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Taking *Advantage* of *Joe Camel*'s and *Marlboro Man*'s Rights Is Un*Kool* and *Merit*s Constitutional Protection

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TAKING AD*VANTAGE* OF JOE *CAMEL*'S AND *MARLBORO* MAN'S RIGHTS IS UN*KOOL* AND *MERITS* CONSTITUTIONAL PROTECTION: *Penn Advertising, Inc. v. Mayor of Baltimore*, 63 F.3d 1318 (4th Cir. 1995)

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I. INTRODUCTION

Throughout their years at junior high and high school, a car full of students passed two billboards on its way to school everyday—one was an advertisement for Camel cigarettes and the other for Marlboro cigarettes. Joe Camel was depicted on Camel's billboard, looking suave and smooth smoking his cigarettes, as he usually does. The group of students would occasionally comment on Joe Camel's appearance whenever his attire changed on the billboard. The other billboard depicted the Marlboro Man, riding high and mighty through the rough terrain of the Southwest. The teens thought Marlboro Man looked pretty cool smoking his cigarettes.

This same group of students also went to parties together, spent countless hours watching TV and movies, and went out to eat at restaurants. At parties they watched the "popular crowd" puffing away at their cigarettes while having a great time. While watching TV and movies, the students drooled over their idols, who were constantly depicted with cigarettes in their hands. As they ate in restaurants, the students noticed adults in business suits smoking, college students smoking while drinking a pitcher of beer, and parents smoking around their children.

These commonplace scenarios illustrate that social situations will more likely cause teens to smoke than billboards. A billboard is a passive medium that may or may not catch an observer's eye. A billboard is a means by which a manufacturer can exert his right to inform the public about his product. The messages conveyed by these advertisements inform consumers about the types of products in the market and their respective prices, features, and availability. Consequently, through advertisements, consumers are able to make choices among competing goods. The students' social lives, however, are anything but passive and greatly influence their behavior.

In *Penn Advertising, Inc. v. Mayor of Baltimore*,[1] the Fourth Circuit Court of Appeals upheld an ordinance that prohibited cigarette advertising on billboards. This holding is the first federal appeals court decision permitting such a restriction on cigarette advertising on billboards.[2] The purpose of the City's ordinance is to decrease the number of teen smokers by prohibiting tobacco advertisements on billboards.[3] This ban, however, infringes upon the constitutional rights of tobacco manufacturers and their advertising agencies who have a right to freedom of speech. This suppression of commercial speech unfairly deprives adult smokers of the information conveyed on these billboards. This Note argues that the Fourth Circuit Court of Appeals has unnecessarily stripped Penn Advertising of its right to freedom of speech. Section II of this Note first examines the history of commercial speech and its significance with respect to constitutional protections.[4] Next, this Note analyzes the Supreme Court's test for commercial speech articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[5] and the Court's inconsistent application of the test.[6] Section III discusses the facts and holding of *Penn Advertising*.[7] Next, Section IV examines the analysis in *Penn Advertising* in light of the inconsistent application of the *Central Hudson* test.[8] Finally, in Section V, this Note concludes that prohibiting the advertisement of cigarettes on billboards deprives cigarette manufacturers of their right to freedom of speech and consequently deprives adults of information concerning a legal activity.[9]

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1. 63 F.3d 1318 (4th Cir.), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 22, 1995) (No. 95-806).
2. Milo Geyelin, *Limits on Cigarette Billboards Upheld*, WALL ST. J., Sept. 7, 1995, at B2.
3. Penn Advertising, Inc. v. Mayor of Baltimore, 862 F. Supp. 1402, 1406 (D. Md. 1994), *aff'd*, 63 F.3d 1318 (4th Cir.), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 22, 1995) (No. 95-806).
4. *See infra* notes 10-36 and accompanying text.
5. 447 U.S. 557, 566 (1980).
6. *See infra* notes 37-62 and accompanying text.
7. *See infra* notes 63-85 and accompanying text.
8. *See infra* notes 86-171 and accompanying text.
9. *See infra* notes 172-74 and accompanying text.

II. THE ROAD TO THE *CENTRAL HUDSON* TEST AND ITS AFTERMATH

A. The History of Constitutional Protection of Commercial Speech

One of the most important and valued rights the United States Constitution guarantees is the freedom of speech.[10] Throughout the history of the United States, courts have regulated only certain types of speech under the First Amendment.[11] These types of speech fell into two categories, creating the "two-level" theory of the First Amendment.[12] This "two-level" theory defines speech as either fully protected or wholly unprotected.[13] In 1941, in *Valentine v. Chrestensen*,[14] the United States Supreme Court held that commercial advertising fell into the wholly unprotected category of speech since commercial advertising merely represented the pursuit of a "gainful occupation."[15]

After several decades of denying commercial speech protection under the Constitution, the Supreme Court in *Bigelow v. Virginia*[16] found that certain

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10. U.S. CONST. amend. I. The First Amendment states that "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.*

11. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1011 (1991). Speech was first restricted under the Sedition Act of 1798. *Id.* at 1015. The Sedition Act prohibited the publication of any writings that were against the government of the United States. *Id.* Since the Sedition Act, the government has imposed greater limitations on the freedom of speech. *Id.*; *see, e.g.*, Shaffer v. United States, 255 F. 886 (9th Cir.) (prohibiting speech that would cause forbidden or undesirable conduct), *cert. denied*, 251 U.S. 552 (1919); *see also* Schenck v. United States, 249 U.S. 47, 52 (1919) (prohibiting speech that creates a clear and present danger that it will bring about undesirable conduct); Masses Pub. Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917) (prohibiting speech employing express words of incitement).

In Brandenburg v. Ohio, the Supreme Court developed two requirements that a statute must meet in order to regulate speech. 395 U.S. 444 (1969). Speech that promoted violence or undesirable conduct could be regulated if: (1) the advocacy is directed to inciting imminent lawless action, and (2) the advocacy is likely to produce such action. *Id.* at 447. Other types of speech that have been unprotected include fighting words, obscenity and libel. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (libel); Roth v. United States, 354 U.S. 476 (1957) (obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words).

12. Thomas Merrill, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 207 (1976). The two-level theory has its origins in *Chaplinsky*:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problems. 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. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

315 U.S. at 571 (footnotes omitted). The type of speech referred to in *Chaplinsky* is "low-level" speech and is given less constitutional protection than other speech. STONE, *supra* note 11, at 1144. Speech is labeled as either "protected" or "unprotected" by the First Amendment once the court determines its relative "value." *Id.* at 1097.

13. Merrill, *supra* note 12, at 209.

14. 316 U.S. 52 (1942).

15. *Id.* at 54. Subsequently, in Breard v. Alexandria, the Supreme Court once again declared that speech with a commercial feature was unworthy of protection under the First Amendment. 341 U.S. 622, 645 (1951).

16. 421 U.S. 809, 821 (1975). The Court struck down a Virginia statute that made it a misdemeanor

types of commercial speech deserved First Amendment protection. The advertisement at issue in *Bigelow* communicated information about abortions, an issue of significant public interest.[17] The newspaper advertisement announced that the advertiser would arrange abortions for women with unwanted pregnancies.[18] Even though the advertisement was commercial in nature, the Court did not deny the advertisement the guarantees of the First Amendment.[19] The *Bigelow* Court noted that "[t]he policy of the First Amendment favors dissemination of information and opinion."[20] The message was constitutionally protected because the advertisement contained factual information in which the public had a legitimate interest.[21] Therefore, the message did not fall into the category of wholly unprotected speech.[22]

In 1976, the Supreme Court again rejected its prior holdings that commercial speech is undeserving of constitutional protection. In *Virginia State Board of Pharmacy v. Virginia Consumer Council*,[23] the Court invalidated a regulation prohibiting the advertisement of prescription drugs.[24] The *Virginia Pharmacy* Court held that "[f]reedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both."[25] As in *Bigelow*, the content of the speech in *Virginia Pharmacy* warranted protection since the speech contained information of public interest.[26]

The *Virginia Pharmacy* Court noted that the consumer's interest in the free flow of commercial information may be greater than the consumer's interest in political information, which the Constitution affords the most protection.[27] The Court concluded that "[t]he public has the right to receive

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to promote abortions through advertisements. *Id.*

17. *Id.* at 822.

18. *Id.* at 812.

19. *Id.* at 818. The Court stated that "[a]dvertising is not . . . 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.

20. *Id.* at 829; *see also* Charles Geyh, *The Regulation of Speech Incident to the Sale or Promotion of Goods and Services: A Multifactor Approach*, 52 U. PITT. L. REV. 1 (1990).

21. MERRILL, *supra* note 12, at 214. The public's interest could have been in obtaining the services offered through the ad or its curiosity concerning the subject of abortions. *Bigelow*, 421 U.S. at 822.

22. *See supra* note 16 and accompanying text.

23. 425 U.S. 748 (1976) (holding that commercial speech was not wholly outside the protections of the Constitution); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 653 (1978).

24. *Virginia Pharmacy*, 425 U.S. at 773 (concluding the State could not suppress the advertising of "truthful information about entirely lawful activity"). The advertising of prescription drugs conveyed truthful information about a legal activity. *Id.* at 749.

25. *Id.* at 756 (footnote omitted). The communication conveyed the following: "I will sell you the X prescription drug at the Y price." *Id.* at 761.

26. *Id.*; *see also* LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA 298 (2d ed. 1995). In *Virginia Pharmacy*, the Court struck down a statute which made it unlawful for a pharmacy to advertise the prices of its prescription medications. 425 U.S. at 770. Under the statute, if a pharmacist advertised his prices, the pharmacist would be cited for unprofessional conduct. *Id.* at 749-50.

27. *Virginia Pharmacy*, 425 U.S. at 763. According to the Court, the suppression of this advertisement would deprive the poor, the sick, and the aged of valuable information since a significant portion of their income is spent on prescription drugs. *Id.* Thus, access to this type of information could lessen the burdens

truthful information about lawful products and services."[28] The Court also stated that the medium that readily and easily provides this information is advertising,[29] and that advertising provides the public the ability to make wiser decisions regarding their personal needs and to decide among competing products.[30] Thus, the *Virginia Pharmacy* Court established the rule that "a State may [not] completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients."[31]

Finally, in 1980, the Supreme Court established a test for determining the constitutionality of commercial speech. *Central Hudson Gas & Electric Corp. v. Public Service Commission*[32] involved the striking down of a regulation that completely banned promotional advertising by an electric utility company. The Supreme Court acknowledged that while commercial speech warrants less protection than other constitutionally guaranteed expression, the First Amendment nonetheless "protects commercial speech from unwarranted governmental regulation."[33] The Court developed the following four-prong test to determine the constitutionality of prohibitions against certain types of commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[34]

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faced by this group of people. *Id.* One commentator stated, "[i]f the individual is to achieve the maximum degree of material satisfaction permitted by his resources, he must be presented with as much information as possible concerning the relative merits of competing products." Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 433 (1971). Advertising the price of drugs would not only benefit society, but would also facilitate "the efficient allocation of resources." Merrill, *supra* note 12, at 216.

28. EPSTEIN & WALKER, *supra* note 26, at 298.

29. *Virginia Pharmacy*, 425 U.S. at 765. The Court stated the following:

> 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 indispensable.

Id.

30. *Id.*; *see also Virginia Pharmacy*, 425 U.S. at 765 (holding that "even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal" (footnote omitted)); Redish, *supra* note 27, at 433.

31. *Virginia Pharmacy*, 425 U.S. at 773.

32. 447 U.S. 557, 566 (1980); *see also* J. Niemeyer, *Signs and Billboards*, 64 U.S.L.W. Sept. 19, 1995, at 2153 (stating that the *Central Hudson* test is always used to evaluate cases concerning the suppression of commercial speech).

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

34. *Id.* at 566.

Simplified, the *Central Hudson* four prong test requires a reviewing court to examine whether "the government seeks to regulate the following: (1) commercial speech that concerns a lawful activity and is not false or misleading [and] then determine whether the regulation (2) promotes a substantial government interest, (3) directly advances that interest, and (4) is not more excessive than necessary."[35] By applying this test to the facts of *Central Hudson*, the Court found the banning of promotional advertising by electric utility companies unconstitutional.[36]

B. Inconsistencies in the Application of the Central Hudson Test

Over the next several years, the Supreme Court inconsistently applied the *Central Hudson* test to commercial speech cases.[37] The third and fourth prongs have troubled the courts the most. The interpretation of these two prongs seems to vary with each case. Courts have made inconsistent conclusions as to the type of evidence necessary to meet the requirements of the third prong.[38] More troublesome, however, has been the fourth prong.[39] Since the fourth prong—that the regulation not be excessive—was vague and ambiguous, the Supreme Court developed a standard for determining whether a "reasonable fit" existed between the government's regulation and its asserted goal.[40] The "reasonable fit" standard set a low threshold that was easy for legislatures to meet. Thus, the Court upheld many regulations that suppressed the freedom of speech.[41]

Strict adherence to this rule was evident in *Metromedia, Inc. v. City of San Diego*.[42] *Metromedia* involved a San Diego ordinance that prohibited advertising display signs.[43] San Diego enacted the ordinance to eliminate

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35. *The Supreme Court—Leading Cases*, 107 HARV. L. REV. 144, 224-25 (1993) (Commercial Speech) [hereinafter *Commercial Speech*].

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

37. *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983) (holding that a ban on contraceptive advertising violated free speech rights); *In re* R.M.J., 455 U.S. 191 (1982) (holding that a prohibition of advertisements by attorneys violated free speech rights); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (holding that restricting commercial speech on billboards did not violate the *Central Hudson* test); *see also* EPSTEIN & WALKER, *supra* note 26, at 305; Mary B. Nutt, *Trends in First Amendment Protection of Commercial Speech*, 41 VAND. L. REV. 173, 189 (1988).

38. *See infra* notes 89-125 and accompanying text.

39. *See infra* notes 126-32 and accompanying text.

40. Board of Trustees v. Fox, 109 S. Ct. 3028, 3035 (1989) (holding that what is required is a "'fit' between the legislature's ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable" (citation omitted)); *see* EPSTEIN & WALKER, *supra* note 26, at 305.

41. *See, e.g.*, Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986) (upholding a ban on advertising of casino gambling); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (upholding a prohibition that prevented a public utility from mailing its opinions with respect to public issues in its bills); *see also* STONE, *supra* note 11, at 1193.

42. 453 U.S. 490 (1981).

43. *Id.* at 493.

distractions to pedestrians and motorists and preserve the City's appearance.[44] The Supreme Court, applying *Central Hudson*, held that the ordinance did not violate the constitution as to its regulation of commercial speech.[45] Conversely, with respect to noncommercial speech, the Court found the ordinance did violate the First Amendment.[46] The Court based its holding on the long-established principal that noncommercial speech receives a greater degree of constitutional protection than commercial speech.[47]

The *Metromedia* Court's distinction between commercial and noncommercial billboard advertising denied advertising agencies and their clients the full protection of the Constitution and deprived consumers access to information for decision-making.[48] Billboards are considered to be an effective medium of communication because advertising billboards convey a variety of messages of which the public may have a legitimate interest.[49] The Supreme Court has stated that "[t]he outdoor sign or symbol is a venerable medium for expressing political, social, and commercial ideas. From the poster or 'broadside' to the billboard, outdoor signs have played a prominent role throughout American history, rallying support for political and social causes."[50] Subsequent Supreme Court holdings that conformed with the reasoning and analysis behind *Metromedia* adhered to the precedent that noncommercial speech is entitled to "a greater degree of protection than commercial speech," by upholding regulations that banned certain advertisements.[51]

The holding in *City of Cincinnati v. Discovery Network, Inc.*,[52] however, signaled a shift in the Supreme Court's decisions regarding commercial speech.

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44. *Id.*

45. *Id.* at 512.

46. *Id.* at 513.

47. *Id.*

48. *See* Bates v. State Bar, 433 U.S. 350, 364 (1977) ("[C]ommercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. [S]uch speech serves individual and societal interests in assuring informed and reliable decisionmaking." (citation omitted)); *see also supra* note 31 and accompanying text.

49. *See Metromedia*, 453 U.S. at 501.

50. *Id.* (quoting Metromedia, Inc. v. City of San Diego, 610 P.2d 407, 430-31 (Cal. 1980) (Clark, J., dissenting), *rev'd*, 453 U.S. 490 (1981)).

51. Nutt, *supra* note 37, at 190 (quoting Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 513 (1981)). In Posadas de Puerto Rico Assocs. v. Tourism Co., the Court upheld a regulation that prohibited advertising for casino gambling. 478 U.S. 328, 329-30 (1986). The Puerto Rican Legislature sought to prevent serious harmful effects of gambling on the health, safety and welfare of the Puerto Rican citizens. *Id.* at 341. This regulation passed the *Central Hudson* test since the regulation concerned a lawful activity, the government had a strong interest in restricting the speech, the restriction advanced the government's interest, and the restriction was not excessive. *Id.* at 341-44; *see also* Geyh, *supra* note 20, at 35-39 (discussing *Posadas* holding).

In Board of Trustees v. Fox, the Court upheld a regulation that prohibited speech whose purpose was to produce a profit in university dormitories. 492 U.S. 469 (1989). The Court reaffirmed its holding in *Posadas*, especially its application of the fourth prong of the *Central Hudson* test. *Id.* at 480. The fourth prong was once again loosely construed to require only a reasonable fit between the regulation and its purpose. *Id.* at 479-80.

52. 113 S. Ct. 1505, 1508 (1993); *see also Commercial Speech*, *supra* note 35, at 228.

In *Discovery Network*, the Court invalidated a ban on newsracks containing commercial handbills because Cincinnati failed to establish a "reasonable fit" between the regulation and its interests in safety and aesthetics.[53] Prior to this decision, the Court required only a slight public interest for a regulation restricting commercial speech to be upheld.[54] The Court noted that "[b]y putting some teeth back into the fourth part of the *Central Hudson* test, *Discovery Network* signals a halt to this drift, at least for the time being, and pulls commercial speech back toward the harbor of intermediate scrutiny."[55]

The decision in *Discovery Network* caused the Court to construe the *Central Hudson* test more strictly. For example, in *Rubin v. Coors Brewing Co.*,[56] a brewer asserted that a regulation prohibiting beer labels from displaying the alcohol content violated the First Amendment. After applying the *Central Hudson* test, the Court held that the labeling ban violated the First Amendment.[57] Even though the government had a "significant interest in protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength, which could lead to greater alcoholism and its attendant social costs," the Court struck down the regulation.[58] Examining past Supreme Court decisions reveals that this holding seems to be somewhat contrary to the Court's previous trend in upholding restrictions on commercial speech.

Conversely, a few months after *Rubin,* in *Florida Bar v. Went For It, Inc.*,[59] the Court, applying *Central Hudson,* upheld a regulation which prohibited

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53. *Discovery Network*, 113 S. Ct. at 1511. The Court stated that "[n]ot only does Cincinnati's categorical ban on commercial newsracks place too much importance on the distinction between commercial and noncommercial speech, but in this case, the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted." *Id.* at 1514 (emphasis in original).

54. *See Commercial Speech*, *supra* note 35, at 228.

55. *Id.* at 228-29 (footnote omitted). One commentator stated, "*Discovery Network* is the first case since *Metromedia* in which the Court has considered a commercial speech regulation intended to combat harms completely unrelated to the commercial content of the speech." *Id.* at 229. The Court continued to apply the intermediate level of scrutiny to constitutional challenges to limitations on commercial speech. Penn Advertising, Inc. v. Mayor of Baltimore, 862 F. Supp. 1402, 1407 n.2 (D. Md. 1994), *aff'd*, 63 F.3d 1318 (4th Cir.), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 22, 1995) (No. 95-806). An intermediate level of scrutiny requires "a more searching inquiry than rational basis review, but one less rigorous than least restrictive means." *Id.* This standard requires that the regulation under review serve an important governmental objective and that the regulation be substantially related to achieving that objective. Craig v. Boren, 429 U.S. 190, 197 (1976) (discussing intermediate scrutiny); *see also* EPSTEIN & WALKER, *supra* note 26, at 306-11 (analyzing *Discovery Network*).

56. 115 S. Ct. 1585 (1995).

57. *Id.* at 1594.

58. *Id.* at 1591. The Court found that the Government failed to present evidence that the disclosure of alcohol content would instigate an alcohol strength war. *Id.* Since disclosing alcohol content in advertisements would more likely start a strength war, but is permitted, this regulation is irrational. *Id.* at 1592. *But see* Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305 (4th Cir.), *petition for cert. filed*, 64 U.S.L.W. 1305 (U.S. Oct. 27, 1995) (No. 95-685) (upholding an ordinance that prohibits the advertisement of alcoholic beverages on certain "publicly visible locations"). The government's asserted interest in *Anheuser-Busch* was to promote the health, safety, and welfare of its minors. *Id.* at 1308; *see also* NIEMEYER, *supra* note 32, at 2152-53.

59. 115 S. Ct. 2371 (1995).

lawyers from using direct mail to solicit personal injury or wrongful death clients within thirty days of an accident. The Florida Bar's interest was the protection of "the personal privacy and tranquility of [Florida's] citizens from crass commercial intrusion by attorneys upon their personal grief in times of trauma."[60] Even though Florida permitted lawyers to advertise through newspapers, periodicals, radio, television, billboards, and other media, the Court still upheld the regulation.[61]

Although *Discovery Network* signaled a shift back to broader protection of commercial speech, the *Rubin* and *Went for It, Inc.* cases illustrate that the Supreme Court continued to inconsistently apply the *Central Hudson* test. Furthermore, the Fourth Circuit Court of Appeals in *Penn Advertising* recently ruled inconsistently with respect to the application of the *Central Hudson* test.[62] Since a widely-used test should produce predictable outcomes, these inconsistencies clearly demonstrate the defects in the *Central Hudson* test.

III. FACTS AND HOLDING

In *Penn Advertising, Inc. v. Mayor of Baltimore*, Penn Advertising brought this action in the United States District Court of Maryland against the Mayor and City Council of Baltimore because it disagreed with the enactment of Baltimore City Ordinance 307.[63] The ordinance banned cigarette advertising on billboards located in certain areas of Baltimore, and Penn Advertising owned billboards located in the restricted areas.[64] Although Penn Advertising asserted three separate grounds for judgment in its suit, this Note focuses on its assertion that the City had infringed upon Penn Advertising's First Amendment right of freedom of speech.[65] The United States District Court of Maryland

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60. *Id.* at 2379.

61. *Id.* at 2380. *But see* Edenfield v. Fane, 113 S. Ct. 1792 (1993). In *Edenfield*, the Court found a regulation that prohibited in-person solicitation by CPA's unconstitutional. *Id.* at 1804. The *Edenfield* Court states that, "[p]ersonal interchange enables a potential buyer to meet and evaluate the person offering the product or service, and allows both parties to discuss and negotiate the desired form for the transaction or professional relation." *Id.* at 1797-98.

62. *See* Penn Advertising, Inc. v. Mayor of Baltimore, 63 F.3d 1318, 1325 (4th Cir.), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 22, 1995) (No. 95-806).

63. Penn Advertising, Inc. v. Mayor of Baltimore, 862 F. Supp. 1402, 1404 (D. Md. 1994), *aff'd*, 63 F.3d 1318 (4th Cir.), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 22, 1995) (No. 95-806). At the same time the *Penn Advertising* case was pending, Penn Advertising was engaged in other suits against the City of Baltimore. *E.g.*, Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305 (4th Cir.), *petition for cert. filed*, 64 U.S.L.W. 1305 (U.S. Oct. 27, 1995) (No. 95-685).

64. *Penn Advertising*, 862 F. Supp. at 1404. The contested portion of Ordinance 307 provides: "Cigarette Advertisements. No person may place any sign, poster, placard, device, graphic display, or other form of advertising that advertises cigarettes in a publicly visible location. In this section 'publicly visible location' includes outdoor billboards, sides of building[s], and free standing signboards." *Penn Advertising*, 63 F.3d at 1327 n.1 (citing BALTIMORE, MD., ZONING CODE art. 30, § 10.0-1(I) (1994)) (alteration in original).

65. *Penn Advertising*, 862 F. Supp. at 1404. At the district court level, Penn Advertising stated three grounds for judgment: (1) Ordinance 307 violates the First Amendment's protection of freedom of speech,

upheld the constitutionality of the ordinance.[66] Penn Advertising then appealed to the Fourth Circuit Court of Appeals which affirmed the lower court's decision, concluding once again that the ordinance passed constitutional muster.[67]

In order to evaluate the constitutionality of Baltimore City Ordinance 307, the court of appeals applied the four-prong *Central Hudson* test.[68] Under the first prong of the test, the commercial speech must concern a lawful activity.[69] In the present case, neither party disputed the fact that the advertising concerned the lawful sale of tobacco products.[70] Under the second prong, the City had to prove that the regulation promoted a substantial government interest.[71] The City declared that its interest "is to promote compliance with the state law prohibition against the sale of cigarettes to minors . . . thereby also furthering the obvious public policy underlying this prohibition which is to prevent the purchase, and thus the consumption, of cigarettes by minors."[72] The City enacted the ordinance in order to advance article 27, section 404 of the Maryland Code, which prohibits the consumption of cigarettes by minors.[73] By prohibiting billboard advertising, the City believed that fewer minors would purchase cigarettes.[74] The court concluded that the City had indeed asserted a substantial interest.[75]

Once the first two prongs were answered in the affirmative, the court applied the third and fourth prongs of *Central Hudson*, which became the main contentions of the case.[76] Under the third prong, the court examined whether the ordinance directly advanced the City's interest.[77] The court stated that the standard "must involve an assessment of the reasonableness of the legislature's belief that the means it selected will advance its ends."[78] The court asserted that the City is not required to proffer concrete evidence that the regulation it enacted would positively advance its interest.[79] The court stated that with

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(2) Ordinance 307 is pre-empted by section 5(b) of the Federal Cigarette Labeling and Advertising Act, and (3) Ordinance 307 is pre-empted by Maryland state law. *Id.*

66. *Id.* at 1405.

67. *Penn Advertising*, 63 F.3d at 1326.

68. *Id.* at 1325; *see supra* note 32-36 and accompanying text.

69. 862 F. Supp. at 1406.

70. *Id.*

71. *Id.*

72. *Id.* (citation omitted).

73. *Id.*

74. *See id.*

75. *Id.*

76. *See* Penn Advertising, Inc. v. Mayor of Baltimore, 63 F.3d 1318, 1325 (4th Cir.), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 22, 1995) (No. 95-806).

77. *Id.*

78. *Id.* (quoting Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305, 1314-15 (4th Cir.), *petition for cert. filed*, 64 U.S.L.W. 1305 (U.S. Oct. 27, 1995) (No. 95-685)).

79. *Id.*

respect to the third prong, it is not mandatory that a correlation between the regulation and the interest advanced in fact exists, or that the proposed measures are the solution to the problem.[80] The court reasoned that if this were the case, "communities could never initiate even minor steps to address their problems, for they could never be assured of the success of their efforts."[81] Applying this standard, the court held that the City had demonstrated that the ordinance would advance its interest.[82]

Under the fourth prong, the City had to prove that the ordinance did not unduly burden speech. The court concluded that:

> If there were some less restrictive means of screening outdoor advertising from minors, or of reducing the area of billboard regulation in a manner that would have it focus more efficiently on reaching minors, the City would have to consider those alternatives. But it is not an acceptable response to the approach taken by the City of limiting advertising exposure to say that the City must abandon altogether an approach that directly advances its goal. In the face of a problem as significant as that which the City seeks to address, the City must be given some reasonable latitude.[83]

The court found that the ordinance directly advanced the City's goal and that it was not excessive.[84] As a result, since the ordinance passed all four prongs of the *Central Hudson* test, the court of appeals affirmed the lower court's decision and upheld the ordinance as constitutional.[85]

IV. ANALYSIS

The main areas of contention in *Penn Advertising* concerned the third and fourth prongs of the *Central Hudson* test.[86] These prongs, especially the fourth, pose problems for courts due to their subjective and inconsistent application.[87] These problems have allowed courts to use their own discretion rather than a concrete set of guidelines for evaluating the constitutionality of commercial speech.[88] Consequently, the application of the *Central Hudson* test has yielded inequitable results.

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80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 1325-26 (quoting Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305, 1316 (4th Cir.), *petition for cert. filed*, 64 U.S.L.W. 1305 (U.S. Oct. 27, 1995) (No. 95-685)).
84. *Id.* at 1326.
85. *Id.*
86. *See id.* at 1325; *see also infra* notes 120-22, 126-32 and accompanying text.
87. *See supra* notes 37-62 and accompanying text.
88. *See, e.g.*, Anheuser-Busch, Inc. v. Mayor of Baltimore City, 855 F. Supp. 811, 815 (D. Md. 1994) (following the Supreme Court's affirmation of "the role of judicial deference to legislative judgments in the area of commercial speech"), *aff'd*, 63 F.3d 1305 (4th Cir.), *petition for cert. filed*, 64 U.S.L.W. 1305 (U.S. Oct. 27, 1995) (No. 95-685).

A. The Third Prong: Direct Advancement of the Substantial Interest

In order to pass constitutional muster under the third prong of *Central Hudson*, the regulation in question must directly advance a substantial state interest.[89] In order to ensure that a "truthful and nonmisleading expression will [not] be snared along with fraudulent or deceptive commercial speech, the State must satisfy the remainder of the *Central Hudson* test by demonstrating that its restriction serves a substantial state interest and is designed in a reasonable way to accomplish that end."[90] The restriction must be supported with concrete evidence; the offering of justifications without proof is insufficient for purposes of this prong.[91]

Despite Penn Advertising's objections, the Fourth Circuit did not require the City of Baltimore to offer real evidence to support its regulations.[92] Penn Advertising relied on several cases to support its assertion that the City had to offer more than "inferential arguments that are based on mere speculation and conjecture."[93] In *Cal-Almond, Inc. v. United States Department of Agriculture,*[94] the court held that advertising regulations intended to promote the sale of almonds infringed upon the almond handler's rights to freedom of speech since the program forced almond handlers to comply with certain regulations.[95] The government, in support of the regulation, did not offer sufficient evidence to prove that the advertising regulations would increase sales.[96] The court, therefore, struck down the regulation, even though "[t]he Supreme Court assumes as a matter of law that advertising increases consumption of the product or service being advertised."[97]

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89. *See supra* note 35 and accompanying text.

90. Edenfield v. Fane, 113 S. Ct. 1792, 1799 (1993).

91. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980); *see also Edenfield*, 113 S. Ct. at 1800 ("This 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.").

92. Penn Advertising, Inc. v. Mayor of Baltimore, 63 F.3d 1318, 1325 (4th Cir.), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 22, 1995) (No. 95-806).

93. Adolph Coors Co. v. Bentsen, 2 F.3d 355, 359 (10th Cir. 1993), *aff'd sub. nom.* Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995); *see also infra* notes 94-106 and accompanying text.

94. 14 F.3d 429 (9th Cir. 1993).

95. *Id.* at 439. The regulations required the almond handlers to pay assessments to the Board of the Almond Marketing Order based upon each handler's volume of sales. *Id.* at 433. This government agency would then market the almond handler's almonds. *Id.* at 439. The Board would eventually lower the assessment by the amount spent by the almond handler on authorized advertising. *Id.* at 433. After the Board determined that the expenditure met the regulation, a handler would receive credit. *Id.*

96. *Id.* The Court found that the "USDA has failed to meet its burden of showing that the overall almond marketing program 'directly advances' its stated goals of selling more almonds and increasing returns to producers." *Id.* The Court also relied on *Edenfield* that held that since no studies or evidence was offered in support of a ban that prohibited accountants from personal solicitation of customers, the restriction was struck down. *Id.* at 438; *see also supra* note 61.

97. *Cal-Almond*, 14 F.3d at 439. The *Cal-Almond* court acknowledged that the regulations may have had a positive effect on the demand for almonds, but the court did not know the degree of impact. *Id.*

Similarly, in *Adolph Coors Co. v. Bentsen,*[98] the court held that a restriction forbidding statements of alcohol content on beverage labels was unconstitutional.[99] The court stated the issue was whether or not the evidence could show that there is a nexus between the prohibition and the threat of alcohol content "strength wars."[100] Since the government offered "only inferential arguments that are based on mere speculation and conjecture" that did not prove the regulation advanced the government's interest in a material way, the court declared the prohibition was unconstitutional.[101]

Likewise in *Hornell Brewing Co. v. Brady,*[102] the court held that a regulation prohibiting Hornell from using the name "Crazy Horse" on its alcoholic beverages was unconstitutional.[103] The court concluded that even though the government had a substantial interest in curbing alcohol use among Native Americans, the prohibition was unconstitutional because the government did not establish that the prohibition advanced that interest.[104] The court stated that "[a] nexus between the ends and the means must be established by the party who seeks to restrict the speech."[105] By not providing sufficient support, the government failed to establish the requisite nexus between the prohibition and the asserted interest, thereby forcing the court to hold the prohibition unconstitutional.[106]

The *Penn Advertising* court differentiated *Cal-Almond*, *Coors*, and *Hornell Brewing* from the facts in *Penn Advertising* by concluding that the three case involved the government trying to establish tenuous propositions.[107] In the three cases, the government wanted the court to accept mere speculation and conjecture as support for passing the third prong of the *Central Hudson* test.[108] In *Penn Advertising*, the city government wanted the court to accept a less tenuous proposition—that advertising increases consumption.[109] The *Penn Advertising* court concluded that "[t]his link is 'more immediately apparent,' and is a long-standing, judicially-recognized proposition."[110]

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98. 2 F.3d 355 (10th Cir. 1993), *aff'd*, 115 S. Ct. 1585 (1995).

99. *Id.* at 359.

100. *Id.* at 358. Strength wars occur when competing alcoholic beverage companies advertise on the basis of alcohol strength to attract that segment of the market that prefers beverages with a higher alcoholic content. *Id.*; *see also supra* notes 56-58 and accompanying text.

101. *Coors*, 2 F.3d at 359.

102. 819 F. Supp. 1227 (E.D.N.Y. 1993).

103. *Id.* at 1229.

104. *Id.* at 1235. The government stated that the regulation was for "the protection and preservation of the health, safety, and welfare of Native Americans by preventing the enhanced appeal of alcohol use among Native Americans due to the use of the name Crazy Horse." *Id.*

105. *Id.* at 1236 (citing Linmark Assocs. v. Willingboro, 431 U.S. 85, 95-96 (1977)).

106. *Id.*

107. Penn Advertising, Inc. v. Mayor of Baltimore, 862 F. Supp. 1402, 1409 (D. Md. 1994), *aff'd*, 63 F.3d 1318 (4th Cir.), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 22, 1995) (No. 95-806).

108. *Id.*

109. *Id.*

110. *Id.* (citation omitted).

Despite Penn Advertising's argument that *Cal-Almond*, *Coors*, and *Hornell Brewing* required the City to offer more than inferential arguments based on mere speculation and conjecture, the *Penn Advertising* court relied on the assumption that advertising on billboards increases consumption without an offer of supporting evidence.[111] The third prong of the *Central Hudson* test requires that evidence support the need for the regulation.[112] The City of Baltimore, however, did not offer any evidence to support its ban of cigarette advertising on billboards.[113] The court only required a substantial government interest and bare assumptions that the regulation directly advance this interest.[114] Such a hasty decision and lack of deference for the First Amendment brings into question the *Penn Advertising* court's observance of its duty to protect fundamental constitutional rights. The assertion that banning cigarette advertising on billboards will directly advance the City's interest, therefore, has no merit. Since the City's assertions are supported only through mere speculation and conjecture, the ordinance fails the third prong of the *Central Hudson* test.

Furthermore, a 1990 survey of 5,000 California teens, conducted by the State Department of Health of California, revealed that "[t]eens exposed to the most advertising are just as unlikely to smoke as teens exposed to the least advertising."[115] Thus, minors are not prompted to smoke because of

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111. *See id.* at 1402. *But see Canadian Supreme Court Overturns Ban on Tobacco Advertising*, PR NEWSWIRE, Sept. 21, 1995. RJR-MacDonald has stated that the purpose behind cigarette advertising is to capture market share, not to increase consumption. *Id.* RJR cites to numerous examples that support its proposition:

> —Norway, Iceland and Finland experienced increases in consumption following the imposition of cigarette advertising bans.
>
> —Cigarette advertising can influence market share among different brands, but does not increase overall cigarette sales. In Thailand, per capita cigarette consumption has grown since advertising restrictions were imposed there in 1989.
>
> —In Asia, the incidence of smoking is slightly higher in Singapore (where there has been a total ban on cigarette advertising for more than a generation) than in Hong Kong, where cigarette advertising laws are considerably more liberal. Singapore has the higher smoking rate despite drastic efforts by the government to ban smoking.
>
> —Smoking incidence is much higher in Eastern Europe, where advertising has been banned for decades, than in Western Europe and the United States, where advertising is generally permitted.
>
> —Overall tobacco consumption continues to decline in several countries where advertising is allowed—including the United States and the United Kingdom.

Id.

112. *See supra* notes 89-91 and accompanying text.

113. *See Penn Advertising*, 862 F. Supp. at 1402. The District Court stated that there was an immediate connection between advertising and demand among minors. *Id.* at 1410. The court further reasoned that since Ordinance 307 would decrease advertising, minors' demand for cigarettes would logically decrease. *Id.* The Fourth Circuit also concluded that there was a "logical nexus" between the city's interest and the ban on advertising. Penn Advertising, Inc. v. City of Baltimore, 63 F.3d 1318, 1325 (4th Cir.), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 22, 1995) (No. 95-806).

114. *See Penn Advertising*, 63 F.3d at 1326. The court, relying on its decision in *Anheuser-Busch*, which also involved the City of Baltimore, stated that since a substantial government interest was involved, the city should be given some latitude to achieve its objective. *Id.* The court only required that the city reasonably believe that the means selected would advance the city's ends. *Id.* at 1325.

115. Jonathon Marshall, *Cigarette Ads Led to Drop in Sales*, THE SAN FRANCISCO CHRON., Jan. 23, 1995

billboards.[116] Teens choose to smoke because of social peer pressures—they smoke because their friends smoke.[117] Furthermore, minors are easily influenced by the behavior of family members.[118] Teens, therefore, do not smoke based on a brief glimpse at a billboard with Joe Camel or Marlboro Man promoting their products. Teens smoke because they want to emulate other smokers.[119] Accordingly, the *Penn Advertising* court erred in relying on the assumption that advertising on billboards increases teens' consumption of cigarettes.

The Supreme Court in *Central Hudson* included the third prong in its test to assure that restrictions placed upon speech achieve the state's goal.[120] The Court stated that restrictions will be invalidated if they provide only a remote possibility of successfully furthering the government's interest.[121] Additionally, the Court noted that "[s]uch conditional and remote eventualities simply cannot justify silencing . . . advertising."[122] It seems, however, that the Court has since forgotten the very reasons for requiring the third prong of the test.

The Supreme Court seems to rely heavily upon the assumption that advertising increases consumption. The Court has often accepted the legislative judgment that there is a connection between advertising and consumption.[123] This assumption, however, should not be given much credibility since advertisers and manufacturers may be deprived of their freedom of speech rights despite the lack of factual support for the purported advertising-consumption connection.[124] Regulations on advertising must be

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at B1; *see also* Monika Guttman, *Why Teens Refuse to Give Up Smoking: Peer Pressure Often Overwhelms Good Sense*, U.S. NEWS & WORLD REPORT, Aug. 7, 1995 at 27. Guttman asserts that advertising is not the cause of teen smoking; teens smoke because of peer pressure. *Id.*

116. *See* Frank S. Molloy, *Good News? Depends on Whom You Ask*, THE HARTFORD COURANT, Aug. 11, 1995, at A1.

117. *Id.* Teens smoke because they think it is cool, fun, and it keeps weight off. They do not really care about the health consequences. *Id.*

118. *See* Marshall, *supra* note 115, at B1. J. Howard Beales, a professor at George Washington University and a consultant to R.J. Reynolds found that "peer behavior, perceptions of risks and family influences—but not advertising—affected their likelihood of smoking." *Id.*

119. Teens are more impressionable and more susceptible to external influences than are adults. Teens tend to mimic the behavior of the people whom they admire in order to be accepted by others teens. An intense pressure of "fitting in" compels many teens to do whatever it takes to be accepted, regardless of the ramifications. Since there exists a heightened concern over teen smoking, adults, role models, and family members should be more weary of their actions. Adults cannot expect teens to stop smoking when adults themselves do not practice what they preach. Also, in today's society, movie stars and musicians influence teen behavior, which is evident through trends in clothing styles and attitudes. If these idols smoke, their teens fans are more inclined to smoke. Obviously, these external influences have a greater impact than a depiction of a camel and a cowboy promoting cigarette campaigns on billboards.

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

121. *Id.*

122. *Id.* at 569.

123. Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 342 (1986); *Central Hudson*, 447 U.S. at 569.

124. This was the position taken in both Penn Advertising, Inc. v. Mayor of Baltimore, 862 F. Supp. 1402, 1407 (D. Md. 1994), *aff'd*, 63 F.3d 1318 (4th Cir.), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 22, 1995) (No. 95-806), and Anheuser-Busch, Inc. v. Mayor of Baltimore, 855 F. Supp. 811, 815 (D.

adequately supported by factual data in order to be justified. Without showing a correlation between a regulation on advertising and decreased consumption, the regulation is supported by speculations and suppositions at the expense of an infringement on constitutional rights. For these reasons, the Supreme Court should abandon this deferential intermediate level of scrutiny for a stricter standard.[125]

B. The Fourth Prong: Narrowly Tailored to Serve the City's Asserted Interest

The fourth prong of the *Central Hudson* test requires that the regulation not be more extensive than necessary.[126] Considerable confusion surrounds the degree of extensiveness required by this prong of the test.[127] Courts are unclear as to how much latitude the government may have when enacting restrictions on commercial speech in order to reach their desired objectives.[128] Accordingly, courts have followed a standard of reasonableness.[129] Courts have concluded that "government restrictions upon commercial speech may be no more broad or no more expansive than 'necessary' to serve its substantial interests."[130] If the government can employ a less harsh prohibition on commercial speech that is narrowly tailored to serve the government's interest, the more lenient regulation should be adopted.[131] A reasonable fit should exist between the regulation and the advertising at issue.[132]

Penn Advertising claimed the outright ban of cigarette advertising on billboards did not reasonably fit the desired end of decreasing smoking among minors.[133] In *Discovery Network*, the Supreme Court held the regulation established by the City of Cincinnati violated the First Amendment since there was no reasonable fit between the regulation and the City's interest.[134] The regulation in question prohibited newsracks containing commercial handbills

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Md. 1994), *aff'd*, 63 F.3d 1305 (4th Cir.), *petition for cert. filed*, 64 U.S.L.W. 1305 (U.S. Oct. 27, 1995) (No. 95-685).

125. *See Penn Advertising*, 862 F. Supp. at 1406-07; see also *supra* note 55 for an explanation of intermediate scrutiny.

126. *See supra* note 35 and accompanying text.

127. *See* EPSTEIN & WALKER, *supra* note 26, at 305.

128. *Id.*

129. *See* Board of Trustees v. Fox, 492 U.S. 469, 480 (1989); *see also* Penn Advertising, 63 F.3d 1318, 1325 (4th Cir.) (holding that "[t]he proper standard for approval must involve an assessment of the reasonableness of the legislature's belief that the means it selected will advance its ends"), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 22, 1995) (No. 95-806); *supra* notes 52-55 and accompanying text.

130. *Fox*, 492 U.S. at 476.

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

132. *See supra* note 40 and accompanying text.

133. *See Penn Advertising*, 63 F.3d at 1325-26; Anheuser-Busch, Inc. v. Mayor of Baltimore, 63 F.3d 1305, 1315-16 (4th Cir.), *petition for cert. filed*, 64 U.S.L.W. 1305 (U.S. Oct. 27, 1995) (No. 95-685).

134. City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1508 (1993).

from being situated on public property since the City had an interest in preserving the safety and beauty of the surrounding area.[135] The ordinance required the removal of sixty-two newsracks that contained commercial handbills, while leaving approximately 2,000 newsracks containing noncommercial speech untouched.[136] The Court noted that the City could have employed similar methods of regulating commercial speech that other communities employed to protect their beauty and aesthetic interests, such as "regulating the size, shape, number or placement of such devices."[137] Further, the Court rejected the City's argument that the commercial speech should be regulated since it was considered "low value."[138] Accordingly, the Court found the regulation was not narrowly tailored to further the City's interest and struck down the regulation as unconstitutional.[139]

Similarly, in *Penn Advertising*, the City of Baltimore could have employed less restrictive means to further its interest rather than infringing on commercial speech.[140] Other cities throughout the nation have reacted to the problem of teen smoking in a less restrictive manner than denying tobacco companies their constitutional rights.[141] For example, in Phoenix, Arizona, the city can fine retailers up to $300 for selling cigarettes to minors.[142] The City of Woodridge, Illinois, has enacted an ordinance that suspends the sales permits for one day of stores that sell cigarettes to minors.[143] Other cities can arrest teens who are caught smoking in public.[144] These measures are more narrowly tailored than the advertising ban. They strongly enforce laws that prohibit selling cigarettes to minors and directly focus on the root of the problem of teen smoking.[145]

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135. *Id.* at 1510.

136. *Id.*

137. *Id.* at 1508 (citation omitted).

138. *Id.* at 1511. The City's main contention was that commercial speech has a low value. *Id.* Relying on this assertion, "the city contends that the fact that assertedly more valuable publications are allowed to use newsracks does not undermine its judgment that its esthetic and safety interests are stronger than the interest in allowing commercial speakers to have similar access to the reading public." *Id.* The Court disagreed with the City. *See supra* note 53 and accompanying text.

139. *Discovery Network*, 113 S. Ct. at 1516.

140. *See supra* notes 130-32 and accompanying text.

141. *See* Virginia Young, *Tobacco Lobby Retains Power in State; Capitol Senate Panel Slaps Industry's Wrist with 'Toothless' Bill, Critics Charge*, ST. LOUIS POST DISPATCH, Feb. 19, 1995, at 1A. Cities have set high fines for retailers who sell to minors and have organized "sting operations" to draw attention to stores that sell cigarettes to minors. *Id.*

142. Howard Fischer, *Lawmakers OK State Liquor Panel to Regulate Tobacco Product Sales*, THE ARIZONA DAILY STAR, Apr. 6, 1995, at 2B.

143. Brian Ford, *Tobacco Law Repeal Mulled*, TULSA WORLD, Oct. 10, 1995, at N7. Ordinances are not only geared at punishing teens, but also at punishing the vendor. *See* Mike Holly, *Pekin Cracks Down on Teen Smokers: Only Place Left for Them to Light Up is in Their Homes*, PEORIA JOURNAL STAR, May 18, 1995, at 2. In Crystal Lake, retailers who sell cigarettes are required to buy a $50 license. Stephanie Price, *Tobacco Licensing Ordinance Approved*, CHICAGO TRIBUNE, Sept. 20, 1995, at 2. If the retailer sells cigarettes to minors, his tobacco license can be suspended indefinitely. *Id.*

144. *See* Holly, *supra* note 143, at 2. Teens in the City of Pekin, Illinois can legally smoke only inside their homes under supervision. *Id.*

145. *See* Marshall, *supra* note 115, at B1.

By enacting the advertising ban, the City of Baltimore took the easy way out. The City did not attempt to deal directly with the problem. Instead, the City banned all cigarette advertising on billboards, thereby relieving itself of the administrative task of creating less restrictive ordinances to decrease the number of teen smokers.[146] The City should have explored alternatives before taking the extreme action of depriving citizens of constitutional rights. This apathy on the part of the government should not pass unnoticed. If the asserted governmental interest is so substantial, steps need to be taken to advance that interest in the most optimal way.

The Supreme Court has held that restrictions on commercial speech should be reasonable.[147] The methods used to achieve the desired goals should be no more restrictive than is necessary.[148] By employing reasonable regulations over harsher regulations, the government is less likely to infringe upon anyone's constitutional rights. Unlike other cities, the City of Baltimore opted for an extremely restrictive means in attempting to solve its problem with teen smoking. The consequences that follow such a stringent regulation are oppressive to cigarette manufacturers. Because cigarette manufacturers are already inhibited from resorting to certain other forms of media,[149] taking away the right to convey truthful information on billboards only further suppresses the industry.

This suppression puts the tobacco companies at a financial disadvantage. By limiting their advertisements to the point of almost complete extinction, adults are not being informed about the different brands of cigarettes and their respective features. As a result, if the adult public is not informed, they will not purchase certain brands. These "unknown" tobacco companies will be unable to capture a significant share of the market.

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146. Other forms of media such as magazines, T-shirts, store signs, and newspapers were not restricted. *See* Penn Advertising, Inc. v. Mayor of Baltimore, 862 F. Supp. 1402, 1411 (D. Md. 1994), *aff'd*, 63 F.3d 1318 (4th Cir.), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 22, 1995) (No. 95-806). This underinclusive restriction would only cause Penn Advertising to increase its cigarette advertising in these other forms of media. *Id.* at 1413. One commentator noted that "[t]obacco companies sponsor sporting events, sell souvenirs . . . show cigarette brands in movies designed for young people, and ignore the sale by candy cigarette manufacturers of candy cigarettes." Scott Solomon, *Will Cigarette Ads Go Up in Smoke? Companies Brace for Government Regulations*, GREENSBORO NEWS & RECORD, Aug. 6, 1995, at E1. Thus, the retaliation by Penn Advertising would defeat the purpose of the ordinance. *See Penn Advertising*, 862 F. Supp. at 1413. In order to effectively advance its interest, the City should have banned cigarette advertising in all forms of media that are "publicly visible" to children. Since this type of action would certainly violate the First Amendment, the City should have considered other alternatives. Instead, tobacco companies will pour all of their efforts into indirectly marketing their products. *See* Solomon, *supra*, at E1; *see also* Marshall, *supra* note 115, at B1 (noting that tobacco companies now spend less on direct advertising and more on coupons, free samples, and sponsoring entertainment events).

147. *See supra* notes 126-32 and accompanying text.

148. *See supra* notes 126-32 and accompanying text.

149. For example, the Public Health Cigarette Smoking Act of 1969 bans the advertising of cigarettes on any electronic communications media. 15 U.S.C. § 1335 (1994). Also, Maryland Executive Order No. 01.01.1993.33 prohibits cigarette advertisers from renewing their contracts for their advertisement on Maryland Transit Authority buses. *Penn Advertising*, 862 F. Supp. at 1413.

The Supreme Court has held that "[s]o 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."[150] The capitalistic economy of the United States relies on the ability of companies to advertise their product. Because this economic system is dependent on the efforts of private individuals and enterprises, the government's restrictions on commercial speech hinders businesses' performance in the market. Thus, government regulation of advertisements defeats the purpose of capitalism because private individuals are prevented from promoting their products.

Those cities that have narrowly tailored regulations of tobacco products reflect the principles underlying capitalism. The interest asserted by the cities (including Baltimore) is to protect teens from smoking, not to deter adults from smoking. If regulations are not narrowly tailored, unexpected consequences may result. The purpose behind this billboard regulation is to deter teenagers from smoking, not to weaken the national economy by suppressing the tobacco industry's capitalistic efforts. By enacting ordinances and regulations narrowly tailored to the asserted interest, city governments have not exceeded their powers. Baltimore, however, did not narrowly tailor its solution to the asserted interest. Baltimore's ban on cigarette advertising on billboards was too broad and had sweeping effects into areas that were entitled to constitutional protection. As a result, the fourth prong of *Central Hudson* was incorrectly applied since the regulation was more excessive than necessary.

C. The Ban Does More than Attempt to Further the City's Interest

Since Baltimore City Ordinance 307 was not narrowly tailored to Baltimore's asserted governmental interest, the ordinance had a detrimental impact that the City overlooked.[151] The ordinance deprived adults of information concerning cigarettes.[152] This unfortunate consequence resulted from the imperfect application of the *Central Hudson* test.[153] This test looks at the regulation itself and whether certain criteria are satisfied.[154] A more appropriate examination of regulating commercial speech would seek to examine the effect the regulation will have on the recipient, not the speaker.[155] The Supreme Court has held that "[f]reedom to distribute information to every citizen wherever he decides to receive it is so clearly vital to the preservation

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150. Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

151. *See Penn Advertising*, 862 F. Supp. at 1412.

152. *Id.* Penn Advertising argued that the City "cannot deprive adults of commercial information concerning cigarettes simply because the City believes that minors should not be exposed to such information." *Id.* (quoting Plaintiff's Opp. to Def. Motion for Summ. Judg., at 44).

153. *See supra* notes 37-41 and accompanying text.

154. *See supra* notes 34-35 and accompanying text.

155. *See supra* note 25 and accompanying text.

of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved."[156] As a result, the dissemination of information should be protected since likely recipients rely and depend upon the message conveyed.

The City of Baltimore enacted Ordinance 307 in order to protect minors from commercial speech concerning cigarettes.[157] By banning cigarette advertising on billboards in certain "publicly visible locations," however, the ordinance denied adults exposure to this form of advertising.[158] In previous years, the Supreme Court has held that restrictions such as this are "more extensive than the Constitution permits, for the government may not 'reduce the adult population . . . to reading only what is fit for children.'"[159] Although certain situations call for special treatment of advertising when children are likely to be exposed to inappropriate speech, such is not the case here.[160] Since people have smoked cigarettes for many years in the United States and smoking is still prevalent in today's society, it is unlikely that advertising of cigarettes will introduce children to something which they have never been exposed to before.

D. The Central Hudson Test has Become Obsolete

The Supreme Court has developed countless tests for determining the constitutionality of certain forms of speech and should now develop a test tailored to the interplay between children and commercial speech.[161] The *Central Hudson* test is insufficient when dealing with issues concerning children and advertising. Without a test that contemplates these concerns, censorship may supersede First Amendment rights. A new test is necessary to prevent future holdings similar to that in *Penn Advertising*.

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156. Martin v. City of Struthers, Ohio, 319 U.S. 141, 146-47 (1943). The Court has previously concluded that "[a]lthough a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion." Schneider v. New Jersey, 308 U.S. 147, 160 (1939).

157. *See* Penn Advertising, Inc. v. Mayor of Baltimore, 63 F.3d 1318, 1320-21 (4th Cir.), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 22, 1995) (No. 95-806).

158. *See* Penn Advertising, Inc. v. Mayor of Baltimore, 862 F. Supp. 1402, 1412 (D. Md. 1994), *aff'd*, 63 F.3d 1318 (4th Cir.), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 22, 1995) (No. 95-806).

159. Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 73 (1983) (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)) (alteration in original). A manufacturer of contraceptives brought action against a statute that prohibited the mailing of contraceptive advertisements. *Id.* at 60. The statute was held to be unconstitutional since it deprived adults of the free flow of information. *Id.* at 75.

160. *See* FCC v. Pacifica Found., 438 U.S. 726 (1978). The Supreme Court declared the prohibition against the broadcast of certain words over the radio constitutional since children would be exposed to the speech as well as adults. *Id.* at 748. The Court held that the broadcast is "uniquely pervasive" and "uniquely accessible to children," even those too young to read." *Id.* at 748-49.

161. *See, e.g.*, Miller v. California, 413 U.S. 15 (1975) (outlining a test for statutes that regulate obscene material); Lemon v. Kurtzman, 403 U.S. 602 (1971) (outlining a test for determining whether certain activities violate the Establishment Clause).

When developing a test that focuses on children's exposure to certain advertisements, the Court should create a list of inappropriate subjects to which children should not be exposed (i.e., sex, alcohol, smoking, pornography, etc.). If a certain subject is outside the scope of this list, then an advertisement concerning that subject is exempt from the test. The more narrowly tailored the test, the less likely constitutional violations will occur. The following is an example of the type of test the Court could create:

(1) The advertisement must fall under one of the categories on the list.
(2) The regulation must concern a substantial government interest.
(3) The regulation must directly advance that interest.
(4) A correlation between the advertisement and its effect on children must be shown through concrete evidence.
(5) Alternative measures would be ineffective.
(6) Other reasonable channels of communication must be available to convey the message to adults.

Applying this test to the facts of *Penn Advertising*, it is clear Baltimore City Ordinance 307 would not pass constitutional muster. The ordinance satisfies the first element if smoking is included in the list of inappropriate subjects. Since the welfare of children is always of utmost importance, the second element is also satisfied.

The third element poses a problem, however, because the regulation did not directly advance the asserted governmental interest of protecting the welfare of children. The City did not provide evidence that banning cigarette advertising on billboards would decrease smoking among minors. The third element, therefore, is not satisfied. Furthermore, the fourth element is not satisfied since the City did not prove that cigarette advertising on billboards influences children's behavior. The fact that the City did not even attempt to employ other alternatives causes the ordinance to fail the fifth element.

The sixth element requires that other alternative channels of communication be available. Even though cigarette manufacturers can advertise through other media, their alternatives are limited. Since there are insufficient alternative means of advertising cigarettes, the ordinance fails the sixth prong as well. Therefore, since the ordinance did not meet all the elements of the new test, the ban would be overturned.

Even though the suggested test is strict, when dealing with constitutional issues, nothing less should suffice. By having such a rigorous test, needless litigation can be avoided. Such a test would put the government on notice as to the qualifications regulations must meet in order to be constitutional. Therefore, a more objective test with well defined elements will yield more equitable results.

E. The Campaign against Cigarette Advertising

It is also necessary to adopt a more objective test given the increased concern about teen smoking. President Clinton has declared a campaign against teen

smoking, which includes the regulation of commercial speech concerning cigarettes.[162] In this campaign, President Clinton stated that "youths must be protected from the 'seduction' of 'skilled marketing companies aimed at their insecurities and uncertainties.'"[163] As a result, the President has given the Food and Drug Administration (FDA) complete authority over the campaign against teen smoking, which includes the authority to monitor the advertising of tobacco products.[164] The FDA has developed many proposals restricting the actions of tobacco companies as part of this anti-smoking campaign.[165] Cigarette manufacturers and advertising agencies stated that the FDA proposals infringe upon their First Amendment rights.[166] By initiating litigation to fight for their constitutional rights, tobacco companies and advertisers hope to delay implementation of the FDA proposals.[167]

An advertising group known as the Association of National Advertisers Inc., representing 5300 manufacturers, retailers, service, and financial concerns, plans to go to court to protect its constitutional rights.[168] "[T]he advertiser's rights must be balanced against the government's interest in protecting its [youth]."[169] By protecting our youth, the FDA proposals will deprive adults of

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162. *See Clinton Takes on the Tobacco Industry; But Cigars are not Part of This*, U.S. NEWS & WORLD REP., Aug. 21, 1995, at 8. The President is "proposing the toughest restrictions ever aimed at the $47 billion-a-year industry." *Id.*

163. Paul Richter & Elizabeth Shogren, *Clinton Orders Smoking Limits for Teen-Agers*, L.A. TIMES, Aug. 11, 1995, at A1.

164. Greg McDonald, *Tobacco Industry Takes Blow/Clinton OKs Curb to Teen Smoking*, HOUS. CHRON., Aug.11, 1995, at A1; *see also Treating Smokers as Drug Addicts*, U.S. NEWS & WORLD REP., July 24, 1995, at 13.

165. J. Jennings Moss, *President Attacks Teen Use of Tobacco; Rules Affect Advertising and Sales in Machines*, WASH. TIMES, Aug.11, 1995, at A1. These proposals are:

—Ban all cigarette vending machines and self-serve displays, allowing cigarettes to be sold only by clerks from behind a counter.

—Allow sales of cigarettes and smokeless tobacco only to customers over 18 and require proof of age.

—Ban sale of individual cigarettes and of packs of fewer than 20 cigarettes, sometimes called "kiddie packs."

—Forbid brand-name advertising at sporting events and on products not related to tobacco use, such as T-shirts and hats.

—Require tobacco companies to pay for $150 million advertising campaign, including TV commercials, to stop young people from smoking.

—Forbid outdoor tobacco ads within 1,000 feet of schools and playgrounds.

—Limit advertising in publications that reach a significant number of children and teen-agers to black-and-white text only, with no pictures.

—Make manufacturers, distributors and retailers responsible for underage sales. The onus would be off the young buyer and part-time sales clerk.

Id.

166. Wade Lambert & Milo Geyelin, *U.S. Smoking Move May Affect Free Speech*, WALL ST. J. EUROPE, Aug.11, 1995, at 4. "Five tobacco companies and an advertising agency attacked FDA's legal right to declare nicotine an addictive drug, while a separate lawsuit filed by a coalition of major advertisers, publishers and ad agencies charged the action violates the First Amendment." Moss, *supra* note 165, at A1.

167. Richter, *supra* note 163, at A1. "Joe Camel might find himself in the middle of a lengthy legal First Amendment battle before his image is banned from billboards and print advertising." Bill Choyke, *Curbs on Tobacco Marketing Could Face Legal Challenge*, THE TENNESSEAN, Aug.11, 1995, at 2A.

168. Richter, *supra* note 163, at A1.

169. David G. Savage, *Tobacco Ad Curbs Face Uphill Fight, Experts Say; Law: Clinton's Proposed*

information to which they have a legitimate interest.[170] If the government starts restricting these cigarette advertisements, commercial speech could fall victim to the "slippery slope," prompting endless restrictions.[171]

V. CONCLUSION

The decision in *Penn Advertising* prohibiting cigarette advertising on billboards has unnecessarily deprived cigarette manufacturers of their right to freedom of speech.[172] By upholding the City of Baltimore Ordinance 307, the *Penn Advertising* court denied tobacco manufacturers the right to disseminate information concerning their product. As a result, the court denied Baltimore adults access to information that they have a constitutional right to receive in order to make prudent decisions among competing products in the marketplace. Even though the asserted interest was for the benefit of children, the *Penn Advertising* court should have considered consequential effects.

Due to the lack of another standard, the *Penn Advertising* court employed the *Central Hudson* test to determine whether Baltimore's ordinance was constitutional.[173] Applying the *Central Hudson* test to the facts of *Penn Advertising*, the court upheld the regulation despite obvious errors in its judgment.[174] These errors can be attributed to the nonadherence to the *Central Hudson* test's requirements. The subjective nature of the *Central Hudson* test has caused the courts, over the years, to use their own judgment in assessing the constitutionality of regulations on commercial speech. The time has come to develop a new test to ensure that commercial speech is properly afforded First Amendment protection. Status quo will only cause others to join Joe Camel and Marlboro Man in their fight for their constitutional rights.

Maria J. Johnson

Restrictions have Ignited Battle over Free-Speech Rights. The Conflict Appears Headed for a Supreme Court Test, L.A. TIMES, Aug.14, 1995 at 4.

170. *Id.* "Not only does it make it hard to advertise to kids, it makes it difficult to advertise to anyone." Lambert, *supra* note 166, at 4. "In its effort to modify and change the behavior of individuals, the government has elected to suppress speech." Frank J. Murray, *Clinton Faces First Amendment Challenge on Cigarettes*, WASH. TIMES, Aug. 11, 1995, at A1.

171. Choyke, *supra* note 167, at 2A.

172. *See* Penn Advertising, Inc. v. City of Baltimore, 63 F.3d 1318 (4th Cir.), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 22, 1995) (No. 95-806).

173. *Id.* at 1325.

174. *Id.* at 1326.