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REGULATING FOOD ADVERTISEMENTS: SOME FIRST AMENDMENT ISSUES

*John M.A. DiPippa**

I. INTRODUCTION

Eric Schlosser's *Fast Food Nation* indicts the fast food industry for creating products that have devastated the economy, the environment, and our health.¹ Among other things, he calls for significant reform in the marketing of fast food:

Today the health risks faced by the nation's children far outweighs the needs of its mass marketers. Congress should immediately ban all advertisements aimed at children that promote foods high in fat and sugar. Thirty years ago Congress banned cigarette ads from radio and television as a public health measure - and those ads were directed at adults. Smoking has declined ever since. A ban on advertising unhealthy foods to children would discourage eating habits that are not only hard to break, but potentially life-threatening. Moreover, such a ban would encourage the fast food chains to alter the recipes for their children's meals. Greatly reducing the fat content of Happy Meals, for example, could have an immediate effect on the diet of the nation's kids. Every month more than 90 percent of the children in the United States eat at McDonald's.²

Schlosser expressly links advertising and obesity, analogizes tobacco and junk food, and urges action to protect the nation's children.³ This essay will take up his call and highlight the First Amendment obstacles to the kinds of food-advertisement regulations Schlosser calls for. In the end, the First Amendment's Commercial Speech doctrine, as it is currently applied by the United States Supreme Court, may make any regulation of food advertising difficult, if not impossible.

II. A BRIEF HISTORY OF THE COMMERCIAL SPEECH DOCTRINE

Commercial advertising is protected by the First Amendment, but this is a comparatively new development. The United States Supreme Court

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1. ERIC SCHLOSSER, *FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL* (PERENNIAL 2002).

2. *Id.* at 262.

3. *Id.*

initially declared that commercial advertising was not a category of speech protected by the First Amendment.⁴ The Court treated it as self-evident that the First Amendment imposed no limits "on government as respects purely commercial advertising."⁵ This put advertising in the company of obscenity, libel, and incitement to violence: that is, categories of speech that the First Amendment simply did not recognize as such.⁶

Over the years, however, the Court blurred the line between protected and unprotected speech.⁷ Finally, in 1975, the Supreme Court declared that commercial speech was entitled to First Amendment protection.⁸ The Court relied on advertising's value to individual consumers and to society in general.⁹ The First Amendment, the Court ruled, does not simply protect the advertiser.¹⁰ If the advertiser has a right to speak, then individual consumers have a right to receive information from the speaker.¹¹ In fact, the consumer's interest in "the free flow of commercial information . . . may be as

4. *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

5. *Id.* at 54.

6. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

Id. (citation omitted).

7. *Compare* *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964) (explaining that an advertisement in newspaper was not commercial speech even though newspaper charged for the space because the advertisement "communicated information, expressed opinion, recited grievances, protested claimed abuses."), *with* *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (stating that *pre-Roe v. Wade* advertisement for out-of-state abortions was not commercial speech because it "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest'"), *and* *Pittsburgh Press Co. v. Pittsburgh Commission of Human Relations*, 413 U.S. 376 (1973) (upholding prohibition on gender-specific employment advertisements because they were "proposal[s] of possible employment" and not statements on matters of public policy).

8. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

9. *See id.*

10. *Id.* at 756.

11. *Id.* The First Amendment protects the source of the "communication" and the recipients. *Id.* "If there is a right to advertise, there is a reciprocal right to receive the advertising." *Id.* at 757. This statement is important when we consider regulating advertisements for lawful but potentially harmful products—like tobacco or junk food. *Id.*

keen, if not keener by far, than his interest in the day's most urgent political debate."¹²

In addition, society has a general interest in commercial advertising because advertising helps consumers decide how to allocate their resources in a free-market economy. No matter how "tasteless and excessive" advertising may seem, it is still information "as to who is producing and selling what product, for what reason, and at what price."¹³ Our free-market system depends on consumers making "intelligent and well-informed" purchasing decisions.¹⁴ Advertising is "indispensable" not only to the purchasing decisions of individual consumers but also to "the formation of intelligent opinions as to how that system ought to be regulated."¹⁵ Thus, even if the First Amendment is limited to speech that contributes to democratic self-government, commercial speech helps advance that goal too.¹⁶

At the same time, the Court recognized that commercial speech differed from other protected categories. Commercial speech has "greater objectivity and hardiness" than other forms of protected speech.¹⁷ Untruthful speech, by itself, does not receive protection and advertisers' factual claims could be verified without chilling their speech.¹⁸ This stands in contrast to other areas of First Amendment law, where falsehood is protected and the remedy is opposing speech.¹⁹ The Court also decided that the prior restraint doctrine did not apply to commercial speech.²⁰ Speakers—that is, advertisers—had an economic incentive to continue speaking, unlike non-commercial speakers who might be deterred by a prior restraint or an overbroad law.²¹

12. *Id.* at 763.

13. *Id.* at 765.

14. *Virginia State Bd.*, 425 U.S. at 765.

15. *Id.* The commercial speech doctrine has been criticized as a revival of economic substantive due process. Thomas H. Jackson & Jon C. Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979). Justice Blackmun's point here mitigates that claim. Blackmun implicitly argues that our economic system is going to be subject to regulation by the democratically elected branches of government. That regulation will be largely immune from judicial review under the post-New Deal regime. Thus, voters (i.e., consumers) must be fully informed about the economic system they control through the ballot.

16. *Virginia State Bd.*, 425 U.S. at 765.

17. *Id.* at 771–72, fn. 24.

18. *Id.* at 771.

19. *See, e.g.*, *New York Times v. Sullivan*, 376 U.S. 254 (1964) (defamation of public figure actionable only if statement made with actual malice.); *see also* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

20. *Virginia State Bd.*, 425 U.S. at 772.

21. *Id.* "Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely." *Id.* at 722, n.24. The Court later used this same reasoning to conclude that the overbreadth doctrine did not apply to commercial speech. *See* *Bates v. State Bar*, 433 U.S. 350, 381 (1977) ("[s]ince advertising

The opinion seemed to contain an inherent contradiction: should commercial advertising be afforded full First Amendment protection, or—as a less important category of speech—should it receive less protection? On the one hand, the Court offered a ringing endorsement of the value of commercial advertising.²² On the other hand, the opinion listed the ways in which commercial advertising differed from other protected speech and, accordingly, waived the protection of several facets of the First Amendment.²³ This conflict suggested that commercial speech regulations would be subject to a less severe standard than other forms of speech.

The Court eventually adopted a middle ground test for commercial speech regulations in *Central Hudson Gas & Elec. Corp. v. Public Service Commission*.²⁴ Recognizing the common-sense distinctions of commercial speech, the Court held that commercial speech was entitled to less protection than other forms of protected speech.²⁵ Regulation of commercial speech must satisfy a four-part test: the advertising must concern lawful activity and not be misleading, the regulation must be supported by a substantial government interest, the regulation must directly advance the government interest, and the regulation must be no more extensive than necessary.²⁶

The court later clarified the “no more restrictive than necessary” prong. In *Board of Trustees v. Fox*,²⁷ Justice Scalia reasoned that the “subordinate” position of commercial speech argued against reading *Central Hudson* as imposing a least restrictive alternative test.²⁸ He wrote:

What our decisions require is a “‘fit’ between the legislature’s ends and the means chosen to accomplish those ends”—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is “in proportion to the interest served;” that employs not necessarily the least restrictive means but . . . [a] means narrowly tailored to achieve the desired objective.²⁹

is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation.”). Compare *Gooding v. Wilson*, 405 U.S. 518, 521 (1972) (holding that an overbreadth challenger need not show that his or her speech was protected because “persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions.”), and *Near v. Minnesota*, 283 U.S. 697 (1931) (preferring subsequent punishment to prior restraint).

22. See *supra*, notes 10–20.

23. See *supra*, note 25.

24. 447 U.S. 557 (1980).

25. *Id.* at 563.

26. *Id.* at 566.

27. 492 U.S. 469 (1989).

28. *Id.* at 479.

29. *Id.* at 480 (citations omitted).

The *Central Hudson* test and its subsequent refinement moved away from the seemingly strict First Amendment protection offered by *Virginia Board*.³⁰ This suggested that the states would have considerable room to craft commercial speech regulations. Results in commercial speech cases have swung like a pendulum, with the Court veering from a strict to a loose application of the *Central Hudson* test.³¹ Like the *Lemon*³² test for Establishment Clause cases, the *Central Hudson* test seems to leave enough room to justify any result that an individual judge may want to reach.³³ Lately, the Court seems to have adopted a strict version of the test. In *44 Liquormart Inc. v. Rhode Island*,³⁴ four justices would have abandoned *Central Hudson* in favor of strict scrutiny while five justices applied the *Central Hudson* test to the regulation in that case.³⁵ Nevertheless, five justices applied the *Central Hudson* test to the regulation at issue in *Thompson v. Western States*.³⁶

30. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

31. The Court struck down the advertising regulation in the following cases: *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002) (striking down a federal law that exempted compounded drugs from FDA approval requirements only if provider did not advertise them); *Greater New Orleans Broadcasting Ass'n Inc. v. United States*, 527 U.S. 173 (1999) (striking down a federal regulation that prohibited broadcasters from advertising privately operated casino gambling even where such gambling was legal); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (declaring unconstitutional a state law prohibited price advertising of alcoholic beverages); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (voiding a federal regulation that prohibited beer labels from listing alcohol content). The Court upheld the advertising regulation in the following cases: *Florida Bar v. Went For It Inc.*, 515 U.S. 618 (1995) (upholding a state bar rule prohibited any lawyer from written solicitation of client within 30 days of an accident); *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (upholding a statute that legalized casino gambling but prohibited advertising).

32. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

33. In his concurring opinion in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), Justice Scalia likened the *Lemon* test to

[a] ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried It is there to scare us [when] we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely [Such] a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

Id. at 398–99 (Scalia, J., concurring). See also Mary Meaden, *Joe Camel and the Targeting of Minors in Tobacco Advertising: Before and After 44 Liquormart v. Rhode Island*, 31 NEW ENGLAND L. REV. 1011, n.381 (1997) (relating Justice Thomas's discomfort with *Central Hudson* and *Lemon*); Frederick Schauer, *Opinions As Rules*, 62 U. CHI. L. REV. 1455 (1995) (comparing the deceptive clarity of *Lemon* and *Central Hudson*).

34. 517 U.S. 484 (1996).

35. Justices Stevens, Kennedy, Thomas, and Ginsburg would have abandoned *Central Hudson* while Chief Justice Rehnquist and Justices O'Connor, Scalia, Souter, and Breyer stayed with *Central Hudson*. Justice Scalia's endorsement was less than ringing, however. *Id.*

A majority of the Court seems to apply a strict version of the test whenever the state tries to prohibit the dissemination of truthful commercial advertising because of the bad decisions consumers may make.³⁷ Thus, the doctrinal pendulum seems to be swinging toward the strict end of the *Central Hudson* test, if not preparing to overrule it. At the same time, a majority of the justices appear skeptical whenever they see paternalism behind the state's regulation. These two developments do not bode well for the success of anti-obesity advertising regulations.

III. THE *LORILLARD* CASE

One Supreme Court commercial speech decision has special importance for anti-obesity-advertising regulation because it comes closest to the situation involving the obesity epidemic. In *Lorillard Tobacco Co. v. Reilly*,³⁸ the Court considered a range of anti-tobacco advertising regulations.³⁹ This case, more than any other commercial speech case, demonstrates the pitfalls that await anti-obesity-advertising regulations.

Lorillard invalidated restrictions on billboards and in-store displays, but upheld rules requiring tobacco products to be placed behind the sales counter. The parties agreed that smoking was legal, the advertisements were accurate, and the public's health (especially its children's) was an important interest.⁴⁰ The case turned on whether or not the regulation directly advanced this interest and, if so, whether it was too restrictive of an adult's right to receive information.⁴¹

at 517–18 (Scalia, J., concurring in part and concurring in the judgment).

36. *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002). Justices Scalia, Thomas, Kennedy, and Souter joined Justice O'Connor's majority opinion. *Id.*

37. *Id.* at 374 (explaining that “[w]e have previously rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information.”). *Id.*

38. 533 U.S. 525 (2001).

39. *Id.* The Massachusetts Attorney General promulgated extensive regulations of the sale, advertising, and labeling of cigarettes pursuant to his power to combat unfair and deceptive trade practices. *Id.* at 533. The provisions included a ban on the use of self-service displays of cigarettes, cigars, or smokeless tobacco products; a requirement that all such products be out of the consumer's reach and accessible only to store personnel; a ban on outdoor advertising of such products within 100 feet of a public playground, playground area of a public park, or an elementary or secondary school; and a ban on point-of-sale advertising lower than five feet from the floor in stores located in the above areas. *Id.* Other provisions regulated the sale and promotion of cigars by banning cigar sampling or give-aways. *Id.* at 534–36. The Court held that the regulations governing the cigarette point-of-sale and outdoor advertising were preempted by federal law. *Id.* at 551. The Court considered the First Amendment challenges to the rest of the regulations. *Id.*

40. *Id.* at 555.

41. *Id.* at 555–56.

In this case, the regulations had prohibited the placement of any billboards that advertised tobacco products within 1000 feet of a school.⁴² The Court noted that although this regulation directly advanced the government's interest in preventing underage smoking, the regulations were more restrictive than necessary.⁴³ The Court noted that the law, as a practical matter, amounted to an almost absolute ban on tobacco billboards.⁴⁴ In addition, the regulations also banned oral communications; those regulations led to seemingly absurd results.⁴⁵

The biggest problem was that the regulations restricted the right of adults to receive tobacco advertising. Even though the state's interest in preventing underage smoking is "substantial, and even compelling," adult tobacco use is still legal.⁴⁶ In such situations, adults have a right to receive the communication and the government cannot unduly infringe on that right.⁴⁷

The restriction on the height of indoor sales displays met a similar fate. Here the court said that the law simply failed to advance the government's interest. To be constitutional, a law must provide more than remote or indirect support for the government's interest.⁴⁸ The size of the in-store display would do little, if anything, to thwart underage smoking. Even if it were true that the height of the display correlated with the height of the child buying the product, many children were taller than the limit imposed on the signs.⁴⁹ In addition, the law was more restrictive than necessary. A blanket ban on

42. *Id.* at 534–35.

43. *Id.* The state's conclusion that advertising stimulated young people to smoke was based on more than "mere speculation and conjecture" but "[w]hatever the strength of the [state's] evidence . . . we conclude that the regulations do not satisfy the fourth step of the *Central Hudson* analysis." *Id.* at 561.

44. *Lorillard*, 533 U.S. at 562. The challengers maintained that the regulations would prevent advertising in 87 to 91% of the available area. *Id.*

45. "Apparently, that restriction means that a retailer is unable to answer inquiries about its tobacco products if that communication occurs outdoors." *Id.* at 563.

46. *Id.* at 564.

47. *Id.* at 564–66. To support this claim, the court cited cases where it struck down regulations designed to protect children from indecent speech. *See Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *Butler v. Michigan*, 352 U.S. 380 (1957). This is significant because each of these cases dealt with speech that was considered fully protected by the First Amendment. It was not surprising that the court would not want to "reduce the adult population . . . to reading only what is fit for children." *Butler*, 352 U.S. at 383. But *Central Hudson* and *Fox* exempted commercial speech from full First Amendment protection. Thus, the citation of the indecency cases suggests that even justices who support the *Central Hudson* test view commercial speech as closer to full First Amendment protection than not.

48. *Lorillard*, 533 U.S. at 566.

49. *Id.* The Court noted that "[n]ot all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings." *Id.*

displays over five feet tall was not a reasonable fit with the government's interest in blocking underage smoking.⁵⁰

The *Lorillard* court upheld the requirement that tobacco products must be located out of consumers' reach and sold from behind the sales counter.⁵¹ The Court said that this did not significantly impede speech; rather, it regulated conduct that had a communicative impact.⁵² Thus, the court used its symbolic speech standard.⁵³ This standard requires that the regulation advance a substantial government interest that does not target speech and that alternative means remain available to disseminate the speaker's message.⁵⁴ Interestingly, this standard is similar to the *Central Hudson* test. Nevertheless, the court upheld the regulations of sales practices.⁵⁵

Moving tobacco products behind the counter advanced the government's interest in curbing underage smoking without interfering with the rights of adults either to hear the cigarette company's message or to purchase the product.⁵⁶

Justice Thomas's opinion is important for two reasons. First, he makes a strong case for rejecting the *Central Hudson* test and increasing protections for commercial speech.⁵⁷ Second, he is the only justice to link the regulations at issue in *Lorillard* with anti-obesity regulations.

Justice Thomas rejects the notion of a variable First Amendment.⁵⁸ If speech is protected, then it is entitled to full first amendment protection—especially the speech at issue when the government seeks to limit information based on a paternalistic sense of what is good for its citizens.⁵⁹ Accord-

50. *Id.* at 567.

51. *Id.* at 570.

52. *Id.* at 569.

53. *See* United States v. O'Brien, 391 U.S. 367 (1968) (upholding rule prohibiting destruction of draft card as applied to purposeful burning of draft card as political protest). The Court has applied this doctrine to other communicative actions. *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (upholding public indecency statute proscribing nude dancing); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (enforcing public indecency statute requiring nude dancers to wear pasties and a g-string); *Texas v. Johnson*, 491 U.S. 397 (1989) (upholding prohibition on flag burning).

54. *See, e.g.*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

55. *Lorillard*, 533 U.S. at 571.

56. *Id.* at 569–70.

57. This point takes on added significance. Since this paper was orally presented, Chief Justice Rehnquist has died and Justice O'Connor has announced her retirement. Their replacements can shift the court decisively toward the mild version of *Central Hudson* that the late Chief Justice advocated, the intermediate version advanced by Justice O'Connor, or the repudiation of *Central Hudson* put forward by Justice Thomas.

58. *Lorillard*, 533 U.S. at 579. "[T]here is no philosophical or historical basis for asserting that commercial speech is of lower value than noncommercial speech." *Id.* (Thomas, J., concurring in part and concurring in the judgment).

59. "[A]n asserted government interest in keeping people ignorant by suppression expression is per se illegitimate and can no more justify regulation of commercial speech than

ingly, Justice Thomas would use a very strong version of strict scrutiny.⁶⁰ In Justice Thomas's view, most attempts to control truthful advertising would be unconstitutional.

His comments about childhood obesity are especially intriguing here:

Tobacco use is, we are told, "the single leading cause of preventable death in the United States." The *second* largest contributor to mortality rates in the United States is obesity. It is associated with increased incidence of diabetes, hypertension, and coronary artery disease and it represents a public health problem that is rapidly growing worse. Although the growth of obesity over the last few decades has had many causes, a significant factor has been the increased availability of large quantities of high-calorie, high-fat foods. Such foods, of course, have been aggressively marketed and promoted by fast food companies.⁶¹

This statement makes the case that the government has a strong interest in stemming the tide of obesity. The problem is—excuse the pun—large and getting larger. It is exacerbated by the "availability of large quantities" of bad food "aggressively marketed and promoted by fast food companies."⁶² Thus, Justice Thomas connects the obesity epidemic with the marketing tactics of fast food companies.

He goes on to show that, unlike tobacco companies, fast food companies *overtly* target children and that their marketing campaigns have worked:

Respondents say that tobacco companies are covertly targeting children in their advertising. Fast food companies do so openly. Moreover, *there is considerable evidence that they have been successful in changing children's eating behavior.* The effect of advertising on children's eating habits is significant for two reasons. First, childhood obesity is a serious health problem in its own right. Second, eating preferences formed in childhood tend to persist in adulthood. *So even though fast food is not addictive in the same way tobacco is, children's exposure to fast food advertising can have deleterious consequences that are difficult to reverse.*⁶³

As Lucy did to Charlie Brown, Justice Thomas pulls the football away just as we are about to kick it. He concludes that, despite the overt similari-

it can justify regulation of noncommercial speech." *Id.* (quoting 44 Liquormart, 517 U.S. at 518 (Thomas, J., concurring in part and concurring in the judgment)).

60. *Id.* at 575–77 (even if commercial speech does not receive full First Amendment protection, there is no reason to dispense with strict scrutiny when a state tries to regulate it for reasons "unrelated to the preservation of a fair bargaining process.").

61. *Id.* at 587 (internal citation omitted).

62. *Id.*

63. *Id.* at 588 (emphasis added).

ties between the two industries and the lifelong harm their marketing campaigns do to children:

Respondents have identified no principle of law or logic that would preclude the imposition of restrictions on fast food and alcohol advertising similar to those they seek to impose on tobacco advertising. In effect, they seek a “vice” exception to the First Amendment. No such exception exists. If it did, it would have almost no limit, for “any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to ‘vice activity.’” That is why “a ‘vice’ label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled justification for the regulation of commercial speech about that activity.”⁶⁴

In other words, Justice Thomas would strike down most of the anti-smoking regulations in *Lorillard* because the logic behind them would also justify regulation of fast food advertisements.⁶⁵

Thomas’s opinion contains an extended analysis of the state’s argument in *Lorillard* using a strict scrutiny standard. He rejects the state’s claim that protecting children from the harms of smoking is compelling⁶⁶ and, even if it is, argues that the advertising restrictions are not narrowly tailored to advance that goal.⁶⁷

The *Lorillard* decision should be the touchstone for any future anti-obesity regulations, but Justice Thomas’s opinion may be the future of commercial speech. His opinion spells out the similarities between anti-smoking and anti-obesity regulations, but concludes that they do not justify advertising regulations. At the very least, he speaks for at least four justices of the Supreme Court. Any anti-obesity advertising regulations must take his position into account. Regulators should pattern their approach to avoid the problems identified in *Lorillard*. Even so, it seems that few advertising restrictions, even those aimed at protecting children, will survive a constitutional challenge.

64. *Lorillard*, 553 U.S. at 589 (internal citations omitted).

65. Upholding the tobacco regulations would “accept a line of reasoning that would permit restrictions on advertising for a host of other products.” *Id.* at 587.

66. *Id.* at 580. (“[i]t is difficult to see any stopping point to a rule that would allow a State to prohibit all speech in favor of an activity in which it is illegal for minors to engage.”) *Id.*

67. *Id.* at 584–85. The state failed to consider ways to advance its goal without restricting speech. *Id.* at 586.

IV. POTENTIAL REGULATIONS AND THEIR LIKELY FATE

There are two ways to regulate food advertisements to combat obesity. First, the government can prohibit or regulate advertisements aimed at vulnerable populations. Second, the government might impose disclosure requirements on food advertisers or food merchants.

Complete advertising bans will be almost impossible to uphold. *Lorillard* makes this point; other commercial speech cases echo it. The Court seems to use a strict version of the *Central Hudson* test when reviewing regulations that totally ban a form of advertising or a category of information. This test recurs when the law expressly bans the advertising or if, as in *Lorillard*, it does so as a practical matter.

Targeted regulations, however, are another matter. *Lorillard* acknowledged that protecting children's health is an important, perhaps compelling, government interest. The billboard regulation failed in *Lorillard* because it went too far in limiting adult access to advertising information. Presumably, restrictions on advertising in forums geared to children might survive court scrutiny. For example, limiting fast food ads during children's shows or banning food commercials in schools are more narrowly tailored ways to curb youth obesity.

Generic regulation of misleading claims is possible.⁶⁸ Many food companies make arguably misleading claims when they market their products in ways that are particularly attractive to children. Even if they disclaim any health claims, these messages are particularly difficult for children to decipher.⁶⁹ Perhaps a law that more tightly defined what constituted misleading statements in ads aimed at children would satisfy the *Central Hudson* test.⁷⁰

It also seems possible to ban certain unhealthy foods from sale in schools. This would be narrowly tailored to advance the government's interest and it would not restrict adults' rights in any respect. In fact, *Lorillard* pointed out that this kind of regulation does not implicate speech rights at all.⁷¹

Lorillard upheld the regulation that required tobacco products to be sold from behind the counter. This might also be appropriate for food products that present a particular risk to children. The problem is that the behind-the-counter rule supported the state's prohibition on the purchase of

68. Lee J. Munger, Comment, *Is Ronald McDonald the Next Joe Camel? Regulating Fast Food Advertisements Targeting Children in Light of the American Overweight and Obesity Epidemic*, 3 CONN. PUB. INT. L. J. 456 (2004).

69. *Id.* at 477 (citing American Academy of Pediatrics, Policy Statement: Children, Adolescents, and Television, 95 *Pediatrics* 295 (1995) (stating that children are incapable of distinguishing false information from true information on television)).

70. *Id.*

71. *Lorillard*, 53 U.S. at 569–70.

tobacco by minors and its goal to curb underage smoking. Buying unhealthy food is not illegal. Thus, the question here is whether or not the law sufficiently advances the state's health goals without unduly restricting the freedom of adults. On the other hand, First Amendment interests do not seem infringed here at all.

Most regulation short of total prohibitions should be upheld. The court has long supported rules that require advertisers to disclose information about their products, even if that information might lead a consumer to forgo the purchase.⁷² Restaurants can be required to accurately disclose the nutritional content of their food, for example. Perhaps high fat or fast food can carry health warnings, as cigarette packages do.⁷³

There is some evidence that junk food has addictive qualities.⁷⁴ If so, this places it on a par with tobacco and increases the strength of the government's interest.⁷⁵ But, as Justice Thomas pointed out, there is no "vice exception" to the First Amendment.⁷⁶ Even if junk food were addictive, the First Amendment continues to protect advertisers as long as eating junk food is legal. Moreover, *Lorillard* makes it clear that while the government may be able to restrict what children hear about an addictive (but legal) substance, it cannot excessively limit an adult's right to the information even if the addictive consequences are the same as for children. Perhaps the only

72. This assumes that people can decode advertisements and that they will listen to the disclaimer. But advertising itself may be the problem. See Tamara R. Piety, *Merchants of Discontent: An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech*, 25 SEATTLE L. REV. 377, 381 (2001) (noting that advertising and addiction are "characterized by denial, escapism, narcissism, isolation, insatiability, impatience, and diminished sensitivity.").

73.

[P]eople can reasonably be expected to exercise personal responsibility only if the manufacturers of products provide meaningful disclosure and adequate warnings Without that, people have no idea how dangerous trans fat is. Without a reference, a context, simply telling people something contains trans fat isn't enough. Despite the best of intentions, warnings are not just for the best and brightest, but for all people—forgetful, tired, fatigued . . . [a]nd children, too. It's hard to argue that a 9-year-old exercises personal responsibility.

Munger, *supra* note 68, at 478 (citing Judith Weinraub, *The Blame Game? Is It Our Fault We Like Bad Fats?* WASH. POST., December 10, 2003, at F01 (quoting John Banzhaf)).

74. Franklin E. Crawford, *Fit for its Ordinary Purpose? Tobacco, Fast Food, and the Implied Warranty of Merchantability*, 63 OHIO ST. L.J. 1165, 1219 (2002). Even if fast food is not addictive, its advertising can change eating habits for a lifetime. See *Lorillard*, 533 U.S. at 588 (Thomas, J., concurring in part and concurring in the judgment) ("[T]here is considerable evidence that [advertisers] have been successful in changing children's eating behavior.")

75. Professor Sylvia Law argues for an exception to the First Amendment for advertising for addictive substances. Sylvia A. Law, *Addiction, Autonomy, and Advertising*, 77 IOWA L. REV. 909 (1992).

76. See *supra*, note 63.

response is for the government to undertake a truly effective counter-advertising campaign.⁷⁷

V. CONCLUSION

The Commercial Speech doctrine limits the effectiveness of advertising regulation in anti-obesity campaigns. The constitutional doctrines that protect the right of adults to receive information about smoking will make it difficult, if not impossible, to pass effective anti-obesity regulations. At most, anti-obesity regulations may limit the access of children in limited circumstances and require disclosures on fast food items. But these tactics will work slowly and unevenly.⁷⁸ To be sure, the First Amendment protects the speech of anti-obesity advocates, but these groups do not have the resources of even one fast food company—let alone the combined resources of them all. Faced with the deluge of slick advertising, is it any wonder why today's teenagers may be the fattest generation ever?

77. See Note, *The Elephant in the Room: Evolution, Behavioralism, and Counteradvertising in the Coming War Against Obesity*, 116 HARV. L. REV. 1161 (2003).

78. Adam Benforado, Jon Hanson & David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1653 (2004) ("Before we can progress in the war against flab, we will have to dig deeper to try to understand what makes us cringe when we hear about a four-hundred-pound man suing McDonald's. Another frame is needed. Instead of distilling our collective corpulence down to 'a decision,' we need to examine why we so often attribute behavior to personal choice. Instead of looking at how we eat, we need to look at how we think.").

