



What the FDA Doesn't Want You to Hear: Regulation of Tobacco Advertising and Disease-Specific Health Claims (A Hypothetical and a Fictional Discussion)

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What the FDA Doesn't Want You to Hear:

Regulation of Tobacco Advertising and Disease-Specific Health Claims

(A Hypothetical and a Fictional Discussion)

AP – December 23, 2007

The New York Yankees today signed multi-millionaire shortstop Tommy Hussein to a one year, \$35 million contract. This is by far the largest sum ever paid a professional athlete for one year's work.

Asked why he would invest such a large sum in a single player for such a short time, ailing Yankee owner George Steinbrenner, 77, said that Hussein's popularity throughout the United States, especially, though not exclusively, with kids, justified the salary. "People will pay at least \$75 a ticket to see this guy play," mused the veteran Yankee owner. "With cable and satellite TV as prevalent as they are," he continued, every Yankee game this season will be broadcast

nationwide. There's money in that. The investment will surely create a significant return. Meanwhile," Steinbrenner added, "this will be great for New York. Not since the '96 series has this town had anything to be excited about. This will surely liven things up." Steinbrenner was uncharacteristically vague in his response when asked why he had not gotten Hussein to sign a longer contract. "He's got plans," Steinbrenner said. "We'll take what we can get."

Hussein was no more specific about his reasons for making such a short commitment. The wildly popular athlete, and sometime actor and political commentator said simply, "I want to have my options open." As for the salary, Hussein, 34, admitted that it would simply pad his already-hefty coffers, but noted, "Hey, this is the kind of thing that made America great. Supply and demand. I'm in demand, and there's only one of me to supply. I'll take what I can get."

Americans polled on their opinion of the contract split almost down the middle. Nearly half expressed outrage, or at least disdain for Steinbrenner and Hussein. "When did the great American pastime become a commodity?" asked one. "*Nobody* deserves \$200,000 for one night's work," griped another, referring to Hussein's estimated per-game salary. "*Nobody*." Barely a majority of those polled, however, approved of the contract, expressing deep admiration for Tommy Hussein. "The guy's the consummate role model," one participant claimed. "He's athletic, good-looking, extremely intelligent, a great actor, and an insightful political theorist. To have a guy like that playing professional baseball and serving as an inspiration to today's young people is worth every

penny I have to pay to see a baseball game. It's a sharp contrast to the drug addicts and perverts who dominated professional sports in the 80s and 90s."

Asked to respond to charges that paying this kind of money to professional athletes was unfair to the American public, which just wants to enjoy the game of baseball at reasonable prices, Hussein reiterated the economic theory for which he is nearly as famous as his baseball skills. "Yes, the money's going into my pocket initially," he said, "but with me on the baseball field, the economy will thrive. Higher priced hot dogs at the ball park and higher priced ads during the televised games means more income for hot dog vendors and TV stations, means higher wages. It gets the economy moving. It will simply be good for America."

AP – April 9, 2008

At a press conference earlier today, Iraqi-American multi-millionaire New York Yankee shortstop, Tommy Hussein made the utterly astonishing announcement that he intends to run for President of the United States this November, as an independent candidate. Hussein, although no stranger to political controversy, shocked the country today when he announced that he plans to campaign throughout the baseball season and to leave the sport for Washington by next January, assuming he is victorious.

Announcing simply, "The key to America's success lies in making a success of the country's businesses. I will make sure American business succeeds," Hussein, who will be 35 next month, declared his official candidacy, without elaborating further on his platform.

Reaction from the Richards and Quayle campaigns were swift. “Everybody loves Tommy Hussein,” said the ex-governor of Texas, who has nearly locked up the democratic nomination. “But his political ideas are just crackers. I don’t consider him serious competition.” Richards is seeking to create two milestones, by becoming both the first woman and the oldest person to serve as President of the United States. Meanwhile, former Vice President Quayle is also extremely negative towards the Hussein candidacy. “We’ve endured 16 years of liberalism run amok in this country,” he charged, “but Hussein’s oddball ideas about support for business and neglect for everyone and everything else is just going too far. I think the good and honest people of these United States will quickly recognize that.”

But Quayle and Richards may be in for more of a battle than they have anticipated. Not since billionaire H. Ross Perot attempted to buy his way into the White House in 1992 and 1996 has such a monied candidate sought the presidency. While Hussein may not be quite as wealthy as was Perot, he may in fact have more capacity to exploit his power due to his popularity as a professional athlete. There has also already been speculation on how Hussein’s ownership of the Coca-Cola company, the stock of which he and a handful of his friends now control, may assist his candidacy.

AP – April 29, 2008

President Gore came to the oval office this morning to find an odd present left by one of his staffers – a single can of Coca-Cola. The President later told White House reporters he was astonished to find the smiling face of

Tommy Hussein, majority stockholder of the Coca-Cola Company and recently-declared presidential candidate, plastered on the can where for years had resided a representation of the uniquely-shaped bottle in which Coke had been sold during his childhood. In letters patterned with the American flag, the President read the words, “Money and power for big business. Good for America. Good for you. Tommy for President.” The President’s staffers informed him that they had already called the Coca-Cola Company, to find that the message had been printed on every bottle and can of Coke now being marketed in the country. The staffers were also informed that the Coca-Cola company was donating approximately 25% of its profits earned between now and the November 4 election to the Hussein campaign.

Outraged, President Gore called an impromptu press conference. He announced he would be immediately urging Congress to take action against the can labeling. “This has just gone too far,” he claimed. “We can’t let this man propagate his wild political ideas to people merely attempting to enjoy one of America’s most popular beverages. It’s bad enough that George Steinbrenner has allowed him to plaster Yankee stadium with his political paraphernalia, while charging hundreds of thousands of dollars to other politicians wishing to gain access to stadium advertising, and now this!” The President said he would urge Congress to prohibit political advertising on food and beverage containers. “The dangers of allowing this kind of advertising are serious. With sales of products like Coke as high as they are, Americans will be bombarded with Hussein’s message.” Asked why that presented a problem, the President noted

that the problem lies in the monopoly Hussein has on the particular speech forum. “And, he added, these ideas he’s proposing, if he’s not lying, at least he’s misleading us. I think the government should be restricting his potentially dangerous message.” Pressed on what scared him so much, besides the possibility of Hussein winning the election, the President declined to comment in any detail. Appearing uncomfortable, Mr. Gore shrugged his way out of the White House press room, slinking sheepishly towards the oval office.

AP – May 1, 2008

The Associated Press has learned from a reliable source who wishes to remain anonymous the reason for the President’s visible discomfort in the White House press room the other day as he announced his intention to ban political advertising from Coke cans. The Central Intelligence Agency has reason to believe presidential candidate Tommy Hussein is the son and political confidant of Iraqi dictator Saddam Hussein. The source could not confirm the CIA’s own sources of information, but he is sure the President is convinced of the veracity of the claim. The source said Gore will do all in his power to make sure Hussein is not elected. Gore, the AP’s source says, is greatly concerned about what could happen if one who sympathizes with a historical enemy of the United States were to become the country’s chief executive. The source confirmed that while Gore understands Tommy Hussein’s birth certificate confirms that he is an American citizen, and that Hussein has resided in this country for the last fifteen years, he cannot ignore the possibility that Hussein is secretly sympathetic with his Iraqi father.

AP – May 2, 2008

Presidential candidate Tommy Hussein today vehemently denied allegations first reported yesterday by the Associated Press that he is the son of Iraqi dictator Saddam Hussein. “Frankly,” he charged, “I’m amazed that the President would be taken in by such a racist allegation. I am a proud American. I happened to spend my childhood years in Iraq, and coincidentally, I share the surname of an American nemesis. But for the President to doubt my patriotism as a result of my national origin is simply astonishing. I am flabbergasted at the lengths to which the President, clearly in cahoots with my opponent, Governor Richards, has gone in an attempt to sully my name. If he and Richards have problems with my political ideas – which they clearly do – let them take their message to the American people and see whose ideas the public prefers.”

The President, for his part, reluctantly declined to deny any of the allegations in yesterday’s story. “I was hoping Hussein would quietly go away, and that we’d never have to bring this out in the open,” he lamented. “But with his poll numbers rising, it was already nearing the time for action. While I am certainly perturbed by the fact that top secret information was released to the press, it was probably only a matter of time before we would have had to warn the American public off of electing the son of an enemy of the American people.” Asked what action he planned to take now, the President said he hoped the American people would have the good sense to vote for one of the other candidates – Richards, Quayle, or anyone else – without any other national security information having to be revealed.

AP – May 6, 2008

Despite allegations last week that baseball player, actor, business mogul and presidential hopeful Tommy Hussein may be the son of Iraqi leader Saddam Hussein, recent polls indicate that Hussein is enjoying a 10 point lead over former Texas Governor Ann Richards, and is running nearly 20 points ahead of former Vice President Quayle. Polls indicate that those still backing Hussein are convinced that the President's allegations are entirely fabricated in a desperate and unprecedented effort to defeat a candidate he sees as undesirable.

Political analysts attribute Hussein's strength in the polls to Hussein's charm, and to the power and pervasiveness of his advertising campaign. Others note that the American people are just unpersuaded by what are certainly far-fetched claims, and that many are rallying in favor of Hussein because they are offended by the quasi-racist character of the allegations. Still other political pundits have theorized that Hussein's popularity with children is rubbing off on adults. "This guy has really created a stir with kids," said democratic pollster Jim Thumb. "With kids constantly talking about him, apparently their parents are beginning to sympathize. As for the allegations about his loyalties, neither kids nor adults seem to be buying it," said Thumb.

AP – May 27, 2008

Both houses of Congress today voted on the final version of the Food Labeling and Sports Advertising Act of 2008. The Act, known for short as FLSA II, passed by a hefty margin and will now be sent to the White House. President Gore, who proposed the original idea for the bill, has already indi-

cated his approval of the final version, and is sure to sign it when he returns from his Memorial Day weekend at Camp David.

The law's major provisions are as follows:

1) All writing on food and beverage products – except pictorial representations of the product and writings which identify the product, list its ingredients and nutrition facts, provide information regarding consumption of the product (such as recipes and serving suggestions) or give information on the product's manufacturer (address and phone number, for example) – is prohibited. All other writing must be approved by the newly-created PCPA – President's Committee on Political Advertising. The PCPA is directed to approve other writings which do not suggest a political message. The definition of "political message" is left to the Committee. The PCPA, according to the statute, should only allow political messages to appear on food and beverages containers when there is "significant agreement, among experts qualified in political analysis that the message is both sincere and represents a feasible political promise." Also, the message must not contain promises which, if carried out, will be detrimental to the well-being of any substantial portion of the American public, or which might lead people to vote for candidates whose agendas the PCPA determines would be damaging to the well-being of a substantial portion of the American public.

2) Political advertising at any place at which sporting events occur is prohibited. Political advertising in any print medium in any location is limited to a

statement of the name of the candidate, his or her political party affiliation, and a likeness of the candidate. Political advertisements in broadcast media must not contain imagery – including cartoons, bright colors, or animal mascots – designed to appeal to those not of voting age.

The students in Professor Shady’s seminar in First Amendment law were beginning to look up from their desks, quizzical, incredulous looks on their faces. When they had all finished reading the last article, the professor opened the class for debate.

Amy: It’s not even close to constitutional. I feel like Justice Kennedy confronting Colorado’s Amendment 2.¹ Every case we’ve studied in this class all but presupposes that political speech can’t be censored because of the message it contains. The whole idea behind the First Amendment, as Justice Holmes recognized, dissenting in *Abrams v. United States*,² is to create a marketplace of competing ideas and thereby to ensure that the ideas supported

¹See *Romer v. Evans* 116 S.Ct. 1620 (1996). Amendment 2 to the Colorado constitution had provided:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

Justice Kennedy, for a majority of six justices found the amendment unconstitutional under the Fourteenth Amendment’s Equal Protection Clause, citing very little case law. Recognizing that Amendment 2 constituted a per se equal protection violation, Justice Kennedy noted, “A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.” *Romer*, 116 S.Ct. at 1622.

²250 U.S. 616 (1919).

by the majority of society win the day.³ That idea's been reiterated on numerous occasions up to the present day. It's in *New York Times v. Sullivan*⁴ and the *Citizens Against Rent Control* case,⁵ to name just a few. There are tons of others.

Joe: And it's not even the censorship alone that's problematic here. There's also a blatantly unconstitutional prior restraint. The Court's made clear for a long time that prior restraints are especially suspect. There's been a consistent presumption against their validity from *Near v. Minnesota*⁶ to the *Pentagon Papers* case⁷ to *Nebraska Press*.⁸

Jon: You guys are definitely right when you cite all that case law, but this case to me seems even easier than that. I would just cite George Orwell's 1984 as evidence enough. I mean, the PCPA for God's sakes! That's as bad as

³"But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution." *Id* at 630, (Holmes, J., dissenting).

⁴376 U.S. 254, 269 (1964). ("The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'")(internal citation omitted).

⁵454 U.S. 290, 295 (1981) ("The Court has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas. That concept has been stated and restated almost since the Constitution was drafted.").

⁶283 U.S. 697, 719 (1931). In striking down a Minnesota law which allowed for the abatement as a public nuisance of any "malicious, scandalous and defamatory newspaper, magazine or other periodical," the Court noted:

"[The] fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy."

⁷*New York Times v. United States*, 403 U.S. 713, 720 (1971) (denying injunction prohibiting newspapers from publishing national security information and noting, "Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity.").

⁸*Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976) (striking down order prohibiting press from reporting on federal criminal trial and labeling prior restraints "the most serious and least tolerable infringement on First Amendment rights.").

the Ministry of Truth.

Shady: Whoa, whoa, whoa! Slow down. I made the hypo pretty straightforward, I admit, and you guys are all certainly on the right track in assuming it's facially invalid, but there has to be more to it than that. At least I hope I gave you some reason to see the law as favorable. Pam, you're the Solicitor General. What would you say to support this law?

Pam: Well, I guess I'd fall back on public health and safety, focusing on the safety part. The government has a compelling interest – in fact it's probably *the* quintessential government interest – in maintaining national security. I guess I'd combine this with the notion that the Bill of Rights is not a suicide pact and say that FLSA II is simply necessary to protect national security. It would be sort of like *Haig v. Agee*,⁹ where the Court said the government can revoke someone's passport if there's a serious risk that that person's activities while abroad will pose a threat to national security. They even specifically noted there that the Constitution is not a suicide pact.¹⁰ This is sort of the same thing. We're obviously restricting speech, and we may even be doing it by prior restraint, but is having a First Amendment really necessary if a few months after we allow Tommy Hussein's political speech, we're a Muslim country?

Shady: A strong argument, Ms. Solicitor General. Counsel for the ACLU?

Amy: Am I the only one here who's read the Pentagon Papers case?

⁹453 U.S. 280 (1981)

¹⁰*See id.* at 309 - 10.

Here, let me read it again for you: “The word ‘security’ is a broad, vague, generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.”¹¹

Pam: Thank you Justice Black, concurring in the per curiam judgment, but I don’t believe that reasoning commanded a majority of the Court. And, if you look below where you’re reading from, even Justice Brennan concedes that there *are* national security exceptions worth considering. He cites the famous “sailing dates” dicta from *Near v. Minnesota*.¹² It just seems to me that, if Tommy Hussein *were* Saddam’s son, electing him might be as bad as “publication of the sailing dates of transports.”

Amy: Fair enough, but I’d say a couple of things in response. First, Justice Brennan does decide, in the end, that even the publication of the Pentagon Papers does not create *enough* of a security risk to justify a prior restraint. And I think he has to be right, along with Justice Black and the others who essentially agreed with the two of them in that case. More importantly, while we don’t have a lot of facts in the Tommy Hussein hypo, it seems pretty clear to me that there’s not nearly the sort of imminent danger to the public pending there that could justify such infringement on First Amendment rights.

Shady: Let me interject here and throw in a small twist, Amy. Once

¹¹ *Pentagon Papers*, 403 U.S. 713, 719 (Black, J., concurring)

¹² 283 U.S. at 716. (“No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.”).

the government has had a little – or maybe even a lot – of experience with the consequences of political speech in certain fora –and the negative effects it has on the public welfare, can't it simply decide that all speech of a particular sort in that forum has the *potential* to have a seriously deleterious effect on the public welfare, and therefore can't it set up a system – as narrowly tailored as possible under the circumstances – which would pre-screen speech to make sure it will not be harmful, before it gets out there and does its damage?¹³

Amy: In theory, we certainly could have that sort of system, but that's where the suicide pact notion comes in. You could possibly conceive of a situation in which the dangers of allowing the speech outweigh any conceivable First Amendment interest. No one will care if we all get blown to smithereens, would be the idea. But there would have to be *serious* danger. I mean, we know that the danger that a criminal defendant might not get a fair trial is not enough,¹⁴ and we even know from *Pentagon Papers* that the possibility that top secret national security information will be leaked is not enough.¹⁵ So I just doubt the possibility of someone the current government doesn't agree with getting elected would be enough.

Pam: But what if there were really good evidence that Tommy Hussein really was dangerous – that he really did plan to allow his father Saddam to take over the country?

Alex: You might be right that that's approaching the sort of danger which would justify forgetting about the First Amendment for the sake of pre-

¹³*cf. infra* nn. 144 - 148 and accompanying text.

¹⁴*See* *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976)

¹⁵*See* *Pentagon Papers*, 403 U.S. 713 (1971)

serving the country. *But*, you're forgetting that it's not as if there's a zero sum game going on here. It's not: forget the First Amendment or lose the country entirely to Iraq. We need to look more carefully to see if there's any conceivable way to have our cake and eat it too.

Pam: What do you mean? How can we do that?

Alex: Well, if you think about what the whole point of the First Amendment is, it reflects the Founders' judgment that the best way to have simultaneously effective and free government is to have a robust exchange of ideas. This is what Justice Holmes was saying in the *Abrams* case that Amy mentioned a few minutes ago when we started the debate.¹⁶

Bob: So you're saying Hussein gets to advertise however much he wants and we just have to hope he doesn't win?

Alex: Essentially. The First Amendment stands for the principle that we can't censor the speech if there's any possibility that counterspeech might convince those who might otherwise be persuaded by the speech that it's dangerous – or unwise, or whatever – to do what the speaker urges. The First Amendment says we need to allow a marketplace of ideas just like we let the market work in the commercial world.

Shady: You make a good point, of course, Alex. But again, there's a twist here. As with a commercial market, government does have a role to play in ensuring that the necessary conditions to have an effective market are in place. They get to regulate, if for no other reason, to take care of the externalities that

¹⁶See *supra*, nn. 2 - 3 and accompanying text.

the market can't address.

Alex: But how does that play out here? All we have to do is make sure the government doesn't stifle any speech and things should work out.

Pam: But that's not entirely true. Look how the economic market system and the speech market system interact. It's perfectly clear in the hypo as given here. The whole reason "President" Gore and the Congress in 2008 see the need to restrict political speech on food and beverage containers is that the owners of the food companies otherwise get to control what speech goes on the containers. Here the situation's pretty clear. Assuming Hussein's opponents don't own multi-national soft drink conglomerates, Hussein is simply in a position to drown out his opponents' advertising by plastering his face on Coke cans, which are literally everywhere in this country.

Joe: Or look at the billboard advertising in sports stadiums, or sponsorship of baseball games. It's great for Tommy Hussein that he happens to play for the New York Yankees and have George Steinbrenner wrapped around his finger, but isn't it unfair for him to be the only political figure who has access to these media?

Amy: But how are you guys proposing we solve this dilemma? I mean can we just say the governmental interest in ensuring a level playing field – in ensuring that all speakers will be able to speak with an equally loud voice – justifies stifling those who are lucky enough to be in a position to convey their message to more people?

Jon: Didn't the Supreme Court emphatically reject that in *Buckley v.*

Valeo?¹⁷ I think they said that a government interest in suppressing communication – even for the sake of leveling the playing field – can’t be a strong enough interest to *justify* suppressing communication. In fact, when I state it that way, I realize it’s pretty much tautological to argue otherwise.

Joe: So you’re saying *Buckley* says government can’t suppress speech for the sake of suppressing speech?

Jon: Sounds logical to me.

Joe: But doesn’t that just bring us back to square one? I mean, wouldn’t the reasoning of *Buckley* have to be modified if the government’s interest in suppressing speech was extremely strong?

Jon: Maybe. But the point I’m making in referring to *Buckley* is that our case is just like that one. The interest the government would be pointing to in banning political ads on Coke cans and in baseball parks is the interest in making sure no single politician’s voice drowns out the voices of the others – which is essentially to say that their interest in suppressing the speech is to make sure the speech is suppressed.

Joe: No, no, no. My point is that it’s not an interest in leveling the playing field generally, but rather an interest in leveling the playing field, *in the situation* in which an unlevel playing field has the possibility of having drastic consequences.

Bob: I see what you’re getting at, Joe, and I think it might make sense, but I’m still stuck back where I was a few minutes ago. If you’re right that there

¹⁷424 U.S. 1 (1976).

could be cases in which we would need to make sure the playing field is level so that truly dangerous messages don't get out there, the law is not narrowly tailored to make sure we get at only those cases, and it is content-based, in that it allows a government body to decide which cases those are.

Shady: That brings us back to my original question. Might it not be fair to say that government experience could show that this certain amount of overbreadth is necessary, because of the years of experience seeing what happens if we only try to police the danger after the fact?

Alex: But that would require years of prior experience with the dangers of letting political figures speak in certain fora.

Shady: You're right, and that's not in the hypo. But assume it was. There had been 10 cases of Tommy Husseins buying up food label space and sports stadiums, with drastic consequences.

Alex: Fine, but I think your hypo may be so far-fetched that it doesn't do us any good to talk about what a constitutional response to it would be, since it would never happen. Unless you're talking about a situation where the prior experiences did not present truly monumentally dangerous situations. Because if they did, then there probably wouldn't any longer be a Constitution left to contemplate protecting. And if those prior situations were *not* dangerous enough to have destroyed the entire country, then FLSA II would be way too drastic a response to them, given the censorship power it gives to the government.

Amy: I just think that solution would be too drastic because there are

always a couple of other ways to deal with even that situation, short of censorship.

Pam: Like what?

Amy: Well, the least constitutionally offensive way would be for the government itself to engage in speech. Here, it doesn't take much. The government just takes out a few high-profile ads that say, essentially, "Hey, dummies: Tommy Hussein's Saddam's son. You do the math." Or if it can't afford to, or doesn't want to do that, it can just subsidize people who otherwise would want to send out that message and make it less costly for them to do so. We know that kind of subsidy's OK from *Rust v. Sullivan*.¹⁸

Pam: But what if the government can't afford to do that because of all its other priorities?

Amy: First of all, any danger that's compelling enough to possibly justify censorship via prior restraint or advertising restrictions should almost by definition be deserving of a serious devotion of government resources.

Pam: But censorship provides a way for the government to do that with minimal expense.

Jon: I'm still stuck on this 1984 thing. There are lots of "government interests" which could be served very inexpensively by censorship. We've got a compelling interest in fighting crime, so we could just give police authority to walk up to anyone they want to on the street and search them, or burst into

¹⁸500 U.S. 173 (1991) (upholding HHS regulation restricting funding of health services clinics at which abortion is available, holding that government can choose to support certain speech and refuse to subsidize other speech).

any house they want. But the society that leaves – the 1984 society – is pretty scary.

Shady: Alright. So what do you do? Just let the Constitution trump and have all this highly dangerous speech being propagated?

Jon: Well, I guess I agree with Amy. If it's that important, let the government spend money on counterspeech.

Shady: Is there any more palatable solution?

Amy: I guess there's one other, but it has its own constitutional problems too. That would be compelled counterspeech, or some sort of equal time requirement.

Alex: But you're right that there are constitutional problems there too. I mean, what would the proposal be? Whenever Tommy Hussein wants to advertise his political candidacy he also has to inform the listener what the drawbacks of voting for him would be? Not only is that patently absurd, and not only is it unrealistic to think that the compelled speaker would ever give a fair presentation of his own faults, or that the government has the capacity to actually prescribe what words he must say, but most importantly, the Supreme Court has already said it's unconstitutional. I mean if New Hampshire can't force someone to put a simple slogan on his license plate,¹⁹ how can it tell a *political candidate* he must impugn himself whenever he wishes to promote himself?

Amy: I agree with you that that would be pretty drastic and would

¹⁹See *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (finding New Hampshire could not prosecute a resident for covering the motto "Live Free or Die" on his license plate, on the ground that freedom of speech includes the "right to refrain from speaking at all.").

contravene *Wooley v. Maynard*, but it's better than outright censorship, and we may at least be willing to go with the lesser of two evils here. But there's also another alternative. Rather than compelling speech, the law could just require that all political messages in limited fora – like on Coke cans, or maybe even in ball parks – be accompanied, in the same forum, by speech expressing an opposite view. That's exactly what the FCC did in the early days of television, and on precisely the theory that the limited size of the forum made such a restriction necessary, the Supreme Court upheld the FCC's action.²⁰

Alex: But aren't there serious problems there too? Yes, the Supreme Court upheld the fairness doctrine, but only on the theory that there was no evidence it would actually deter broadcasters from airing political messages.²¹ Years later, when it became clear that there *was* such a chilling effect, the FCC voluntarily repealed the fairness doctrine, citing First Amendment concerns.²² And how is that kind of compelled speech any better than *Wooley v. Maynard*-type compelled speech. What about the rights of the speaker not to speak?

Amy: Well, as to your last point, the Court in *Red Lion* said that the First Amendment rights of the listeners to get full information outweigh the rights of the owner of the forum – the broadcasters in that case – not to speak. I know that sounds shaky, but I would endorse that view, at least for the situation in which, because of a very compelling government interest, like national security threats, the alternative would be an outright ban on the speech. And of course, I would only resort to this doctrine if the law were narrowly tailored

²⁰ See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

²¹ See *id.* at 393.

²² See Stone, Seidman, Sunstein and Tushnet, *Constitutional Law* 1429 (2d. ed. 1991).

somehow to make sure the equal time requirement only kicks in where that sort of danger exists and where the requirement won't chill less dangerous speech. And as to your first point, I would agree with the *Red Lion* Court that where there's no evidence of the chilling effect in a given forum, we should wait to see if there is one before saying the fairness doctrine would be unconstitutional. And again, even if there is a chilling effect, it's better than the chilling effect – that is the outright censorship – caused by FLSA II.

Shady: OK. I think we've gotten all the major issues about FLSA II out there, although we didn't get into a full discussion of this notion that the law is also tailored to restrict the appeal of political figures to children, but maybe we'll come back to that notion later in the discussion. And of course, we haven't reached an ultimate consensus, but that's always the way these things work out. Anyway, the exercise certainly served as a good review of the speech doctrine we've learned this year, but I actually had a dual purpose in mind. As a way of reviewing commercial speech doctrine, I want to examine some hypos which are not actually hypotheticals. You'll notice Mark and Roger haven't said anything in the debate so far. That's because they've been sitting quietly by noting the parallels between the FLSA II hypo and the real laws I've asked them to research and present here. Mark, why don't you set up the Nutrition Labeling and Education Act of 1990 and the regulation of health claims FDA has promulgated under it?

Mark: OK. Since at least 1973, the FDA has essentially prohibited – without really questioning its authority to do so – the making of “health claims”

on food packages. By health claim, I'm talking now about a rather specific type of claim, really a claim regarding disease prevention. "Twinkies prevent tooth decay," for example. Anyway, in 1973, FDA explicitly noted in the Federal Register that the making of such claims on food products actually transformed the food product into a "drug" under the meaning of the Food, Drug & Cosmetic Act.²³

Alex: Hold it. You're saying FDA thinks Twinkies are a drug?

Mark: Well, I know it sounds crazy, but they were interpreting the statute to say that – if Hostess claimed Twinkies prevent tooth decay.

Alex: You're going to need to chew this for me a little. Pun intended.

Mark: OK. If you look at the definition of "drug" in the FD&C Act – I've given you guys copies of the relevant portions – you'll see it says in section 321 (we're using the U.S. Code numbers here), in part (g)(1)(B) that "The term 'drug' means... articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals."

Amy: So a Twinkie labeled as effective in preventing tooth decay is "intended for use in the... prevention of disease?"

Mark: That was the FDA's position.

Pam: It sounds logical to me. I mean, by labeling it like that, Hostess has admitted it intends its product to act as a disease-preventer, so why shouldn't it have to go through all the FDA rigmarole for a new drug, unless Twinkies are already "generally recognized as safe and effective" for prevention

²³See 38 Fed. Reg. 6951, 6958 (March 14, 1978) ("[I]t must be recognized that claims related to specific disease conditions render the product a drug under section 201(g)(1)(B) of the Act.").

of tooth decay?²⁴

Mark: Well, that was the FDA’s position in 1973, and it lasted about 10 years.

Alex: Wait a minute. Something about that seems really troubling. First of all, I’m looking at this statute here, and it actually says a drug is “articles (*other than food*) intended to affect the structure or any function of the body.”²⁵ Doesn’t that suggest pretty plainly that a *food* can’t also be a *drug*?

Mark: Well, it seems tempting to conclude that, and FDA eventually tried to take that position,²⁶ but Congress appeared to disagree, arguing that the separate subsections of the §321(g)(1) definition have to be read as disjunctive to be meaningful.²⁷

Amy: Hold on. That may be fair enough, but I think I can account for what sounds so illogical about that position. Twinkies illustrate it well. Even with the tooth decay prevention claim on its package, it’s very clear that Hostess still “intends” Twinkies to be used as nourishment – as a fun, if sickly sweet way for people to have a snack. An *incidental* benefit of the Twinkies may be that they prevent tooth decay, and Hostess would be advertising that incidental

²⁴See 21 U.S.C. § 321(p)(1) (defining “new drug” as “Any drug... the composition of which is such that such drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, as safe and effective for use under the conditions prescribed, recommended, or suggested in the labeling thereof); 21 U.S.C. § 355 (prohibiting introduction into interstate commerce of a new drug which is not the subject of an FDA-approved new drug application).

²⁵321 U.S.C. §321(g)(1)(C) (Alex added the emphasis).

²⁶See “Disease-Specific Health Claims on Food Labels: An Unhealthy Idea,” H.R. Rep. No. 100-561, 100th Cong., 2d Sess. (1988) at 11. The Human Resources and Intergovernmental Relations Subcommittee of the House Committee on Government Operations noted that at hearings it had held, FDA Commissioner Young had argued for this approach, quoting the views of former FDA Chief Counsel Richard M. Cooper to the effect that the subsection parenthetical qualification should be read as creating an “implicit partial exception for foods” to the definition in §321(g)(1)(B).

²⁷See *id.*

benefit, but the straightforward intended use of Twinkies would not be as a disease-preventer, but as a nourisher. Isn't there enough room in our statutory interpretation notions to allow for a distinction between primary intended uses and incidental ones?

Mark: If I were a judge, I might have bought that argument, but this is all sort of moot, since Congress amended the FD&C Act to deal with the problem in 1990. But let me just get through a little background before getting to that. OK, so throughout the 70s and early 80s, FDA took the position that food labels could not bear health claims, and it prosecuted food manufacturers which did label their products with such claims.²⁸

Amy: Wait, so FDA just decided what could not be said and prosecuted people for saying it?

Mark: Yup.

Amy: And the Constitution... ?

Mark: As far as I can tell there was very little consideration of the First Amendment in these decisions. It was just sort of assumed that FDA had jurisdiction over food and could thus prohibit whatever labeling it wanted. Congress and the agency tend to talk of FDA "allowing" claims.²⁹ Anyway, while this was going on, the FTC, which has jurisdiction over all advertising – including

²⁸See *id.* at 2. See also 44 Fed. Reg. 75990, 76007 (December 21, 1979) in which FDA reaffirmed this policy.

²⁹See, e.g. "Disease-Specific Health Claims," *supra* n.26 at 3 ("FDA was not prepared at the time, however, to allow labeling that so explicitly linked consumption of a particular brand with prevention of a specific disease or set of diseases."); see also "Health and Nutrition Claims in Food Advertising and Labeling, 1990: Hearing Before the Senate Committee on Governmental Affairs," 101st Cong., 2d Sess. 1224 (1990) at 37 (testimony of John La Rosa on behalf of the American Heart Association, stating, "I think that we have all understood that the FDA all along has had the authority, if they wished to exercise it, to mandate food labels and to mandate their content.").

advertising of food products – was taking a little bit of a different approach. They determined in the early 80s that because truthful speech *is* protected by the Constitution, and also because the public benefits from truthful information, explicit health claims which are not false or misleading should not be prohibited from advertising.³⁰

Amy: Well thank God at least one government agency was coming to their constitutional senses.

Mark: Well, hold on. The story gets more complicated. In 1984, Kellogg's became the first company to put health claims prohibitions to the test. Seizing on a National Cancer Institute (NCI) report linking fiber to reduction of cancer, Kellogg's printed the following statements on boxes of their All-Bran Cereal: "The National Cancer Institute reports that research may suggest eating the right foods may reduce your risk of some kinds of cancer. Here are their recommendations: eat high fiber foods. A growing body of evidence says high fiber foods are important to good health.... Eat foods low in fat.... Eat fresh fruits and vegetables.... Eat a well-balanced diet and avoid being over or under weight...."³¹

Jon: Was that what NCI had in fact reported?

Mark: Apparently it was, since FDA had actually obtained the approval of NCI before launching the campaign.³² In any event, FTC, which as I said, had already said it wanted to encourage truthful health claims, took the Kel-

³⁰See Peter Barton Hutt, "Health Claims for Foods – An American Perspective," Kellogg Nutrition Symposium, Toronto Canada, April 1986, excerpted in Hutt and Merrill, *Food and Drug Law* 183 (1991).

³¹Quoted in "Disease-Specific Health Claims," *supra* n.26, at 2 n.9.

³²See *id.* at 5; see also Hutt, *supra* n.30, at 184.

logg's opportunity to promote its idea, making speeches endorsing the Kellogg's label and encouraging other companies to follow their lead.³³ After a few years, the FDA decided it would go along. In 1987, they published new proposed rules for health claims in the Federal Register.³⁴ The proposal would reverse FDA's long-standing rule prohibiting disease-specific health claims on food labels,³⁵ and would have set up FDA criteria for the evaluation of health-claims. But Congress wasn't too keen on the idea.

Amy: Tell me they recognized that the government can't decide what truthful information a company can put forth.

Mark: Uh... not exactly. In fact, quite the opposite. A subcommittee of the House Committee on Government Operations determined that any relaxation of the FDA's prohibition of all disease-specific health claims would be contrary to statutory law.³⁶

Amy: FDA *had* to prohibit all claims?

Mark: Well, pretty much. The subcommittee endorsed the notion that any such health claim made a food into a drug, and that Congress had explicitly set up the procedures a company had to follow in marketing and labeling drugs.³⁷

Amy: They actually *bought* that idea. I can't get over this. It just seems utterly illogical to me. Food is food and drugs are drugs. Just saying food is good for you magically transforms it into a drug? I mean, come on. It

³³Hutt, *supra* n.30, at 184 - 85.

³⁴See 52 Fed. Reg. 28843 (August 4, 1987).

³⁵Previously codified at 21 C.F.R. 101.9(i) (1989).

³⁶See "Disease-Specific Health Claims," *supra* n.26.

³⁷See *id.*

really doesn't pass the laugh test.

Mark: Maybe not, but the Subcommittee apparently thought it passed the statutory construction test. And if you think of it that way – in a strict constructionist mode – maybe it's not really so far-fetched.

Joe: Maybe not, but maybe it also proves too much. If we buy that construction – and don't read in Amy's distinction between primary intention and subsidiary – isn't *all* food essentially intended for the prevention or mitigation of disease – if you construe it broadly? If nothing else, any food will tend to prevent starvation, or anorexia at least. I mean, there are even doctors who tell you to treat food like drugs, because it *all* contributes to your health and well-being.³⁸ I mean that's pretty obvious, but once you admit it, where do you draw the line?

Mark: Fair enough. But Congress didn't worry excessively about any of this, and instead decided to play it safe³⁹ and explicitly give FDA new statutory authority to permit health claims.⁴⁰ In 1990, it officially gave FDA this

³⁸ See, e.g., Barry Sears, *The Zone: A Dietary Road Map* 77 (1995) (emphasis in original):

Food is far more important than just something you eat for pleasure or to appease your hunger. Rather, it is a potent drug that you'll take at least three times a day for the rest of your life. Once food is broken down into its basic components... and sent into the bloodstream, *it has a more powerful impact on your body – and your health – than any drug your doctor could ever prescribe.*

³⁹ See 1990 U.S.C.C.A.N. 3336. Without explicitly deciding the issue of FDA's authority to allow health claims, the House Committee on Energy and Commerce noted in House Report 101-538 (June 13, 1990), in assessing the need for legislation in the area: "[T]here is a serious question as to whether the Agency has the legal authority to implement the program that it has proposed, which would permit health claims regarding the usefulness of a food in treating a disease, without also requiring that the claim meet the pre-market approval requirements applicable to drugs."

⁴⁰ Congress was also prompted to legislate by the fact that it felt FDA was dragging its feet in getting regulations on health claims (and nutrition labeling) promulgated. In its June, 1990 report, the House Energy and Commerce Committee noted: "FDA has been unable to issue final regulations that establish clear, enforceable rules regarding claims that may be made on food." 1990 U.S.C.C.A.N. 3336. Since the publication of its 1987 proposed rules, *see supra*, n.34, FDA had merely published a repropounded rule in February 1990. See 55 Fed. Reg. 5,176 (Feb. 13, 1990). No final rule was published by the time President Bush signed the NLEA.

authority in the form of the Nutrition Labeling and Education Act of 1990, which is now codified as an amendment to the FD&C Act, at parts (q) and (r) of 21 U.S.C. §343. For our purposes, Professor Shady asked me to focus on §343(r), regarding “health-related claims”. The statute provides that a food is misbranded if “a claim is made in the label or labeling of the food which expressly or by implication... characterizes the relationship... of the food to a disease or a health-related condition,” unless the claim meets certain requirements as promulgated by the Secretary of HHS – i.e., the FDA. This is all in §343(r)(1)(B), which directs you to §343(r)(3). Section 343(r)(3)(B) describes the regulations which the Secretary (FDA) can promulgate. She can “authorize claims of the type described in paragraph (1)(B) only if [she] determines, based on the totality of publicly available scientific evidence... that there is significant scientific agreement, among experts qualified by scientific training and experience to evaluate such claims, that the claim is supported by such evidence.”⁴¹ Sections 343(r)(3)(B)(ii) and (iii) provide some details on what sorts of information approvable health claims must contain. Other provisions of the Act allow individuals to petition the Secretary to issue regulations allowing claims – that’s in §343(r)(4)(A)(i) – and to petition the Secretary to grant permission to make claims consistent with already-approved claims. That’s §343(r)(4)(A)(ii).

Amy: So essentially, all health claims are re-banned, but the FDA can grant exceptions. And you basically have to submit what you want to say to the FDA to get approval before you can print it. I’m beginning to see how this

⁴¹21 U.S.C. §343(r)(3)(B)(i).

is related to the Tommy Hussein hypo.

Mark: Scary, huh?

Amy: I'll say. And no one questioned whether this would be constitutional?

Shady: Hold on guys, you're getting ahead of the game. The constitutional issues are actually pretty complex, and we'll get to those in a minute, but let's wait 'til we get the other example on the table.

Mark: Also, I'm not even finished with the law in this area. But the short answer to your question, Amy, is that as far as I can tell, no one on the Hill even mentioned the First Amendment in considering the NLEA. Don't quote me definitively on that, because I didn't have time in the limited amount of time Professor Shady gave me to look into this to look at all the committee hearings and other legislative history, but suffice it to say that in the major House report and a few hearings, I saw no mention of the First Amendment. Anyway, FDA responded to the NLEA by November of 1991, with a proposed rule.⁴² They published a final rule regarding general requirements for health claims in January of '93.⁴³ That rule is now codified at 21 C.F.R. § 101.14. FDA defines a health claim as any claim that "characterizes the relationship of any substance to a disease or health-related condition."⁴⁴ Claims can be either express or implied, including in brand names and via symbol, such as a heart

⁴²See 56 Fed. Reg. 60537 (November 27, 1991),

⁴³See 58 Fed. Reg. 2478 (January 6, 1993). This rule *does* contain a detailed analysis of the First Amendment's impact on the regulations at pages 2524 - 58

⁴⁴21 C.F.R. § 101.14(a)(1).

symbol.⁴⁵ 21 C.F.R. § 101.14 further provides that for a substance to be eligible for a health claim, “the substance must be associated with a disease or health-related condition for which the general U.S. population, or an identified U.S. population subgroup (e.g., the elderly) is at risk,” unless the party petitioning for the claim “otherwise explains the prevalence of the disease or health-related condition in the U.S. population and the relevance of the claim in the context of the total daily diet.”⁴⁶ The rule also reiterates the circumstances in which the FDA will authorize the claim, restating the statutory requirement from 21 U.S.C. §343(r)(3)(B)(i).⁴⁷ Finally, FDA’s rule provides that when conditions for authorizing a claim are met, FDA will publish a regulation authorizing the claim.⁴⁸ At that point, any company can make a claim based on that regulation, as long as it is “consistent with[] the conclusions set forth in the regulation,”⁴⁹ “is limited to describing the value that ingestion (or reduced ingestion) of the substance, as part of a total dietary pattern, may have on a particular disease or health-related condition,”⁵⁰ and “is complete, truthful, and not misleading.”⁵¹ With limited exceptions, “all information required to be included in the claim” must also “appear[] in one place.”⁵² Furthermore, the claim must be comprehensible to the public.⁵³ And finally, if the claim is about the benefits of reducing

⁴⁵ *Id.*

⁴⁶ 21 C.F.R. § 101.14(b)(1).

⁴⁷ 21 C.F.R. § 101.14(c) (“FDA will promulgate regulations authorizing a health claim only when it determines, based on the totality of publicly available scientific evidence... that there is significant scientific agreement, among experts qualified by scientific training and experience to evaluate such claims, that the claim is supported by such evidence.”).

⁴⁸ 21 C.F.R. § 101.14(d)(1).

⁴⁹ 21 C.F.R. § 101.14(d)(2)(i).

⁵⁰ 21 C.F.R. § 101.14(d)(2)(ii).

⁵¹ 21 C.F.R. § 101.14(d)(2)(iii).

⁵² 21 C.F.R. § 101.14(d)(2)(iv).

⁵³ 21 C.F.R. § 101.14(d)(2)(v).

intake of certain substances, there is a threshold amount of that substance the food can contain,⁵⁴ and by the same token, if the claim is about eating more of a particular substance, the food must contain a certain amount of that substance.⁵⁵

Amy: So what you're saying is that a government agency has written a detailed script of what it is that private citizens are allowed to say in certain situations.

Mark: That's pretty much the scoop.

Shady: But again, I hasten to add that – as we all have already learned this semester – there are complicated considerations that go into the First Amendment calculus. It's of course not as open and shut as you make it sound, Amy.

Amy: Well I'll bite my lip for now, anyway. But I am curious as to what's happened since FDA set up this system. How many claims has our friendly government bureaucracy actually "authorized"?

Mark: So far, the FDA has approved nine types of claims, including the relationship between calcium and osteoporosis (21 C.F.R. §101.72), dietary lipids and cancer (§101.73), sodium and hypertension (§101.74), saturated fat and cholesterol and risk of coronary heart disease (§101.75), fruits and vegetables and cancer (§§101.76 and 101.78), fruits and vegetables and risk of coronary heart disease (§101.77), folate and neural tube defects (§101.79), and dietary sugar alcohols and dental caries (§101.80).

⁵⁴21 C.F.R. § 101.14(d)(2)(vi).

⁵⁵21 C.F.R. § 101.14(d)(2)(vii).

Alex: That's it? So I can't label my bag of carrots as improving eyesight, and I can't make Popeye's Spinach – "Try it, and take on the world's Blutos"?

Mark: Nope. Not if you want to risk the FDA coming and confiscating your product. I should also note that FDA has proposed some alterations to its current rules, but so far the proposal has not become codified.⁵⁶ The new proposal would relax FDA's strict rules in some areas. Whereas the FDA currently requires a food to have 10% of the RDA of a nutrient in order for a health claim based on that nutrient to be made, the new rule would lift that requirement for fruits and vegetables and some enriched grain products. The rule would also relax the requirement that all claims be made in one place on the package. And there are a number of other minor changes the rule would effect.⁵⁷ As I mentioned, this rule has not become effective, so I assume we should stick to a constitutional analysis of the current rule. Of course, I'm not sure the new proposal would really change anything in any event.

Shady: Thanks Mark. We'll get to the constitutionality in a few minutes. I just want to get the tobacco regulations on the table. Roger?

Roger: Congress has not been nearly as involved in the regulation of cigarette marketing, labeling and advertising in recent years as they have been in the field of food labeling and advertising. But President Clinton and his allies in FDA have seen fit to pick up the slack. In 1995, President Clinton

⁵⁶See 60 Fed. Reg. 66206 (December 21, 1995).

⁵⁷See *id*; see also Beatrice Trum Hunter, "Relaxing the Rules on Food Labels," 4/1/96 Consumers' Res. Mag. 18 (1996).

declared war on teenage smoking.⁵⁸ He did attempt to solicit aid from Congress, but knowing opposition would be formidable, Clinton threatened that the FDA would take action quickly if Congress didn't.⁵⁹ When Congress essentially called the presidential bluff, he and the FDA didn't balk, and by August of 1996, after receiving numerous comments on the rule they had proposed in 1995,⁶⁰ FDA published a final rule in the Federal Register.⁶¹

Pam: I'm a little confused about this. You're saying it was just a race – either Congress could act or the FDA could? I mean, if it's the kind of thing that requires a federal law, how does FDA have the authority to do it as well? Are cigarettes food? Or drugs? They're certainly not cosmetics, and I can't see how they're medical devices...

Roger: Funny you should ask. There are a lot of people asking the same thing, and some of them have even asked it of a federal judge.⁶² The short answer is that FDA says nicotine is a drug and that tobacco – either in a cigarette or in smokeless form – is a “nicotine-delivery device” and thus a medical device. A lot of ink has been spilled defending that proposition,⁶³ but I suppose for now, the best thing to do is presume, for the sake of argument that FDA has the ju-

⁵⁸See Todd S. Purdam, “Teenagers and Tobacco: Clinton Proposes Broad Plan to Curb Teen-Age Smoking,” N.Y. Times, Aug. 11, 1995, at A1.

⁵⁹See “Teenagers and Tobacco: Excerpts from Clinton News Conference on His Tobacco Order,” N.Y. Times, Aug. 11, 1995, at A18.

⁶⁰See 60 Fed. Reg. 41,314 (August 11, 1995).

⁶¹See 61 Fed. Reg. 44,396 (August 28, 1996) (to be codified at 21 C.F.R. pt. 897).

⁶²See *Coyne Beahm, Inc. v. FDA*, No. 2:95CV0059 (M.D.N.C. filed Aug. 10, 1995).

⁶³See 61 Fed. Reg. 44,396 (August 28, 1996); Defendants' Brief In Opposition To Plaintiffs' Motions For Summary Judgment in *Coyne Beahm, supra* n.62; FDA, “Executive Summary: Annex: Nicotine in Cigarettes And Smokeless Tobacco Is a Drug And These Products Are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act,” 1996, available on the World-wide Web at URL: <http://www.fda.gov/opacom/campaigns/tobacco/execsum.html>. For an opposing view, see Lars Noah and Barbara A. Noah, “Nicotine Withdrawal: Assessing the FDA's Effort to Regulate Tobacco Products,” 48 Ala. L. Rev. 1 (1996).

jurisdiction to regulate tobacco products, and move on to the constitutionality. One way to think about it for now is just to presume that a government agency can do whatever it wants, and that Congress always has the power to correct it later if it wants. Hopefully, we could argue, the agency will not be able to get away with outrageous actions, especially politically unpopular ones, because this could be fatal for the Chief Executive. In other words, one way of looking at it for now is that if what FDA is doing was not what the majority of citizens wanted, it might have cost Clinton the '96 election – and given that there's also the democratic possibility of Congress correcting the FDA, we shouldn't be too worried about what the FDA's done. And from a legalistic point of view, if FDA's statutory authority is open to more than one interpretation, and the FDA's assertion of jurisdiction is at least reasonable, the courts will let them get away with it. They have to, under *Chevron v. NRDC*.⁶⁴

Pam: It still sounds pretty undemocratic to me. Wouldn't we rather have popularly elected people doing this than appointed bureaucrats?

Roger: Maybe. But for now, FDA's done it. I think Professor Shady would prefer us to focus on the First Amendment issues, in the interest of time.

Shady: He's right, Pam. These are fascinating and complicated issues, but we only have time to cover the First Amendment stuff today. So Roger, let's see if we can get the regulations' major provisions on the table.

Roger: OK. The relevant new regulations are codified at 21 C.F.R., in part 897. First, it's worth noting that the "Purpose" section of the regs ex-

⁶⁴467 U.S. 837 (1984).

plicitly notes that “[t]he purpose of this part is to establish restrictions on the sale, distribution, and use of cigarettes and smokeless tobacco *in order to reduce the number of children and adolescents who use these products.*”⁶⁵ That will probably become highly relevant as we analyze the constitutionality of these regs. A number of the other regs don’t appear to have serious First Amendment implications.⁶⁶ These include: imposition of a federal minimum age for purchasing tobacco products of 18,⁶⁷ with an obligation imposed on retailers to check IDs;⁶⁸ prohibitions of “kiddie packs” of cigarettes – that is, boxes containing fewer than 20 cigarettes;⁶⁹ prohibition of vending machines and self-serve displays, except in places to which minors are denied admittance 24 hours a day;⁷⁰ and a ban on distribution of free samples.⁷¹ The rest of the regulations are more problematic. FDA begins with the following generous grant, in part 897.30: “A manufacturer, distributor, or retailer may, in accordance with this subpart D, disseminate or cause to be disseminated advertising or labeling which bears a cigarette or smokeless tobacco brand name... in newspapers; in magazines; in periodicals or other publications... on billboards, posters, and placards; in non-point-of-sale promotional material (including direct mail); in point-of-sale promotional material; and in audio or video formats delivered at

⁶⁵21 C.F.R. 897.2 (Roger added the emphasis).

⁶⁶*See generally* FDA, “Executive Summary: The Regulations Restricting the Sale and Distribution Of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents,” August 1996. This publication is available on the World-wide Web at URL: <http://www.fda.gov/opacom/campaigns/tobacco/execrule.html>.

⁶⁷21 C.F.R. §897.14(a).

⁶⁸21 C.F.R. §897.14(b)

⁶⁹21 C.F.R. §897.16(b)

⁷⁰21 C.F.R. §897.16(c)

⁷¹21 C.F.R. §897.16(d)

a point-of-sale.”⁷² The next section requires companies wishing to advertise in any other medium to get prior clearance from the FDA,⁷³ and the third subsection of that part prohibits outdoor advertising of tobacco products within 1,000 feet of a playground or school.⁷⁴ Part 897.32 bears the innocuous title “Format and content requirements for labeling and advertising”.

Jon: Orwell really should have called the book “1996”.

Shady: Ah- ahem.

Jon: Sorry.

Roger: Anyway, you can tell I’m really fond of these regulations, too. In any event, part 897.32 provides that with a few exceptions, print advertising of tobacco products can only consist of black text on a white background.⁷⁵ The exceptions are for advertising in publications whose readers are mostly over 18 – the publication has to have a readership of fewer than 15% minors and fewer than 2 million minors total⁷⁶ – and for stationary advertising in places to which minors do not have access – the same places where vending machine and self-serve sales are permitted.⁷⁷ 897.32 also scripts permissible audio and video advertising. It provides: “Audio format shall be limited to words only with no music or sound effects,”⁷⁸ and “Video formats shall be limited to static black text only on a white background. Any audio with the video shall be limited to words only with no music or sound effects.”⁷⁹ The regulations also require

⁷²21 C.F.R. §897.30(a)(1).

⁷³21 C.F.R. §897.30(a)(2).

⁷⁴21 C.F.R. §897.30(b).

⁷⁵21 C.F.R. §897.32(a).

⁷⁶21 C.F.R. §897.32(a)(2).

⁷⁷21 C.F.R. §897.30(a)(1).

⁷⁸21 C.F.R. §897.32(b)(1).

⁷⁹21 C.F.R. §897.32(b)(2).

that all advertising bear a statement of what the product being advertised is – cigarettes, chewing tobacco, snuff, or whatever – along with the words, “A Nicotine-Delivery Device for Persons 18 or Older”.⁸⁰ There is also a ban on things like T-shirts and hats which have tobacco logos of some sort on them,⁸¹ and a restriction on giving away free gifts with tobacco products.⁸² Finally, a regulation which has caused a lot of commotion in the auto-racing industry⁸³ provides that tobacco companies can’t sponsor “athletic, musical, artistic, or other social or cultural” events by using their products’ logos, mottos, etc. The companies can sponsor such events, but only using their corporate name in isolation.⁸⁴ The majority of these provisions become effective in August of 1998.⁸⁵

Shady: Thanks Roger. Now we can get into evaluating how the tobacco regulations and the health claims restrictions stand up to constitutional scrutiny.

Amy: I don’t think they do. I know you set it up intentionally, but I just don’t see the distinctions between these laws and the FLSA II hypo.

Shady: Slow down, Amy. You know there’s one big distinction.

Amy: Commercial speech? Can I be blunt here and say what I really think?

⁸⁰21 C.F.R. §897.32(c).

⁸¹21 C.F.R. §897.34(a).

⁸²21 C.F.R. §897.34(b).

⁸³See, e.g., Daniel Helberg, “Butt Out: An Analysis of the FDA’s Proposed Restrictions on Cigarette Advertising under the Commercial-Speech Doctrine,” 29 Loy. L.A. L. Rev. 1219, 1220 - 22 (1996) (discussing impact on racing industry, *citing* Jeanne Whalen, “Cigarette Interest Flags in Racing,” *Advertising Age*, Dec. 6, 1993 at 28, and discussing attached advertisement featuring NASCAR driver Richard Petty); see also David A. Locke, “Counter-speech as an Alternative to Prohibition: Proposed Federal Regulation of Tobacco Promotion in American Motorsport,” 70 Ind. L.J. 217 (1994).

⁸⁴21 C.F.R. §897.34(c). See generally

⁸⁵See 61 Fed. Reg. 44396 (August 28, 1996).

Shady: Be our guest.

Amy: I think the Supreme Court went way off course back in 1942 with *Valentine v. Chrestensen*⁸⁶ and hasn't sufficiently corrected itself since.

Joe: For the sake of those of us who are not exactly on top of all the material, could you just chew what you're talking about for a minute?

Amy: Sure. *Chrestensen* is the first case where the Supreme Court made up this bogus distinction between "commercial" and "non-commercial" speech. New York had a "sanitary code" prohibiting distribution of "commercial" handbills. Chrestensen was arrested for doing just that and took the case to the Supreme Court on First Amendment grounds. The Court rejected his claim, stating simply that it is "clear the Constitution imposes no... restraint on government as respects purely commercial advertising."⁸⁷

Joe: But wasn't that case quickly reversed?

Amy: Well, I wouldn't say "quickly," and "reversed" may be a little strong. The first case to back significantly away from *Chrestensen* came in the wake of the Supreme Court's recognition of a fundamental right to abortion. In 1975, in *Bigelow v. Virginia*,⁸⁸ the Court held that the state could not interfere with the advertising of the availability of abortions. That might not be commercial speech, and the case might have been confinable to its own facts – specifically the Supreme Court's new-found eagerness to safeguard a woman's right to choose – but the following year, the Court really did breathe strong life into the First Amendment as a protector of commercial speech. In the

⁸⁶316 U.S. 52 (1942).

⁸⁷*Id.* at 54.

⁸⁸421 U.S. 809 (1975).

Virginia Board of Pharmacy case,⁸⁹ the Court held that the First Amendment does indeed protect purely commercial speech. There the speech was advertising the price of prescription drugs. The Court determined that the very difficulty of distinguishing purely commercial speech from more publicly useful speech – especially given consumers’ interest, in a free market economy, in receiving commercial information – made it unnecessary to attempt to do so.⁹⁰

Pam: But didn’t Virginia say that it had a good reason to restrict price advertising of prescription drugs? Weren’t they concerned competition would lead to a race to the bottom, meaning inferior pharmacists and, eventually, compromised public health?

Amy: They did indeed.⁹¹ But Justice Blackmun didn’t think that justified the restriction. Noting that the government was essentially promoting public health by trying to keep the public in the dark, he suggested that an alternative approach would be to allow the information to flow and to assume that “people will perceive their own best interests if only they are well enough

⁸⁹Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

⁹⁰See *id.* at 765:

[T]here is another consideration that suggests that no line between publicly interesting or important commercial advertising and the opposite kind could ever be drawn. Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.... And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

See also *Rubin v. Coors Brewing Company*, 115 S.Ct. 1585, 1589 (1995) (“The free flow of commercial information is ‘indispensable to the proper allocation of resources in a free enterprise system’ because it informs the numerous private decisions that drive the system.”).

⁹¹See *id.* at 767 - 78.

informed, and that the best means to that end is to open the channels of communication rather than to close them.”⁹² He concluded, however, that “the choice among these alternative approaches is not ours to make or the Virginia General Assembly’s.” Instead, he noted, “[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.”⁹³

Alex: Sounds like it seals all our cases – tobacco, NLEA, *and* FLSA II.

Bob: Well, not exactly, I don’t think. Despite Blackmun’s grandiose language, Amy neglects to mention that he did drop a footnote, which became the much more important aspect of the case.

Amy: I didn’t neglect to mention it. I just hadn’t gotten there yet. Remember, I admitted that the Supreme Court has never fully corrected its *Chrestensen* mistake?

Bob: True enough. In fact, *Virginia Board* can be read as only slightly modifying *Chrestensen*, if you focus on its footnote 24, as most people did.

Joe: You all are getting ahead of me again. What did this all-important footnote actually say?

Amy: Here, I’ll read it, since it still forms the basis for the commercial/non-commercial distinction today: “In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does ‘no more than propose a commercial transaction,’ and other varieties. Even if

⁹² *Id.* at 770.

⁹³ *Id.*

the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *Sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely. Attributes such as these, the greater objectivity and hardness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive. They may also make inapplicable the prohibition against prior restraints.”⁹⁴

Pam: Whoa! *That* sounds like it settles our cases – except FLSA II – in *favor* of the constitutionality of the laws we’re talking about.

Alex: Well, I don’t know if I’d go that far, but the “common sense differences,” along with the “verifiability” and “durability” notions have gotten a lot of mileage over the last 20 years.

⁹⁴*Id.* at 771 n.24.

Amy: But not exactly as much as you might think Those notions justified more regulation of commercial speech than of other speech, but the Court didn't let the *Virginia Board* footnote overpower its main body. It remained skeptical especially, of any speech restriction meant to accomplish non-speech goals, and has remained so right up to last term.⁹⁵ In 1980, the Court officially announced a middle ground test for commercial speech. In evaluating a New York law prohibiting the electric company from running ads promoting electricity consumption in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,⁹⁶ the Court set out an explicit four-part test for evaluating commercial speech restrictions.

Joe: Wait. Hasn't that test been modified quite a bit? Is it still good law?

Amy: Well, it was modified slightly a couple years ago in the *Florida Bar* case,⁹⁷ but that was really only semantic, and the crux of the test survived. Last year, in *44 Liquormart v. Rhode Island*,⁹⁸ a severely divided Court left the status of the Central Hudson test in a state of confusion, but if you count noses, the test is still hanging on by a thread.

Shady: Just for the sake of those who haven't reviewed as much as you guys have, can we go back and get the Central Hudson test itself on the table?

⁹⁵ See *44 Liquormart v. Rhode Island*, 116 S.Ct. 1495 (1996).

⁹⁶ 447 U.S. 557 (1980).

⁹⁷ See *Florida Bar v. Went For It, Inc.*, 115 S.Ct. 2371 (1995).

⁹⁸ 116 S.Ct. 1495 (1996).

Bob: Sure. I'll lay it out. The Court set up four prongs. The first is the inquiry about the type of speech involved. If the speech concerns unlawful activity, or is misleading, the First Amendment does not protect it.⁹⁹ If it concerns lawful activity and is not misleading, the Court moves on to look into the asserted government interest.¹⁰⁰ If the government interest is substantial enough, the third and fourth prongs inquire whether the law "directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest."¹⁰¹

Shady: To make it a little simpler, let me quote a law review article I read recently. As the authors put it, "In other words, assuming that the speech does not relate to some unlawful activity and is not inherently misleading, the government may restrict commercial speech only to achieve a substantial interest, and then only to the extent necessary?"¹⁰²

Bob: That's useful, but doesn't it sort of mush together the last two prongs? I mean, don't courts have to be careful in assessing "the extent necessary," to look into both the extent of "direct advancement" of the government interest *and* whether it is more extensive than necessary.

Shady: Fair enough. Don't forget the "direct advancement" part.

Pam: OK. So the tobacco regs and the health-claims regs get this intermediate-type scrutiny and we just apply it and see what happens.

Alex: Easier said than done. *Much* easier. If you look how the Court

⁹⁹ *See id.* at 566

¹⁰⁰ *See id.*

¹⁰¹ *Id.*

¹⁰² Lars Noah and Barbara A. Noah, "Liberating Commercial Speech: Product Labeling Controls and the First Amendment," 47 Fla. L. Rev. 63, 77 (1995).

has applied the test over the years, you realize that they can basically do whatever they want with it.¹⁰³

Amy: Yeah, I mean where's the distinction between prohibiting commercial billboards while allowing certain sorts of non-commercial billboards (which the Court disallowed),¹⁰⁴ prohibiting advertising of casino gambling directed at a specific population (which the Court allowed),¹⁰⁵ prohibiting distribution of commercial newsletters on newsracks placed on public property (disallowed),¹⁰⁶ prohibiting advertising of state lotteries on broadcast media (allowed),¹⁰⁷ and prohibiting advertising of liquor prices (disallowed)?¹⁰⁸

Pam: Well, doesn't it just depend upon the facts of each case – the law at issue, the alternative approaches available, the government interest involved, etc.? It's a test to be applied. Different cases will come out different ways. For the sake of predictability, would anyone prefer a more strict rule, which would be bound to either over-protect or under-protect speech in the long run?

Amy: How do you over-protect speech?

Pam: Well, look at the first prong of the test. Or look at our Tommy Hussein hypo. You overprotect speech if the marginal benefits of having open communications is far outweighed by the government interest involved.

¹⁰³See *id.* at 78; see also Alex Kozinski and Stuart Banner, "Who's Afraid of Commercial Speech," 76 Va. L. Rev. 627, 631 (1990) (mounting a rather caustic attack on the malleability of the Central Hudson test and the unpredictability of cases to be decided under it); Michael W. Field, "On Tap, 44 Liquormart, Inc. v. Rhode Island: Last Call for the Commercial Speech Doctrine," 2 Roger Williams U. L. Rev. 57, 59 - 61 (1996) (discussing 16 year history of Supreme Court uncertainty about commercial speech and inability of litigants to predict outcomes).

¹⁰⁴See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

¹⁰⁵See *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986).

¹⁰⁶See *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993).

¹⁰⁷See *United States v. Edge Broadcasting*, 509 U.S. 418 (1993).

¹⁰⁸See 44 *Liquormart*, *supra* n.95.

Amy: But I just don't think you can underestimate the importance of the free speech interest. As Justice Blackmun says, the Constitution itself does the balancing for us.¹⁰⁹ Justice Brennan made the same point in the gambling advertising case, *Posadas*.¹¹⁰

Jon: That was in dissent though, right?

Amy: Yeah, but it was brilliant. Rehnquist had come up with a totally inane "greater includes the lesser rationale" for the restriction at issue there. He said, "It would... surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising."¹¹¹ Brennan responded that the "constitutional doctrine' which bans Puerto Rico from banning advertisements concerning lawful casino gambling is not so strange a restraint – it is called the First Amendment."¹¹²

Mark: Oh come on. That's sort of a cute retort, but you know it just begs the question. I mean just saying "it's unconstitutional; see the First Amendment," doesn't solve anything.¹¹³ The First Amendment has to be interpreted by the Court, and the Court has said there's a meaningful distinction

¹⁰⁹ See *supra*, n.93 and accompanying text.

¹¹⁰ See *supra*, n.105.

¹¹¹ *Posadas*, *supra* n.105, at 346.

¹¹² *Id.* at 355, n.4 (Brennan, J., dissenting).

¹¹³ *cf.* Alex Kozinski and Stuart Banner, "Colloquy: The First Amendment In A Commercial Culture Response: The Anti-History and Pre-History of Commercial Speech," 71 Tex. L. Rev. 747 (1993) ("The First Amendment poses a difficult practical problem: It is quite short and does not explain what counts as 'speech,' what counts as 'freedom,' or what counts as 'abridging.' To fill the chasm between the broad rule and its application to specific cases, a great deal of thinking has to be done.").

between commercial and non-commercial speech. *And*, despite misgivings being articulated by specific justices throughout the years, the Court has stuck to that distinction, right up through their latest commercial speech case.¹¹⁴

Alex: Yes, but does the distinction make any sense? That's what all this should turn on.

Mark: Well then let's look at where it came from.

Amy: Thin air. The *Chrestensen* Court literally made it up out of whole cloth.¹¹⁵

Mark: You're so knee jerk, Amy. That may be true, but modern commercial speech doctrine really only starts with *Virginia Board*, so we can at least look at that Court's reasoning for giving commercial speech less protection.

Amy: Oh, that's right. I forgot. "Commonsense differences." Real persuasive.

Mark: Oh, come on Amy. You don't agree that there *are* commonsense differences? I don't mean to get us into a deep philosophical discussion of what it is the First Amendment is really protecting, but don't we just care more about Tommy Hussein's political message than R.J. Reynolds' commercial one?

Amy: Well, there may be some slight differences in importance which are "commonsense" between *purely* political speech and *purely* commercial speech

¹¹⁴See 44 *Liquormart*, *supra*, n.95.

¹¹⁵See Kozinski and Banner, "Who's Afraid," *supra* n.103, at 628 (internal citation omitted): The most remarkable aspect of [*Chrestensen*] is that it cites no authority. None. Instead, the opinion, disposes of the issue in one sentence: 'We are... clear that the Constitution imposes no... restraint on government as respects purely commercial advertising.' And so was born the commercial speech doctrine. Without citing any cases, without discussing the purposes or values underlying the first amendment, and without even mentioning the first amendment except in stating *Chrestensen's* contentions, the Court found it clear as day that commercial speech was not protected by the first amendment.

– as the *Virginia Board* Court put it, speech which does no more than communicate the message, “I will sell you the X... at the Y price.”¹¹⁶

Mark: OK, then.

Amy: Well, but the problem comes in when you recognize that the world is never that black and white. Almost all speech is somewhere stuck in the gray, middle area between pure commercial and pure political speech. So how do you know what kind of protection the speech gets? I mean there’s something in itself unconstitutional-sounding about the idea of the Supreme Court determining how to classify speech, even if they had the capacity to do it.¹¹⁷ And how *would* they do it? The lines just blur so easily.¹¹⁸

Joe: I think I need some examples here. Because it seems to me that you can pretty much tell when speech is commercial.

Amy: Well, here’s an example. How about a disease-specific health claim on the label of a food product?

Pam: Well, but isn’t that pretty clearly commercial? We all know Kellogg’s doesn’t print the NCI report on the side of All-Bran boxes for its health, so to speak. It puts it there to sell cereal.

Amy: And you want the government looking into the true motive of one who puts forth a public service message?

Pam: But we just *know* what the motive is. The court or the FDA or whoever doesn’t actually have to *look*.

¹¹⁶See *Virginia Board*, *supra* n.89, at 761.

¹¹⁷See Helen McGee Konrad, “Eliminating Distinctions Between Commercial and Political Speech: Replacing Regulation with Government Counterspeech,” 47 Wash. & Lee L. Rev. 1129, 1139 - 40 (1990).

¹¹⁸See *generally*, Kozinski and Banner, “Who’s Afraid,” *supra* n.103, at 638 - 48.

Amy: OK. Let's make it a little harder. Consider this ad sponsored by Philip Morris which I've passed around, which simply reminds the reader of the importance of the Bill of Rights in our nation's history, and rather than selling anything, offers to give copies of the Bill of Rights away for free.¹¹⁹ If anything, that sort of speech sounds rather political. But we all know who Phillip Morris is, and if we have any knowledge of government regulations like the ones we're discussing today – or of the milder ones in effect at the time this ad ran, banning cigarette ads on broadcast media¹²⁰ – then we have a pretty good idea what the true motivation for the ad is. Does that make it fair to call the speech commercial?¹²¹

Pam: That's tricky. But I think it would be fair to say that's not really commercial speech and that it therefore deserves more full protection.

Alex: More full?

Pam: Yeah, well maybe if we've got a continuum from purest political speech to purest commercial, we can set up a continuum of amount of protection.

Alex: Well I guess that's not so crazy, but it sounds a little difficult to administer.

Amy: And it presumes that there's a good reason to protect commercial speech less.

¹¹⁹The ad was printed in L.A. Times, Dec. 7, 1989 at D20.

¹²⁰See 15 U.S.C. §§ 331 - 39.

¹²¹Amy gets her argument, and her specific example, from Kozinski and Banner, "Who's Afraid," *supra* n.103, at 645 - 46. That article contains further compelling illustrations of her point.

Pam: What happened to verifiability and durability?¹²²

Amy: Alright. Let's talk verifiability of disease-specific health claims. Isn't the whole reason the FDA says they can ban them because they're concerned that the claims might be misleading precisely because they are not yet scientifically verifiable? If the whole reason we presume speech should be entirely free in political matters is because no single politician can have a monopoly on truth – because no political claim is verifiable, why doesn't the same hold for unverifiable scientific claims. How is: "Vote for me and the economy will get better" any different from: "Some studies have shown that if you eat this product, you're less likely to get cancer?"¹²³

Pam: Because people just accept that it is somehow more important that political speech be free and open.

Amy: But what *really* matters more to the average person's everyday life? What they eat or who is sitting in any particular political office?

Bob: Well, if Saddam Hussein's son is sitting in the *Oval* Office, it may matter a lot.

Amy: And, the FDA argues, it may matter just as much if people eat food thinking it will prevent them from getting a certain disease when that product is actually unhealthy, or if people – particularly young people – use a certain drug for recreational purposes because they think it will make them cool, like Joe Camel or the Marlboro man, when in fact it will cause them to

¹²² See *Virginia Board*, *supra* n.89, at 771 n.24; see also *supra*, nn. 93 - 95 and accompanying text.

¹²³ Cf. Martin Redish, "Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech," 43 Vand. L. Rev. 1433, 1437 (1990) (arguing that claims such as Amy's last example should get full First Amendment protection).

die young.

Alex: But something's backwards here. Now you're saying that because the government deems an issue important, that's all the more reason they can restrict talk about it?

Amy: Well, that's the irony, as far as I'm concerned. But we were supposed to be talking about verifiability. My point is simply that so-called "commercial" speech is often no more verifiable than political speech and thus that that notion can't justify diminished protection for supposed commercial speech.

Jon: OK. What if I temporarily concede that the verifiability notion doesn't work so well? What about the durability claim? Isn't the notion that, due to profit motive, commercial speakers are less likely to be entirely deterred by government regulation than are non-commercial speakers compelling logic?

Amy: I think not. I don't know of a reason to think that fully protected speech with no profit motive – be it artistic, political, or even religious speech – would be any less durable in lots of instances than speech motivated by profit. By the same token, we already fully protect plenty of speech forms which do have profit as a major motivator behind them. Filmmaking is a good example. Or news reporting.¹²⁴

Alex: Or you can look at this from the reverse direction. Regulations like the tobacco and health-claims ones we're talking about here may be so pow-

¹²⁴Once again, Amy has been reading Kozinski and Banner, "Who's Afraid," *supra* n.103, at 637; *see also* Konrad, *supra* n.117, at 1138 - 39.

erful that they actually do deter the speaker, despite the speaker's obvious profit motive in speaking. Kellogg's simply will not be able to say its All-Bran fights cancer if the FDA doesn't let them. That message will very likely simply not get out there. Or if it does, through more protected forms of speech – Kellogg's writes a book about it, or mails out pamphlets or something – it will still not reach nearly as wide an audience as the speech would if unregulated.

Amy: And of course what you're saying clearly points up the absurdity of this whole thing. The form a piece of information takes determines its fate? How are we about to distinguish Kellogg's writing that its product combats cancer right on its box, from Kellogg's running an advertisement on TV or in a newspaper saying the same thing, from Kellogg's CEO publishing a book about the healthfulness of products which Kellogg's happens to make, from the CEO's writing a letter to the editor of a newspaper about All-Bran's qualities, from the President of the National Cancer Institute talking about the benefits of eating bran on the Today Show? What if Kellogg's paid the NCI president's expenses for his travel to New York? Doesn't it all just show we're slicing the baloney too thin?

Alex: *And*, to get back to durability. In these situations in which the whole point of regulating the speech is that the government thinks it would be dangerous for the public to receive the information the speaker would like to convey, why is the fact that the speech might be durable a reason to justify regulating it. The Court's saying, "If we know regulation will be futile in actually defeating the message, then it's OK to regulate the speech." That certainly

makes no sense when the only justification we have for regulating the speech is that we want it to go away.

Bob: And that's especially true when you look at the Central Hudson test's *requirement* that a speech restriction be effective in serving the government's substantial interest.¹²⁵

Roger: OK. Alright. I get the picture. You guys think the distinction can't be justified. But what do you do about the fact that the Supreme Court just hasn't agreed? Last I checked, the Central Hudson test *is* still good law. That means commercial speech gets a different level of scrutiny from non-commercial speech.

Jon: What we do about it is try to analyze these things under Central Hudson. Unfortunately, that requires us to know where the Central Hudson test really stands today?

Shady: I guess it does, and as some of us who have been reading U.S. Law Week this year know, where it stands is basically up in the air. Anyone want to fill us in?

Bob: Sure. I think I can take this one. Apparently, the current Supreme Court just doesn't know what to do with commercial speech. Last spring, they handed down an opinion which seemed like it almost could have set things straight, but the Court was so sharply divided that the law is probably even more confused than it was before the Court took the case.¹²⁶ The state law at issue banned price advertising of alcoholic beverages. Everyone on the Court

¹²⁵See *supra*, nn. 99 - 102 and accompanying text (discussing the Central Hudson test).

¹²⁶See 44 *Liquormart*, *supra*, n.95.

agreed on one thing: the law was unconstitutional. But the justices all came to that conclusion in very different ways. Essentially, here's how it broke down: Justice Thomas declared that the Central Hudson test should simply be abandoned – at least for those situations in which the asserted government interest is an interest in keeping legal users of a product from receiving information about it. I emphasize that he restricted the notion to government efforts directed at curbing *legal* activities because it may become relevant later.¹²⁷

Alex: But you're saying no one else was willing to go as far as Justice Thomas in throwing out Central Hudson?

Amy: And even he wouldn't go all the way. So the result is that *no one* on the Court is yet willing to put commercial speech on exactly the same plane as non-commercial, despite Justice Thomas' recognition of the silliness of the distinction.¹²⁸

Bob: That's essentially the upshot. Anyway, Justice Stevens wrote the "controlling opinion," for a shifting plurality of anywhere from three to six justices. He agreed with the tenor of Justice Thomas' opinion – that truthful non-misleading speech about lawful activity should not lightly be deterred for other government motives. As he put it, "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for

¹²⁷See *id.* (Thomas, J. concurring in part and concurring in the judgment).

¹²⁸See *id.* at 1517 - 18 (Thomas, J., concurring in part and concurring in the judgment) (interior citations omitted):

The Court has at times appeared to assume that 'commercial speech could be censored in a variety of ways for any of a variety of reasons because, as was said without clear rationale in some post-Virginia Pharmacy Bd. cases, such speech was in a 'subordinate position in the scale of First Amendment values, or of 'less constitutional moment.' I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'non-commercial' speech.

what the government perceives to be their own good.”¹²⁹ Justice Stevens just didn’t go as far as Justice Thomas. Preserving the core of the Central Hudson test – its four prongs – he simply concluded that when it comes to a state regulation which “entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands,”¹³⁰ and therefore a more strenuous form of Central Hudson review should be applied.¹³¹ According to Justice Stevens, the state’s law was not effective “to a material degree” in achieving its stated goal,¹³² and was more extensive than necessary.¹³³ Thus it failed this enhanced Central Hudson scrutiny test.

Jon: Wait a minute. It sounds like the Court has done a huge about face in just 10 years. I mean, in *Posadas*, the Court was willing to let the legislature make any reasonable choice as to how best to serve its substantial interest in reducing gambling among Puerto Rico’s residents.¹³⁴

Bob: Well, remember, this was only a plurality opinion, but the plurality did soundly reject all of the reasoning of *Posadas*,¹³⁵ including the notion Amy was criticizing earlier that the supposedly “greater” power to outlaw gam-

¹²⁹116 S.Ct. at 1508.

¹³⁰*Id.* at 1507 (Stevens, J., joined by Justices Kennedy and Ginsburg).

¹³¹*See id.* at 1508 (Stevens, J., joined by Justices Kennedy, Souter and Ginsburg).

¹³²*Id.* at 1509 - 10.

¹³³*See id.* at 1510 (“It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the state’s goal of promoting temperance.”).

¹³⁴*See Posadas, supra*, n.105, at 344 (determining that it was “up to the legislature” to decide among the various alternatives – suppressing advertising, engaging in educational counterspeech, or banning gambling altogether).

¹³⁵*See 44 Liquormart*, 116 S.Ct. at 1511 (“[W]e conclude that a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate.”).

bling must necessarily include the “lesser” power to prohibit advertising promoting gambling.¹³⁶

Amy: And didn’t everyone on the Court basically agree with that rejection?

Bob: It certainly seems like it, if it’s not crystal clear.¹³⁷

Alex: So I assume – unless someone’s willing to take on all nine of the sitting Supreme Court justices – that we can all agree that even if FDA had the power to ban tobacco use and sale entirely, we would still have to give at least some form of Central Hudson scrutiny which is not wholly deferential.

Pam: I’m not saying I’m ready to disagree with nine such formidable opponents, but I could use a little more persuading. And might I add that I certainly wouldn’t be going out on *too* much of a limb in buying that reasoning. I mean, it’s not as if some two-bit law professor made that argument in the first place. Six Supreme Court justices – including three who are sitting on the current Court¹³⁸ – bought into that logic.

Alex: Well the key is that the syllogism sounds nice – and even obvious. Of *course* greater powers include lesser ones. The problem comes in the assumption that there is anything less intrusive about outlawing speech than about outlawing conduct. First off, the First Amendment itself is pretty good

¹³⁶See *id.* at 1512 (finding this notion “inconsistent with both logic and well-settled doctrine,” and “reject[ing] the notion that words are necessarily less vital to freedom than actions.”).

¹³⁷See *id.* at 1513 (“As the entire Court apparently now agrees, the statements in the *Posadas* opinion on which Rhode Island relies are no longer persuasive.”); *id.* at 1522 (O’Connor J., with whom Rehnquist, C.J. and Souter and Breyer, J.J. joined, concurring in the judgment) (noting that since *Posadas* the Court has consistently applied a more strict form of scrutiny than had that Court).

¹³⁸Pam is referring to Chief Justice Rehnquist, Justice Stevens, and Justice O’Connor.

evidence that this country considers the power to ban speech a pretty “great” power indeed. And second of all, there’s sort of an accountability problem with speech bans. The fact of the matter is that legislatures may often not have enough of a political mandate to ban certain activities – smoking is a perfect example. To ban speech about these activities as a way to do what the people really don’t want you to do is highly undemocratic, to say the least.¹³⁹

Pam: But maybe FDA actually does have a political mandate to regulate cigarette advertising, even if the public is not ready to see cigarettes banned entirely. As Roger pointed out in describing the regs, if there *hadn’t* been popular support for them, it might have cost Clinton the election.¹⁴⁰

Alex: No one’s suggesting that there *isn’t* popular support for the measures we’re discussing here. We’re only discussing whether they’re unconstitutional – an entirely different inquiry.

Pam: But you were just saying that government can’t always ban speech even if they could ban conduct, because it’s undemocratic. I’m saying that in some cases, banning speech may be the democratic thing to do.

Alex: Yes, but not if it’s unconstitutional. And my point is that the Constitution expresses a preference for open debate on all issues – for free speech – so that the public can make informed and free choices on all matters in life. The fact that you can point to a popular consensus on a particular issue – a consensus which says we can do an end run around that constitutional principle – is not persuasive. My point is just that censoring speech is rarely a “lesser”

¹³⁹See 44 *Liquormart* at 1511; see also *Posadas*, *supra*, n.105, at 351 (Brennan, J., dissenting).

¹⁴⁰See *supra* nn. 63 - 64 and accompanying text.

infringement because it means debate on the issues of the day is stifled.

Amy: Or we can put it really simply like this: The Constitution expresses a preference for free flow of information. It doesn't express nearly as strong a preference – if it expresses one at all – for freedom to gamble or smoke or even to be able to buy healthful food.

Shady: Alright. I think you guys are going off on a little too much of a tangent on *Posadas*. Pam's right to say she has some legitimate arguments, but Alex has some convincing ones, too, and a seemingly unanimous Supreme Court is on his side, so why don't we just assume that the *Posadas* logic is no longer good law and move on?

Jon: That would be fine with me, but I'm still a little shaky on where we stand with the Central Hudson test today. You guys were saying that Stevens only had a plurality for "enhanced" Central Hudson scrutiny. What did the rest of the Court think?

Bob: Well, Justice O'Connor, joined by Rehnquist, Souter, and Breyer wrote a short opinion simply applying the Central Hudson test – presumably without modification – to the Rhode Island law. Deciding the case on the fourth prong of the test, Justice O'Connor had no trouble determining that Rhode Island's ban on price advertising was more extensive than necessary since there was no "reasonable fit" between its means and its ends.¹⁴¹

Jon: So where does that leave us? It seems as if Central Hudson is still the test, but that we just don't know how strictly to apply its prongs –

¹⁴¹See 44 *Liquormart* at 1521 - 22 (O'Connor, J., concurring in the judgment).

particularly the last two, right?

Amy: And it seems pretty clear that the first prong is as strong as ever, since not even Justice Thomas was willing to say misleading speech, or speech about illegal activity, gets any protection.

Roger: And isn't that what's really relevant here – I mean in our two hypos?

Joe: How do you figure?

Roger: Well, in both our examples, the FDA merely needs to make the claim that it's regulating misleading speech, or speech advocating illegal activity and the First Amendment simply is not a bar to their regulations.

Bob: And that's exactly what the FDA has tried to do, in both cases. If you look, for example at the statement FDA put in the Federal Register when it announced the final rule on disease-specific health claims,¹⁴² one of their main arguments for why the regulation doesn't violate the First Amendment – besides the obvious, if unavailing claim that Congress directed them to regulate –¹⁴³ is that because health claims have been found, in the past, to often be misleading, Congress reasonably labeled such claims “inherently misleading” and therefore that they are not protected by the First Amendment.¹⁴⁴

Shady: Now you see why I was pushing you guys with the similar ar-

¹⁴²58 Fed. Reg. 2478 (January 6, 1993).

¹⁴³*See, e.g.*, 58 Fed. Reg. at 2526; *see also* 58 Fed. Reg. 2302, 2396 (January 6, 1993) (making a similar claim relating to nutrient content claims regulations); Noah and Noah, “Liberating Commercial Speech,” *supra* n. __ at 89 (Although the FDA apparently took comfort in the fact that Congress specifically directed it to promulgate many of these new rules, this cannot insulate the regulations, or for that matter, the statute itself from searching judicial scrutiny.”).

¹⁴⁴*See* 58 Fed. Reg. at 2526 (January 6, 1993).

gument regarding FLSA II.¹⁴⁵

Amy: Yeah, but how can Congress categorically label a type of speech “inherently misleading?” That’s just utterly unfair to the truly honest food-makers out there who would never use misleading claims, but who wish to communicate valuable information to their customers, which will be pertinent to those customers’ health – even if it the food-maker does simultaneously have a profit-motive in making the claim. At least as applied to that type of manufacturer, I would say a blanket speech ban with required pre-approval for any speech is blatantly unconstitutional.

Bob: But the Supreme Court *has* said that when speech “is inherently misleading *or when experience has proved that in fact such advertising is subject to abuse,*” regulation may be appropriate.¹⁴⁶

Amy: Yes, I know. And the FDA even pointed to that language exactly in trying to justify the health claims restrictions.¹⁴⁷ But the Supreme Court, even in the *R.M.J.* case you’re citing, was not willing to say that speech which is inherently misleading to that extent – that is, speech which has the potential to mislead and which past experience has shown often is misleading – is entirely undeserving of First Amendment protection.¹⁴⁸ And that’s what the FDA missed entirely.

Bob: So you’re saying that speech of this inherent-potential-to-mislead

¹⁴⁵ See *supra*, text accompanying nn. 13 - 18.

¹⁴⁶ *In Re R.M.J.*, 455 U.S. 191, 203 (1982).

¹⁴⁷ See 58 Fed. Reg. at 2526.

¹⁴⁸ See *In Re R.M.J.* at 203 (holding restrictions of the type before the Court in that case – which restricted advertising by attorneys and which the Court found to be of the type past experience had shown carried a serious potential to mislead – could nonetheless be “no broader than reasonably necessary to prevent the deception.”).

type still has to get Central Hudson scrutiny?

Amy: I'm not sure the Court has said as much, and the language in the Stevens primary opinion in *44 Liquormart* only indicates categorically that speech which is about unlawful activity or is misleading doesn't get First Amendment protection. That sort of leaves open what happens to speech that has only "inherent-potential-to-mislead," even where past experience has shown that that potential often is realized. But I think First Amendment principles require that such speech get not only Central Hudson scrutiny, but the more searching Central Hudson scrutiny of the type Justice Stevens said restrictions on speech directed at keeping people in the dark for their own good gets.

Alex: Well if that's the case, doesn't that seal the tobacco case, too?

Bob: How so?

Alex: Well, isn't it really the same case, but on the "unlawful" rather than the "misleading" half of the Central Hudson first prong?

Amy: I think you're right. The tobacco industry wants to argue that its regulations only restrict speech exhorting the observer of the speech to engage in unlawful activity – that is, ads which try to get kids to smoke, when smoking is already illegal for those under 18 in all fifty states, and is now a federal offense as well.

Alex: But, just as not all health claims actually *are* misleading, not every cigarette ad concerns unlawful activity. And in fact, one might even argue that *every* cigarette ad is simultaneously directed at some lawful and some unlawful activity. So the question becomes how FDA can possibly regulate such

speech, when it always has two goals – one legal and one illegal. Does the First Amendment apply or not?

Jon: I think you're on the right track, Alex, and I definitely agree with you and Amy about the parallels between the two sets of regs we're talking about, but I think the Supreme Court has already answered your question about what to do when speech restrictions which are meant to protect minors have a simultaneous effect on adults. The Court has stated on numerous occasions that the First Amendment will not allow the government to "reduce the adult population... to... only what is fit for children."¹⁴⁹ This was the holding, for example, of the 1989 phone sex case. The Court determined that restricting "adult" telephone services "has the invalid effect of limiting the content of adult telephone conversations to what is suitable for children."¹⁵⁰ These cigarette restrictions do the same thing. Adults never get the benefits of the color ads, or ads with sound, or sports sponsorships – whatever those benefits are, which the First Amendment directs is not for government to decide.¹⁵¹

Alex: Well I'm inclined to agree with you, but that notion doesn't really add anything to "enhanced" Central Hudson scrutiny. FDA just asserts a substantial interest in keeping information relating to an unlawful activity

¹⁴⁹Butler v. Michigan, 352 U.S. 380, 383 (1957).

¹⁵⁰Sable Communications v. FCC, 492 U.S. 115, 131 (1989). *See also* Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 73 (1983) (applying this logic in rejecting a ban on unsolicited mailing of contraceptives); Jacobellis v. State of Ohio, 378 U.S. 184, 195 (1964) (applying same notion to defendant's claim that prosecution for exhibiting an allegedly obscene film violated the First Amendment); *cf.* FCC v. Pacifica Foundation, 438 U.S. 726, 750, n. 28 (1978) (upholding FCC's order fining radio station for obscene broadcast, in part because the order did not have the effect of reducing the adult population to what is fit for children, because the same recording was readily available elsewhere).

¹⁵¹*See Virginia Board, supra*, n.89.

(smoking by kids) away from those who have the potential to engage in that activity (kids). Then the court merely has to look very closely at whether these particular regulations directly advance that end and whether there is a reasonable fit between means and ends.

Bob: That all would make sense, but it's not really how the Central Hudson test, as currently articulated works. You've really skipped over prong one – or at least made the assumption that speech must be 100% misleading or 100% about unlawful activity in order to get tripped up by it, which the Court has never really said.

Alex: Fair enough. But I'm ready to advocate that they *should* say it.

Amy: And I'm ready to go one step further. The problem with prong one, at least as regards *misleading* speech, is that it will *always* be impossible to label speech misleading ex ante. *Any* time you categorize speech – any time you say: "All speech of X type has the inherent potential to mislead and is therefore banned," you're bound to have banned some speech which, if allowed, would have turned out not to be misleading.

Pam: But in this case, the FDA has laid out a fair definition of the type of speech that is and is not misleading. They've said – taking a definition which actually comes originally from Congress – that any health claim not supported by "significant scientific agreement" is inherently misleading.

Jon: And you want the FDA – or Congress – defining "truth" for us in an area in which we are often unlikely to find *any* objectively verifiable "truth"? Think of the consequences of that. What will FDA – or the FTC – be regulating

next in the name of its being “misleading.” Have you *ever* seen an advertisement that doesn’t mislead, if you construe that term broadly. Budweiser leads you to believe drinking beer will make you attract beautiful women. Revlon leads you to believe you can look like Cindy Crawford if you wear their make-up. I could go on and on. The same holds for advertising which has only the *potential* to promote unlawful activity.¹⁵²Pam: Maybe in the cases of food labeling and smoking, it’s just too dangerous to the public health to have it any other way.

Shady: Aha! Now we’re getting back to where I started this. Even if some of you are right, and FDA can’t get out from First Amendment scrutiny under Central Hudson’s first prong, and even if the very fact that this is commercial speech is not enough to make a difference – that is, if we accept that commercial/non-commercial is a distinction without a difference, might the mere substantiality of the government interest justify these regulations, as it can with any constitutional infringement?

Amy: But now we’re back where we started from with the Hussein/FLSA II example. I thought we demonstrated pretty clearly why even that danger didn’t justify the FLSA II restrictions – which were, after all, patterned after the tobacco and health claims regs. So if the misleading nature or unlawful subject matter of the speech doesn’t make a difference, and the fact that it’s

¹⁵²See American Advertising Federation, “FDA Talking Points,” on file with author:

Censorship begins, but does not end, with tobacco. The FDA could consider censoring the truthful advertising for any and all food products, cosmetics, alcoholic beverages, coffee, sugar, fats, cholesterol, salt, medicines and medical devices. Activists will urge other agencies to censor advertising for such legal products and services as firearms, motor vehicles, abortion services, violent or sexually explicit movies, television programs, books and any other unpopular product or service.

commercial doesn't make a difference, then there's just no difference, and these regs fall with FLSA II.

Pam: Of course, those are very big "Ifs," Amy.

Joe: And you forgot a third one. Your argument is valid only "if" the threat posed by Tommy Hussein's candidacy is equally as serious or more serious than the threats posed by teenage smoking and unsubstantiated health claims.

Amy: True, but do you really want to argue about that?

Joe: I only point it out because the *FDA* might want to make that argument, judging from their statements in the Federal Register when they announced the final health claims rules.¹⁵³ There, the FDA pointed to the recognized strong government interest in regulation of the food supply and likened that interest to the government's interest in regulating other types of economic activity – securities exchanges and the practice of law provide two good examples. The notion they appeal to is that "The Government 'does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.'"¹⁵⁴ And, they add, "Indeed, regulation of food labeling would be impossible if the government could not restrict speech."¹⁵⁵

Amy: Yeah, and they even note that the FDA can seize *books*, as long as they're in the health food store, where they can be construed as "labeling"

¹⁵³ See 58 Fed. Reg. 2478.

¹⁵⁴ *Id.* at 2525, *quoting* *Ohralik v. Ohio Bar Association*, 436 U.S. 447, 456 (1978).

¹⁵⁵ *Id.*

the products in the store, and not in the library.¹⁵⁶ So what they're really saying – and what you're saying, Joe – is that FDA is above the Constitution – that their whole mission – keeping America's food, drug, cosmetic, and medical device supply safe, healthy, and effective – is *so* important, that the First Amendment just falls by the wayside.

Joe: You can look at it that way if you want. And you could say the same about the FTC. Or the SEC, for that matter, and the courts seem to have bought it.¹⁵⁷

Mark: But there's got to be more to it than that, too. It really does have to have something to do with the fact that whatever speech is censored by the regulation of the sorts of economic activity we're talking about – lawyering, selling securities, selling food, etc.– is regulation of commercial speech. The problem comes in because we all recognize the very legitimate government interest in regulating these economic activities, where in reality, speech – albeit commercial speech – is an integral part of those activities. So my point, I guess, is that recognizing government power to regulate the economic activity necessarily means recognizing government power to regulate the speech which is such an integral part of that economic activity. All we have to do – and this is what Justice Stevens was getting at in *44 Liquormart* – is to make sure that the government really is only regulating speech as part of its need to regulate the

¹⁵⁶See *Id.*, citing U.S. v. 8 Cartons, Containing Plantation The Original... Molasses, 103 F. Supp. 626, 628 (W.D.N.Y. 1951) and U.S. v. Article of Drug, 32 F.R.D. 32 (S.D. Ill. 1963).

¹⁵⁷See *Ohralik*, *supra*, n.154 (upholding restrictions on lawyer's solicitation of business); SEC v. Wall Street Publishing Institute, 851 F.2d 365, 373 ("If speech employed directly or indirectly to sell securities were totally protected, any regulation of the securities market would be infeasible – and that result has long since been rejected.").

economic activity generally, and not for some other motive. If the regulation meets that requirement, it's OK.

Joe: And then would you even say you can look at the Central Hudson test as a way of making sure the only thing really being regulated is the economic activity, and the speech incident to it?

Mark: Well, I'm not sure the Central Hudson test can actually be read to say all that, but I do think the Court might be going in this direction, judging from *44 Liquormart* and most of the Court's hostility to regulation – even of commercial speech – when the regulation is meant to keep information from people to get them to behave the way the government (paternalistically) prefers – as opposed to being merely a “consumer protection” measure.¹⁵⁸

Jon: Wait. So if I read you guys right, you're now saying that the distinction here *does* turn on the fact that the speech being regulated is commercial?

Mark: Well, that's part of it, I think. But I think what I'm saying is a little more strict than the commercial/non-commercial distinction. I'm saying only *some* types of regulation of *some* types of commercial speech gets lesser scrutiny than does other speech. Yes, the speech must be commercial, but that's really because to be regulable, the speech must be incident to otherwise regulable commercial activity. *And* when the government does regulate that speech, it must be doing it for the more general consumer protection purposes for which government – particularly the agencies we're talking about (FTC, SEC, FTC,

¹⁵⁸See *44 Liquormart*, 116 S.Ct. at 1507 (Stevens, J.)

FDA, the state bar association...) – exist, and not for some ulterior motive, like reducing alcohol consumption, as in *44 Liquormart* or the *Coors* case,¹⁵⁹ or like discouraging gambling, as in *Posadas*.

Joe: Or like discouraging smoking?

Mark: Yeah. I think the point is that regulations like the tobacco regs just don't fit into the little exception I'm really saying needs to be carved out here. That doesn't mean I'm yet 100% convinced that the tobacco regs are unconstitutional, only that they don't fit into my exception.

Joe: And the health claims?

Mark: Well that's trickier. It *does* seem as if FDA's doing that with no ulterior motive and purely in the interest of consumer protection. So maybe they're right that the fact that they have to regulate speech as part of their regulation of the economic activity of food-selling shouldn't doom the endeavor.

Joe: But... ?

Mark: *But*, it still doesn't seem fair for them to be stifling messages the public has an interest in hearing...

Jon: ... or for the government to be determining "truth" with regard to scientifically uncertain issues. I mean it really is different from the government regulating objectively false advertising or fraudulent securities offerings.

Amy: I think I agree with you there Jon, and you know, I think I may reluctantly be coming around to see what you guys are getting at, more gener-

¹⁵⁹Rubin v. Coors Brewing Co., 115 S.Ct. 1585 (1995) (invalidating federal law forbidding disclosure of alcohol content in the labeling of beer, supposedly for the government purpose of discouraging 'strength wars' among brewers).

ally. I'm not fully sure I buy it, but I'm willing to say I'll think about it. It's at least intriguing.

Alex: But it still doesn't definitively solve our cases as far as I'm concerned. I mean, even if we buy your exception, we still have to make sure we're not unnecessarily chilling speech. *Nothing* can justify that – assuming we emphasize the “unnecessarily” part.

Roger: So you're saying we still need to do the Central Hudson analysis, in any event?

Alex: Yea, because I think it's possible that even if the health claims regulations could conceivably be justified on the type of logic Mark was talking about, they might still be “overbroad”.

Amy: I sure hope we can conclude that, because even if I buy Mark's point, this whole prior restraint thing bothers me a lot.

Mark: Well, unfortunately, I'm not sure it will be so easy to show how these regs fail the Central Hudson test. The government interest is surely substantial, as I think we've more or less agreed.

Joe: You mean just the interest in making sure consumers aren't deceived, or confused?

Mark: Yeah, or to make it concrete, the interest in protecting health by ensuring that the public is not eating too much or too little of a certain substance, based upon false information.

Bob: And there's also an articulable government interest that actually comes right out of the First Amendment. As FDA said in its justification for

the regulation, there's a government interest in ensuring that consumers obtain information necessary to make intelligent decisions – and in ensuring that this information is truthful and not misleading.¹⁶⁰

Amy: Alright. Even I'll agree that there is a substantial government interest in protecting health. But as to Bob's point, I think it's disingenuous, or at least oddly ironic for the government to justify speech restrictions by pointing to the First Amendment. On that logic, President Gore could say FLSA II serves a substantial government interest as well: the First Amendment interest in ensuring that voters receive truthful information about candidates. That would seem fine, but it's horribly dangerous, when the President – or his Committee – is deciding what information is truthful. Do we trust that Gore didn't make up the whole Saddam's son thing? I certainly don't see a good reason to trust the overworked FDA to decide – at least in a timely manner – whether a claim – which is bound to be laden with scientific and statistical uncertainty – is “true”.¹⁶¹

Mark: I guess I agree with you, Amy, but not much has to turn on your point if we all agree there is at least a substantial interest in protecting health. Now, as for the second – or officially the third – Central Hudson prong –

Pam: Wait a minute. Before we get to that, what about just the government interest in making sure that both sides of any debatable issue get out

¹⁶⁰See 58 Fed. Reg. at 2526.

¹⁶¹*cf.* Noah and Noah, “Liberating Commercial Speech,” *supra* n.102, at 96 (“The Agency itself has acknowledged that ‘consumers will lose valuable information’ if truthful health claims are withheld from the public.”)

there. I mean, doesn't the government have an interest in regulating health claims on labels just because the food manufacturer has a monopoly on that forum. If the manufacturer could say whatever it wants, there would be no way for the person consuming the food to evaluate an alternative side of the story. I'm not even talking here about manufacturers making intentionally false or misleading claims. I'm just talking about them making claims on which there is scientific uncertainty. "Some scientists have found...", "Consuming this product may help prevent...", etc. If there are contrary studies, the manufacturer won't tell the consumer about them, but the consumer will have no other realistic and convenient way to hear about them. So doesn't the government have an interest in making sure one side of a story on issues so relevant to everyone's daily life isn't sitting out there?

Alex: That sounds logical enough, but that's exactly what we were talking about with Tommy Hussein, and you sound like President Gore. But we determined, looking at *Buckley v. Valeo*,¹⁶² that the government *can't* level the playing field by simply silencing the one side of the story that would otherwise get out there. They have to find another way to do that, even if it means spending lots of government money on counterspeech.¹⁶³ Or *maybe* an equal time requirement would be OK.¹⁶⁴ But the sort of interest you're articulating could never justify censorship.

Pam: Well, but you've just done the whole Central Hudson analysis there and found it fails prong four. That doesn't mean I didn't articulate a

¹⁶²424 U.S. 1 (1976).

¹⁶³See *supra*, text accompanying nn. 16 - 18.

¹⁶⁴See *supra* nn. 20 - 22 and accompanying text.

legitimate enough government interest to get past Central Hudson's prong two.

Alex: Fair enough, but I'm just saying *Buckley* has already instructed us that if you assert *that* sort of government interest, the First Amendment will never allow you to serve it by censorship.

Pam: But *Buckley* involved political speech.

Alex: True, and that may make a difference, but I just doubt it should. It just seems so obvious that even under Central Hudson – not even the enhanced version from *44 Liquormart* – censorship will never be a reasonable way of leveling the playing field on which speech takes place.

Mark: Alright, I think you guys have pretty much settled that one, or at least you know what the issues are. So as I was saying, regarding the third Central Hudson prong, there can be no doubt that a blanket ban on health claims not previously approved by FDA directly advances the government interest in preventing misleading health claims and thereby protecting the public health.

Amy: But I think there can be a doubt. And that's why I think my earlier point about what the government interest is is relevant.¹⁶⁵ If the government interest is recast as an interest in making sure the American public gets the most accurate information about the disease-preventing and disease-causing aspects of the various elements of the food supply, I don't think we have any evidence that the FDA's methods advance that interest. Perfectly valid claims

¹⁶⁵See *supra*, text accompanying n.161.

– or at least claims which are, on the basis of currently available evidence, more likely than not to be true – are going un-made. That has to be true. It seems obvious even from looking at the sheer paucity of claims the FDA has allowed.¹⁶⁶ So I would argue that the current system may be causing more public deception – in the form of omissions of valid information – than there would be if the FDA did not censor un-approved claims.

Mark: But you can't be sure that's going to be empirically true.

Amy: Maybe not, so that's why I would say there's only one way to find out – the way the Constitution already predetermined is the best way to get at truth: free and open public debate.

Roger: So now we're getting into prong four. You're really questioning whether this is the best way to go about achieving the government's goals, even recast as you articulated them.

Bob: Maybe they are, but remember that that's not really what the fourth prong inquiry is.

Pam: Well, but does anybody know what that inquiry is?

Mark: Well, we do have some good evidence of what at least one court dealing with this exact situation thought it is. In 1995, a Utah district court actually ruled on the constitutionality of the FDA health claims regulations regarding diet supplements, which are really not significantly different for our purposes from the regulations covering health claims about food products.¹⁶⁷

The court held that the regs passed the Central Hudson test easily, and its de-

¹⁶⁶ See *supra*, text accompanying nn. 55 - 56.

¹⁶⁷ See *National Council for Improved Health v. Shalala*, 893 F.Supp. 1512 (D. Utah 1995).

scription of the fourth prong provides a good summary. The court took its lead from the Supreme Court’s 1989 decision in *Board of Trustees of State University of New York v. Fox*,¹⁶⁸ and noted that “it is only required that a “reasonable fit” be achieved between the end sought and the means used.”¹⁶⁹ Quoting further from *Fox*, the court noted, “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, as we have put it in other contexts... a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.”¹⁷⁰ With those parameters laid out, the court had no difficulty finding the health claims regs meet the test.¹⁷¹

Amy: But that was a year and a half ago. A major commercial speech decision has intervened.

Mark: True, and that’s why where the fourth prong is is a little up in the air. The Stevens opinion did seem to reject such a lenient test, pretty clearly, especially when it disparaged *Posadas* so explicitly, since that case really epitomized the lenient enforcement the Court had previously given the fourth prong.¹⁷² And Thomas certainly dislikes *Central Hudson* altogether.¹⁷³ *But*, at

¹⁶⁸492 U.S. 469, 478 (1989).

¹⁶⁹See *National Council for Improved Health* 893 F.Supp at 1520.

¹⁷⁰492 U.S. at 478.

¹⁷¹See *National Council for Improved Health* 893 F.Supp at 1520.

¹⁷²See *supra* nn. 134 - 137 and accompanying text.

¹⁷³See *supra* n.127 and accompanying text.

least four justices didn't *really* express any interest in modifying the test much,¹⁷⁴ and more importantly, we have to remember the distinctions we've already talked about between cases which get the "enhanced" Central Hudson scrutiny and those that don't. It may be that to the extent the health claims regs get any sort of Central Hudson scrutiny, it may *still* be of the more lenient *Posadas/Fox* type the Utah judge applied. And that, as the Utah judge has already told us, it would clearly pass.

Shady: OK. I think you now all see what I meant when I kept saying the First Amendment issues are much more complicated than they appeared at first blush. And once again, we've been unable to reach any clear consensus of what to do, but we at least understand most of the issues. And I think, despite the similarities to FLSA II, most of you are willing to concede that it really *may* make some sense to distinguish the health claims regs from FLSA II. At the same time, I hope it's become clear that it really does take some work to distinguish the cases. If you debunk the commercial/non-commercial speech distinction, as I think you may have effectively done, and if you can't prove that the threat posed by misbranding is worse than the threat posed by Tommy Hussein (which is certainly hard to do), the cases may still be very similar. Courts will have to do a lot to uphold the health claims regs yet keep on the books all the holdings you guys were citing in discussing FLSA II. Now, how does all this apply to cigarettes?

Alex: Well I think we decided a few minutes ago that there really is no

¹⁷⁴See *supra* n.141 and accompanying text.

way to apply anything but Justice Stevens' "enhanced" Central Hudson scrutiny to the tobacco regs, since cigarette ads are always at least partially promoting lawful activity, and because of the Court's restrictions on government regulation which reduces the adult population to what is fit for children.¹⁷⁵

Amy: So basically, we have to look very closely at the regs to determine whether they directly advance, "to a material degree," the government's clearly substantial interest in reducing teen-age smoking, and whether there is...

Bob: Whether there is what? See, that's the problem. Justice Stevens never really defined how to apply the fourth prong in enhanced-Central-Hudson-type situations. He said *Posadas* didn't make sense, and that it wasn't "up to the legislature".¹⁷⁶ And there is some language to the effect that restrictions must be "no more extensive than necessary,"¹⁷⁷ but Stevens also says Rhode Island "failed to establish a 'reasonable fit' between its abridgement of speech and its temperance goal."¹⁷⁸

Roger: And that's exactly what the cigarette industry and the FDA are fighting about down in North Carolina.¹⁷⁹ The plaintiffs want to say that 44 *Liquormart* and other recent commercial speech cases mean that the fourth prong test is relatively strict, and even that it means that when alternatives which do not require speech restrictions are available, any speech restriction is unconstitutional.¹⁸⁰ The FDA, meanwhile, emphasizes that the Court "has

¹⁷⁵ See *supra* nn. 149 - 51 and accompanying text.

¹⁷⁶ 44 *Liquormart*, 116 S.Ct. at 1510 - 11.

¹⁷⁷ *Id.* at 1510.

¹⁷⁸ *Id.*

¹⁷⁹ See briefs filed in *Coyne Beahm*, *supra* n.62.

¹⁸⁰ See Plaintiff's Third Brief in Support of Its Motion for Summary Judgment in *Coyne Beahm*, *supra* n.62, at 14 - 18

never retreated from *Fox*'s firm rejection of a 'least restrictive means' test,"¹⁸¹ and that five justices in *44 Liquormart* did decline to alter the Central Hudson test in any significant way.¹⁸²

Amy: Well, the FDA may officially be right, and it may even be too drastic to say that there's now this new per se rule about not restricting speech when non-speech alternatives are available, but it just seems so obvious to me that there are so many effective and much less restrictive means of achieving the legitimate and substantial government interests asserted here. Given that you can't make head or tail of what the Supreme Court has *actually* said – and the *Coyne Beahm* parties' diametrically opposed views, neither of which is non-sensical, are evidence of that – given that that's the case, I would just fall back on the intuitive sense of what the First Amendment's supposed to be doing. Just as with FLSA II, I would say, at least for this case, the restrictions are so invasive that the First Amendment won't allow it.

Pam: But are there really alternatives which would be effective?

Amy: Well, first of all, I'm not even convinced that the regulations as they currently exist would be effective in curbing teen-age smoking significantly. In fact, we skipped over the third prong inquiry, which is exactly what that question gets at.

Bob: But isn't that just an empirical question? We just don't know, in the abstract, whether they work or not. We'd need to do all kinds of scientific,

¹⁸¹Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment in *Coyne Beahm*, supra n.62, at 116.

¹⁸²*See id.* at 102. (noting that neither the opinion of Justice O'Connor, in which Chief Justice Rehnquist and Justices Breyer and Souter joined, nor the separate opinion of Justice Scalia expressed interest in departing from the Central Hudson test as currently formulated.)

psychological studies about the effects of advertising, and about whether social realities may be much more of a cause of teen smoking than advertising.¹⁸³ And that's why the *Coyne Beahm* plaintiffs have only sought summary judgment on the fourth prong ground and have agreed that a trial would be necessary if the court thought the constitutionality would turn on the prong three analysis.¹⁸⁴ So who are we to sit here in the abstract and judge whether the regulations will work?

Amy: You're right, but what if it does work? If it effectively prevents teen smoking, that's one thing, but what if it turns out it also prevents adult smoking? Is that good? Not speaking legally, of course it is – at least I certainly think so – but from a legal point of view, it would just serve to show that the government has succeeded, via speech restriction, in achieving one of its paternalistic goals – which is just what *44 Liquormart* (or Stevens' opinion at any rate) made clear would be unacceptable.

Alex: So then we would have shown that the law was not narrowly tailored enough to serve the government's legitimate interest in deterring unlawful activity, which brings us back to prong four.

Amy: OK. You're right. So the essential question is Pam's: Are there less restrictive alternative means by which the government can achieve its goal of curbing teenage smoking without restricting speech regarding lawful activity – without overly restricting advertising directed at adults and thereby reducing

¹⁸³ Cf. Maria J. Johnson, "Taking Advantage of Joe Camel's and Marlboro Man's Rights Is UnKool and Merits Constitutional Protection: Penn Advertising, Inc. v. Mayor of Baltimore, 63 F.3d 1318 (4th Cir. 1995)," 21 U. Dayton L. Rev. 489, 489 - 90 (1996) (arguing that social pressures have a more serious impact on teen smoking than advertising).

¹⁸⁴ See Plaintiff's Third Brief, *supra* n.180, at 4 n.3

them to children?

Pam: Well? Are there?

Amy: I would say there certainly are. And I would make the same arguments I made about FLSA II.¹⁸⁵

Mark: But before you even get to those, here there's an even less controversial way to do it. Just regulate the conduct – teen smoking – extensively. That's what many of the regulations which I don't have a problem with do, like the federal minimum age, the requirement of checking IDs, the vending machine ban, etc.¹⁸⁶ And the *Coyne Beahm* plaintiffs have proposed a few others in their brief, including prohibiting possession and use of tobacco by minors, requiring licensing for tobacco vendors, establishing an extensive enforcement mechanism, and prosecuting violators.¹⁸⁷

Pam: But what happens when FDA argues that even all that is not enough, since if there's demand, kids will always find a way to smoke, and thus that to really accomplish its goal, FDA has to cut off demand by limiting smoking's appeal?

Alex: Then we at least fall back on Amy's less restrictive speech-related alternatives.

Amy: Yeah, so as I was saying, as with FLSA II, government counterspeech, or at least government-subsidized counterspeech might be enough. Or, if necessary, an equal time requirement of some sort would probably work.¹⁸⁸

¹⁸⁵ See *supra*, text accompanying nn. 18 - 23 (Amy's arguments).

¹⁸⁶ See *supra* nn. 66 - 71 and accompanying text.

¹⁸⁷ See Plaintiff's Third Brief, *supra* n.180, at 19.

¹⁸⁸ See *generally*, Helen McGee Konrad, "Eliminating Distinctions Between Commercial and Political Speech: Replacing Regulation with Government Counterspeech," 47 Wash. & Lee

And, if all else fails, I would at least prefer compelled counterspeech to the outright bans and severe censorships the current regulations impose. Of course, I understand that that's very possibly unconstitutional under the compelled speech doctrine of *Wooley v. Maynard* – which, I should note, the Supreme Court could possibly reaffirm and extend to the realm of commercial speech this term in the peach advertising case¹⁸⁹ – but I still think it would be better than what the current regs do.

Pam: And what if the FDA says the government just doesn't have the resources to pursue any of those options?

Amy: Again, like I said with regard to FLSA II, if the government is not willing to step up to the plate in a constitutional fashion, then its goal can't be that pressing, and it should be forced to forego regulation altogether.¹⁹⁰

Pam: Well, but you could be saying that in all sorts of places. I mean, doesn't that make the Constitution into too much of a barrier to effective government. After all, it's *not* a suicide pact.

Amy: True, but now we're back to the same old argument. At some point we'll have to balance when the Constitution has to give way to greater interests – be they prevention of the publication of sailing dates of ships, the

L. Rev. 1129 (1990);

¹⁸⁹Wileman Bros. & Elliott, Inc. v. Espy, 58 F.3d 1367 (9th Cir. 1995), cert. granted, 116 S.Ct. 1875 (1996) (holding California's mandatory assessment on peach and nectarine growers to pay for generic advertising program violated First Amendment); *cf.* Noah and Noah, "Nicotine Withdrawal," *supra* n.63 at 60 - 62 (determining that FDA proposal to require that \$150 million of tobacco industry money be spent annually on anti-smoking messages posed serious First Amendment problems); *see also supra*, n.19 and accompanying text.

¹⁹⁰*See supra*, text accompanying nn. 18 - 19 (discussing argument that government should have to bear the costs of regulating in a constitutionally inoffensive manner).

publication of top-secret national security files, the election of an Iraqi dictator's son, or dissemination of false claims about the quasi-medicinal values of food. I just don't think teen smoking has yet become such a huge problem that we're ready to say the interest in preventing it trumps the Constitution, *especially* when there *are* so many less constitutionally offensive, if expensive, alternatives out there. We just don't want to set an awful precedent for the government to be able to say casually that it's too expensive to follow the Constitution.

Pam: But overly strong resolutions of these cases would set the equally troublesome precedent that the Constitution will prevent effective government.

Shady: And therein lies the dilemma.