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“Camels Agree with your Throat” and Other Lies: Why Graphic Warnings are Necessary to Prevent Consumer Deception

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NOTE

“CAMELS AGREE WITH YOUR THROAT” AND OTHER LIES: WHY GRAPHIC WARNINGS ARE NECESSARY TO PREVENT CONSUMER DECEPTION

Ellen English*

Abstract

The government’s latest attempt to protect consumers from the perils of tobacco use is in jeopardy. In 2009, Congress enacted the Family Smoking Prevention and Tobacco Control Act, which requires cigarette advertisements and packages to bear nine new textual health warnings and gives the FDA authority to regulate tobacco products. In 2011, in compliance with the Act, the FDA issued a regulation, known as the graphic warning requirement, which mandates that a color graphic image accompany each of the nine textual warning statements. The graphic warning requirement now faces challenges from the tobacco industry, and the ambiguities current standards present divide courts as to the constitutionality of the warnings.

Part I introduces the Family Smoking Prevention and Tobacco Control Act and the graphic warning requirement. Part II provides an overview of the protections the First Amendment affords commercial speech, specifically tobacco advertisements and labels. Part III sets out the framework for the levels of scrutiny the Supreme Court has applied to compelled and commercial speech. Part IV explains the current circuit split and analyzes the courts’ treatment of the issue. The deceptive nature of tobacco advertisements, the impact of tobacco advertising, and the effectiveness of the new warnings are described in Part V. In conclusion, this Note emphasizes the deceptive nature of past and present tobacco advertisements and urges the Court to further develop compelled commercial speech doctrine to better enable mandated disclosures of health hazards to pass constitutional muster.

* J.D. expected, May 2014, University of Florida Levin College of Law; B.S., 2011, Troy University. To Mom, Dad, and Will—thank you for your constant encouragement, patience, and willingness to listen. A special thank you to the editors of the Florida Law Review for their hard work and dedication.
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INTRODUCTION

“More Doctors smoke CAMELS than any other cigarette” bragged a 1951 advertisement printed in the Boston Globe.1 Eva Cooper of Massachusetts blamed this advertisement, among others, for her husband’s untimely death.2 Cooper, the first plaintiff in a long history of litigation surrounding tobacco’s harmful health effects,3 pointed to this advertisement in response to an interrogatory that followed the complaint she filed against R.J. Reynolds Tobacco Company and blamed the manufacturer of Camel cigarettes for killing her husband, Joseph.4 The complaint alleged that Joseph’s reliance on misleading cigarette advertisements caused his lung cancer and resulting death.5 Specifically, Cooper claimed that R.J. Reynolds Tobacco Company “daily and in a negligent and reckless manner . . . inserted certain advertisements in newspapers, radio and television and other media which [ ] were false and misleading and [her husband] relied upon [the] advertisements . . . [and] continued to smoke ‘Camel’ cigarettes”6 Cooper’s claim was eventually dismissed on summary judgment,7 and she was only the first of decades of tobacco liability plaintiffs to leave the courtroom empty-handed.8 In fact, a jury did not hand over a verdict in favor of a tobacco liability plaintiff until 1988.9 Many of the plaintiffs who followed Cooper’s lead also based their claims against the tobacco giants on the industry’s misleading statements regarding the dangers of tobacco consumption.10

While the courts sided with the tobacco companies,11 the legislative

4. Cooper, 256 F.2d at 466.
5. Cooper, 158 F. Supp. at 23.
6. Complaint, supra note 2, at 3.
9. See id. at 1023.
10. See, e.g., Tuttle v. Lorillard Tobacco Co., 377 F.3d 917, 922–23 (8th Cir. 2004) (alleging that a tobacco company’s statement that tobacco products are not harmful to health was a misrepresentation); Tompkin v. Am. Brands, 219 F.3d 566, 568 (6th Cir. 2000).
11. See, e.g., Jacobson, supra note 8, at 1021–22; Frontline: Inside the Tobacco Deal
branch took notice of the need for regulation in the tobacco industry. The government first attempted to warn citizens of the health risks of smoking by enacting the Federal Cigarette Labeling and Advertising Act of 1965, which mandated that cigarette packages display a warning that “Cigarette Smoking May Be Hazardous to Your Health.” The Act was a response to a 1964 Surgeon General’s report that detailed the health consequences of smoking. Following the passage of the Act, Congress continued to pass legislation that regulated tobacco labeling and advertising, several pieces of which updated and strengthened the content of the required warnings. In 1970, Congress went a step further and prohibited cigar and cigarette advertisements “on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.”

The government’s latest effort to regulate the tobacco industry is codified in the Family Smoking Prevention and Tobacco Control Act. This Note will examine a key provision of the Act, the graphic warning requirement, and the constitutional attacks to the warning requirement. Part I of this Note introduces the Family Smoking Prevention and Tobacco Control Act, specifically the graphic warning requirement, and the FDA’s findings in support of this requirement. Part II provides an overview of the First Amendment protections afforded to commercial speech, specifically tobacco advertisements and labels. Part III sets out the framework for the levels of scrutiny the Supreme Court has applied to compelled and commercial speech. The current circuit split on the constitutionality of the graphic warning requirement is explained in Part IV. Specifically, Part IV will explore the reasoning each court used and the factors that proved outcome determinative. Part IV also discusses the shortcomings of compelled commercial speech doctrine, as it currently stands, that led to the circuit split. Part V discusses the
deceptive nature of both past and current tobacco advertisements, the
effectiveness of graphic warnings. Finally, the conclusion emphasizes
the need for further development of standards for evaluating the
constitutionality of compelled commercial speech and argues that, based
on the tobacco industry’s history of deceptive advertising and its current
practices, courts should uphold the graphic warning requirement as it is
vital to the prevention of consumer deception.

I. GRAPHIC WARNINGS: AN ATTEMPT TO PREVENT DECEPTION

The Family Smoking Prevention and Tobacco Control Act, the latest
piece of tobacco control legislation, directs the Food and Drug
Administration to issue a regulation that requires companies to place
graphic health warnings on tobacco products. The Food and Drug
Administration’s findings in support of the rule demonstrate the critical
need for more effective warnings.

A. The Family Smoking Prevention and Tobacco Control Act

On June 22, 2009, Congress enacted the Family Smoking Prevention
and Tobacco Control Act19 (the Act), which amended the Federal Food,
Drug and Cosmetic Act to give the Food and Drug Administration
(FDA) authority to regulate tobacco products20 and to require all
cigarette advertisements and packages to bear nine new textual health
warnings.21 The Act also ordered the Department of Health and Human
Services to “issue regulations that require color graphics to depict the
negative health consequences of smoking to accompany the [textual
warnings].”22 In 2010, the FDA issued the proposed rule (the graphic
warning requirement)23 and issued the final rule that implemented the
graphic warning requirement on June 22, 2011.24

B. Graphic Warning Requirement

The graphic warning requirement was scheduled to become effective
on September 22, 2012, but following a federal court ruling, the FDA is
going “back to the drawing board” to create a new set of labels.25 As

19. Id.
22. Id.
23. Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69,524
(proposed Nov. 12, 2010).
24. 21 C.F.R. § 1141.10 (West, WestlawNext through December 19, 2013) (overruled by
R.J. Reynolds Tobacco Co. v. FDA, 845 F. Supp. 2d 266 (D.D.C. 2012)).
stated above, the graphic warning requirement mandates that each of the nine textual warning statements is accompanied by a color graphic image. The graphic warnings must be noticeable on both packages and advertisements and cover fifty percent of both the front and back of cigarette packages and twenty percent of advertisements. Electronic images of the original graphic warnings are contained in a document labeled “Cigarette Required Warnings” which is incorporated into the Code of Federal Regulations. The warning statement “Cigarettes are Addictive” is supplemented with a picture of a man exhaling through a tracheotomy hole; “Cigarettes Cause Fatal Lung Disease” is paired with a graphic of black, diseased lungs; and a photo of oral sores and decayed teeth accompanies the warning that “Cigarettes Cause Cancer.”

The court of appeals did not hold the provision of the Act directing FDA to promulgate graphic-warning regulations facially invalid. Rather, the court held that the particular graphic warnings adopted in FDA’s regulations violated the First Amendment, based on the record before FDA in the rulemaking proceedings, and it remanded the matter to the agency. FDA therefore remains free to conduct new rulemaking proceedings under the Act, and it can address issues identified by the court of appeals and other relevant issues in such proceedings. The Department of Health and Human Services (HHS) has informed this Department that FDA will undertake research to support a new rulemaking consistent with the Tobacco Control Act. . . . If a court of appeals were to set aside new regulations issued by FDA at a later date, there will be an opportunity to seek full Supreme Court review at that time.


27. Id.
It comes as no surprise that tobacco companies are challenging the graphic warning requirement. Big tobacco argues that the requirement unconstitutionally infringes on their First Amendment rights. 33 Two cases already reached the appellate level and a circuit split now exists between the D.C. Circuit and the Sixth Circuit. 34

C. FDA Findings

In support of the rule, the FDA produced findings on the occurrence of smoking in the United States, the health consequences of smoking, and the deficiencies in consumer knowledge of the risks. 35 In terms of prevalence, the FDA voiced particular concern over the use of cigarettes among America’s youth. 36 According to the 2008 National Survey on Drug Use and Health, approximately 6,600 people begin smoking each day, 4,000 of whom are under the age of eighteen. 37 Findings also indicate that economically disadvantaged adults and adults with low levels of education have high smoking rates. 38

Statistics on the health consequences of smoking are astounding. Cigarette smoking is to blame for 443,000 human deaths per year in the United States alone. 39 The FDA referenced the Surgeon General’s 2004

31. Id.
32. Id.
33. See, e.g., R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1208 (D.C. Cir. 2012); Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 518 (6th Cir. 2012).
36. Id.
37. Id.
38. Id. at 36,630.
39. Id.
report on “The Health Consequences of Smoking,” which indicated that “cigarettes have been shown to cause an ever-expanding number of diseases and conditions, including lung cancer, laryngeal cancer, oral cavity and pharyngeal cancers, esophageal cancer, bladder cancer, pancreatic cancer, kidney cancer, stomach cancer, cervical cancer, acute myeloid leukemia, all the major clinical cardiovascular diseases, COPD, and a range of acute respiratory illnesses.”

The Surgeon General’s finding that “[c]hildren who smoke experience impaired lung growth and an early onset of lung function decline” is in line with concern over smoking initiation in young adults.

D. Early Judicial Responses to Tobacco Legislation

The graphic warning requirement is not the first piece of tobacco control legislation to face a challenge, but is likely to be the most controversial. Interestingly, the Federal Cigarette Labeling and Advertising Act of 1965 did not sustain significant direct constitutional attacks.

More surprising is the fact that the 1969 Act, which was challenged on First Amendment grounds, was attacked by a broadcast company, rather than a tobacco manufacturer. In *Capital Broadcasting Company v. Mitchell*, a broadcasting company alleged that the Public Health Cigarette Smoking Act of 1969’s prohibition on cigarette advertisements violated the First Amendment. The court found the ban constitutional. *Capital Broadcasting Company* is not particularly helpful to the analysis of the graphic warning requirement issue because, as the court stated, the broadcasters themselves “lost no right to speak—they have only lost an ability to collect revenue from others for broadcasting their commercial messages.” However, the court’s observation that “advertising is less vigorously protected than other forms of speech” is still relevant.

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40. *Id.* at 36,631.
41. *Id.*
44. *Id.* at 584.
45. *Id.* at 583.
46. *Id.* at 584.
47. *Id.*
II. TOBACCO ADVERTISEMENTS AND LABELS ARE ENTITLED TO FIRST AMENDMENT PROTECTION

Tobacco advertisements and labels can be classified as both commercial and compelled speech. The First Amendment protects commercial speech, albeit to a lesser extent than other forms of speech, and in some instances protects individuals from being compelled to speak.

A. Tobacco Advertisements and Labels are Forms of Commercial Speech

The first step in analyzing the First Amendment protections afforded tobacco advertising and labeling is to determine the speech classifications of tobacco advertisements and labels. The Supreme Court long ago defined commercial speech as speech that does “no more than propose a commercial transaction.” The Court continually applies this definition in commercial speech cases. In a leading commercial speech case, the Court clarified this definition of commercial speech to encompass any “expression related solely to the economic interests of the speaker and its audience.” Furthermore, the Court made it clear that commercial speech includes advertisements. It also established that labels on food and drug packages are forms of commercial speech. Thus, tobacco advertisements and tobacco product labels are forms of commercial speech.

B. Commercial Speech is Protected Speech, but Not Without Exceptions

The Supreme Court originally refused to find First Amendment protection for commercial speech. However, the Court gradually shied away from that position and affirmatively renounced that view in

51. See id. at 563 (“The First Amendment’s concern for commercial speech is based on the informational function of advertising.”); Va. State Bd. of Pharmacy, 425 U.S. at 762 (“[T]he advertiser’s interest is a purely economic one.”); Pittsburgh Press Co., 413 U.S. at 385 (noting that advertisements are “classic examples of commercial speech”).
53. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (finding that “the Constitution imposes no such restraint on government as respects purely commercial advertising”).
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.55 There, the Court considered the question of whether commercial speech is so removed from any “exposition of ideas,” and from “truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,” that it lacks all protection.56 Specifically, the Virginia Citizens Consumer Council attacked the constitutionality of a state law that prohibited pharmacists from advertising prices for prescription drugs.57 The Court emphasized the importance of the free flow of information58 and concluded that commercial speech does not fall outside the protections of the First Amendment.59 Furthermore, commercial speech protections are not limited to verbal expression. Commercial illustrations receive the same protections as other forms of speech.60

However, in holding that commercial speech is entitled to First Amendment protection, the Court was careful to note that “[s]ome forms of commercial speech regulation are surely permissible.”61 The Court even took care to articulate such exceptions including time, place, and manner restrictions; restrictions on false or misleading speech; and restrictions on illegal speech.62 Later cases expounded this principle and declared that commercial speech enjoys less protection than noncommercial speech.63

C. The First Amendment Protects Compelled Speech

It is clear that tobacco advertisements and labels are commercial speech and that commercial speech is protected. However, it is important to note that the graphic warning requirement mandates, rather

55. Id. at 762.
56. Id. (internal quotations and citations omitted).
57. Id. at 749–50.
58. Id. at 764; id. at 765 (“It is a matter of public interest that . . . decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.”); id. at 770 (noting that the public cannot be kept in ignorance).
59. Id. at 770; see also id. at 762 (noting that the fact that an advertiser’s interest is purely economic does not put him outside the scope of First Amendment protection).
62. Id. at 770–72 (emphasis added).
than prohibits, speech.\footnote{R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1217 (D.C. Cir. 2012); Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 558 (6th Cir. 2012).} This point begs the question of whether the First Amendment protects an individual or entity from the government compelling them to speak. The Supreme Court has expressly stated that the First Amendment protects “both the right to speak freely and the right to refrain from speaking at all.”\footnote{Wooley v. Maynard, 430 U.S. 705, 714 (1977).} Similarly, in Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, the Court noted “in some instances compulsion to speak may be as violative of the First Amendment as prohibitions on speech.”\footnote{Zauderer, 471 U.S. at 650.} Therefore, the graphic warning requirement does not fall outside the protection of the First Amendment solely because it compels speech rather than prohibits it.

III. LEVELS OF SCRUTiny APPLIED TO COMPELLED COMMERCIAL SPEECH

The Supreme Court has articulated and applied standards of review to commercial speech and to compelled speech, but has only once evaluated the constitutionality of compelled commercial speech. The Court applied rational basis to a compelled disclosure, but it is unclear how far the Court’s opinion will reach.

A. Origins of Scrutiny

As Part IV will demonstrate,\footnote{See discussion infra Part IV.} the level of scrutiny applied to the graphic warning requirement proved to be outcome determinative in both of the appellate cases that addressed the constitutionality of the graphic warning requirement.\footnote{See generally R.J. Reynolds Tobacco Co., 696 F.3d 1205; Disc. Tobacco City & Lottery, Inc., 674 F.3d 509.} The Supreme Court introduced the process of applying varying levels of scrutiny to laws depending on the right at stake in the famous Commerce Clause case, United States v. Carolene Products Co.\footnote{United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); Matthew D. Bunker et al., \textit{Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech}, 16 COMM. L. & POL’Y 349, 352 (2011).} In the early years following Carolene Products, the Supreme Court applied levels of scrutiny mostly to equal protection and due process cases, but now, the Supreme Court applies differing levels of scrutiny to a broad range of constitutional law issues.\footnote{Ashutosh Bhagwat, \textit{The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence}, 2007 U. ILL. L. REV. 783, 784.} Originally the Court applied only two standards of review: strict scrutiny and rational basis review.\footnote{Id.} However, when the Court
began to apply these tests to First Amendment cases, the need for a third
standard of review arose and intermediate scrutiny was born.\textsuperscript{72} Despite
the frequency of mandated disclosures,\textsuperscript{73} little case precedent on the
phenomenon of compelled commercial speech exists. The scarcity of
precedent forces courts to borrow and apply to compelled disclosures
doctrines that better suit other types of speech regulations.\textsuperscript{74} An analysis
of strict scrutiny, intermediate scrutiny, and rational basis review as
they may apply to compelled commercial speech follows.

\section*{B. Wooley v. Maynard and Strict Scrutiny}

The Supreme Court applied strict scrutiny to compelled speech in
\textit{Wooley v. Maynard}.\textsuperscript{75} In \textit{Wooley}, appellee Maynard challenged a New
Hampshire law that effectively required owners of a vehicle registered
in the state to display the motto "Live Free or Die" on the vehicle’s
license plate.\textsuperscript{76} Appellees were Jehovah’s Witnesses and “consider[ed]
the New Hampshire State motto to be repugnant to their moral,
religious, and political beliefs.”\textsuperscript{77} The Court framed the issue as
“whether the State may constitutionally require an individual to
participate in the dissemination of an ideological message by displaying
it on his private property in a manner and for the express purpose that it
be observed and read by the public.”\textsuperscript{78}

In addressing this issue, the Court first acknowledged that the
“Maynards’ interests . . . implicat[ed] First Amendment protections,”\textsuperscript{79}
and then stated that the State could not require the Maynards to display
the motto unless the State had a “sufficiently compelling” interest in
doing so.\textsuperscript{80} The State’s asserted interests were “facilitat[ing] the
identification of passenger vehicles” and “promot[ing] appreciation of
history, individualism, and state pride.”\textsuperscript{81} The Court suggested that the

\footnotesize{
\begin{itemize}
\item \textsuperscript{72} \textit{Id.}
\item \textsuperscript{73} \textit{See Andrea M. Matwyshyn, Hidden Engines of Destruction: The Reasonable
Expectation of Code Safety and the Duty to Warn in Digital Products, 62 FLA. L. REV. 109,
156–57 (2010) (providing examples of the use of compelled disclosures to protect consumers).}
\item \textsuperscript{74} \textit{See Dayna B. Royal, Resolving the Compelled-Commercial-Speech Conundrum, 19
two existing doctrines: compelled speech and commercial speech . . . . [which] makes
determining whether compelled-commercial-speech regulations violate the First Amendment
difficult.”).}
\item \textsuperscript{75} \textit{Wooley v. Maynard, 430 U.S. 705, 716 (1977) ("We must also determine whether the
State’s countervailing interest is sufficiently compelling to justify requiring appellees to display
the state motto on their license plates.”).
\item \textsuperscript{76} \textit{Id. at 706–07.}
\item \textsuperscript{77} \textit{Id. at 705.}
\item \textsuperscript{78} \textit{Id. at 713.}
\item \textsuperscript{79} \textit{Id. at 715.}
\item \textsuperscript{80} \textit{Id. at 716.}
\item \textsuperscript{81} \textit{Id.}
\end{itemize}

http://scholarship.law.ufl.edu/flr/vol65/iss6/9

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interest in identifying passenger vehicles might be compelling, but skirted around this issue and noted that the slogan was not necessary because state officers could identify passenger vehicles by looking at a number sequence.\textsuperscript{82} In other words, even if the state’s interest is compelling, the regulation will not pass muster if the state can achieve the interest by a less restrictive alternative.\textsuperscript{83} Furthermore, the Court found that the second asserted interest was not sufficiently compelling because it was “not ideologically neutral.”\textsuperscript{84} Thus, in order for a rule that compels speech to survive strict scrutiny, the government must show that the rule advances a sufficiently compelling ideologically neutral interest and the state cannot achieve such interest by a less restrictive alternative.

Wooley v. Maynard does not specifically provide guidance on the application of strict scrutiny to compelled speech that is not ideological. However, later Supreme Court cases counsel on this question by providing bases for distinguishing Wooley. First, Wooley has been distinguished many times on the grounds that Wooley involved the compelled expression of an ideological message.\textsuperscript{85} Second, Wooley did

\begin{flushleft}
82. \textit{Id.}
83. \textit{Id.} at 716–17. The Court stated:

\begin{quote}
Even were we to credit the State’s reasons and “even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.”
\end{quote}


84. \textit{Id.} at 717 (“[W]here the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.”).

85. In Zauderer, the Court explained that:

\begin{quote}
[T]he interests at stake in this case are not of the same order as those discussed in Wooley, Tornillo, and Barnette. Ohio has not attempted to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available.
\end{quote}

not involve commercial speech. These cases seem to indicate that strict scrutiny does not have a place in the compelled commercial speech context. The idea that compelled speech that is commercial in nature and does not convey an ideological message does not warrant strict scrutiny is in line with the notion that commercial speech enjoys less protection than noncommercial speech.

C. Central Hudson and Intermediate Scrutiny

The Supreme Court formulated the intermediate scrutiny test for commercial speech in Central Hudson Gas & Electric Corporation v. Public Service Commission of New York. In Central Hudson, an electric company challenged an order that prohibited all electric utilities in New York from advertising to encourage the use of electricity. The Court acknowledged that the restriction concerned commercial speech and that commercial speech receives a lower degree of protection than noncommercial speech. The Court emphasized that because the informational purpose of commercial speech is important, the government must be able to suppress misleading commercial speech. In other words, the Court suggested that if the speech is misleading, the regulation is not subject to heightened scrutiny, but if the speech is not misleading, the regulation is subject to intermediate scrutiny. Thus, if the speech the government seeks to regulate is not misleading, the regulation must serve a substantial government interest, the regulation must be proportionate to that interest, and the regulation “must be designed carefully to achieve the [government’s] goal.” To satisfy the “designed carefully” requirement, the regulation must directly advance the asserted government interest and must not prove “more extensive than is necessary to serve that interest.”

Central Hudson’s intermediate scrutiny test seems more on point in the compelled commercial speech context than Wooley’s strict scrutiny standard. Central Hudson concerned a restriction, rather than a

86. See Zauderer, 471 U.S. at 651; Royal, supra note 74, at 222 (explaining that Wooley applied to compelled speech rather than commercial speech).
88. Id. at 558–59.
89. Id. at 561–63.
90. Id. at 563 (“[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it . . . .”).
91. Id. at 562–63. In fact, the Court stated that misleading commercial speech does not come within the purview of First Amendment protection. Id. at 566.
92. Id. at 564.
93. Id. at 564–66.
mandate, but commercial speech doctrine may be more applicable to the development of compelled commercial speech doctrine than compelled speech doctrine. 94 The more significant point is that the classification of the regulated speech as misleading or nonmisleading may have a strong impact on the level of scrutiny the Court applies, and may even determine whether the First Amendment provides any protection.

D. Zauderer and the Rational Basis Standard

The Supreme Court articulated and applied a rational basis standard of review to regulations that concerned both compelled and commercial speech in Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio. 95 In Zauderer, authorities charged an attorney for violating certain Ohio disciplinary rules by making misleading advertisements. 96 The complaint further alleged that the attorney–plaintiff violated the rules when he failed to disclose the terms of contingent fees in an advertisement that mentioned contingent fees. 97 The attorney–plaintiff challenged both of these rules on First Amendment grounds. 98 The Court analyzed the constitutionality of three rules: “prohibitions on soliciting legal business through advertisements containing advice and information regarding specific legal problems; restrictions on the use of illustrations in advertising by lawyers; and disclosure requirements relating to the terms of contingent fees.” 99

The Court began its analysis with a discussion of Central Hudson and its predecessors and noted that though the government has discretion to regulate misleading or deceptive speech, if the speech is not misleading or deceptive, the government must overcome intermediate scrutiny. 100 The Court then performed an individual analysis on each of the three rules listed above. The first two rules underwent nearly identical analyses. The Court found that neither the advertisement that contained advice nor the illustrations were deceptive or misleading, and therefore the government had the burden to overcome intermediate scrutiny to uphold the first two regulations listed above. 101 However, the analysis of the rule requiring disclosure of contingent fee terms proved quite different. First, the Court rejected the

94. Royal, supra note 74, at 208 (examining which of the two doctrines applies to compelled commercial speech).
96. Id. at 629, 631–33.
97. Id. at 633.
98. Id. at 634.
99. Id. at 638.
100. Id. at 638.
101. Id. at 641, 647.
attorney’s argument that the government must establish that the advertisement would have been misleading or deceptive without the disclosure.\textsuperscript{102} In other words, the attorney’s argument was that the Court should apply the same analysis to the disclosure requirements as the Court applied to the first two restrictions. The Court was quick to note that “appellant . . . overlooks material differences between disclosure requirements and outright prohibitions on speech.”\textsuperscript{103} Essentially, the Court rejected the attorney’s argument because the First Amendment does little to protect an interest in failing to provide factual information in commercial speech.\textsuperscript{104} To be sure, the Court did not hold that disclosure requirements fall outside the scope of the First Amendment.\textsuperscript{105} Rather, disclosures are reviewed under a less stringent standard than restrictions.\textsuperscript{106} Specifically, “an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”\textsuperscript{107} Thus, rational basis is applied to regulations that require factual disclosures, and the regulation is upheld as long as the regulation is reasonably related to the government’s interest in preventing deception of consumers.\textsuperscript{108}

\textit{Zauderer} provides guidance for analyzing compelled commercial speech, but it still leaves unanswered questions. Most importantly, when does the \textit{Zauderer} standard apply?\textsuperscript{109} The \textit{Zauderer} opinion is

\begin{enumerate}
\item \textit{Id.} at 650.
\item \textit{Id.} The Court stated:

In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present.

\textit{Id.}

\item \textit{Id.} The Court explained:

[A]ppellant’s constitutionally protected interest in not providing any particular factual information in his advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech, “warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.”

\textit{Id.} at 651 (citations omitted).
\item \textit{Id.} at 650.
\item \textit{Id.} at 651.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{See id.}
\item \textit{Cf. Royal, supra} note 74, at 207 (“This new doctrine of compelled-commercial speech
somewhat unclear because the Court concludes that disclosures are reviewed under a different standard than restrictions on speech, and that factual disclosure requirements are constitutional as long as they are reasonably related to preventing consumer deception. However, the Court did not specify that Zauderer applies only when the disclosure pertains to misleading speech. In fact, the Court rejected Zauderer’s argument that the government must show the advertisement was misleading absent the disclosure. This determination, along with the reasoning behind it, suggests that all commercial speech is presumed to potentially deceive consumers, and in the case of all disclosure requirements the government’s only burden is to prove the regulation is reasonably related to preventing consumer deception. Thus, it is clear that Zauderer applies to factual disclosure requirements, but precisely what type of speech the disclosure must pertain to is questionable.

IV. THE CIRCUIT SPLIT

The circuit courts are split as to the appropriate standard of review to apply to compelled commercial speech. The courts’ differences in opinion stem from their respective positions as to when regulated speech is misleading so as to warrant the application of Zauderer. The split demonstrates the need for Supreme Court precedent to reduce the amount of discretion courts have to answer this question. In the context of the graphic warning requirement, there is always a potentially real danger that the marketing of tobacco products will mislead consumers, and Zauderer should always apply.

A. Overview

The Sixth Circuit and the D.C. Circuit both ruled on the constitutionality of the graphic warning requirements. Both courts relied on the commercial speech and compelled speech standards of review presented in Part III, but reached conflicting conclusions. Given the unanswered questions inherent in Central Hudson and Zauderer, it comes as no surprise that two courts independently justified very different opinions. In fact, as the following discussion reveals, the

110. The emphasis on the informational purpose of commercial speech further suggests that the Court views all commercial speech with an eye towards protecting consumers from deception. Zauderer, 471 U.S. at 651 (“[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides.”).

111. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1222 (D.C. Cir. 2012); Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 569 (6th Cir. 2012).
courts disagreed over the type of regulation the graphic warnings qualify as.

B. Discount Tobacco City & Lottery, Inc. v. United States

In Discount Tobacco City & Lottery, Inc., a group of tobacco product manufacturers and vendors appealed the district court’s decision to grant summary judgment to the government on the tobacco companies’ claim that the graphic warning requirement violated their First Amendment rights. The court began with a discussion of findings about juvenile tobacco use. The court then recognized that the government has “a significant interest in preventing juvenile smoking and in warning the general public about the harms associated with the use of tobacco products.”

1. Determining the Standard of Review

In determining the standard of review to apply, the court took the stance that “[l]aws that restrict speech are fundamentally different than laws that require disclosures, and so are the legal standards governing each type of law.” The court then determined that it will evaluate commercial-speech disclosures that “fit within the framework of Zauderer” under a rational basis standard, but it will evaluate disclosures that do not fit within that framework under the strict scrutiny standard set forth in Wooley. The court went further to note that its own precedent held that Zauderer applies to disclosures aimed at speech that is “inherently misleading” as well as disclosures that pertain to speech that is “potentially misleading.” Thus, in the Sixth Circuit’s view, courts should apply Zauderer to factual disclosures that are targeted at speech that is either inherently misleading or has the potential to mislead.

The court determined that, contrary to the cigarette companies’ argument, the mandated graphic warnings were factual disclosures rather than opinions. The court noted that the health risks of tobacco

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112. Disc. Tobacco City & Lottery, Inc., 674 F.3d at 518, 520.
113. Id. at 519.
114. Id.
115. Id. at 552.
116. Id. at 554; see also id. at 555 (noting that “Zauderer relied on the distinction between a fact and a personal or political opinion to distinguish factual, commercial-speech disclosure requirements, to which courts apply a rational-basis rule, from the type of compelled speech on matters of opinion that is ‘as violative of the First Amendment as prohibitions on speech’”) (quoting Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio, 471 U.S. 626, 650 (1985)).
118. Id.
119. Id. at 561; see also id. at 569 (finding that a “disclosure that provokes a visceral
use are scientifically proven facts, and that cigarette companies can express these facts through graphics. Therefore, the court applied Zauderer’s rational basis standard.

2. Application of Zauderer

The court began to apply the Zauderer standard to the graphic warning requirement by noting that “[t]he Act’s required textual and graphic warnings are constitutional if there is a rational connection between the warnings’ purpose and the means used to achieve that purpose.” The court then found that the purpose of the warning was to “prevent consumers from being misled about the health risks of using tobacco.” In other words, the government’s interest was in the prevention of consumer deception. Because the government’s purpose behind the regulation is outcome determinative in the Zauderer test, the court’s reasoning behind this determination is of great interest. Here, the court focused on the history of deception in the tobacco industry. Further, “[tobacco] advertising promoting smoking deceives consumers if it does not warn consumers about tobacco’s serious health risks.”

Thus, the court was satisfied that the government met one part of the rational basis test when it showed that the prevention of consumer deception was the purpose behind the graphic warning requirement.

The next inquiry was whether the graphic warnings were reasonably related to this purpose. The court noted that the then-current tobacco warning requirements were outdated and ineffective. This conclusion was based largely on findings about the size and complexity of the then-current warnings. Finally, the court concluded that the graphic warning requirement solves these issues “by being larger and including

response [does not] fall outside Zauderer’s ambit. Facts can disconcert, displease, provoke an emotional response, spark controversy, and even overwhelm reason, but that does not magically turn such facts into opinions.”.

120. Id. at 561.
121. Id.
122. Id.
123. Id.
124. Id. at 562 (“The genesis of the stated purpose is self-evident. Tobacco manufacturers and tobacco-related trade organizations (collectively, ‘Tobacco Companies’) knowingly and actively conspired to deceive the public about the health risks and addictiveness of smoking for decades.”).
125. Id.
126. Id. at 561.
127. Id. at 562.
128. Id. at 563 (“They have not been revised since 1984 and do not effectively convey the risks of smoking, primarily because the warnings are easily overlooked.” (footnote omitted)).
129. Id. at 563–64.
Thus, the Sixth Circuit held that the graphic warning requirement does not violate the First Amendment because the government has an interest in preventing tobacco consumers from deception and the graphic warning requirement is reasonably related to that interest because it cures the imperfections in the current warnings.131

C. R.J. Reynolds Tobacco Co. v. Food and Drug Administration

The D.C. Circuit handed down the most recent decision on the constitutionality of the graphic warning requirement on August 24, 2012.132 In R.J. Reynolds Tobacco Co., the FDA appealed a district court judgment that granted summary judgment to five tobacco companies on a claim that the graphic warning requirement violated the First Amendment.133 The court observed that “[a]t the outset of the Proposed Rule, FDA asserted the government’s ‘substantial interest in reducing the number of Americans, particularly children and adolescents, who use cigarettes and other tobacco products in order to prevent the life-threatening health consequences associated with tobacco use.’”134 The court then discussed the criticisms the FDA received prior to the commencement of this case in regard to the study used to select the images.135

1. Determining the Standard of Review

Before it dove into a discussion of the standards of review applied to speech, the court suggested that, even if the graphic warnings are commercial speech, the warnings may be so ideological as to warrant heightened scrutiny.137 The court then noted the two exceptions “to the

130. Id. at 564.
131. Id. at 569.
133. Id. at 1208.
134. Id. at 1209.
135. Id. at 1210.
136. Id. at 1211.
137. The court reasoned that:

Even assuming the Companies’ marketing efforts (packaging, branding, and other advertisements) can be properly classified as commercial speech, and thus subject to less robust First Amendment protections, a thorny question remains: how much leeway should this Court grant the government when it seeks to compel a product’s manufacturer to convey the state’s subjective—and perhaps even ideological—view that consumers should reject this otherwise legal, but disfavored, product?
general rule that content-based speech regulations—including compelled speech—are subject to strict scrutiny, and analyzed the applicability of those two exceptions. In its review of the Zauderer standard, the court opined that Zauderer and its progeny “establish that a disclosure requirement is only appropriate if the government shows that, absent a warning, there is a self-evident—or at least ‘potentially real’—danger that an advertisement will mislead consumers.” The court found that the graphic warning requirement was not properly aimed at preventing consumer deception and that the graphic warnings did not convey purely factual information. The court distinguished the graphic warnings from the “indisputably accurate” disclosures in Zauderer because consumers could misinterpret the graphic warnings. The court explained, for example, that “the image of a man smoking through a tracheotomy hole might be misinterpreted as suggesting that such a procedure is a common consequence of smoking.” Further, the court did not believe that the images were “‘purely’ factual because the FDA intended to ‘shock’ consumers into remembering the dangers of smoking.” Thus, the court found that Zauderer did not apply to the graphic warning requirement.

The court decided that because Zauderer did not apply, it was necessary to determine whether strict or intermediate scrutiny applied. The court accepted the government’s argument that it should regard the graphic warnings as restrictions on commercial speech, which are evaluated under the Central Hudson intermediate scrutiny standard. The court ultimately relied on its own precedent to conclude that Central Hudson is appropriately applied to compelled commercial speech.

2. Application of Central Hudson

The court noted that the first part of the test is to determine whether

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Id. at 1212.
138. Id. (noting that factual disclosures are subject to rational basis review and commercial speech is subject to intermediate scrutiny).
139. Id. at 1213–17.
140. Id. at 1214.
141. Id. at 1214–17.
142. Id. at 1216.
143. Id.
144. Id.
145. Id. at 1217.
146. Id.
147. Id.
148. Id. (noting that it applied Central Hudson to the requirement in United States v. Phillip Morris, 566 F.3d 1095, 1142 (D.C. Cir. 2009), which was also a compelled commercial disclosure).
the government’s interest is substantial.149 If the government passes this
test, then it must also prove that “the regulation directly advances the
governmental interest asserted, and . . . is not more extensive than is
necessary to serve that interest.”150 In its determination of the
government’s interest, the court noted that it must look only to the
interest asserted by the government.151 The court found that “[t]he only
explicitly asserted interest in either the Proposed or Final Rule is an
interest in reducing smoking rates.”152

Before it determined whether this was a substantial interest, the
court addressed the issue of whether the government could show that
the graphic warning requirement directly furthered that interest.153 The
court found that the government failed to satisfy its burden to prove that
the graphic warning requirement directly advanced its interest in the
prevention of smoking.154 Thus, the court concluded that the graphic
warning requirement did not pass intermediate scrutiny because the
government failed the second part of the Central Hudson test when it
failed to show any evidence that the graphic warning requirement
furthered the government’s interest in the reduction of smoking rates.155

D. Closing the Gap

The graphic warning requirement controversy indicates that now is
the time for the Supreme Court to set more definite standards for testing
the constitutionality of compelled commercial speech. In both Discount
Tobacco City & Lottery, Inc. and R.J. Reynolds Tobacco Company,
the classification of the regulated speech, as misleading or nonmisleading,
and the classification of the regulation itself, as a requirement or a
disclosure, significantly impacted the level of scrutiny the court chose to
apply.156 Because of the high degree of variation among the standards of
scrutiny, the level of scrutiny the court applies in many First
Amendment cases, including Discount Tobacco City & Lottery, Inc. and
R.J. Reynolds Tobacco Company, is outcome determinative. It is
problematic that the courts reach opposite conclusions over whether the

149. Id.
150. Id. at 1217 (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.,
447 U.S. 557, 566 (1980)).
151. Id. at 1218 (“Unlike rational-basis review, the Central Hudson standard does not
permit this Court to ‘supplant the precise interests put forward by [FDA] with other
suppositions.’”).
152. Id.; see also id. (noting that the government’s counsel argued other interests, but the
court did not find these interests in the administrative record).
153. Id. at 1218–19.
154. Id. at 1219 (“FDA has not provided a shred of evidence—much less the ‘substantial
evidence’ required by the APA—showing that the graphic warnings will ‘directly advance’ its
interest in reducing the number of Americans who smoke.”).
155. Id. at 1222.
graphic warnings are targeted at the prevention of consumer deception and whether they are factual disclosures. Thus, the Supreme Court must explicitly address two questions: When is regulated speech misleading as to warrant the application of Zauderer and when is a disclosure factual? This Note is concerned primarily with the former.

As applied to the facts, the logical answer is that any advertisement or marketing of a potentially lethal product is misleading absent a disclosure. The Sixth Circuit was of the opinion that Zauderer applies to disclosures aimed at speech that is either “inherently misleading” or “potentially misleading.” But the D.C. Circuit will apply Zauderer only when there is a “‘potentially real’—danger that an advertisement will mislead consumers” without a disclosure.

Despite the D.C. Circuit’s stringent tone, the two courts essentially apply the same standard: The targeted speech must have the potential to mislead consumers. But the D.C. Circuit manipulated the facts to survive this standard. The D.C. Circuit refused to consider the history of deceptive tobacco advertising and found that the government did not show that, without the disclosure, future tobacco advertising would mislead consumers. The court itself noted that when it applies rational basis review the court is not constrained by the interests the government specifically asserts, but nonetheless it used its discretion to find the government’s additional interests without merit. The Sixth Circuit, on the other hand, placed tremendous emphasis on the tobacco industry’s history of deceptive practices.

While the Court revisited Zauderer on several occasions, the current circuit split evinces that under existing precedent, courts have too much discretion to determine whether a regulation is aimed at the prevention of consumer deception. At the outset, it is important to note that in Zauderer, the Court stated that “[w]hen the possibility of

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156. See id. at 1217; Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 552 (6th Cir. 2012).


158. Disc. Tobacco City & Lottery, Inc., 674 F.3d at 558.

159. R.J. Reynolds Tobacco Co., 696 F.3d at 1214 (quoting Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation, Bd. of Accountancy, 512 U.S. 136, 146 (1994)).

160. Id. at 1215–16.

161. Id. at 1218.

162. Id. at 1215–16.

163. Disc. Tobacco City & Lottery, Inc., 674 F.3d at 562 (“Tobacco manufacturers and tobacco-related trade organizations (collectively, ‘Tobacco Companies’) knowingly and actively conspired to deceive the public about the health risks and addictiveness of smoking for decades.”).

deception is as self-evident as it is in this case, we need not require the State to ‘conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead.’”  

Several Supreme Court opinions handed down since Zauderer also shed light onto the type of speech to which the Court intends Zauderer to apply. In Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy, the Board of Accountancy sought to require an attorney to include disclaimers in connection with the use of the Certified Financial Planner and Certified Public Accountant designations in advertisements, and argued that the designation was “‘potentially misleading.’”  

The Court found that the Board failed to “point to any harm that is potentially real, not purely hypothetical,” and reasoned that “‘[i]nvocation of the words ‘potentially misleading’ [does not] supplant the Board's burden to ‘demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.’”  

While the D.C. Circuit relied in part on Ibanez to avoid the application of Zauderer, the Court’s language helps to justify rather than refute the argument that the graphic warnings are aimed at preventing deception. As Part V explains, the “harms [the government] recites” are “real” rather than “purely hypothetical” and the warnings will “alleviate them to a material degree.” Further, in Lorillard Tobacco Company v. Reilly, the Court clarified that the proponent of the regulation is not required to present “empirical data . . . accompanied by a surfeit of background information” to show that the “harms . . . are real,” but that a proponent may justify a regulation “based solely on history, consensus, and simple common sense.”  

The Court’s more recent decision in Milavetz, Gallop & Milavetz, P.A. v. United States may prove most relevant. In Milavetz, the Court considered the constitutionality of required disclosures in debt relief agencies’ advertisements. The Court applied the Zauderer standard, and reasoned that the “[g]overnment maintains that [the regulation] is directed at misleading commercial speech” and “impose[s] a disclosure

166. Ibanez, 512 U.S. at 146 (Marshall, J., concurring) (quoting Peel v. Attorney Registration & Disciplinary Comm’n of Ill., 496 U.S. 91, 116 (1990)).
167. Id.
169. See Ibanez, 512 U.S. at 146 (citation omitted); see also discussion infra Part V.
172. Id. at 232.
requirement rather than an affirmative limitation on speech.”

In response to Milavetz’s argument that the government did not offer evidence that the regulated speech was misleading, the Court announced that evidence of a pattern of misleading advertisements is sufficient to establish potential deception.

As Part V will explain, tobacco companies undoubtedly misled consumers through deceptive advertising for decades and, albeit through a subtler means, they continue to do so. Thus, pursuant to the Court’s reasoning in Milavetz, Ibanez, and Lorillard, common sense and the tobacco industry’s history of deception should make it painfully clear that absent a disclosure on tobacco packages and advertisements, all tobacco advertisements and labels are potentially misleading. Nonetheless, the current precedent is malleable enough to enable courts to manipulate the facts and standards to achieve a politically favorable result. The Supreme Court needs to carve out a rule that applies to disclosures of health risks and underscores the fact that there is always a “potentially real danger” that the marketing of tobacco products will mislead consumers.

V. THE IMPACT OF TOBACCO ADVERTISEMENTS AND THE EFFECTIVENESS OF THE NEW WARNINGS

Tobacco industry marketing efforts misled and continue to mislead consumers about the health risks of tobacco use. Graphic warnings will more effectively reduce the deceptive impact of the industry’s innovative marketing efforts than the outdated, text-only warnings currently in use.

A. “Just What the Doctor Ordered”: A Look at the Ads

Perhaps Eva Cooper failed to produce sufficient evidence to prove precisely which advertisements her husband detrimentally relied on, but she did not fabricate the concept of deceptive advertising in an effort to win a lawsuit. Stanford School of Medicine’s exhibit, “Not a Cough In a Carload: Images from the Campaign by the Tobacco Industry to Hide the Hazards of Smoking,” featured in Time

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173. Id. at 249.
174. Id. at 251; see also id. (noting that “[w]hen the possibility of deception is as self-evident as it is in this case, we need not require the State to ‘conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead’” (second and third alterations in original) (quoting Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio, 471 U.S. 626, 652–53 (1985))).
175. See discussion infra Part V.
177. A Stanford School of Medicine research group, known as Stanford Research into the Impact of Tobacco Advertising (SRITA), is dedicated to analyzing the impact of tobacco
museum. Demonstrates just how blatantly misleading early tobacco advertisements were. The most deceitful advertisements featured statements including: “As your Dentist, I would recommend Viceroy,” “Nose, throat, and accessory organs not adversely affected by smoking Chesterfields,” “No other cigarette approaches such a degree of health protection and taste satisfaction,” “Just what the doctor ordered,” and the Camel assertion Cooper relied on, “More Doctors smoke Camels than any other cigarette.”

Though cigarette advertisements no longer boast statements from doctors and dentists who proclaim the health benefits of smoking, deceptive tobacco advertisements are not a thing of the past. The congressional findings in support of the Family Smoking Prevention and Tobacco Control Act indicate that “[t]obacco product advertising often misleadingly portrays the use of tobacco as socially acceptable and healthful to minors.” The government also notes “there is significant evidence to show that consumers lack knowledge about or underestimate the health risks of smoking.” As noted in Part IV, speech regulations, even in the strict scrutiny context, the Court justified based on “simple common sense.” Common sense and a quick glance at a modern tobacco advertisement are telling about the potential for tobacco advertisements to deceive. Today’s generation of tobacco advertisements portray smoking as a glamorous, “unique,” “enchanting,” and “enticing” hobby. In 2005, Kool, owned by R.J. Reynolds Tobacco Company, launched a series of advertisements featuring musicians, including guitar players, disc jockeys, and, ironically, a voice artist. Camel, another R.J. Reynolds brand, advertising, marketing, and promotion. SRITA compiled the exhibit, which features vintage tobacco advertisements. Museum Exhibit, Stanford Research into the Impact of Tobacco Advertising, http://srita.stanford.edu/exhibit.html (last visited Dec. 27, 2013).


179. Id.


186. Kool Modern, Stanford Research into the Impact of Tobacco Advertising,
recently introduced Camel No. 9 cigarettes, packaged in sleek pink and black cartons, almost certainly marketed to teenage girls. Flavored smokeless tobacco, which stands a greater chance of being overlooked in schools, is one of the latest trends.

Further, a Stanford Medical School professor observed that the tobacco industry continues to use the same advertising tactics it always used, namely advertising that targets teenagers and young adults, a problem the government also recognizes. That cigarette companies

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187. Jackler, supra note 181 (calling Camel No. 9 “a cynical attempt to get teenage girls with pink cigarettes”); see also Research Planning Memorandum on Some Thoughts About New Brands of Cigarettes for the Youth Market, UNIV. OF CAL., S.F., LEGACY TOBACCO DOCUMENTS LIBRARY, http://legacy.library.ucsf.edu/tid/far01d00/pdf [hereinafter Research Planning Memorandum] (last visited Dec. 27, 2012) (suggesting that a tobacco company should reach the youth market by tailoring brands to youths).


189. Jackler, supra note 181 (noting that tobacco manufacturers now market flavored smokeless tobacco to youth since the FDA prohibited flavored cigarettes, and that kids may get away with chewing tobacco in school).


193. Jackler, supra note 181; see also Reiner Hanewinkel et al., Cigarette Advertising and Teen Smoking Initiation, 127 PEDIATRICS 271, 276 (2011) (noting that “tobacco companies aim their message at adolescents because this is when most people start smoking”).

194. See Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 2(15), 123 Stat. 1776 (2009) (codified as amended in scattered sections of 21 U.S.C.) (finding that “[a]dvertising, marketing, and promotion of tobacco products have been especially directed to attract young persons to use tobacco products, and these efforts have resulted in increased use of such products by youth. Past efforts to oversee these activities have not been successful in
target youth is not simply an inference drawn from the content of the advertisements. Tobacco companies’ internal documents, produced in the course of litigation, confirm that the industry strategically marketed to America’s youth. 195 The documents reveal that the industry recognizes the importance of young smokers to the survival of its business 196 and the tobacco companies strive to attain their “share of the youth market.” 197 Most disturbing is the suggestion that marketing to the “beginning smoker should emphasize the desirable psychological effects of smoking, also suggesting the desirable physical effects to be expected later.” 198

B. Impact of Tobacco Advertisements

Not only do tobacco companies target teenagers, 199 studies show that their tactic works. 200 A recent study, conducted among 3,029 adolescents between the ages of ten and seventeen years old, 201 indicates “that the association between tobacco advertisement and youth smoking is specific to tobacco advertising content and not simply a marker of an adolescent that is generally receptive to marketing.” 202 Similarly, a study published in 2000 “supports a close linkage between tobacco promotional activities and uptake of smoking among adolescents beyond baseline descriptions of receptivity to cigarette promotions.” 203 These studies support congressional findings that indicate that “[c]hildren are more influenced by tobacco marketing than adults: more than 80 percent of youth smoke three heavily marketed brands, while only 54 percent of adults, 26 and older, smoke these same brands.” 204 Tobacco advertisements are effective because they portray the idea that smoking cigarettes will help vulnerable adolescents to achieve the characteristics they yearn for, such as masculinity and sex


196. The Importance of Younger Adults, UNIV. OF CAL., S.F., LEGACY TOBACCO DOCUMENTS LIBRARY, http://legacy.library.ucsf.edu/tid/jye76b00/pdf (last visited Dec. 27, 2012) (noting that “[y]ounger adults are the only source of replacement smokers” and sixty-nine percent of smokers start at age eighteen or younger).

197. Research Planning Memorandum, supra note 187 (suggesting that a tobacco company should reach the youth market by tailoring brands to youth).

198. Id.

199. See, e.g., Hanewinkel et al., supra note 193, at 276.

200. Id. at 272.

201. Id. at 272–73.

202. Id. at 276.


Moreover, the Supreme Court recognized the impact of advertisements on youth. In *Lorillard v. Reilly*, the Court acknowledged that “there is sufficient evidence to conclude that advertising and labeling play a significant and important contributory role in a young person's decision to use . . . tobacco products.”

While it is disheartening that the tobacco industry continues to employ deceptive techniques to market a deadly product, the ugly truth is that tobacco manufacturers, like other businesses, are all about the bottom line. Absent legally imposed constraints, the industry will continue to do what it takes to sell its product. Thus, some measure must cure, or at least offset the impact of both past and current tobacco advertisements. Sure, schools nationwide implement antidrug programs, but showing an educational video once a year will not counteract the effects of deceptive advertisements. Advertisements that portray a sophisticated and prohibited adult activity have a much stronger impact on teenagers than bare statistics on smoking deaths.

### C. Effectiveness of Graphic Warnings

Research suggests that tobacco warning labels work and smoking rates declined since their introduction in 1965. But the current warning labels, in place since 1984, desperately need a facelift, as evidenced by statistics that demonstrate that current warning...
requirements do not adequately offset the influence of tobacco advertisements. Small-print textual warnings are not fit to compete with innovative advertisements designed by sophisticated advertising agencies.

New studies indicate that graphic warnings are likely the makeover that current warnings need. The Harvard School of Public Health partnered with the University of California’s Legacy Tobacco Documents Library to conduct a study focusing on the impact of graphic warnings across various racial, ethnic, and socioeconomic groups. Researchers randomly assigned participants to groups to view either text-only or graphic warnings and then rated the groups’ reactions to the warnings based on salience, perceived impact, credibility, and intention to quit. Participants from all backgrounds consistently indicated considerably stronger reactions to the graphic warnings than text-only warnings in all categories. The research concluded “[graphic] warning labels may be one of the few tobacco control policies that have the potential to reduce communication inequalities across groups. Policies that establish strong pictorial warning labels on tobacco packaging may be instrumental in reducing the toll of the tobacco epidemic, particularly within vulnerable communities.”

A separate study, conducted by University of South Carolina researchers, surveyed 1,000 daily smokers who rated warnings based on credibility, effectiveness, and personal relevancy. The participants indicated that graphic warnings are more relevant and effective than text-only warnings. The most vivid images proved the most

http://www.samhsa.gov/data/NSDUH/2k10NSDUH/2k10Results.pdf; see also Smoking and Tobacco Use, CTRS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm (last visited Oct. 15, 2013) (noting that “[e]ach day in the United States, nearly 4,000 people younger than 18 years of age smoke their first cigarette, and an estimated 1,000 youth in that age group become new daily cigarette smokers”).

213. See Tobacco Warning Labels, supra note 209.
214. See Jackler, supra note 181.
218. Id. at 1.
219. Id. at 1, 10.
220. Marcus, supra note 215.
221. Id.
The study suggests that adults are more responsive to illustrations than text and it likely follows that visuals impact adolescents also more than black-and-white text. Alluring tobacco advertisements suggest that the tobacco industry is well aware of this fact and already capitalizes on it. The courts should not inhibit the FDA from attempting to do the same to protect the public health and inform our nation’s youth of the risks of tobacco use.

CONCLUSION

Despite an uphill battle, tobacco regulation progressed significantly since the day Eva Cooper left a Massachusetts courtroom without her husband and without a remedy. However, the challenges to the graphic warning requirement present a threat of regression as the current warnings lose their effect in the face of a tobacco industry that remains on the cutting edge of advertising techniques. The D.C. Circuit’s adverse ruling already led the FDA to withdraw the original set of labels, and it thus remains open-ended how the next round of graphics will hold up in court against potential tobacco industry challenges. Graphic warnings may be the FDA’s best shot at competing with the industry, but the lack of development of compelled commercial speech doctrine presents opponents of required disclosures with too much room to maneuver around the existing standards.

Currently, courts have three options when they evaluate the constitutionality of compelled commercial speech: apply Wooley’s strict scrutiny standard, Central Hudson’s intermediate scrutiny standard, or Zauderer’s rational basis standard. Courts agree that Zauderer sometimes applies to compelled commercial speech, but disagree as to whether the strict scrutiny standard, borrowed from compelled speech doctrine, or the intermediate scrutiny standard, borrowed from commercial speech doctrine, is the applicable standard when the

222. Id.

223. Id. (noting that “[r]esearch on cigarette warnings in the United States and other countries has repeatedly shown that pictures work better than text” (quoting Dr. James Thrasher, Associate Professor, University of South Carolina)).

224. Id. (noting that “people live in a more visual world now, with quick images on television, in games and in movies, so this type of study in younger adolescent smokers is also worth exploring”).


226. Royal, supra note 74, at 206.

227. See discussion supra Part III; see also R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1211–13 (D.C. Cir. 2012); Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 554 (6th Cir. 2012) (determining the appropriate level of scrutiny to apply).
regulation does not meet Zauderer’s prerequisites. 228 The Sixth Circuit’s view that courts appropriately apply strict scrutiny to compelled commercial disclosures is somewhat unpersuasive, considering the Court’s repeated emphasis on the lesser degree of protection afforded to commercial speech. 229

Of course, the most pertinent disagreement among courts surrounds the application of Zauderer. Zauderer’s importance to the survival of disclosure requirements cannot be overstated, but like the current tobacco warnings, courts must refine the standard. Zauderer’s extension to the graphic warning requirement and similar disclosures is key to the government’s ability to effectively protect consumers from deception. Because consumer deception poses its greatest hazard when consumer health is concerned, this Note urges the Court to set the precedent that there is always a “potentially real” risk that consumers will be deceived by the advertisement and marketing of a product that carries far more than a “purely hypothetical” chance of resulting fatalities.

Zauderer is the appropriate standard of review to apply to the graphic warning requirement. Under Zauderer, factual disclosures are upheld as long as the regulation is reasonably related to the government’s interest in the prevention of consumer deception. 230 The graphic warnings, while certainly capable of inducing an emotional response, are factual disclosures that are rationally related to the government’s interest in preventing consumers, particularly America’s youth, from the inherent deception of tobacco advertising and marketing. 231

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228. R.J. Reynolds Tobacco Co., 696 F.3d at 1217; Disc. Tobacco City & Lottery, Inc., 674 F.3d at 554.
229. See discussion supra Section II.B.
231. See discussion supra Part V.