

An hourglass-shaped graphic with a globe in the top bulb and a smaller globe in the bottom bulb. The hourglass is light blue and has a dark blue top and bottom. The globe in the top bulb is dark blue with light blue continents. The globe in the bottom bulb is light blue with dark blue continents. The hourglass is centered on the page.

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*TOBACCO ADVERTISING: THE CONSTITUTIONALITY  
OF LIMITING ITS TAX DEDUCTIBILITY*

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**Abstract.** Under the Internal Revenue Code, advertising is ordinarily deductible as a business expense (26 U.S.C. Section 162). It has been proposed, however, that the deductibility of the cost of advertising tobacco products be limited or eliminated. Since advertising is a form of speech, this raises the question of whether such a limitation would violate the provision of the First Amendment that "Congress shall make no law abridging the freedom of speech, or of the press."

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## Tobacco Advertising: The Constitutionality of Limiting its Tax Deductibility

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### Summary

Under the Internal Revenue Code, advertising is ordinarily deductible as a business expense. 26 U.S.C. § 162. It has been proposed, however, that the deductibility of the cost of advertising tobacco products be limited or eliminated. Since advertising is a form of speech, this raises the question of whether such a limitation would violate the provision of the First Amendment that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .” We conclude that it apparently would not. As advertising is commercial speech, it is not entitled to the same level of First Amendment protection as other speech, and to make it more expensive by limiting its tax deductibility would apparently not violate the *Central Hudson* test that the Supreme Court applies in determining whether governmental restrictions on commercial speech are constitutional.

### Tax Deductions and Free Speech

The Supreme Court has held that Congress is not required to subsidize First Amendment rights through a tax deduction, but that a First Amendment question would arise if Congress were to discriminate invidiously in its subsidies in order to suppress what it deemed dangerous ideas. In 1991, the Court wrote:

*Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983), stands for the proposition that a tax scheme that discriminates among speakers does not implicate the First Amendment unless it discriminates on the basis of ideas. In that case, we considered provisions of the Internal Revenue Code that discriminated between contributions to lobbying organizations. One section of the Code conferred tax-exempt status on certain nonprofit organizations that did not engage in lobbying activities. Contributions to those organizations were deductible. Another section of the Code conferred tax-exempt status on certain other nonprofit organizations that did lobby, but contributions to them were not deductible. Taxpayers contributing to veterans’ organizations were, however, permitted to deduct their contributions regardless of those organizations’ lobbying activities.

The tax distinction between these lobbying organizations did not trigger heightened scrutiny under the First Amendment. *Id.*, at 546-551. We explained that a legislature is not required to subsidize First Amendment rights through a tax exemption or tax deduction. *Id.*, at 546. For this proposition, we relied on *Cammarano v. United States*, 358 U.S. 498 (1959). In *Cammarano*, the Court considered an Internal Revenue regulation that denied a tax deduction for money spent by businesses on publicity programs directed at pending state legislation. The Court held that the regulation did not violate the First Amendment because it did not discriminate on the basis of who was spending the money on publicity or what the person or business was advocating. The regulation was therefore “plainly not “aimed at the suppression of dangerous ideas.”” *Id.*, at 513, quoting *Speiser v. Randall*, 357 U.S. 513, 519 (1958).

*Regan*, while similar to *Cammarano*, presented the additional fact that Congress had chosen to exempt from taxes contributions to veterans’ organizations, while not exempting other contributions. This did not change the analysis. Inherent in the power to tax is the power to discriminate in taxation. “Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes.” *Regan*, *supra*, at 547. . . .

*Cammarano* established that the government need not exempt speech from a generally applicable tax. *Regan* established that a tax scheme does not become suspect simply because it exempts only some speech. *Regan* reiterated in the First Amendment context the strong presumption in favor of duly enacted taxation schemes. . . . [T]he presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. . . .

On the record in *Regan*, there appeared no such “hostile and oppressive discrimination.” We explained that “[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas.” *Id.*, at 548. . . . But that was not the case. The exemption for contributions to veterans’ organizations applied without reference to the content of the speech involved; it was not intended to suppress any ideas; and there was no demonstration that it had that effect. . . .<sup>1</sup>

Because, in *Regan*, “[t]he exemption for contributions to veterans’ organizations applied without reference to the content of the speech involved,” the Supreme Court applied a rational basis test in upholding the discrimination in favor of veterans’ organizations. It wrote:

Generally, statutory classifications are valid if they bear a rational relation to a legitimate government purpose. Statutes are subjected to a higher level of scrutiny if they interfere with a fundamental right, such as freedom of speech, or employ a suspect classification, such as race.<sup>2</sup>

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<sup>1</sup> *Leathers v. Medlock*, 499 U.S. 439, 450-452 (1991).

<sup>2</sup> *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 547 (1983).

If Congress were to eliminate or limit the tax deduction for tobacco advertising without doing the same for all advertising, then it would effectively be interfering with the freedom of speech. It would not matter, from a First Amendment standpoint, that it would make tobacco advertising more expensive rather than directly limit it, because the Supreme Court has held “that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints.”<sup>3</sup> “A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.”<sup>4</sup>

Nevertheless, the speech whose freedom would be limited by limiting the tax deduction for tobacco advertising would be commercial speech. This makes it probable that such a limitation would be constitutional.

## Commercial Speech

The Supreme Court has held that the First Amendment, notwithstanding its broad language (“Congress shall make no law . . . abridging the freedom of speech”), is not absolute. Some speech, such as obscenity, it does not protect at all.<sup>5</sup> Other speech, such as commercial speech, which is speech that “propose[s] a commercial transaction,”<sup>6</sup> it “accords a lesser protection to . . . than to other constitutionally guaranteed expression.”<sup>7</sup> In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Court prescribed the test to be used to determine the constitutionality of governmental restrictions on commercial speech. For such a restriction to be constitutional, it must meet a four-prong test. This test asks initially (1) whether the commercial speech at issue is protected by the First Amendment (that is, whether it concerns a lawful activity and is not misleading) and (2) whether the asserted governmental interest in restricting it is substantial. “If both inquiries yield positive answers,” then to be constitutional the restriction must (3) “directly advance[ ] the governmental interest asserted,” and (4) be “not more extensive than is necessary to serve that interest.”<sup>8</sup>

In *Board of Trustees of the State University of New York v. Fox*, the Supreme Court made it easier for the government to satisfy the fourth prong of the *Central Hudson* test. It held that the fourth prong is not to be interpreted “strictly” to require the legislature to use the least restrictive means available to accomplish its purpose.<sup>9</sup> Instead, the Court held, legislation regulating commercial speech is to be upheld if there is a “‘fit’ between the

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<sup>3</sup> *Leathers v. Medlock*, *supra* note 1, at 447.

<sup>4</sup> *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 115 (1991).

<sup>5</sup> *Miller v. California*, 413 U.S. 15 (1973).

<sup>6</sup> *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 473 (1989).

<sup>7</sup> *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563 (1980).

<sup>8</sup> *Id.* at 566

<sup>9</sup> *Fox*, *supra* note 6, at 476.

legislature's ends and the means chosen to accomplish those ends," — "a fit that is not necessarily perfect, but reasonable . . . ."<sup>10</sup>

## Applying the *Central Hudson* Test

The first prong of the *Central Hudson* test asks whether the advertising being limited concerns a lawful activity and is not misleading. Tobacco advertising is lawful (except "on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission"<sup>11</sup>), and we will presume that only non-misleading advertising is at issue, as misleading advertising is already illegal under § 5 of the Federal Trade Commission Act.<sup>12</sup>

The second prong of *Central Hudson* asks whether the asserted governmental interest in restricting it is substantial. The purpose of limiting the tax deductibility of tobacco advertising presumably would be to increase its cost, in order to reduce the amount of such advertising, in order to reduce the demand for tobacco products, in order to reduce the incidence of tobacco-related illnesses. The Supreme Court has held that the government's "interest in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest."<sup>13</sup>

The third prong of *Central Hudson* asks whether the restriction on commercial speech directly advances the governmental interest asserted. The Supreme Court has found reasonable the view that restricting advertising directly advances the asserted governmental interest by reducing the demand for the product advertised.<sup>14</sup> The Court has also held, however, that the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."<sup>15</sup> With respect to restrictions on tobacco advertising that the Food and Drug Administration proposed, it concluded "that tobacco advertising plays a concrete role in the decision of minors to smoke, and that each specific restriction on this advertising that it is adopting will contribute to limiting its effect and thus to protecting the health of children and adolescents under the age of 18."<sup>16</sup> If this is true, then the advertising restrictions would apparently satisfy the third prong of the *Central Hudson* test.

The fourth and final requirement of the *Central Hudson* test is that there be a reasonable "fit" between the legislature's ends and the means chosen to accomplish those

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<sup>10</sup> *Id.* at 480. The Court does "not equate this test with the less rigorous obstacles of rational basis review." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995). In other words, although a restriction on commercial speech need not constitute the least restrictive means to satisfy the fourth prong, it must be more than merely rational.

<sup>11</sup> 15 U.S.C. § 1335.

<sup>12</sup> 15 U.S.C. § 45.

<sup>13</sup> *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328, 341 (1986).

<sup>14</sup> *Id.* at 341-342.

<sup>15</sup> *Edenfield v. Fane*, 507 U.S. 761, 771 (1993).

<sup>16</sup> 61 Fed. Reg. 44,474 (1996).

ends.<sup>17</sup> In light of the fact that limiting or eliminating the tax deduction for tobacco advertising would not directly limit tobacco advertising itself, it appears likely that it would be found a reasonable means to accomplish the end of reducing smoking.

## Viewpoint-based Discrimination

Would it constitute unconstitutional discrimination if Congress were to limit or eliminate the tax deduction for tobacco advertising but not for other product advertising, or at least for advertising of other dangerous products? A law review article concedes that elimination of the tax deduction for tobacco advertising “may arguably pass constitutional muster under the *Central Hudson* test,” but nevertheless concludes that it would constitute unconstitutional viewpoint-based discrimination.<sup>18</sup> The article claims that “the Court, in *Central Hudson*, did not address the issue of viewpoint distinctions. This type of analysis is therefore inappropriate in the context of the Harkin Amendment,<sup>19</sup> where the restriction on commercial speech is content-based. . . . Based on this fact, the Harkin Amendment is unconstitutional because the First Amendment does not allow the government to single out any form of speech and suppress it because of its content.”<sup>20</sup>

The law review article’s analysis appears confused on this point. To say that a restriction on advertising is viewpoint-based or content-based is to say merely that it applies to advertisements for particular products — that it restricts, or imposes additional costs on, what one may say in advertisements about a particular product or products rather than with respect to all advertisements. Viewpoint-based advertising restrictions might be contrasted with, for example, zoning restrictions on billboards that apply to all advertisements regardless of content.

*Central Hudson*, contrary to the claim in the law review article, did in fact involve viewpoint-based discrimination, as it concerned a regulation that prohibited electric utilities from advertising to promote the use of electricity, but did not prohibit electric utilities or anyone else from advertising any other products.<sup>21</sup> The Supreme Court declared the regulation unconstitutional, but not because it constituted viewpoint-based discrimination. Rather, it declared it unconstitutional because it failed the new test that the Court created in that case: the *Central Hudson* test. The *Central Hudson* test is the test that the Supreme Court has mandated for determining the constitutionality of governmental actions that restrict commercial speech, whether on the basis of viewpoint or otherwise.<sup>22</sup>

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<sup>17</sup> *Fox*, *supra* note 6, at 480.

<sup>18</sup> Sally L. Venverloh, *The Harkin Amendment: The Constitutionality of Limiting Deductions for Tobacco Advertising*, 13 St. Louis University Public Law Review 787, 818 (1994).

<sup>19</sup> S. 609, 103d Cong. (1993), which would have permitted tobacco companies to deduct only 50 percent of their tobacco advertising expenses.

<sup>20</sup> Venverloh, *supra* note 18, at 817-818.

<sup>21</sup> *Central Hudson*, *supra* note 7.

<sup>22</sup> Among the numerous cases involving advertisements that may be viewed as viewpoint-based to which the Supreme Court applied the *Central Hudson* test are *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), which struck down a ban on mailing unsolicited

(continued...)

In conclusion, it appears that the courts would assess the constitutionality of limiting or eliminating the tax deduction for tobacco advertising under the *Central Hudson* test and would likely find it not to violate the First Amendment.

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<sup>22</sup>(...continued)

advertisements for contraceptives; *Posadas*, *supra* note 13, which upheld a restriction on advertisements for casino gambling; *Ibanez v. Florida Board of Accountancy*, 512 U.S. 136 (1994), which struck down a restriction on advertising by accountants; *Florida Bar*, *supra* note 10, which upheld a restriction on lawyer solicitation; and *44 Liquormart, Inc., v. Rhode Island*, 116 S. Ct. 1495 (1996), which struck down a restriction on alcoholic beverage advertising.