Massachusetts Regulations on Cigarette Advertising Are Preempted by the Federal Cigarette Labeling and Advertising Act and Massachusetts Regulations on Cigar and Smokeless Tobacco Advertising Fail the Central Hudson Test for Commercial Speech and Violate the First Amendment: Lorillard Tobacco Co. v. Reilly

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Massachusetts Regulations on Cigarette Advertising are Preempted by the Federal Cigarette Labeling and Advertising Act and Massachusetts Regulations on Cigar and Smokeless Tobacco Advertising Fail the *Central Hudson* Test for Commercial Speech and Violate the First Amendment: *Lorillard Tobacco Co. v. Reilly*

**CONSTITUTIONAL LAW — SUPREMACY CLAUSE — FIRST AMENDMENT — COMMERCIAL SPEECH — THE CENTRAL HUDSON TEST** — The United States Supreme Court held that Massachusetts regulations regarding point-of-sale and outside cigarette advertising were preempted by the FCLAA. The majority also held that Massachusetts regulations regarding point-of-sale and outside cigar and smokeless tobacco advertising failed the *Central Hudson* four-part test for commercial speech because the regulations were too broad to be constitutional. However, the Court held that the Massachusetts regulations regarding sale of tobacco products passed the *Central Hudson* test because of the substantial interest of Massachusetts that was promoted and the regulations were narrow enough to be constitutional.

*Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404 (2001)

Following the agreement between Massachusetts, along with forty other states, and cigarette manufacturers in 1998, the Massachusetts Attorney General, Scott Harshberger, stated that he wanted to enact more regulations to protect consumers, especially children, from tobacco advertising and sales.¹ These regulations were promulgated in January of 1999 under the Attorney General’s authority to stop “unfair or deceptive practices in trade.”² The goal of these regulations on cigarettes, smokeless tobacco, and cigars was to restrict the advertising and the sale of such products to minors.³ The Attorney General’s regulations went beyond what was

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¹ Lorillard Tobacco Co. v. Reilly, 121 S. Ct. 2404, 2410 (2001). The agreement between Massachusetts and the cigarette manufacturers can be obtained at: http://www.naag.org.
² MASS. GEN. LAWS ch. 93A, § 2 (1997). These laws vest the Attorney General with the authority to make regulations. *Id.*
³ MASS. REGS. CODE tit. 940, §§ 21.01–21.07, 27.01-27.09 (2000). These regulations
contained in the 1998 agreement by placing restrictions on outside advertisements, transactions between seller and buyer, mailings, samples, promotions, and wrappers for cigars.  

Prior to the regulations becoming effective, a group of tobacco product manufacturers and retailers brought an action against the Attorney General of Massachusetts, Thomas Reilly, in the United States District Court for the district of Massachusetts. The manufacturers claimed that the state tobacco regulations were unconstitutional and were preempted by federal tobacco regulations. The district court first heard the Supremacy Clause claim. The tobacco companies urged in their claim that the

provide, in pertinent part, that for cigarettes, smokeless tobacco, cigars, and little cigars:

(2) ... it shall be an unfair or deceptive act or practice for any person who sells or distributes cigarettes or smokeless tobacco products [and cigars and little cigars] through a retail outlet located within Massachusetts to engage in any of the following practices ... (c) Using self-service displays of cigarettes or smokeless tobacco products; [and cigars and little cigars]; (d) Failing to place cigarettes and smokeless tobacco products [and cigars and little cigars] out of the reach of all consumers, and in a location accessible only to outlet personnel ... (5) ... It shall be an unfair or deceptive act or practice for any manufacturer, distributor, or retailer to engage in any of the following practices: (a) outdoor advertising, including advertising in enclosed stadiums and advertising within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school, or secondary school; (b) Point-of-sale advertising of cigarettes or smokeless tobacco products [and cigars and little cigars] any portion of which is placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of any public playground, playground area in a public park, elementary school, or secondary school, and which is not an adult-only retail establishment. In addition, for cigars and little cigars: (1) ... it shall be an unfair or deceptive act or practice for any person who sells or distributes cigars or little cigars directly to consumers within Massachusetts to engage in any of the following practices: (a) Sampling of cigars or little cigars or promotional give-aways of cigars or little cigars.

Id.

4. Lorillard, 121 S. Ct. at 2410-11.


6. Lorillard, 121 S. Ct. at 2412. The claim that the regulations were unconstitutional was based on the First Amendment, which provides in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

7. Lorillard, 121 S. Ct. at 2412. Whether a federal law preempts a state law is governed by the Supremacy Clause in Article VI of the Constitution. Id. The Supremacy Clause states in pertinent part that federal laws "shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, §
Federal Cigarette Labeling and Advertising Act ("FCLAA") preempts the Massachusetts regulations because of the Supremacy Clause.\(^8\) The district court held that the Massachusetts regulations were based on the location of the advertising, which the FCLAA did not restrict; therefore, the FCLAA did not preempt the Massachusetts regulations.\(^9\)

In a second opinion, the district court heard the First Amendment claim.\(^10\) The tobacco companies argued that the regulations should be subject to a strict scrutiny standard to determine their constitutionality.\(^11\) The district court rejected this suggestion and instead used the *Central Hudson* four-part test for commercial speech.\(^12\) The district court held that the Massachusetts regulations regarding outside advertisements and selling practices (i.e., keeping tobacco products behind the counter) did not violate the First Amendment.\(^13\) The district court also held that the regulation regarding point-of-sale advertisements (i.e., no advertisements lower than five feet in places where tobacco products are sold) did violate the First Amendment.\(^14\) The tobacco companies appealed both district court decisions.\(^15\)

The United States Court of Appeals for the First Circuit agreed with the district court that the Massachusetts regulations were not preempted by the FCLAA.\(^16\) On the First Amendment issues, the court of appeals applied the same test as the district court and

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1, cl. 2.


The four-part test provides in pertinent part:

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. *Id.* at 566.


14. *Id.* at 2413.


16. *Lorillard*, 121 S. Ct. at 2413. The First Circuit reached this conclusion based on *Greater New York Metropolitan Food Council, Inc. v. Giuliani*, 195 F. 3d 100 (2d Cir. 1999) and *Federation of Advertising Industry Representatives, Inc. v. Chicago*, 189 F. 3d 633 (7th Cir. 1999) (holding that the content of the advertising is what is important, not the location). *Lorillard*, 121 S. Ct. at 2413.
concluded that the outside advertisement regulation, the point-of-sale regulation, and the selling restrictions did not violate the First Amendment. The court of appeals did not issue any order due to the petition by the tobacco companies to the Supreme Court of the United States. The cigarette companies and the smokeless tobacco company sought review of the court of appeals' findings regarding the outside and point-of-sale regulations, citing First Amendment and Supremacy Clause concerns, and regarding the selling restrictions, citing First Amendment reasons only. The cigar companies questioned the court of appeals' findings on the First Amendment issues with regard to all three regulations.

The Supreme Court granted certiorari due to a conflict in the circuit courts regarding the Supremacy Clause issue, and to address the First Amendment rights of the tobacco companies. The majority held that the FCLAA preempts the Massachusetts regulations, which restrict outside and point-of-sale advertising of cigarettes, and therefore it was unnecessary for the Court to reach the First Amendment issues for these regulations. Justice O'Connor, writing on behalf of the majority, held that the outside and point-of-sale advertising regulations on cigars and smokeless tobacco products were unconstitutional. Finally, the Court held that the selling restrictions for all of the tobacco products were constitutional.

Prior to addressing any First Amendment issues, the majority discussed the Supremacy Clause issue regarding the outside and point-of-sale regulations on cigarettes. The Court first discussed the specific area that the FCLAA regulated to determine if the

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18. Lorillard, 121 S. Ct. at 2413.
19. Id.
20. Id. at 2413-14.
21. Lorillard Tobacco Co. v. Reilly, 531 U.S. 1068 (2001). The petition for certiorari by the smokeless tobacco company and the cigarette manufacturers and the petition for certiorari by the cigar companies were granted. Id.
22. Lorillard, 121 S. Ct. at 2419.
23. Id. at 2428.
24. Id. at 2430.
25. Id. at 2414.
(a) Additional statements No statements related to smoking and health, other than the statement required by §1333 of this title, shall be required on any cigarette package.
(b) State regulations No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.
FCLAA trumped the Massachusetts regulations regarding outside and point-of-sale advertising of cigarettes.\textsuperscript{27} The majority interpreted the language in the FCLAA through an examination of the prior FCLAA provision and the conditions under which the present version came into effect.\textsuperscript{28} The Court determined that the original purpose of the FCLAA, as it was enacted in 1965, was to warn the public about the health risks posed by cigarettes and to assure uniformity across the nation in cigarette labeling and advertising.\textsuperscript{29} In addition, the majority reported that the FCLAA was to have been revamped in 1969, which plan led to committee hearings in the House and Senate that year.\textsuperscript{30} The Court stated that the House passed a bill to make the warning stronger and keep the preemption provisions in the FCLAA\textsuperscript{31} as it was and the Senate changed the bill to include a ban of cigarette advertising on television and radio.\textsuperscript{32} The majority then examined Congress' 1984 amendment to the FCLAA,\textsuperscript{33} which was designed to further educate the public about the health risks associated with smoking.\textsuperscript{34} The Court analyzed this history of the FCLAA and the language of the statute to determine whether the federal law trumped the Massachusetts regulations.\textsuperscript{35} The majority interpreted the phrase "based on smoking and health" from the FCLAA to mean that Congress intended to prevent states from creating regulations on cigarette advertising to the extent that the regulations were designed with the purpose of addressing any smoking and health concern.\textsuperscript{36} The Court reasoned that the Massachusetts cigarette regulations governing outside and point-of-sale advertising have smoking and health as a primary concern because Massachusetts' intention was to prevent cigarette advertising directed at youth as a means of protecting children's health.\textsuperscript{37}

The Court then addressed Justice Stevens' contention that the Massachusetts regulations were designed to restrict location and

\textsuperscript{27} Lorillard, 121 S. Ct. at 2415.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{30} Id. at 2416.
\textsuperscript{32} Lorillard, 121 S. Ct. at 2416. This act ushered in the present version of the FCLAA (available at supra note 26). Id.
\textsuperscript{34} Lorillard, 121 S. Ct. at 2416.
\textsuperscript{35} Id. at 2417.
\textsuperscript{36} Id. at 2418.
\textsuperscript{37} Id.
not content. The majority rejected Justice Stevens' argument by stating that the Massachusetts regulations were not mere zoning regulations and were motivated by a regard for public health and the risks of smoking. The Court also found that if Justice Stevens' contention were correct, then the FCLAA in itself would serve no purpose because State and local government could direct regulations to stop all advertisement of cigarettes. The majority then held that the FCLAA preempts the outside and point-of-sale regulations for cigarettes. Next, the Court detailed what powers the States maintain to regulate cigarette advertising, such as zoning regulations and the prevention of cigarette sales to minors. Finally, the majority refused to decide if the FCLAA preempts the outside and point-of-sale regulations for smokeless tobacco because the issue was never addressed in any of the lower courts.

Following the discussion of the FCLAA, the Court turned to the First Amendment issue regarding the outside and point-of-sale regulations for smokeless tobacco and cigars and the First Amendment issue regarding the selling restrictions on all of the tobacco products. The majority discussed the four elements of the Central Hudson test for commercial speech. The Court applied the Central Hudson test to the outside regulations of smokeless tobacco and cigar advertising. The Court found that the outside regulations did meet the first three parts of the Central Hudson test but could not meet the fourth. The Court applied the fourth part and found the outside regulations to be too broad to be constitutional. The majority reasoned that the outside regulations banning cigars or smokeless tobacco advertisements within 1,000 yards of a school or playground covered too large a geographic area and would be an almost complete ban on this type of advertising to adult consumers who are lawfully allowed to

38. Id. Justice Stevens wrote an opinion concurring in part and dissenting in part. Id. at 2440-48 (Stevens, J., concurring in part and dissenting in part).
39. Lorillard, 121 S. Ct. at 2419.
40. Id.
41. Id.
42. Id. at 2420.
43. Id.
44. Lorillard, 121 S. Ct. at 2421.
46. Lorillard, 121 S. Ct. at 2422.
47. Id. at 2425.
48. Id.
purchase tobacco products. The Court held the outside regulations on cigars and smokeless tobacco advertising to be unconstitutional.

The majority then addressed the constitutionality of the point-of-sale regulations on cigar and smokeless tobacco advertisements. The Court determined that the regulations satisfied the first two parts of the Central Hudson test but failed the third and fourth elements. The majority applied the third part and found that since the regulation only required that advertising of smokeless tobacco and cigars be five feet or higher from the floor, the regulation did not promote the governmental interest in preventing minors from seeing the advertisements. The Court reasoned that there are some minors who are taller than five feet and there is nothing to prevent a child who is less than five feet tall from looking up.

The majority then criticized Justice Stevens' contention that the point-of-sale regulations were aimed at conduct and not communication so that the First Amendment does not apply. The Court found that in order for the regulation to be one of conduct, and not of communication under the O'Brien test, the regulation must be totally "unrelated to expression." The majority determined that the point-of-sale regulation was a direct regulation of communication and not of conduct. The Court held that the point-of-sale regulations on smokeless tobacco and cigar advertisements were unconstitutional.

Finally, the majority addressed the contention that the regulations on cigarette, smokeless tobacco, and cigar sales by Massachusetts were unconstitutional. The Court again applied the

49. Id. at 2426. Here, the Court cited Reno v. American Civil Liberties Union, 521 U.S. 844, 875 (1997), which held that "the governmental interest in protecting children from harmful materials [here indecent speech on the internet] ... does not justify an unnecessarily broad suspension of speech addressed to adults." Id.

50. Id. at 2427.
51. Lorillard, 121 S. Ct. at 2427.
52. Id. at 2428.
53. Id.
54. Id.
55. Id. Justice Stevens relied on United States v. O'Brien, 391 U.S. 367 (1968), as his test of conduct. Id. at 2440-48 (Stevens, J., concurring in part and dissenting in part).
56. Lorillard, 121 S. Ct. at 2428. The Court stated, "to qualify as a regulation of communicative action governed by the scrutiny outlined in O'Brien, the State's regulation must be unrelated to expression." Id.
57. Id.
58. Id.
59. Id.
Central Hudson test to the sales regulations that required all tobacco products to only be accessible by salespersons and found that the regulations met all four parts of the test. The majority found that keeping tobacco products out of the hands of minors was a "substantial interest" of the State, and the sales regulations were "an appropriately narrow means of advancing that interest." The Court held that the sales regulations on all tobacco products were constitutional.

Justice O'Connor concluded the majority opinion by stating that the States are free to help stop underage use of tobacco products as long as their actions do not violate the First Amendment and are not preempted by federal law. The majority affirmed in part and reversed in part the decision of the United States Court of Appeals, and remanded the case.

Justice Kennedy, joined by Justice Scalia, concurred in the judgment and concurred with all but Part III-B-1 of the majority opinion. Justice Kennedy found the majority's discussion of the third part of the Central Hudson test to be unnecessary. Justice Kennedy expressed his inability to agree with the inclusion of the third part of the Central Hudson test because he found that part to be problematic in that it may cause speech that is constitutional to be found unconstitutional. Justice Kennedy and Justice Scalia, however, concurred in the result because the regulations that were found to be unconstitutional by the majority were unconstitutionally overbroad.

Justice Thomas also concurred in the judgment and with all of the majority opinion except for III-B-1. His only contention with the majority opinion was that the majority applied too lax a standard in order to determine if the Massachusetts regulations

60. Id. at 2429.
61. Lorillard, 121 S. Ct. at 2430.
62. Id.
63. Id.
64. Id.
65. Id. (Kennedy, J., concurring).
66. Lorillard, 121 S. Ct. at 2430 (Kennedy, J., concurring). The third part of the Central Hudson test concerns "whether the regulation directly advances the governmental interests asserted." Id. at 2421 (Kennedy, J., concurring).
67. Id. at 2430 (Kennedy, J., concurring).
68. Id. (Kennedy, J., concurring). Here, Justice Kennedy was referring to the outside advertising and point-of-sale advertising regulations on cigar and smokeless tobacco advertisements. Id. (Kennedy, J., concurring).
69. Id. at 2431 (Thomas, J., concurring).
violated the First Amendment.\textsuperscript{70} Justice Thomas first addressed the position that the Massachusetts regulations were aimed at restricting location, and not content, and should be upheld on that basis.\textsuperscript{71} He countered that point by stating that Massachusetts created its regulations because of its objection to what was contained in the advertising, and not because of the location of the advertisements.\textsuperscript{72}

Justice Thomas then gave a brief history of the First Amendment protection of commercial speech.\textsuperscript{73} He expounded his opinion that commercial speech should be given the same level of protection that noncommercial speech receives, and a strict scrutiny test should be used to determine if restrictions on commercial speech are constitutional, as opposed to the Central Hudson test as it was applied in the majority opinion.\textsuperscript{74} Justice Thomas furthered his position by explaining the reason why commercial speech has traditionally received less constitutional protection than noncommercial speech.\textsuperscript{75} He offered that this lower level of protection has applied to commercial speech in the past because commercial speech can be projected to a lot of people at one time and commercial speech can contain deceptive advertising.\textsuperscript{76} Justice Thomas countered this traditional standard by explaining that regulating commercial speech due to content, as the Massachusetts regulations attempted to do, is not similar to the reasons given for affording commercial speech less protection than noncommercial speech.\textsuperscript{77}

Justice Thomas went on to address two points that were made by the respondents.\textsuperscript{78} He stated that the respondents argued that the Massachusetts regulations were targeted to prevent deceptive advertising and illegal sales of tobacco products to minors.\textsuperscript{79} Justice Thomas explained that the regulations were designed to prevent deceptive as well as accurate advertisements, which demonstrates

\textsuperscript{70} Id. (Thomas, J., concurring).
\textsuperscript{71} Lorillard, 121 S. Ct. at 2431 (Thomas, J., concurring).
\textsuperscript{72} Id. at 2431-32 (Thomas, J., concurring).
\textsuperscript{73} Id. at 2432 (Thomas, J., concurring).
\textsuperscript{74} Id. at 2432-33 (Thomas, J., concurring). Justice Thomas' position was first expressed in his concurring opinion in 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518 (1996). Id. (Thomas, J., concurring).
\textsuperscript{75} Id. at 2433 (Thomas, J., concurring).
\textsuperscript{76} Lorillard, 121 S. Ct. at 2433 (Thomas, J., concurring).
\textsuperscript{77} Id. (Thomas, J., concurring).
\textsuperscript{78} Id. at 2434 (Thomas, J., concurring).
\textsuperscript{79} Id. (Thomas, J., concurring).
that the regulations were not designed to target deceptive advertising.\textsuperscript{80} He then analyzed the respondents' second point by applying the \textit{Brandenburg} test.\textsuperscript{81} Justice Thomas opined that the Massachusetts regulations fail this test because they cover all advertising, not just advertising that targets minors.\textsuperscript{82} He did not see how a state could be constitutionally permitted to prevent all advertising just because what the advertising promotes is illegal for some members of the advertising audience to purchase.\textsuperscript{83} Justice Thomas concluded that the respondents' two points didn't justify an application of anything less than a strict scrutiny standard to the regulations.\textsuperscript{84}

Justice Thomas next applied the strict scrutiny standard to the facts of the present case.\textsuperscript{85} He stated that the "compelling government interest" was to prevent the use of tobacco products by minors.\textsuperscript{86} Justice Thomas, like Justice O'Connor, stressed that the point-of-sale advertising regulations prohibiting tobacco advertising below five feet did nothing to promote the interest of preventing minors from seeing tobacco advertising, since minors can be over five feet tall and can look up.\textsuperscript{87} He then criticized the outside cigar and smokeless tobacco regulations due to the very limited number of this type of advertisement and the fact that there is no proof that minors are in any way the audience that outside advertising is directed to by the tobacco companies.\textsuperscript{88}

Justice Thomas further explained that even if a "compelling interest" was promoted by the regulations, the regulations would not meet the strict scrutiny test due to their overbreadth.\textsuperscript{89} He illustrated the overbreadth of the regulations as follows: (1) the

\textsuperscript{80} \textit{Id.} (Thomas, J., concurring).

\textsuperscript{81} \textit{Brandenburg} v. Ohio, 395 U.S. 444 (1969). The \textit{Brandenburg} test provides in pertinent part, "a state may not forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." \textit{Id.}

\textsuperscript{82} \textit{Lorillard}, 121 S. Ct. at 2435 (Thomas, J., concurring).

\textsuperscript{83} \textit{Id.} (Thomas, J., concurring).

\textsuperscript{84} \textit{Id.} at 2436 (Thomas, J., concurring).

\textsuperscript{85} \textit{Id.} (Thomas, J., concurring). The strict scrutiny test was explained in \textit{United States v. Playboy Entertainment} as "under strict scrutiny, the advertising ban may be saved only if it is narrowly tailored to promote a compelling government interest." 529 U.S. at 813 (2000). And also in \textit{Reno v. American Civil Liberties Union}, "if that interest [the government interest] could be served by an alternative that is less restrictive of speech, then the State must use that alternative instead." 521 U.S. at 874 (1997).

\textsuperscript{86} \textit{Lorillard}, 121 S. Ct. at 2436 (Thomas, J., concurring).

\textsuperscript{87} \textit{Id.} (Thomas, J., concurring).

\textsuperscript{88} \textit{Id.} at 2437 (Thomas, J., concurring).

\textsuperscript{89} \textit{Id.} (Thomas, J., concurring).
regulations were geographically too broad because they banned tobacco product advertising over a large area due to the number of playgrounds and schools; and (2) the regulations defined the word "advertisement" in such a way that just about anything mentioning a tobacco product in any way would be considered an advertisement.90 Justice Thomas next pointed out that Massachusetts did have other ways to promote its goal of preventing minors from exposure to tobacco advertising that would be less broad.91 He proposed that Massachusetts could make tougher laws on tobacco sales to minors and make more anti-tobacco product speech available to minors in order to counteract the advertising by the tobacco companies.92

Justice Thomas finished his opinion by criticizing the respondents and their amici for wanting to restrict the freedom of speech of the tobacco companies to such a vast extent.93 He stated that there are a variety of harmful products, e.g., fast food and alcohol, which do not have their speech restricted.94 Justice Thomas concluded by stating that the States cannot deny the freedom of speech guaranteed by the First Amendment to anyone.95

Justice Souter concurred with most of the majority's opinion, but dissented to part III-B-2 recommending that the case be remanded to determine if the outside advertising regulation was constitutional.96

Justice Stevens concurred in part, concurred in the judgment in part, and dissented in part in his opinion.97 Justice Ginsburg, Justice Breyer, and Justice Souter joined Justice Stevens' opinion.98 Justice Stevens' main disagreement with the majority concerned the Supremacy Clause issue.99 He stated that the States had two guaranteed powers: (1) the power to oversee land use; and (2) the

90. Id. at 2437-38 (Thomas, J., concurring).
91. Lorillard, 121 S. Ct. at 2438 (Thomas, J., concurring).
92. Id. (Thomas, J., concurring).
93. Id. (Thomas, J., concurring).
94. Id. at 2438-2440 (Thomas, J., concurring). Justice Thomas noted that obesity is the second largest contributor to mortality rates due to its link with a variety of diseases. He also noted that alcohol is the third largest cause of preventable deaths due to disease and accidents. Id. (Thomas, J., concurring).
95. Id. at 2440 (Thomas, J., concurring).
96. Lorillard, 121 S.Ct. at 2440 (Souter, J., concurring).
97. Id. (Stevens, J., concurring in part and dissenting in part).
98. Id. (Stevens, J., concurring in part and dissenting in part).
99. Id. (Stevens, J., concurring in part and dissenting in part). Justice Stevens stated that the preemption issue was clear but the First Amendment issue was complex. Id. (Stevens, J., concurring in part and dissenting in part).
power to promote the well being of minors. Justice Stevens explained that based on these powers, the Court has historically interpreted preemption provisions in a narrow sense. He then analyzed the preemption provision of the FCLAA in light of the regulations created by the FCLAA. Justice Stevens explained that the FCLAA preemption provision was only directed at the content of tobacco advertising and not at the location of tobacco advertising. He concluded this issue by finding that the Massachusetts regulations were aimed at location, not content, and were therefore not trumped by federal law.

Justice Stevens then addressed his differences with the majority's opinion regarding the First Amendment challenges. He expounded that the outside advertising regulations were not too restrictive because it was crucial to keep outside tobacco advertising away from areas with a lot of children, like playgrounds and schools. Justice Stevens agreed with the majority that there was a concern that the regulations restricted the freedom to advertise to adults, but he could not conclude from the record whether the regulations were too restrictive and therefore would have remanded the case for decision on this issue.

Justice Stevens then addressed the First Amendment issue regarding the selling restrictions. He concurred with the majority's conclusion that the selling restrictions did not violate the First Amendment, but disagreed with one aspect of the Court's analysis. Justice Stevens stated that his problem with the

100. Id. at 2441 (Stevens, J., concurring in part and dissenting in part).
101. Lorillard, 121 S. Ct. at 2441 (Stevens, J., concurring in part and dissenting in part).
102. Id. (Stevens, J., concurring in part and dissenting in part). Justice Stevens stated that Congress adopted the FCLAA for two reasons: "(1) to inform the public that smoking may be hazardous to health and (2) to ensure that commerce and the interstate economy not be impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." Id. (Stevens, J., concurring in part and dissenting in part).
103. Id. at 2444 (Stevens, J., concurring in part and dissenting in part).
104. Id. at 2445 (Stevens, J., concurring in part and dissenting in part).
105. Id. (Stevens, J., concurring in part and dissenting in part).
106. Lorillard, 121 S. Ct. at 2446 (Stevens, J., concurring in part and dissenting in part).
107. Id. (Stevens, J., concurring in part and dissenting in part). Justice Stevens found that the majority lacked enough information as to the areas where the advertising would be restricted compared to where the advertising would be allowed in order to make a valid determination of this issue. Id. (Stevens, J., concurring in part and dissenting in part).
108. Id. at 2447-48 (Stevens, J., concurring in part and dissenting in part).
109. Id. at 2448 (Stevens, J., concurring in part and dissenting in part).
majority's opinion was that the selling restrictions were restrictions of conduct and not of speech, as the majority had determined. He found that there was nothing constitutionally wrong with restricting conduct. Justice Stevens then explained that the same reasoning applied to the point-of-sale advertising regulations. He proposed that the five-foot restriction contained in these regulations was a restriction on conduct and merely an extension of the selling restrictions. Justice Stevens concluded by conceding that he agreed with most of the majority's First Amendment analysis, but due to his rejection of the majority's preemption analysis he could only concur in the judgment in part.

The Supreme Court of the United States, in the past, has taken the position that the First Amendment affords no protection to commercial speech. The Court first addressed the application of the First Amendment to commercial speech in Valentine v. Chrestensen. Valentine involved a citizen of Florida who wished to advertise tours of his submarine with a handbill on the streets of New York City. New York City had a statute that prohibited this type of speech. Chrestensen attempted to distribute his handbills but the police restrained him. Chrestensen filed suit against the police commissioner for an injunction. The district court granted

110. Id. (Stevens, J., concurring in part and dissenting in part). Justice Stevens stated that "however difficult that line may be to draw, it seems clear to me that laws requiring that stores maintain items behind counters and prohibiting self-service displays fall squarely on the conduct side of the line." Id. (Stevens, J., concurring in part and dissenting in part).

111. Lorillard, 121 S. Ct. at 2448 (Stevens, J., concurring in part and dissenting in part).

112. Id. (Stevens, J., concurring in part and dissenting in part).

113. Id. (Stevens, J., concurring in part and dissenting in part).

114. Id. (Stevens, J., concurring in part and dissenting in part).

115. Rubin v. Coors Brewing Co., 514 U.S. 476 (1995). This case discussed the history of the application of the First Amendment to commercial speech. Id.

116. 316 U.S. 52 (1942).

117. Id. at 52-53. F. J. Chrestensen was the citizen of Florida. Id.

118. N.Y. CITY SANITARY §318 (1942). This section provides in pertinent part: No person shall throw, cast or distribute or cause or permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever, in or upon any street or public place, or in a front yard or courtyard, or on any stoop, or in the vestibule or any hall of any building, or in a letterbox therein; provided that nothing herein contained shall be deemed to prohibit or otherwise regulate the delivery of any such matter by the United States postal service, or prohibit the distribution of sample copies of newspapers regularly sold by the copy or by annual subscription. This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter. Id.

119. Valentine, 316 U.S. at 53.

120. Id. at 59. Chrestensen asserted that the statute of New York City violated the
the injunction and the court of appeals affirmed.\textsuperscript{121} The Supreme Court of the United States granted \textit{certiorari} and disagreed with the district court and the court of appeals.\textsuperscript{122} The Court held that the New York City statute did not restrict Chrestensen's freedom of speech because "the Constitution imposes no such restraint on government as respects purely commercial advertising."\textsuperscript{123}

The Court reexamined the application of the First Amendment to commercial speech in \textit{Breard v. City of Alexandria, Louisiana}.\textsuperscript{124} In this case, Jack H. Breard was selling magazines door-to-door in the City of Alexandria, Louisiana.\textsuperscript{125} The City of Alexandria had an ordinance against this type of speech.\textsuperscript{126} Breard was arrested and was found guilty and given a choice of paying a twenty-five-dollar fine or spending thirty days in jail.\textsuperscript{127} The Supreme Court of Louisiana affirmed Breard's conviction and the Supreme Court of the United States granted \textit{certiorari}.\textsuperscript{128}

The Court addressed the First Amendment issue by phrasing it as a question of whether the selling of magazines door-to-door was protected by the First Amendment.\textsuperscript{129} The majority held that this type of commercial speech was not protected because "freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses."\textsuperscript{130} The Court concluded that the ordinance did not violate the First Amendment.\textsuperscript{131}

Twenty-two years later, The Court revisited this issue in

\footnotesize{\begin{itemize}
\item \textsuperscript{121} Id.
\item \textsuperscript{122} Id.
\item \textsuperscript{123} Id.
\item \textsuperscript{124} 341 U.S. 622 (1951).
\item \textsuperscript{125} Id. at 624.
\item \textsuperscript{126} \textit{Id.} Section 1 of the City of Alexandria ordinance stated in pertinent part:
Be it ordained by the council of the City of Alexandria, Louisiana, in legal session convened that the practice of going in and upon private residences in the City of Alexandria, Louisiana, by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences for the purpose of soliciting orders for the sale of goods, wares and merchandise and/or disposing of and/or peddling or hawking the same is declared to be a nuisance and punishable as such nuisance as a misdemeanor.
\item \textsuperscript{127} Id. at 624-25.
\item \textsuperscript{128} Id. at 625. At Breard's trial there was a motion to quash the conviction because the ordinance violated the Fourteenth Amendment, the First Amendment, and the Commerce Clause. \textit{Id.} The trial court overruled this motion. \textit{Id.}
\item \textsuperscript{129} \textit{Breard}, 341 U.S. at 641.
\item \textsuperscript{130} Id. at 642.
\item \textsuperscript{131} Id. at 645.
\end{itemize}}
In this case, the Pittsburgh Press was running classified advertisements that separated jobs based on gender. The National Organization for Women, Inc. notified the Pittsburgh Commission on Human Relations ("Commission") that the Pittsburgh Press had violated the Commission's ordinance. The Commission ordered the Pittsburgh Press, over its objection that the ordinance violated the First Amendment, to stop printing the advertisements because they violated the ordinance. The commonwealth court found that the Pittsburgh Press could continue to print advertisements segregated by gender for organizations that were exempt from the ordinance. The Supreme Court of Pennsylvania refused to hear the case, and the Supreme Court of the United States granted certiorari. The Court found that the advertisements were commercial speech and, for that reason, not afforded the same First Amendment protection as noncommercial speech. However, the Court did imply that commercial speech, if legal, should be afforded some protection, but in this case the commercial speech was not afforded protection because its content was illegal. The majority concluded that the ordinance did not violate the First Amendment.

Subsequently, the Court approached the First Amendment issue in _Bigelow v. Virginia_. In this case, Jeffrey C. Bigelow was
responsible for publishing the Virginia Weekly. He published an advertisement for an abortion clinic in his newspaper. Bigelow was then charged with violating a Virginia statute by printing the advertisement and was found guilty at the trial level. Bigelow appealed and the circuit court rejected his claim that the statute was unconstitutional, and fined him $150. The Supreme Court of Virginia then affirmed the judgment of both the trial court and the circuit court. The Supreme Court of the United States then granted certiorari. The Court first refuted the conclusion of the Supreme Court of Virginia that there is no First Amendment protection afforded to paid commercial speech. The majority quoted from Ginzburg v. United States and reported, "the existence of commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." The Court then discussed how Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations demonstrated the principle that commercial speech is afforded some protection by the First Amendment. The majority concluded that the Virginia statute violated Bigelow's First Amendment rights because the commercial speech was afforded protection by the First Amendment.

142. Id. at 811.
143. Id. at 812.
144. VA CODE ANN. §18.1-63 (Michie 1960). This statute provides in pertinent part, "if any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor." Id.
145. Bigelow, 421 U.S. at 813.
146. Id. at 814.
147. Id.
148. Id. at 815.
149. Id. at 819.
150. 383 U.S. 463, 474 (1966). In this case a publisher attempted to get mailing privileges from the postmasters of Intercourse and Blue Ball, Pennsylvania for the purpose of selling his publications due to "salacious appeal." Id. at 474. The Court held that "commercial exploitation of erotica solely for the sake of their prurient appeal may support the determination that the material is obscene even though in other contexts the material would escape such condemnation." Id.
151. Bigelow, 421 U.S. at 818.
152. 413 U.S. at 376. The Court quoted the portion of this opinion that implied a First Amendment protection for commercial speech: "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." Id. at 389.
154. Id. at 829.
One year later, the Court was again determining what level of protection the First Amendment affords to commercial speech. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the consumers of prescription drugs in Virginia sued the Virginia State Board of Pharmacy because they believed that a Virginia statute related to the speech of pharmacists was unconstitutional. The district court found the challenged statute to be invalid. The Supreme Court then noted jurisdiction of the appeal. The Court discussed prior cases involving the First Amendment and commercial speech and found that since *Breard v. City of Alexandria, Louisiana*, "the Court has never denied protection on the ground that the speech in issue was commercial speech." The majority concluded that the First Amendment protects commercial speech, but that commercial speech can be regulated in some aspects. The Court held that the commercial speech advertising the prescription drug prices was protected by the First Amendment because of the need to promote the free dissemination of commercial speech, and therefore the Virginia statute was unconstitutional.

*Virginia State Board of Pharmacy* was the Supreme Court's final determination that the First Amendment protected commercial speech, but there had yet to be developed a test to determine if commercial speech regulations were in violation of the First Amendment. A test was announced four years later in *Central*

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156. *Va. Code Ann.* § 54-524.35 (Michie 1974). This statute provides in pertinent part: Any pharmacist shall be considered guilty of unprofessional conduct who (1) is found guilty of any crime involving grave moral turpitude, or is guilty of fraud or deceit in obtaining a certificate of registration; or (2) issues, publishes, broadcasts by radio, or otherwise, or distributes or uses in any way whatsoever advertising matter in which statements are made about his professional service which have a tendency to deceive or defraud the public, contrary to the public health and welfare; or (3) publishes, advertises, or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription.

*Id.*
158. *Id.*
159. *Id.* at 759.
160. *Id.* at 771. The Court stated that restrictions have been approved that do not reference the content of the regulated speech, that the restrictions serve a government interest, and that the restrictions leave open other means of communication. *Id.*
161. *Id.*
162. 425 U.S. 748.
In this case the Public Service Commission of New York ("Commission") put a ban on all advertising by electric utilities if such advertising promotes the use of electricity. Central Hudson Gas and Electric Corporation ("Central Hudson") claimed that the Commission's ban violated its First and Fourteenth Amendment rights. The trial court found that the ban was valid. Central Hudson appealed and both the intermediate appellate court and the New York Court of Appeals agreed with the trial court's ruling. The Supreme Court of the United States then heard the case.

The Court discussed a brief history of the protection afforded to commercial speech by the First Amendment. The majority noted that the First Amendment does not protect commercial speech to the extent that it protects noncommercial speech, but commercial speech still deserves some protection. The Court then developed a four-part test to be applied to regulations of commercial speech in order to determine if the regulations violated the First Amendment. The four-part test provides:

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

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164. Id. at 559. The Commission wanted to ban this type of advertisement as a means of conserving energy. Id.
165. Id. at 560.
166. Id. at 561.
167. Consol. Edison Co. v. Pub. Serv. Comm'n, 390 N.E. 2d 749 (1979). The New York Court of Appeals' opinion stressed that since consumers have no choice of what electric company to use there was no need for electric utilities to advertise. Id.
170. Central Hudson, 447 U.S. at 564. The Court noted that commercial speech has been permitted to be regulated in the past for two reasons: First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation. Id.
171. Id. at 566.
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 necessary to serve that interest.\footnote{172}

The majority concluded that the Commission's order failed the fourth part of the test by being too extensive, and thereby violated the First Amendment.\footnote{173}

Following \textit{Central Hudson Gas}, the four-part test that was developed in that case has been applied in a number of other cases with varied results.\footnote{174} The test was applied first in \textit{Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico}.\footnote{175} In this case Puerto Rico legalized some forms of gambling but prohibited the advertisement of gambling to the public of Puerto Rico.\footnote{176} \textit{Posadas de Puerto Rico Associates} ("Associates") sought a declaratory judgment against the Tourism Company because it believed that the statute violated the First Amendment.\footnote{177} The Superior Court of Puerto Rico altered the statute so that gambling could be advertised as long as the advertisements were directed at tourists and not at the public of Puerto Rico.\footnote{178} The Supreme Court of Puerto Rico refused to hear the case and the Supreme Court of the United States noted jurisdiction.\footnote{179} The Court applied the four-part \textit{Central Hudson} test to the Puerto Rican statute in order to determine if the statute violated the First Amendment.\footnote{180} The majority found that the statute met all four parts of the \textit{Central Hudson} test and was therefore constitutional.\footnote{181}

\footnotesize{172. \textit{Id.}}
\footnotesize{173. \textit{Id.} at 571.}
\footnotesize{175. 478 U.S. 328 (1986).}
\footnotesize{176. 15 P.R. LAWS ANN. § 71, 77 (1972). These statutes legalized gambling and prohibited advertising of gambling. \textit{Id.}}
\footnotesize{177. \textit{Posadas}, 478 U.S. at 334.}
\footnotesize{178. \textit{Id.} at 336.}
\footnotesize{179. \textit{Id.} at 337.}
\footnotesize{180. \textit{Id.} at 340.}
\footnotesize{181. \textit{Id.} at 341-345. The Court found that:}
\footnotesize{(1) The government of Puerto Rico had a strong interest in restricting the advertisement of gambling to its residents in order to prevent the residents from experiencing the harms of gambling; (2) the advertising of gambling concerned a lawful activity that wasn't misleading or fraudulent; (3) the restrictions on the}
Several years later, the Supreme Court again applied the *Central Hudson* test in *Edenfield v. Fane*.\textsuperscript{182} In this case, Fane was a CPA in New Jersey.\textsuperscript{183} Fane decided to move to Florida and continue his practice there.\textsuperscript{184} The Board of Accountancy in Florida had a rule against personal solicitation.\textsuperscript{185} Fane, wishing to continue his practice as he had in New Jersey, brought suit against the Board of Accountancy, alleging that the rule violated the First and Fourteenth Amendments.\textsuperscript{186} The district court found for Fane and enjoined the Board of Accountancy from enforcing the rule.\textsuperscript{187} The court of appeals agreed with the district court.\textsuperscript{188} The Supreme Court of the United States then granted *certiorari*.\textsuperscript{189} The Court applied the *Central Hudson* test to the facts of the instant case.\textsuperscript{190} The majority found that the interest that the Board of Accountancy sought to protect was an interest in preventing fraud, overreaching, and compromised independence.\textsuperscript{191} The Court determined that the rule did not directly or materially advance the interests of the Board of Accountancy and therefore, the rule was unconstitutional.\textsuperscript{192}

A few months following *Edenfield v. Fane*, the Court again employed the *Central Hudson* test to determine if a restriction on commercial speech was constitutional in *United States v. Edge Broadcasting Company*.\textsuperscript{193} The facts of this case center on the Edge Broadcasting Company ("the Edge"), which broadcasts primarily to Virginia residents but also to a number of North advertising of gambling directly advanced the government's interest because they prohibited advertising to residents of Puerto Rico; and (4) the restrictions only applied to advertising directed at residents and not at tourists so the restrictions were not more extensive then necessary to serve the government's interest.

\textit{Id.}
\textsuperscript{182} 507 U.S. 761 (1993).
\textsuperscript{183} \textit{Id.} at 763.
\textsuperscript{184} \textit{Id.}
\textsuperscript{185} \textit{Fla. Admin. Code Ann.} \textit{r. 21A-24.002(2)(c)} (1992). This rule provides in pertinent part, "[a CPA] shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services . . . where the engagement should be for a person or entity not already a client of [the CPA], unless such person or entity has invited such a communication." \textit{Id.}
\textsuperscript{186} *Edenfield*, 507 U.S. at 764.
\textsuperscript{187} \textit{Id.} at 765.
\textsuperscript{188} *Edenfield v. Fane*, 945 F.2d 1514 (11th Cir. 1991).
\textsuperscript{190} *Edenfield*, 507 U.S. at 767.
\textsuperscript{191} \textit{Id.} at 771.
\textsuperscript{192} \textit{Id.} at 777.
\textsuperscript{193} 509 U.S. 418 (1993).
Carolina residents. North Carolina has not legalized lotteries, but Virginia has. Congress enacted statutes in 1934, which were amended in 1988, that prohibited the advertisement of a lottery unless the advertisement was of a lottery within states that permitted lotteries. The Edge sought declaratory judgment and injunctive protection in the district court because it claimed that the statutes violated the First Amendment. The district court found that the statutes were unconstitutional as applied to the Edge. The court of appeals affirmed the district court's decision in an unpublished *per curiam* opinion. The Supreme Court questioned what the court of appeals did and granted *certiorari*. The Court then applied the *Central Hudson* test. The majority disagreed with the court of appeals, which had found that the statutes did not meet the third step of the *Central Hudson* test because the regulations did not directly advance the governmental interest. The Court examined *Board of Trustees of State*
University of New York v. Fox and determined that based on that case, the third part of the Central Hudson test did not mean that the regulation and the government interest protected should have a perfect fit, but that only a reasonable fit was required. The majority concluded that the statutes met all four parts of the Central Hudson test and therefore the statutes were constitutional.

Rubin v. Coors Brewing Company, like Edenfield v. Fane, applied the Central Hudson test to a regulation and found it to be unconstitutional. In this case, Coors Brewing Company ("Coors") requested approval of labels and advertisements from the Bureau of Alcohol, Tobacco, and Firearms ("BATF"). The BATF refused to allow the labels and advertisements based on the Federal Alcohol Administrative Act ("FAAA"). Coors sought declaratory and injunctive relief in the district court, claiming that the regulations violated the First Amendment. The district court found for Coors. The court of appeals then reversed and remanded the case to the district court. On remand, the district court upheld the advertising regulation but struck down the labeling regulation. The court of appeals affirmed the district court's decision. The Supreme Court of the United States then granted certiorari. The Court applied the Central Hudson test. The majority focused on the governmental interest behind the regulation and on whether the regulation advanced the governmental interest. The Court found

203. 492 U.S. 469 (1989). This case focused on a university regulation that banned commercial enterprises from functioning in university dormitories. Id. The Court held that the regulation was permissible because under Central Hudson the regulation does not have to be the least restrictive measure that could effectively protect the university's interest. Id. The regulation must be reasonable but not necessarily perfect. Id.


205. Id. at 436.


207. Id. at 478.

208. 27 U.S.C. § 205(e)(2) (1994). This statute prohibited alcohol content from appearing on labels or in advertisements of beer. Id.

209. Rubin, 514 U.S. at 479.

210. Id.

211. Adolph Coors Co. v. Brady, 944 F.2d 1543 (10th Cir. 1991).

212. Rubin, 514 U.S. at 479.


216. Id. at 483. The Court did not focus on the first step because "both the lower courts and parties agree that respondents seek to disclose only truthful, verifiable, and nonmisleading factual information about alcohol content on its beer labels." Id.
that the governmental interests behind the regulations were: (1) to prevent "strength wars"; and (2) to help states regulate alcohol.\textsuperscript{217} The majority determined that these interests were not substantial enough to meet the \textit{Central Hudson} test.\textsuperscript{218} The Court then found that the regulations did not decrease the "strength wars" and therefore did not advance the governmental interest.\textsuperscript{219} Based on the application of the \textit{Central Hudson} test, the majority held that the regulations were unconstitutional.\textsuperscript{220}

The final case in the series of cases that applied the \textit{Central Hudson} test is \textit{44 Liquormart, Inc. v. Rhode Island}.\textsuperscript{221} In 1956, Rhode Island passed legislation that disallowed putting the price of alcoholic beverages in advertisements.\textsuperscript{222} Peoples Super Liquor Stores, Inc. ("Peoples") and 44 Liquormart, Inc. ("Liquormart") both published advertisements that did not give the price of the alcoholic beverages themselves but advertised other goods at bargain prices next to the alcoholic beverages in the advertisements.\textsuperscript{223} The Rhode Island Liquor Control Administration fined Liquormart and Peoples $400 because the advertisements made an implied inference that they sold cheap alcohol.\textsuperscript{224} Liquormart and Peoples sought declaratory judgment in the district court.

\begin{itemize}
\item \textsuperscript{217} \textit{Id.} at 485.
\item \textsuperscript{218} \textit{Id.} at 486.
\item \textsuperscript{219} \textit{Id.}
\item \textsuperscript{220} \textit{Rubin}, 514 U.S. at 491. The Court found that the government's interest in preventing "strength wars" was not directly and materially advanced by the statutes and there were less extensive ways to achieve this goal. \textit{Id.}
\item \textsuperscript{221} 517 U.S. 484 (1996).
\item \textsuperscript{222} R.I. GEN. LAWS § 3-8-7 (1987). This regulation provides in pertinent part:
\begin{quote}
Advertising price of malt beverages, cordials, wine, or distilled liquor. – No manufacturer, wholesaler, or shipper from without this state and no holder of a license issued under the provisions of this title and chapter shall cause or permit the advertising in any manner whatsoever of the price of any malt beverage, cordials, wine or distilled liquor offered for sale in this state; provided, however, that the provisions of this section shall not apply to price signs or price tags attached to or placed on merchandise for sale within the licensed premises in accordance with the rules and regulations of the department.
\end{quote}
\textit{Id.} R.I. GEN. LAWS § 3-8-8.1 (1987), provides in pertinent part:
\begin{quote}
Price advertising by media or advertising companies unlawful. – No newspapers, periodicals, radio or television broadcaster or broadcasting company or any other person, firm, or corporation with a principal place of business in the state of Rhode Island which is engaged in the business of advertising or selling advertising time or space shall accept, publish, or broadcast any advertisement in this state of the price or make reference to the price of any alcoholic beverages. Any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor.
\end{quote}
\textit{Id.}
\item \textsuperscript{223} \textit{44 Liquormart, Inc.}, 517 U.S. at 492-93.
\item \textsuperscript{224} \textit{Id.} at 493.
\end{itemize}
court that the Rhode Island regulations violated the First Amendment.\textsuperscript{225} The district court found that the pricing ban did violate the First Amendment.\textsuperscript{226} The court of appeals disagreed and reversed the decision of the district court.\textsuperscript{227} The Supreme Court of the United States granted \textit{certiorari} due to the importance of the issue.\textsuperscript{228} The Court first gave a brief history of the regulation of commercial speech.\textsuperscript{229} The majority reviewed the \textit{Central Hudson} test but concluded that a stricter test is required when a state completely bans the communication "of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process."\textsuperscript{230} The Court found that the Rhode Island regulations in question constituted a total ban on "truthful, nonmisleading speech about a lawful product" and the "ban serves an end unrelated to consumer protection."\textsuperscript{231} The majority primarily examined whether the Rhode Island regulations would materially advance the interest of the government in reducing alcohol consumption.\textsuperscript{232} The Court concluded that Rhode Island did not show that the regulations materially advanced its interest; therefore, the Court held that the regulations violated the First Amendment.\textsuperscript{233}

Since \textit{Valentine}, there have been drastic alterations in the way the Court has examined the First Amendment's protection of commercial speech. In \textit{Valentine}, the majority concluded that the First Amendment did not protect commercial speech.\textsuperscript{234} Following \textit{Valentine}, the Court steadily moved toward affording First Amendment protection to commercial speech and developed the \textit{Central Hudson} test to determine when this protection was violated by a regulation or restriction on commercial speech.\textsuperscript{235} The majority applied the \textit{Central Hudson} test in \textit{Lorillard} in order to determine if the Massachusetts regulations violated the First Amendment rights of the tobacco producers and advertisers. The

\begin{itemize}
\item \textsuperscript{225} \textit{Id.}
\item \textsuperscript{226} \textit{Id.} at 494.
\item \textsuperscript{227} \textit{44 Liquormart, Inc. v. Rhode Island}, 39 F.3d 5 (1st Cir. 1994).
\item \textsuperscript{228} \textit{44 Liquormart, Inc. v. Rhode Island}, 514 U.S. 1095 (1995).
\item \textsuperscript{229} \textit{44 Liquormart, Inc.}, 517 U.S. at 498-500.
\item \textsuperscript{230} \textit{Id.} at 501.
\item \textsuperscript{231} \textit{Id.} at 504.
\item \textsuperscript{232} \textit{Id.} at 505. The Court stated that the burden on Rhode Island to show that the regulation materially advances their interest is particularly great because Rhode Island must demonstrate that the regulations "will significantly reduce alcohol consumption." \textit{Id.}
\item \textsuperscript{233} \textit{Id.} at 516.
\item \textsuperscript{234} 316 U.S. at 55.
\item \textsuperscript{235} \textit{Central Hudson}, 447 U.S. at 566.
\end{itemize}
application of the *Central Hudson* test is consistent with past decisions of the Supreme Court regarding commercial speech, and it appears that the *Central Hudson* test is the standard to be applied in future cases where the protection of commercial speech is concerned.

Unless the Supreme Court overruled *Central Hudson*, it was impossible for the majority to reach a different conclusion. The Court demonstrated a respect for *stare decisis* by applying a precedent instead of seeking a different test in order to uphold a regulation. The Court took a very unpopular route by declaring the Massachusetts regulations to be unconstitutional. The majority could have easily overruled *Central Hudson* in order to allow Massachusetts to regulate tobacco advertising, since Massachusetts' goal was to prevent tobacco advertising to children, which goal the public supports. Instead, the Court followed a developed test and gave stability to the law instead of overruling precedent.

The Court's decision in *Lorillard* has set a standard for future cases that is based on justice and freedom. Everyone is protected by the First Amendment and is entitled to freedom of speech. Commercial speech is no different. If the majority had held that states could regulate tobacco advertising to the degree that Massachusetts wanted to, the government would have complete control over commercial advertising of tobacco, which is completely contrary to what the First Amendment stands for. The Court's holding gives a clear message to the states that they can only go so far in restricting commercial speech, even if the speech regards something that is considered to be harmful but not illegal. As Justice Thomas stated in his concurring opinion, "there are many products that are harmful, such as alcohol and fast food, but speech regarding these items is not restricted." 236

The majority's holding in *Lorillard* can be viewed from two points of view that are completely at odds with one another. On the one side there is the position that tobacco is so harmful, especially for children, that the Supreme Court should create a new test for commercial speech about such a harmful product. On the other side there is the position that tobacco, though harmful, is legal and should be afforded the same protection as other commercial speech, and so the *Central Hudson* test should be applied. The first viewpoint, by only giving protection to certain types of commercial speech and refusing protection to others,
would eventually turn the First Amendment into a selective right with the government and the courts determining who was worthy of such a right. The second viewpoint, by viewing all forms of commercial speech regarding legal activity equally, allows the First Amendment to continue to do what it was designed to do, that is, to protect all people from governmental determination of what can be expressed.

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