NOTE:

FILTERING CIGARETTE ADVERTISING: A CONSTITUTIONAL VICE

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I. INTRODUCTION

Congress is presently deliberating on three bills aimed at regulating cigarette smoking in the Philippines. These are House Bill Nos. 460[1] and 1198[2] and Senate Bill No. 1554.[3] Said bills refer to the State policy of protecting and promoting the right to health of the people.[4]

One curious feature of the bills is not so much as regards the sale of cigarettes, but more importantly, the regulation of the promotion and advertising thereof.[5] For example, the bills prohibit the giving of free samples

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[1] An Act Totally Banning All Forms of Advertisement of Tobacco Products or Liquor Products and Providing Penalties for Violations Thereof.

[2] H. No. 1198, 11th Cong., 1st Sess. (1998) An Act Regulating the Labelling, Sale and Advertising of Cigarettes (and other Tobacco Products), Prohibiting Smoking in Public Conveyances and in Enclosed Public Places, Providing Penalties for Violations Thereof and For Other Purposes.

[3] Comm. on Health and Demography, Trade and Commerce; and Local Government, S.Rpt. 39, 11th Cong.,1st Sess. (1999). This is composed of S. Nos. 301, 445, 875, 1101, 1110 and 1113.

[4] CONST. art. II, sec. 15.

[5] H. No. 1198, 11th Cong. 1st Sess. (1998), sec. 5. Promotions and advertisements using electronic media such as radio, television and cinema shall be required to prominently display the specified health warning throughout the duration of the said advertisement: Provided, that cigarette or tobacco advertisements aired over the radio shall devote twenty percent of their total air time to the airing of the warning: Provided, further, that the promotions using print media shall include a health warning occupying at least thirty percent of the total advertisement spaces: Provided furthermore, that cigarette or tobacco advertisements aired over television shall contain the warning at the lower portion of the screen equivalent to at least twenty percent thereof for the entire duration of the advertisement. Provided still, that intentionally or unintentionally, no object shall in any way or any angle, obscure, conceal, hide or hinder the visualization of the said warning; Provided, finally, that after the effectivity of the Act (four years for H. No. 1198, two years for S. No. 1554), all tobacco advertisements and promotions shall be prohibited in all electronic media, including cable television operating locally. Local television companies shall be required to incorporate in their contract with foreign entities providing

for purposes of promotion and/or advertising,[6] which shall extend to non-tobacco products. There is also a proposed ban on sports, cultural and art sponsorship, two years from the effectivity of the proposed act.[7] In effect, the proposed bills lump the speech regulations with non-speech restrictions.

Guised under the police power of the state to promote the health of people, the bills actually restrict free speech because of the regulations they impose on the promotion and advertising of cigarette products, in an indirect response to a state interest in constraining cigarette smoking by citizens.By unduly curtailing cigarette advertising, it makes illegal the promotion of a legal product.

These curious measures bring the proposed bills squarely in the realm of controversy, as regards the extent of the constitutional freedom of speech. Is this a proper case of constitutional friction between two competing interests or can it be resolved coextensively without doing violence to either principles?

A ban of cigarettes is different from a ban on cigarette advertising. If the legislature decides to ban cigarettes, it can do so by virtue of its police power without implicating any free speech values. The danger lies in the fact that if the proposed measures will not be passed, the regulation of cigarette advertising may be seen as a happy compromise — the second best deal, so to speak. Regulating advertising strikes a first amendment chord and is considered a direct assault on constitutionally protected expression.

What is disquieting is that by treating the two similarly, the arguments supporting the regulation of one sphere might be misconstrued to be applicable, as sufficient justification to impair freedom of speech, thus ignoring its constitutional dimension. Thus, it becomes important to lay the fundamental importance of all forms of speech, even of cigarette advertising.

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television shows that tobacco advertisements are prohibited under Philippine laws, and therefore should not be transmitted as part of any programming that is covered by such contract.

For purposes of this Act, print communications include but is not limited to, newspapers, journals, serials, magazines, books, pamphlets, booklets, static signs, outdoor or indoor billboards, neon signs and streamers, circulars, notices, bills or letters. Electronic communication includes, but is not limited to, radio, television, video, moving picture and cinema.

[6] H. No. 1198 (1998), sec. 6; S. No. 1554 (1998), sec. 7.

[7] S. No. 1554 (1998), sec. 6.

In the United States and elsewhere in the globe, there has been a raging controversy as to the status of commercial speech and the level of constitutional protection it deserves. In the case of cigarette advertising, the difficulty is magnified. As a species of commercial speech, not only must it first prove the parity of commercial speech with other forms of speech, especially political expression, it must also assert its constitutional value independently as well. This is because cigarette advertising concerns the communication of the sale and use of a product considered as a vice — thus relegating its position to the lower rung of the commercial speech list.

This brings to fore the time immemorial question concerning the delineation of the rightful limit of the government's regulation over the affairs of its individual members. Specifically, the issue is whether the government can extend its paternalistic arms to the realm of cigarette advertising, in the hope of regulating the behavior of its smoking populace.

This Note will discuss commercial speech and the regulation of cigarette advertising. It will look into the distinction between political and commercial speech, but at the same time explore the attendant reasons as to why the two forms should be treated similarly. By looking at cigarette advertising, it aims to show the fundamental importance of commercial speech, particularly cigarette advertising, and the reason for extending the mantle of constitutional protection. Some alternatives are proposed to materially advance the government interest of regulating tobacco use without violating constitutional precepts.

II. FREEDOM OF EXPRESSION

A. The place of free expression in a democratic society

Freedom of speech[8] is a relatively new concept in Philippine law. It was one of the issues emphasized by the propagandists like Jose Rizal and

[8] This is provided in the First Amendment to the United States Constitution. Historical roots reach as far as 1781, even before the end of the Revolutionary War, when the United States adopted its first constitution, the Articles of Confederation. The Articles provided for a loosely knit confederation of the 13 colonies, or states, in which the central or federal government had little power. The Articles of Confederation did not contain a guarantee of freedom of expression. It did not contain a bill of rights. The men who drafted this constitution did not believe that such guarantees were necessary since

Marcelo del Pilar in their struggle against Spain during the turn of the century. The denial of said right was, in fact, "the primary moving force of the revolution."[9]

In its present form, the 1987 Constitution provides that, "[n]o law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances."[10] This can be traced from the First Amendment of the U.S. constitution.

Freedom of speech has been defined as the liberty to know, to utter and to argue freely according to conscience, above all liberties. It thus includes not only the right to express one's views, but also the cognate rights relevant to the free communication of ideas, not excluding the right to be informed[11] on matters of public concern.[12] Thus, freedom of speech can be viewed as a process, concerned not only with the speaker's right to communicate, but also with the developmental interest of its speakers. Freedom of speech assumes that access to information facilitates personal autonomy in decision-making because individuals are free to choose ideas from many diverse sources,[13] for diversity is highly valued in a democracy. This fundamental freedom is primarily a vehicle for the promotion of enlightened public decision-making about political, social and other issues important to a democratic society.[14]

The protection given to expression in the Constitution reflects the special value placed on human capacities for thought and verbal

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guarantees of freedom of expression were already part of the constitutions of most of the thirteen states. However, since the system of government did not work well, delegates were sent to make amendments. The First Amendment was originally a third amendment, but the first two amendments were not approved. DON R. PEMBER, MASS MEDIA LAW 39 (1996).

[9] *See* U.S. v. Bustos, 37 Phil. 731, 739-40 (1918). The Philippine national hero Jose Rizal, in his work *"Filipinas Despues de Cien Años,"* counted freedom of expression as one of the reforms *sine quibus non* demanded by the Filipinos. The columns of *La Solidaridad* were used by Filipino propagandists as a tool for advocating reforms. *See* JOAQUIN BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 203-4 (1996).

[10] CONST. art. III, sec. 4.

[11] CONST. art. III, sec. 7.

[12] Osmeña v. COMELEC, G.R. No. 132231, 31 March 1998, 288 SCRA 447, 496 (1998).

[13] Associated Press v. United States, 326 U.S. 1, 20 (1944). The U.S. Supreme Court noted that the First Amendment assumes that the "widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."

[14] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 787 (1976)

communication.[15] According to Justice Cardozo, freedom of thought and speech form "the matrix, the indispensable condition, of nearly every other form of freedom."[16] In the words of Justice Brandeis, it exists to "make men free to develop their faculties."[17] Speech is the means both by which we facilitate the processes of self-government and by which we assert our dignity as human beings. Thought is so highly valued as a unique human activity that interferences with the operations of the mind are deemed to constitute greater impairments of human dignity than are restrictions on most forms of conduct.[18] Free speech protects a number of values, among which is the promotion of individual growth and self-fulfillment.

John Stuart Mill noted that competition among ideas, whether true or false, strengthens truth, compels the continuous revelation of ideas, and facilitates principles based on reason rather than prejudice.[19] Only by tolerating different ideas and beliefs can democracy function and survive. The free exchange of ideas results in the enlightenment of the public and thus, is for the public good.[20]

In the case of *Abrams v. United States*,[21] the erudite Justice Holmes in his dissenting opinion stated,

> [b]ut when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very

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[15] John Blim, *Undoing Ourselves: The Error of Sacrificing Speech in the Quest for Equality*, 56 OHIO ST. L.J. 427 (1985).

[16] Palko v. Connecticut, 302 U.S. 319, 327 (1937).

[17] Whitney v. California, 274 U.S. 357, 375 (1927).

[18] Martin Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 601 (1996).

[19] See JOHN STUART MILL, ON LIBERTY 19-67 (C. Shields rev. ed. 1976) (1859).

[20] "First, if an opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility. Secondly, though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by collision of adverse opinions that the remainder of the truth has any chance of being supplied. Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is vigorously and earnestly contested, it will, by most of those who receive it be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but, fourthly, the meaning of the doctrine itself, will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction from reason or personal experience." JOHN STUART MILL, ON LIBERTY, excerpts from Chapter II (1859), cited in DAVID M. ADAMS, PHILOSOPHICAL PROBLEMS IN THE LAW, 238 (1996).

[21] 250 U.S. 616 (1919).

> foundations of their conduct that the ultimate good desired is better reached by the free trade of ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. . . .[22]

B. Political and commercial speech[23]

1. The Interface

Alexander Meiklejohn theorizes that political expression is most deserving of constitutional protection.[24] In contrast, commercial speech[25] is less protected by the First Amendment. Meiklejohn argues that constitutional protection for freedom of commercial expressions has little intrinsic societal value.[26] Expression not related to the advancement of the process of self-government should not be presumptively protected from government regulation, because such speech does not advance a great societal value.[27] Meikeljohn continues his argument by saying that "commercial speech might be differentiated because, unlike political expression, it generally pertains less directly to self-government and is associated with matters evoking less constitutional concern." Only when such protections are used to foster the growth of democracy do they acquire value. Therefore, he argues, speech which furthers the ability of the body politic to engage in self-government should be protected absolutely and should be sheltered from all but the most incidental government regulation or interference.

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[22] Abrams v. United States 250 U.S. 616, 620 (1919), Dissenting Opinion, Justice Holmes.

[23] This distinction must be taken with a grain of salt. Speech is not classified in neat categories because there are complex, multi-dimensional expressions where political, commercial, religious ideas intertwine. For a fuller discussion, see Donald Lively, *The Supreme Court and Commercial Speech: New Words with an Old Message*, 72 MINN. L. REV. 289, 295-96 (1987).

[24] ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 73-75 (1960).

[25] Commercial speech is defined as merely a form of commercial activity incidentally involving speech. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 781-84, 787-89 (1976), Dissenting Opinion, Justice Rehnquist. This was repeated in Justice Rehnquist's dissent in Central Hudson Gas and Electric Corp. v. Public Service Communications, 447 U.S. 557, 584, 588-600.

[26] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 125 (1948), cited in Barbara Mack, *Commercial Speech: A Historical Overview of its First Amendment Protections and an Analysis of its Future Constitutional Safeguards*, 38 DRAKE L. REV. 59, 60 (1988-89).

[27] *Id.*

Placing speech relating to self-government at the top of the First Amendment hierarchy is consistent with the importance that the Court places on personal and property rights.[28] Communications, in connection with commercial transactions, generally relate to a separate sector of social activity involving the system of property rights rather than free expression.[29]

The argument distinguishing commercial from political speech rests upon the assumption that commercial speech has little or no value as speech *per se*. Because speech is perceived to be merely incidental to the commercial activity of advertising, commercial speech may be subjected to regulation by reference to the traditional power of the state to regulate commercial activity.

The proffered reason for the distinction is that

> to require a parity of constitutional protection for commercial and noncommercial speech alike would invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, commercial speech is afforded a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.[30]

Sadly, in the marketplace of ideas, commercial speech is always priced at a bargain.

2. The need for parity of status between the two forms of expression

Though Meikeljohn's argument is not totally baseless, it is nevertheless problematic, for there is neither rhyme nor reason for upholding his bifurcated distinction. Commercial speech is no different in principle from other speech. Traditional marketplace theory protects speech in order to spread information and promote discussion relevant to people's search for truth or attempt to make wise decisions. Many people devote more attention to private economic than political decisions. Private economic decisions may be more personally controllable and more relevant to a person's life, to self-expression and self-

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[28] LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, § 8-6 to 9-5, 446-67 (1978).

[29] THOMAS EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 105 (1966).

[30] Ohralik v. Ohio State Bar Association, 436 U.S. 447, 456 (1978).

realization, than most political issues. Commercial speech, probably to a greater extent than political speech, makes individual self-government more effective. So long as a predominantly free enterprise economy is preserved and maintained, the allocation of resources will be made through numerous private economic decisions. To this end, the free flow of commercial information is indispensable.

Advertising is the vehicle through which commercial information is relayed. However tasteless and excessive it may seem, advertising is nonetheless a means by which information is disseminated: who produces the product, for what reason, and at what price.[31] Like other spheres of social or cultural life, the commercial marketplace provides a forum where ideas and information flourish. Some ideas and information are vital, some of slight worth. But the general rule is that the speaker and audience be the one to assess the value of the information presented, not the government.[32]

When an individual is presented with grounds for preferring one product brand over another, he is encouraged to consider the competing information. In so doing, he exercises his abilities to reason and think.[33] Practice in assimilating commercial speech develops the people's rational decision-making capabilities. Any speech that challenges an individual to think has at least the potential to develop the rational capacity of the individual, or to bring that capacity to bear on some problem, regardless of the topic. There is no "political" rationality separate from "commercial" rationality.[34] Thus, the concern here is capacity — the capacity to reason and develop one's liberty and happiness. This capacity may be developed and exercised either by a political campaign speech or by cigarette advertising.[35] The source is unimportant and irrelevant as regards providing men the venue to think and reason. Rational thinking is not hermetically sealed in neat compartments.

> [It] exists at the level of the capacity of reason, implicated by speech that enhances the capacity or applies it to a different subject matter. Thus, only the *source* of the information is commercial, the rational thought process that is employed is generic. The thought process is simply

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[31] Virginia State Board v. Virginia State Board of Pharmacy, 425 U.S. 728, 772 (1976).

[32] Edenfield v. Fane, 113 S. Ct. 1792, 1798 (1993).

[33] Martin Redish, *First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 443-44 (1971).

[34] David McGowan, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359, 435 (1990).

[35] *Id.* at 414.

> brought to bear by speech on different topics — one political, and the other, commercial.[36]

It is argued that the broadcast media, through advertising, bombards man with emotional appeals through a gestalt of auditory and visual image. The mental passivity with which electronic media are alleged to induce captive consumers makes the latter imminently vulnerable to the employment of conditioning techniques (similar to Pavlovian dogs) by which an emotional response to a product presentation can be taught. There are also perceived dangers in the use of subliminal techniques, in which words and symbols are introduced into advertising beneath the threshold of conscious attention.[37] This is perceived to justify the regulation of commercial speech.

This argument is however a great disservice to man's complexity and it reduces if not denies his capacity to understand the limits of advertising.[38] For even if the classic model has an "overblown faith in our reason," still, a free marketplace of ideas systematically contributes to reaching the wisest or best or most desired conclusions. Suppression necessarily restricts the flow of information and limits the range of choices which may be used, or of ideas which may be adopted. Limitations on speech only deepen our admitted irrationality, while increasing the probability of deleterious conclusions.[39] Freedom of speech can be a useful advantage, given the fallibility of our judgment, for it is always better to err in knowledge that in ignorance.

III. DOCTRINAL ODYSSEY

The decisions of the United States Supreme Court as regards the regulation of commercial speech are characterized by a pendulum-like regression and vacillation, exhibiting doctrinal flux and intellectual failure.[40] The Court has neither articulated a coherent theory explaining why

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[36] *Id.* at 414.

[37] Michael Blakeney and Shengh Barces, *Advertising Regulation in Australia: An Evaluation* 8 ADELAIDE L. REV. 29, 41 (1982)

[38] Donald Garner, *Protecting Children from Joe Camel and His Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation*, 46 EMORY L.J. 479, 525 (1997).

[39] *Id.* at 484.

[40] EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 194 (1989).

commercial speech should or should not be protected, nor defined commercial speech in a way that predictably classifies different types of speech.[41]

In 1942, in *Valentine v. Chrestensen*,[42] the U.S. Supreme Court permitted the state to prohibit commercial advertising circulars even though the constitution protected the distribution of noncommercial leaflets. The Court stated that purely commercial advertising, properly viewed, is merely the pursuit of "gainful occupation" and as such, is not entitled to First Amendment protection.[43]

In 1971, in the case of *Capital Broadcasting Co. v. Acting Attorney General Mitchell*,[44] the Court summarily upheld a district court decision sustaining a congressional ban on electronic media broadcasting of cigarette advertising.[45] The district court characterized the form of communication as commercial speech. By so holding, the Court intimated that the legislature may restrict truthful advertising of legal activities considered harmful.[46] The Court held that Congress has a rational basis for prohibiting the advertising because substantial evidence demonstrated that radio and television reached a large audience of young people.[47]

In the cases of *Bigelow v. Virginia*[48] and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[49] the Court announced that it could find no justification for excluding commercial speech from First Amendment protection and accordingly would henceforth treat commercial speech like other varieties of speech. A key aspect of the decisions in *Bigelow*

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[41] McGowan, *supra* note 34, at 360.

[42] 316 U.S. 52 (1942).

[43] 316 U.S. 52, 54 (1946). This case involves a municipal ordinance that prohibited the distribution in the streets of printed handbills bearing commercial advertising matter. The disputed handbill in the case was double-faced: one-half consisting of a protest against the city's police (protected speech) and the other half containing an advertisement.

[44] 405 U.S. 1000 (1972), 333 F. Supp 582 (D.D.C. 1971).

[45] Capital Broadcasting Co. v. Acting Attorney General Mitchell 333 F. Supp. 582, 584 (1971).

[46] Capital Broadcasting Co. v. Acting Attorney General Mitchell 333 F. Supp. 582, 585-86 (1971).

[47] This was reversed by Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973).

[48] 421 U.S. 809 (1975). The U.S. Supreme Court struck down a state law that made it a misdemeanor for anyone to sell or circulate newspapers that contain ads encouraging abortions. At issue in *Bigelow* was not merely the right of newspapers to publish commercial material, but also the right of the reader to make informed choices.

[49] 425 U.S. 728 (1976). The court rejected a state law that declared it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs.

and *Virginia Board of Pharmacy* was the view that the state had no interest, consistent with the First Amendment, in denying consumers truthful, non-misleading information that could be relevant for their decision-making. The Court found particularly persuasive the argument that consumers have at least as keen an interest in the free flow of commercial information as in political debate.[50] The Court described advertising as information, the importance of which lies in its ability to transform speech, which does "no more than propose a commercial transaction, into a form of constitutionally protected speech."[51] The case of *Virginia Board of Pharmacy* supposedly "eclipsed any fragment of hope"[52] for the continuing validity of the commercial speech exception in *Valentine's.*

After five years, however, in *Metromedia, Inc. v. San Diego,*[53] the majority of the Court indicated that the state could ban *commercial* billboards even if *political* billboards were not banned — a result hardly distinguishable from the result in *Valentine.* In this case, the Court deferred to the legislature proclaiming that it was hesitant to disagree with the accumulated common sense judgment of local lawmakers with respect to the prohibition.

Yet in *Central Hudson Gas & Electric Corporation v. Public Service Commission,*[54] the Court held that the State could prohibit an electric utility from engaging in presumably truthful, informative advertising, provided the prohibition was narrowly tailored to serve the State's interest in energy conservation. The case ushered in the four-prong test:

> *First*, the speech at issue must concern a lawful activity and must not be misleading. *Second*, the restriction on commercial speech must serve a substantial governmental interest. *Third*, the regulation must directly further the asserted interest. *Finally*, the regulation must be no more extensive than necessary to achieve the state's interest. (emphasis supplied)[55]

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[50] Virginia State Board v. Virginia State Board of Pharmacy, 425 U.S. 728, 763(1976).

[51] Virginia State Board v. Virginia State Board of Pharmacy, 425 U.S. 728, 748 (1976).

[52] Virginia State Board v. Virginia State Board of Pharmacy, 425 U.S. 728, 760 (1976).

[53] 453 U.S. 490 (1981).

[54] 447 U.S. 557, 563 (1980). A New York Law prohibited a electric utility from placing ads to encourage the use of electricity. The law reflected a concern at that time over insufficient fuel supply because of the Middle East embargoes. The Court held that the law violated the First Amendment.

[55] Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 566 (1980).

The *Central Hudson* case suggested that government had to use the "least restrictive means" in regulating commercial speech. The Court in *Board of Trustees v. Fox*,[56] however, clarified that the fourth prong of the balancing test only requires a "reasonable fit" between the government's ends and the means chosen to accomplish those ends.[57]

In *Posadas de Puerto Rico Associates v. Tourism Company*,[58] the Court upheld a prohibition on truthful advertising on casino gambling directed at the residents of Puerto Rico. The Court held that a legislature may ban expression concerning an activity it considers harmful, even if not illegal, because "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." This decision taken to the extreme, can be interpreted to suggest that the legislature could also ban advertising for products such as alcohol and cigarettes.[59]

In the case of *Rubin v. Coors Brewing Co.*,[60] the Court analyzed the "fit" between the aim of government to prevent strength wars and the forbidding alcohol content labeling requirements in beers. It held that government failed to show a strong empirical connection between alcohol content labeling and the threat of strength wars in the beer market. The Court stated that the regulation would fail the fourth prong enunciated in the *Central Hudson* case because there are less restrictive alternatives for achieving the governmental interest. The Court concluded that the regulation was not adequately tailored to the attainment of the government's goal.[61]

In the case of *44 Liquormart, Inc. v. Rhode Island*,[62] the Court found that a price advertising ban on alcoholic beverages did not satisfy the

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[56] 492 U.S. 469 (1989). The Court held that New York could prohibit on-campus marketing strategies at state colleges without showing that its total ban was the "least restrictive means" of advancing the state's interest in ensuring academic tranquility.

[57] Board of Trustees v. Fox, 492 U.S. 469, 475-81 (1989).

[58] 478 U.S. 328, 106 S. Ct. 2968 (1986).

[59] Howard Jeruchimowitz, Note, *Tobacco Advertisements and Commercial Speech Balancing: A Potential Cancer to Truthful, Nonmisleading Advertisements of Lawful Products*, 82 CORNELL L. REV., 440 (1997).

[60] 115 S.Ct. 1585, 1593 (1995).

[61] 115 S.Ct. 1585, 1597 (1995). In the concurring opinion of Justice Stevens, he stated that "[a]ny interest in restricting the flow of information because of the perceived danger of the knowledge is anathema to the First Amendment."

[62] 517 U.S. 484 (1996).

requirement that regulation be no more extensive than necessary. Temperance, the desired legislative end, could be achieved through less intrusive means such as higher prices, taxation and educational campaigns. The Court noted that commercial speech bans "not only hinder consumer choice, but also impede public debate over central issues of public policy."[63] The U.S. Supreme Court rejected the idea that there was a vice category within commercial speech doctrine that entitled advertising of tobacco products to less constitutional protection than other forms of commercial speech.[64]

From the doctrines cited, it is clear that the commercial speech doctrine is vague and the U.S. Supreme Court is at times confused as to the level of constitutional protection that commercial speech deserves.

In the Philippines, there is no case specifically addressing the status of commercial speech. The Supreme Court has yet to determine whether commercial speech is at par with political speech. It must likewise choose the applicable test to use that would carve the landscape of our commercial speech doctrine. In the absence of specific jurisprudence, cases in which the Supreme Court upheld the validity of restrictions of free speech must be examined. The various test used to determine the propriety of regulation can be adapted to the regulation of commercial speech.

Tests developed by the Supreme Court are similar to those found in U.S. jurisprudence. The case of *Eastern Telecom v. Dans*[65] used the "clear and present danger" test to limit freedom of expression. The test provides that when words are used in such circumstances and are of such a nature as to create a "clear and present danger" that they will bring about the substantial evil that the lawmaker has a right to prevent. Applied to the problem, it means that it must be shown that cigarette advertising (not cigarette smoking) will bring about a substantial evil that would necessitate its repression. As a corollary, absent a "clear and present danger," suppression should not come as a matter of course.

In the case of *Osmeña v. COMELEC*,[66] relating to the regulation of political advertisements, the Court upheld the validity of the restriction of

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[63] 517 U.S. 484 (1996).
[64] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 508-11 (1996)
[65] Eastern Telecom v. Dans, G.R. 59329, 19 July 1985, 137 SCRA 628, 634.
[66] Osmeña v. COMELEC, G.R. No. 132231, 31 March 1998, 288 SCRA 447.

media access to candidates in the hope of "leveling the playing field" by giving poor and rich candidates the same opportunity use political ads. Justice Mendoza's opinion characterized the regulation as "content-neutral," not dependent on the message, but on the time, place and manner in which the message was conveyed. Such a test would need a substantial government interest before speech is regulated. The case used the "reasonable fit" nexus, wherein the restriction on speech was merely incidental, and was no more than necessary to achieve its purpose of promoting equality of opportunity in the use of mass media for political advertising. Further, the restriction was limited in time and scope. Thus, with regard to cigarette advertising, it is submitted that the proposed regulation is sweeping, total and absolute in nature. The blanket prohibition will not pass the constitutional challenge.

Content-based restrictions are more insidious than content neutral regulations and thus are subjected to stricter scrutiny.[67] Content-based restrictions carry a heavy presumption of constitutional invalidity, subject to the test of overbreadth and vagueness.[68] Applied to cigarette advertising, any curtailment thereof based on the content of such ads must be presumptively considered invalid. It is the burden of the government to overthrow this presumption. If it fails to discharge this burden, its act of censorship will be struck down.[69]

IV. PRESENT REGULATIONS

A. Global regulations

On a global scale, moves have been made to regulate tobacco advertising, ranging from the extreme position of total ban to lesser forms of control and restriction. These include the mandatory explicit warnings concerning the dangers of smoking, as well as the prohibition of billboards advertising cigarettes near schools and playgrounds.

These regulations aim to prohibit the marketing, distribution, sale, or gift of any items, other than the tobacco products themselves, bearing the name, logo, selling message or other "indicia of product identification" of such

[67] Virginia State Board v. Virginia State Board of Pharmacy, 425 U.S. 728, 771 (1976).
[68] Osmeña v. COMELEC, G.R. No. 132231, 31 March 1998, 288 SCRA 447.
[69] Osmeña v. COMELEC, G.R. No. 132231, 31 March 1998, 288 SCRA 447.

products.[70] Regulations prevent tobacco companies from offering any gift or item, whether identified with a tobacco brand or not, to any customer.[71] The rationale behind this ban is that these promotional items often end up in the hands of young people who may not yet be able to discern the health hazards posed by smoking.

Sponsorship of sports events like racing is now prohibited.[72] Also, sale of non-tobacco items is not given franchise.[73] Further, there is a proposed regulation in the United States to limit the form of advertisements to text-only tombstone ads.[74] Color in tobacco advertisements would be permitted only under two very limited exceptions; (1) in publications with primarily adult readerships;[75] and (2) adult-only facilities like bars.[76]

B. The Philippine millieu

In the Philippines, although numerous tobacco control bills have been presented to the legislature, most fell short of the mark except the Consumer Act of 1992,[77] which required health warnings on labels.[78] Presently, tobacco

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[70] Barbara Noah, *Constitutional Qualms Concerning Governmental Restrictions on Tobacco's Product Advertising*, 29 U. TOL. L. REV. 637, 638 (1998).

[71] E.g. lighters, bags, shirts, ballpens and caps.

[72] Jeruchimowitz, *supra* note 59, at 465.

[73] *Id.*

[74] U.S. FOOD AND DRUG ADMIN. EXECUTIVE SUMMARY: THE REGULATION RESTRICTING THE SALE AND DISTRIBUTION OF CIGARETTES AND SMOKELESS TOBACCO TO PROTECT CHILDREN AND ADOLESCENTS 2 at 9 (1996) [hereinafter FINAL RULE SUMMARY] cited in Gregory Bassuk, Note, *Advertising Rights and Industry Fights: A Constitutional Analysis of Tobacco Advertising Restrictions in a Federal Legislative Settlement of Tobacco Industry Litigation*, 85 GEO L. J. 715, 719-720.

[75] Debra G. Hernandez, *Restrictions on Cigarette Advertising*, 12 August 1995 at 12. The magazines that would be restricted to black and white, text-only advertisements include: Sports Illustrated, People, TV Guide, Parade, Cosmopolitan, Entertainment Weekly, Glamour, Rolling Stones, Mademosielle, Vogue, Gentleman's Quarterly (GQ). This is criticized because the restriction that publications with fifteen percent youth readership would mean that eighty-five percent of the adult readers will not receive the tobacco companies' full message. Mike Brown, *Muzzling Tobacco Ads Pits FDA Against Constitution*, Courier-J, 8 September, 1A (1996) cited in Jeruchimowitz, *supra* note 59, at 440.

[76] *Id.* at 454.

[77] Rep. Act No. 7394 (1992).

[78] Rep. Act No. 7394 (1992), art. 94. Labeling requirements of cigarettes – All cigarettes for sale or distribution within the country shall be contained in a package which shall bear the following statement or its equivalent in Filipino: "Warning: Cigarette Smoking is Dangerous to Your Health." Such statement shall be located in conspicuous place on every cigarette package and shall appear in conspicuous and legible type in contrast by typography, layout or color with other printed matter on

advertising is freely allowed on all media, and the sponsorship of arts and cultural events by tobacco firms abounds.

Despite this realm of freedom, cigarette advertising can be regulated on the same grounds that regulate commercial speech in general. The Constitution provides that "[t]he advertising industry is impressed with public interest, and shall be regulated by law for the protection of consumers and the promotion of the general welfare."[79] Advertising regulation in the Philippines is being undertaken by the Advertising Board of the Philippines (ADBOARD).[80] An umbrella organization of the advertising industry, it is composed of national organizations involved in advertising practice, who have banded together to promote the development of the advertising field through self-regulation.[81] This set-up was formulated to counter attempts of the Marcos administration to impose control on media, including advertising through the Mass Media Council. The Board was constituted with official encouragement of the Department of Public Information (DPI).

ADBOARD has adopted a Code of Ethics as a guidepost which aims to professionalize the advertising sector through self-imposed norms and standards. Advertising being an effective tool for communication with the public, is an activity which entails a social responsibility. The ADBOARD is guided by the Advertising Content Regulation (ACR) Manual of Procedures and the Standards of Trade Practices and Conduct Manual.

ADBOARD pre-screens all advertisements. For broadcast media, ADBOARD pre-screening and approval is a precondition to the airing of the commercial. Any violation of the provisions of the Code of Ethics is usually the subject of a complaint that is presented to the Advertising Content Regulation Committee (ACRC) for a hearing. ACRC decisions may call for a cease and desist order of errant ad material. Compliance is assured through

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the package. Any advertisement of cigarette shall contain the name warning as indicated in the label.

[79] CONST. art. XVI, sec. 11, par. (2).

[80] All cigarette/tobacco advertisements shall be screened on the basis of the Code of Ethics of the Advertising Board of the Philippines; and section 94 of Republic Act No. 7394, otherwise known as the Consumer Code of the Philippines.

The Advertising Board of the Philippines shall a) pre-screen broadcast advertisements; and post-screen print advertisements, as well as billboards and non-traditional media. No cigarette/tobacco advertisements shall be aired in broadcast media without the proper clearance issued by the Advertising Board of the Philippines.

[81] A Primer of the Advertising Board of the Philippines (ADBOARD).

specific sanctions on violations. Post-screening is done for print ads. A cease and desist order is immediately handed down against violative materials. To enforce its rulings, the ADBOARD depends on agreement between member-associations. An extreme case may cause all media-print and broadcast to refuse to print/broadcast advertising material that is found to have violated specific provisions of the Code.

The ADBOARD has few provisions relating to cigarette regulations, most of which relate to the protection of minors. In general, cigarette advertisements should not suggest that smoking is essential to social success or acceptance, that smoking is a genuine symbol of adulthood, or that refraining from smoking is a sign of weakness.[82] Section 14 paragraph 2 of the Code provides that cigarette and tobacco product advertisements should not depict the act of puffing, inhaling smoke, or having a lit cigarette in the mouth. Neither should it feature or promote excessive smoking, nor suggest that smoking brings about therapeutic, sedative, tranquilizing or stimulating effects or that smoking enhances sex appeal.

The placement of advertising of tobacco products is prohibited in theaters during schedules of motion picture exhibition directed mainly or entirely to children. In addition, advertisements for cigarettes and tobacco may not be directed to minors. Specifically, models and talents who are minors or roles meant to appeal especially to minors[83] may not appear in such advertisements.

> The health warning is regulated and incorporated in television and radio advertisements, textually[84] featured or through the use of a voice-over[85] in the last three seconds thereof, regardless of the duration of the television commercial. In print and outdoor advertisements, cigarette warning shall also be integrated.[86]

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[82] THE CODE OF ETHICS FOR ADVERTISING, art. 19, sec. 14, par. (1) (5th rev. 1996).

[83] Examples include folk or comic book heroes, war heroes, national heroes, and law enforcers.

[84] The health warning shall be rendered in clearly legible black types on a white background. If the print ad or billboard has a colored background, then a box with a white background would be sufficient even without a border. However, if the ad or billboard has a white background, there should be a thin line border on the box, which would be in any color at the option of the advertiser. No extraneous text nor visual design that adversely affects the readability of the health warning shall be allowed.

[85] The health warning shall be voiced-over without the extraneous sound nor effect that will adversely affect the clarity of the message.

[86] The health warning shall be rendered in clearly legible black types on a white background. If the print ad or billboard has a colored background, then a box with a white containing the warning would be sufficient even without a border. However, if the ad or billboard has a white background there should

Generally, the health warning shall be integrated in other advertising forms which refer to non-traditional media, electronic or otherwise, utilized for purposes of promoting consumption of branded cigarette/tobacco products. However, in other advertising forms with inherent media space/time limitation or where technical considerations disallow it, the integration of the health warning shall be waived provided that no selling message, outside of a brand name or logo, is placed thereon.

There is a billboard regulation wherein cigarette utilizing billboard, mini-boards, neon signs, digital or electronic signs. Posters, banners, and store support signs must have a distance of 100 meters from the school or church[87] but the enforcement of this regulation is lax.

The ADBOARD has already conceded many points as to what the nature of advertising as a species of commercial speech is. Advertising is defined as the dissemination of information or messages *for a business purpose*, usually *intended to promote commercial transactions*[88] or to enhance a business general standing in the marketplace or the community.

It is conceded that regulations are tailored to address the problem of exposure of minors can be valid as to time-place-manner restriction. But the enforcement of such restriction is difficult considering the fact that the ADBOARD has no financial backing and institutional teeth to monitor compliance. Self-regulation of cigarette advertising as it relates to minors will not fit in the general framework of ADBOARD goals, which is merely to make advertising truthful, not misleading or unfair. The health warning, by the standards of the ADBOARD is sufficient compliance since there is no contention that such warning is false or is in fact misleading.

Cigarette advertising is an important sphere to be left to the private sector insofar as the interest of minors is concerned. In the case of self-regulation, since the Adboard does not adequately address cigarette advertising for minors, there is a lurking danger that anti-tobacco lobbyists may be

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be a thin line border on the box, which would be in any color at the option of the advertiser. No extraneous text nor visual design that adversely affects the readability of the health warning shall be allowed.

[87] THE CODE OF ETHICS FOR ADVERTISING (5th rev. 1996).

[88] Virginia State Board v. Virginia State Board of Pharmacy, 425 U.S. 748 (1976).

successful in asking the legislature for regulation by the government on this sphere, leading to a total ban on cigarette advertising.

IV. FILTERING CIGARETTE ADVERTISING

A. Arguments for the validity of regulation, and their refutation

By far the most logically seductive of the asserted constitutional rationales for a total ban on tobacco advertising is the argument that government's power to ban the actual sale of a product logically includes the power to allow sales while simultaneously prohibiting promotional advertising.[89] Such is a fallacy that must be disregarded. The greater power does not always include the lesser power. For example, even if Congress has the power to build public libraries, it does not follow that Congress can likewise regulate the kinds of books in the said library.[90]

Another argument to support the validity of regulating commercial speech is provided in *Virginia State Board.* The Court in said case recognized that the durability and hardiness of commercial speech reduces the risk that it might be chilled by regulation. Thus, because of its greater durability, commercial speech maybe regulated in order to prevent consumer deception. Since commercial speech is a *sine qua non* to profit, commercial enterprises will advertise the product regardless of the potential for suffering sanctions under overbroad regulations.[91] The problem here is that the focus is on the profit motivation of the speaker and not on the speech per se and its value to the listener.

It is worth noting that there has been much emphasis on the profit-motive behind commercial speech, whether said suspicion is articulated or not, to justify its being accorded less protection. The argument that the motive needs to be factored in the equation in evaluating the level of protection fails to explore and appreciate the utilitarian value of commercial speech to its

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[89] City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993). See also Posadas de Puerto Rico Association v. Tourism Co., 106 S. Ct. 2968 (1986).

[90] McGowan, *supra* note 34, at 437.

[91] Virginia State Board v. Virginia State Board of Pharmacy, 425 U.S. 748 (1976).

audience. Advertising of commercial speech is not an end in itself but is a part of a process:

> [It] should not be viewed as uniquely tied to the speaker's developmental interest, but to the listener's free speech right as well. It consists at least in part of the listener's right to receive information. The protection is extended to foster rationality on the intended recipients. The speaker's motive should not be made controlling as a basis for upholding or denying constitutional protection to commercial speech.[92]

Profit-motivated speech is as capable of advancing their realization as is speech motivated by altruism, political gain or any other motive. For example, a speaker who campaigns for election because he or she expects to benefit economically if he or she is elected is motivated by profit, but his/her speech is as important to the democratic process as it would be if it were motivated by pure ideology.[93] Freedom of speech has never been reserved exclusively for speech motivated by concerns other than personal gain.[94] Thus, there is an inherent difficulty in using ascribed meaning and intention behind the speech as a criterion for extending protection, because it would consequently entail probing into the minds and motives of citizens.

Another argument for the regulation of cigarette advertising is the protection of minors. Children are bombarded daily by massive marketing campaigns that play on their vulnerabilities and insecurities.[95] Owing to the susceptibility of minors to tobacco advertising, it is argued that special solicitude and protection of the law is needed because it is presumed that they lack the ability to assess and analyze fully the information presented to them.

It is true that the State has an interest in protecting human beings who are not yet fully mature in their faculties. Those who still require care by others must be protected against their own actions as well as against external injury. It is further argued that the overriding fact is that many smoking adults and more importantly, children and young adolescents, are not in any position to make a reasoned and informed judgment about smoking. They lack adequate

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[92] New York Times v. Sullivan, 376 U.S. 254, 266 (1964) held that whether the speech made is for profit is irrelevant to the level of protection appropriate for that speech.

[93] McGowan, *supra* note 34, at 85.

[94] Redish, *supra* note 33, at 595.

[95] Remarks by President Bill Clinton During the Announcement of Food and Drug Administration Rule on Children and Tobacco (White House, 23 August 1996), cited in Jeruchomowitz, *supra* note 59, at 433.

comprehension of the significant health dangers inherent in smoking. In fact, they are misinformed, confused, or wholly ignorant about such matters as the nature and range of smoking related diseases, the health consequences of low tar and smokeless tobacco, the level of "safe" smoking, and their future ability to quit this highly addictive product.[96]

This analysis is not intended to suggest that government is powerless to impose appropriately circumscribed and legitimate time-place-manner regulations on cigarette advertising in order to advance its obviously substantial interest in deterring smoking among minors.[97] However, the government must not be allowed to stifle communications aimed predominantly at adults under the guise of protecting children. Such restrictions on advertising which effectively preclude communications to adults will not be upheld on the ground that children and adolescents also might be exposed to such advertising.[98] Simply put, "speech cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them,"[99] when adults are also effectively precluded from receiving the communications. Government, so to speak, "cannot burn the house to roast the pig inside,"[100] through overbroad regulations. Such solicitude is misplaced in the adult world. The world of children is not strictly part of the adult realm of free expression. The factor of immaturity imposes different rules. It is made clear that the government may not reduce adults to the status of children by regulating expression directed primarily at adults on the grounds that minors may also be exposed to it.[101] To allow such restrictions would be to reduce all of society to a community of children.[102]

Even if it is conceded that government has an interest because of health reasons in preventing the use of cigarettes or tobacco, there is no corresponding

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[96] Vincent Blasi & Henry P. Monaghan, *The First Amendment and Cigarette Advertising, 256* JAMA 502 (1996), cited in Redish, *supra* note 33, at 598.

[97] *Id.* at 638.

[98] This principle was articulated in Carey v. Population Services Int., 431 U.S. 678 (1977) in which the Supreme Court invalidated a restriction on contraceptive advertising notwithstanding the exposure to children and adolescents that such advertising would permit. The Court reaffirmed this principle in Bolger v. Youngs Drug Products Corporation, 463 U.S. 60, by invalidating a restrictive ban on mailing birth control advertisements to bones. Notwithstanding the fact that children and adolescents would therefore be able to view the material. *See* Bassuk, *supra* note 74, at 730.

[99] *Id.*

[100] Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 131 (1989).

[101] Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 131 (1989).

[102] Redish, *supra* note 33, at 608.

government interest in preventing the advertising of such products. Such restriction fails to distinguish between tobacco use and tobacco advertising. The studies cited by the United States Food and Drug Administration (FDA) to support a causal relationship between tobacco advertising and tobacco use establish, at best, evidence of some correlation.[103] Correlation, however, does not imply causation, and is an insufficient legal basis for establishing "direct and material advancement of the asserted government interest" under the *Central Hudson* test.

The Canadian Supreme Court, by a narrow majority, struck down those sections of the Tobacco Products Control Act which banned tobacco advertising and which required tobacco companies to post unattributed health warnings on cigarette packages.[104] The Court, through Justice Mclachlin, upheld the advertising and promotion of tobacco products on two grounds. First, the Court found, based on the record presented by the government, that no direct and scientific evidence showed a causal link between an increase in advertising bans and a decrease in tobacco consumption among young people. The government failed to demonstrate that less intrusive regulation such as bans on lifestyle advertising or advertising to children would not have achieved the objective of reducing cigarette consumption. Second, the court reasoned that the overwhelming weight of the research established that the advertising of tobacco products does not encourage current smokers to smoke more or discourage smokers from quitting. The ban denied information on brand preference and content to existing consumers of tobacco products who might use this information to reduce their risk to health.[105] The advertising ban deprives those who lawfully choose to smoke of information relating to price, quality and even health risks associated with different brands.[106]

B. The dark side of regulation

It is dangerous to regulate commercial speech of a particular product because of the spiraling consequences it might create. Such a rule opens a

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[103] Bassuk, *supra* note 74, at 730.

[104] RJR MacDonald v. Canada Attorney General, 3 S.C.R. 199 (1995), cited in IAIN RAMSAY, *Advertising, Culture and the Law*, MODERN LEGAL STUDY 95 (1996).

[105] RJR MacDonald v. Canada Attorney General, 3 S.C.R. 199 (1995), cited in IAIN RAMSAY, *Advertising, Culture and the Law*, MODERN LEGAL STUDY 95 (1996).

[106] RJR MacDonald v. Canada Attorney General, 3 S.C.R. 199 (1995), cited in IAIN RAMSAY, *Advertising, Culture and the Law*, MODERN LEGAL STUDY 95 (1996).

Pandora's box of regulation that tramples on the Constitution and the rights of millions of adults. It may lead to the regulation or suppression of high-fat foods, sugar, coffee, gasoline and cellphones. The state may legitimately assert an interest in discouraging consumption of many products including beef, sugar, and dairy products. A deferential application to commercial speech regulations aimed at limiting the consumption of harmful products could, in effect, lead the government to discourage the use of a variety of legal products,[107] thus creating a slippery slope.[108]

> Government restrictions on certain types of speech can ultimately become restrictions on all speech. Restrictions on one group of commercial speakers . . . can ultimately become restrictions on all commercial speakers. If a state has a legitimate interest in protecting people from harmful products, such as cigarettes, then a state can regulate the advertisements of other products.[109]

It is on issues of censorship that such advertising restrictions were controverted, not the controversial benefits or deficiencies of tobacco products. Objectively, the argument proceeds as follows: Smoking is an addictive habit that causes severe social harm by giving rise to serious, often fatal illnesses in thousands of individuals every year. The government may exercise its regulatory police power to prevent or reduce harm. It possesses the power to protect the public interest by completely banning sale of tobacco products, but it need not take such extreme action. Rather, it is argued, the government may take the lesser step of allowing sales to continue while prohibiting advertising of tobacco products, as a reduction in advertising would reduce demand for the product, thus, such a prohibition would largely achieve the government's legitimate goal of curbing tobacco use indirectly by reducing the public's demand for that product.[110]

Blackmun's concurring opinion in *Central Hudson*[111] notes that he

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[107] Sylvia A. Law, *Addiction, Autonomy and Advertising*, 77 IOWA L. REV. 909, 913 (1992) noting substantial interest in protecting people from grave harm caused by cigarettes could be applied to a variety of activities other than smoking, such as handguns, motorcycle riding, boxing, playing football, auto racing or liquor consumption.

[108] Claudia Mclachlan, *Ad Limits Get Harder to Enact*, NAT'L. L. J. n 281, 26 July 1993.

[109] Redish, *supra* note 33, at 598.

[110] Law, *supra* note 107, at 937.

[111] Central Hudson Electric Corp. v. Public Service Commission, 447 U.S. 557 (1978).

> seriously doubt[s] whether the suppression of the information concerning theavailability and price of a legally offered product is never a permissible way for the state to "dampen" demand for or use of the product. Even though "commercial" speech is involved, such a regulatory measure strikes at the heart of the First Amendment . . . because it is a covert attempt by the state to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public the information needed to make a free choice . . . The State's policy choices are insulated from the visibility and scrutiny that direct regulation would entail and the conduct of the citizens is molded by the information that government chooses to give them. To allow government to halt a particular activity, not by direct regulatory means but rather indirectly by suppressing advocacy and dissemination of information about that activity, effectively enables government to subvert the traditional democratic value of accountability. Instead of exposing attainment of its goal to the normal pressures and debates of the democratic process, government is authorized to employ furtiveness and stealth to achieve its desired social ends.[112]

No doubt many raise serious questions about the wisdom of engaging in the activity of smoking in light of its health risks, but the freedom of speech has never been construed to allow the government to ban truthful expression advocating a lawful activity simply because the majority deems such advocacy to be unpersuasive or the activity to be unwise or unhealthy. This is a display of outright arrogance and parentalism, subverting the "rhetoric of democracy" with the value system of the government and other advocates, taking it out of the province of liberty and making it a function of moralistic intolerance.

> Since freedom of expression occupies a dominant position in the hierarchy of rights under the Constitution, it deserves no less than an exacting standard of limitation. Limitations on the guarantee must be clearcut, precise, and if needed, readily controllable, otherwise, the forces that press towards curtailment will eventually break through the crevices and freedom of expression will become the exception and suppression the rule.[113]

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[112] Central Hudson Electric Corp. v. Public Service Commission, 447 U.S. 557, 574-575 (1978).
[113] Osmeña v. COMELEC, G.R. No. 132231, 31 March 1998, 288 SCRA 447 (1988).

C. State parentalism and cigarette advertising: the case of information versus manipulation

Governmental interference is advanced because of the danger of consumer manipulation by private commercial speakers. The first issue raised by Professor Daniel Hay Lowenstein is the argument that cigarette advertising is manipulative, and it cannot aid in the development of rationality. Apparently, he therefore considers a decision based upon the acceptance of the ideas set forth in such advertisement as "irrational."

This position is untenable for three reasons. The position wrongly assumes that the government can determine, in the context of persuasive commercial speech, which decisions are rational and which are not.[114] Government cannot dictate in advance what is rational or not. This is a sphere reserved to individuals. To allow the government to do so would lead to mind control, and put each "ideal" citizen into a pre-cast mold.

The government is and always will be incapable of deciding what makes a person sexually attractive, or sociable; such determinations are inherently subjective and are a function of democratic choice. Unless the government decides that cigarette smoking, for example, does not do so, it cannot say that a decision accepting the contrary view as irrational.[115] The government derives its power from the people as the sovereign and it may not impose its standards of what is true or false, what is informative and what is not for the individual who, as a "particle" of the sovereignity, is the only one entitled to exercise [such] privilege.[116]

The second reason for rejecting this proposition is that it portrays too narrow a view of rationality — a narrow conception of what makes a decision rational. Even when an advertisement sets forth what may be classified as an opinion that works subliminally on many people, it may work in an expressly rational way on others. For example, a person who relaxes when she smokes may have made a rational judgment that the relaxation she gains by smoking is worth the health risks involved.[117] The same person also may rationally decide

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[114] McGowan, *supra* note 34, at 426.
[115] *Id.* at 426.
[116] Osmeña v. COMELEC, G.R. No. 132231, 31 March 1998, 288 SCRA 447 (1988).
[117] Redish, *supra* note 33, at 636.

that he desires to be associated with the attributes of smoking portrayed in advertisements, and that the desire outweighs the health risks involved.[118]

The government should not interfere with this strictly private and individual domain. Parentalism is an indication of the unwillingness on the part of the government to trust the ability of its citizens to make decisions on the basis of competing information. If government is permitted parentalistically to shield its citizens from such open debate as a means of controlling their behavioral choices, it will have simultaneously affronted individual dignity and stunted the individual's personal and intellectual growth, a developmental process that lies at the heart of the free speech right. It will have contributed to an intellectual atrophy of the citizen that ultimately will undermine their effective participation in the democratic process.[119] It would lead to the mutilation of the thinking process of the community[120] and no meaningful system of free expression can flourish if government is given such a power.[121]

Professor Burt Neuborne notes that

> [a]lthough the objects of the State's exercise in mind control retain the illusion of free choice, the censor engages in subtle manipulation by selectively deciding what information the consumer is permitted to receive, the result is the illusion of freedom, but in reality government control...[122] Instead of free choice among lawful alternatives, individuals are deftly guided by a Platonic guardian into behavior patterns that are pre-set for them by a benevolent State.[123]

Either one trusts the public to hear competing viewpoints, including those deemed by the government to be unwise, or one does not. Thus, if we do not trust the public to make a choice about a lawful activity of smoking on the basis of free and open debate, neither can citizens be trusted in processing competing information and opinion concerning competing societal choices.[124] If such premise is accepted, it is difficult to see how government could be denied the exact power when political choices are involved. Whether motivated

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[118] *Id.*

[119] *See generally,* Frank I. Michelman, *Law's Republic,* 97 YALE L.J. 1493 (1998).

[120] Christopher Stone, *Content Regulation and First Amendment,* 25 WM AND MARY L. REV 189, 198 (1983).

[121] Redish, *supra note* at 33, 605-6.

[122] Christopher Stone, *Theorizing Commercial Speech,* 11 GEO. MASON L. REV. 95, 110 (1988).

[123] *Id.* at 114.

[124] Redish, *supra* note 33, at 636.

out of desire to suppress the expression of particular viewpoints or out of a legitimate concern to the public's welfare, a government's suppression of advocacy, because of its failure to trust its citizen's judgment, fails the test of democracy.[125] The State's protectiveness of its citizens rest in large measure on the advantages of their being kept in ignorance.[126] The tradition and values of our system of free expression dictate that government refrain from manipulating citizens' behavior through selective control of the flow of information.[127] The state may not seek to further its aim by keeping its citizens in the dark because in the final analysis, ignorance may not always be blissful.

V. ALTERNATIVES

The challenge is in devising alternatives that will advance the government's interest in decreasing the incidence of underage tobacco use, while remaining faithful to the letter and spirit of the Constitution. The following are suggested:

A. Counter-speech

The rationale behind this view is that if the government's objective is to increase education among young people about the health risks associated with tobacco products, then it can provide that information itself. In addition to regulating conduct, legislature could also choose to add to rather than subtract from, the commercial marketplace of ideas. In his concurrence in *Virginia Pharmacy*, Justice Stewart stated that the only way that ideas can be suppressed is through "the competition of other ideas." This method is commonly referred to as counter-speech. Counter-speech gives consumers the ability to weigh the two competing messages in the context of the individual consumer's economic decision-making capacity.

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[125] Redish, *supra* note at 33, at 607.
[126] Virginia State Board v. Virginia State Board of Pharmacy, 425 U.S. 748, 769-70 (1976).
[127] Redish, *supra* note 33, at 635.

In the late 1960s, counter-speech proved to be a highly effective tool in convincing people to quit smoking. In 1967, the Federal Communications Commission decided that the "Fairness Doctrine" applied to cigarette advertising. This meant that it was a "controversial issue of [such] public importance" that broadcasters would be required to donate air time to anti-smoking organizations. Soon thereafter, television and radio stations began carrying advertisements concerning the dangers of cigarette advertisements concerning the dangers of smoking and its causal relationship to lung cancer. The consumption of cigarettes declined, and several reports credited the decline to the anti-smoking ads.

Due to the dramatic impact of anti-smoking advertisements on sales of tobacco that the tobacco industry itself supported a ban on radio and television advertising of its product. The industry decided that it would not challenge the 1969 ban on cigarette advertisement because they knew that the advertising ban eliminated not only cigarette commercials, but the anti-smoking commercials as well. The tobacco industry knew that as soon as the anti-smoking advertisements stopped, cigarette sales would begin to rise. With the cigarette smoking controversy removed from the air, the decline in cigarette smoking was abruptly halted.[128]

The agency's competing speech requirement facilitated autonomous decision-making and antismoking messages on cigarette consumption[129] furthered regulatory interests. In the Philippines, the Department of Health employed counterspeech by adopting a mascot, "*Yosi Kadiri*," to emphasize the bad effects of cigarettes on personal hygiene.

B. Direct regulation

If a community wishes to reduce the consumption of a certain product or service, it would make more sense to regulate the use of that product or service than to restrict the advertisement of the product. Justices Stevens and O'Connor agreed that direct regulations on conduct would be preferable and

[128] Banzhaf v. FCC, 405 F. 2d 1082 (D.C. Cir. 1968) (upholding antismoking advertisements as part of the fairness doctrine), cert. Denied, 396 U.S. 842 (1969). Under the fairness doctrine, the FCC required radio and television broadcasters to provide a balanced representation and fair coverage of controversial issues of public importance. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 369 (1969).

[129] Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 588 (1971).

more effective than restrictions on speech. There are at least three tactics that can be used to regulate conduct. First, the government could reduce demand. The most common method for reducing demand for a product or service is to make the product more expensive by imposing a higher tax on it. The higher the tax, the more difficult it is for underage smokers to purchase cigarettes and tobacco. The increased revenue generated by the tax could be used and earmarked for anti-smoking campaigns and public education programs. This alternative will directly and materially advance the state interest of reducing tobacco use while at the same time steering clear of constitutional problems.

Second, the government could restrict access. For instance, the government could impose and strictly enforce age restrictions, purchase period curfews or impose higher licensing fees to reduce the number of vendors authorized to sell the product. The state can bar youth access through face to face sales and verification procedures and the elimination of access to vending machine, self-service displays and free samples. An additional measure could require packages of cigarettes to contain at least twenty cigarettes. This would eliminate access to cigarettes sold individually, or "loosies" which are attractive to young people as an easy, affordable way to purchase tobacco. Restricting the access of children would more directly and materially reduce underage tobacco use than would the advertising restrictions without infringing on the constitutional rights of adults to receive communications about tobacco products.

Since enforcement of sales-to-minors laws has been virtually nonexistent, this can be devolved to local government units for manageability. Sting operations can be undertaken and penalties imposed for violations either through fine or license revocation. Finally, the government could enhance the penalties imposed upon those vendors and consumers who fail to conform to the requirements.

Government must combat behavior that it deems unwise with its own persuasive powers, not through a vast regulatory scheme that compromises personal autonomy and principles of freedom of expression. As long as these workable alternatives exist, curtailing cigarette advertising must not be undertaken.

VI. CONCLUSION

Freedom of expression is the foundation upon which our democratic institution rests. Freedom of speech is inextricably intertwined with the other freedoms such as freedom to information and freedom of choice. From a broad perspective, assault on this freedom cannot be isolated from other fundamental freedoms, since it is considered an attack on the entire covenant of liberty itself. If the foundation weakens, its implication would be that our entire democratic structure will crumble.

In a democratic set-up such as ours, diversity is a value in itself, and different ideas must compete against each other for acceptance. Suppression of information, whether political or commercial could only have resulted in stunting individual growth and civilization.

It is true that the tobacco problem has already decimated millions upon millions of lives. However, the problem cannot be solved by sacrificing hard-earned principles of liberty and humanity. The existence of workable alternatives means that it is possible to pursue state concerns coextensively with, rather than at the expense of, the protection of free expression interests.

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