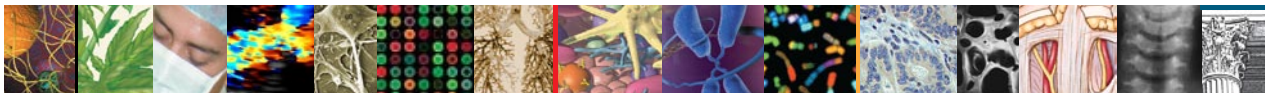

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Perspective

Tobacco Control and Free Speech — An American Dilemma

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On June 22, 2009, President Barack Obama signed the Family Smoking Prevention and Tobacco Control Act. This landmark legislation, which passed the House by a vote of 307 to 97 and the Senate 79 to 17, grants the Food and Drug Administration (FDA) extensive authority to regulate tobacco products. In signing the law, Obama underscored the importance of radically limiting the tobacco industry's capacity to market its products to young people. "The kids today don't just start smoking for no reason," he said. "They're aggressively targeted as customers by the tobacco industry. They're exposed to a constant and insidious barrage of advertising where they live, where they learn, and where they play."

The law was long sought by public health advocates stung by a 2000 U.S. Supreme Court decision declaring that the FDA had not been granted the authority it had assumed for tobacco regulation.[1] Among the new law's sweeping provisions are some permitting the FDA to regulate the content of tobacco products. The act prohibits the use of the terms "light," "mild," and "low" on packaging and in advertising and mandates dramatic changes in the nature and strength of cigarette warnings, which by 2012 would have to cover the top 50% of both front and rear panels of cigarette packages. And it stipulates that the FDA will reissue its 1996 regulations, which, among other things, would prohibit outdoor advertising of tobacco products within 1000 ft (305 m) of a school or playground, limit advertising to a simple black-text-on-white-background "tombstone" format in publications with a "significant youth readership," limit advertising in video to static black-and-white text, and ban brand-name sponsorship of sporting and cultural events.

Even before the legislation was passed, the extent to which it would be challenged by industry and proponents of stringent First Amendment protections for advertising was signaled by a letter to senators from the American Civil Liberties Union (ACLU) arguing that "regulating commercial speech for lawful products only because those products are widely disliked — even for cause — sets us on the path of regulating such speech for other products that may only be disfavored by a select few in a position to impose their personal preferences. Usually," the ACLU remarked, "the antidote to harmful speech

can be found in the wisdom of countervailing speech — not in the outright ban of the speech perceived as harmful."

On August 21, 2009, the tobacco industry filed suit in the U.S. District Court in Bowling Green, Kentucky, challenging the constitutionality of the law's advertising and promotion restrictions. In a press release, the R.J. Reynolds Tobacco Company acknowledged Congress's authority to grant the FDA regulatory authority over tobacco but argued that "the law contains provisions that severely restrict the few remaining channels we have to communicate with adult tobacco consumers." Floyd Abrams, a leading First Amendment attorney, joined the lawsuit representing the Lorillard Tobacco Company and told the *New York Times* that "When you cut back [tobacco companies'] ability to speak to their potential lawful purchasers, you do start running into serious legal issues."

But the legislation's defenders believe that its carefully crafted language has paved the way for a Supreme Court decision recognizing that its restrictions are no more extensive than necessary to protect the country's young people. Thus the stage is set for a recapitulation of a decades-long struggle between those who believe that protecting the public health may necessitate stringent limits on commercial expression and those who warn that any chink in the armor of First Amendment protection threatens the very fabric and vitality of U.S. democracy.

In the mid-1980s, the American Medical Association joined the American Heart Association and the American Lung Association in calling for a total ban on cigarette advertising and promotion. In Congressional testimony, the American Public Health Association underscored the gravity of the stakes: "Cigarettes are killing us. . . . Advertisements should be to promote good healthy products and not products that kill. Cigarette companies practice false advertising at its worst: deceptively offering freedom while actively inducing bondage." Surgeon General C. Everett Koop expressed a similar desire to ban tobacco advertising. Such calls provoked ire and dismay from civil-liberties advocates; Burt Neuborne of the New York Civil Liberties Union told Congress that the proposed bans represented "a vote of no confidence in the capacity of ordinary Americans to judge for themselves how to react to tobacco advertising."

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In 1994, an Institute of Medicine (IOM) report called for severe restrictions on tobacco advertising, including the possible imposition of a total ban.[2] Concerned about protecting children and adolescents, the IOM asserted that "Portraying a deadly addiction as a healthful and sensual experience tugs against the nation's efforts to promote a tobacco-free norm and to discourage tobacco use by children and youths." The IOM believed there was sufficient evidence to suggest that advertising encouraged young people to start smoking.

In 2007, the IOM again called for far-reaching limits on tobacco advertising — noting, however, that "it is by no means clear" that such restrictions "would survive a constitutional challenge."[3] Indeed, IOM committee member and law professor Cass Sunstein, who now directs the White House Office of Information and Regulatory Affairs, dissented from the recommendation, citing doubts about its constitutionality.

In the mid-1970s, when the Supreme Court first extended First Amendment protection to advertising, stating that commercial speech was not "valueless in the marketplace of ideas," it emphasized that advertising was "lower-value" expression, deserving of less-exacting constitutional protection than social or political discourse. In 1980, the Court adopted a framework for deciding commercial-speech cases, known as the *Central Hudson* test, according to which it is constitutional to regulate commercial speech only if doing so "directly advances" a "substantial" government interest and there is a "reasonable fit" between the regulation and the government's objective.

The Court has followed an uncertain path since that time. Early decisions regarding the regulation of commercial speech reflected a deference to the public health and welfare — a trend that reached a peak in 1986 in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico.* In a decision that provoked bitter dissent on the Court and protest from civil libertarians, Chief Justice William Rehnquist noted

that "It would surely . . . be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity [such as gambling] but deny to the legislature the authority to forbid the stimulation of demand for the product or activity."[4]

During the past decade, however, the Supreme Court has all but repudiated its *Posadas* holding and begun a robust defense of commercial speech. Most pertinently, in a 2001 decision in *Lorillard Tobacco Company v. Reilly*, it rejected a set of Massachusetts antitobacco measures designed to protect young people from advertising, concluding that the state had demonstrated neither that the proposed restrictions would have an effect on smoking by minors nor that they were tailored narrowly enough to preclude unnecessary intrusions on expressive freedom.[5]

How the Court will decide the case that is now bound to come before it is unclear. Whether it will distinguish between the current legislation and the *Lorillard* ruling regarding point-of-sale advertising and outdoor billboards, whether it will tolerate the dampening effect of tombstone advertising on companies' ability to reach consumers, and whether the limits on packaging will be viewed as narrowly tailored or as crippling firms' ability to promote the consumption of a legal product will all depend on how the justices read and apply the Court's precedents. The Court will also need to address the January 2010 decision by the U.S. District Court in Kentucky holding that limiting advertisement to a black-and-white tombstone format would represent a violation of commercial free-speech rights. Inevitably, the political context surrounding the current regulatory move will have an effect. This move was not simply the determination of a state health official or a regulatory body but a bill passed overwhelmingly by both houses of Congress and signed into law by the President on the basis of massive, if contested, evidence about how advertising limits might advance the public health and the protection of children.

But it would be a mistake for us to limit consideration of this issue to constitutional doctrine alone. The encounter over tobacco advertising raises profound questions. Why does the United States alone among advanced liberal democracies extend to advertising exacting protections more commonly afforded to political, social, and cultural expression? How did we come to believe that the exchange of commercial appeals in the marketplace of goods and services should be equated with free exchange in the marketplace of ideas? Are our freedoms really secured by a constitutional doctrine that would limit our capacity to inhibit the promotion of toxic goods? This is an opportune moment to reflect on these questions and their implications for the relationship between public health goals and the rules that should be foundational in a democracy.

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4. Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 United States 325 (1986).
5. Lorillard Tobacco Co. v. Reilly, 533 United States 25 (2001).