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Prohibiting Television Advertising of Alcoholic Beverages: A Constitutional Analysis

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Prohibiting Television Advertising of Alcoholic Beverages: A Constitutional Analysis

Summary

Federal law does not prohibit radio or television advertising of alcoholic beverages. However, starting in 1936 for radio and 1948 for television, the industry voluntarily refrained from advertising hard liquor on radio or television. In December, 2001, NBC announced that it would air liquor advertisements, but in March 2002, it reversed its policy.

The U.S. Court of Appeals for the District of Columbia has struck down a law that banned "indecent" speech on broadcast radio and television 24 hours a day, but has upheld the current law, which imposes the ban from 6 a.m. to 10 p.m. This suggests that a comparable ban on liquor ads would be constitutional. A 24-hour ban might too, however, because advertising is entitled to less protection under the First Amendment than "indecent" speech. Yet the Supreme Court's trend in recent years of striking down governmental restrictions on commercial speech suggests that the constitutionality of a 24-hour ban would hardly be certain.

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Prohibiting Television Advertising of Alcoholic Beverages: A Constitutional Analysis

Background

Although federal law prohibits radio and television advertising of cigarettes and little cigars (15 U.S.C. § 1335) and smokeless tobacco (15 U.S.C. § 4402), it does not prohibit radio and television advertising of alcoholic beverages.[1] However, starting in 1936 for radio and 1948 for television, the industry voluntarily refrained from advertising hard liquor on radio or television. Then, in June 1996, Seagram started to advertise its Crown Royal Canadian Whisky on an NBC station in Corpus Christi, Texas, and, on November 7, 1996, the Distilled Spirits Council of the United States said that it would lift the ban, but that it had "drawn up 26 guidelines for the industry to follow – guidelines that will avoid a younger audience but also allow this industry to compete more effectively . . . ."[2] Nevertheless, the four major television networks announced at the time that they would not air liquor advertisements. Then, in December, 2001, NBC announced that it would accept liquor ads, but imposed 19 rules to govern them, including limiting them to after 9 p.m E.S.T., requiring that actors in them be at least 30 years old, and requiring liquor advertisers also run social-responsibility messages on subjects like designated drivers and drinking moderately.[3] In March 2002, NBC announced that it would no longer accept liquor ads.[4]

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[1]In *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd without opinion*, 405 U.S. 1000 (1972), the Supreme Court upheld the constitutionality of the statute prohibiting radio and television advertising of cigarettes and little cigars. This case, however, seems of little precedential value today. It was decided at a time when the Court deemed commercial speech to have no constitutional protection (*see*, *Valentine v. Chrestensen*, 316 U.S. 52 (1942)). In addition, the ban on tobacco advertising applies to "any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission," which, when the Supreme Court upheld the statute in 1972, before the prevalence of commercial cable television, meant essentially broadcast radio and television. And, in 1972, under the "spectrum scarcity" rationale of *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969), broadcast radio and television had limited First Amendment protection. The force of *Red Lion* today seems questionable; *cf.*, *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622, 638 (1994), and *Red Lion*, in any event, would have no force with regard to an advertising restriction applicable to cable television.

[2]*Washington Post*, Nov. 8, 1996, p. A1.

[3]*See*, *New York Times*, Dec. 14, 2001, p. C1.

[4]*See*, *New York Times*, Mar. 21, 2002, p. C1.

First Amendment Protection of Commercial Speech

The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." Despite its absolute language, the First Amendment provides only limited protection to commercial speech, which includes advertisements.[5]

Commercial speech may be banned if it advertises an illegal product or service, and, unlike fully protected speech, may be banned if it is unfair or deceptive. Even when it advertises a legal product and is not unfair or deceptive, the government may regulate commercial speech more than it may regulate fully protected speech.

Fully protected speech may be restricted only "to promote a compelling interest" and only by "the least restrictive means to further the articulated interest."[6] For commercial speech, by contrast, the Supreme Court has prescribed the four-prong *Central Hudson* test to determine its constitutionality. This test asks initially (1) whether the commercial speech at issue is protected by the First Amendment (that is, whether it concerns a lawful activity and is not misleading) and (2) whether the asserted governmental interest in restricting it is substantial. "If both inquiries yield positive answers," then to be constitutional the restriction must (3) "directly advance[ ] the governmental interest asserted," and (4) be "not more extensive than is necessary to serve that interest."[7] The Supreme Court, however, subsequent to *Central Hudson*, held that the fourth prong should not to be interpreted "strictly" to require the legislature to use the "least restrictive means" available to accomplish its purpose. Rather, the Court held, legislation regulating commercial speech satisfies the fourth prong if there is a reasonable "fit" between the legislature's ends and the means chosen to accomplish those ends.[8]

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[5]Commercial speech, for purposes of First Amendment analysis, is "speech that *proposes* a commercial transaction." Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 482 (1989) (emphasis in original). That books and films are sold for profit does not make them commercial speech; *i.e.*, it does not "prevent them from being a form of expression whose liberty is safeguarded [to the maximum extent] by the First Amendment." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-502 (1952).

[6]Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115, 126 (1989).

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

[8]Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 480 (1989). The Court does "not equate this test with the less rigorous obstacles of rational basis review." Florida Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995). In other words, although a restriction on commercial speech need not constitute the least restrictive means to satisfy the fourth prong, it must be more than merely rational.

Applying the *Central Hudson* Test

The **first prong** of the *Central Hudson* test asks whether the restricted speech concerns a lawful activity and is not misleading. The sale of alcoholic beverages is generally lawful, and we assume that a ban on radio and television advertising of alcoholic beverages would apply to non-misleading advertisements.

The **second prong** of the *Central Hudson* test asks whether the asserted governmental interest in restricting the commercial speech in question is substantial. The Supreme Court, in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, held that a government's "interest in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest."[9] There thus seems no doubt that a ban on alcoholic beverage advertising would satisfy the second prong. It is on the next two prongs that the case likely will turn, as these prongs address whether the government's restriction on commercial speech is a reasonable way to further that interest.

In *Rubin v. Coors Brewing Co.*, the Court struck down a federal statute, 27 U.S.C. § 205(e), that prohibited beer labels from displaying alcohol content unless state law requires such disclosure.[10] The Court found sufficiently substantial to satisfy the second prong of the *Central Hudson* test the government's interest in curbing "strength wars" by beer brewers who might seek to compete for customers on the basis of alcohol content. With respect to the **third prong**, however, it concluded that the ban "cannot directly and materially advance" this "interest because of the overall irrationality of the Government's regulatory scheme."[11] This irrationality was evidenced by the fact that the ban did not apply to beer advertisements, and by the fact that the statute *required* the disclosure of alcohol content on the labels of wines and spirits.

In *44 Liquormart, Inc. v. Rhode Island*, the Court struck down a statute that prohibited advertising the price of alcoholic beverages, finding that Rhode Island had not met its burden of showing that the "ban will significantly advance the State's interest in promoting temperance."[12]

Cases like *Rubin* and *44 Liquormart* indicate that, to satisfy the third prong of the *Central Hudson* test, the government must present evidence to support its claim that its restriction on commercial speech directly and materially advances a substantial governmental interest. In *Florida Bar v. Went For It, Inc.*, the Court upheld a rule of the Florida Bar that prohibited personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident

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[9]478 U.S. 328, 341 (1986).

[10]514 U.S. 476 (1995).

[11]*Id.* at 488.

[12]517 U.S., at 505.

or disaster.[13] The Bar argued "that it has a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers,"[14] and the Court found that "[t]he anecdotal record mustered by the Bar" to demonstrate that its rule would advance this interest in a direct and material way was "noteworthy for its breadth and detail"; it was not "mere speculation and conjecture."[15]

By contrast, in *44 Liquormart*, the Court found that "any conclusion that elimination of the ban [on alcoholic beverage price advertising] would significantly increase alcohol consumption would require us to engage in the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest."[16]

Thus, if a ban on radio and television advertising of alcoholic beverages were enacted and challenged as unconstitutional, the government would have to demonstrate that such a ban would directly and materially advance the governmental interest in reducing alcohol consumption. Arguably, a ban on radio and television advertising of alcoholic beverages would advance the governmental interest in reducing alcohol consumption in a much more straightforward way than the laws against disclosing alcohol content or alcohol prices that the Supreme Court held unconstitutional, and consequently would likely be found to satisfy the third prong of the *Central Hudson* test.[17]

We turn now to the **fourth prong** of the *Central Hudson* test – that restrictions on commercial speech constitute a reasonable "fit" between the legislature's ends and the means chosen to accomplish those ends.

In *44 Liquormart*, the Court found it "perfectly obvious that alternative forms of regulation would be more likely to achieve the State's goal of promoting temperance. As the State's own expert conceded, higher prices can be maintained either by direct regulation or by increased taxation. . . . Even educational campaigns . . . might prove to be more effective."[18] With respect to a ban on radio and television advertising of alcoholic beverages, it does not seem "perfectly obvious that alternative forms of regulation would be more likely to achieve the State's goal of promoting temperance."

Another goal of a ban on radio and television advertising, however, might be to protect children in particular from such advertising, and a court might find that a *total*

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[13]515 U.S. 618 (1995).

[14]*Id.* at 624.

[15]*Id.* at 627.

[16]517 U.S., at 507.

[17]The Supreme Court has "acknowledged the theory that product advertising stimulates demand for products, while suppressing advertising may have the opposite effect." Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 560-561 (2001).

[18]*Id.*

ban on radio and television advertising is not necessary to accomplish this goal. A federal court of appeals declared unconstitutional a statute that prohibited "indecent" material on broadcast radio and television, but subsequently upheld such a statute that banned it only from 6 a.m. to 10 p.m., which Congress had deemed to be the hours when most children are in the audience.[19] "Indecent" material, however, is fully protected by the First Amendment and therefore may be restricted only by the least restrictive means available to further a compelling governmental interest.[20] A restriction of commercial speech, by contrast, need merely represent a reasonable fit between means and ends. Under this standard, it seems more likely that a court would uphold a total ban on radio and television advertising.

Nevertheless, a 1996 court of appeals case, *Anheuser-Busch, Inc. v. Schmoke*, might support an argument that a *total* ban on radio and television advertising would be unconstitutional.[21] The Fourth Circuit, in 1995, had upheld a city ordinance that prohibited, except in certain commercially and industrially zoned areas of the city, billboards and other outdoor advertising of alcoholic beverages. The Supreme Court vacated and remanded to the Fourth Circuit "for further consideration in light of *44 Liquormart* . . . ." The Fourth Circuit, after further consideration in light of *44 Liquormart*, re-adopted its previous decision.

In *44 Liquormart*, the Supreme Court had increased the protection that the *Central Hudson* test guarantees to commercial speech by making clear that "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process," the courts should apply stricter review than when a regulation is designed "to protect consumers from misleading, deceptive, or aggressive sales practices."[22] The Court found that "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."[23] In its reconsideration of *Anheuser-Busch, Inc. v. Schmoke*, the Fourth Circuit wrote that, in its previous decision,

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[19]Action for Children's Television v. Federal Communications Commission, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 913 (1992); Action for Children's Television v. Federal Communications Commission, 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996).

[20]It is fully protected unless it constitutes obscenity under *Miller v. California*, 413 U.S. 15 (1973), or child pornography under *New York v. Ferber*, 458 U.S. 747 (1982). Those two forms of speech receive no protection.

[21]63 F.3d 1305 (4th Cir. 1995), *vacated and remanded*, 517 U.S. 1206 (1996), *affirmed on reconsideration*, 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997). Baltimore has a similar ordinance with respect to cigarette advertising, which the Fourth Circuit also upheld, the Supreme Court remanded, and the Fourth Circuit re-adopted. Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 518 U.S. 1030 (1996), *affirmed on reconsideration*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).

[22]517 U.S., at 501.

[23]*Id.* at 503.

> we recognized the reasonableness of Baltimore City's legislative finding that there is a "definite correlation between alcoholic beverage advertising and underage drinking." . . . While we acknowledged that the geographical limitation on outdoor advertising may also reduce the opportunities of adults to receive the information, we recognize that there were numerous other means of advertising to adults . . . .
>
> In *44 Liquormart*, by contrast, the State prohibited all advertising throughout Rhode Island, "in any manner whatsoever," of the price of alcoholic beverages except for price tags or signs displayed with the beverages and not visible from the street. . . . While Rhode Island's blanket ban on price advertising failed *Central Hudson* scrutiny, Baltimore's attempt to zone outdoor alcoholic beverage advertising into appropriate areas survived our "close look" at the legislature's means of accomplishing its objective . . . . Baltimore's ordinance expressly targets persons who cannot be legal users of alcoholic beverages, not legal users as in Rhode Island. More significantly, Baltimore does not ban outdoor advertising of alcoholic beverages outright but merely restricts the time, place, and manner of such advertisements. And Baltimore's ordinance does not foreclose the plethora of newspaper, magazine, radio, television, direct mail, Internet, and other media available to Anheuser-Busch and its competitors.

This quotation might support the constitutionality of a ban on radio and television advertising of alcoholic beverages, as the government could argue that such advertising is especially accessible to children, and that such a ban does not foreclose advertisements for alcoholic beverages in "the plethora of . . . other media." At the same time, however, the Fourth Circuit's finding significant the fact that "Baltimore does not ban outdoor advertising of alcoholic beverages outright but merely restricts the time, place, and manner of such advertisements" might support an argument that a 24-hour-a-day ban on radio and television advertising of alcoholic beverages would go beyond a reasonable fit between the government's ends and means. A ban of fewer than 24 hours, one might argue, might be sufficient to protect children. Nevertheless, because the government in regulating commercial speech, unlike in regulating "indecent" material, is not required to use the least restrictive means available to further its ends, the courts might uphold a total ban on radio and television advertising of alcoholic beverages.

The Fourth Circuit focused on the fact that the Baltimore regulation was aimed at protecting children. Though the Supreme Court in *44 Liquormart* said that it would be "skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good," its disapproval of governmental paternalism would likely diminish where such paternalism is directed at children. Furthermore, the Court in *44 Liquormart* objected to a state's "entirely" prohibiting "the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process," and the Baltimore prohibition was not total.

Subsequent to the Fourth Circuit's decision, the Supreme Court, in *Lorillard Tobacco Co. v. Reilly*, struck down, under the fourth prong of the *Central Hudson*

test, a Massachusetts regulation that prohibited the outdoor advertising of cigarettes, smokeless tobacco, and cigars within 1,000 feet of schools or playgrounds.[24] The Court found that the regulation "prohibit[ed] advertising in a substantial portion of the major metropolitan areas of Massachusetts,"[25] and that such a burden on speech did not constitute a reasonable fit between the means and ends of the regulatory scheme. "Similarly, a ban on all signs of any size seems ill suited to target the problem of highly visible billboards, as opposed to smaller signs."[26]

The *Lorillard* decision need not be read to imply that the Court today would disapprove of the Fourth Circuit's decision, as the regulations at issue in the two cases were different. It is unclear, for example, whether the Baltimore regulations' inapplicability in certain commercially and industrially zoned areas of the city prevented it from restricting speech, as the Massachusetts regulation did, in a substantial portion of the metropolitan area. But *Lorillard* was a continuation of the Court's trend in recent years of striking down governmental restrictions of commercial speech.[27]

Conclusion

Whether the Supreme Court would uphold a restriction on television advertising of alcoholic beverages might depend upon whether the Court views it as an attempt "to keep people in the dark for what the government perceives to be their own good," or as an attempt to protect children. It might be more likely to view a 24-hour ban as the former, and a more limited ban as the latter.

Furthermore, in light of the D.C. Circuit's having upheld the 6 a.m. - 10 p.m. ban on "indecent" material on broadcast radio and television, and the fact that "indecent" material receives greater First Amendment protection than commercial speech, it seems likely that a comparable restriction on radio and television advertising of alcoholic beverages would be found constitutional.

It is more difficult to predict, however, whether a 24-hour-a-day ban would be upheld. Though the D.C. Circuit struck down such a ban for "indecent" material, such material, again, receives greater First Amendment protection than commercial speech. Yet the Supreme Court's trend of striking down commercial speech restrictions makes it hardly certain that it would uphold a 24-hour ban on television advertising of alcoholic beverages

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[24]533 U.S. 525 (2001).

[25]*Id.* at 562.

[26]*Id.* at 564.

[27]Since 1994, the Court has struck down commercial speech restrictions in *Ibanez v. Florida Board of Accountancy*, 512 U.S. 136 (1994); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173 (1999); and *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). Since 1994, it has upheld restrictions only in *Lorillard*, and these concerned retail product placement, not advertising.

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