Up in Smoke? Commercial Free Speech in the United States and the European Union: Why Comprehensive Tobacco Advertising Bans Work in Europe, but Fail in the United States

"Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensible."[1]

I. INTRODUCTION

On June 22, 2009, President Barack Obama signed the Family Smoking Prevention and Tobacco Control Act (Smoking Prevention Act) into law, authorizing new methods to fight youth smoking.[2] The new law provides the legislative approval necessary for the Food and Drug Administration (FDA) to regulate the tobacco industry.[3] Advertising and marketing restrictions designed to thwart the tobacco industry's attempts to communicate with American youths are among the new rules and regulations proposed in the Smoking

1. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

2. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009); *see also* Remarks on Signing the Family Smoking Prevention and Tobacco Control Act of 2009, 2009 DAILY COMP. PRES. DOC. 00493 (June 22, 2009), *available at* http://www.gpoaccess.gov/presdocs/2009/DCPD-200900493.pdf [hereinafter Remarks] (articulating goals and desired impact of new legislation). In discussing the impact of the Smoking Prevention Act, President Obama stated: "This legislation will not ban all tobacco products, and it will allow adults to make their own choices. But it will also ban tobacco advertising within a thousand feet of schools and playgrounds." Remarks, *supra*.

3. *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, §3(1), 123 Stat. 1776, 1781 (2009) (providing FDA authority to regulate tobacco industry). *See generally* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,615-18 (proposed Aug. 28, 1996) (to be codified at 21 C.F.R. pt. 897) (outlining specific advertising restrictions focused on curbing youth smoking); Meghan McCarthy & Matthew Spieler, *HR 1256—Family Smoking Prevention and Tobacco Control Act*, CQ BILLANALYSIS, July 30, 2009, *available at* 2009 WLNR 14967316 (summarizing specifics of legislation). The law authorizes the FDA to restrict certain advertising within stores that limited service to persons above the age of eighteen. *See* McCarthy & Spieler, *supra*; *see also* Margie Arnett, Opinion, *Tobacco Bill Will Save Lives, Money*, SAN BERNARDINO COUNTY SUN, June 30, 2009, *available at* 2009 WLNR 12552902 (citing beneficial aspects of new act regarding youth smoking). The new law prohibits tobacco advertising within one thousand feet of schools and playgrounds, and allows point-of-sale advertising only within adult-oriented facilities. *See* Arnett, *supra*.

Prevention Act.[4] The new law mimics legislation passed within the European Union (EU), which instituted a complete ban on tobacco advertising in print, radio, and national services media.[5] Although the World Health Organization (WHO) argues that comprehensive bans on advertising—like the one implemented in the EU—are effective means to prevent youth smoking, a major commercial free speech battle looms on the horizon—one that may prove fatal to the Smoking Prevention Act.[6]

Both the United States and the EU provide protection for at least some commercial speech.[7] The difference between the two lies in the degree of protection afforded to such speech, and in what situations the government can regulate or ban commercial speech.[8] In the United States, the Supreme Court has recognized the importance of protecting commercial free speech that is neither misleading nor deceptive.[9] In the recent case *Lorillard Tobacco Co. v.*

4. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,617 (proposed Aug. 28, 1996) (to be codified at 21 C.F.R. § 897.30) (outlining new tobacco advertising restrictions).

5. Council Directive 2003/33, 2003 O.J. (L 152) 16-19 (EC) (creating comprehensive ban on tobacco products in print and visual media). The EU directive limits advertising in the press and printed publications to only those publications intended solely for the cigarette industry. *See id.*

6. *See* WORLD HEALTH ORG., WHO REPORT ON THE GLOBAL TOBACCO EPIDEMIC, 2008: THE MPOWER PACKAGE 35-38 (2008) (assessing impact of tobacco advertising on youth smoker population). The WHO claims that tobacco industry officials realize that people are less likely to start smoking once they reach adulthood and develop the ability to make informed decisions. *See id.* at 38. The tobacco industry falsely associates tobacco products with glamour, youth, and sex appeal through its advertising. *See id.* at 36. The WHO promotes advertising restrictions as highly effective, noting that countries with comprehensive bans saw an average reduction in cigarette consumption of nine percent over ten years. *See id.* at 37. *See generally* Duff Wilson, *Tobacco Firms Sue to Block Marketing Law*, N.Y. TIMES, Sept. 1, 2009, at B1, *available at* http://www.nytimes.com/2009/09/01/business/01tobacco.html (reporting tobacco industry's immediate opposition to new legislation). Approximately one month following President Obama's signing statement, many of the nation's largest tobacco companies joined forces and filed a free speech lawsuit in Kentucky. *Id.* The tobacco industry focused a majority of its argument on the curtailing of advertising in the press and in certain publications, as well as the ban on billboards within one thousand feet of schools and playgrounds. *See id.*; *see also* John Reid Blackwell, *Lawsuit Challenges Tobacco Advertising Rules*, RICH. TIMES DISPATCH, Sept. 1, 2009, http://www2.timesdispatch.com/rtd/business/local/article/B-TOBA01_20090831-215404/289625 (noting tobacco industry's perceived inability to effectively communicate with adults). Tobacco companies argue that the new regulations "severely restrict the few remaining channels [they] have to communicate with adult tobacco consumers." Blackwell, *supra*.

7. *See* U.S. CONST. amend. I (establishing right to freedom of speech); Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, E.T.S No. 5 (1953) [hereinafter European Convention on Human Rights] (providing protection to certain forms of expression).

8. *Compare* European Convention on Human Rights, *supra* note 7, *with* U.S. CONST. amend. I.

9. *See* U.S. CONST. amend. I. The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id. See generally* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (rejecting Massachusetts ban on advertising as violation of commercial free speech); Reno v. ACLU, 521 U.S. 844 (1997) (holding content-based blanket speech regulations unconstitutional violations of free speech); Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996) (holding FCC orders regarding obscenities on television unconstitutional); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (concluding Rhode Island statute banning price advertising for alcohol violated commercial free speech);

Reilly,[10] the Supreme Court held that a Massachusetts tobacco advertising regulation violated commercial free speech because the rules were not narrowly tailored to avoid infringing the rights of able-minded adults.[11] Although the Court did not afford commercial speech the heightened level of protection that guards noncommercial expression—both political and religious—it held that legislators must narrowly tailor restrictions on commercial speech to meet specific objectives.[12] By contrast, both the European Convention on Human Rights (ECHR) and the European Court of Justice (ECJ) afford less protection to commercial speech and more deference to lawmakers, allowing broad prohibitions and regulations given certain justifications.[13]

In 2003, the EU established sweeping tobacco advertising restrictions for all print media.[14] Germany challenged the new restrictions the following year, citing violations of commercial free speech principles laid out in the ECHR.[15] The ECJ held that although the regulations did violate the freedom of expression of advertisers and promoters, the ECHR states that commercial freedom of expression is subject to limitations that allow lawmakers to effectively protect consumers and the general public.[16] EU lawmakers, therefore, have an inherent advantage compared to their U.S. counterparts when attempting to restrict or ban certain types of commercial advertising.[17]

This Note will begin with an overview of historical developments leading up to the passage of the Smoking Prevention Act.[18] This Note will then examine

Edenfield v. Fane, 507 U.S. 761 (1993) (holding CPAs could communicate nondeceptive information to potential clients); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (holding state violated attorney's commercial free speech rights by prohibiting newspaper advertising); Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 35 (1980) (establishing four-part analysis in determining commercial free speech violations); Carey v. Population Servs. Int'l., 431 U.S. 678 (1977) (holding New York law banning any advertisement for contraceptives unconstitutional).

10. 533 U.S. 525 (2001).

11. *See id.* at 529 (noting overly broad restrictions impinged on rights of adult listeners).

12. *See id.* at 558-59 (holding restrictions require narrow tailoring). The Court noted that legislators must carefully craft legislation in a manner that directly advances their proposed goal. *See id.* According to the Court, banning advertising within one thousand feet of schools and playgrounds effectively created a complete ban in metropolitan areas, and therefore failed to meet the constitutional requirement of a narrowly tailored restriction. *Id.*

13. *See* Council Directive 2003/33, 2003 O.J. (L 152) 16-19 (EC); Case C-380/03, Germany v. Parliament, 2006 E.C.R. I-11573 (holding EU laws comprehensively restricting tobacco advertising across Europe did not violate commercial free speech).

14. *See* Council Directive 2003/33, 2003 O.J. (L 152) 16-19 (EC) (implementing new tobacco advertising restrictions).

15. *See* Case C-380/03, Germany v. Parliament, 2006 E.C.R. I-11573 (holding commercial free speech subject to legitimate government intervention).

16. *See id.* (recognizing limitations on freedom of commercial speech in Europe).

17. *Compare* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (holding government to high burden when restricting commercial speech) *with* Case C-380/03, Germany v. Parliament, 2006 E.C.R. I-11573 (exhibiting deference to government intervention in area of commercial advertising).

18. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 2, 123 Stat. 1776, 1776-81 (2009) (outlining findings supporting enactment of new tobacco control regime); *see also* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and

the origins of commercial free speech jurisprudence in both the United States and the EU.[19] Next, this Note will analyze the differences in the judicial interpretation of commercial free speech in the United States and the EU, as well as the constitutional difficulties that lie ahead for the Smoking Prevention Act.[20] Finally, this Note will discuss the pros and cons of constitutionally valid strategies—such as higher taxes on cigarettes and clean air requirements—that lawmakers may adopt to achieve the goal of reducing youth smoking rates.[21]

II. HISTORY

A. The History Behind the Family Smoking Prevention and Tobacco Control Act

In 1996, the FDA asserted control over tobacco regulation after determining the definition of "drug" found in the Food Drug and Cosmetic Act (Cosmetic Act) included tobacco products.[22] With this newly found authority, the FDA quickly drafted new regulations and rules restricting the sale and distribution of tobacco products to minors.[23] Before the FDA codified the new regulations,

Adolescents, 61 Fed. Reg. 44,396, 44,615-18 (proposed Aug. 28, 1996) (to be codified at 21 C.F.R. pt. 897) (setting forth new tobacco advertising restrictions).

19. *See infra* Parts II.B & II.C.

20. *See infra* Parts III.A & III.B.

21. *See infra* Part III.C.

22. *See* Nicotine in Cigarettes and Smokeless Tobacco Is a Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination, 61 Fed. Reg. 44,619, 45,219-52 (Aug. 28, 1996) (analyzing jurisdictional authority concerning tobacco regulation). The FDA determined that tobacco products, such as cigarettes and smokeless tobacco, qualified as a "drug" or "device" under definitions of the Cosmetic Act. *See id.* at 44,628. A "drug," as defined by the Cosmetic Act, is an article—other than food—intended to affect the body's structure or function. *Id.* at 44,629; *see also* 21 U.S.C. § 321 (2006) (defining "drug" and "device" under Cosmetic Act). The FDA concluded tobacco products fell within the definitions of "drugs" and "devices" because nicotine is highly addictive, alters "the structure and function of the body," and because "evidence establishes that [tobacco products] are intended by the manufacturers to affect the structure and function of the body." *See* Nicotine in Cigarettes and Smokeless Tobacco Is a Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination, 61 Fed. Reg. at 44,628-29, 40. The FDA claimed regulatory control over the distribution and manufacturing of tobacco products, because it found such products constituted both a drug and a device to deliver nicotine. *See id.* at 44,628.

23. *See generally* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,615-18 (proposed Aug. 28, 1996) (to be codified at 21 C.F.R. pts. 801, 803-04, 807, 820, 897) (creating regulatory scheme for distribution and sale of tobacco products). The proposed regulations focused heavily on advertising, creating restrictions for both manufacturers and distributors. *Id.*

> § 897.30 Scope of permissible forms of labeling and advertising.
> (a)(1) A manufacturer, distributor, or retailer may, in accordance with this subpart D, disseminate or cause to be disseminated advertising or labeling which bears a cigarette or smokeless tobacco brand name (alone or in conjunction with any other word) or any other indicia of tobacco product identification, in newspapers; in magazines; in periodicals or other publications (whether periodic or limited distribution); on billboards, posters, and placards; in nonpoint-of-sale promotional material

however, the Supreme Court determined that the agency lacked regulatory authority over the tobacco industry without explicit authorization from Congress.[24] The Court's decision did not, however, answer any questions regarding the constitutionality of such advertising regulations under the First Amendment.[25]

On June 22, 2009, President Barack Obama signed into law the Smoking Prevention Act, thereby granting the FDA regulatory authority over the tobacco industry.[26] The Smoking Prevention Act adopted the same advertising restrictions the FDA proposed in 1996—preventing tobacco advertisements within one thousand feet of public parks and schools, restricting print media advertising, and limiting tobacco advertisements to mere black and white type.[27] The outdoor advertising restrictions the Smoking Prevention Act

> (including direct mail); in point-of-sale promotional material; and in audio or video formats delivered at a point-of-sale.
>
> (2) A manufacturer, distributor, or retailer intending to disseminate, or to cause to be disseminated, advertising or labeling for cigarettes or smokeless tobacco in a medium that is not listed in paragraph (a)(1) of this section, shall notify the agency 30 days prior to the use of such medium. The notice shall describe the medium and discuss the extent to which the advertising or labeling may be seen by persons younger than 18 years of age . . . .
>
> (b) No outdoor advertising for cigarettes or smokeless tobacco, including billboards, posters, or placards, may be placed within 1,000 feet of the perimeter of any public playground or playground area in a public park . . . elementary school, or secondary school.

Id. at 44,617.

24. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000) (holding FDA lacked authority to control tobacco industry). The *Brown & Williamson* Court noted the importance of and need for tobacco regulations, but concluded that the executive branch overstepped its authority without consent from Congress. *See id.* The Court observed that Congress not only refrained from granting authority over the tobacco industry to the FDA, but based on the structure of the Cosmetic Act, Congress intentionally excluded tobacco regulation from FDA powers. *See id.* at 160-61.

25. *See id.* (neglecting to address First Amendment issue).

26. *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 3(1), 123 Stat. 1776, 1781 (2009) (granting authority over tobacco industry to FDA); *see also* Remarks, *supra* note 2 (outlining goals of FDA control over tobacco). President Obama stated his desire to reduce the rate of youth smoking in the United States, noting that one out of five adolescents are smokers by the time they leave high school. *Id.* The president also admonished the tobacco industry for actively targeting the youth population as customers. *Id.* President Obama further claimed that the FDA's new advertising regulations would curb youth smoking by restricting the methods by which tobacco manufacturers and distributors market their products. *Id.*; *see also* McCarthy & Spieler, *supra* note 3 (summarizing specifics of legislation).

27. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 2(30), 123 Stat. 1776, 1778-79 (2009) (adopting standards set forth in FDA regulations). Congress found the formerly proposed regulations consistent with the goals and objectives of the Smoking Prevention Act. *Id.* Congress also determined that the FDA regulations existed within the confines of the Constitution. *Id.* The Smoking Prevention Act credits the FDA advertising restrictions as being "narrowly tailored" to the goal of preventing youth smoking without inhibiting the ability of adults to receive information regarding the legal purchase of tobacco products. *Id.* § 2(32). The Smoking Prevention Act states that any less restrictive measures cannot effectively curb youth smoking. *Id.* § 2(31); *see also* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,615-18 (proposed Aug. 28, 1996) (to be codified at 21 C.F.R. pt. 897) (supporting notion of Smoking Prevention Act as least restrictive measure). *But see* R. GEORGE WRIGHT, SELLING WORDS: FREE SPEECH IN A COMMERCIAL

adopted are subject to a final regulation the Secretary of Health and Human Services (HHS) issued after consideration of the advertising restrictions within the scope of current First Amendment jurisprudence.[28]

In September 2009, several tobacco companies filed suit in the United States District Court in Bowling Green, Kentucky.[29] The tobacco companies claimed that the new advertising restrictions set out in the Smoking Prevention Act violated their First Amendment commercial free speech rights.[30] In *Commonwealth Brands, Inc. v. United States*,[31] the United States District Court for the Western District of Kentucky heard the tobacco industry's challenge to the Smoking Prevention Act.[32] The court held that the Smoking Prevention Act restrictions limiting tobacco advertisement to black and white text violated the tobacco industry's commercial free speech rights and enjoined the government from enforcing these restrictions.[33] The court reserved judgment about the constitutionality of the outside advertising bans the Smoking Prevention Act proposed.[34] The court held the issue unripe because the Secretary of HHS had not yet made a final regulation concerning the proposed outdoor advertising restrictions.[35] According to the Smoking Prevention Act, the Secretary of HHS

CULTURE 86-87 (1997) (claiming tobacco advertising has less influence over minors than commonly thought). Evidence and studies performed in both the United States and Europe have reached conflicting conclusions about the effect of tobacco advertising on youth smoking. *See id.* at 87. The intent of tobacco advertising restrictions might be symbolic of the government's condemnation of cigarettes rather than a result of pragmatism. *See id.* at 89.

28. *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 102(a)(2)(E), 123 Stat. 1776, 1830-31 (2009) (granting Secretary of HHS final authority over advertising restrictions). The statute states:

> Except as provided in this subsection, the final rule published under paragraph (1), shall be identical in its provisions to part 897 of the regulations promulgated by the Secretary of Health and Human Services in the August 28, 1996, issue of the Federal Register (61 Fed. Reg. 44615–44618). Such rule shall . . . include such modifications to section 897.30(b), if any, that the Secretary determines are appropriate in light of governing First Amendment case law, including the decision of the Supreme Court of the United States in Lorillard Tobacco Co. v. Reilly (533 U.S. 525 (2001)) . . . .

Id.

29. *See* Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512, 521-22 (W.D. Ky. 2010) (stating tobacco companies' argument concerning First Amendment rights).

30. *See* Wilson, *supra* note 6 (outlining constitutional objection to Smoking Prevention Act); *see also* Blackwell, *supra* note 6 (discussing tobacco companies' legal challenge to Smoking Prevention Act). The tobacco industry acknowledged the FDA's authority to regulate the tobacco industry, but viewed the new advertising restrictions as violating their commercial free speech rights. *See* Blackwell, *supra* note 6.

31. 678 F. Supp. 2d 512 (W.D. Ky. 2010).

32. *Id.* at 519.

33. *See id.* at 525-26 (holding advertising restrictions not narrowly tailored). The *Commonwealth Brands* court relied on the Supreme Court's earlier decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York.*, 447 U.S. 557 (1989), to reach its conclusion. *See Commonwealth Brands*, 678 F. Supp. 2d at 525-26; *see also infra* notes 54-61 and accompanying text (discussing *Central Hudson* standard).

34. *Commonwealth Brands*, 678 F. Supp. 2d at 535-36 (determining outdoor advertising challenge unripe).

35. *See id.*; *see also* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, §

had until March 22, 2010, to modify or implement the proposed outdoor advertising restrictions.[36]

On March 19, 2010, the Secretary of HHS issued a final regulation concerning the advertising issues contained within the Smoking Prevention Act.[37] The Secretary of HSS called for further reflection and study of the effects outdoor advertising had on youth smoking.[38] As a result of the Secretary's determination, the FDA will solicit data and research in an effort to carefully craft outdoor advertising restrictions in light of recent First Amendment jurisprudence.[39] Currently, the Secretary of HHS reserves any implementation of the proposed outdoor advertising restrictions until the FDA adequately researches the issue.[40] In the final regulation, the Secretary also made note of the government's intention to appeal the decision the court rendered in *Commonwealth Brands, Inc. v. United States* regarding the color and placement of advertising restrictions.[41]

B. Commercial Free Speech and Tobacco Advertising Regulation in the United States

Until the middle of the twentieth century, the Supreme Court of the United States excluded commercial speech from the shield of First Amendment free speech protection.[42] For more than thirty years, *Valentine v. Chrestensen*[43]

102(a)(2)(E), 123 Stat. 1776, 1830-31 (2009) (instructing Secretary of HHS to implement restrictions by designated date).

36. *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 102(a)(1), 123 Stat. 1776, 1830 (requiring Secretary of HHS to implement final ruling within 180 days of publication).

37. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 75 Fed. Reg. 13,225 (Mar. 19, 2010) (to be codified at 21 C.F.R. pt. 1140) (promulgating rules regarding sale and distribution of tobacco products). The ruling fulfilled the requirement that the Secretary of HHS issue a final rule under the Smoking Prevention Act. *See generally* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 102(a)(2)(E), 123 Stat. 1776, 1830-31 (2009).

38. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 75 Fed. Reg. 13,225, 13,226 (Mar. 19, 2010) (to be codified at 21 C.F.R. pt. 1140) (calling for further contemplation of effects of outdoor tobacco advertising). The final ruling states that the FDA carefully considered modifying the proposed outdoor advertising restrictions based on the ruling in *Lorillard*. *Id.* The FDA published an advance notice of proposed rulemaking (ANPR) requesting additional information regarding outdoor advertising. *Id.*

39. *See id.* (discussing FDA's plan to use further information in rulemaking process).

40. *See id.* The FDA intends to use the information on outdoor advertising to help frame future restrictions within the confines of recent developments in commercial free speech jurisprudence. *See id.*

41. *See id.* (recognizing appeal of *Commonwealth Brands* decision); *see also* Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512, 525-26 (W.D. Ky. 2010) (holding Smoking Prevention Act violated free speech of tobacco companies with regard to color advertising). The tobacco companies also challenged those restrictions in the Smoking Prevention Act banning color from all tobacco advertising and labels. *See Commonwealth Brands*, 678 F. Supp. 2d at 525-26. The *Commonwealth Brands* court determined that the government overextended its reach in banning all color advertising, thus failing to narrowly tailor the restrictions under the *Central Hudson* framework. *See id.*

42. *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (holding commercial advertising not entitled free speech protection under First Amendment), *abrogated by* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976). The *Valentine* Court noted that the legislature could regulate

provided the controlling rule regarding commercial speech and the First Amendment.[44] In *Valentine*, the Court distinguished commercial speech from other forms of solicitation-based expression such as political and religious recruitment.[45] The *Valentine* Court granted free speech protection to noncommercial communications, but held that commercial speech failed to carry the requisite public interest required for protection under the First Amendment.[46] The Court's recognition of some commercial free speech rights—although minimal—began in the 1970s with *Bigelow v. Virginia*.[47] In *Bigelow*, the Court held that certain types of commercial speech may earn protection under the First Amendment and invalidated a Virginia statute prohibiting advertisement of abortion services.[48] The *Bigelow* Court balanced the importance of commercial expression against the state's interest in protecting the public—one of the first instances in which the Court recognized commercial speech protection.[49]

speech of a purely commercial nature. *See id.* at 54-55; *see also* Emily Erickson, *Disfavored Advertising: Telemarketing, Junk Faxes and the Commercial Speech Doctrine*, 11 COMM. L. & POL'Y 589, 594 (2006) (discussing *Valentine* holding). Although the Court held that the government could not suppress opinion or information, it could put restraints on commercial advertising. *See Valentine*, 316 U.S. at 54-55; *see also* EDWIN P. ROME & WILLIAM H. ROBERTS, CORPORATE AND COMMERCIAL FREE SPEECH: FIRST AMENDMENT PROTECTION OF EXPRESSION IN BUSINESS 11-33 (1985) (analyzing Court's mid-1900s reluctance to protect commercial speech).

43. 316 U.S. 52 (1942).

44. *See id.* at 54-55 (outlining standard for free speech in solicitation situations).

45. *See id.*; *see also* ROME & ROBERTS, *supra* note 42, at 12-28 (analyzing conflict between commercial speech and protected speech after *Valentine*). The Court's decisions after *Valentine* blurred the line between religious solicitation and commercial advertising. *See* ROME & ROBERTS, *supra* note 42, at 20. Constant friction occurred as lawmakers in various communities used *Valentine*'s ruling to stop the spread of the Jehovah's Witness movement. *Id.* at 20-21. Lawmakers created ordinances banning the solicitation of funds and members by the Jehovah's Witnesses, characterizing these activities as unprotected under the ruling in *Valentine*. *Id.* at 21-22. The prevalence of ordinances directed at Jehovah's Witnesses forced the Court to distinguish between "purely" commercial speech and other speech protected under the Constitution. *See id.* at 22-28; *see also* Murdock v. Pennsylvania, 319 U.S. 105, 110 (1943) (distinguishing religious solicitation from commercial solicitation). The *Murdock* Court struck down ordinances banning solicitation of funds for religious organizations under First Amendment freedom of religious expression because of the inherent religious nature of the solicitation. *Murdock*, 319 U.S. at 110-11.

46. *See Valentine*, 316 U.S. at 54-55 (differentiating between types of solicitation). The Court indicated that a major component of commercial speech was the promotion of a company or business. *See id.*

47. 421 U.S. 809, 820 (1975) (recognizing commercial free speech protection).

48. *See id.* at 809-20 (establishing broader interpretation of protected commercial free speech). *See generally* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978) (holding Massachusetts law denying expression by corporations First Amendment protection unconstitutional); Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85 (1977) (invalidating ordinance outlawing posting of "For Sale" or "Sold" signs on residential property); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976) (striking down Virginia statute forbidding pharmacists from advertising prescription prices).

49. *See Bigelow*, 421 U.S. at 827-28 (holding Virginia could not regulate information disseminated to citizens about New York services). According to the Court, the advertisement provided the general public with important information of both a commercial and factual nature. *See id.* at 822. The *Bigelow* Court went on to state that "[a]dvertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas." *Id.* at 826.

One year later, the Court extended commercial free speech more protection in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.[50] In *Virginia State Board of Pharmacy*, the Court overturned a Virginia law prohibiting pharmacists from advertising drug prices, holding that such a statute violated commercial free speech.[51] The Court held that the Virginia statute violated consumers' right to free flow of information from those selling important products.[52] The Court reasoned that it was important for individuals to gain awareness of prescription prices, which, in many instances, is vital to the quality of life of those dependent on prescription medication at an affordable price.[53]

The Court formalized a commercial free speech protection standard under the First Amendment in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[54] The case involved an electric company's challenge to advertising regulations the New York Public Service Commission had imposed, banning all promotional advertising by utilities.[55] The majority opinion, penned by Justice Powell, developed a four-step analysis for determining the outcome of commercial free speech challenges.[56] Under this framework, the Court must consider four issues: first, whether the advertising concerns lawful activity and is not misleading; second, whether the government's interest in regulating the speech is substantial; third, whether the regulation directly advances the government's interest; fourth, whether the regulation is narrowly drawn so as not to be overly intrusive.[57] The

50. 425 U.S. 748 (1976) (ruling on commercial free speech relating to pharmacy advertisements); *see also* 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, 595-98 (2000) (analyzing commercial free speech protection in *Virginia State Board of Pharmacy*). The Court noted the importance of the commercial transaction, stressing consumers' right to receive communications of a commercial nature. *See* Langvardt, *supra*, at 597. The Court failed to fully protect commercial speech under the First Amendment, stating that speech that was misleading or deceptive or that promoted unlawful activity failed under a free speech analysis. *See id.* at 597-98; *see also Va. State Bd. of Pharmacy*, 425 U.S. at 762.

51. *See Va. State Bd. of Pharmacy*, 425 U.S. at 762 (holding law prohibiting pharmacy advertisements violated constitutional protection of free speech).

52. *See id.* at 763-64 (noting importance of pharmaceutical pricing information for senior citizens). Justice Blackmun noted the heavy toll prescription drugs took on the income of senior citizens. *See id.* at 764. The Court recognized that prohibiting pricing information from reaching those in need could eliminate the ability of many individuals to alleviate their pain and enjoy everyday life. *See id.* at 764. *But see* Marsha Cope Huie et al., *The Right to Privacy in Personal Data: The EU Prods the U.S. and Controversy Continues*, 9 TULSA J. COMP. & INT'L L. 391, 408-09 (2002) (articulating negative aspects of further extension of commercial free speech). The authors state that the law developed after *Bigelow* articulates only the "interest of mercantilism, and discount[s] the interest of the commonwealth." Huie et al., *supra*, at 408.

53. *Va. State Bd. of Pharmacy*, 425 U.S. at 764 (stating importance of seniors obtaining prescription drug prices).

54. 447 U.S. 557 (1980).

55. *Id.* at 559-61 (outlining facts leading to petition).

56. *See id.* at 566 (developing framework for analyzing commercial free speech issues).

57. *Id.* (announcing standard in commercial free speech cases); *see* Huie et al., *supra* note 52, at 407 (outlining *Central Hudson* balancing test); *see also* Langvardt, *supra* note 50, at 598-602 (analyzing *Central*

Commission conceded the expression the utility companies sought was both legal and accurate.[58] The Court noted that the Commission had a substantial interest in monitoring and lowering energy use throughout the state, and that the advertising ban directly advanced that interest.[59] Although the *Central Hudson* Court determined that the government satisfied the first three components of the test for validity, the Court held that the regulations were too broad and violated the First Amendment free speech rights of the utility companies.[60] The Court determined that the Commission's ban reached advertising beyond that which directly satisfied its goal of energy conservation, and banning advertising for energy services unrelated to conservation intruded on utility companies' right to commercial expression.[61]

In decisions following the creation of the *Central Hudson* test, the Court waffled over how much deference the government deserved with regard to parts three and four of the *Central Hudson* framework.[62] In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*[63] and *Board of Trustees of the State University of New York v. Fox*,[64] the Court granted deference to government restrictions, allowing government agencies to make reasonable regulations of commercial speech rather than insisting on the least restrictive

Hudson test). The Court must first determine whether the contested speech is not misleading and concerns lawful activity. *See* Langvardt, *supra* note 50, at 599. Parts two, three, and four of the test concern the government restrictions of speech and whether the regulatory action violates the First Amendment. *See id.* The government typically encounters little difficulty in proving step two of the test—a substantial government interest in restricting the specific commercial speech. *See id.* at 600. Part three of the test seeks to discover whether the restriction "would make a meaningful contribution to accomplishment of that interest." *Id.* at 601. When applying part four of the test, the Court looks at the scope of the chosen restrictions and determines whether any narrower options existed for the government. *See id.*

58. *Central Hudson*, 477 U.S. at 566.

59. *See id.* at 568-69.

60. Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566-70 (1980) (applying commercial free speech test to determine regulations invalid).

61. *Id.* at 570 (setting forth reasoning).

62. *See* Edenfield v. Fane, 507 U.S. 761, 763-765 (1993) (holding law barring CPAs from soliciting customers violated free speech). In *Edenfield*, although the state had a substantial interest in protecting the public from fraud committed by CPAs, the Court determined that a ban on soliciting clients failed to promote the asserted interest. *Id.* at 777; *see also* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 425-30 (1993) (holding city ordinance removing racks of commercial advertising failed *Central Hudson* test). The *Discovery Network* Court determined that the government's action failed to further its public interest in promoting aesthetics and public safety. *Discovery Network*, 507 U.S. at 424-25. The Court also found that the city failed to implement less intrusive measures to promote their interest. *See id.* at 430; *see also* Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (rejecting least-restrictive-means interpretation of part four of *Central Hudson* test). In *Fox*, the Court determined that means "narrowly tailored to achieve the desired objective" did not equate to the narrowest possible solution. *See Fox*, 492 U.S. at 480; *see also* Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 344 (1986) (upholding a Puerto Rico statute restricting casino advertising). The *Posadas* Court took a more deferential approach than it did in *Central Hudson*, relying heavily on the government's explanation as to why the advertising restrictions were direct and nonintrusive. *Posadas*, 479 U.S. at 341-44; *see also* Langvardt, *supra* note 50, at 604-09 (outlining varying application of *Central Hudson* standard).

63. 478 U.S. 328, 344 (1986).

64. 492 U.S. 469, 480 (1989).

means possible.[65] In 1993, however, the Court seemed to alter its interpretation in both *Edenfield v. Fane* and *City of Cincinnati v. Discovery Network, Inc.*, adding strength to commercial speech protection under the First Amendment.[66] Displaying a new fervor for commercial free speech protection, the *Edenfield* Court stated that the government's "burden is not satisfied by mere speculation or conjecture; rather, 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."[67] The Court continued its support of commercial free speech under the First Amendment, heavily scrutinizing the scope of free speech restrictions governments use in attempting to satisfy a legitimate public interest.[68]

Recently, the Supreme Court tackled the issue of commercial free speech within the tobacco advertising context in *Lorillard Tobacco Co. v. Reilly*.[69] In this 2001 case, the Court heard a tobacco industry challenge to a Massachusetts regulation prohibiting outdoor advertising of smokeless tobacco or cigars within one thousand feet of schools or playgrounds.[70] Applying the *Central Hudson* test, the Court determined that the advertising was for legal activity (the sale of legal tobacco products), that the government had a substantial interest in curbing youth smoking, and that banning advertising within one thousand feet of schools and playgrounds directly advanced this interest.[71] The Court determined, however, that the regulation on advertising was too broad to

65. *See* Langvardt, *supra* note 50, at 603-09 (discussing Court's deference to government restriction in mid-to-late 1980s).

66. *See* Langvardt, *supra* note 50, at 606-10 (examining shift to greater commercial speech protection in early 1990s).

67. *Edenfield*, 507 U.S. at 770-77 (setting high burden of proof for government restrictions of commercial speech; *see also* Langvardt, *supra*, note 50, at 608 (reiterating shift towards greater commercial speech protection).

68. *See* Langvardt, *supra* note 50, at 610 (analyzing Court's movement toward strong commercial speech protection).

69. 533 U.S. 525 (2001).

70. *Id.* at 535-36 (outlining advertising restrictions Massachusetts imposed). The restrictions also banned point-of-sale advertising of both cigars and smokeless tobacco lower than five feet from the floor in non-adult-only retail stores located within one thousand feet of the previously mentioned locations. *See id.* The Attorney General deemed these comprehensive advertising restrictions necessary in order to "close holes" in a previously signed Master Settlement Agreement made between forty states and the tobacco industry. *Id.* at 533. Pursuant to his authority to prevent deceptive trade practices, the Attorney General implemented tobacco advertising and distribution restrictions with the goal of eliminating "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." *See id.*

71. *Id.* at 553-61 (applying *Central Hudson* test). The petitioners argued that the Court should not apply the *Central Hudson* test and instead apply strict scrutiny. *See id.* at 554. The Court, however, determined that there was no need to create a new precedent, and concluded that the *Central Hudson* test provided the proper framework to analyze this case. *See id.* at 554-55. Determining that the Attorney General satisfied the first two elements of the *Central Hudson* analysis, the Court went on to conclude that the Attorney General satisfied the third as well, providing ample information connecting the effect of advertisements on youth use of smokeless tobacco and cigars to the ban on tobacco advertising. *See id.* at 561.

satisfy the narrowly tailored requirement of the *Central Hudson* test.[72] The Court noted that a prohibition of advertising over such a great distance would constitute a complete ban of tobacco advertising in many metropolitan areas throughout the state.[73] The restriction on advertising locations, as well as the broad range of communication forms subject to the regulations, showed that the Attorney General of Massachusetts did not "carefully calculat[e] the costs and benefits associated with the burden on speech imposed."[74] The Court observed that speech regulation cannot "unduly impinge" on a merchant's ability to propose commercial activity, nor can the regulation impinge on the adult consumer's right to obtain information regarding commercial transactions.[75] The Court emphasized that the government did not necessarily need to use the least restrictive means possible, but required that a more reasonable means-ends relationship exist.[76]

C. Commercial Free Speech and Tobacco Advertising Restrictions in the EU

Free speech in the EU stems from the adoption of Article 10 of the ECHR, and the ECJ stands as the court of last instance for the interpretation of EU law.[77] Unlike the United States Constitution, the ECHR contains an explicit

72. *See id.* at 562-63 (holding advertising restrictions too broad under *Central Hudson* analysis). The Court determined that the restrictions had a disparate effect on speech based on whether an area is rural, suburban, or urban. *See id.* at 563. According to the Court, this disparate impact signified the Massachusetts legislature's failure to narrowly tailor the law to satisfy the *Central Hudson* standard. *See id.*; *see also* WRIGHT, *supra* note 27, at 80 (noting government's burden in commercial free speech tobacco cases). The government must show that advertising restrictions lead to substantial reductions in youth smoking, and that less intrusive measures could not produce similar results. *See* WRIGHT, *supra* note 27, at 80; *see also* Huie et al., *supra* note 52, at 465-66 (explaining negative aspects of allowing wide range of commercial free speech protection). The authors propose that the Court should allow government regulation of all commercial speech "posing harmful societal circumstances." *Id.* at 466.

73. *See Lorillard*, 533 U.S. at 562 (assessing scope of proposed ban). The Court determined that the ban created too heavy a burden on tobacco manufacturers and distributors who wanted to convey information about their product to adults. *Id.* at 564.

74. *Id.* at 561 (alteration in original) (quoting City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993)).

75. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 565 (2001) (affirming rights of consumers and merchants to propose commercial transactions).

76. *See id.* (acknowledging government's ability to impinge on some forms of legitimate speech).

> A careful calculation of the costs of a speech regulation does not mean that a State must demonstrate that there is no incursion on legitimate speech interests, but a speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products.

Id.; *see also* IAN CRAM, CONTESTED WORDS: LEGAL RESTRICTIONS ON FREEDOM OF SPEECH IN LIBERAL DEMOCRACIES 184 (2006) (analyzing commercial speech jurisprudential development in United States since *Central Hudson*). Although the *Central Hudson* standard lives on in *Lorillard*, the Court did not limit governments to using the least restrictive means possible in reaching their objectives. *See* CRAM, *supra*, at 184.

77. European Convention on Human Rights, *supra* note 7 (providing protection to certain forms of expression). Article 10 provides European citizens freedom to express opinions and exchange information

caveat allowing for public intervention in cases of speech deemed harmful to the overall public.[78] The ECJ consistently provides less protection to commercial and artistic expression than freedom of expression in the political realm.[79] According to the ECJ, however, member nations must balance the proportionality of restrictions against the rights of municipal actors—commercial or noncommercial.[80] Factors used in the proportionality analysis include: the nature of the disputed right, the degree of state interference, whether the measure taken is proportionate to the aim pursued, the type of

without fear of public persecution. *See id.* Article 10 of the ECHR reads:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Id.; *see also* Case 4/73, Nold v. Comm'n, 1974 E.C.R. 491 (recognizing ECHR as guideline for ECJ regarding human rights); Alec Stone Sweet, *Constitutional Dialogues in the European Community*, *in* THE EUROPEAN COURTS AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE 312, 318-19 (Anne-Marie Slaughter et al. eds., 1998) (analyzing development of ECJ supremacy regarding fundamental rights); *The Court of Justice*, EUROPA, http://europa.eu/institutions/inst/justice/index_en.htm (last visited Oct. 10, 2010) (describing structure and responsibilities of ECJ). The ECJ's main objective is to make sure EU member states and institutions correctly interpret EU legislation. *See The Court of Justice*, *supra*. The ECJ is comprised of twenty-seven judges—one for each member state. *Id.* If an EU member state, the Council, the Commission, or Parliament believes an EU law or directive is illegal, that particular body may request annulment by the ECJ. *Id.*

78. European Convention on Human Rights, *supra* note 7 (permitting restrictions on expression based on societal interests). Under the ECHR, member states may restrict free expression when necessary to preserve democracy and national security, prevent disorder or crime, protect the rights of others, and maintain authority. *Id.*

79. *See* CRAM, *supra* note 76, at 189-90 (articulating differences between EU protection of political speech and commercial speech). The ECHR consistently provides strong protections to speech made within the political realm. *See id.* The ECHR displays deference to institutions and government entities interfering with artistic and commercial speech. *See id.*

80. *See id.* at 191 (analyzing type of speech restrictions commonly upheld). Nations fare much better when the restricted expression is shown to go far beyond simple communication to the public about a good or service. *See id.*; *see also* X, and Church of Scientology v. Sweden, App. No. 7805/77, 16 Eur. Comm'n H.R. Dec. & Rep. 68, 73 (1979) (acknowledging protection of commercial free speech). The Commission recognizes commercial free speech under Article 10 of the ECHR, but uses a tiered structure, placing commercial expression under that of individual expression. *See X, and Church of Scientology*, 16 Eur. Comm'n H.R. Dec. & Rep. at 73. This case stemmed from a Church of Scientology challenge to a marketing injunction the Swedish government placed on the Church. *See id.* at 69. The Church's advertisement included information about the "E-Meter," a required tool for members of the Church. *Id.*; *see also* Barthold v. Germany, 7 Eur. H.R. Rep. 33 (1985) (Pettiti, J., concurring) (asserting direct connection between commercial speech and right to receive and impart information).

public interest, and the degree of protection required.[81] Although commercial speech does not fall outside the protection of Article 10, the ECHR calls for less scrutiny when looking at the necessity of government action to thwart the flow of commercial information.[82]

In 2003, the European Parliament and the EU Council published Directive 2003/33/EC (Directive), effectively banning many forms of print media advertising of tobacco products.[83] The Directive limited print media tobacco advertisements to publications intended for those in the tobacco trade, prohibited all radio advertising of tobacco products, forbade tobacco sponsorship of any event or activity within the EU, and banned free distribution of tobacco products for promotional purposes.[84] The Directive called for compliance from all EU member nations by July 31, 2005.[85]

In 2003, Germany challenged the Directive in the ECJ, on the grounds that it violated freedom of expression under Article 10 of the ECHR.[86] The ECJ conceded that the Directive infringed on the expressive abilities of the tobacco industry and adult consumers within the EU member states.[87] Despite this finding, the ECJ invoked the limiting language provided in Article 10 and noted that the EU Council, as well as individual member states, reserved the right to limit expression that threatened overall societal interests.[88] The ECJ held that the discretion Article 10 provided to authorities limited judicial review to mere reasonableness and proportionality of the Directive.[89] Any less

81. *See X, and Church of Scientology*, 16 Eur. Comm'n H.R. Dec. & Rep. at 73 (outlining factors of proportionality test for free speech within EU).

82. *See id.* (clarifying application of necessity test to commercial speech). "[T]he Commission considers that the test of 'necessity' in the second paragraph of Article 10 should therefore be a less strict one when applied to restraints imposed on commercial 'ideas.'" *Id.*

83. Council Directive 2003/33, arts. 3-5, 2003 O.J. (L 152) 16-19 (EC) (banning print and media forms of tobacco advertising in EU).

84. *Id.* at 18 (outlining restrictions on tobacco media advertising).

85. *Id.* at 19.

86. Case C-380/03, Germany v. Parliament, 2006 E.C.R. I-11573 (holding Directive did not violate freedom of expression). Germany argued that the overly broad drafting of print and media advertising bans across the EU violated freedom of expression rights under Article 10. *See id.* Germany also maintained that the Directive's lack of proportionality threatened economic sectors. *See id.*

87. *See id.* (recognizing possible freedom of expression restrictions). The ECJ disagreed with Germany, noting that although the Directive interferes with expression by the tobacco companies, the Directive imposed restrictions proportional to their stated goal. *See id.*

88. *See id.* (analyzing discretion afforded to authorities).

> With regard to judicial review of the conditions referred to in the previous paragraph, the Community legislature must be allowed a broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. The legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue.

Id.

89. *Id.* (developing proportionality analysis).

restrictive measures, according to the ECJ, failed to effectively achieve the EU Council's objectives of harmonizing member states' tobacco advertising policies and ensuring public health.[90] The ECJ upheld the Directive as proportional to the needs of the authorities, but left open the question as to whether commercial expression ever fell under the protection of Article 10.[91]

III. ANALYSIS

A. Important Differences Between Commercial Free Speech in the United States and the EU

Any comparison of the interpretive differences between the Supreme Court of the United States and the ECJ regarding free speech inevitably begins with a comparative analysis of the United States Constitution and the ECHR.[92] The First Amendment of the Constitution provides protection for a variety of expression, but fails to expressly provide the government with any guidance as to the type of speech it may prohibit.[93] Although the Supreme Court of the United States recognizes instances that warrant restriction of certain speech, the lack of enumerated restrictions on speech affords the Court the ability to analyze government intervention with a higher degree of scrutiny.[94] Article 10 of the ECHR also provides individuals within the EU freedom of expression, but includes important language providing member states the flexibility to prohibit certain forms of communication in order to protect values such as democracy, public safety, and health.[95]

The difference in interpretive latitude enjoyed by the Supreme Court and the ECJ with regard to commercial free speech results in varying analyses concerning the proportionality of free speech restrictions the United States and EU enact.[96] Under the *Central Hudson* approach, a restriction of expression

90. *See* Case C-380/03, Germany v. Parliament, 2006 E.C.R. I-11573 (labeling less restrictive measure insufficient).

91. *See id.* (upholding Directive after freedom of expression analysis). The ECJ failed to find that the Directive actually violated freedom of expression, but held that the restrictions in the Directive fell within the discretion of "competent authorities." *Id.*

92. *Compare* U.S. CONST. amend. I (establishing freedom of speech), *with* European Convention on Human Rights, *supra* note 7, at cl. 1 (creating freedom of expression in EU).

93. *See* U.S. CONST. amend. I (protecting freedom of speech).

94. *See* ROME & ROBERTS, *supra* note 42, at 5 (listing categories of speech unprotected by First Amendment). The authors note that the Court recognizes "fighting words," "obscenity," "libel and slander," "incitement to violence," and language inciting action—such as the false shouting of "fire"—as unprotected by the First Amendment. *Id.* The commercial speech doctrine is the only instance in which the Court singles out a type of speech based on content and affords it any protection. *See id.*

95. *See* European Convention on Human Rights, *supra* note 7, at cl. 1 (providing freedom of expression in EU member states).

96. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 582 (2001) (holding advertising restrictions unconstitutional unless narrowly tailored); Case C-380/03, Germany v. Parliament, 2006 E.C.R. I-11573 (holding tobacco advertising restriction legal unless manifestly inappropriate).

that directly serves a substantial government interest is invalid under the First Amendment if less intrusive measures exist.[97] The focus of the Court is less on the ends justifying the means and more about the means causing minimal intrusion.[98] The EU's approach, however, flips the Supreme Court's analysis, rejecting only "manifestly inappropriate" European Community expression restrictions that serve the enumerated purposes of Article 10.[99] Analyzed within the *Central Hudson* framework, the Supreme Court relies greatly on the government's ability to use less intrusive measures to advance their interest, while the ECJ focuses heavily on the government's action satisfying a legitimate interest.[100] These different methods of analysis result in more deference to the authorities in the EU, while free speech restrictions in the United States are subject to higher scrutiny.[101]

B. Suggested Advertising Restrictions in the Family Smoking Prevention and Tobacco Control Act are Unconstitutional Violations of Commercial Free Speech

The Smoking Prevention Act authorizes the Secretary of HHS to promulgate rules regarding tobacco advertising, including the restrictions the FDA previously drafted.[102] The advertising ban the FDA suggested mirrors many of the Massachusetts restrictions the Court held unconstitutional in *Lorillard*.[103] The decision in *Lorillard* highlights a more probing judicial scrutiny on issues of commercial free speech restrictions in the United States because the Court's holding hinges on whether the government took sufficient steps to narrowly tailor the regulations.[104] Under an ECHR-type analysis of both the *Lorillard* restrictions and current FDA suggestions, the ECJ would likely uphold the restrictions because they are not "manifestly inappropriate" and directly

97. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 567-70 (1980) (laying out commercial free speech standard).

98. *See Lorillard*, 533 U.S. at 561 (holding reasonable means required to meet ends).

99. *See* Case C-380/03, Germany v. Parliament, 2006 E.C.R. I-11573 (explaining ECJ's deference towards government restrictions of commercial speech); *see also* CRAM, *supra* note 76, at 191 (defending standard of review providing deference to government restrictions of free speech). Cram argues that the ECJ developed appropriate distinctions between communications contributing to public debate and those communications intended to promote commercial transactions. *See id.*

100. *Compare Central Hudson*, 533 U.S. at 561 (establishing new framework for commercial free speech), *with* Case C-380/03, Germany v. Parliament, 2006 E.C.R. I-11573 (recognizing judicial deference toward legislative initiatives aimed at reducing harmful speech).

101. *Compare Lorillard*, 533 U.S. at 561 (focusing on narrowly tailored restrictions), *with* Case C-380/03, Germany v. Parliament, 2006 E.C.R. I-11573 (allowing for legislative flexibility).

102. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 102(a)(2)(E), 123 Stat. 1776, 1830-31 (2009) (enacting new tobacco advertising restrictions).

103. *Compare id.*, *with* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 562 (2001) (outlining advertising restrictions enacted in Massachusetts).

104. *See Lorillard*, 533 U.S. at 561-62 (holding Massachusetts advertising restrictions unconstitutional based on broad scope).

advance a legitimate government interest.[105] Given the Supreme Court's heightened scrutiny of advertising restrictions, the FDA needs to revamp parts of the Smoking Prevention Act and implement new strategies to fight the epidemic of youth smoking.[106]

C. Suggested Plan for Future Legislation Combating Youth Smoking

Although the Supreme Court's recent decision makes the implementation of tobacco advertising bans difficult in the United States, legal experts and the WHO suggest alternative methods that may help reduce teen smoking.[107] According to studies by the WHO and other organizations, governments should increase their anti-tobacco counter-advertising to target the youth population.[108] These campaigns should focus on new forms of media, including the internet and other computer-based forms adolescents use heavily.[109] The goal of anti-tobacco campaigns is to change tobacco's image among youth by showing the extreme addictiveness and health consequences associated with tobacco products.[110]

A second measure to curb youth smoking, and smoking in general, is to promote the introduction of smoke-free environments in states and municipalities throughout the country.[111] According to the WHO, many countries throughout Europe have already recognized smoke-free environments with great success.[112] If properly imposed, smoke-free laws could lead to a

105. *See* European Convention on Human Rights, *supra* note 7, at cl. 1 (providing freedom of expression); Case C-380/03, Germany v. Parliament, 2006 E.C.R. I-11573 (applying Article 10 to EU advertising restrictions).

106. *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. 111-31, § 102(a)(2)(E), 123 Stat. 1776, 1830-31 (2009). *See generally* WORLD HEALTH ORG., *supra* note 6, at 23-41 (suggesting policies to reverse tobacco epidemic).

107. *See* Robert L. Rabin, *Tobacco Control Strategies: Past Efficacy and Future Promise*, 41 LOY. L.A. L. REV. 1721, 1724-29 (2008) (discussing effective measures against tobacco use). The author suggests a three-pronged attack against youth tobacco consumption: increasing exposure to information regarding health risks of tobacco, enacting clean air restrictions, and imposing heavy taxation. *Id.*

108. *See* WORLD HEALTH ORG., *supra* note 6, at 33-34 (analyzing effectiveness of education about tobacco dangers). Tobacco users remain generally unaware of the actual risks continuous tobacco use poses beyond the general notion that tobacco is harmful. *Id.* Counter-advertising can take away the allure and glamour of tobacco use, revealing the negative aspects of tobacco use, both financially and in terms of health. *See id.* at 34; *see also* Rabin, *supra* note 107, at 1724-26. *But see* Michael Blakeney & Shenagh Barnes, *Advertising Regulation in Australia: An Evaluation*, 8 ADEL. L. REV. 29, 51 (1983) (analyzing effectiveness of counter-advertising initiatives). The counter-advertising movement fails, many times, because of the superior financial resources of those seeking to thwart the counter-message. *See id.*

109. *See* Rabin, *supra* note 107, at 1724 (discussing targets of counter-advertising).

110. *See* WORLD HEALTH ORG., *supra* note 6, at 33-34 (advocating counter-advertising targeted at youth). Advertising should seek to prevent smoking experimentation among the youth population. *See id.* at 34.

111. *See id.* at 44-46 (promoting increased use of smoke-free environments); *see also* Rabin, *supra* note 107, at 1726-29 (discussing success of smoke-free environments). Instituting non-smoking offices increased the "hassle factor" of smoking, decreasing the amount of workers who smoked. *See* Rabin, *supra* note 107, at 1729.

112. *See* WORLD HEALTH ORG., *supra* note 6, at 25-28 (analyzing smoke-free environments in Europe).

four percent cut in worldwide smoking.[113] Smoke-free laws are widely popular and less susceptible to legal challenges than advertising bans.[114]

Taxation remains the most effective measure in reducing tobacco use across the world.[115] Price increases have the greatest impact on youth and poor populations due to their extreme sensitivity to the price of goods.[116] Excise taxes directed at all tobacco products—not just cigarettes—dramatically reduce youth smoking in the United States.[117] For excise taxes to work, however, taxes on cheap tobacco products must equal those applied to heavily taxed products to prevent consumer substitution.[118] Building programs using these three tactics—educational information, smoke-free environments, and taxation—will confront the youth tobacco epidemic in a multifaceted manner that will avoid many of the legal issues surrounding advertising restrictions.[119]

IV. CONCLUSION

The commercial free speech standard in the United States is not conducive to the broad tobacco advertising restrictions implemented within the EU. In future legislation, the FDA and Congress must work to narrow the scope of any advertising restrictions. If implemented by the Secretary of HHS, the current advertising restrictions proposed in the Smoking Prevention Act will not survive the heightened judicial scrutiny *Central Hudson* requires. Although the Court will likely determine that advertising restrictions serve the substantial government interest in curbing youth tobacco consumption, the Court is equally likely to hold that the current structure of the FDA restrictions is not narrowly tailored.

If curbing youth tobacco consumption is a true goal of the Obama administration, it should continue to seek effective alternatives to advertising restrictions. Tobacco reform in the United States should focus on the three

Ireland, Norway, Italy, and Uruguay are among many European countries already implementing smoke-free laws. *See id; see also* Rabin, *supra* note 107, at 1727-29.

113. *See* WORLD HEALTH ORG., *supra* note 6, at 33-34 (discussing developments of clean air regulation and smoke-free environments).

114. *See* Rabin, *supra* note 107, at 1726-29.

115. *See* WORLD. HEALTH ORG., *supra* note 6, at 39-41 (explaining effect of taxation on tobacco consumption). According to the WHO, a seventy percent increase in the price of tobacco would cut smoking related deaths by twenty-five percent worldwide. *Id.* at 39; *see also* Rabin, *supra* note 107, at 1765-68 (linking increased excise taxes on tobacco products in New York and decreased youth tobacco consumption).

116. *See* WORLD HEALTH ORG., *supra* note 6, at 40 (examining relationship between taxation of tobacco products and consumption). In South Africa, cigarette consumption decreased five to seven percent for every ten percent increase in the cost of tobacco products. *Id.* at 40.

117. *See id.* at 41, 54 (recommending policy regarding excise taxes); *see also* Rabin, *supra* note 107, at 1730 (noting smoking behavior sensitive to price increases).

118. *See* WORLD HEALTH ORG., *supra* note 6, at 41, 54 (noting risk of consumers substituting other tobacco products for cigarettes).

119. *See* Rabin, *supra* note 107, at 1765-68 (emphasizing importance of multi-pronged approach to tobacco control).

areas the WHO has laid out: education, environmental restrictions, and taxation. These areas are statistically more effective at reducing smoking than advertising. They are also less susceptible to constitutional scrutiny. These methods of tobacco control directly affect the lives of smokers by designating where they may smoke and how much they must pay for tobacco products. As long as these strong alternatives exist, it is unlikely that courts will deem broad advertising restrictions the least restrictive means to achieve a reduction in youth smoking in the United States.

Sean P. Flanagan