BEYOND ADVERTISING CONTROLS: INFLUENCING JUNK-FOOD MARKETING AND CONSUMPTION WITH POLICY INNOVATIONS DEVELOPED IN TOBACCO CONTROL

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I. INTRODUCTION

In many ways, the tobacco control movement and the improved-nutrition advocacy movement (sometimes called the obesity prevention movement) are on parallel tracks. Both movements are grounded in compelling epidemiological data that document the extraordinary toll on human health and mortality caused by unhealthful consumer products.[1] Tobacco products kill more than 440,000 Americans annually, and the total cost of smoking in California in

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1. *See generally* CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH AND HUMAN SERVS., PROFILING THE LEADING CAUSES OF DEATH IN THE UNITED STATES—CALIFORNIA 1–2, http://www.cdc.gov/nccdphp/publications/factsheets/ChronicDisease/pdfs/California.pdf (last visited Jan. 21, 2006) (discussing poor health conditions as one of the leading causes of death in the country); WENDY MAX ET AL., CAL. DEP'T OF HEALTH SERVS., THE COST OF SMOKING IN CALIFORNIA, 1999, at 9 (2002), *available at* http://www.dhs.ca.gov/ps/cdic/tcs/documents/pubs/costofsmoking1999.pdf (showing statistics for the large number of deaths attributed to smoking in California alone).

1999, including both direct and indirect costs, was estimated to be $15.8 billion.[2] Although fewer deaths are currently attributed directly to poor nutrition, the morbidity caused by diseases related to poor nutrition (such as diabetes, heart disease, stroke, some cancers, and osteoporosis) is one of the leading causes of disability and death in the country.[3] In 2000, California spent $21.7 billion on direct and indirect medical care, worker's compensation, and lost productivity related to poor nutrition and physical inactivity.[4]

The two movements are also similar in that both address problems caused by, or directly associated with, consumer products that are heavily promoted through a wide array of media channels. Cigarette companies spent $15.2 billion in 2003 promoting their products via several methods including (i) point-of-sale, newspaper, and direct mail advertising; (ii) promotional allowances to retailers; and (iii) sponsorship of sporting events, public entertainment, and theme events like bar nights.[5] Likewise, in 1999, the U.S. food industry spent $7.3 billion advertising its products.[6]

Finally, both movements engage in ecological change strategies, employing public policy tactics to "denormalize" the use of the

2. MAX ET AL., *supra* note 1, at 7; J.L. Fellows et al., *Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Economic Costs—United States, 1995–1999*, 51 MORBIDITY & MORTALITY WKLY. REP. 300, 301 (2002), *available at* http://www.cdc.gov/mmwr/PDF/wk/mm5114.pdf.

3. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 1, at 2.

4. DAVID CHENOWITH, CAL. DEP'T OF HEALTH SERVS., THE ECONOMIC COSTS OF PHYSICAL INACTIVITY, OBESITY, AND OVERWEIGHT IN CALIFORNIA: HEALTH CARE, WORKERS' COMPENSATION, AND LOST PRODUCTIVITY 2 (2005), *available at* http://www.dhs.ca.gov/ps/cdic/cpns/press/downloads/CostofObesityToplineReport.pdf.

5. CAMPAIGN FOR TOBACCO-FREE KIDS, ALLOCATIONS OF U.S. CIGARETTE COMPANY MARKETING EXPENDITURES SINCE 1998, at 1 (2005), http://tobaccofreekids.org/research/factsheets/pdf/0079.pdf (citing FTC, CIGARETTE REPORT FOR 2003, at 2 (2005), *available at* http://www.ftc.gov/reports/cigarette05/050809cigrpt.pdf); *see also* Press Release, FTC, FTC Report to Congress Shows Increases in Smokeless Tobacco Revenues and Advertising and Promotional Expenditures (Aug. 12, 2003), http://www.ftc.gov/opa/2003/08/smokeless.htm (stating that smokeless tobacco companies spent $237 million advertising their products in 2001). Manufacturers also provided $10.8 billion in price discounts. Press Release, FTC, *supra*, at 2.

6. Mary Story & Simone French, *Food Advertising and Marketing Directed at Children and Adolescents in the U.S.*, 1 INT'L J. BEHAV. NUTRITION & PHYSICAL ACTIVITY 3 (2004) (citing J. MICHAEL HARRIS ET AL., U.S. DEP'T OF AGRIC., THE U.S. FOOD MARKETING SYSTEM, 2002, at 3 (2002)).

products, and thus address the morbidity and mortality associated with such heavily-promoted, unhealthy consumer products. The tobacco control movement is far more advanced than the nutrition advocacy movement in this regard. The tobacco control movement has spent more than twenty years successfully pursuing aggressive public policy campaigns to: (i) raise taxes on tobacco products; (ii) limit exposure to secondhand smoke in public places, workplaces, outdoor venues, and in some instances even private residences; (iii) counter and curtail the advertising and promotion of tobacco products to youth; and (iv) initiate litigation against the industry for the public costs associated with tobacco-related illnesses.[7] Denormalization campaigns challenge the status quo: no longer considered the norm, the public increasingly sees tobacco use as a marginalized behavior that is contrary to the best interests of children, adults, and society as a whole.

Nutrition advocates openly acknowledge that their profession has much to learn from the tobacco control movement. Nutrition advocates are succeeding as they begin setting policy agendas to lower the incidence of obesity/overweight and their related health problems. Their efforts have led to bans on the sales of soda and other sweetened beverages in elementary and high schools,[8] and

7. Michael Siegel et al., *Preemption in Tobacco Control: Review of an Emerging Public Health Problem*, 278 JAMA 858, 859 (1997).

8. For the 2001–2002 school year, Oakland Unified School District implemented a comprehensive, six-goal, nutrition policy, and, as a result, rejected a potentially lucrative pouring rights contract. California Project Lean, Creating a Comprehensive District Nutrition Policy (Mar. 18, 2004), http://www.californiaprojectlean.org (search "Creating a Comprehensive District Nutrition Policy," then follow hyperlink). The policy's six goals were to: "(1) insure that no OUSD student goes hungry; (2) improve the nutritional quality of all food served to OUSD students; (3) serve enjoyable foods from diverse cultures; (4) improve the quality of food service jobs; (5) integrate nutrition into the district's education program; and (6) establish a Nutrition Advisory Board." *Id.* At the state level, the California legislature has passed Senate Bill 12 and has another bill pending, Assembly Bill 622, that would affect vending machines in schools. S.B. 12, 2005–2006 Gen. Assem., Reg. Sess. (Cal. 2005); NAT'L CONFERENCE OF STATE LEGISLATURES, VENDING MACHINES IN SCHOOLS (2005), *available at* http://www.ncsl.org/programs /health/vending.htm. Senate Bill 12 (i) restricts portion sizes of a la carte items in elementary school cafeterias (no item can exceed the serving size of the food served in the National School Lunch Program or School Breakfast Program) and (ii) restricts food items in vending machines to less than 200 calories per item. S.B. 12, 2005–2006 Gen. Assem., Reg. Sess. (Cal. 2005). Assembly

institution of basic nutritional standards for vending machine products in public buildings.[9] Meanwhile, significant media attention has increased public awareness about the problems associated with the overwhelming availability of unhealthful food choices and the lack of access to healthful choices, especially in low-income communities.[10]

This Article addresses one policy area that both movements are still grappling to address: controlling the effects of advertising and promotion of the unhealthy products through the mass media. The tobacco control movement has secured a ban on tobacco advertising on television.[11] It has also negotiated the Master Settlement Agreement (MSA) with the tobacco industry, under which the industry gave up some of its constitutionally protected free speech rights, including its right to promote its products through spon-

Bill 622 would, if passed, impose additional nutritional standards for food and beverages sold or served to students. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra*. In addition, California recently passed Senate Bill 965, which prohibits the sale of sodas and other carbonated beverages in K–12 public schools. S.B. 965, 2005–2006 Gen. Assem., Reg. Sess. (Cal. 2005) (amending CAL. EDUC. CODE § 49431.5 West 2005). Similarly, West Virginia enacted the Promoting Healthy Lifestyles in West Virginia Act of 2005, which requires senior high schools to offer equal amounts of soft drinks and healthy beverages in vending machines. H.B. 2816, 2005 Leg., 79th Sess. (W. Va. 2005).

9. *See* CONTRA COSTA HEALTH SERVS., CONTRA COSTA COUNTY VENDING MACHINE POLICY (2004), http://www.cchealth.org/topics/nutrition/cc_county_vending_machine_policy.php. Under its "Nutrition Standards for Vending Machine Beverages and Snacks," the Board of Supervisors adopted the following policy:

> 50% of beverages offered in each vending machine shall be one or a combination of the following:
>
> a. Water
>
> b. Coffee or tea
>
> c. Reduced fat milk (including soy or cow's milk, chocolate or other flavored milk not containing more than 15 grams of added sugar per 250 gram serving or 3 tsp sugar per 1 cup milk)
>
> d. 100% fruit/vegetable juice
>
> e. Fruit based drinks containing at least 50% juice and no added caloric sweeteners
>
> f. All other non-caloric beverages, including diet sodas.

Id.

10. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 8.

11. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 88 (1970) (codified as amended at 15 U.S.C. § 1335 (2000)).

sorships, billboards, and other media venues.[12] However, the tobacco control movement has had difficulty restricting other forms of advertising. The U.S. Supreme Court handed the movement a significant setback in *Lorillard v. Reilly*,[13] a commercial speech case that invalidated Massachusetts regulations limiting indoor and outdoor tobacco advertising near schools and playgrounds.[14] *Lorillard* effectively sounded the death knell for local regulations that ban publicly visible tobacco advertising.[15]

Given that the First Amendment presents a major obstacle to controlling advertising for unhealthful products, the tobacco control movement has developed innovative policy strategies for dampening the *impact* of tobacco advertising while avoiding First Amendment scrutiny. This Article highlights several of these strategies, explains why they are legally sound, and suggests how they might apply in the nutrition context.[16] The policies considered here include:

- Regulating a product directly (in other words, regulating what, when, where, and how products are sold), which

12. Master Settlement Agreement § III, http://www.caag.state.ca.us/tobacco/pdf/1msa.pdf (last visited Oct. 20, 2005).

13. 533 U.S. 525 (2001).

14. The Massachusetts regulations contained two main provisions: one prohibiting placing outdoor tobacco advertisements or indoor ads visible from the outside within a 1000 foot radius of a school playground; the other prohibiting point-of-sale tobacco advertisements placed lower than five feet from the floor of stores located within a 1000 foot radius of a school or playground. *Id.* at 534–35.

15. *See* Kerri L. Keller, Note, Lorillard Tobacco Co. v. Reilly*: The Supreme Court Takes First Amendment Guarantees Up in Smoke By Applying the Commercial Speech Doctrine to Content-Based Regulations*, 36 AKRON L. REV. 133 (2002) (describing the implications of the *Lorillard* case and the history of the "commercial speech doctrine").

16. Most of the options described subsequently involve laws, regulations, or agreements that affect a defined category of food, mainly the unhealthful food choices. But what qualifies as an unhealthful food? Defining what foods fall within a regulation or agreement and what foods fall outside of it may be a far greater challenge than crafting a legally sufficient policy. This Article does not address what factors should be considered when defining food types for policy interventions. Undoubtedly, science and professional opinions will play a large role in determining which foods to focus on and how to make the determination. However, assuming most product regulations are only subject to a rational basis review, courts will likely accept whatever line a legislative body draws even if it is not the best line, or even a good one, so long as it is at least a rational line. *See* Vance v. Bradley, 440 U.S. 93, 96–97 (1979).

includes:
  - Banning the product;
  - Regulating the retail sale of the product (e.g., age restrictions);
  - Employing land use regulations to limit where product retailers can operate;
  - Imposing product standards; and
  - Taxing or exacting a fee on the product.
- Regulating a product by agreement, which includes:
  - Private binding contracts;
  - Public binding contracts;
  - Private litigation settlements;
  - Public litigation settlements;
  - Private nonbinding agreements; and
  - Public nonbinding agreements.
- Government-sponsored education and counter-advertising

II. CONTROLLING UNHEALTHFUL FOOD PRODUCTS OUTSIDE THE SPHERE OF THE FIRST AMENDMENT

A. The Legal Landscape

Depending on the type of regulatory action the government takes, courts will impose different standards of review when determining the constitutionality of the regulation. Generally, there are three potential levels of review for any given law:

- Rational basis, applicable to most laws, is the standard most deferential to a legislative body's decision.[17]
- Intermediate scrutiny, a more demanding standard, is applicable to laws affecting commercial speech (the four prong *Central Hudson* test)[18] and gender-specific laws.

17. *See, e.g.*, *id.* at 96–97.

18. The U.S. Supreme Court, in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, struck down a state regulation banning promotional advertising by electric utilities. 447 U.S. 557 (1980). In so doing, it enunciated a four-prong test for assessing the validity of a government restriction of commercial speech based on its content:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be

- Strict scrutiny, the highest standard, is applicable to laws affecting most types of speech, fundamental rights, and suspect classifications (race, ethnicity, or national origin).[19]

Legislation or regulations subject to the rational basis test are generally valid as long as they bear a *rational relationship* to a *legitimate governmental purpose*.[20] Under the rational basis test, a court will give great deference to government regulatory action.[21] Courts will rarely overturn government action if the action is subject to the rational basis test.[22] Under the rational basis test, a rational relationship need not be established by scientific studies.[23] Less rigorous data or information, even rational beliefs, are acceptable as long as they provide plausible support for the legislative body's conclusion that a policy or regulation is justified.[24] In other words, a

> misleading [prong one]. Next, we ask whether the asserted governmental interest is substantial [prong two]. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted [prong three], and whether it is not more extensive than is necessary to serve that interest [prong four].

Id. at 564. Prong one of this test sets a threshold. *Id.* In order to reach prongs two through four, a court must find that the advertising at issue accurately informs the public about lawful activity. *Id.* In other words, the government is free, without oversight of the courts, to suppress all advertising that promotes illegal activity or that is false or inherently misleading. *Id.* Prong two requires the government to assert a substantial interest intended to be met by the advertising restriction. *Id.* Prongs three and four pertain to the fit between the government interest and the advertising restriction. *Id.* Under prong three, the restriction must directly advance the government interest; to survive, it cannot provide "only ineffective or remote support" for the interest. *Id.* Prong four mandates that the restriction be no more extensive than necessary to achieve the government interest. *Id.*

19. LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 80–81 (2001).

20. *See, e.g.*, Consol. Rock Prods. v. City of Los Angeles, 57 Cal. 2d 515, 522 (1962).

21. GOSTIN, *supra* note 19, at 78.

22. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452 (1991); Dandridge v. Williams, 397 U.S. 471 (1970); Ry. Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

23. *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

24. *Id.* ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.").

regulation is supported by a rational relationship unless it is arbitrary, capricious, or entirely lacking in evidentiary support.[25] A legitimate state purpose exists when government legislates to protect the public's health, morals, safety, or general welfare.[26] Therefore, laws motivated by public health almost always involve a legitimate government concern.[27] Finally, the burden is on the party challenging the law to "convince the court that the legislative facts on which the [law] is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."[28]

25. Arnel Dev. Co. v. City of Costa Mesa, 28 Cal. 3d 511, 524 (1980) (holding that zoning is a legislative act that may only be reviewed under traditional mandate principles, that is, for arbitrary and capricious actions); Strumsky v. San Diego County Employees Ret. Ass'n, 11 Cal. 3d 28, 34–35 n.2 (1974) (stating that judicial review of quasi-legislative acts is limited to whether the action taken was "arbitrary, capricious, or entirely lacking in evidentiary support," or contrary to required legal procedures); *see also* Lockard v. City of Los Angeles, 33 Cal. 2d 453, 460–61 (1949) (stating that zoning legislation is presumed to be constitutional, and this presumption can only be overcome by a clear showing of arbitrariness and irrationality).

26. Consol. Rock Prods. v. City of Los Angeles, 57 Cal. 2d 515, 522 (1962) (quoting Miller v. Bd. of Pub. Works, 195 Cal. 447, 490 (1925)).

27. The broad powers enjoyed by public health officials are grounded in a legal principle called the "police power." GOSTIN, *supra* note 19, at 80–81. The police power is the natural prerogative of sovereign governments to enact laws, promulgate regulations, and take action to protect, preserve, and promote public health, safety, and welfare. *Id.* In the words of the California Supreme Court, "[t]he preservation of the public health is universally conceded to be one of the duties devolving upon the state as a sovereignty, and whatever reasonably tends to preserve the public health is a subject upon which the legislature, within its police power, may take action." Patrick v. Riley, 287 P. 455, 456 (Cal. 1930) (upholding a bovine tuberculosis control law).
The concept of the police power comes from common law, a body of judicially created law that spans from medieval England to the present day. David A. Thomas, *Finding More Pieces of the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. COLO. L. REV. 497, 501–516 (2004). In political theory, the police power describes the conditions under which a sovereign government can legitimately intrude upon a person's autonomy, privacy, liberty, or property. GOSTIN, *supra* note 19, at 47–48. The police power is an inherent authority of the states. *Id.* at 48. The federal government does not have inherent police power. *Id.* at 26–27. The states can delegate their police power to local governments; some states have done so through their state constitution, while others have accomplished this by statute. *See, e.g.*, CAL. CONST. art. XI, § 7; COLO. REV. STAT. § 31-15-401 (2005).

28. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981) (quoting Vance v. Bradley, 440 U.S. 93, 111 (1979)); *see also* Heller v. Doe, 509 U.S. 312, 320 (1993) (emphasis added) (quoting Lehnhausen v. Lake

Generally, when government regulates a product *directly*, including the sale of a product, the Court will review the law under the rational basis test.[29] On the other hand, when government regulates commercial speech (that is directed, at least in part, to adults) *about* a product, the Court will apply some form of intermediate scrutiny, such as the *Central Hudson* test, in reviewing its constitutionality.[30]

Shore Auto Parts Co., 410 U.S. 356, 364 (1973)) ("[T]he burden is on the one attacking the legislative arrangement to negative every *conceivable* basis which *might* support it.").

29. *See, e.g.*, *Clover Leaf Creamery*, 449 U.S. at 461 (holding that the proper standard of review for a law banning plastic milk containers was rational basis).

30. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980). See *supra* note 18 for more detail on the *Central Hudson* test. Note that once a product is prohibited, ads about the product become easier to control because the ad no longer relates to a legally available product, and thus the *Central Hudson* test is easier to satisfy. GOSTIN, *supra* note 19, at 158 (noting that the government can ban commercial speech related to "illicit drug use; driving while intoxicated; or underage possession of tobacco, alcoholic beverages, or handguns"). The Court has applied a more deferential standard than the *Central Hudson* test when evaluating governmental restrictions on speech aimed at an audience made up predominantly of children because the intellectual and emotional immaturity of children makes them particularly vulnerable to harm. *See* Alan E. Garfield, *Protecting Children From Speech*, 57 FLA. L. REV. 565, 568–69 (2005).

In *Ginsberg v. New York*, the U.S. Supreme Court set forth a special test for government regulation of speech received by minors, though the issue before the Court was one of indecent speech rather than commercial speech. The Court stated that:

> [M]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. . . . Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.

Ginsberg v. New York, 390 U.S. 629, 636 (1968) (alteration in the original) (quoting Bookcase, Inc. v. Broderick, 218 N.E.2d 668, 671 (N.Y. 1966)). The Supreme Court has also determined that speech regulations on public school campuses should receive a special level of review. *See* Healy v. James, 408 U.S. 169, 180 (1972); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). In *Hazelwood School District v. Kuhlmeier*, the Court "recognized that the First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings,' and must be 'applied in light of the special characteristics of the school envi-

For the purposes of judicial review, legislators will prefer a law subject only to the rational basis test over a law subject to greater scrutiny because a rational basis law is more likely to survive a legal challenge. In the context of how *Lorillard* might affect marketing restrictions on unhealthful foods, there are three additional reasons to pursue, at least initially, product-focused laws subject to rational basis review.

First, to the extent that nonspeech regulations create an environment in which certain products are prohibited from being sold, such as a ban on soda sales in the immediate neighborhood of schools, subsequent or contemporaneous restrictions on marketing such products within the product-ban range more easily pass prong one of the *Central Hudson* test. Prong one is the threshold question of whether a commercial message concerns a lawful activity and is not misleading.[31] If a product cannot be lawfully sold, then the First Amendment, via *Central Hudson*, does not protect the advertising of the product.[32] For example, once soda *sales* are banned in the neighborhood surrounding school grounds, a ban on soda *ads* at stores within the product-ban radius of school grounds stands a much greater chance of surviving a legal challenge because the ads would not relate to a product that is legally available at the store.[33]

Second, if government regulates speech, such as advertisements, commercials, billboards, and other marketing media, courts will look to see what nonmarketing options the government has tried and how effective they were when analyzing prongs three and four of the *Central Hudson* test. [34] If a court can imagine laws that do *not* regu-

ronment.'" 484 U.S. 260, 266 (1988) (citations omitted).

31. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

32. *Id.*

33. *See* United States v. Edge Broad. Co., 509 U.S. 418 (1993) (holding a federal statute constitutional as applied, thereby prohibiting a North Carolina station from broadcasting lottery advertising when such lotteries were banned in North Carolina).

34. Prong three of the *Central Hudson* test examines whether the regulation directly advances the governmental interest asserted, and prong four asks whether the regulation is more extensive than necessary to serve that interest. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564; *see, e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002) (holding the government's advertising ban on compounded drugs unconstitutional because there were several nonspeech-related means to achieve the government's goal, including (i) regulating large-scale manufacturing, (ii) prohibiting wholesale sales, and (iii)

late speech, including direct product regulations, but might mitigate or solve a problem as well as or better than laws that *do* regulate speech, a court is likely to require such nonspeech laws be attempted and proven to fail before it will uphold a regulation of speech subject to the *Central Hudson* test.[35] In other words, the failure of government to attempt to solve a problem without regulating speech is likely to weigh against a government regulation of speech if a court considers whether a marketing law directly advances the government's interest and whether it is more extensive than necessary under *Central Hudson*.[36]

Lastly, because the most influential marketing of unhealthful food to children occurs via federally regulated media, such as television, radio, and the Internet, [37] local and state governments may be unable to enact effective legislative curbs to such marketing due to potential federal law preemption of state action.

B. Regulating the Product by Law: Regulating the What, When, Where, and How of Retail Sales

Local and state government regulations concerning what products can be sold and what conditions can be imposed on sales within a jurisdiction are subject only to the deferential rational basis test.[38] Therefore, legislators and government agencies have broad power to create laws and regulations related to the sales of goods as long as the laws do not affect commercial speech.[39]

1. Product Bans & Other Retailing Restrictions

a. Product bans

If government determines that a product is a health or safety threat, it may ban the product outright.[40] Generally, banning a pro-

limiting manufacturing to prescriptions received).

35. *W. States Med. Ctr.*, 535 U.S. at 372–73.

36. *Id.* at 371–73.

37. *See, e.g.*, 47 U.S.C. §§ 151-1110 (2000) (creating the Federal Communications Commission and providing for federal regulation of various types of media).

38. *See, e.g.*, FCC v. Beach Commc'ns, 508 U.S. 307, 315–18 (1993).

39. *W. States Med. Ctr.*, 535 U.S. at 374 (describing the *Central Hudson* test as "significantly stricter than the rational basis test").

40. *See* Bowman v. Chicago & N.W. Ry. Co., 125 U.S. 465, 520–521

duct does not involve speech, a fundamental right, or suspect classification and therefore receives rational basis review when challenged.[41] From a legal perspective, product bans are straightforward: a government simply passes a law that says product X cannot be sold. Politically, however, such bans may be very difficult.

There are a few examples of product bans in tobacco control.[42] The city of Chicago banned imported cigarettes favored by young people called "bidis," coming in almond, cinnamon, clove, root beer, strawberry and vanilla flavors.[43] Following Chicago's lead, the entire state of Illinois banned bidis.[44]

Notable bans of non-tobacco products include a complete ban on the sale of spray paint in Chicago in response to a pervasive graffiti problem.[45] Elsewhere, environmental concerns about Styrofoam fast food containers prompted bans on polystyrene in Portland, Oregon, and Suffolk County, New York.[46] Additionally, concern about the effects of mercury on child development resulted in bans on mercury thermometers in Ann Arbor, Michigan, and Duluth, Minnesota.[47]

In upholding Chicago's spray paint ban, the Seventh Circuit, applied a rational basis standard of review and noted that Chicago's reasoning behind the need for a complete ban "is not subject to courtroom factfinding and may be based on rational speculation *unsupported* by evidence or empirical data."[48] The court also noted that, "[a]vailability of spray paint in the suburbs, and of undercoating in Chicago, reduces the effectiveness of the statute, but a rational legislature could conclude that some effect remains."[49] In other

(1888).

41. *See supra* note 29 and accompanying text.

42. 720 ILL. COMP. STAT. 685/4 (2005); CHICAGO, ILL., CODE § 4-64-194 (2005).

43. CHICAGO, ILL., CODE § 4-64-194; *see* Dennis Conrad, Associated Press, Total Bidi Cigarette Ban has Teens Primarily in Mind (Dec. 12, 2000), http://www.no-smoking.org/dec00/12-12-00-3.html.

44. 720 ILL. COMP. STAT. 685/4.

45. Nat'l Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124 (7th Cir. 1995).

46. *See* City of Portland v. Jackson, 826 P.2d 37 (Or. Ct. App. 1992); Soc'y of Plastics Indus., Inc. v. County of Suffolk, 573 N.E.2d 1034 (N.Y. 1991).

47. ANN ARBOR, MICH., ORDINANCE 28-05 (2005); DULUTH, MINN., CODE § 28.61 (2005).

48. *Nat'l Paint & Coatings Ass'n*, 45 F.3d at 1127 (emphasis added) (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307 (1993)).

49. *Id.* at 1128.

words, to support a ban of products like spray paint, Styrofoam, and mercury thermometers, such ban need not be based on extensive research nor be fully effective. It simply must be rationally related to a legitimate governmental concern.

Similarly, bans on nutritionally deficient foods, such as sodas, are likely to withstand legal challenge under the rational basis standard. This is true even if the science supporting such a ban is incomplete and the potential effect of the ban will be insufficient to fully solve the growing problem of childhood overweight and obesity.[50]

Product bans, while not targeting commercial speech directly, can impact marketing in two ways. First, basic tenets of capitalism suggest that if a product cannot be sold legally, retailers will not waste money marketing it. Second, banning the sale of a product in a particular place or jurisdiction allows for the regulation of commercial speech about that product since the speech would concern unlawful activity and thus fail the first prong of *Central Hudson*.[51]

Enforcing an outright product ban is relatively simple. It should be fairly easy to determine if a retailer is selling a banned product or not.

b. Retailing restrictions

Short of banning a product, a state or local government may impose regulations restricting many aspects of how a product is sold.[52] Every facet of a product's sale is potentially subject to regulation: when, where, how, to whom, etc. As with product bans, the legitimacy of such government regulations is usually tested under the lenient rational basis standard.[53]

50. In contrast, in order to uphold a ban on commercial speech *about* unhealthful foods, science proving a substantial link between food marketing and ill-health would need to be convincing, and the effect of the ban would need to be substantial. *See, e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002). Further, the government would need to show that other nonspeech laws are unlikely to accomplish the same result. *Id.* at 372.

51. *See supra* notes 31–33 and accompanying text.

52. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, TOBACCO INFORMATION AND PREVENTION SOURCE, MINOR'S ACCESS TO TOBACCO FACT SHEET (2005), http://www.cdc.gov/tobacco/sgr/sgr_2000/factsheets/factsheet_minor.htm.

53. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 462 (1981).

Retailing restrictions are commonplace in tobacco control.[54] In fact, *all* states limit youth access to tobacco by prohibiting tobacco sales to minors.[55] Other common access limitations include prohibiting the self-service display of tobacco[56] and limiting the distribution of free samples of tobacco products.[57]

Retailing limits can take many forms: age limits, time-of-day limits, product display limits, and location limits.[58] For example, communities could require that candy or other products be restricted to certain locations in a retail outlet. Some supermarkets already have candy-free check-out lanes to assist parents that are trying to encourage healthful eating habits for their children.[59] Other limits could include a requirement that candy be placed above a certain height (e.g., higher than a child's eye level) or even behind the counter. Similar to the common restrictions on self-service displays for tobacco products, such limits discourage impulse purchases and reduce the opportunity for shoplifting by youth.[60]

Another idea related to product shelving is to require that product packaging, such as cereal boxes, be positioned so that the side of the box bearing nutritional information faces out toward the consumer, ensuring that these facts are at least as readily viewable as the alluring color imagery typical of cereal boxes. Alternately, if products contain more than a specified percentage of calories from sugar or fat, they could be placed above a certain height in the retail outlet, resulting in cereals with the most sugar being placed on the

54. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 52.

55. *Id.*

56. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 22960, 22962 (West 2005) (prohibiting access to cigarettes without the assistance of a clerk); *see also* American Lung Association, Database on State Legislated Actions on Tobacco Usage (2005), http://www.virtualsql.com/abcqxyz/dev/lungusa/StateLegislate Action.asp.

57. *See, e.g.*, CAL. PENAL CODE § 308 (West 2005) (prohibiting selling or giving tobacco products to minors); CAL. HEALTH & SAFETY CODE § 118950 (West 1996 & Supp. 2005) (prohibiting samples and coupons for cigarettes and smokeless tobacco).

58. *See* American Lung Association, *supra* note 56.

59. *See, e.g.*, Maureen Sangiorgio, *The Top Family-Friendly Supermarket Chains*, CHILD, Aug. 2003, at 153.

60. Rebecca E. Lee et al., *The Relation Between Community Bans of Self-Service Tobacco Displays and Store Environment and Between Tobacco Accessibility and Merchant Incentives*, 91 AM. J. PUB. HEALTH 2019, 2019, 2021 (2001).

highest row of an aisle. Such hypothetical restrictions are legally permissible because they impose limits on the product display and location rather than the commercial message.[61]

In theory, a law limiting product access could incorporate multiple simultaneous restrictions. For example, the "City of Wellbeing" could enact a law that limits access to sodas and prohibits the sale of soda: (i) to anyone under the age of twelve; (ii) to anyone during the hour before school begins and the hour after school ends; (iii) via a vending machine; and (iv) on school grounds or within 500 feet of a school.

Some access limits can be difficult to abide by or enforce. For example, how would a vendor determine whether a purchaser was younger than twelve, assuming most twelve–year-olds do not carry identification? Moreover, how would a vendor know when school starts and ends? Although a government may have ample power to regulate access to a product, the regulation may be invalid if it fails to provide a vendor with sufficient certainty regarding the application of the law.[62] However, such potential legal infirmities are primarily drafting issues and do not call into question a government's basic authority to regulate product access.[63]

Beyond controlling the basic facets of a sale, a state or local government may impose additional conditions on sales to limit a

61. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 551–552, 569 (2001) (upholding Massachusetts' restrictions on the self-service display of tobacco products and finding that the Federal Cigarette Labeling and Advertising Act left significant power in the hands of states to impose generally applicable zoning regulations and to regulate conduct with respect to cigarette use and sales); Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 496 (1982) (holding a local ordinance requiring a license to sell drug paraphernalia and restricting the manner of marketing such products did not "appreciably limit[] [the retailer]'s communication of information . . . .").

62. A law is vague if persons of "common intelligence must necessarily guess . . . its meaning and differ as to its application." Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926). The Court has deemed such laws unconstitutionally vague. Winters v. New York, 333 U.S. 507, 520 (1948) (reversing a vendor's conviction for possession of certain publications because the relevant statute was unconstitutionally vague).

63. Osborne v. Ohio, 495 U.S. 103, 121 (1990) (holding that an overly broad statutory ban on child pornography, when narrowly construed by the judiciary, is constitutional despite the risk of "careless drafting" by "legislators who know they can cure their own mistakes by amendment without [the] significant cost" of invalidated laws).

product's detrimental effect on public health. A common, and potentially comprehensive, regulation imposed on tobacco retailers in some states and local communities is that a tobacco retailer must obtain a license before selling tobacco.[64] Typically, violating any tobacco law puts the license at risk.[65] Other common conditions, all of which are in effect in California, include requiring: (i) cigarettes be sold in a minimum quantity;[66] (ii) age of purchase signs be posted at retail points of sale;[67] and (iii) free samples of tobacco products not be distributed on public grounds or on private grounds open to the public.[68] Again, the legal test for such creative restrictions is the lenient rational basis test.[69]

Similarly, many creative conditions attached to the sale of unhealthful food should easily survive a rational basis review. A local government might require that unhealthful fast food outlets, however they might be defined, meet the following conditions in order to legally sell fast food:[70]

- Unhealthful fast food purveyors may not distribute toys or other promotional items (e.g., "Happy Meal" toys) in

64. *E.g.*, CAL. BUS. & PROF. CODE §§ 22970-79 (West Supp. 2005) (regulating retailers, wholesalers, distributors, manufacturers, and importers); CONN. GEN. STAT. ANN. § 12-285b (West Supp. 2005) (regulating cigarette manufacturers); CONN. GEN. STAT. ANN. §§ 12-287 to -288 (West 2000 & Supp. 2005) (regulating cigarette dealers and distributors). *See generally* American Lung Association, Database on State Legislated Actions on Tobacco Issues, http://slati.lungusa.org/search.asp (last visited Aug. 29, 2005) (presenting a comprehensive list by selecting a state and following the "Licensing Requirements" link).

65. *E.g.*, CONN. GEN. STAT. ANN. § 12-295 (2000) (providing that any violation of statutory regulations on the sale of cigarettes may be grounds for the suspension or revocation of a license).

66. *E.g.*, CAL. PENAL CODE § 308.2 (West 2005) (prohibiting single cigarette sales); CAL. PENAL CODE § 308.3 (West Supp. 2005) (requiring a minimum pack size).

67. *E.g.*, CAL. BUS. & PROF. CODE § 22952 (West 2005) (requiring age of purchase signs); CAL. PENAL CODE § 308 (c) (West Supp. 2005) (stating penalties for failing to post signs); CAL. CODE REGS. tit. 17, § 6902(a) (2005) (stating format requirements for age of purchase signs).

68. *E.g.*, CAL. HEALTH & SAFETY § 118950(b) (West 1996 & West Supp. 2005) (prohibiting samples and coupons for cigarettes and smokeless tobacco).

69. *See supra* Part II.A, B.1(a)–(b).

70. *See generally* Marice Ashe et al., *Land Use Planning and the Control of Alcohol, Tobacco, Firearms, and Fast Food Restaurants*, 93 AM. J. PUB. HEALTH 1404, 1407 (2003).

connection with their meals. The rational basis for this prohibition would be that giving away toys encourages unhealthful eating. Restricting toys is *not* restricting speech.

- Unhealthful fast food purveyors must offer nutritious alternatives to unhealthful meals wherever they sell their food. The rational basis for this requirement would be that the public will eat more healthful food if nutritious options are available with the same convenience as unhealthful fast food.
- Unhealthful fast food purveyors may not provide drive-through service. The rational basis for this prohibition would be that the public will eat more healthful food if only healthy restaurants are able to lure customers with the convenience of a drive-through window. Further, drive-through services encourage a sedentary lifestyle that only compounds the problems of consuming unhealthful fast food.
- Food sold as a complete "meal" package must not exceed maximum limits on calories, fat, salt, and other potentially unhealthful components. The rational basis for this requirement would be that restaurants selling single meals exceeding the maximum daily recommended intake of certain components encourage unhealthful eating.

Like basic sales restrictions, creative retailing restrictions could substantially affect product advertising. For example, if toys cannot be distributed with unhealthful fast food, one would expect to see the powerful Happy Meal marketing tool applied to healthful meals instead.

c. The land use angle

Land use authority, usually expressed through city planning, is a fundamental power of local governments.[71] Land use regulations also are typically reviewed under the rational basis test.[72]

Land use has its roots as a public health tool used to promote sanitation and improve urban environments.[73] In light of this history,

71. *Id.* at 1404.
72. *Id.*
73. *Id.*

local governments can invoke their land use powers to combat the increasing prevalence of poor nutrition.[74] In the area of tobacco control, for instance, some communities have enacted laws that prohibit tobacco retailers from locating within 1,000 feet of a school or other youth-sensitive location.[75]

Other communities require certain businesses, such as liquor stores, to receive a conditional use permit (CUP) prior to opening.[76] In the CUP process, the local government can factor in a community's needs in deciding whether to allow businesses to open.[77] The process also offers the local government an opportunity to impose conditions on businesses allowed to open.[78] For example, a CUP for a liquor store might include provisions for increased lighting, a ban on pay phones, and anti-loitering requirements aimed at curtailing drug dealing.[79] Local governments can apply similar restrictions to unhealthful fast food outlets, guided by at least two purposes: "(1) to encourage restaurants to improve the nutritional

74. *Id.* at 1407.

75. For example, significant tobacco retailers in Marin County, California must be:

> located [at least] one thousand feet from a parcel occupied by the following uses:
>
> (1) Public or private kindergarten, elementary, middle, junior high or high schools;
>
> (2) Licensed child day-care facility or preschool other than a small or large family daycare home;
>
> (3) Public playground or playground area in a public park (e.g., a public park with equipment such as swings and seesaws, baseball diamonds or basketball courts);
>
> (4) Youth or teen center;
>
> (5) Public community center or recreation center;
>
> (6) Arcade;
>
> (7) Public park;
>
> (8) Public library, or
>
> (9) Houses of worship conducting youth programs or youth oriented activities.

MARIN COUNTY, CAL., CODE tit. 22I, ch. 22.68I, § 110(b) (2002); *see also* TECHNICAL ASSISTANCE LEGAL CTR., PUB. HEALTH INST., MODEL LAND USE ORDINANCE REGULATING THE LOCATION AND OPERATIONS OF TOBACCO RETAILERS 7–8 (2002), http://talc.phlaw.org/pdf_files/0014.pdf.

76. Ashe et al., *supra* note 70, at 1405.

77. *Id.*

78. *Id.*

79. *Id.*

quality of their food or at least provide alternative healthier meals, and (2) to displace those fast food outlets that do not improve in an effort to open the marketplace to competition from healthier restaurants."[80]

Because land use is principally a local concern, land use controls provide an important means for advancing local-level policy.[81] Land use regulations are particularly well suited for curtailing certain kinds of business activity based upon proximity to other businesses or locations of concern, such as schools. For example, a land use law could prevent fast food outlets from opening within 500 feet of a school or another fast food outlet, and it could limit the per capita number of fast food outlets in a community.[82]

2. Product Standards

In addition to product bans and sale regulations, product standards may regulate a given set of product characteristics. Generally, product standards are subject to rational basis review.[83]

As part of its comprehensive tobacco control program, New York recently adopted a product standard approach by imposing a fire safety standard for all cigarettes sold in the state.[84] The requirement was designed to reduce fires caused by smoldering cigarettes.[85] In New York, it is illegal to sell cigarettes that do not meet the standard.[86] To the extent that certain food product compositions are known or suspected to be harmful (e.g., food with high levels of added sugars or fat), under similar legislation, the sale of products that do not meet particular standards could be illegal to sell or sales could be limited to certain circumstances.

Product standards may be difficult to develop without a clear understanding of what makes a deficient product. Product standards can also present enforcement problems, especially where product

80. *Id.* at 1407 (internal quotation marks omitted).
81. *Id.* at 1405.
82. *See* TECHNICAL ASSISTANCE LEGAL CTR., *supra* note 75, at 8–9 (giving an example of language imposing similar land use restrictions in the tobacco context).
83. *See supra* Part II.B.1(a).
84. N.Y. COMP. CODES R. & REGS. tit. 19, §§ 429.1, 429.4 (2003).
85. *Id.* § 429.4.
86. *Id.* § 429.1.

testing is required to determine a violation of the standard.[87] In addition, the public may automatically perceive a product to be "safe"[88] simply because it meets a standard. For example, food industry use of healthy-sounding terms like "diet" or "light" can have a profound effect on public perception that foods labeled such are healthy.[89] Product standards also might not prevent manufacturers from engineering products that meet standards yet still pose the same health threat. For example, tobacco companies learned to manufacture filters with tiny holes to fool the government's smoke-testing machines into measuring reduced carcinogens.[90] In the real world, the smoker's fingers or lips cover the holes, resulting in a more concentrated and deadlier smoke stream.[91]

3. Taxes

Government taxes on tobacco products represent the centerpiece of the tobacco control movement because tobacco taxes serve the dual purposes of helping to deter smoking directly and simultaneously providing needed resources for anti-tobacco efforts.[92] The taxes help deter smoking by raising the cost of tobacco, which has been shown to be the most effective approach to lowering smoking rates, especially among youth, who are generally sensitive to price increases.[93] The second purpose is achieved when a portion

87. *E.g.*, id. § 429.4 (requiring product testing).

88. "For many, although certainly not all Americans, hearing that the Food and Drug Administration has approved a particular food or drug increases their confidence in its safety." Peggy G. Lemaux, Cooperative Extension Specialist in Plant Biotechnology, Univ. of Cal. Berkeley, Lecture at the Second BioValley Life Sciences Conference on The Future of Plant Engineering (Nov. 5, 1999), http://ucbiotech.org/resources/biotech/talks/crops/FREIBURG.html.

89. Andrea Lynn, TV Confuses Children About Which Foods are Healthy, New Study Finds, June 17, 2005, http://www.sciencedaily.com/releases/2005/06/050614235942.htm.

90. Martin Jarvis, Imperial Cancer Research Fund, Why Low Tar Cigarettes Don't Work and How the Tobacco Industry Has Fooled the Smoking Public (Mar. 18, 1999), http://www.ash.org.uk/html/regulation/html/big-one.html.

91. *Id.*

92. *See* Campaign for Tobacco-Free Kids, Higher Cigarette Taxes: Reduce Smoking, Save Lives, Save Money, http://tobaccofreekids.org/reports/prices (last visited Nov. 2, 2005).

93. Sherry Emery et al., *Does Cigarette Price Influence Adolescent Experimentation?*, 20 J. HEALTH ECON. 261, 261–270 (2001); Jeffrey E. Harris

of the tax revenue from tobacco is used to fund a comprehensive tobacco control program, as is done in California.[94]

The power to tax is a fundamental power of government.[95] Although potentially broad, the taxing authority of local governments is often limited by state law.[96] Limits on state and local taxing authority vary from state to state.[97] For example, in California, the state's power to tax is restricted by constitutional provisions added through California's citizen initiative process.[98]

& Sandra W. Chan, *The Continuum-of-Addiction: Cigarette Smoking in Relation to Price Among Americans Aged 15–29*, ELECTRONIC HEALTH ECON. LETTERS, Sept. 1998, at 3–12, *available at* www.mit.edu/people/jeffrey/HarrisChanHel98.pdf.; John A. Tauras et al., *Effects of Price and Access Laws on Teenage Smoking Initiation: A National Longitudinal Analysis*, IMPACTEEN, Apr. 2001, at 3, *available at* http://www.impacteen.org/researchproducts.htm; John A. Tauras, *Public Policy and Smoking Cessation Among Young Adults in the United States*, 68 HEALTH POL'Y 321, 324–26 (2004); Frank Chaloupka & Rosalie Pacula, *An Examination of Gender and Race Differences in Youth Smoking Responsiveness to Price and Tobacco Control Policies* 1–15 (Nat'l Bureau of Econ. Research, Working Paper No. 6541, 1998), *available at* http://tigger.uic.edu/~fjc; William N. Evans & Lynn X. Huang, *Cigarette Taxes and Teen Smoking: New Evidence from Panels of Repeated Cross-Sections* 2–3 (Univ. of Md., Working Paper, 1998) *available at* http://www.bsos.umd.edu/econ/evans/wrkpap.htm; Eric Lindblom, Campaign for Tobacco-Free Kids, Raising Cigarette Taxes Reduces Smoking, Especially Among Kids (Jan. 31, 2005), http://www.tobaccofreekids.org/research/factsheets/pdf/0146.pdf (citing Frank Chaloupka, *Macro-Social Influences: The Effects of Prices and Tobacco Control Policies on the Demand for Tobacco Products*, 1 NICOTINE AND TOBACCO RES. 77, 78 (1999)).

94. Cal. Dep't of Health Servs., Proposition 99 and the Legislative Mandate for the California Tobacco Control Program, http://www.dhs.ca.gov/tobacco/html/about.htm (last visited Nov. 12, 2005).

> In November 1988, California voters approved the California Tobacco Health Protection Act of 1988, also known as Prop 99. This referendum increased the state cigarette tax by 25 cents per pack and added an equivalent amount on other tobacco products. The new revenues were earmarked for programs to reduce smoking, to provide health care services to indigents, to support tobacco-related research, and to fund resource programs for the environment.

Id.; *see also* CAL. HEALTH & SAFETY CODE §§ 104350-104875 (West 1996 & Supp. 2005).

95. *See* U.S. CONST. art. I, § 8, cl. 1; CAL. CONST. art. XIII §§ 1–2; CAL. CONST. art. XI, § 5; CAL. GOV'T CODE § 37100.5 (West 1988).

96. *See, e.g.*, CAL. CONST. art. XIIIA, C–D.

97. *Compare id.*, *with* N.Y. CONST. art. XVI, § 1.

98. *See* CAL. CONST. art. XIIIA (having been passed as Prop. 13); CAL. CONST. art. XIIIC–D (having been passed as Prop. 218).

However, there may be legal ways to avoid limits on taxing authority. For example, regulatory fees in California are free of the restrictions imposed on taxes and can be used to accomplish the dual purposes of a public health tax, deterring product use and generating resources to mitigate product harm.[99] While imposing taxes and fees raise important legal issues, the greatest obstacles to increased taxes and fees are most often political. Convincing legislative bodies to exercise their power to tax or to impose a fee is usually the crucial challenge.

A state or a local jurisdiction with the power to impose a product tax could impose a tax on nutritionally deficient food, such as soda.[100] The exact amount of a tax could be calculated to provide a measured deterrence to purchasing the product, and the tax proceeds ideally would be used to fund programs aimed at reducing the public health burden associated with unhealthful foods.

As politically challenging as taxes are to impose, the potential benefit of taxes and fees cannot be overstated. Every option proposed or discussed in this Article requires significant resources to implement and enforce.[101] The ongoing success of California's comprehensive tobacco control program would not exist without the state's dedicated tobacco tax.[102]

99. *See, e.g.*, Sinclair Paint Co. v. State Bd. of Equalization, 937 P.2d 1350 (Cal. 1997).

100. A tax to curtail product usage is more likely to survive judicial scrutiny than a restriction on speech. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507 (1996) (holding that a state ban on advertising liquor prices in order to curb consumption was unconstitutional).

> [Rhode Island] . . . cannot satisfy the requirement that its restriction on speech be no more extensive than necessary. 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. As the State's own expert conceded, higher prices can be maintained either by direct regulation or by increased taxation.

Id.

101. *See* Cal. Dep't of Health Servs., *supra* note 94.

102. *Id.*

C. Regulating Product Marketing by Agreement: Binding & Nonbinding Limits on Commercial Speech

The First Amendment provides protection from *government* interference with speech.[103] It does not guarantee an absolute right to speak or preclude agreements to limit one's own speech.[104] In fact, private parties can voluntarily negotiate agreements among themselves or with government agencies to limit the speech rights the parties would otherwise possess.[105] This Section explores the types of agreements that limit commercial speech. Such agreements can take the form of enforceable contracts, which include litigation settlements, or they simply can be unenforceable understandings secured only by the integrity of the parties making the agreement.[106] The types of agreements considered here include:

1. *Private binding contracts* between one business or organization and another;
2. *Public binding contracts* between the government and a business or organization;
3. *Private litigation settlements* in which the government is not a party;
4. *Public litigation settlements* in which the government is a plaintiff;
5. *Private nonbinding agreements* between one business or organization and another; and
6. *Public nonbinding agreements* between the government and a business or organization.

1. Private Binding Contracts

When private parties contract to limit speech, the First Amendment may not be implicated.[107] As a result, contracts to limit speech are generally enforceable.[108] Examples of contractual speech

103. U.S. CONST. amend. I.

104. *See* Erie Telecomm. Inc. v. City of Erie, 853 F.2d 1084, 1094 (3d Cir. 1988) (noting that "constitutional rights may be waived under particular circumstances").

105. *See id.*

106. *See id.* at 1099.

107. *See, e.g.*, *id.* at 1084.

108. *See, e.g.*, *id.* at 1094. When contracts restricting speech are not

limitations include nondisclosure agreements, nondisparagement clauses, and confidentiality provisions.

A common form of contract in which an advertising prohibition might appear is in the landlord and tenant context. For example, a private property owner might lease his field to a concert promoter. As part of the lease agreement, the property owner could prohibit the promoter from accepting tobacco advertising or sponsorship of the concert.[109] If the promoter violated the contract, the property owner could sue in court and potentially obtain damages and a court order requiring that any tobacco ads be removed. Tobacco control advocates have focused on influencing such private contracts as a means to eliminate tobacco sponsorship at sporting events such as rodeos and NASCAR races.[110] In the nutrition context, one can imagine a landlord of a strip mall being influenced by nutrition advocates to restrict the window advertising for unhealthful foods by the mall's tenants.

2. Public Binding Contracts

The U.S. Supreme Court has determined that there are limits on how state or local governments can generally regulate advertising on private property, such regulations must pass the demanding *Central Hudson* test.[111] However, the way a government regulates the use of private property is different from the way a government controls the use of its *own* property.[112] This distinction between the "regulatory" interests (i.e., interfering with private relationships) and "proprietary" interests (i.e., managing public property) is key because a government entity has a greater ability to regulate advertising on its own property.[113]

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enforceable it is usually because of some overriding public policy consideration, other than the First Amendment, such as a public policy supporting whistle blowing. *See id.* at 1096; Novosel v. Nationwide Ins. Co., 791 F.2d 894 (3d Cir. 1983); Brian Stryker Weinstein, *In Defense of Jeffrey Wigand: A First Amendment Challenge to the Enforcement of Employee Confidentiality Agreements Against Whistleblowers*, 49 S.C. L. REV. 129, 141–42 (1997).

109. *See infra* notes 167–71 and accompanying text.

110. *See* notes 167–71 and accompanying notes.

111. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

112. Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992).

113. *See, e.g.*, Lee v. Int'l Soc'y for Krishna Consciousness, 505 U.S. 830 (1992) (affirming for the reasons expressed in the concurring opinions of *Int'l*

First, as a proprietor, a government has broad latitude to decline advertising or sponsorship when soliciting ads if the government itself will be the speaker.[114] The government is the speaker when, for instance, it prepares a visitors' guide to local attractions. As the proprietor of the publication, the government is not restricting the speech of third parties but is itself acting as a speaker.[115]

A second constitutionally permissible limitation that governments can make via a contract are restrictions on advertising by private parties in connection with their use of government property.[116] Like the example of the private landowner renting a field for a concert in Section (1) above, the government also has the ability to restrict advertising by private parties in relation to government property.[117] That is, besides the *Central Hudson* analysis, focusing on the commercial nature of speech, the Supreme Court also has developed a "forum" analysis, which focuses on the nature of the traditional use of public property as a venue for public speaking.[118] Under the "forum" analysis, the level of protection afforded to speech on public property depends on the nature of the property at issue.[119]

Soc'y for Krishna Consciousness, 505 U.S. 672). The government's proprietary interest also bolsters its position when regulating ads on public school grounds or on the public airwaves. *See supra* Part II.B.1(c).

114. Memorandum from the Ctr. for the Study of Law & Enforcement Policy Pac. Inst. for Research and Evaluation to the Ctr. on Alcohol Mktg. & Youth (July 2004), *available at* http://camy.org/action/pdf/CommercialSpeech Memo.pdf.

115. *See infra* Part II.D.

116. *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 678.

117. *Id.*

118. *See id.* at 694 (Kennedy, J., concurring).

119. The "forum" analysis begins with determining the nature of the forum in which the speech occurs. Hopper v. City of Pasco, 241 F.3d 1067, 1074 (9th Cir. 2001). The United States Supreme Court has "identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985). "[T]he two main categories of fora are public (where strict scrutiny applies) and non-public (where a more lenient 'reasonableness' standard governs)." *Hopper*, 241 F.3d at 1074. If a forum is not a traditional public forum (for example, meeting hall, park, street corner, public thoroughfare), it is a nonpublic forum unless the government intentionally designates it as public. DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 964–65 (9th Cir. 1999). On designating the forum, "[t]he government does not create a public forum by . . . permitting

If the property is a place that is usually opened to speakers, the property is a "traditional public forum" (e.g., a town square).[120] In this case, the government must pass the strict scrutiny test if it limits the content of what individuals may say on the property because the government will be infringing on a fundamental right.[121] The government must pass the *Central Hudson* test if it limits the content of commercial speech on the property.[122] If the property is not a "traditional public forum" (e.g., a government business office), the government has greater freedom to selectively grant some speakers access to the government's own property while denying others.[123]

The forum analysis doctrine generally has not been applied in the tobacco control context, perhaps because the most obvious

limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802. Further, a designated public forum may be opened only for some purposes, such as First Amendment uses, but remain a nonpublic forum for others. United States v. Kokinda, 497 U.S. 720, 730 (1990). In those situations, "regulation of the reserved nonpublic uses would still require application of the reasonableness test." *Id.* Evidence of government intent may include a written policy or conduct sufficient to show the government's actual intent. Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist., 941 F.2d 817, 823–24 (9th Cir. 1991). As to government restrictions in traditional public forums and designated public forums, speech is afforded the highest level of First Amendment protection. *Hopper*, 241 F.3d at 1074. In these fora, non-commercial speech is subject to strict scrutiny while commercial speech is subject to the lesser standard set forth in *Central Hudson*. *Id.*; Cent.Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).

Government restrictions in nonpublic forums and limited public forums, "[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license," will not be subjected to heightened review. *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 678. "[H]owever, the policies and practices governing access to . . . [government] advertising space must not be arbitrary, capricious, or invidious." Lehman v. City of Shaker Heights, 418 U.S. 298, 303 (1974). "The Government's decision to restrict access to a nonpublic forum need only be *reasonable*." *Cornelius*, 473 U.S. at 808. Therefore, if a "decision to limit access [to a nonpublic forum], whether wise or unwise, is reasonable and not an effort at viewpoint discrimination, . . . [it does] not violate the first amendment . . . ." *Planned Parenthood of S. Nev., Inc.*, 941 F.2d at 830.

120. *Hopper*, 241 F.3d at 1074.

121. *Id.*

122. Am. Future Sys., Inc. v. Pa. State Univ., 752 F.2d 854, 863 (3d Cir. 1984).

123. *Id.*

forums one would wish to control, public schools and broadcast media, already exclude tobacco marketing.[124] But a forum analysis may be important in determining that a commercial speech restriction is subject not to the *Central Hudson* test but to an alternative test specific to the forum at issue, such as public schools and broadcast media.[125] Nutrition advocates should carefully consider whether regulating food marketing in other nonpublic and limited public forums might form the basis for meaningful policy intervention. Properly crafted food advertising restrictions in these forums should receive a more lenient review than that required by the *Central Hudson* test. However, it remains to be seen if courts will perceive the logic in first using a forum analysis before employing, if necessary, the *Central Hudson* test.

3. Private Litigation Settlements

Settlements of civil cases between two or more private parties are essentially private binding contracts.[126] Just like private contracts,[127] settlements can contain speech restrictions that are enforceable in court.[128] A common speech provision of private settlements is a confidentiality clause in which the parties agree to keep the terms of the settlement contract secret.[129] Speech restrictions in settlements can also target advertising.[130] For example, in a settlement with the Center for Environmental Health,

124. *See* Master Settlement Agreement, *supra* note 12, § III(a).

125. *See, e.g.*, Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996) (plurality opinion) (upholding restrictions on programming imposed by the Cable Television Consumer Protection and Competition Act as a means of protecting children from indecent programming); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (stating that school authorities have greater power to control speech, in accord with their "basic educational mission," than would be the case in other contexts); FCC v. Pacifica Found., 438 U.S. 726, 750–51 (1978) (stating that "[t]he ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting").

126. 15A AM. JUR. 2d *Compromise and Settlement* § 18 (2005).

127. *See infra* Part II.C.1.

128. *See* Laurie Kratky Doré, *Settlement, Secrecy, and Judicial Discretion: South Carolina's New Rules Governing the Sealing of Settlements*, 55 S.C. L. REV. 791, 799–800 (2004).

129. *Id.*

130. *See, e.g., 2 Firms Stamp Out Lawsuit with Free Anti-Smoking Billboards*, S.F. CHRON., Aug. 24, 1998, at A13.

two of California's largest billboard companies agreed to pull down tobacco billboards and donate 500 months of billboard space to anti-tobacco ads.[131]

A prerequisite for a settlement is having a potentially valid legal claim. Many high profile tobacco cases have been based on the personal injuries suffered by smokers and to those exposed to secondhand smoke.[132] Likewise, in the nutrition context, analogous personal injury cases could be brought, and a few have been,[133] to compensate the injured for the harm done to them by the food industry's products and practices.

Beyond personal injury claims, all states have consumer protection laws that potentially could be used as a basis for a private lawsuit.[134] In California, for instance, laws that prohibit deceptive advertising and unfair competition allow certain private parties to sue for violations of the law.[135] Tobacco control advocates have repeatedly used these laws to hold the tobacco industry accountable for deceptive marketing practices, especially predatory marketing to children.[136]

In 1992, for example, advocates brought a lawsuit under California's unfair competition law against R.J. Reynolds Tobacco Co., alleging that the company's "Old Joe Camel" advertising campaign targeted minors "for the purpose of inducing and increasing their illegal purchases of cigarettes."[137] It is illegal in California for minors to buy or possess tobacco products.[138] The California Supreme Court found that advertising aimed at such

131. *Id.*

132. *See, e.g.*, Castano v. Am. Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995), *reversed*, 84 F.3d 734; Broin v. Philip Morris Cos., 641 So. 2d 888 (Fla. Dist. Ct. App. 1994).

133. *See, e.g.*, Pelman *ex rel.* Pelman v. McDonald's Corp., 396 F.3d 508 (2d Cir. 2005) (vacating the district court's dismissal and remanding for further proceedings).

134. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 17200–17209 (West 2005).

135. *Id.* A recent California ballot initiative, Proposition 64, amended California Business and Professions Code section 17204 by tightening the standing requirements for private plaintiffs but not government plaintiffs. *Id.* § 17204 (Supp. 2005).

136. *See, e.g.*, Mangini v. R.J. Reynolds Tobacco Co., 875 P.2d 73 (Cal. 1994).

137. *Id.* at 78.

138. *Id.* at 80.

unlawful conduct encourages both vendors and minors to violate the law.[139] R.J. Reynolds decided to settle the case rather than make further appeals.[140] This landmark settlement directly led to the end of the cartoon-based and kid-focused Old Joe Camel advertising campaign.[141]

Although *Mangini* involved advertising for a product that was illegal for children, lawsuits could be initiated against food advertising that allegedly is "unfair, deceptive, untrue, or misleading,"[142] depending on the language of the individual state's consumer protection law. A lawsuit could focus on what is "unfair, deceptive, untrue or misleading" to children of different ages who are the primary targets of the advertising (for example, five-year-olds or ten year olds) in an attempt to have the courts, rather than direct government regulation, limit food marketers' advertising practices. Under California's consumer protection laws, a case was brought in the late 1970s claiming that the marketing of certain sugary cereals, including Alpha Bits, Honeycomb, Fruity Pebbles, Sugar Crisp, and Cocoa Pebbles, was false or misleading.[143] The case eventually settled, and $1 million of the settlement went toward initiating the California Adolescent and Nutrition and Fitness Program ("CANFit"), a statewide, nonprofit organization that works to improve the nutrition and physical activity of low-income youth.[144]

Litigation settlements from potentially valid claims in personal injury or consumer protection cases could be used in almost limitless ways to achieve marketing restrictions that would be unconstitutional

139. *Id.* at 82. *Mangini* was decided on federal preemption grounds. *Id*. at 74. It did not involve any First Amendment issues. *See id*. at 76. R.J. Reynolds argued that the action violated the Federal Cigarette Labeling and Advertising Act (FCLAA). *Id*. at 75. The court in *Mangini*, decided prior to *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), found that restrictions on tobacco advertising were not preempted by the FCLAA. *Id.* at 74.

140. Mangini v. R.J. Reynolds Co., No. 939359 (Cal. Sup. Ct. 1997) (settlement agreement), *available at* http://www.tobacco.neu.edu/litigation/hotdocs/mangini.htm.

141. *Id.*

142. CAL. BUS. & PROF. CODE § 17200 (West 2005); *id.* § 17500 (providing a criminal penalty for false or misleading advertising).

143. *See* Comm. on Children's Television, Inc. v. Gen. Foods Corp., 673 P.2d 660, 663–64 (Cal. 1983).

144. *See* California Adolescent Nutrition and Fitness Program, About Us, http://www.canfit.org/about_us.html (last visited Aug. 26, 2005).

if imposed by law. However, barriers to a litigation approach exist, including potential difficulties forming a valid claim and the extreme cost of litigating against a powerful industry. The tobacco industry, for example, employs a "scorched earth"[145] litigation policy designed to deplete a plaintiff's resources far before a judgment is ever reached on the merits of a case.[146] To date, there are too few cases against the food industry to accurately predict what litigation strategy that industry would employ, but one should expect that the food industry is well aware that the "scorched earth" policy historically has been very successful for the tobacco industry.[147]

4. Public Litigation Settlements

Like private litigants, when the government sues a private party, the lawsuit usually is resolved with a settlement.[148] Government settlements have played an extremely important role in tobacco control.[149] Most notably, the attorneys general of several states reached a Master Settlement Agreement (MSA) with leading cigarette manufacturers based on the theory that the manufacturers should be held liable for past costs to the government due to smoking.[150] The MSA requires manufacturers to pay billions of dollars to the plaintiff states.[151] The MSA also contains important provisions specifically limiting cigarette manufacturers' speech.[152] For example, in the MSA, tobacco companies agreed to give up cigarette billboards and to forgo cigarette advertising directed at youth.[153] As seen in *Lorillard*,[154] the states would have had great

145. WORLD HEALTH ORG. [WHO], TOWARDS HEALTH WITH JUSTICE: LITIGATION AND PUBLIC INQUIRY AS TOOLS FOR TOBACCO CONTROL 18, (2002), *available at* http://www.who.int/tobacco/media/en/final_jordan_report.pdf (prepared by D. Douglas Blanke).

146. *Id*. (quoting Haines v. Liggett Group, Inc., 814 F.Supp. 414, 421 (D.N.J. 1993).

147. *Id.*

148. Jillian Smith, *Secret Settlements: What You Don't Know Can Kill You!*, 2004 MICH. ST. L. REV. 237, 240.

149. *See, e.g.*, Master Settlement Agreement, *supra* note 12.

150. *Id.*

151. *Id.*

152. *Id.* § III.

153. *Id.*

154. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

difficulty in achieving these results through regulation alone.[155]

Beyond the MSA, tobacco control routinely employs government settlements to achieve public health goals.[156] For example, in Fresno County, California, a deputy district attorney settles virtually all of his cases against retailers found violating California's laws prohibiting tobacco sales to minors.[157] Through settlements, he can obtain agreements tailored to the particular violation, agreements that usually involve a monetary penalty, and can include the removal or reduction of tobacco advertising at a particular store.[158] Likewise, a city prosecutor for the City of San Diego, California, frequently requests that restrictions on speech be part of a tobacco law violator's probation requirements.[159] In both scenarios, the government is obtaining a *voluntary* agreement to restrict speech, not mandating the restriction.

Government settlements of alleged legal violations can be a particularly effective way to achieve speech restrictions in areas most in need of them. Nutrition advocates should keep in mind the opportunities settlements provide when enforcing existing laws or when crafting new ones. For example, a potentially valid claim against a food manufacturer for its marketing on school campuses (either in violation of existing law, or in violation of a law advocates enact to protect school children) could, in theory, result in a voluntary settlement agreement by the food manufacturer to limit or change its television advertising. A more imaginative approach might be to require settling food manufacturers to meet specified targets, such as reducing childhood obesity rates to those found in the United States thirty years ago and allowing the industry to settle on the most efficient methods of achieving those targets.[160]

155. *See, e.g.*, *id.* at 557.

156. Telephone interview with Roger Wilson, Deputy Dist. Att'y, in Fresno County, Cal. (Feb. 9, 2005).

157. *Id.*

158. *Id.*

159. Telephone interview with Joan McNamara, City Prosecutor, in San Diego, Cal. (Jan. 26, 2005).

160. *See* Stephen D. Sugarman, *A New Diet Plan*, LEGAL TIMES, Jan. 10, 2005, at 1–2, *available at* http://www.law.berkeley.edu/faculty/sugarmans/Sugarman%20Legal%20Times%201-10-05.pdf.

Settlements are not a perfect solution. The agreement reached in the MSA serves to highlight some of the shortcomings of settlements. At its core, a settlement is always a compromise, meaning all parties obtain something they want. Many tobacco control advocates remain skeptical about the value of settlement agreements with tobacco companies.[161] Along with its notable achievements, the MSA offers tobacco companies a safe harbor for certain activities and practices.[162] For example, the MSA permits a tobacco company to sponsor one event per year.[163] That particular compromise points out yet another shortcoming of a settlement-interpretation. Does "one event per year" mean one weekend sporting event, as some tobacco control advocates believe?[164] No, in fact, it means a year-long series of racing events held under the umbrella event name the "Winston Cup."[165] Tobacco companies also sponsor individual athletes, race cars, and stock (such as rodeo bulls) to extend this allowance in the MSA into a near-continuous presence at many sporting events.[166]

5. Private Nonbinding Agreements

Tobacco advocates have influenced private binding contracts with the goal of eliminating tobacco sponsorship from sporting venues such as NASCAR racing[167] and rodeos.[168] In both cases,

161. Patricia A. McDaniel & Ruth E. Malone, *Understanding Philip Morris's Pursuit of U.S. Government Regulation of Tobacco*, 14 TOBACCO CONTROL 193, 193 (2005) (arguing that Philip Morris uses regulation to rehabilitate its image in order to appear socially responsible).

162. Master Settlement Agreement, *supra* note 12, § III(c)(2).

163. *Id.*

164. *See, e.g.*, State *ex rel.* Goddard v. R.J. Reynolds Tobacco Co., 75 P.3d 1075, 1078 (Ariz. Ct. App. 2003).

165. *See id.* at 1076.

166. *See id.* R.J. Reynolds argued that the disputed provision of the MSA allowed its signs to be posted at the raceway every day of every year that it sponsored a series. *Id.* at 1078. The trial court ordered the removal of all outdoor advertising signs that exceeded the authorized event-related window at either raceway. *Id.* The appellate court concluded, as did the trial court, that the subject language as a matter of law referred to the events at each site, not to multiple sites. *Id.* at 1080.

167. "Now it's the Nextel Cup series and no longer the Winston Cup. Out are the cigarettes, in are wireless phone networks." Editorial, *Racing's Evolution: 20th Year at Reborn Watkins Glen Keeps up with NASCAR's Changing Market, Faces*, STAR-GAZETTE (Elmira, N.Y.), Aug. 14, 2005, at 12,

advocates reached nonbinding agreements with the business decision makers of NASCAR and local rodeos to reject any offer by tobacco companies to sponsor the events.[169] Essentially, NASCAR and the local rodeos declined to contract with tobacco companies.[170]

Tobacco control advocates also have influenced the private contracts for advertisements that appear in many newspapers and magazines.[171] Through nonbinding agreements, advocates have been able to eliminate the presence of tobacco ads in the following publications: *New York Times*, *San Jose Mercury News*, *Business Week*, and *Reader's Digest*.[172] Again, the private organization made the decision to exclude tobacco sponsorship. These restrictions on speech are private restrictions, not government restrictions, and are not subject to First Amendment scrutiny.[173]

A great deal of food marketing appears in privately-controlled venues such as television, grocery stores, and restaurants.[174] Nutrition advocates can try to limit junk-food marketing in these venues by seeking nonbinding agreements with business decision makers to decline, reduce, or better scrutinize ads for unhealthful foods. Child-oriented television stations, for example, could voluntarily decline ads for unhealthful food during shows with a significant viewing population under the age of ten. Private schools could voluntarily agree to refuse any unhealthful food advertisements on school grounds. Grocery stores could build upon a recent trend to offer "family-friendly" checkout lines free of candy and other unhealthful foods easily accessible to children.[175] As mentioned above, stores also could voluntarily agree to place kids' cereal boxes on the shelf with only the nutrition information panel showing.

available at http://www.star-gazette.com/apps/pbcs.dll/article?AID=/20050814/OPINION01/508140308/1004.

168. The Buck Tobacco Sponsorship project Web site provides information about how to eliminate tobacco sponsorship at rodeos and related events such as rodeo-themed "bar nights." Buck Tobacco Sponsorship, http://www.buck tobacco.org (last visited Aug. 29, 2005).

169. Buck Tobacco Sponsorship, *supra* note 168; Editorial, *supra* note 167.

170. Buck Tobacco Sponsorship, *supra* note 168; Editorial, *supra* note 167.

171. Tobacco.org, A List of Periodicals Which Refuse Tobacco Ads, http://www.tobacco.org/Misc/tob_ad_mags.html (last visited Aug. 26, 2005).

172. *Id.* (providing a more complete list of publications).

173. *See supra* Part II.C.1.

174. *See* Sangiorgio, *supra* note 59, at 153.

175. *Id.*

Additionally, they could refuse slotting fees and other incentives to place unhealthful food products at commercially desirable locations, such as the end of the aisles.

Despite the flexibility and creativity they allow, voluntary policies have a significant flaw—they are unenforceable. Once the impetus driving a voluntary agreement dissipates, be it through good will, public pressure, the possibility of legislation, or the threat of litigation, the party making the concessions has no reason to continue abiding by the policy.[176]

6. Public Nonbinding Agreements

Like private advocates, the government can solicit voluntary agreements from industry. In fact, the government is often more successful than private parties at inducing industry to accept voluntary policies, because it has the added power of enacting legislation if a voluntary policy is insufficient or abandoned.[177] Voluntary agreements between industry and government are frequently referred to as "self-regulation."[178]

Industry rating systems provide some of the best, and most complex, examples of government-initiated, voluntary policies regulating marketing and commercial speech. The examples of self-regulation below originated with a fear of legislation.[179] When the threat of government regulation lessens, so too does the effectiveness of self-regulation.[180]

176. *See generally* Angela J. Campbell, *Self Regulation and the* Media, 51 FED. COMM. L.J. 711, 727 (1999) (stating that "effective enforcement of the Television Code was hampered by . . . inadequate enforcement incentives").

177. *See generally id.* at 715 ("Often times, an industry will engage in self-regulation in an attempt to stave off government regulation.").

178. *See, e.g.*, *id.* at 750–55.

179. *Id.* at 751 (noting that the Supreme Court's approval of age classification systems prompted the movie industry to develop its own rating system); *id.* at 753 (noting that the Telecommunications Act of 1996 required the FCC to take steps toward establishing a ratings system if the television industry failed to implement a satisfactory system of its own); *id.* at 752 (noting that the Software Publishers Association "announced its intent to create its own rating and warning system" on the first day of legislative hearings about video game standards).

180. *See id.* at 727.

a. Movie ratings

Almost every moviegoer is familiar with the Motion Picture Association of America's (MPAA's) movie rating system.[181] The MPAA rates movies with the designation of either G, PG, PG-13, R, or NC-17.[182] The ratings directly relate to the appropriateness of the movie's content for children.[183] No law requires the ratings system to be enforced.[184] Theater owners decide how strictly to enforce the system.[185]

One novel idea in tobacco control is to tap into the existing movie rating system and convince the MPAA to consider if and how smoking is portrayed in movies. For example, one proposed guideline provides that, "[a]ny film that shows or implies tobacco should be rated 'R.'"[186]

b. Television ratings

Perhaps less familiar than movie ratings is the fairly new television rating system. Like the movie rating system, television

181.

> The MPAA ratings are enforced by the MPAA-created Classification and Rating Administration (CARA). . . . While the rating system is voluntary, the great majority of producers submit their films to CARA to be rated.
>
> The movie makers may make cuts based on CARA suggestions, or they may appeal to the Ratings Appeal Board. . . . The movie industry's adoption of CARA immediately led to the decline, and ultimately the extinction, of all local censorship boards.

Colin Miller, *A Wolf in Sheep's Clothing:* Wolf v. Ashcroft *and the Constitutionality of Using the MPAA Ratings to Censor Films in Prison*, 6 VAND. J. ENT. L. & PRAC. 265, 273 (2004).

182. *See* MPAA, Voluntary Movie Rating System, http://www.mpaa.org/FilmRatings.asp (last visited Aug. 29, 2005) (explaining the ratings system).

183. Miller, *supra* note 181, at 273 (quoting MPAA President Jack Valenti, "the only objective of the ratings is to advise the parent in advance so he or she may determine the possible suitability or unsuitability of viewing by children").

184. Jack Valenti, MPAA, How the Rating System is Used by Theater Owners and Video Retailers (Dec. 2000), http://www.mpaa.org/Ratings_Purpose.asp (last visited Jan. 28, 2006).

185. *Id.*

186. Smoke Free Movies, The Solution, http://www.smokefreemovies.ucsf.edu/solution/index.html (last visited Aug. 29, 2005).

shows contain an age-appropriateness rating.[187] The Telecommunications Act of 1996[188] required every television set thirteen inches or larger sold in the United States to include an electronic chip allowing parents to block programming based on an encoded rating.[189] The Act,

> gave the industry one year to come up with 'voluntary rules for rating video programming that contains sexual, violent, or other indecent materials about which parents should be informed before it is displayed to children' and to agree 'voluntarily to broadcast signals that contain ratings of such programming.' If the industry failed to develop rules acceptable to the FCC, the FCC was required to establish an advisory committee to recommend a rating system; to prescribe guidelines and procedures for rating video programs; and to require stations to include the ratings on any program that is rated.[190]

The Act's "'fail-safe' provision deliberately stops short of requiring that broadcasters accept the ratings system devised by the advisory committee,"[191] leaving itself "deliberately toothless to avoid constitutional problems of prior restraint and compelled speech."[192] As expected, the industry developed an age-based rating system on its own, which was revised after public disapproval but later accepted by the FCC as sufficient.[193]

c. Video game ratings

In response to congressional inquiries into violence in video games, the video game industry created the Entertainment Software Rating Board (ESRB) in 1994 as an industry mechanism for self-

187. *See* CONSUMER & GOV'T AFFAIRS BUREAU, FCC, THE V-CHIP: PUTTING RESTRICTIONS ON WHAT YOUR CHILDREN WATCH 1–2 (2005), http://www.fcc.gov/cgb/consumerfacts/vchip.pdf (explaining the voluntary ratings system adopted for television programs).

188. 47 U.S.C. § 230 (2000).

189. *Id.*; CONSUMER & GOV'T AFFAIRS BUREAU, *supra* note 187.

190. Campbell, *supra* note 176, at 753 (quoting Telecommunications Act of 1996, 47 U.S.C. § 230 (2000)).

191. *Id.* at 754 (quoting J.M. Balkin, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1157–58 (1996)).

192. *Id.*

193. *Id.* at 754–55.

regulation.[194] Similar to television, the ESRB developed an age-based ratings system for games.[195] Although video game makers, unlike their television counterparts, are not required to participate, the Congressional pressure to do so is so significant that, "WalMart, Toys R Us, and other retailers . . . only stock rated games."[196] At least two local governments have attempted to create ordinances that restrict the selling of video games with certain ratings.[197] At first glance, such regulation might appear to be simple product regulation subject to a rational basis review. However, the essence of a video game is speech, and a game's assigned rating is based on the game's content.[198] Therefore, a law prohibiting the sale of a video game based on its rating is regulating speech based on the content of speech.[199] Such regulations are subject to strict scrutiny, a standard neither law survived.[200] In the most-watched decision in this area, *Interactive Digital Software Association v. St. Louis County*, the Eighth Circuit struck down an attempt by St. Louis County to make it unlawful for any person to knowingly sell or rent graphically violent video games to minors.[201] The court invalidated the ordinance because the county failed to prove its first alleged, compelling interest of "safeguarding the psychological well-being of minors."[202] Likewise, in *Video Software Dealers Association v. Maleng*, a federal district court applied strict scrutiny to a

194. Entertainment Software Ratings Board, About ESRB, http://www.esrb.org/about.asp (last visited Nov. 6, 2005).

195. Campbell, *supra* note 176, at 753.

196. *Id.* at 752.

197. ST. LOUIS COUNTY, MO., REV. ORDINANCES § 602.440 (2005) (making it unlawful for any person knowingly to sell, rent, or make available graphically violent video games to minors, or to "permit the free play of" graphically violent video games by minors, without a parent or guardian's consent); WASH. REV. CODE ANN § 9.91.180 (West 2003 & Supp. 2005) (criminalizing the sale or rental of "violent" video games to minors).

198. Entertainment Software Ratings Board, Game Ratings and Descriptor Code, http://www.esrb.org/esrbratings_guide.asp (last visited Nov. 8, 2005).

199. Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954, 957 (8th Cir. 2003).

200. *Id.* at 960; Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180, 1190 (W.D. Wash. 2004).

201. *Interactive Digital Software Ass'n*, 329 F.3d at 960.

202. *Id.* at 958 (holding that the County did not establish a compelling interest for the ordinance, because the County did not provide empirical evidence that violent video games were psychologically harmful to children).

Washington law prohibiting the distribution of violent video or computer games to minors and found the law unconstitutional.[203]

The strength of the voluntary agreement strategy, in the context of the food industry, is the potential ability to limit the industry's advertising to children, a commitment that could be difficult or impossible to impose by law. To be most effective, the government, or private parties, could seek agreements that contain specific criteria to ensure measurable outcomes. For example, they could ask the industry to discontinue billboard advertising of unhealthful foods and beverages rather than requesting broad commitments relating to the "targeting" of youth, or specific age groups, because nonspecific commitments are difficult to measure. How does one track all the ads placed in all the various marketing media to ensure that the industry is not targeting a specific age group? Billboards are far easier to see and track. Government or private parties also could consider prioritizing marketing venues that are difficult for parents to control, such as event sponsorships (concerts, fairs, theme parks, etc.) and product placement in movies, television shows, video games, and internet sites.[204] These venues can be difficult to track and measure, but they represent huge marketing venues for the food industry.[205]

Unfortunately, like privately negotiated voluntary agreements, any such agreement negotiated between the food industry group and the government would be legally unenforceable.[206] It will likely take media advocacy, threats of legislation, and other pressure tactics, to compel the industry to abide by its stated promises. Any agreement, binding or nonbinding, would ultimately be a compromise. Knowing which principles can be compromised is an essential first step toward deciding whether an agreement can be a truly effective policy approach.

203. *Maleng*, 325 F. Supp. 2d at 1190.

204. *See* Story & French, *supra* note 6, at 7–8.

205. *Id.*

206. *Cf.* Michael A. McCann, *Economic Efficiency and Consumer Choice Theory in Nutritional Labeling*, 2004 WIS. L. REV. 1161, 1203 (2004) (addressing New York's inability to compel fast food restaurants to comply with a 1991 voluntary agreement to provide nutritional posters and brochures in restaurants).

D. Government Speech: Education & Counter Advertising

Government may have an opinion and may speak out on issues in which it has a legitimate interest, such as issues involving public health, safety, and welfare.[207] The Supreme Court has explained that "when the government appropriates public funds to promote a particular policy of its own[,] it is entitled to say what it wishes."[208] Thus, when the government acts as a speaker, it has wide latitude to take a substantive position on issues and take steps consistent with that position.[209] Public service messages are familiar forms of government speech and typically attempt to educate the public about important issues, such as HIV/AIDS prevention.[210] In California, the government produces strong anti-tobacco messages focusing on the greed and immorality of the tobacco industry.[211] California buys radio and television airtime like any other advertiser and spreads its anti-tobacco message throughout the state.[212] California's counter advertising program has been an important component of a highly effective, comprehensive tobacco control program.[213] Tobacco industry challenges to California's hard-hitting ads have lost in court.[214]

207. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 193 (1991).

208. Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995).

209. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (stating that "viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker"); *Rosenberger*, 515 U.S. at 834 ("A holding that the [state] University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles"); *Rust*, 500 U.S. at 192–93.

210. Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 116 (2004).

211. *See* CAL. DEP'T OF HEALTH SERVS., CALIFORNIA'S TOBACCO EDUCATION MEDIA CAMPAIGN 1 (2004), *available at* http://www.dhs.ca.gov/tobacco/documents/pubs/FSMediaCamp.pdf.

212. *Id.*

213. Press Release, California Department of Health Services, California Smoking Rates Drop 33 Percent Since State's Anti-Tobacco Program Began 1 (May 16, 2005), *available at* http://www.dhs.ca.gov/tobacco/documents/press/PressRelease05-22-05.pdf.

214. *E.g.*, R.J. Reynolds Tobacco Co. v. Bonta, 272 F. Supp. 2d 1085, 1105–06 (E.D. Cal. 2003).

The First Amendment does not protect government speech, because the government does not need to be protected from itself.[215] As a result, the government cannot invoke the First Amendment in defense of its own speech.[216] On the other hand, government speech can be limited by others' First Amendment rights as well as other basic limits on government power.[217] However, when the

215. *Id.* at 1102.

216. *Id.* at 1101.

217. In general, government speech is subject to limitation in six situations. One such situation is where "[t]he speech does not have a rational relationship to a legitimate government interest." *Id.* at 1108. As with any legislative action, government speech is invalid if it violates the rational basis test. *Id.* Another situation is where the government speech drowns out private speech in violation of the First Amendment. NAACP v. Hunt, 891 F.2d 1555, 1566 (11th Cir. 1990) (stating that "the government may not monopolize the 'marketplace of ideas,' thus drowning out private sources of speech"); Warner Cable Commc'ns, Inc. v. City of Niceville, 911 F.2d 634, 638 (11th Cir. 1990) (stating that "the government may not speak so loudly as to make it impossible for other speakers to be heard by their audience").

Government speech will also be subject to limitation where the speech interferes with constitutionally protected behavior. *Bonta*, 272 F. Supp. 2d at 1109. However, the Supreme Court's "unconstitutional conditions jurisprudence has said that the state may exercise its power to spend in order to discourage protected activity." *Id.* At some point that discouragement can become coercion which is unconstitutional under the First Amendment. *Bonta*, 272 F. Supp. 2d at 1110; Rust v. Sullivan, 500 U.S. 173 (1991).

A limitation additionally exists where the speech funds politically partisan activity. *See* NEA v. Finley, 524 U.S. 569, 598 (1998); Leigh Contreras, *Contemplating the Dilemma of Government as Speaker: Judicially Identified Limits on Government Speech in the Context of Carter v. Las Cruces*, 27 N.M. L. REV. 517, 519 (1997).

Where government compels private citizens to speak or compels citizens to subsidize speech they disagree with, the government's speech will be subject to limitation. *See* Johanns v. Livestock Mktg. Ass'n, 125 S. Ct. 1055 (2005) (rejecting a First Amendment challenge brought by beef producers against an ad campaign run by the government but paid for by an assessment on the beef producers). The Court in *Johanns* held that although the government cannot compel private citizens to express a certain message, and the government cannot compel citizens to subsidize *private* speech that they disagree with, the government can generally compel citizens to subsidize government speech. *Id.*; *see* also Keller v. State Bar of Cal., 496 U.S. 1 (1990); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Wooley v. Maynard, 430 U.S. 705 (1977); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

Finally, government speech will be limited where the speech violates the Establishment Clause. *Bonta*, 272 F. Supp. 2d at 1106. The government violates the Establishment Clause when it uses its own speech to endorse

government speaks truthfully or offers its own opinion on matters related to public health, it is unlikely that any of the potential limitations will be relevant.

Therefore, truthful government speech, based on research or the government's opinion about nutrition or food products, is likely to be upheld as a valid exercise of the government's power. For example, if a state government sponsored public service messages proclaiming, "Kids and soda make a dangerous mix," a legal challenge by soda manufacturers would likely fail.

Courts prefer more government speech over more government regulation of speech.[218] The Supreme Court has repeatedly emphasized that the best solution to speech that the government does not like (e.g., ads for nutritionally deficient food) is more speech, specifically more government speech espousing the counterpoints.[219]

The reality, however, is that effective counter advertisements are extremely expensive.[220] California's notable success countering tobacco advertising relies on a significant and dedicated tobacco tax.[221] Unfortunately, even with such resources, government will always be outspent when confronting the billion-dollar tobacco and food industries.[222]

III. CONCLUSION

Although the U.S. Supreme Court has significantly limited the ability of government to directly regulate the commercial media environment to promote public health goals, whether related to tobacco products, unhealthful foods, or other advertising that entices risky behavior, government agencies and public health advocates can still take action. Governments can regulate nonexpressive conduct rather than speech, by prohibiting toy give-aways, except when

religion. *Id.* The Establishment clause reads, in part, "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

218. *Bonta*, 272 F. Supp. 2d at 1105–06.

219. *See, e.g.*, 44 Liquormart v. Rhode Island, 517 U.S. 484, 498 (1996). The "remedy to be applied is more speech, not enforced silence." *Id.* (quoting Whitney v. California, 274 U.S. 357, 377 (1927)).

220. *See* CAL. DEP'T OF HEALTH SERVS., *supra* note 211, at 2.

221. *Id*.

222. GOSTIN, supra note 19, at 148. In 1999, the U.S. food industry spent 7.3 billion dollars advertising their products. *See supra* note 6 and accompanying text.

accompanied by healthful foods, or prohibiting the sale of complete "meals" that exceed a maximum level of unhealthful components. Also, health advocates and governments can use enforceable contracts and voluntary agreements to achieve public health goals that may not be achievable through regulation. Following these guidelines, government agencies and public health advocates can work to improve health outcomes and hold the food industry accountable for the impact of its media messages.

IV. POSTSCRIPT

Preemption is an ever-present danger, no matter what policy approach is taken to combat the prevalence of unhealthful food, and no matter how constitutionally sound a regulation might be. Preemption occurs when a law passed at a higher level of government precludes a law passed at a lower level.[223] Preemption can be either express or implied.[224] Federal laws such as the Federal Cigarette Labeling and Advertising Act ("FCLAA")[225] can preempt state and local laws.[226] State regulation can also preempt local laws.[227]

223. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 374 (7th ed. 2004).

224. Express preemption occurs when Congress explicitly states that it intends to preclude a certain kind of state regulation. *Id.* Implied preemption occurs where Congress, through statutory language or a regulatory structure, precludes state regulation by implication. *Id.* A final category of preemption, conflict preemption, occurs where, by virtue of an inherent conflict between state and federal law, the state law is invalid. *See, e.g.*, *id.* at 377. This occurs when a state regulation contradicts the provisions or purposes of a federal law or where the court determines that Congress meant to "occupy the field." *Id.* at 374. These distinctions are the subject of much litigation, as even when some kind of preemption is clear, it is often unclear as to exactly the scope of what is preempted. *See id.* at 374–75.

225. FCLAA, 15 U.S.C. §§ 1331–41 (2005).

226. *Id.* § 1334(a). The idea of federal preemption is based on the Supremacy Clause of the U.S. Constitution, which states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

227. NOWAK & ROTUNDA, *supra* note 223, at 374.

The tobacco industry has traditionally argued that preemption is necessary in order to level the playing field and avoid confusing or conflicting rules.[228] This argument is often an excuse to limit local regulation, which the industry is less able to control.[229] As a result, state and local laws are neutralized, and political debate is limited to the halls of government where the industry enjoys the most influence.[230]

Preemptive legislation has significantly inhibited tobacco control advocates' efforts.[231] The long-term success of any policy objective demands that advocates: (i) fully understand the concept of preemption; (ii) watch for opposition efforts that attempt to enact

228. Americans for Nonsmokers' Rights, Preemption: Arguments and Responses 1 (Aug. 2004), http://www.protectlocalcontrol.org/files/preemption responses.pdf; Robin Hobart, Tobacco Technical Assistance Consortium, Preemption: Shifting the Battle to Stronger Ground 7 (Sept. 2002), http://www.ttac.org/assistance/pdfs/Advice_Preemption.pdf.

229. More than 2300 local jurisdictions now have tobacco control ordinances. Americans for Nonsmokers' Rights, *supra* note 228, at 4. The cigarette warning label in the United States has been criticized for its weak language, especially compared to warning labels in countries like Canada and Brazil. *See* Karen L. Schneider, Am. Council on Sci. & Health, Gross Pics Intended to Help Canadian Smokers (July 22, 2002), http://www.acsh.org/healthissues/newsID.383/healthissue_detail.asp. There is also precedent, at least in California, for imposing individual state warning regulations because of an important public health goal. *See, e.g.*, Safe Drinking Water and Toxic Enforcement Act of 1986, CAL. HEALTH & SAFETY CODE §§ 25249.5–.13 (West 2005). For instance, California's Proposition 65 requires businesses to warn of potential exposure to carcinogens or reproductive toxins. *Id.* § 25249.6.

230. Americans for Nonsmokers' Rights, Preemption: Tobacco Control's #1 Enemy 1 (Aug. 2004), http://www.no-smoke.org/document.php?id=397.

231. *See, e.g.*, ADVOCACY INST., PREEMPTION OF STATE AND LOCAL TOBACCO CONTROL POLICIES (1998), *available at* http://www.advocacy.org/publications/mtc/preemption.htm; ROBIN HOBART, AM. MED. ASS'N, PREEMPTION: TAKING THE LOCAL OUT OF TOBACCO CONTROL 6 (2003), *available at* http://www.smokelessstates.org/downloads/2003_Preemption.pdf; Michael Siegel et al., *supra* note 7, at 858–63. In certain circumstances, legislation adopted at higher levels of government can have significant positive public health effects. For example, a law passed at the state level can extend public health protections to local communities that might not pass their own ordinance on the topic. However, this strategy runs the risk of preempting more stringent local public health efforts unless the state or federal law explicitly allows for stricter local ordinances through the inclusion of anti-preemptive language. *See* NOWAK & ROTUNDA, *supra* note 223, at 374.

preemptive law; and (iii) make the inclusion of anti-preemptive language a key objective for any law passed.[232]

232. A number of California tobacco control laws contain language explicitly allowing local governments to adopt stricter ordinances. CAL. LAB. CODE § 6404.5 (West 2005) (prohibiting smoking in enclosed places of employment); CAL. BUS. & PROF. CODE § 22971.3, 22970.2 (West 2005) (requiring tobacco retailers, distributors, and wholesalers to obtain a license); CAL. BUS. & PROF. CODE §§ 22962, 22960 (West 2005) (prohibiting most forms of self-service displays of tobacco).