even obscenity is entitled to First Amendment protection if it has

Most content-based statutes must pass strict judicial scrutiny.<sup>41</sup> In order to pass strict scrutiny, the government must: (1) show a compelling interest, (2) narrowly tailor the regulation to promote that interest, and (3) ensure there is no less restrictive alternative available.<sup>42</sup> Generally, expression will prevail over government regulations<sup>43</sup> unless strict scrutiny is satisfied.<sup>44</sup>

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“serious literary, artistic, political, or scientific value. . . .” *Id.*

41. Coffin, *supra* note 34, at 613. “A statute which burdens the exercise of protected speech or expression based upon the content or ideas contained within the expression itself will pass constitutional muster only if it meets the test of strict or exacting scrutiny.” *Id.* (citations omitted). However, certain content-based restrictions are not put through the rigors of a strict scrutiny analysis because they are considered *per se* unconstitutional. See *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995) (finding the University of Virginia’s policy regulating the funding of newspapers was unconstitutional viewpoint discrimination).

“Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Id.* at 829. (citations omitted). Moreover, “[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.” *Id.* It is often hard to tell what constitutes viewpoint discrimination and what is merely a content-based regulation that should be subjected to a strict scrutiny analysis. See Nicole B. Casarez, *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, 64 ALB. L. REV. 501, 512 (2000) (discussing the difficulty the Supreme Court has had in distinguishing between content-based regulations or viewpoint discrimination). There are several reasons why viewpoint discrimination harms the First Amendment. See Anthony J. Colletta, *Abridgments of Free Speech Which Discriminate on the Basis of Viewpoint: Finzer v. Barry*, 61 ST. JOHN’S L. REV. 127, 142 (1986). According to Colletta:

A viewpoint-discriminatory abridgment of speech distorts public debate by silencing one point of view while providing an opposed viewpoint with exclusive control of a particular forum. Since this kind of one-sided debate is precisely what the [F]irst [A]mendment seeks to prevent, viewpoint-discriminatory statutes must be held unconstitutional, especially where viable viewpoint-neutral alternative [sic] exist.

*Id.* Moreover, mere attempts by the government to restrict certain viewpoints may “impair the practice of free speech in a society.” James Weinstein, *Free Speech, Abortion Access, and the Problem of Judicial Viewpoint Discrimination*, 29 U.C. DAVIS L. REV. 471, 477 (1996). For a discussion of how the Massachusetts regulations may constitute viewpoint discrimination, see *infra* Part IV.

42. *U.S. v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000) (holding restrictions requiring cable operators to scramble sexually explicit programs, or to restrict such programming to certain hours, failed the strict scrutiny test because there were less restrictive means).

43. See *Boos v. Barry*, 485 U.S. 312 (1988) (holding a restriction on the display of signs in front of a foreign embassy failed strict scrutiny because it was not narrowly tailored).

44. See *Burson v. Freeman*, 504 U.S. 191 (1992) (finding strict scrutiny satisfied for a regulation aiming to prohibit individuals from campaigning within one hundred feet of an election polling place).

*C. The Commercial Speech Doctrine — The Middle Ground of Intermediate Scrutiny*

1. The Early Cases — Creation of the Commercial Speech Doctrine

At one time, the Supreme Court held that commercial speech was entitled to no First Amendment protection.<sup>45</sup> Nevertheless, in *Bigelow v. Virginia*, the commercial speech doctrine was created to offer limited protection for speech that proposed a commercial transaction.<sup>46</sup> The *Bigelow* Court balanced the public's interest in receiving information with the state's interest in preventing the speech.<sup>47</sup> *Bigelow*, however, did little for commercial speech because the Court narrowly limited the holding to the facts of the case.<sup>48</sup>

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court expanded the commercial speech doctrine.<sup>49</sup>

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45. *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942), *limited by* *Bigelow v. Virginia*, 421 U.S. 809 (1975), *overruled by* *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). In *Valentine*, the respondent was forbidden from distributing flyers, which he had drawn up to advertise his submarine. *Id.* at 52. It was a violation of a New York ordinance to distribute such flyers unless they provided "information or a public protest." *Id.* at 53. The Court denied the respondent's challenge to the bill, finding that there was no protection of speech that was solely commercial. *See id.* at 55. According to the Court, "[w]hether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment." *Id.* at 54.

46. *Bigelow*, 421 U.S. at 826 (1975). In *Bigelow*, the appellant was convicted under a statute making it a misdemeanor to advertise abortion services. *Id.* at 811. In reversing the conviction, the Court distinguished the facts in *Bigelow* from the facts in *Chrestensen*. *Id.* at 821-22. *Chrestensen*, the Court stated, merely proposed a commercial transaction. *Id.* at 822. Moreover, the Court stated that *Chrestensen* did not stand for a "sweeping proposition" that all advertising was unprotected. *Id.* at 820. Looking at the facts presented in *Bigelow*, the Court stated "the advertisement conveyed information of potential interest and value to a diverse audience – not only to readers possibly in need of the services offered, but also to those with a genuine curiosity about [the issue]. . . ." *Id.* at 822.

47. *Bigelow*, 421 U.S. at 826. The State's interest in *Bigelow* was in providing quality medical care. *Id.* at 827.

48. *Id.* at 826.

49. *Virginia Pharmacy*, 425 U.S. at 762. In *Virginia Pharmacy*, the State Board of Pharmacy prohibited "advertising or other affirmative dissemination of prescription drug price information. . . ." *Id.* at 752. The Court noted the importance of the consumer's interest in the information, and it generalized "society also may have a strong interest" in the information. *Id.* at 763-64. According to the Court:

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price . . . . It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial

The Court based the expansion of the commercial speech doctrine on the theory that the First Amendment protects the right to disseminate information.<sup>50</sup> The Court also noted the importance of the public's right to receive information.<sup>51</sup> However, in *Virginia Pharmacy*, First Amendment protection of commercial speech was strictly limited to truthful, non-deceptive advertising.<sup>52</sup>

Even though First Amendment protection of commercial speech began with *Virginia Pharmacy*, it was not until the landmark case of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* that the commercial speech doctrine became well established.<sup>53</sup> The importance of *Central Hudson* lies in the fact that the Court decided intermediate scrutiny was appropriate for commercial speech.<sup>54</sup> The Court articulated a four-prong test that balanced the government's interests with the interests that are served by the commercial speech.<sup>55</sup> First, the speech must not be misleading or related to unlawful activity.<sup>56</sup> Second, the government must have a substantial interest in regulating the speech.<sup>57</sup> Third, the regulation must directly serve the substantial interest.<sup>58</sup> Finally, the regulation must be no more extensive than necessary.<sup>59</sup>

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information is indispensable.

*Id.* at 765. (citations omitted).

50. *Id.* at 756-57 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972)).

51. *Id.* at 763-64.

52. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). *See also* *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60 (1983) (finding advertising of contraceptives entitled to First Amendment protection because it was truthful and nonmisleading); *In re R.M.J.*, 455 U.S. 191 (1982) (holding attorney advertising cannot be prohibited where the advertising in question was not misleading); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (holding non-misleading attorney advertising protected by the First Amendment).

53. *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). *See also* Joshua A. Marcus, Note, *Commercial Speech on the Internet: Spam and the First Amendment*, 16 *CARDOZO ARTS & ENT. L.J.* 245, 253 (1998) (stating *Central Hudson* appeared to address the issue of commercial speech by developing a "permanent test").

54. *Central Hudson*, 447 U.S. at 563.

55. *Id.* at 564. It is important to note the Court acknowledged that commercial speech is afforded less constitutional protection than high value speech, therefore "[t]he protection available for particular commercial expression turns on the nature of the expression and of the governmental interests served by its regulation." *Id.* at 563.

56. *Id.* at 564. According to the Court, the government has less power if the speech is non-misleading and truthful. *Id.*

57. *Id.* "The State must assert a substantial interest to be achieved by restrictions on commercial speech." *Id.*

58. *Id.* "[T]he restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Id.*

59. *Id.* "[I]f the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Id.*

## 2. The Later Cases — Application of the Commercial Speech Doctrine

Although the *Central Hudson* analysis has been upheld for many years, the Court has “applied the test with varying degrees of scrutiny.”<sup>60</sup> For instance, in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, the Court upheld a statute restricting the advertising of casino gambling.<sup>61</sup> The Court focused primarily on the state’s interest in protecting the welfare of its residents.<sup>62</sup> The effect of *Posadas* was ultimately to weaken the commercial speech doctrine by affording deference to the states.<sup>63</sup> Ironically, in the later case of *Edenfield v. Fane*, the Court rejected any deference to the state.<sup>64</sup> The *Edenfield* Court reasoned that the state could not satisfy *Central Hudson* with “mere speculation or conjecture.”<sup>65</sup> *Edenfield* illustrates that the *Central Hudson* test is malleable and inconsistently applied because it takes an opposite approach from the one taken in *Posadas*.<sup>66</sup>

More evidence of the flexible nature of *Central Hudson* can be seen in *United States v. Edge Broadcasting Co.*<sup>67</sup> In *Edge Broadcasting*, the Court considered the constitutionality of a federal statute that regulated

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60. Howard K. Jeruchimowitz, Note, *Tobacco Advertisements and Commercial Speech Balancing: A Potential Cancer to Truthful, Nonmisleading Advertisements of Lawful Products*, 82 CORNELL L. REV. 432, 447 (1997) (discussing the varying degrees to which the Court applies *Central Hudson* in order to uphold various statutes). See also Matthews, *supra* note 33, at 237 (stating the Supreme Court has continually struggled to consistently apply the *Central Hudson* test).

61. *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 331 (1986). The statute at issue made it unlawful for casino owners to direct their advertising toward the citizens of Puerto Rico. *Id.* at 332. In upholding the statute, the *Posadas* Court found the first two prongs of *Central Hudson* were fulfilled. *Id.* at 340-43. While the Court found overwhelmingly the regulations directly advanced the government interest, it also found the regulations were no more extensive than necessary. *Id.* at 342-43.

62. *Id.* at 341. The Court had “no difficulty in concluding that the Puerto Rico Legislature’s interest [was] in the health, safety, and welfare of its citizens.” *Id.*

63. Marcus, *supra* note 53, at 266.

64. *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). See also Marcus, *supra* note 53, at 268. In *Edenfield* the Court considered the constitutionality of a solicitation ban applicable to certified public accountants. 507 U.S. at 763. The Court found the ban was unconstitutional and violated the First Amendment. *Id.* Resting its decision on the third prong of *Central Hudson*, the Court found the regulation at issue did not directly advance the government’s purpose. *Id.* at 771.

65. *Id.* at 770. According to the Court, “a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” *Id.* at 770-71.

66. See *Posadas*, 478 U.S. at 342. In analyzing the third prong of *Central Hudson*, the *Posadas* Court merely relied on what the legislature believed. *Id.* The Court stated, “[t]he Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature’s belief is a reasonable one . . . .” *Id.*

67. *U.S. v. Edge Broad. Co.*, 509 U.S. 418, 421 (1993).

the broadcast advertising of lotteries.<sup>68</sup> The Court ultimately found the statute constitutional, but did so in a way that implied “a piecemeal approach to solving the problem would be acceptable.”<sup>69</sup> Again, the Court changed its position — this time reverting back to the position it had taken in *Posadas*.<sup>70</sup>

In *44 Liquormart, Inc. v. Rhode Island*, the Court decided whether a statute prohibiting the advertisement of liquor prices was constitutional.<sup>71</sup> In finding the statute unconstitutional, the Court showed that it was “still deeply divided on many commercial speech issues.”<sup>72</sup> In fact, several Justices indicated uncertainty surrounding the commercial speech doctrine.<sup>73</sup> *Lorillard* is the most recent commercial speech case to come before the Court. It, too, reveals uncertainty surrounding the commercial speech doctrine and its application to First Amendment issues.<sup>74</sup>

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68. *Id.*

69. Marcus, *supra* note 53, at 269.

70. *Id.* For instance, in examining the third prong of *Central Hudson*, the Court indicated it would not require cold, hard proof that the regulation directly advanced the government interest. *Edge Broad. Co.*, 509 U.S. at 434. This is in direct contradiction with *Edenfield*. 507 U.S. at 771. The *Edge Broadcasting* Court stated “[i]f there is an immediate connection between the advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced.” 509 U.S. at 434.

71. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

72. Marcus, *supra* note 53, at 270.

73. Marcus, *supra* note 53, at 273. For instance, Justice Stevens, writing for the majority, indicated that different regulations may be deserving of differing levels of protection. *44 Liquormart*, 518 U.S. at 501. In a concurring opinion, Justice Scalia mentioned he shared “Justice Thomas’s [sic] discomfort with the *Central Hudson* test, which seems . . . to have nothing more than policy intuition to support it.” *Id.* at 517. These two comments illustrate that the application of the commercial speech doctrine is not consistent. See Marcus, *supra* note 53, at 273. According to Joshua A. Marcus:

Although twenty years have passed since the Court first explicitly gave commercial speech First Amendment protection in [*Virginia Pharmacy*], the commercial speech doctrine is still not a settled area of law. Despite a plethora of cases reaching the Court, there is still debate about the extent of the protection commercial speech deserves. The *Central Hudson* test, which was believed to be an “end all” test, has metamorphosed and is still under attack. However, many guiding principles have emerged from the [*Virginia Pharmacy*] progeny which will be useful in determining whether commercial speech . . . can be regulated.

*Id.* See also Sean P. Costello, Comment, *Strange Brew: The State of Commercial Speech Jurisprudence Before and After 44 Liquormart, Inc. v. Rhode Island*, 47 CASE W. RES. L. REV. 681 (1997) (examining the impact of *44 Liquormart* on the commercial speech doctrine and discussing why strict scrutiny should have been applied).

74. See *infra* Part IV.

### III. STATEMENT OF THE CASE

#### A. *Statement of the Facts*

In November of 1998, the Commonwealth of Massachusetts entered into a settlement agreement with major manufacturers in the tobacco industry.<sup>75</sup> This agreement, known as the Master Settlement Agreement (MSA),<sup>76</sup> settled pending claims<sup>77</sup> against the tobacco manufacturers in exchange for monetary and injunctive relief.<sup>78</sup> However, the Massachusetts Attorney General felt that the MSA did not

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75. Alan E. Scott, Article, *The Continuing Tobacco War: State and Local Tobacco Control in Washington*, 23 SEATTLE U. L. REV. 1097, 1098 (2000). Forty-six other states entered into the agreement as well. *Id.*

76. See generally Robert L. Kline, *Tobacco Advertising After the Settlement: Where We Are and What Remains to be Done*, 9 KAN. J.L. & PUB. POL'Y 621 (2000) (discussing the Master Settlement Agreement); Lori Ann Luka, Note, *The Tobacco Industry and the First Amendment: An Analysis of the 1998 Master Settlement Agreement*, 14 J.L. & HEALTH 297 (1999-2000) (analyzing the Master Settlement Agreement under *Central Hudson's* four-part test); Walter Henry Clay McKay, *Reaping the Tobacco Settlement Windfall: The Viability of Future Settlement Payment Securitization as an Option for State Legislatures*, 52 ALA. L. REV. 705 (2001) (discussing the terms of the Master Settlement Agreement and the problems involved in securitization of the payment).

77. See generally Scott, *supra* note 75, at 1100. According to Scott, the tobacco industry had been able to defeat private lawsuits for a number of years. *Id.* However, plaintiffs' attorneys had begun to discover damaging documents, which proved the tobacco industry was partially to blame for many tobacco related deaths. *Id.* According to Scott:

Perhaps the most damaging new weapon . . . was the availability of new internal tobacco company documents that came to light through previous litigation and tobacco-industry whistleblowers. These documents revealed that the tobacco [industry] had been aware of the detrimental health effects of smoking since at least 1953, had suppressed the results of internal research, and had deliberately attempted to create doubt and controversy about the health effects of smoking in the minds of the American public.

*Id.* (citations omitted). New lawsuits began to emerge and the states began to sue the tobacco industry "to reclaim medical expenses . . . spent on tobacco related illnesses." *Id.*

78. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 533 (2001). In general:

[The settlement agreement banned] all advertising using cartoons, but not human figures . . . . Tobacco ads on billboards, buses, and subway cars [were] banned, but outdoor ads smaller than fourteen square feet [were] permitted. Tobacco advertising in sports arenas and venues [were] banned, but tobacco companies [were] each allowed to sponsor one sporting event a year for each brand they manufacture. The tobacco companies agreed not to target youth, but [would] print no additional and unequivocal health warnings on their packages.

In the [settlement agreement], the participating manufacturers and the attorneys general state they [were] "committed to reducing underage tobacco use." To that end the [agreement] set unit minimums of twenty cigarettes per pack and limited free gifts and samples. *However, no provisions regulate[d] self-service displays, point-of-sale advertising, or vending machines.*

Scott, *supra* note 75, at 1103 (citations omitted, emphasis added).

address all pertinent tobacco-related issues.<sup>79</sup> Accordingly, the Attorney General created the regulations at the center of the *Lorillard* litigation.<sup>80</sup> These regulations attempted to restrict “outdoor advertising, point-of-sale advertising, retail sales transactions, transactions by mail, promotions, sampling of products, and labels for cigars.”<sup>81</sup>

## B. Procedural History

### 1. District Court — First Ruling (Preemption)

The *Lorillard* litigation began when the Plaintiffs<sup>82</sup> (hereinafter “Tobacco Companies”) filed suit in the United States District Court for the District of Massachusetts, seeking a determination as to whether the Massachusetts regulations<sup>83</sup> had been preempted by federal law.<sup>84</sup> The

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79. *Lorillard*, 533 U.S. at 533:

At the press conference covering Massachusetts’ decision to sign the agreement, then-Attorney General Scott Harshbarger announced that as one of his last acts in office, he would create consumer protection regulations to restrict advertising and sales practices for tobacco products. He explained that the regulations were necessary in order to “close holes” in the settlement agreement . . . .

*Id.*

80. *Id.* at 533-34. In 1999, the regulations were created pursuant to the Attorney General’s authority under the Massachusetts General Laws, ch. 93A, § 2 (1997). *Id.* at 533. This act prevents unfair or deceptive trade practices. *Id.* The regulations promulgated under the Massachusetts General Laws restricted advertising practices in an effort to prevent adolescents from using cigarettes, cigars, and smokeless tobacco. *Id.*

81. *Lorillard*, 533 U.S. at 534.

82. The plaintiffs in *Lorillard* were: Lorillard Tobacco Company, R.J. Reynolds Tobacco Company, Philip Morris Incorporated, Brown & Williamson Tobacco Corporation, and United States Tobacco Company. *Lorillard Tobacco Co. v. Reilly*, 76 F. Supp. 2d 124 (D. Mass. 1999).

83. First, the Tobacco Companies challenged the provision that outlawed tobacco advertising if visible from the outdoors and if located within one thousand feet of public playgrounds, playground areas in public parks, elementary schools, or secondary schools. *Id.* at 127-28. Second, the Tobacco Companies challenged the provision that outlawed all tobacco advertising placed below five feet from the floor in stores if those stores were located within one thousand feet of public playgrounds, playground areas in public parks, elementary schools, or secondary schools and if minors would have access to the stores. *Id.* at 128. This type of advertising is known as “ground-level advertising.” *Id.* Third, the Tobacco Companies challenged the provision that outlawed promotional techniques like samplings, give-aways, mail distributions, and non-tobacco gifts given in consideration of purchase, without first verifying age. *Id.* Lastly, the Tobacco Companies challenged the provision that allowed retailers only one black and white, five hundred and seventy-six square inch sign outside, which could state only the phrase “Tobacco Products Sold Here.” *Id.* This type of advertising is known as “tombstone advertising.” *Lorillard*, 76 F. Supp. 2d at 128. For the full text of the Massachusetts regulations, see 940 C.M.R. §§ 21.01 – 22.09 (2002).

84. *Id.* at 127. The Federal Cigarette Labeling and Advertising Act contains an express provision requiring pre-emption. 15 U.S.C. § 1334 (1994). The full text of this section is as follows:

(a) Additional statements

district court found that only the tombstone advertising provision was preempted.<sup>85</sup> Furthermore, the court expressly refused to address any potential speech-related issues, stating that it intended “no intimation whatsoever concerning the First Amendment issues presented in [the] case.”<sup>86</sup>

## 2. District Court — Second Ruling (The First Amendment)

After an unfavorable decision on preemption grounds, the Tobacco Companies returned, seeking a declaration that the regulations were unconstitutional under the First Amendment.<sup>87</sup> This time, the Tobacco Companies were joined by several cigar manufacturers (hereinafter “Cigar Companies”) who also sought to have the regulations declared unconstitutional.<sup>88</sup> The court first examined the regulations as they applied to the Tobacco Companies.<sup>89</sup> Before beginning its analysis, the court held that *Central Hudson* was the appropriate standard of review.<sup>90</sup>

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No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) State regulations

No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C § 1334.

85. *Lorillard*, 76 F. Supp. 2d at 133. The court stated it was pre-empted because it prevented “the Tobacco Companies from making a statement concerning the relationship between smoking and health.” *Id.* See generally Lee Gordon Dunst, *Federal Preemption: The Federal Cigarette Labeling and Advertising Act and Tort Claims Challenging the Adequacy of Cigarette Warnings*, 1990 ANN. SURV. AM. L. 459 (1991) (discussing the problem of preemption as it relates to cigarette advertising); Harold C. Reeder, *Lindsey v. Tacoma-Pierce County Health Department: Cipollone Revisited, Billboards, State Law Tort Damages Actions, Federal Preemption and the Federal Cigarette Labeling and Advertising Act*, 24 SEATTLE U.L. REV. 763 (2001) (discussing the doctrine of preemption and examining case law on the issue of preemption and cigarette advertising).

86. *Lorillard*, 76 F. Supp. 2d at 134.

87. *Lorillard Tobacco Co. v. Reilly*, 84 F. Supp. 2d 180, 182 (D. Mass. 2000), *reversed in part by Consolidated Cigar Co. v. Reilly*, 218 F.3d 30 (1st Cir. 2000), *reversed in Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

88. The cigar manufacturers were: Consolidated Cigar Corporation, General Cigar Company, Havatampa, John Middleton, L.J. Peretti Company, Swedish Match North America, Swisher International, and Tobacco Exporters International (NSA), Ltd. *Id.* at 180.

89. *Id.* at 183.

90. *Id.* at 185. The district court dismissed the Tobacco Companies request for a heightened standard of review. *Id.* The Tobacco Companies felt that their case was analogous to the advertiser in *Carey v. Population Services Int'l*, 431 U.S. 678 (1977). *Id.* at 184. In *Carey*, the Supreme Court held it was unconstitutional for the state of New York to prohibit the advertisement of contraceptives. 431 U.S. at 700. The Court found heightened scrutiny must be applied when a fundamental interest is involved. See *id.* at 688. Furthermore, the Court found that a state could only surpass this heightened scrutiny by showing a “compelling” state interest, advanced by a narrowly drawn regulation. *Id.* In *Lorillard*, the district court stated that the Tobacco Companies

The court reasoned the first prong of *Central Hudson* was satisfied; the advertising qualified for protection because it did not incite illegal activity.<sup>91</sup> It also decided that the asserted government interest — preventing underage smoking — was substantial, thus meeting the second prong of the test.<sup>92</sup> The court also found the third prong of the test was met because the regulations directly advanced the government interest.<sup>93</sup> Finally, the court determined all of the regulations passed the

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“closest companions are pornographers” because both offer services, which although legal, are recreational and not “fundamental.” 84 F. Supp. 2d at 184. The court also distinguished *Carey* on the ground that the regulations in *Carey* sought a complete ban of all advertising, an activity the state could not regulate. *Id.* According to the Court, the regulations at issue in *Lorillard* concerned “place and manner” only. *Id.* at 185. Although the court did acknowledge that under a different set of circumstances, such as a complete ban on advertising, the heightened scrutiny of *Carey* could be invoked. *Id.* Moreover, the court noted “[s]moking presents no . . . underlying constitutional concerns.” *Id.*

91. *Lorillard*, 84 F. Supp. 2d at 185-86. The Attorney General was willing to pass on this point, and not argue that cigarette advertising induced illegal activity. *Id.*

92. *Id.* at 186. The court also agreed with the Attorney General’s citation to *Penn Advert. of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 63 F.3d 1318 (4th Cir. 1995), where the Fourth Circuit “found that promoting compliance with the state prohibition of the sale of cigarettes to minors was a substantial governmental interest under *Central Hudson*.” *Lorillard*, 84 F. Supp. 2d at 186. It did not agree with the Tobacco Companies’ attempt to show no substantial governmental interest by citing to *44 Liquormart, Inc. v. Rhode Island*, because that case dealt with a state ban on liquor price advertising. *Id.* at 186. The court distinguished *44 Liquormart* on the grounds it attempted to impose a “vice” characterization on an activity with respect to adult consumers, whereas the Massachusetts regulations attempted only to prevent an illegal activity — underage smoking. *Id.*

93. *Lorillard*, 84 F. Supp. 2d at 187. The court acknowledged that no governmental interest can justify legislation that does not directly advance its interest. *Id.* at 186. However, the District Court stated “[t]his requirement may be satisfied by the submission of surveys, studies, and even anecdotal evidence.” *Id.* (citing *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 627-29 (1995)). Furthermore, the court stated such things as history and common sense could support the a finding that the regulation advances the asserted interest. *Id.* (quoting *Florida Bar v. Went for It, Inc.*, 515 U.S. at 628). Here, the Attorney General cited cases that showed a “common-sense” connection between advertising and smoking, and he cited reports showing that link. *Id.* at 186-87. The court discounted the Tobacco Companies’ assertion that the Attorney General’s evidence was insufficient. *Id.* at 187-89. The Tobacco Companies argued the Attorney General’s evidence did not satisfy *Central Hudson* because it relied too much on common sense. *Lorillard*, 84 F. Supp. 2d at 188. The court dismissed this argument, stating “[s]everal studies, and common sense, show a link between advertising and smoking.” *Id.* (emphasis added). The Tobacco Companies challenged the accuracy and conclusions of the studies the Attorney General cited. *Id.* They argued that there was no evidence advertising was the “sole cause” of adolescent tobacco use and they argued there was no “conclusive proof” advertising causes people to start smoking. *Id.* The court found there was a “solid body of research demonstrating the link between advertising and the incidence of smoking” to support the Attorney General’s position. *Id.* Furthermore, the court noted “[t]he government is not “required to satisfy the causal relationship by a preponderance of the evidence.” *Id.* Rather, it stated the government only had to prove the evidence made it “objectively reasonable” to believe that the asserted regulation would advance its goal. *Lorillard*, 84 F. Supp. 2d at 189 (citations omitted).

fourth prong of *Central Hudson*, with the exception of the point-of-sale regulations, because those were not narrowly tailored.<sup>94</sup>

The Cigar Companies also challenged the regulations requiring additional warning labels<sup>95</sup> and restricting certain retail sales practices.<sup>96</sup> The only difference between the Cigar Companies' arguments and Tobacco Companies' arguments was the Cigar Companies' argument that the First Amendment analysis should be different for cigars.<sup>97</sup> In addressing these arguments, the court focused only on the last two prongs of *Central Hudson*.<sup>98</sup> It looked at whether the regulations directly served the asserted government interest, and whether the regulations were more extensive than necessary.<sup>99</sup>

In determining whether the regulations advanced the governmental interest, the court noted that the Attorney General could not regulate cigars in the same manner as cigarettes, unless he could show "how regulation of [a] distinguishable product also materially advances the governmental interest."<sup>100</sup> Ultimately, the court held the regulation of cigars did directly advance the government's interest.<sup>101</sup> However, the

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94. *Lorillard*, 84 F. Supp. 2d at 193. On this point, the court found that the Attorney General had failed to show the regulation was narrowly tailored "because its sole justification for the selection of a [one thousand] foot zone relates to conclusions by a federal agency concerning outdoor advertising." *Id.* (emphasis in original). Noting it is not the position of the judiciary to choose the proper number, the court held the Attorney General could not prove the one thousand foot zone was narrowly tailored for indoor advertising purposes by relying on administrative conclusions that picked that number for outdoor advertising purposes. *Id.* at 192-93.

95. *Id.* at 193. The warnings were to inform consumers about the health risks associated with cigar smoking, that cigars are addictive, and that cigars are not a safe alternative to cigarette smoking. *Id.*

96. *Id.* at 195. The Cigar Companies argued the restriction on the physical locations of cigars in retail stores and the restrictions on promotions and sampling also violated the First Amendment. *Lorillard*, 84 F. Supp. 2d at 195-96. The court dismissed these arguments by stating "[t]hese concerns are not properly examined under a First Amendment analysis because they do not implicate speech or expression." *Id.* at 195. The court stated the fact that consumers like to handle cigars is not a First Amendment issue. *Id.* The court found this to be a "characteristic of the commodity" and not an indication of protected expression. *Id.* The court also noted that if the restrictions against promotional giveaways and samplings were prevented, then every commercial transaction in the country would be implicated "because any sale or giveaway of a product inherently conveys information about [the] product itself." *Id.*

97. *Id.* at 193. Mainly, the Cigar Companies argued cigars are different because: (1) cigar manufacturers advertise relatively little compared to cigarette manufacturers, (2) the Food and Drug Administration does not include cigars in its regulations because the evidence does not show that minors smoke cigars, (3) cigar manufacturers do not advertise by billboard and they do not advertise a lot in magazines or newspapers, and (4) consumers like to feel, smell, and look at cigars before they purchase them. *Lorillard*, 84 F. Supp. 2d at 193-94.

98. *Id.* at 194.

99. *Id.*

100. *Id.*

101. *Id.* at 195. The court stated that the Attorney General had proved cigarettes and cigars

court found the evidence insufficient to justify the point-of-sale restriction and the restriction on retail sales practices.<sup>102</sup> As to the challenge on the additional warning label requirement, the court found that it was constitutional because it advanced the state's interest and was narrowly tailored.<sup>103</sup>

### 3. The Appeal

On appeal, both the Tobacco Companies and the Cigar Companies advanced the same arguments presented to the lower court.<sup>104</sup> The First Circuit affirmed the district court on the preemption issue.<sup>105</sup> On the First Amendment issue, the circuit court also agreed that *Central Hudson* was the appropriate test.<sup>106</sup> The court then followed the *Central Hudson* analysis, much like the lower court.<sup>107</sup> However, it ultimately

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had many similarities. *Id.* Furthermore, the court stated the "Attorney General should not have to wait until there is a new epidemic of underage cigar smokers in order to enact regulations intended to prevent that very epidemic." *Lorillard*, 84 F. Supp. 2d at 195.

102. *Id.*

103. *Id.* at 198. The court found the third prong of *Central Hudson* was "easy to satisfy in the context of product warnings." *Id.* at 197 (citing *In re R.M.J.*, 455 U.S. 191, 201 (1982)). As to the fourth prong of *Central Hudson*, the court found the requirement narrowly tailored and dismissed the Cigar Companies' argument that the warning labels were burdensome. *Id.* at 198.

104. *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 38 (1st Cir. 2000) (per curiam), *reversed in part by Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). The Attorney General cross-appealed the district court's decision regarding the indoor advertising restriction. *Id.*

105. *Id.* at 41.

106. *Id.* at 42. "[T]he Supreme Court has made clear that even regulations which single out the promotional speech of a particular industry are analyzed under the *Central Hudson* test." *Id.* (citing *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 184 (1999)). The court also rejected the argument that the regulations constitute viewpoint discrimination. *Id.* "Under these circumstances, we do not see the danger of viewpoint discrimination . . . and we decline to impose a higher level of review on such basis." *Id.* *But see* Tommy Sangchompuphen, *Stripping United States v. Playboy Entm't Group Down to the Bare Essential: Why Keeping Abreast of First Amendment Issues in Developing Technology Requires Predictability and a Return to Strict Scrutiny*, 23 HAMLINE L. REV. 81 (1999) (arguing strict scrutiny is needed to uphold First Amendment safeguards in cases where the regulations are content-based).

107. The court assumed, but did not explore the first prong of the test — whether the speech concerns lawful activity. *Consolidated*, 218 F.3d at 43. Concerning the second prong, the court found the state's interest was substantial. *Id.* at 44. The court dismissed the argument made by the Tobacco and Cigar Companies that "Massachusetts cannot have a substantial interest in depriving consumers of truthful information in a paternalistic effort to protect them by 'keeping them in the dark.'" *Id.* The court agreed with the statement as it related to adults, but stated the government has greater power when it comes to children. *Id.* With regard to the third prong, the court found the Massachusetts regulations directly advanced the state's interest. *Id.* Looking to the Supreme Court for guidance, the circuit court analyzed whether the regulations addressed "real" harms and alleviated them to a "material" degree. *Id.* (citing *Greater New Orleans Broad.*, 527 U.S. at 188). The court felt the Attorney General established there is a risk of harm from underage tobacco use, including cigars and smokeless tobacco. *Consolidated*, 218 F.3d at 45. The court also felt the

reversed the district court, finding that *all* of the restrictions were narrowly tailored.<sup>108</sup> The court summarily dismissed all of the other First Amendment arguments the parties presented.<sup>109</sup> The Supreme Court granted certiorari to hear arguments on both issues.<sup>110</sup>

### C. *United States Supreme Court Decision*

#### 1. The Majority Opinion

The regulations before the Supreme Court were the outdoor advertising and point-of-sale advertising restrictions.<sup>111</sup> The Cigar Companies also challenged the regulation that made it unlawful to have samplings and promotional giveaways, and unlawful to have self-service displays within the reach of the consumer.<sup>112</sup> The Court first considered the preemption issue and reversed the First Circuit.<sup>113</sup> It held that the regulations *were* preempted because “Congress prohibited state cigarette advertising regulations that were motivated by concerns about smoking *and* health.”<sup>114</sup> However, despite finding that the regulations were preempted, the Court still had to decide the First Amendment issues.<sup>115</sup>

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Attorney General’s “common sense argument on the causal relationship between advertising and product use” carried the burden of proving that the Massachusetts regulations would alleviate the “harm” to a “material degree.” *Id.* at 47-48. The court summarized its analysis of the third prong of *Central Hudson*, stating “[l]ess advertising may reasonably be expected to reduce the consumption of tobacco products by current users, insofar as there will be fewer reminders to stop at the store and pick up a pack of cigarettes, a can of smokeless tobacco, or a cigar. . . .” *Id.* at 49.

108. The Circuit Court stated the one thousand foot regulation did not need to be a “perfect fit.” *Id.* at 50. According to the court, *Central Hudson* only requires a “reasonable fit.” *Id.*

109. *Id.* at 51-53. Namely, both the Tobacco Companies and the Cigar Companies argued Massachusetts should more strictly enforce its current laws prohibiting tobacco sales to minors, that the regulations did not leave open ample alternative modes of communication, and that the regulations were not sufficiently tailored. *Consolidated*, 218 F.3d at 51-53. The Cigar Companies and manufacturers of smokeless tobacco also argued the restrictions on self-service displays violated the First Amendment. *Id.* However, the circuit court found this was not “speech” within the meaning of the First Amendment. *Id.* The court declined to answer whether the sale of high-end cigars was protected commercial speech finding that “the regulations pass muster under *Central Hudson* even assuming *arguendo* that the commercial speech analysis applies.” *Id.* at 54 (emphasis in original). With respect to the warning requirement for cigars, the court affirmed the district court for “substantially” the same reasons. *Id.*

110. *Lorillard Tobacco Co. v. Reilly*, 531 U.S. 1068 (2001) (order granting certiorari to hear the issues); *Altadis U.S.A. Inc. v. Reilly*, 531 U.S. 1068 (2001) (order granting certiorari to hear the issues).

111. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 534 (2001).

112. *Id.* at 535.

113. *Id.* at 551.

114. *Id.* at 548 (emphasis added).

115. *Id.* at 533. This is because the FCLAA’s pre-emption provision only applies to cigarettes,

Consistent with both lower courts, the Supreme Court rejected the argument that strict scrutiny should apply.<sup>116</sup> The Court quickly dispensed with the first two prongs of *Central Hudson*, and found that only the third and fourth prongs were at issue.<sup>117</sup> It then addressed whether the outdoor advertising and point-of-sale restrictions for smokeless tobacco and cigars directly advanced the government interest, and whether they were narrowly tailored.<sup>118</sup>

The Court found that the Attorney General satisfied the third prong of *Central Hudson* for the outdoor advertising restrictions by relying on its previous cases,<sup>119</sup> and on the Attorney General's citations to studies supporting the correlation between advertising and tobacco use.<sup>120</sup> The Court reasoned that the evidence proved the regulations were based on more than just "mere speculation and conjecture."<sup>121</sup> However, the Court still determined that the Attorney General failed to satisfy the fourth prong of *Central Hudson*.<sup>122</sup> The Court stated the regulations were not a "reasonable fit between the means and the ends of the regulatory scheme."<sup>123</sup> Moreover, it ascertained that the regulations were

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not cigars or smokeless tobacco. *Id.* The Court was also forced to examine the First Amendment issues for the Tobacco Companies because they did not raise the issue of pre-emption for the restrictions on sales practices. *Id.*

116. *Id.* at 554-55. ("[W]e see no need to break new ground. . . . *Central Hudson*, as applied in our more recent cases, provides an adequate basis for decision") (citing *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 184 (1999)). *But see* Clara Sue Ross, Comment, *Pushing Puffing Post-Posadas*, 56 U. CIN. L. REV. 1461 (1988) (arguing that even if *Central Hudson* continues to be the standard it should be strictly applied).

117. *Lorillard*, 533 U.S. at 555. As to the first two prongs, the Court noted that the parties agreed the speech was entitled to First Amendment protection, and the government had a substantial interest in preventing minors from using tobacco. *Id.*

118. *Id.*

119. The Court stated "[i]n previous cases we have acknowledged the theory that product advertising stimulates the demand for products, while suppressed advertising may have the opposite effect." *Id.* at 557 (citations omitted).

120. *Id.* The Court relied in large part on the FDA's findings, which consisted of various studies that showcased the affects of tobacco advertising on children. *Id.* at 557-59. Although the Court acknowledged the evidence showing the correlation between advertising and the use of cigars by children was lacking, it found that the third prong of *Central Hudson* was satisfied by other indications that cigar use by minors was increasing and that there was a link between cigar advertising and demand. *Lorillard*, 533 U.S. at 560.

121. *Id.* at 561 (citing *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)).

122. *Id.*

123. *Id.* (citing *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 569 (1980)). The main reason was that the regulations, in some areas, would constitute almost complete ban of tobacco advertising. *Id.* at 562. The Court found "[t]he breadth and scope of the regulations, and the process by which the Attorney General adopted the [Massachusetts] regulations, do not demonstrate a careful calculation of the speech interests involved." *Id.* At the heart of this statement was the fact the one thousand foot restriction was inappropriate for every area. *See Lorillard*, 533 U.S. at 562-63. According to the Court, the effect of such a regulation will vary

more extensive than necessary to accomplish the stated goals.<sup>124</sup> The Court next examined the point-of-sale regulations and held that the Attorney General had failed to satisfy both the third and fourth prongs of *Central Hudson*.<sup>125</sup>

Next, the Court addressed the retail sales practices as they applied to *all* tobacco products.<sup>126</sup> Namely, the Court addressed those regulations that banned self-service displays and those that required tobacco products to be placed out of the consumer's reach.<sup>127</sup> The Court upheld all of these restrictions, reasoning that they withstood First Amendment scrutiny because the state's interest was "unrelated to the communication of ideas."<sup>128</sup> Overall, the Court affirmed in part, reversed in part, and remanded for further proceedings consistent with its decision.<sup>129</sup>

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depending on the locale, and it should be tailored for that reason. *See id.* at 563. The Court also found the "range of communications" was too broad. *Id.* The Court pointed to the portion of the regulations that banned oral communications and found that it was not clear why such a ban would be necessary. *Id.* The Court also found the regulations restricting the size of signs were overbroad. *Id.* As to these overbroad regulations, the Court noted the circuit court had "failed to follow through with an analysis of the countervailing First Amendment interests." *Id.* at 564. It placed a great deal of emphasis on the rights of the tobacco retailers and manufacturers in conveying information about their product to adults, and the corresponding rights of adults to receive that information. *Lorillard*, 533 U.S. at 564.

124. *Id.* at 565. The Court stated "a speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products." *Id.*

125. *Id.* at 566. The Court found the regulation did not support the government's stated purpose to the degree required by *Central Hudson*. *Id.* Citing *Central Hudson*, the Court stated that a regulation must fail if it offers only "ineffective or remote support" for the government's stated purpose. *Id.* The Court also noted:

[T]he State's goal is to prevent minors from using tobacco products and to curb demand for that activity by limiting youth exposure to advertising. The [five] foot rule does not seem to advance that goal. Not all children are less than five feet tall, and those who are certainly have the ability to look up and take in their surroundings.

*Lorillard*, 533 U.S. at 566. The Court recognized the Attorney General may well have a valid interest in preventing "displays that entice children," but that a "blanket height restriction does not constitute a reasonable fit with that goal." *Id.* at 567.

126. *Id.*

127. *Id.*

128. *Id.* at 569 (citation omitted). The Court further stated "[t]he means chosen by the State are narrowly tailored to prevent access to tobacco products by minors, are unrelated to expression, and leave open alternative means for vendors to convey information about their products and for would-be customers to inspect products before purchase." *Id.* at 570.

129. *Lorillard*, 533 U.S. at 571.

## 2. Justice Thomas' Concurring Opinion<sup>130</sup>

Justice Thomas concurred in the majority opinion because he agreed with the resolution of the preemption issue and that the regulations failed *Central Hudson*.<sup>131</sup> However, he disagreed with the Majority's application of the commercial speech doctrine to the Massachusetts regulations.<sup>132</sup> Not only did Justice Thomas feel the regulations were incorrectly classified as commercial speech,<sup>133</sup> but also that the regulations were more than "time, place and manner" restrictions.<sup>134</sup> Relying heavily on his concurring opinion in 44

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130. Several other justices filed separate opinions. *Id.* at 571-605. First, Justice Kennedy, joined by Justice Scalia, concurred in part and concurred in the judgment. *Id.* at 571. Justice Kennedy felt the outdoor advertising restrictions were overbroad enough to invalidate them on that ground alone. *Id.* As a result, he felt there was no need to analyze the regulations under the first prong of *Central Hudson*. *Id.* Moreover, he expressed doubt over the Court's affirming *Central Hudson* as the appropriate level of scrutiny in light of the objections made by Justice Thomas. *Id.* Justice Souter concurred in part and dissented in part. *Lorillard*, 533 U.S. at 590. He felt the case should be remanded for trial regarding the constitutionality of the one thousand foot restriction. *Id.* Justice Stevens, joined by Justices Ginsburg and Breyer, and joined in part by Justice Souter, dissented. *Id.* at 591. They found that the FCLAA does not prevent states from regulating the location of advertising. *Id.* Justice Stevens felt the decision should be vacated as to the outdoor-advertising restrictions because the record "[did] not enable [the Court] to adjudicate the merits of those claims on summary judgment." *Id.* As to the point-of-sale restrictions, Justice Stevens would have upheld them, finding no significant First Amendment concerns. *Id.*

131. *Lorillard*, 533 U.S. at 572.

132. *Id.* According to Justice Thomas, "when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial.'" *Id.* (citation omitted). *But see* Ralph W. Johnson, III, Comment, *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board: The Demise of New York's Son of Sam Law and the Decision that Could Have Been*, 2 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 193, \*4 (1992) (arguing the overuse of strict scrutiny will dilute it and make it less effective). Johnson states:

[R]eliance [on strict scrutiny] creates the possibility that the protection of strict scrutiny will be "diluted." The notion of content-based regulations can be more precisely divided into subject-matter restrictions and viewpoint-based discriminations. It is the latter that is the most consistent with the fundamental purpose of the First Amendment and therefore requires the most stringent review.

*Id.* at \*16 (citation omitted).

133. *Lorillard*, 533 U.S. at 574. Justice Thomas briefly outlines the commercial speech doctrine and notes the Court has "followed an uncertain course" in its application of the doctrine, due in large part to the "malleability" of the *Central Hudson* test. *Id.* Observing that there is no "philosophical or historical" basis for lowering the scrutiny for commercial speech, Justice Thomas expresses doubt over "whether it is even possible to draw a coherent distinction between commercial and noncommercial speech." *Id.* at 575 (citing Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 VA. L. REV. 627 (1990)).

134. *Id.* at 573. Acknowledging that the Court has previously upheld time, place and manner restrictions as zoning restrictions, Justice Thomas states the "abiding characteristic of valid time, place, and manner restrictions is their content neutrality." *Id.* The Massachusetts regulations, Justice Thomas notes, are not concerned with "secondary effects," but rather, with the primary

*Liquormart v. Rhode Island*,<sup>135</sup> Justice Thomas argued that the Massachusetts regulations sought “to suppress speech about tobacco because [the government] object[ed] to the content of [the] speech.”<sup>136</sup>

Justice Thomas contended that because the Court had “consistently applied strict scrutiny” to content-based regulations, it should have done so in *Lorillard*.<sup>137</sup> Furthermore, he stated the asserted governmental interest was “*per se*” illegitimate because the regulations sought to keep “people ignorant by suppressing expression.”<sup>138</sup> Justice Thomas stated that even if the commercial speech doctrine was applicable, “the government may not engage in content discrimination for reasons unrelated to those characteristics of the speech that place it within [that] category.”<sup>139</sup> According to Justice Thomas, the commercial speech doctrine should be limited to those regulations that address the “*commercial* harms that commercial speech can threaten.”<sup>140</sup>

#### IV. ANALYSIS

##### *A. Regulations Aimed at Keeping the Public Ignorant Deserve Strict Judicial Scrutiny*

Justice Thomas is correct in concluding that content-based regulations should not be analyzed under *Central Hudson*.<sup>141</sup> Certain regulations, such as the Massachusetts regulations in *Lorillard*, are

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effect of inducing those who view the tobacco advertisements to purchase the products. *Id.* at 574. *See supra* note 16 (noting the use of the term “content-based” in this Note refers to those regulations that are normally subjected to strict scrutiny in order to protect First Amendment guarantees).

135. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas J., concurring in part, and concurring in the judgement) (arguing *Central Hudson* does not apply where the regulations are *per se* illegitimate).

136. *Lorillard*, 533 U.S. at 574.

137. *Id.* at 574. (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-43 (1994)).

138. *Id.* (quoting *44 Liquormart*, 517 U.S. at 518 (Thomas, J. concurring in part and concurring in judgment)). Moreover, Justice Thomas stated content-based discrimination cannot be analyzed under reduced scrutiny merely because it can be labeled commercial speech. *See id.* at 576.

139. *Id.*

140. *Lorillard*, 533 U.S. at 576 (emphasis in original). An example would be regulations that address the risks of deceptive and misleading advertising — not those that regulate the content. *Id.* According to Thomas, “[w]hatever power the State may have to regulate commercial speech, it may not use that power to limit the content of commercial speech . . . . Such content-discriminatory regulation — like all other content-based regulation of speech — must be subjected to strict scrutiny.” *Id.* at 577.

141. *But see Lorillard*, 533 U.S. at 554-55. Generally, “[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.” *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) (citation omitted).

content-based regardless of their somewhat commercial nature.<sup>142</sup> Moreover, the aim of such regulations is to keep people ignorant of ideas that are considered harmful or socially inappropriate by preventing access to such information.<sup>143</sup> Because of the potential to keep people ignorant, several justices have opined that *Central Hudson* is not always the appropriate test to apply.<sup>144</sup> However, the Court has yet to move away from *Central Hudson* and apply strict scrutiny to regulations of a “commercial nature.”<sup>145</sup> Nevertheless, the Court needs to recognize that strict scrutiny is the appropriate test when the government seeks to regulate the content of speech.<sup>146</sup>

### 1. Content-Based Regulations Must Pass Strict Scrutiny

The Massachusetts regulations in *Lorillard* are content-based because they seek to prohibit access to information about tobacco.<sup>147</sup> If a regulation is content-based, it is presumed unconstitutional and subject

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142. *Lorillard*, 533 U.S. at 574 (Thomas, J., concurring in part, concurring in judgement).

143. *Id.* at 575. *Cf.* *Roth v. United States*, 354 U.S. 476, 484 (1957) (discussing First Amendment protection of all ideas). According to the Court in *Roth*:

The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people . . . .

... .

All ideas having even the slightest redeeming social importance – unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion – have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.

*Id.* (citations omitted).

144. *Lorillard*, 533 U.S. at 554. (citations omitted). According to the *Lorillard* Court, “[s]everal Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases.” *Id.* (citations omitted). However, the *Lorillard* Court found no “need to break new ground.” *Id.*

145. *See id.* The Court, looking at its recent commercial speech cases, found that the *Central Hudson* test is “adequate.” *Id.* at 555 (citing *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 184 (1999)).

146. It is important to note “that the government’s ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.” *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). According to the Supreme Court:

The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice . . . .

*Leathers v. Medlock*, 499 U.S. 439, 448-49 (1991) (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)).

147. *Lorillard*, 533 U.S. at 574. (Thomas, J., concurring in part, concurring in judgement). According to Justice Thomas, the regulations are content-based because they seek “to suppress speech about tobacco because [the government] objects to the content of that speech.” *Id.*

to strict scrutiny.<sup>148</sup> The *Lorillard* Court should have made a determination as to whether or not the regulations were content-based.<sup>149</sup> Apparently, the Court felt because there was a commercial nature to the speech, it was unnecessary to consider a content-based analysis.<sup>150</sup> However, by comparing *Lorillard* to other content-based regulations, it becomes clear the Massachusetts regulations were content-based and that strict scrutiny should have been applied.<sup>151</sup>

a. Ward v. Rock Against Racism

In *Ward v. Rock Against Racism*, the Court was forced to decide whether a municipal noise regulation was facially invalid.<sup>152</sup> Because content-neutral time, place and manner restrictions are subject to a lower

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148. See *supra* notes 41-44 and accompanying text.

149. *Lorillard*, 533 U.S. at 555. The threshold question that needs to be asked is whether a regulation is content-based. Russell W. Galloway, *Basic Free Speech Analysis*, 31 SANTA CLARA L. REV. 883, 910 (1991). Galloway argues:

Content-based infringements fall into several categories. First, infringements directed at [a] claimant's point of view are content-based. Second, infringements directed at the subject matter of the communication are content-based. Third, infringements directed at [a] claimant's choice of words are content-based. Fourth, infringements directed at [a] claimant's identity are content-based. Fifth, infringements directed at the "communicative impact" of [a] claimant's conduct are content-based.

*Id.* (citations omitted) The Massachusetts regulations are content-based because they are directed at both the subject matter (tobacco) and the communicative impact of the speech (youth smoking). See 940 CMR §§ 21.01 – 22.09 (2002).

150. *Lorillard*, 533 U.S. at 554. The *Lorillard* Court merely quoted *Central Hudson* for the proposition that there is a "distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulations, and other varieties of speech." *Id.* (quoting *Central Hudson*, 447 U.S. at 562). The Court performed no analysis to determine whether the regulations were content-based, other than stating that *Central Hudson* was the appropriate test. See *id.*

151. See *infra* notes 152-184 and accompanying text.

152. *Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989). In *Ward*, the city of New York enacted a municipal ordinance, which required those who performed in the bandshell, an amphitheater in Central Park, to use certain city furnished equipment and personnel designed to minimize the volume of amplified music. *Id.* at 787. Respondent, *Rock Against Racism*, had put on concerts in the bandshell in the years prior to the enactment of the ordinance. *Id.* at 784. However, it filed suit when it learned that its upcoming concert would be subject to the new ordinance. *Id.* at 787. The Federal District Court for the Southern District of New York issued an injunction, which permitted the Respondent to use its own sound equipment instead of the city's. *Id.* After the concert, Respondent sought to have the ordinance struck down as facially invalid. *Id.* at 788. The district court upheld the guidelines allowing the city to require use of its own equipment. *Id.* The Second Circuit Court of Appeals reversed, finding that content-neutral regulations are permissible as long as the regulation is reasonable. *Id.* at 789. The appellate court also found that the regulation must be as least restrictive as possible, but found that in this case the city did not use the least restrictive means. *Id.* The Supreme Court reversed, finding the ordinance was valid on its face and that the appellate court erred by requiring the city prove that the regulation was the least restrictive means. *Id.* at 789-90.

level of judicial scrutiny,<sup>153</sup> the Court initially inquired as to whether the regulations were content-based.<sup>154</sup> First, the Court noted the controlling consideration in making this determination is the government's purpose.<sup>155</sup> Second, it noted the regulation must be "justified without reference to the content of the regulated speech."<sup>156</sup> The *Ward* Court, in applying this two-part test, found that the ordinance at issue was not content-based.<sup>157</sup> However, the respondent's First Amendment rights were sufficiently protected because the Court made a content-based determination before choosing which level of judicial scrutiny to apply.<sup>158</sup>

In *Lorillard*, the government's purpose in enacting the regulations was to keep "people ignorant by suppressing expression. . . ."<sup>159</sup> The regulations were created to keep minors from viewing tobacco advertising, in order to further the primary purpose of preventing underage smoking.<sup>160</sup> However, the regulations are not "justified" without reference to the content of the speech because they are specifically limited to tobacco.<sup>161</sup> Accordingly, if the *Lorillard* Court

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153. See *supra* note 32 (discussing the level of judicial scrutiny afforded to content-neutral regulations).

154. *Ward*, 491 U.S. at 791. According to the Court, "[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.* (citing *Clark v. Community For Creative Non-Violence*, 468 U.S. 288, 295 (1984)).

155. *Id.* "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages, but not others." *Id.* (citations omitted).

156. *Id.* (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

157. *Ward*, 491 U.S. at 792. According to the Court, the government's purpose was to: (1) control noise, and to (2) "avoid undue intrusion into residential areas and other areas of the park." *Id.* The Court noted the regulations had nothing to do with the content of the speech. *Id.*

158. *But see*, Johnson, *supra* note 132, at \*18 (arguing there is a danger of diluting the protection strict scrutiny affords when the Court applies it to anything other than viewpoint discrimination). According to Johnson, the Court does great detriment to the First Amendment when it protects regulations that are merely content-based subject matter restrictions. *Id.* Moreover, Johnson argues that the Massachusetts regulations would not be deserving of strict scrutiny because the regulations do not deal with political speech. See *id.* at \*19. Cf. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (noting nothing less than strict scrutiny is appropriate when state law burdens "core political speech").

159. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 575 (2001) (Thomas, J. concurring in part, concurring in judgement).

160. *Id.* at 533. The Massachusetts Attorney General explicitly stated the purpose of the regulations was to prevent the Tobacco Companies from recruiting new customers. *Id.*

161. See 940 CMR §§ 21.01 – 22.09 (2002). *But see* *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 762 (1994) (finding an injunction restricting only the speech of anti-abortion protestors was not content-based). In *Madsen*, the petitioners argued that an injunction specifically directed at anti-abortion protests was content-based. *Id.* However, the Court found "[t]o accept

would have gone through a content-based determination, it would likely have found that the Massachusetts regulations failed the test set forth in *Ward*.<sup>162</sup>

b. *Boos v. Barry*

In *Boos v. Barry*, the Court analyzed whether a statute prohibiting the display of signs in front of a foreign embassy violated the First Amendment.<sup>163</sup> Appropriately, the Court first made a determination as to whether the statute was content-based or content-neutral.<sup>164</sup> In making this determination, the Court looked at exactly what type of speech the government was attempting to prohibit.<sup>165</sup> The Court began by noting that the First Amendment is hostile “to [the] prohibition of public discussion of an entire topic.”<sup>166</sup> The Court ultimately found the statute was not content-neutral because it was not concerned with the secondary effects of the prohibited speech.<sup>167</sup> In discussing secondary

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petitioners’ claim would be to classify virtually every injunction as content or viewpoint based. An injunction, by its very nature, applies only to a particular group . . . and perhaps the speech, of that particular group.” *Id.* However, in a dissenting opinion, Justice Scalia found the ordinance did violate the First Amendment. *Id.* at 785. According to Justice Scalia, regulations that deny exercise of free speech and apply only to “a particular group, which had broken no law, [and] to that group and that group alone, are profoundly at odds with our First Amendment. . . .” *Id.*

162. *See supra* notes 152-161 and accompanying text. According to the Supreme Court, “government regulation of speech must be measured in minimums, not maximums.” *See Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 790 (1988) (applying strict scrutiny to a North Carolina statute that regulated charities). If this is true, then it stands to reason the Court should start its analysis with a determination as to whether the regulations are content-based and work its way down. *See id.*

163. *Boos v. Barry*, 485 U.S. 312, 315 (1988). In *Boos*, the petitioners wanted to place signs in front of foreign embassies. *Id.* at 315. They also wanted to be able to congregate within 500 feet of the embassies. *Id.* However, the statute at issue prevented both of these activities. *Id.* The petitioners brought an action challenging the statute as facially unconstitutional. *Id.* at 316. The district court granted the respondent’s motion for summary judgment, and the appellate court affirmed. *Id.*

164. *Boos*, 485 U.S. at 318. However, before deciding whether the speech was content-based, the Court did note the speech at issue was political speech and was worthy of the most Constitutional protection. *See id.*

165. *Id.* at 318-19. In *Boos*, the Court found the government was attempting to prohibit only speech that was critical of a foreign government. *Id.*

166. *Id.* at 319 (citation omitted).

167. *Boos*, 485 U.S. at 321. The respondents in this case argued the statute should be upheld as a content-neutral regulation of time, place, and manner. *Id.* They argued that the statute was concerned with the secondary effects of the speech, which was protecting foreign diplomats “from speech that offends their dignity.” *Id.* at 320. The Court, however, decided the statute was not concerned with secondary effects because concern about secondary effects applies “to regulations that apply to a particular category of speech because the regulatory targets happen to be associated with that type of speech.” *Id.* (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)).

effects, the Court stated “[r]egulations that focus on the direct impact of the speech on its audience present a different situation.”<sup>168</sup> Moreover, the Court held that restrictions aimed at regulating a person’s *reactions* to speech are not valid because a person’s reaction to speech is not a type of secondary effect.<sup>169</sup>

The *Boos* Court’s reasoning, applied to *Lorillard*, demonstrates that the Massachusetts regulations are content-based and should have been subject to strict scrutiny.<sup>170</sup> First, the Massachusetts regulations are aimed at preventing smoking.<sup>171</sup> Second, they prohibit an entire category of speech — tobacco.<sup>172</sup> The regulations are not concerned with secondary effects, but with the primary effect of discouraging smoking.<sup>173</sup> Moreover, the regulations are aimed at regulating a person’s reactions to advertising.<sup>174</sup> According to the Court’s decision in *Boos*, such regulations are not content-based.<sup>175</sup> Yet, the *Lorillard* Court did not adopt this reasoning, presumably only because the speech was commercial in nature.<sup>176</sup>

### c. Turner Broadcasting System, Inc. v. FCC

In *Turner*, the Court decided that the constitutionality of the Cable Television Consumer Protection and Competition Act’s “must carry”

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168. *Id.* at 321.

169. *Boos*, 485 U.S. at 321. The Court made a comparison to its decision in *Renton*. *Id.* In *Renton*, a zoning ordinance was enacted that prohibited any adult movie theaters from locating within one thousand feet of any residential area, church, park, or school. *Renton*, 475 U.S. at 43. The *Renton* Court found the ordinance was a content-neutral regulation of time, place, and manner. *Id.* at 49. The Court noted the regulation did “not appear to fit neatly into either the ‘content-based’ or the ‘content-neutral’ category.” *Id.* at 47. However, because the regulation was not concerned so much with the content of the films, but with the “undesirable secondary effects,” the Court appropriately applied an intermediate level of judicial scrutiny. *See id.* at 49.

170. *But see* *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (noting the First Amendment’s protections are strongest with regard to political speech).

171. *Cf. Boos*, 485 U.S. at 318 (finding regulations preventing the criticism of foreign governments are content-based).

172. *Cf. Boos*, 485 U.S. at 319 (noting regulations aimed at preventing an entire category of speech are not permitted).

173. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 574 (2001) (Thomas, J. concurring in part, concurring in judgement). “Massachusetts is not concerned with any ‘secondary effects’ of tobacco advertising — it is concerned with the advertising’s primary effect, which is to induce those who view the advertisements to purchase and use tobacco products.” *Id.*

174. *Id.*

175. *Boos*, 485 U.S. at 321.

176. *Lorillard*, 533 U.S. at 575 (Thomas, J. concurring in part, concurring in judgement). “It should be clear that if these regulations targeted anything other than advertising for commercial products — if, for example, they were directed at billboards promoting political candidates — all would agree that they restrictions should be subjected to strict scrutiny.” *Id.*

provisions needed to be decided by “some measure of heightened First Amendment scrutiny.”<sup>177</sup> Before determining a proper level of judicial scrutiny, the Court stated that “[d]eciding whether a particular regulation is content based or content neutral is not always a simple task.”<sup>178</sup> The Court went back to its opinion in *Ward* and noted the principal inquiry — whether the government seeks to regulate speech because of the message it conveys — must be made.<sup>179</sup> According to the Court, “[l]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.”<sup>180</sup> The Court contrasted content-based regulations with content-neutral regulations and noted content-neutral regulations *do not* reference ideas or viewpoints.<sup>181</sup>

Again, if the *Turner* Court’s reasoning is applied to *Lorillard*, it illustrates that the *Lorillard* Court failed to afford the Tobacco Companies the proper measure of First Amendment protection.<sup>182</sup> First, the Court did not perform the “principal inquiry” to determine whether the government was seeking to regulate the speech based on the message conveyed.<sup>183</sup> In fact, if the Court *had* made this inquiry, it would have

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177. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). In *Turner*, the regulations required that cable operators “must carry” certain local broadcast stations. *Id.* at 630. The Court ultimately held that intermediate scrutiny was the appropriate form of “heightened scrutiny.” *Id.* at 643. According to the Court, “[i]nsofar as they pertain to the carriage of full-power broadcasters, the must carry rules, on their face, impose burdens and confer benefits without reference to the content of the speech.” *Id.* See generally Symposium, *Constitutional Substantial-Evidence Review? Lessons from the Supreme Court’s Turner Broadcasting Decision*, 97 COLUM. L. REV. 1162, 1175 (1997) (discussing the Court’s use of intermediate scrutiny in *Turner*).

178. *Turner*, 512 U.S. at 642.

179. *Id.* According to the Court, “The purpose, or justification, of a regulation will often be evident on its face.” *Id.* (citations omitted).

180. *Id.* at 643 (citations omitted).

181. *Id.* The Court stated, “[l]aws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.” *Id.* See generally Jerome A. Barron, *The Electronic Media and the Flight From [the]First Amendment Doctrine: Justice Breyer’s New Balancing Approach*, 31 U. MICH. J.L. REFORM 817 (1998) (discussing Justice Breyer’s approach in *Turner* and its effect on competing First Amendment interests).

182. But see Sylvia A. Law, *Addiction, Autonomy, and Advertising*, 77 IOWA L. REV. 909, 954-55 (1992) (arguing the First Amendment should not prevent government regulation of harmful products). According to Law,

[A] state is free to ban advertising for products producing harmful dependence in a substantial proportion of users. Whether a product is addictive or harmful is an empirical question. Whether advertising for a particular product can be banned depends upon the state’s ability to demonstrate that the particular product is harmful and likely to produce dependence.

*Id.*

183. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554-55 (2001) (finding *Central Hudson* to be the appropriate test and refusing to “break new ground” by applying strict scrutiny).

found Massachusetts was attempting to regulate speech based on the ideas and views that would have been expressed through the Tobacco Companies' advertising.<sup>184</sup>

## 2. Viewpoint Discrimination Deserves Strict Scrutiny

At the very least, the *Lorillard* Court should have found the Massachusetts regulations were content-based restrictions and applied strict scrutiny.<sup>185</sup> However, the regulations arguably constitute viewpoint discrimination and could have been found *per se* unconstitutional.<sup>186</sup> While the better approach would have been to apply strict scrutiny, the Court should not have limited itself to *Central Hudson* when the regulations could have failed for other reasons.<sup>187</sup> An

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184. Cf. Robinson, *supra* note 34, at 707 (arguing that the *Turner* Court failed in its analysis by not finding the "must carry" provisions content-based restrictions on the freedom of speech). According to Robinson, "[t]he Supreme Court incorrectly held the First Amendment intermediate level scrutiny applicable to the must-carry provisions. The Court should have held that the provisions warrant strict scrutiny because they are content-based regulations on speech protected by the First Amendment." *Id.* (citations omitted).

185. *But see* Wojciech Sadurski, *Does the Subject Matter? Viewpoint Neutrality and Freedom of Speech*, 15 CARDOZO ARTS & ENT. L.J. 315, 337 (1997) (arguing there is no distinction between content-based regulations and viewpoint-based regulations unless there is a distinction between those regulations founded on intolerance and those based on paternalism); Penelope Seator, *Judicial Indifference to Pornography's Harm: American Booksellers v. Hudnut*, 17 GOLDEN GATE U. L. REV. 297, 302 (1987) (arguing laws prohibiting pornography should not be seen as unconstitutional viewpoint discrimination because they are aimed at social harms and not at the underlying idea).

186. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (holding a university policy regulating the funding of newspapers was unconstitutional viewpoint discrimination). According to the Supreme Court:

[T]he state may sometimes curtail speech when necessary to advance a significant and legitimate state interest . . . . [However], there are some purported interests – such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the market place of ideas – that are so plainly illegitimate that they would immediately invalidate the rule. The general principle that has emerged . . . is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.

*City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

187. *But see* Kent Greenawalt, *Viewpoints From Olympus*, 96 COLUM. L. REV. 697, 697 (1996) (arguing that allowing content-based restrictions to be classified as viewpoint discrimination may have significant impact on First Amendment law). According to Greenawalt, "[t]he Core of the Court's opinion [in *Rosenberger*] is unconvincing because it fails to elaborate a plausible account of what constitutes viewpoint discrimination." *Id.* at 697. In his criticism of the *Rosenberger* opinion, he states:

Taken at face value, the *Rosenberger* majority . . . undermines the distinction between viewpoint discrimination and most other content distinctions . . . . [I]f the fact that descriptive treatments of a subject matter from a historical or psychological perspective are left free by some regulation is sufficient to constitute viewpoint discrimination, then there has not yet been (and probably never will be) an instance of content discrimination that is not viewpoint discrimination. Further, any content discrimination is likely to have

examination of the Massachusetts regulations as compared to previously decided cases dealing with viewpoint discrimination proves the Court could have found the regulations *per se* unconstitutional.<sup>188</sup>

a. *R.A.V. v. City of St. Paul*

In *R.A.V.*, the Court considered whether a city ordinance was facially invalid under the First Amendment.<sup>189</sup> The Court established that the ordinance was unconstitutional because it prohibited speech based solely on its subject.<sup>190</sup> The Court further noted the regulations amounted to viewpoint discrimination because they only proscribed hate speech on certain topics.<sup>191</sup> According to the Court, this was impermissible viewpoint discrimination.<sup>192</sup>

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some indirect effect of helping certain viewpoints in preference to others . . . . No restriction on expression (content based or not) will be entirely free of influence on acceptance of viewpoint.

*Id.* at 707-08.

188. *But see* Harvard Law Review, *Viewpoint Discrimination — Funding for Religious Publication*, 109 HARV. L. REV. 210, 215 (1995) (noting viewpoint discrimination will normally be applied to most bans on religious and political speech).

189. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992). In *R.A.V.*, the Petitioner was charged with violating a provision of the city code, which made it unlawful to place “on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . . .” *Id.* See generally Elena Kagan, *Regulation of Hate Speech and Pornography after R.A.V.*, 60 U. CHI. L. REV. 873, 874 (1993) (discussing the problems of viewpoint discrimination as they relate to *R.A.V.* and discussing alternative ways for the government to regulate hate speech and pornography).

190. *R.A.V.*, 505 U.S. at 381. According to the Court, just because some categories of speech are traditionally unprotected, does not mean “that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government ‘may regulate [them] freely.’” *Id.* at 384 (alterations in original).

191. *Id.* at 391. The *R.A.V.* Court stated:

In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words — odious racial epithets, for example — would be prohibited to proponents of all views. But, “fighting words” that do not themselves invoke race, color, creed, religion, or gender — aspersions upon a person’s mother, for example — would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers’ opponents. One could hold up a sign saying, for example, that all “anti-Catholic bigots” are misbegotten; but not that all “papists” are, for that would insult and provoke violence “on the basis of religion.”

*Id.* (emphasis in original).

192. *Id.* at 393-94. *But see id.* at 415 (Blackmun, J. concurring) (arguing that the effect of the Court’s opinion will be to weaken First Amendment protection). According to Justice Blackmun, the problem with the Court’s decision is: (1) if the Court is forbidden to characterize protection, for example as fighting words or obscenity, First Amendment protection will be reduced across the board, and (2) the case would be regarded as an “aberration,” where the Court manipulated and

Applying this same reasoning to *Lorillard*, it is simple to see how the Court could have used viewpoint discrimination as a basis for striking down the Massachusetts regulations.<sup>193</sup> In *Lorillard*, the regulations prohibit speech based solely on the subject of the speech — tobacco.<sup>194</sup> Moreover, the regulations prohibit speech by narrowing it to a certain topic — adolescents and tobacco.<sup>195</sup> For all intents and purposes, this was viewpoint discrimination.<sup>196</sup> However, it would be difficult to support the argument that the Massachusetts regulations should be struck down under *R.A.V.* alone, because *R.A.V.* did not clearly define what constitutes viewpoint discrimination.<sup>197</sup> Therefore, it is necessary to examine some of the Court's later cases on this subject.<sup>198</sup>

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created a doctrine solely for the purpose of striking down an ordinance "whose premise it opposed." *Id.* at 416. Moreover, Justice Blackmun stated, "I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns, but I see great harm in preventing the people of Saint Paul from specifically punishing the race-based fighting words that so prejudice their community." *Id.*

193. *But see* Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 100 (1996) (stating the prohibitions against viewpoint discrimination arise from core First Amendment values). Heins states:

These values include the right to think, believe, and speak freely, the fostering of intellectual and spiritual growth, and the free exchange of ideas necessary to a properly functioning democracy. Government action that suppresses or burdens speech on the basis of its viewpoint threatens all of these values by skewing public debate, retarding democratic change, depriving people of ideas and artistic experiences that could contribute to their growth, and otherwise constricting human liberty.

*Id.* (citations omitted). It can be argued that regulations of a commercial nature cannot be struck down under the doctrine of viewpoint discrimination because commercial speech is a lesser form of speech that was not based on core First Amendment values. *See generally*, Geoffrey R. Stone, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 HARV. J.L. & PUB. POL'Y 461, 468 (1986) (noting anti-pornography legislation may be viewpoint based, but survive because it does not pose the usual dangers associated with viewpoint discrimination).

194. *Cf. R.A.V.*, 505 U.S. at 391 (finding St. Paul's ordinance prevented only the subject of hate speech).

195. *Cf. id.* (holding that there was viewpoint discrimination because the ordinance prevented only hate speech on certain topics such as race, gender, and religion).

196. *See id.*

197. Bruce A. Grabow, Note, *R.A.V. v. City of St. Paul: Dismantling Free Speech Jurisprudence to Make Room for Equal Treatment*, 3 WIDENER J. PUB. L. 577, 581 (1993) (discussing the need for a heightened analysis after the Court's decision in *R.A.V.*). According to Grabow, "[i]t is the Court's prerogative to commission new standards for constitutional review, [but] such discretionary decisions deserve to be analyzed closely. This need for heightened analysis becomes even more apparent when the new approach creates more problems than it solves." *Id.* at 582.

198. *See infra* notes 199-208 and accompanying text.

b. *Rosenberger v. Rectors and Visitors of the University of Virginia*

In later cases, the Court's determination of what constitutes viewpoint discrimination became clearer.<sup>199</sup> In *Rosenberger*, the Court stated that the government may not regulate speech based on its content.<sup>200</sup> According to the Court, "[w]hen the government targets not subject matter, but particular *views* taken by speakers on a subject, the violation of the First Amendment is all the more blatant."<sup>201</sup> More importantly, the Court noted viewpoint discrimination is more evident when the state seeks to regulate speech that is reasonable in light of the forum in which it is presented.<sup>202</sup>

Under the reasoning set forth in *Rosenberger*, the Massachusetts regulations would constitute viewpoint discrimination.<sup>203</sup> First, the regulations sought to target particular views — the acceptance of

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199. See generally *Rosenberger*, 515 U.S. at 829 (discussing what constitutes viewpoint discrimination). In *Rosenberger*, the Court determined the University of Virginia's refusal to fund a newspaper because of its religious content was viewpoint discrimination. *Id.* at 832.

200. *Id.* at 828. Furthermore, the Court stated that discrimination based on the message of the speech is presumed unconstitutional. *Id.* However, in certain situations, the Court has held that the government may regulate speech based on content and viewpoint. See *Gitlow v. State of New York*, 268 U.S. 652, 672 (1925) (finding a statute prohibiting criminal anarchy constitutional). According to the *Gitlow* Court:

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom . . . .

That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question.

*Id.* at 666-67 (citations omitted). Arguably, restrictions such as the one in *Gitlow* would be unprotected under the incitement-to-riot or fighting words theories.

201. *Rosenberger*, 515 U.S. at 829 (emphasis added). Moreover, the Court stated "[v]iewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.*

202. See *Id.* According to the Court:

[I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

*Id.* at 829-30.

203. See generally Helgi Walker, Note, *Communications Media and the First Amendment: A Viewpoint Neutral FCC is Not Too Much to Ask For*, 53 FED. COMM. L.J. 5, 6 (2000) (stating most courts consider viewpoint discrimination to be particularly "egregious").

smoking.<sup>204</sup> Second, the government sought to regulate *only* tobacco-related advertising.<sup>205</sup> According to the *Rosenberger* Court, this would constitute viewpoint discrimination.<sup>206</sup> It is easier to argue that the Massachusetts regulations are content-based;<sup>207</sup> nevertheless, the regulations can be seen as viewpoint-based discrimination based on prior Supreme Court decisions.<sup>208</sup>

### *B. The Commercial Speech Doctrine Needs to Be Limited To Commercial Situations*

Although doubt exists as to whether *Central Hudson* is always the appropriate test, the Court has yet to “break new ground” and apply strict scrutiny to commercial regulations.<sup>209</sup> This is problematic because

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204. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 533 (2001) (stating the Attorney General’s purpose in creating the Massachusetts regulations was to prevent underage smoking). See Amy Ruth Ita, Note, *Censorial Community Values: An Unconstitutional Trend in Arts Funding and Access*, 61 OHIO ST. L.J. 1725, 1728 (2000) (discussing the use of community values to censor art and how that is unconstitutional viewpoint discrimination). Viewpoint discrimination often arises in the case of government funding of arts. See generally Harold B. Walther, Note, *National Endowment for the Arts v. Finley: Sinking Deeper Into the Abyss of the Supreme Court’s Unintelligible Modern Unconstitutional Conditions Doctrine*, 59 MD. L. REV. 225 (2000) (discussing the Supreme Court Holding in *Finley* and arguing that the decision limits and suppresses free speech). The idea behind the state’s ability to withdraw funding for certain types of art is that the state cannot be forced to fund art that it deems indecent or disrespectful. Barry J. Heyman, *The National Endowment for the Arts v. Finley: The Supreme Court’s Artful Yet Indecent Proposal*, 16 N.Y.L. SCH. J. HUM. RTS. 439, 446 (1999). Although state funding is not an issue in *Lorillard*, the Massachusetts regulations were arguably enacted because the state sought to regulate behavior that it thought to be inconsistent with community values. See *supra* Part III, notes 79-81.

205. See generally 940 CMR §§ 21.01 – 22.09 (2002).

206. *Rosenberger*, 515 U.S. at 829. But see Erwin Chemerinsky, *Court Takes a Narrow View of Viewpoint Discrimination*, 35 MAR. TRIAL 90, 91 (1999) (stating that the Supreme Court has never defined viewpoint discrimination).

207. See *supra* note 185 (arguing viewpoint discrimination is not applicable to speech of a commercial nature).

208. See *supra* notes 186-206 and accompanying text.

209. *Lorillard*, 533 U.S. at 554. Arguably, the commercial speech doctrine is not even necessary because courts would have appropriate discretion in applying a strict scrutiny standard. See *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 740-41 (1996) (discussing the competing interests between the state’s interests and those of the First Amendment). According to the *Denver* Court:

Over the years, [the] Court has restated and refined these basic First Amendment principles, adopting them more particularly to the balance of competing interests and the special circumstances of each field of application.

This tradition teaches that the First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, thereby enforcing the Constitution’s constraints, but without imposing judicial formulas so rigid that they become a straitjacket that disables the government from responding to serious problems.

*Id.* (citations omitted).

even regulations of a commercial nature can be content-based, and hence deserving of a higher level of judicial scrutiny.<sup>210</sup> A likely reason the Court is hesitant to change the level of scrutiny is that commercial speech is typically considered less deserving of constitutional protection.<sup>211</sup> *Central Hudson*, however, should not be applied unless the regulation at issue is dealing with commercial harms.<sup>212</sup>

### 1. Commercial Harms

According to Justice Thomas, it is important to apply *Central Hudson* only to those cases for which it was designed.<sup>213</sup> The commercial speech doctrine, therefore, should be limited to the “particularly *commercial* harms that commercial speech can threaten . . . .”<sup>214</sup> This would include commercial harms, such as illegal, deceptive, or misleading advertising.<sup>215</sup> Alternatively, the commercial speech doctrine should be limited to those situations that do *no more* than

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210. *But see* Mary B. Nutt, Recent Development, *Trends in First Amendment Protection of Commercial Speech*, 41 VAND. L. REV. 173, 174 (1988) (discussing how the Supreme Court affords commercial speech less protection because the Court is willing to defer to the state’s judgment).

211. Bd. of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989). In *Fox*, the Court was forced to determine whether speech proposing a commercial transaction was subject to *Central Hudson*, where that speech was combined with non-commercial speech. *Id.* at 474. The facts of the case were based on a University policy that prohibited private enterprises from soliciting on campus. *Id.* at 471-72. Respondents were prohibited from having a “Tupperware party” because of the University’s policy. *Id.* They argued that although there was a commercial component to the speech, it should not be subject to a *Central Hudson* analysis because there was also non-commercial speech taking place. *Id.* at 474. The Court disagreed. *Id.* In noting the role the Constitution takes in protecting commercial speech, the Court stated “[o]ur jurisprudence has emphasized that ‘commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,’ and is subject to ‘modes of regulation that might be impermissible in the realm of noncommercial expression.’” *Id.* at 477 (alteration in original) (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978)).

212. *See infra* notes 213-233 and accompanying text.

213. *Lorillard*, 533 U.S. at 576 (Thomas, J., concurring in part, concurring in judgment). “Even when speech falls into a category of reduced constitutional protection, the government may not engage in content discrimination for reasons unrelated to those characteristics of the speech that place it within the category.” *Id.* The point of the commercial speech doctrine is to protect truthful, non-misleading speech even though there may be an economic motive on behalf of the speaker. *See generally* Arlen W. Langvardt and Eric L. Richards, *The Death of Posadas and the Birth of Change in[sic] Commercial Speech Doctrine: Implications of 44 Liquormart*, 34 AM. BUS. L.J. 483 (1997) (discussing the point of the commercial speech doctrine).

214. *Lorillard*, 533 U.S. at 576 (Thomas, J., concurring in part, concurring in judgment) (emphasis in original).

215. *Id.* “Whatever power the State may have to regulate commercial speech, it may not use that power to limit the content of commercial speech as it has done here . . . . Such content-discriminatory regulation — like all other content-based regulation of speech — must be subjected to strict scrutiny.” *Id.* at 577.

propose a commercial transaction.<sup>216</sup> The proper question is “not what qualifies commercial speech for First Amendment coverage, but what, if anything, disqualifies it?”<sup>217</sup>

a. Central Hudson Applies Only To Certain Forms of Advertising

Certain cases would clearly qualify for *Central Hudson* because they do no more than propose a commercial transaction.<sup>218</sup> For instance, in *Virginia Pharmacy*, the pharmacists sought to publish price information about prescription drugs. This was the only message the advertisements were transmitting.<sup>219</sup> Similarly, in *Florida Bar v. Went For It, Inc.*, the lawyer advertisements sought only to solicit new business, and no other message was transmitted.<sup>220</sup> Because false, deceptive, or misleading information is subject to regulation, it would only be appropriate to apply *Central Hudson* to those regulations that are

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216. Rodney Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 780 (1993).

Commercial speech, as speech, should presumptively enter the debate with full First Amendment protection . . . . The argument for even reducing the level of protection to the intermediate standard of review granted by existing First Amendment doctrine is theoretically sound only if applied to a limited subclass of advertising: that subclass of advertising that does “no more than propose a commercial transaction.”

*Id.* (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976)).

217. *Id.*

218. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 571 (1980) (holding regulation which banned advertising by utility companies violated the First Amendment). *See, e.g., Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 622 (1995) (holding state regulations designed to protect the privacy interests of victims did not violate the First Amendment); *Edenfield v. Fane*, 507 U.S. 761, 763 (1993) (finding regulation prohibiting certified public accountants from direct in-person solicitation was unconstitutional); *In re R.M.J.*, 455 U.S. 191, 206-207 (1982) (holding restrictions on lawyers non-misleading speech was a violation of the First Amendment); *Virginia Pharmacy*, 434 U.S. at 750 (finding state regulation prohibiting the advertisement of prescriptions was unconstitutional).

219. *Virginia Pharmacy*, 434 U.S. at 760-61. *See generally* Glenn C. Smith, *Avoiding Awkward Alchemy — In the Off-Label Drug Context and Beyond: Fully-Protected Independent Research Should Not Transmogrify Into Mere Commercial Speech Just Because Product Manufacturers Distribute It*, 34 WAKE FOREST L. REV. 963, 967 (1999) (arguing that mere distribution of research by a product manufacturer should not result in the speech being treated as commercial speech).

220. *Florida Bar*, 515 U.S. at 621. In *Florida Bar*, the state bar had restrictions on lawyer advertising. *Id.* at 620. The restrictions prohibiting lawyers from contacting victims, “unless the accident or disaster occurred more than 30 days prior to the mailing of the communication.” *Id.* This restriction was challenged on First Amendment grounds, but the Supreme Court upheld its validity. *Id.* at 634. The basis of the Court’s decision rested upon the state’s interest in protecting the privacy of its citizens. *Id.*

designed to prevent commercial harms.<sup>221</sup>

b. Strict Scrutiny Should Otherwise Apply

While *Central Hudson* should apply to some forms of commercial advertising, strict scrutiny should apply to others.<sup>222</sup> When an advertiser promotes more than mere prices and services, the regulations should be subject to strict scrutiny, especially if there is a risk that the state is seeking to prohibit the advertising on the basis of its content.<sup>223</sup> For instance, in *Bolger v. Youngs Drug Products Corp.*, the state sought to prohibit the unsolicited advertisement of contraceptive devices.<sup>224</sup> Although the Court analyzed the case under *Central Hudson*, it would have been more appropriate to apply strict scrutiny because the state sought to restrict the advertisements because it did not approve of the content.<sup>225</sup>

Similarly, in *Bigelow v. Virginia*, the state regulations sought to prohibit the advertisement of abortions.<sup>226</sup> Again, the Court analyzed the regulation under *Central Hudson*, but it would have been more appropriate to analyze it under strict scrutiny because the government's purpose was to prohibit speech based solely on its content.<sup>227</sup> Because

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221. See *In re R.M.J.* at 455 U.S. at 203 (stating truthful advertising of lawful subjects is entitled to First Amendment protection).

222. See *supra* notes 141-208 and accompanying text (arguing the initial inquiry should be as to whether the regulations are content-based).

223. See Smolla, *supra* note 216, at 781. According to Smolla:

To the extent that advertisers are selling fantasies, lifestyles, identity, or anything other than 'hard core' transactional information, they are doing what all other speakers routinely do. They are making these points, to be sure, out of utter self-interest; indeed, out of the most grasping of all forms of self-interest — the desire for financial profit. But the profit motive alone is not enough, either in First Amendment doctrine or theory, to disqualify speech from full constitutional protection.

*Id.* See also *New York Times Co. v. L.B. Sullivan*, 376 U.S. 254, 266 (1964) (finding the publication in question was not commercial because it did such things as communicate information and express opinions); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 384 (1973) (noting speech is not commercial merely because it relates to advertising).

224. *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 61 (1983).

225. See *id.* at 71. The government's purpose was to: (1) protect the recipients of these advertisements from information they may find offensive, and (2) help parents control the information their children have access to. *Id.* Ultimately, the Court found the regulations were in violation of the First Amendment. *Id.* at 75.

226. *Bigelow v. Virginia*, 421 U.S. 809, 811 (1975).

227. *Id.* at 827. The state argued its legitimate purpose was in regulating the quality of health care; however, the First Amendment would have been better served if the Court would have made a determination as to whether the regulation was content-based. See *supra* notes 141-184 and accompanying text (arguing the First Amendment requires an initial inquiry into whether a regulation is content-based).

the purpose of the commercial speech doctrine is to protect consumers from such things as fraud or deception, “laws which attempt to limit commercial speech for some other purpose . . . can be valid only if they withstand full First Amendment scrutiny.”<sup>228</sup>

### c. Preventing Commercial Harms

The Massachusetts regulations are *arguably* within the ambit of the commercial speech doctrine because the stated purpose was to “eliminate deception and unfairness in the way cigarettes and smokeless tobacco products are marketed, sold and distributed. . . .”<sup>229</sup> However, the regulations do more than merely attempt to prevent commercial harms.<sup>230</sup> For instance, the Massachusetts regulations do not deal exclusively with preventing deception. Moreover, the federal government has already legislated the issue of deception in the FCLA.<sup>231</sup> It is clear that the *major portion* of the regulations were designed to

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228. Nicole B. Casarez, *Don't Tell Me What to Say: Compelled Commercial Speech and the First Amendment*, 63 MO. L. REV. 929, 966 (1998) (stating it is a “more principled approach” to restrict commercial speech only to those situations where it prevents a purely commercial harm).

229. 940 CMR § 21.01. The statute states:

The purpose of 940 CMR [§] 2100 is to eliminate deception and unfairness in the way cigarettes and smokeless tobacco products are marketed, sold and distributed in Massachusetts in order to address the incidence of cigarette smoking and smokeless tobacco use by children under legal age. 940 CMR [§] 21.00 imposes requirements and restrictions on the sale and distribution of cigarettes and smokeless tobacco products in Massachusetts in order to prevent access to such products by underage consumers.

*Id.* The statement of purpose for the restrictions regarding cigars is essentially the same. 940 CMR § 22.01. However, the state also wanted to ensure that consumers were informed of the addictive nature of cigars. *Id.* According to the statute:

The purpose of 940 CMR [§] 22.00 is to eliminate deception and unfairness in the way cigars and little cigars are packaged, marketed, sold and distributed in Massachusetts whereby:

(1) Massachusetts consumers may be adequately informed about the health risks associated with cigar smoking, its addictive properties, and the false perception that cigars are a safe alternative to cigarettes by requiring the cigar industry to include health warnings on the package labels of cigars sold and distributed within Massachusetts and in the advertisement of such products within Massachusetts; and

(2) the incidence of cigar use by children under legal age is addressed by imposing requirements and restrictions on the sale and distribution of cigars in Massachusetts in order to prevent access to such products by underage consumers.

*Id.*

230. See Arlen W. Langvardt, *The Incremental Strengthening of First Amendment Protection for Commercial Speech: Lessons from Greater New Orleans Broadcasting*, 37 AM. BUS. L.J. 587, 598 (2000) (discussing the measure of First Amendment protection afforded to commercial speech). Commercial harms come from false, misleading advertisement, or from the advertisement of illegal products. See *id.*

231. See *supra* note 7 (discussing federal legislation and regulation of tobacco products).

prevent children from seeing tobacco advertisements.<sup>232</sup> Because the regulations do not address purely commercial harms, the commercial speech doctrine should not have been applied.<sup>233</sup>

## 2. No Clear Rationale

According to Justice Thomas, the Court has been inconsistent in applying the commercial speech doctrine.<sup>234</sup> This is in part because there is no basis for asserting that commercial speech is deserving of a lower level of constitutional protection.<sup>235</sup> In contrast, there *is* a firm

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232. See 940 CMR §§ 21.01 – 22.09 (2002). A fundamental problem with the Massachusetts regulations is the regulations also prevent adults from seeing tobacco advertisements. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 580 (2001) (Thomas, J., concurring in part, concurring in judgement). The Court has often recognized that despite the state's interest in protecting children from harmful materials, the First Amendment does not justify broad suppressions of speech. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (holding certain restrictions on the transmission of obscene materials over the internet were unconstitutional restrictions on speech). The Supreme Court has stated that it has "repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults." *Id.* at 875 (citations omitted). Generally speaking, however, the State will be allowed to restrict youth access to those products that are deemed obscene. See *Ginsberg v. New York*, 390 U.S. 629, 636 (1968) (noting even constitutionally protected material may be regulated when it comes to protecting children).

233. *Lorillard*, 533 U.S. at 577 (Thomas, J., concurring in part, concurring in judgement).

234. *Id.* at 574 (Thomas, J., concurring in part, concurring in judgement). According to Justice Thomas, "[t]here was once a time when this Court declined to give any First Amendment protection to commercial speech . . . . That position was repudiated . . . . Since then, the Court has followed an uncertain course – much of the uncertainty being generated by the malleability of the four-part balancing test of *Central Hudson*." *Id.* In fact, the Court itself has stated the *Central Hudson* test is not "entirely discrete." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 183-84 (1999). This means all four prongs of the *Central Hudson* test are "interrelated." *Id.* Moreover:

Each raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three. Partly because of these intricacies [many petitioners, judges, and scholars] have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech.

*Id.*

235. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part, concurring in judgement). According to Justice Thomas,

I do not see a philosophical or historical basis for asserting that "commercial" speech is of a "lower value" than "noncommercial" speech . . . . Nor do I believe that the only explanations that the Court has ever advanced for treating "commercial" speech differently from other speech can justify restricting "commercial" speech in order to keep information from legal purchasers so as to thwart what would otherwise be their choices in the marketplace.

*Id.* In *Lorillard*, Justice Thomas went on to state he doubted "whether it is even possible to draw a coherent distinction between commercial and noncommercial speech." *Lorillard*, 533 U.S. at 575

basis for arguing that strict scrutiny should be applied to content-based regulations — the First Amendment, which prohibits the state from restricting free speech.<sup>236</sup> Arguably, the Court has been inconsistent in applying the commercial speech doctrine because there is no clear rationale behind it.<sup>237</sup>

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(Thomas, J., concurring in part, concurring in judgement).

236. *But see* Jo-Jo Baldwin, Note, *No Longer that Crazy Aunt in the Basement, Commercial Speech Joins the Family*, 20 U. ARK. LITTLE ROCK L.J. 163, 166 (1997) (stating there is disagreement over how to interpret the First Amendment). According to Baldwin:

[T]he framers did not clarify how to fulfill the promise of free speech in America, and people disagree about the types of speech the First Amendment protects and the forms of government action it prohibits. As a result, the guarantee of free speech has not received a literal reading in American jurisprudence, and the United States Supreme Court has produced a catalogue of balancing tests and speech categories that determines the boundaries of our right to freedom of speech.

*Id.*

237. *See 44 Liquormart*, 517 U.S. at 519-22 (Thomas, J., concurring in part, concurring in judgement) (discussing the inconsistent ways in which *Central Hudson* has been applied by the Court). Moreover,

Unlike core First Amendment speech, commercial speech has only recently been given constitutional protection. The United States Supreme Court has defined commercial speech as speech that relates solely to the economic interests of the speaker and its audience. Needless to say, the Supreme Court's definition is problematic.

The problem is that speech incident to the sale or promotion of goods and services has a protean quality. First, the line separating commercial from noncommercial speech is nebulous. Speech is sometimes directed toward making the world a better place, sometimes toward making a profit, and frequently toward a combination of both. Absent resort to arbitrary distinctions that elevate form over substance, the difference between speech incident to the sale of products which possesses ideological overtones, and speech incident to the sale of ideas which encourages product sales, is often difficult to discern.

Leonard J. Nannarone, Jr. Esq., *Move Over Joe Camel: Governmental Attempts to Ban Tobacco Advertising*, 45 R.I. BAR JNL. 11, 11 (1997). Nannarone continues by noting the category "commercial speech" is arbitrary. *Id.* He argues that it is both too large and yet too small. *Id.*

This special subset is simultaneously too large, in that it encompasses noncommercial information dressed up as commercial advertising, and too small in that it fails to encompass related variations of speech incident to the sale or promotion of goods and services . . . .

Even assuming that commercial speech can be defined, it is difficult to determine what amount of constitutional protection it deserves. Commercial speech is a hybrid of commerce and speech. It is related both to the sale of goods and services and to the ideas about those goods and services. As it relates to the sale or promotion of those goods and services, it occupies to so-called marketplace of goods and services, where government regulation is regarded as presumptively valid. On the other hand as it relates to speech and ideological expression, it occupies the marketplace of ideas, where content-based government regulation has traditionally been regarded as inherently suspect.

*Id.* at 11-12.

### 3. No Consistent Standard

The Supreme Court may have had the best First Amendment intentions when it enacted the *Central Hudson* test.<sup>238</sup> However, the Court has not been able to apply the test consistently.<sup>239</sup> The test may be too complicated, especially in light of modern society.<sup>240</sup> In addition, the test is highly subjective, encouraging variations in judicial interpretation.<sup>241</sup> Because the Court cannot analyze cases under *Central Hudson* with any sort of predictability, it should not try to force content-based regulations into an intermediate scrutiny analysis.<sup>242</sup> Doing so further dissolves *Central Hudson* and ineffectively protects the First Amendment rights of the speaker.<sup>243</sup>

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238. See *Central Hudson*, 447 U.S. at 562-66. The Court apparently went through great effort to come up with a test that balanced the interests of all those concerned. See *id.* In creating the four-part test, the Court acknowledged the rights of the speaker and the listener, while at the same time acknowledging the rights of the state. *Id.*

239. See also *supra* Part II, notes 60-74 and accompanying text. See, e.g., Aaron A. Schmoll, *Sobriety Test: The Court Walks the Central Hudson Line Once Again in 44 Liquormart, But Passes on a New First Amendment Review*, 50 FED. COMM. L.J. 753, 754 (1998). "If one were to consider the intermediate-level scrutiny given commercial speech as a straight line, the Supreme Court has barely been able to walk it without tripping over its precedents during the past fifteen years." *Id.*

240. Schmoll, *supra* note 239, at 754-55.

[T]he *Central Hudson* test is too complicated and manipulable to provide any certainty of protection. . . . [A]s society becomes more commercialized, the distinction between commercial and noncommercial becomes obscure. Today's political statement is tomorrow's Web-page endorsement. The nature of speech is one of multiple meanings, and it would be contrary to the intent of the First Amendment to reduce speech to its lowest common denominator.

*Id.*

241. See *id.* (arguing the last two prongs of the *Central Hudson* test are subjective).

242. See *id.* at 772-73.

The Court historically has had difficulty analyzing commercial speech. Since the middle of this century, protection for commercial speech has improved from none to some level of intermediate scrutiny. The importance of advertising has seemingly improved in the minds of the Justices, while the Court has begun to more carefully consider the state's motivation for regulation. However, the road the Court has taken . . . since the adoption of *Central Hudson*, fails to consider consistently opposing these forces. In one instance, the Court embraces the state-sponsored paternalism; it sees through it and discards it in the next. Only by adopting an absolute, less-manipulable test can the Court avoid the pitfalls of its own creation.

*Id.*

243. But see Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123, 124 (1996) (stating the Court has recently found in favor of the advertiser for First Amendment challenges). Where desired, *Central Hudson* will allow content-based regulations to undergo only an intermediate scrutiny analysis. *Id.* at 156.

### C. *The Government Interest*

Often the government will have a valid interest at stake.<sup>244</sup> However, it is more important to see that First Amendment safeguards are afforded to the speaker, especially when the government seeks to regulate speech on the basis of content.<sup>245</sup> Applying strict scrutiny to content-based regulations will protect any valid interest the government may have, and it will also protect the speaker's First Amendment rights.<sup>246</sup> The government is free to protect its interest by drafting regulations that will pass strict scrutiny, or alternatively, it can enact content-neutral regulations.<sup>247</sup>

#### 1. Passing the Strict Scrutiny Test

Government regulations that are content-based can still pass strict scrutiny.<sup>248</sup> To pass strict scrutiny, the government would merely have to design regulations that are narrowly tailored and that have no less restrictive alternative.<sup>249</sup> The Massachusetts regulations, as they stood, would not have passed strict scrutiny because of how they were drafted.<sup>250</sup>

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244. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001) (finding the state's interest in preventing underage smoking was substantial). See also *supra* Part I, notes 3-5 and 11-13 (noting the increase in tobacco consumption by minors and the devastating consequences of tobacco addiction).

245. But see Sullivan, *supra* note 243, at 129 (stating there are those who feel that commercial speech deserves no "robust protection at all"). See *supra* notes 22-28 and accompanying text (discussing the importance and meaning behind the First Amendment).

246. But see Nannarone, *supra* note 237 at 44 (noting tobacco advertising bans would likely fail even *Central Hudson* if it was applied more strictly); Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2418 (1996) (arguing a better approach would be a *per se* ban on content-based regulations because the Court is inconsistent in applying strict scrutiny).

247. See *infra* notes 257-265 and accompanying text (discussing how the Massachusetts regulations could be content-neutral).

248. See, e.g., *Burson v. Freeman*, 504 U.S. 191, 195 (1992) (finding strict scrutiny satisfied for a content-based regulation that aimed to prohibit individuals from campaigning within one hundred feet of an election polling place). The regulation at issue in *Burson* was content based. *Id.* at 198. In fact, it was a "facially content-based restriction on political speech in a public forum . . ." *Id.* Yet, the Court found the statute to be constitutional because the state met its burden of proving a compelling interest that was narrowly tailored, with no less restrictive means available. *Id.* at 199-211.

249. *U.S. v. Playboy Entm't Group Inc.*, 529 U.S. 803, 813 (2000) (discussing strict scrutiny and holding that restrictions requiring cable operators to scramble sexually explicit programs, or to restrict such programming to certain hours, failed the strict scrutiny test because there were less restrictive means).

250. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001) (Thomas, J., concurring in part, concurring in judgement) (noting the Massachusetts regulations would have failed even

However, Massachusetts' "1,000 foot rule" may have been drafted in such a way as to pass strict scrutiny.<sup>251</sup> First, assume the State of Massachusetts had a compelling interest in trying to prevent underage smoking.<sup>252</sup> Second, assume the regulation did not require a blanket rule prohibiting tobacco advertising within one thousand feet of playgrounds, public parks, or schools. Rather, the regulation prohibited such advertising within direct sight of those areas where children typically play or gather.<sup>253</sup> Third, assume the State of Massachusetts had *already* taken steps to regulate all other non-speech methods of preventing underage tobacco consumption.<sup>254</sup> Perhaps, then, the regulations could have passed a strict scrutiny.<sup>255</sup> However, even if a state cannot draft

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intermediate scrutiny).

251. See *infra* notes 252-56 and accompanying text (discussing the necessary elements of strict scrutiny).

252. *Lorillard*, 533 U.S. at 561. But see *id.* at 582 (Thomas, J. concurring in part, concurring in judgement) ("Massachusetts asserts a compelling interest in reducing tobacco use among minors. Applied to adults, an interest in manipulating market choices by keeping people ignorant would not be legitimate, let alone compelling."). *Id.*

253. See *id.* at 584. According to Justice Thomas, the majority was correct in finding the "1,000 foot" rule was not narrowly tailored because it was arbitrary. *Id.* Thomas, however, went further in his analysis when he stated:

A prohibited zone defined solely by circles drawn around schools and playgrounds is necessarily overinclusive, regardless of the radii of the circles. Consider, for example, a billboard located within [one thousand] feet of a school, but visible only from an elevated freeway that runs nearby. Such a billboard would not threaten any of the interests respondents assert, but it would be banned anyway, because the regulations take no account of whether the advertisement could even be seen by children.

*Id.* at 585. See also William E. Lee, *The Unwilling Listener: Hill v. Colorado's Chilling Effect on Unorthodox Speech*, 35 U.C. DAVIS L. REV. 387, 390 (2002) (comparing the tailoring of the regulations in *Hill* and the regulations in *Lorillard* and examining the Court's holding on this issue as compared to the two cases).

254. According to Justice Thomas:

In addition to examining a narrower advertising ban, the State should have examined ways of advancing its interest that [did] not require limiting speech at all. Here, [the State] had several alternatives. Most obviously, they could have directly regulated the conduct with which they were concerned. Massachusetts already prohibits the sale of tobacco to minors, but it could take steps to enforce that prohibition more vigorously. It also could enact laws prohibiting the purchase, possession, or use of tobacco by minors. And, if its concern is that tobacco advertising communicates a message with which it disagrees, it could seek to counteract that message with "more speech, not enforced silence."

*Lorillard*, 533 U.S. at 586 (Thomas, J. concurring in part, concurring in judgement) (citations omitted). See also Sullivan, *supra* note 243, at 160 (arguing the states can seek to achieve the same goals by other means). According to Sullivan, the states "might achieve the same consumer protection goals through direct regulation of production and sales, shifting means but not altering ends." *Id.*

255. But see *Lorillard*, 533 U.S. at 587 (Thomas, J. concurring) (arguing that to uphold regulations on tobacco would call into question other types of advertising that produced harmful effects). Justice Thomas stated:

regulations to pass strict scrutiny, it can enact content-neutral regulations.<sup>256</sup>

## 2. The *O'Brien* Test for Content Neutral Regulations

Even if the Commonwealth of Massachusetts could not have satisfied the strict scrutiny test with its content-based regulations, it would not be left without means to protect its interest.<sup>257</sup> States are free to enact content-neutral time, place, and manner regulations.<sup>258</sup> Such

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[I]t seems appropriate to point out that to uphold . . . tobacco regulations would be to accept a line of reasoning that would permit restrictions on advertising for a host of other products. . . . Tobacco use is, we are told, "the single leading cause of preventable death in the United States." The *second* largest contributor to mortality rates in the United States is obesity. . . . Respondents say that tobacco companies are covertly targeting children in their advertising. Fast food companies do so openly. Moreover, there is considerable evidence that they have been successful in changing children's eating behavior . . . . So even though fast food is not addictive in the same way tobacco is, children's exposure to fast food advertising can have deleterious consequences that are difficult to reverse.

*Id.* at 587-88 (emphasis in original) (citations omitted). Justice Thomas continues by making a similar analogy to alcohol. *Id.* at 588. He mentions alcohol related problems and notes children oftentimes view alcohol advertising, and yet the state did not place such comparable restrictions on its advertising. *Id.* He concludes by noting that Massachusetts had "identified no principle of law or logic that would preclude the imposition of restrictions on fast food and alcohol advertising similar to those they seek to impose on tobacco advertising." *Id.* at 589. See also Mark R. Ludwikowski, *Proposed Government Regulation of Tobacco Advertising Uses Teens to Disguise First Amendment Violations*, 4 COMMLAW CONSPICUOUS 105, 110 (1996) (discussing the argument that not all advertising of harmful products can be banned).

256. See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (holding an ordinance prohibiting camping in parks did not violate the First Amendment). Generally speaking:

Expression, whether oral or written or symbolized by conduct, is subject to *reasonable* time, place, or manner restrictions. [The Supreme Court] has often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

*Id.* at 293 (emphasis added) (citations omitted).

257. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (establishing a test for content-neutral regulations); Stan M. Weber, Note, *City of Ladue v. Gilleo*, 18 U. ARK. LITTLE ROCK L.J. 157, 164 (1995) (discussing content-neutral regulations as compared to content-based restrictions).

258. See Weber, *supra* note 257, at 164. Content-neutral time, place, and manner restrictions are those that regulate speech without taking into consideration the content of the speech. *Id.* "Often these restrictions aim at the noncommunicative aspects speech." *Id.* See also *City of Erie v. Pap's A.M.*, 529 U.S. 277, 290 (2000) (finding an ordinance prohibiting nude dancing was not targeting erotic expression, but public nudity in general). *But see Texas v. Johnson*, 491 U.S. 397, 412 (1989) (finding strict scrutiny applies to content-based non-speech restrictions). Certain restrictions that are seemingly content-neutral *can* be subject to strict scrutiny if those restrictions intend to restrict conduct intended to express an idea. *Id.* at 404. According to the *Johnson* Court:

The First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we

regulations, which are subject to an intermediate level of scrutiny, are constitutional if they pass the test set forth in *O'Brien*.<sup>259</sup> Basically, content-neutral regulations must further an important or substantial government interest, be unrelated to the suppression of free speech, be no greater than essential, and allow alternative means of communication.<sup>260</sup>

The Massachusetts regulations were not content-neutral.<sup>261</sup> This is not to say the government could not have drafted a content-neutral set of regulations.<sup>262</sup> It would have been possible for the government to have adopted restrictions on all forms of advertising.<sup>263</sup> For instance, the government could have attempted to prohibit the advertisement of *all* adult products within a certain area of parks, playgrounds and schools.<sup>264</sup> However, it must be noted that a state choosing to blindly wipe out all forms of advertising must have an extremely substantial interest, because

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have rejected “the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea,” we have acknowledged that conduct may be “sufficiently imbued with elements of communication to fall within the scope of the [First Amendment].”

*Id.* (citations omitted).

259. *O'Brien*, 391 U.S. at 377; *supra* note 32 (discussing the test for content-neutral time, place, and manner restrictions).

260. *See O'Brien*, 391 U.S. at 377.

261. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 574 (2000) (Thomas, J., concurring in part, concurring in judgement). Although Justice Thomas did not analyze the Massachusetts regulations under intermediate scrutiny, he did note they were not content-neutral restrictions. *Id.*

262. *Cf. Hill v. Colorado*, 530 U.S. 703, 725-26 (2000) (holding a regulation prohibiting all speech within one hundred feet of a healthcare facility was a valid restriction of time, place, and manner). In *Hill*, the State of Colorado enacted a statute, which made it unlawful for one person to approach another, without consent, for the purpose of “passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person. . . .” *Id.* at 707. While the statute did not regulate the content of the prohibited speech, it made it more difficult for persons to give unsolicited advice. *Id.* The Court found the statute constitutional for three reasons. *Id.* at 719. First, the Court stated it was not a regulation of speech, but a regulation of place. *Id.* Second, the Court noted that the regulation was not adopted in order to prohibit any particular message. *Id.* Third, the Court found the state had a valid interest in protecting a person’s rights to access and privacy and providing police with clear guidelines. *Id.* at 719-20.

263. *But see, Lorillard*, 533 U.S. at 580 (Thomas, J. concurring in part, concurring in judgement). According to Justice Thomas, a state cannot blindly restrict advertising. *See id.* “Even if [a state] has a valid interest in regulating speech directed at children — who, it argues, may be more easily misled . . . it may not pursue that interest at the expense of the free speech rights of adults.” *Id.*

264. *But see id.* According to Justice Thomas, “[i]t is difficult to see any stopping point to a rule that would allow a State to prohibit all speech in favor of an activity in which it is illegal for minors to engage.” *Id.* However, in *FCC v. Pacifica Foundation*, the Court held the government had a valid interest in protecting children from an offensive radio broadcast. 438 U.S. 726, 749 (1978). The Court’s holding seemed to be based on the accessibility of the material. *See id.* at 749-50. According to the Court, “[t]he ease with which children may obtain access to broadcast material . . . justify special treatment of indecent broadcasting.” *Id.* at 750.

the First Amendment rights of adult listeners would be at stake.<sup>265</sup>

### 3. No “Vice” Exception

“The extent to which government ought to regulate the promotion of so-called ‘vice’ products like tobacco and alcohol, and activities such as gambling, is one of the most controversial contemporary advertising issues.”<sup>266</sup> Nevertheless, the Supreme Court has refused to apply a “vice” exception to the commercial speech doctrine.<sup>267</sup> Because there is

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265. See, e.g., *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 75 (1998) (finding a statute prohibiting the mailing of contraceptive information unconstitutional). In *Bolger*, the Court was forced to decide whether a statute prohibiting a person from mailing information relating to contraception was unconstitutional. *Id.* at 61. In finding the statute unconstitutional, the Court looked at the state’s interest and the interests of the adult listener. *Id.* at 68-75. In an oft-cited statement, Justice Marshall noted “[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.” *Id.* at 74. Moreover, the Court has noted certain restrictions, designed to protect minors, can be overbroad. See *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957). In *Butler*, the Court found a Michigan statute regulating adult materials was unconstitutional. *Id.* at 384. According to the Court, “The State insists that by . . . quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. *Surely, this is to burn the house to roast the pig.*” *Id.* at 383. (emphasis added).

266. Michael Hoefges and Milgros Rivera-Sanchez, “Vice” Advertising Under the Supreme Court’s Commercial Speech Doctrine: The Shifting Commercial Speech Doctrine, 22 HASTINGS COMM. & ENT L.J. 345, 347 (2000). According to Hoefges and Rivera-Sanchez:

Advertisers spend massive amounts of money each year seeking customers for legal products such as cigarettes, smokeless tobacco, beer, wine, and distilled spirits; and lawful gambling facilities such as state lotteries, private and public casinos, and horse and dog racing tracks, among others.

Often, when federal or state governments seek to curtail the potentially harmful effects of these products and activities, restrictions on advertising are politically attractive. The legislative rationale often assumes that curtailing advertising for a product like alcohol, for instance, will dampen consumer demand and thus alleviate social costs related to harmful secondary effects, like alcoholism.

*Id.*

267. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482, n. 2 (1995) (suggesting it would be difficult to define a “vice” exception to the *Central Hudson* test). See generally P. Cameron Devore, *First Amendment Protection of “Vice” Advertising: Current Commercial Speech Hot Buttons*, 15 COMM. LAW. 3 (discussing the First Amendment and how the Court has applied it to the so-called “vices”). It is also important to note that once something is deemed a “vice” and its advertising is prohibited, the possibility of a slippery slope becomes great. Ludwikowski, *supra* note 255, at 110. If restrictions, such as tobacco restrictions are implemented,

[W]ill the simple appearance of cigarettes in movies or on television thereafter be banned because celebrities smoking may negatively influence children? It is not improbable to suspect that a ban on tobacco advertising [would] lead to gags on manufacturers of other products that at any given time may be considered politically incorrect.

*Id.* Moreover, the government may not act as a censor. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975). In discussing the effects of certain types of speech upon the unwilling listener, the *Erznoznik* Court stated:

no vice exception, the argument that strict scrutiny should apply to content-based restrictions of a commercial nature is even stronger because states will undoubtedly attempt to circumvent *Central Hudson* to prohibit the advertising of so-called “vices.”<sup>268</sup>

#### *D. Strict Scrutiny Prevents the Erosion of First Amendment Principles*

It is important that the Court strike a balance between valid, legitimate government interests and maintenance of First Amendment safeguards.<sup>269</sup> The First Amendment focuses not only on the rights of the speaker, but also on the rights of the listener.<sup>270</sup> It is important the listener have access to truthful, non-misleading information in order to prevent government encroachment on individual rights.<sup>271</sup> Strict scrutiny would ensure that the principles of the First Amendment are

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A State or municipality *may* protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content. *But* when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power.

*Id.* (emphasis added) (citations omitted).

268. *See generally* Kathleen E. Burke, Greater New Orleans Broadcasting Association v. United States: *Broadcasters Have Lady Luck, or At Least the First Amendment, on Their Side*, 35 NEW ENG. L. REV. 471, 497-99 (2001) (discussing the government’s attempts at circumventing *Central Hudson* by way of a “vice” exception).

269. *See* notes 22-28 and accompanying text (discussing the importance and history of the First Amendment).

270. *See* Robert T. Cahill, Jr., Casenote, *City of Cincinnati v. Discovery Network, Inc.: Towards Heightened Scrutiny For Truthful Commercial Speech?*, 28 U. RICH. L. REV. 225, 252 (1994) (stating it is important for commercial speech regulations to be examined from the listener’s perspective). Cahill advises that the Court adopt a three-tiered approach to analyzing commercial speech regulations. *Id.* He proposes that:

The first tier pertains to commercial speech that is untruthful, misleading, coercive, or related to an unlawful activity. Regulations which suppress this type of commercial speech will be upheld by the Court so long as the state has a rational basis to conclude that the regulation advances the state’s interest in preventing untruthful speech. The second tier involves regulations “designed to protect consumers from misleading or coercive speech” or a regulation seeking to remedy the secondary effects of misleading speech. These regulations are entitled to *Central Hudson*’s intermediate level of scrutiny. The third tier involves regulations that suppress “truthful commercial speech designed to serve some other government purpose.” These regulations will only be upheld if the regulation survives strict scrutiny.

...

*Because the listener has a substantial interest in hearing truthful, commercial speech, commercial speech deserves a high level of judicial scrutiny.*

*Id.* at 251-52 (emphasis added) (citations omitted).

271. *Cf.* John M. Faust, Note, *Of Saloons and Social Control: Assessing the Impact of State Liquor Control on Individual Expression*, 80 VA. L. REV. 745, 745-46 (1994) (arguing attempts by the government to institute controls on liquor allow a “quiet intrusion” on individual rights).

upheld by forcing states to prove the necessity of any proposed regulations and by ensuring that the state regulates speech only as a last resort.<sup>272</sup>

## V. CONCLUSION

The Supreme Court should apply strict scrutiny to content-based regulations. It is not enough for the Court to apply the watered-down commercial speech doctrine every time profit motivates the speaker. Surely the State may have a valid interest in regulating speech. The State's interest in *Lorillard* was valid — even noble. But the Massachusetts regulations *were* content-based and should have been analyzed as such. Hopefully, the next time the Court decides this issue it will follow Justice Thomas' lead. He was correct in his analysis of *Lorillard*. He is also correct when he noted that:

No legislature has ever sought to restrict speech about an activity it regarded as harmless and inoffensive. Calls for limits on expression always are made when the specter of some threatened harm is looming. The identity of the harm may vary. People will be inspired by totalitarian dogmas and subvert the Republic. They will be inflamed by racial demagoguery and embrace hatred and bigotry. Or they will be enticed by cigarette advertisements and choose to smoke, risking disease. It is therefore no answer for the State to say that the makers of cigarettes are doing harm: perhaps they are. But in that respect they are no different from the purveyors of other harmful products, or the advocates of harmful ideas. When the State seeks to silence them, they are all entitled to the protection of the First Amendment.<sup>273</sup>

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272. *But see* Timothy R. Mortimer, 44 *Liquormart, Inc. v. Rhode Island: A Toast to the First Amendment*, 32 *NEW ENG. L. REV.* 1049, 1091-92 (1998) (stating that it is unlikely the Court will abandon *Central Hudson* in favor of strict scrutiny). However, Mortimer notes "the level of scrutiny under which the Central Hudson test is applied is in question." *Id.* at 1091. Moreover, he states that "the Court's current trend is toward, although still shy of, affording commercial speech the same level of protection other forms of protected speech enjoy." *Id.* at 1092.

273. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 590 (2001) (Thomas, J., concurring in part, concurring in judgement).