Tobacco is a Filthy Weed and from the Devil Doth Proceed: A Study of the Government's Efforts to Regulate Smoking on the Silver Screen

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"Tobacco is a Filthy Weed and from the Devil Doth Proceed": A Study of the Government's Efforts to Regulate Smoking on the Silver Screen

by
JASON EDWARD LAVENDER*

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Introduction

Cigarette smoking causes more than 100,000 lung cancer deaths each year in the United States.\(^1\) Combined with other smoking-related diseases, such as emphysema, heart disease and cancers other than of the lungs, smoking leads to over 400,000 deaths each year in the United States.\(^2\) It is estimated that five to six million people will die from smoking in the United States between the years 1990-2000.\(^3\) In attempting to draw a connection between smoking and movies, First Lady Hillary Rodham Clinton noted that seventy-seven percent of all films released in 1996 featured scenes depicting smoking, and furthermore, every film nominated for best picture at the Academy Awards contained similar scenes.\(^4\) Clinton cites these statistics in order to give validity to her premise that Hollywood is to blame for an increase in teenage smoking.\(^5\) Despite all the scientific data and studies seemingly proving the harmful effects of smoking, the numbers of those who smoke are constantly increasing.\(^6\) But, do these statistics grant the government, particularly the federal government, the power to regulate the use of tobacco products in movies? Recently, the government has made significant in-roads into the tobacco industry’s realm of advertisements, most noticeably the proposed settlement on June 20, 1997 between the tobacco industry and some forty state attorneys general.\(^7\) The proposed settlement, pending Congressional approval, calls for a $368.5 billion payment by the tobacco industry, as well as strict regulations on tobacco advertising, bans on product placement in movies and television, and bans on brand-name sponsorship of sporting

\(^1\) See Institute for Health Policy, Brandeis University, Substance Abuse: The Nation’s Number One Health Problem, Key Indicators for Policy 33 (1993).
\(^5\) See id.
events and promotional merchandise. This note examines the constitutionality of the tobacco settlement as it relates to the bans on product placement in movies. Since the historic tobacco settlement proposal, both the federal government and numerous state governments have renewed the effort to regulate the portrayal of smoking on the silver screen.

The First Amendment provides a substantial bulwark in favor of free speech against any intrusion by the federal government. Subsequently, the Fourteenth Amendment applied this protection against state intrusion. However, the right to free speech is not absolute and can be abridged under certain circumstances. Historically, cigarette placement in motion pictures has escaped governmental regulation. However, this was not due to a lack of federal regulation. Federal regulation of tobacco-related products began in earnest with the Surgeon General’s report on the health hazards associated with smoking. This report prompted congressional regulation of tobacco products. The first such regulation was the Federal Cigarette Labeling and Advertising Act of 1965, which precipitated the infamous warning displayed so prominently on all tobacco products and advertisements. Then, in 1970, Congress passed the Public Health Cigarette Smoking Act, which prohibited tobacco producers from advertising and promoting their products on television and radio. This Act demonstrates that there is precedent for an absolute ban of tobacco products in an entertainment medium.

This Note examines those circumstances which lend themselves to governmental regulation, or even proscription,

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8. Id. This Note was written and edited while the federal tobacco settlement was still pending. The issues discussed are still relevant to any present or future legislative restrictions on tobacco product placement in movies.
9. U.S. Const. amend. I.
of speech. In connection with this analysis, this Note focuses upon pre-existing regulation of tobacco advertising, as well as proposed regulation of tobacco advertising. More specifically, this Note addresses how tobacco advertisement restrictions will affect product placement in movies. Part I of this Note traces the history of the commercial speech doctrine, starting with the seminal case of *Valentine v. Chrestensen*, right up to the most recent case of *44 Liquormart, Inc. v. Rhode Island*. Part II provides a definitional overview of what constitutes product placement, as well as the tobacco industry's use of product placement in movies. Part III analyzes the Executive Branch's pre-existing regulations of tobacco products, as well as proposed regulations. This Part also looks more specifically at the effect which the Executive's regulations would have on the movie industry, vis-a-vis product placement. Part IV gives an overview of the proposed tobacco settlement of 1997 and how it will affect the symbiosis of the tobacco industry and the motion picture industry. Lastly, this note, in Part V, concludes that product placement is commercial speech and therefore should be granted heightened protection under recent Supreme Court case law, including the *44 Liquormart* case.

I

Background

A. The Commercial Speech Doctrine

1. The Motive Test

The first bifurcation of speech occurred in the *Valentine v. Chrestensen* case, which recognized the separate categories of commercial and noncommercial speech. In *Chrestensen*, the Supreme Court upheld an ordinance which prohibited the dissemination of advertising leaflets. The respondent protested against the ordinance as an unjustified and unlawful intrusion into his liberty, as guaranteed under the

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15. 316 U.S. 52 (1942).
17. 316 U.S. 52 (1942).
18. Id. at 54.
Fourteenth and First Amendments of the United States Constitution.\textsuperscript{19} In the context of the First Amendment, the Court’s dichotomy between the two types of speech created a situation where “purely commercial”\textsuperscript{20} speech would not be protected from governmental infringement. Unfortunately, the Court did not define or expound on the phrase “purely commercial speech.” In addition, the Court did not provide any guidelines to help lower courts discern between commercial and noncommercial speech, or speech which contained aspects of both.\textsuperscript{21} The Court did, however, imply that the primary component of commercial speech centers around the speaker’s motive.\textsuperscript{22} The Court concluded that if “the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition . . . was lawfull.”\textsuperscript{23}

2. The Content Test

The implication that commercial speech hinges upon the speaker’s motive was officially discarded when the Court decided the case of \textit{Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations}.\textsuperscript{24} There, the plaintiff newspaper company violated an ordinance by utilizing an employment advertising system which classified its potential employees based upon gender.\textsuperscript{25} The Court focused on the plaintiff’s want-ads, holding them to be purely commercial and therefore unprotected under the \textit{Chrestensen} case.\textsuperscript{26} The emphasis of the Court’s analysis changed from the speaker’s motive to the content of that speech. In holding that the plaintiff’s want-ads supported illegal discrimination on the basis of gender, the Court provided the definition of

\begin{itemize}
  \item[19.] \textit{Id.}
  \item[20.] \textit{Id.}
  \item[22.] \textit{Id.}
  \item[23.] \textit{Chrestensen}, 316 U.S. at 55.
  \item[25.] \textit{Id.} at 379.
  \item[26.] See \textit{id.} at 385, 391.
\end{itemize}
commercial speech: "[speech which does] no more than propose a commercial transaction." 27

The following term, the Court further denounced Chrestensen's motive test in the case of Bigelow v. Virginia. 28 In Bigelow, the plaintiff, an underground newspaper at a Virginia university, was convicted for violating a Virginia statute which proscribed advertising that aided or encouraged abortions. 29 The statute rested upon the idea that since all advertising must be paid for, it was therefore commercial. 30 Upon payment, the advertisement was infused with commercial properties and was thus subject to proscription by the Virginia legislature. The Supreme Court, recognizing the dual nature of the advertisement, accorded the plaintiff constitutional protection under the First and Fourteenth Amendments. 31 The Court expressly rejected its motive test under Chrestensen and upheld a content-based balancing test. 32 This test balances the importance of the speech against the statute's reasonableness and whether it serves a "legitimate public interest." 33 While this test adequately identified commercial and noncommercial speech, it failed to provide consistency and required a case-by-case analysis, the outcome of which was dependent upon the content of the speech, the public's interest in the free flow of information 34 and the legitimate public interest of the government.

27. Id. at 385.
29. Id. at 812.
30. Id. at 818.
31. See id.
32. Id. at 820-22.
33. Id. at 825-26.
34. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976). This case involved a Virginia statute which prohibited pharmacists from advertising the prices of their prescription drugs. Id. at 749-50. The Court, despite the pharmacists' purely economic motivations, struck down the statute. Id. at 750. The Court reasoned that society's general interest in the free flow of information regarding economics and consumerism "may be as keen, if not keener by far, than [the] interest in the day's most urgent political debate." Id. at 763-64. This holding, however, did not lead to the eradication of the commercial/non-commercial distinction.
3. The Modern Commercial Speech Test: Central Hudson’s 4-Part Test

The modern commercial speech test, aimed at resolving the inconsistent and largely unpredictable Bigelow/Virginia Board of Pharmacy test, is, in large part, derived from Central Hudson Gas & Electric Corp. v. Public Service Commission of New York. The Court, while maintaining the commercial/noncommercial dichotomy, limited the definition of commercial speech to an “expression [that] relate[s] solely to the economic interests of the speaker and its audience.” The Court devised a four-part test in order to determine the legality of governmental intervention of speech. Under the Central Hudson test, the initial inquiry is whether the speech is misleading or related to unlawful activity. If it can be shown that the speech is not misleading or unlawful, then the speech is protectable under the First and Fourteenth Amendments. The government regulation must then satisfy the second prong of the Central Hudson test. Under the second prong, the government must show a substantial interest in regulating the commercial speech. Under the third prong, the government regulation must directly advance the substantial interest forwarded under the second prong. After the third prong is satisfied, the fourth prong mandates that the government show that its interest could not be served as well by an alternate, less restrictive form of regulation.

36. Justice Blackmun, in opposition to the commercial/non-commercial dichotomy, argued that: “No differences between commercial speech and other protected speech justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information.” Id. at 578 (Blackmun, J., concurring). Further, government advertising regulations are “a covert attempt by the State to manipulate the choices of its citizens, . . . [protecting the State] from the visibility that direct regulation would entail.” Id. at 574-75 (Blackmun, J., concurring).
37. Id. at 561.
38. See id. at 566
39. See id.
40. Id.
41. See id.
42. See id.
43. See id.
The *Central Hudson* case involved a plaintiff electrical utility corporation which was prohibited from promotional advertising. The State Commission argued that the monopolistic nature of utilities justified the proscription as a way of counterbalancing the inherent power and privilege consistent with a public utility. The State Commission also posited the theory that it had an interest in energy conservation and that promotional advertisement would act as a counter-measure to that interest. The Central Hudson Corporation satisfied its burden of showing that the ads were not misleading or related to unlawful activity, thereby transferring the burden to the state to satisfy prongs two through four. The State Commission met its burden in prongs two and three, but failed to show that a less restrictive regulation could not serve that interest as well. By invalidating the state proscription on advertising in *Central Hudson*, the Supreme Court solidified its implicit and unclear stance in *Virginia Board of Pharmacy*. While commercial speech is not granted the strong protection of political speech, the Court is willing to invalidate governmental restrictions on commercial speech which deny or unconstitutionally limit the "fullest possible dissemination of information" to the public. The Supreme Court's stance of granting commercial speech limited protection emphasizes the Court's opposition to governmental paternalism in the area of First Amendment free speech cases.

The primary problem with the *Central Hudson* test was the ease with which a legislative body could satisfy the third prong. After *Posadas de Puerto Rico Associates v. Tourism Co.* and *United States v. Edge Broadcasting*, it appeared
that the government need only use "common sense" in order to determine whether the regulation in question would directly advance the government's interest.\textsuperscript{54} However, this deferential approach was soon to be altered, resulting in a much narrower interpretation of \textit{Central Hudson}'s third and fourth prongs.

4. \textit{Strengthening the Third Prong of the Central Hudson Test}

Despite the deferential approach taken in \textit{Posadas}, the Supreme Court took a strong stance against governmental paternalism which attempted to protect the public in the gain of advertising regulations.\textsuperscript{55} In \textit{Edenfield v. Fane},\textsuperscript{56} the Court substantiated the \textit{Central Hudson} test by providing an evidentiary standard for determining whether a governmental body has satisfied its burdens under the second and third prongs of the \textit{Central Hudson} test.\textsuperscript{57} This evidentiary standard required the government body to show that its interests were advanced in a "direct and material way" by its regulations.\textsuperscript{58} In \textit{Edenfield}, the Court invalidated the Florida Board of Accountancy's prohibition against in-person solicitation by certified public accountants.\textsuperscript{59} The plaintiff CPA contested that the proscription interfered with his First Amendment right to free speech and unconstitutionally deprived him of the liberty to compete within his profession.\textsuperscript{60} The Florida Board argued that absent a regulation prohibiting in-person solicitation, accountants would seek employment in a manner that included fraud and overreaching.\textsuperscript{61} In striking down the Florida CPA prohibition, the Court held that the Board of Accountancy failed to produce any statistical studies showing,
in a direct and material way, that in-person solicitation furthers fraud and overreaching. Thus, the Court once again affirmed its holding that commercial speech is afforded some constitutional protection under the First Amendment.

Finally, in the case of *Rubin v. Coors Brewing Co.*, the Court established a strong evidentiary standard which must be satisfied before government legislation could be permitted. In *Rubin*, the Court placed the burden of proof on the legislature, requiring empirical evidence to be submitted showing that the regulation would significantly alleviate the harm that the government sought to prevent. The Court invalidated a federal regulation regarding printing alcohol-content on beer labels. The Court's refusal to give deferential treatment to the federal government's regulation hinged upon the fact that no empirical evidence could be found to support the government's interest. The only "evidence" which could be mustered by the federal government was "(a)necdotal" in nature, supported by mere "educated guesses."

B. The Decline of the Central Hudson Test?

1. *44 Liquormart v. Rhode Island*

With its plurality decision in the case of *44 Liquormart, Inc. v. Rhode Island*, the Court left many unanswered questions regarding the continuing validity of the commercial/noncommercial dichotomy which has existed since *Chrestensen*. In *44 Liquormart*, the Court applied the Central Hudson test, utilizing the newest evidentiary standard promulgated in *Rubin*. Here, Rhode Island placed a ban on retail price advertising of alcoholic beverages. In 1991, *44 Liquormart*, at 489-90.

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62. Id. at 771.
63. Id.
65. Id. at 489-90.
66. Id. at 490. The Federal Alcohol Administration Act, 27 U.S.C. § 205(e)(2) (1994), prohibited beer labels from advertising alcohol-content in order to avoid "strength wars" amongst brewers. Id. at 479.
67. Id. at 489-90.
68. Id.
70. *44 Liquormart*, 517 U.S. at 505.
71. Id. at 489.
Liquormart, Inc. advertised a picture of rum and vodka bottles with the word “WOW” adjacent to the bottles. The Rhode Island Liquor Control Administrator assessed a fine, despite the lack of any price quotation, because of the implied reference to bargain prices for alcohol.

The Court invalidated the Rhode Island statute because the ban on retail price advertising of alcohol was more extensive than necessary to achieve the state's goal of promoting temperance. The Court's hostility toward the Rhode Island statute was nearly unanimous. However, the plurality resulted from the Justices' failure to agree on how to implement the *Central Hudson* test. Although Justice Stevens' plurality, Justice O'Connor's faction, and Justice Scalia all applied the *Central Hudson* test in striking down Rhode Island's ban, Justice Stevens' plurality focused on an independent rationale. Borrowing from the general premise behind *Virginia Board of Pharmacy* and a footnote from *Central Hudson*, Stevens promoted the "special care" doctrine. The plurality wrote that the Supreme Court should exercise "special care" when reviewing state legislative efforts that "entirely suppress commercial speech in order to pursue a non-speech-related policy."

2. *The Influence of the Special Care Doctrine*

Applying this analysis to the *Liquormart* case, Rhode Island’s complete ban on the advertisement of alcohol prices should warrant special care because Rhode Island's interest in temperance is non-speech-related. Furthermore, the Court should be wary of a complete "blanket ban" over the "dissemination of truthful, nonmisleading commercial messages." This language hearkens to the Court's stance against governmental paternalism, as well as supporting "an

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72. *Id.* at 492.
73. *Id.* at 492-93.
75. *44 Liquormart*, 517 U.S. at 498.
76. *Id.* at 500.
77. *Id.* (quoting *Central Hudson*, 447 U.S. at 566 n.9).
78. *Id.* at 501.
interpretation of the First Amendment that provides constitutional protection for the dissemination of accurate and nonmisleading commercial messages. 79

Thus, while the Court has not yet decided a commercial speech case after 44 Liquormart, Stevens' implication is that commercial speech will be accorded strong judicial protection whenever state bans completely proscribe advertising based on interests which are not related to speech. 80 It remains to be seen whether the “special care” doctrine will be absorbed into the Central Hudson four-part test, or whether it will initiate the creation of an entirely new First Amendment commercial speech test. Most commentators, however, have merely incorporated the special care rule into the Central Hudson test, thereby establishing a five-part test: 1) if the advertiser is promoting an illegal or misleading product or form of conduct, then there is no First Amendment protection; 2) if a government statute completely proscribes the dissemination of completely truthful and non-misleading advertising consumer information, such as price or availability, then there is First Amendment protection; 3) the government must advance a substantial interest in regulating the speech; 4) the regulation under review must directly advance that interest, keeping in mind the evidentiary standard forwarded in Rubin; and 5) that restriction must be narrowly tailored to achieve the desired objective. 81 If the government can satisfy these five prongs, then the regulation should prevail over the First Amendment's guaranteed right to free speech.

79. Id. at 496.

80. Absent untruthful or misleading advertising, which the government can readily prohibit in order to protect the consumer public at large. See, e.g., Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 763 (1976).

II

Product Placement

A. Introduction

Based on the Supreme Court’s current definition of, and test for, determining commercial speech, the next step is to apply the legal emanations of product placement to the constitutional framework of commercial speech. The application of the commercial speech doctrine to the practice of product placement presents two basic questions: first, whether product placement is commercial speech; and second, if product placement is commercial speech, how may it be regulated under the 44 Liquormart framework?82

B. Product Placement is Commercial Speech

The 44 Liquormart case sets precedent for the Supreme Court to determine the constitutionality of a governmental regulation of commercial speech. However, the first step in analyzing the constitutionality of a regulation on speech requires that a court determine if the regulated speech is commercial or noncommercial. 44 Liquormart served to underscore, among other things, the idea that noncommercial speech is entitled to constitutional protection.83 Similarly, Central Hudson provided legal analysts with the definition of what commercial speech entails: expression related solely to the economic interests of the speaker and its audience.84 The following cases help to show the constitutional evolution of commercial speech.

The seminal case of Valentine v. Chrestensen first distinguished between commercial and noncommercial speech.85 Chrestensen’s original bifurcation of speech distinguished between noncommercial speech and speech which comprised “purely commercial advertising.”86

83. 517 U.S. at 501.
84. 447 U.S. at 561 (citing Virginia Bd. of Pharmacy, 425 U.S. at 762).
85. 316 U.S. 52, 54 (1942).
86. See Lackey, supra note 82, at 280.
original definition, however, did not take account of speech which contained both advertising and noncommercial speech, such as political speech.

In the case of Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, the Court re-examined its definition of commercial speech, while maintaining its test for constitutionality articulated in Central Hudson. In Posadas, the speech at issue proposed a commercial transaction for a casino resort, and could therefore be restricted. This new legal perspective on commercial speech suggested that the mere mention of a product sold by a producer or an advertiser constitutes commercial speech, because it proposes a commercial transaction.

1. Commercial Speech is Entitled to Broad First Amendment Protection

With the decision of the 44 Liquormart case, the Supreme Court signaled the death of the Posadas standard and the arrival of broad protection for commercial speech. At the very least, relaxed the distinction between commercial and noncommercial speech. At the most, 44 Liquormart eliminated the distinction, thereby granting the same First Amendment protection to commercial speech that had existed for noncommercial speech. 44 Liquormart may stand for the proposition that historical distinctions between commercial and noncommercial speech are without merit and that commercial speech should be given equal protection. This elevation of commercial speech is expressed in Justice Thomas' concurring opinion, where he stated that: "[A]ll attempts to dissuade legal choices by citizens by keeping them

88. Id. at 340.
89. See Lackey, supra note 82, at 282.
90. 44 Liquormart, 517 U.S. at 489.
92. See id. Justice Thomas, advocating the elimination of the distinction between commercial and non-commercial speech, said, "I do not see a philosophical or historical basis for asserting 'commercial' speech is of 'lower value' than 'non-commercial' speech." 44 Liquormart, 517 U.S. at 522 (Thomas, J., concurring in part and concurring in the judgment).
ignorant are impermissible."\textsuperscript{93} This anti-paternalistic view, and the Court's view in \textit{Virginia Board of Pharmacy}, when it said that the "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener, by far, than his interest in the day's most urgent political debate,"\textsuperscript{94} both support this proposition. Therefore, under the \textit{44 Liquormart} framework, commercial speech is accorded the same level of First Amendment protection as noncommercial speech.\textsuperscript{95} In this way, \textit{44 Liquormart} and \textit{Central Hudson} create the framework under which product placement must be analyzed.

2. \textit{Product Placement}

Product placement, in this context, involves a conscious effort by a producer/advertiser to influence consumers to buy their goods by placing those goods in situations which result in high exposure. An essential element of product placement is that exhibitions are driven by purely economic motivations. The classic example, which best demonstrates the idea of product placement, was the use of Reese's Pieces candies in the movie \textit{E.T.: THE EXTRA TERRESTRIAL}.\textsuperscript{96} The use of Reese's Pieces in such a globally popular movie led to tremendous exposure of the candy. The success which Reese's Pieces enjoyed has paved the way for increased product placement in the movies. For example, the continued success of the James Bond saga reflects the public's fascination not only with 007's exploits, but also with catching a sneak-peek at his new BMW.\textsuperscript{97} As a result, nearly every big-budget Hollywood blockbuster utilizes product placement to help finance its soaring costs.\textsuperscript{98}

\textsuperscript{93} \textit{Id.} at 526 (Thomas, J., concurring in part and concurring in the judgment).

\textsuperscript{94} See \textit{Virginia Bd. of Pharmacy}, 425 U.S. at 763.

\textsuperscript{95} Additionally, the Court has recognized that dual aspect speech, containing both commercial and non-commercial speech, deserves broad First Amendment protection. See Joachim, \textit{supra} note 21, at 542.

\textsuperscript{96} \textit{E.T., THE EXTRA TERRESTRIAL} (Universal Pictures 1982).

\textsuperscript{97} \textit{GOLDFENEYE} and \textit{TOMORROW NEVER DIES} both introduced new BMW cars which helped propel Bond through numerous situations, as well as to propel those car's popularity forward. \textit{GOLDFENEYE} (MGM/UA 1995). \textit{TOMORROW NEVER DIES} (MGM/UA 1997).

3. Tobacco Products and Movies

Almost since the beginning of its national recognition, the motion picture industry and cigarettes have gone hand in hand. In fact, "Hollywood loves a good cigarette." In the golden years of film-making, Hollywood and cigarette makers were unabashed bedfellows due to the moral and governmental regulations which prohibited explicit sexual situations between actors. When Lauren Bacall blew a plume of smoke at Humphrey Bogart in TO HAVE AND HAVE NOT, Hollywood was able to convey the burgeoning sexual dynamic between the two stars, at a time when films were heavily censored. This film, and others like it, created the oft-cited generalization that "smoking was eroticized." Starting in 1971, when the federal government banned cigarette ads from the airwaves (including radio and television), the motion picture and tobacco industries have stepped up their bombardment of films with product placements.

Motion pictures are no longer subject to censorship, only ratings regulations. Therefore, the need for cigarettes as a substitute for sex has been greatly reduced. Nonetheless, cigarette manufacturers continue to promote their product. Brown & Williamson Tobacco, Corp., for example, agreed to pay half a million dollars to actor Sylvester Stallone, in exchange for promotion of its cigarettes. What followed was John Rambo, in Stallone's epic RAMBO: FIRST BLOOD, sharing the screen with Kool, Raleigh, and Barclay. Similarly, Phillip Morris, the producer of Marlboros, placed its product between the lips of Margot Kidder in SUPERMAN and

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100. See id.; TO HAVE AND HAVE NOT (MGM 1944).
105. RAMBO: FIRST BLOOD (Carolco Pictures 1982).
106. See Levy, supra note 104, at D12.
SUPERMAN II. In SUPERMAN II, Phillip Morris paid $42,000 for Kidder's use of the cigarettes, as well as scenes depicting Superman flying past Marlboro billboards and Marlboro delivery trucks. Since then, the Liggett Group paid $30,000 to have its Eve cigarettes displayed prominently in the movie SUPERGIRL, Phillip Morris paid $350,000 to have James Bond tote his cigarette of choice, Lark cigarettes, in the film LICENCE TO KILL. In a more recent trend, cigarettes have been reserved for crooks, killers, and psychopaths. In the post-apocalyptic picture WATERWORLD, the bad guy, played by Dennis Hopper, led a group of thugs called the "smokers." Sharon Stone, in her breakthrough movie BASIC INSTINCT, where she played a sexually provocative murder suspect, was seen lighting up numerous times. John Travolta also has proven to be a cigarette magnet. Whether he is portraying an angel in MICHAEL, a hit-man/thug in PULP FICTION, or a nuclear arms dealer in BROKEN ARROW, Travolta can be seen smoking one cigarette after another. In the recent blockbuster, MEN IN BLACK, a little alien is seen pushing a cart of Marlboros.

Tobacco foes attest that the most unsettling aspect of movie stars promoting tobacco is embodied in the person of Arnold Schwarzenegger. The former Chairman of the President's Council on Physical Fitness & Sports, under President Bush, can be seen smoking a cigarette in his

110. LICENSE TO KILL (United Artists 1988). In addition, 007 used Q's seemingly everyday pack of Lark cigarettes to destroy, via explosion, a window of Bond's nemesis in the movie. See Lackey, supra note 82, at 278.
111. See Levy, supra note 104, at D12.
112. WATERWORLD (MCA/Universal Pictures 1995).
113. See Levy, supra note 104, at D12.
115. See Levy, supra note 104, at D12.
117. PULP FICTION (Miramax Films & A Band Apart 1994).
118. BROKEN ARROW (20th Century Fox 1996).
119. MEN IN BLACK (Columbia Pictures Corp. 1997).
blockbuster film TRUE LIES. In addition, Schwarzenegger regularly flaunts his affair with cigars. Cigars, which have not achieved the notoriety of cigarettes, are equally damaging to the human body. Lastly, Julia Roberts' incessant nervous smoking in MY BEST FRIEND'S WEDDING has led to an uproar in the media and in Washington D.C. Therefore, whether it is Lauren Bacall, Margot Kidder, John Travolta or Sharon Stone, anti-tobacco proponents have few reservations about the effect that showing stars smoking can have on encouraging tobacco use. It is for this reason, among others, that politicians have been leading the charge to curb the portrayal of smoking in movies.

4. The Relation Between Movies and Advertising

In 1959, the Supreme Court held that noncommercial speech is protected, despite being packaged in a form which is sold for profit. The case of Joseph Burstyn, Inc. v. Wilson was the first case which provided the modern-day characterization of the content of motion pictures and films. In Wilson, petitioner Burstyn analogized film, which was previously unprotected under the case of Mutual Film Corp. v. Industrial Commission of Ohio, to other forms of speech. The Court, starting with the case of Gitlow v. New York, affirmed the notion that freedom of speech and the press were safeguarded by the liberty clause of the Fourteenth

<http://www.schwarzenegger.com/arnold.html>. Schwarzenegger is currently the Chairman of the Governor's Council of Physical Fitness in California. See Id.

121. TRUE LIES (20th Century Fox 1994).
123. MY BEST FRIENDS WEDDING (TriStar Pictures 1997).
125. See Smith v. California, 361 U.S. 147, 150 (1959). The Smith case focused on non-commercial speech which was published in a book. Despite the book being sold for profit, the Court held that the speech which comprised the book was protected. Id.
126. 343 U.S. 495 (1952).
127. 236 U.S. 230, 244 (1915).
128. Wilson, 343 U.S. at 499.
129. 268 U.S. 652 (1925).
Amendment against state invasion.\textsuperscript{130} Thirty-four years later, the Court held in \textit{Wilson} that \textit{Gitlow} necessarily overruled the \textit{Mutual Film} case.\textsuperscript{131} In \textit{Wilson}, the petitioner attempted to screen a film entitled \textit{The Miracle}.\textsuperscript{132} However, he was denied the necessary license by the New York Education Department.\textsuperscript{133} The Court held that motion pictures are protected by the right to freedom of speech and expression.\textsuperscript{134}

Three ideas are central to the Court's holding. The first is that the protection afforded to motion pictures cannot be diminished by the fact that they are designed to entertain, as well as to inform.\textsuperscript{135} The Court makes clear that certain aspects of a film, which are not meant solely to entertain, are protected despite their informative nature: "The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."\textsuperscript{136} Impliedly, this statement grants judicial sanction to product placement because it recognizes the idea that a commercial message (e.g., cigarette smoking is cool) can exist within an idea meant primarily to entertain (e.g., a motion picture).\textsuperscript{137} Secondly, the Court responds to the idea that irrespective of the artistic nature of a film, the economic factors of a motion picture remove it from First Amendment protection. The Court disregarded this notion by stating that a film's operation for profit has no effect upon the liberty that the First Amendment safeguards.\textsuperscript{138} Finally, and most importantly for this Note, the New York Education Department urged that movies are not entitled to First Amendment protection because they possess

\begin{itemize}
\item \textsuperscript{130} \textit{Gitlow}, 268 U.S. at 666.
\item \textsuperscript{131} \textit{Wilson}, 343 U.S. at 502.
\item \textsuperscript{132} Id. at 498.
\item \textsuperscript{133} See id. at 499.
\item \textsuperscript{134} See id. at 502.
\item \textsuperscript{135} See id. at 501.
\item \textsuperscript{136} Id. (quoting \textit{Winters v. New York}, 333 U.S. 507 (1948)).
\item \textsuperscript{137} In effect, Steven Spielberg's amusement, via \textit{E.T.}, teaches movie-goers about the intergalactic appeal of Reese's Pieces. In a similar vein, the movies which America so desperately needs for amusement are saturated with product placement. The doctrine of cigarettes (for example, smoking a cigarette makes you cool or grown-up) can be taught through movie promotion.
\item \textsuperscript{138} \textit{Wilson}, 343 U.S. at 501-02.
\end{itemize}
a "greater capacity for evil, particularly among the youth of a community."\textsuperscript{139} The Court responded by stating that: "Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection."\textsuperscript{140} This is the exact argument that tobacco foes are currently forwarding with regard to the portrayal of tobacco products in movies.\textsuperscript{141} Just as this argument was not accepted by the Supreme Court in 1952, it should not be accepted today.

One response to Wilson is that it did not foreclose the idea that, although movies are granted First Amendment protection, free expression is not absolute: "If there be capacity for evil it may be relevant in determining the permissible scope of community control."\textsuperscript{142} Wilson opened the door to the regulation of movies and books found in the case of Interstate Circuit, Inc. v. United Artists Corp.\textsuperscript{143} In that case, the Supreme Court upheld the constitutional power of states and cities to prevent the exposure of children to books and films, while underscoring their inability to regulate adult exposure.\textsuperscript{144} However, no formal government regulations have been accepted which would curtail the freedom of speech which motion pictures now enjoy.\textsuperscript{145} Working in conjunction with movie theater associations and distribution associations, the Motion Picture Association of America ("MPAA") established voluntary film ratings systems, with the objective of giving advance warning to parents so that parents could make the decision about the movie their child wishes to see.\textsuperscript{146} These ratings are enforced through the movie theaters, distributors, and the MPAA.\textsuperscript{147}

\begin{itemize}
\item \textsuperscript{139} Id. at 502.
\item \textsuperscript{140} Id.
\item \textsuperscript{141} See Big Tobacco's Racial Stereotypes, Strategies for Luring Children, S. F. CHRON., Feb. 6, 1998, at A5. Furthermore, President Clinton called for "changes in the way the tobacco industry does business," including cutting marketing to children and creating programs to discourage children from smoking. See How Clinton Could Win on Tobacco: Wide Opposition to Teen Smoking, S.F. CHRON., Sept. 18, 1997, at A1.
\item \textsuperscript{142} 343 U.S. at 502.
\item \textsuperscript{143} 390 U.S. 676 (1968).
\item \textsuperscript{144} Id. at 683.
\item \textsuperscript{145} See Jack Valenti, "Movie Ratings: How it Works" (visited Dec. 11, 1998) <http://www.mpaa.org/movieratings/about/index/htm>.
\item \textsuperscript{146} Valenti states that: "The entire rostrum of the rating program rests on
One commentator has even theorized that the struggle between the federal government and the tobacco industry, marshaling widespread political and social debate, has molded tobacco advertising into a "major political issue," thereby transforming it into political speech.148 Under this view, the merits of tobacco advertising would be afforded full constitutional protection, surpassing the level guaranteed to the film itself.149

III
Executive Action

A. The Executive's Regulation of Tobacco Advertising

In light of the proposed settlement and on-going state litigation efforts, the tobacco companies' ability to promote and advertise their wares has been drastically curtailed. As mentioned before, federal regulation of tobacco products has included the Surgeon General's report,150 the Federal Cigarette Labeling and Advertising Act of 1965,151 and the Public Health Cigarette Smoking Act.152

These restrictions, according to many social commentators, are simply not working.153 Adolescent smoking increased from 17% to 19% between 1992 and 1993, and studies indicate that the average smoker begins at the age of

147. Id.
149. Historically, political speech was the primary basis for the Constitutional right to free speech under the First Amendment.
151. 15 U.S.C. §§ 1331-1341 (1994). All cigarette advertisements and products must contain the following warning: "Caution: Cigarette Smoking May Be Hazardous to Your Health."
thirteen and is a regular smoker by the age of fourteen. As a result, President Clinton has pushed for administrative and Congressional reform of the tobacco industry’s advertising and promotion.

B. The Food & Drug Administration and President Clinton’s Proposal

President Clinton has not masked his desire to strictly regulate the tobacco industry. In August of 1995, President Clinton took steps to regulate tobacco advertising through the Food and Drug Administration (FDA), in order to prevent “aggressive marketing to our young people.” In 1996, the FDA declared nicotine a drug and imposed strict limits on the advertising of tobacco products. The FDA’s limits comprised the following seven restrictions: 1) institution of a federal minimum age of eighteen years to purchase tobacco products; 2) prohibition of free samples of tobacco products; 3) prohibition of mail-order sales, including redemption of coupons; 4) restricting the use of cigarette vending machines to places where no person younger than eighteen is permitted to enter; 5) limiting advertising and labeling to black text on white background; 6) a ban on sale or distribution of corporate-branded items such as hats or T-shirts; and 7) restriction of sponsorship of events to corporate names only. President Clinton offered his full support for these restrictions by stating:

[When Joe Camel tells young children that smoking is cool, when billboards tell teens that cigarettes will lead to true romance, when Virginia Slims tell adolescents that cigarettes may make them thin and glamorous, then our children need our wisdom, our guidance and our experience. We’re their parents, and it is up to us to protect them.]

However, on April 25, 1997, a North Carolina federal judge ruled that the FDA did not have the power or authority to regulate the advertising or promotional practices of the

154. See id.
155. See Joachim, supra note 21, at 539.
156. See id. at 539-40.
158. Id. at 244 (quoting President Clinton, Statement Made at a Press Conference (Aug. 10, 1995)).
tobacco industry. In response, the Federal Trade Commission (FTC) filed a complaint against RJR Nabisco Holdings Corporation in order to enjoin further use of Joe Camel in advertising. However, the complaint was mooted by the proposed tobacco settlement of 1997.

IV

The Proposed Tobacco Settlement of 1997

A. Introduction

The tobacco settlement proposes sweeping changes and restrictions on the promotional and advertising practices of the tobacco industry. The proposed settlement would:

- Ban all outdoor tobacco product advertising;
- Ban the use of human images and cartoon characters in all tobacco advertising and product packaging;
- Restrict advertising to a “tombstone” format of black text on a white background;
- Ban all non-tobacco merchandise, including caps, jackets, or bags bearing the name or logo of a tobacco brand;
- Ban offers on non-tobacco items on proof of purchase of tobacco products;
- Ban event sponsorships, including concerts and sporting events, by tobacco brands;
- Prohibit tobacco product advertising on the Internet, unless designed to be inaccessible in or from the United States;
- Prohibit tobacco advertising in magazines or publications with more than 15% youth readership or more than 2 million youth readers;
- Prohibit the use of non-tobacco brand names as brand names of tobacco products;
- Require cigarette and smokeless tobacco product advertisements to carry the FDA-mandated statement of intended use (‘Nicotine Delivery Service’);

160. See Wood, supra note 7.
161. See id.
• Prohibit direct and indirect payments to “glamorize” tobacco use in media appealing to minors, including recorded and live performances in music; and
• Ban direct and indirect payments for tobacco product placement in movies, television programs and video games.\(^{162}\)

In addition, the tobacco industry would be required to pay a settlement fee of $368.5 billion over a twenty-five year period.\(^{163}\) In return, the tobacco industry will gain restrictions on the recovery of compensatory damages in private suits, as well as the elimination of punitive damages claims based on conduct occurring before the settlement.\(^ {164}\)

**B. Congressional Response**

Although most settlements are not subject to constitutional review, due to the fact that the proposal must be congressionally sanctioned, restrictions sought in the settlement must be in accordance with First Amendment standards.\(^ {165}\) Any ban on both paid and unpaid product placement of tobacco products in movies is constitutionally significant because of its effect on how tobacco companies may promote their goods in a realm where they have had historical success. And, further, the ban will necessarily eliminate a considerable source of funding for motion pictures.

1. **Senator Jack Burton’s Quest to Regulate On-screen Smoking**

Senator Jack Burton, a Democrat from California and Chairman of the Senate Judiciary Committee, said he will hold a hearing to take testimony from representatives of the film-making industry on increased smoking in movies.\(^ {166}\) One of Senator Burton’s proposals would be to place warning labels on films, either in addition to the current guidance

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164. Id.
165. See *Wood*, supra note 7.
labels, or in a manner similar to the labels on cigarette packaging.\textsuperscript{167} In response to the idea that most of the time only the villain or psychotic smokes, Burton said, "Young people are very impressionable, kids can identify with the villain as much as with the hero."\textsuperscript{168} Supported by both Vice-President Al Gore and First Lady Hillary Clinton, Burton has grounded his views on two studies involving the relationship between movies and smoking.\textsuperscript{169} First, a study by the University of California found that half of the highest grossing films released between 1990 and 1995 had scenes in which a lead character smoked, a rise of twenty-nine percent from the 1970's.\textsuperscript{170} In addition, the top ten highest grossing films in 1996 all contained smoking.\textsuperscript{171} Second, a study by the American Lung Association found that seventy-seven percent of one hundred thirty-three movies released in 1996 had at least one character who smoked.\textsuperscript{172} Further, eleven percent of the movies released had more than fifty separate incidents of smoking.\textsuperscript{173}

2. Hollywood's Response

In response, Jack Valenti, President of the Motion Picture Association of America, stated that "[g]overnment can't lay a hand on a director and say 'do this' or 'don't do that.'"\textsuperscript{174} Valenti's remarks have constitutional merit. In the case of \textit{Young v. American Mini Theaters, Inc.}, the Court held that "[t]he central concern of the First Amendment in this area is that there be a free flow from creator to audience of whatever message a film or book may convey."\textsuperscript{175} Additionally, in the case of \textit{Superior Films v. Department of Education}, Justice Douglass said, "[i]n this Nation, every writer, actor, or producer, no matter what medium of expression he may use,

\textsuperscript{167} See id.
\textsuperscript{168} See id.
\textsuperscript{169} See id.
\textsuperscript{170} See id.
\textsuperscript{171} See id.
\textsuperscript{172} See id.
\textsuperscript{173} See id.
\textsuperscript{175} 427 U.S. 50, 77 (1976).
should be freed from the censor." It remains to be seen whether the United States Congress will attempt to pass legislation curbing the portrayal of smoking in movies. However, the proposed tobacco settlement is attempting to laterally attack this portrayal of smoking in movies by prohibiting payments for placement of tobacco products in movies.

V

Government Regulation of Smoking in Films is Unconstitutional

A. Introduction

The federal government's attempted regulation of the portrayal of smoking in movies is unconstitutional. Congressional approval of the proposed tobacco settlement necessarily requires that the proposal be able to withstand First Amendment scrutiny. It cannot. The applicable test for intrusions into rights of free speech is the hybrid Central Hudson and 44 Liquormart test. As stated earlier, there are two questions which need to be resolved in order to determine the constitutionality of the regulation: first, whether product placement is commercial speech, and second, if product placement is commercial speech, how may it be regulated? This Note answered the first question in Part II(B)(1), where I concluded that product placement is entitled to broad First Amendment protection under the 44 Liquormart test. The second question requires the 44 Liquormart analysis to determine the constitutional extent of permissible governmental restrictions on speech.

177. See Schultz, supra note 162.
178. See Wood, supra note 7.
179. See supra Part II(A) and accompanying text.
180. See Lackey, supra note 82.
181. 44 Liquormart signaled the demise of the legal distinction between commercial and non-commercial speech, thereby establishing general protection for all speech, including product placement. See, e.g., 44 Liquormart, 517 U.S. at 509-10; Langvardt and Richards, supra note 91, at 484.
B. 44 Liquormart Analysis

The restrictions embodied in the proposed tobacco settlement are extremely problematic under the First Amendment analysis provided in 44 Liquormart. Briefly, a restriction on commercial speech is unconstitutional, unless the government can show that the restriction "directly advances" a "substantial interest" and is "no more extensive than necessary." 182 Under this framework, the provisions relating to the restriction of product placement in movies are unconstitutional.

1. The First Prong

The first step of the 44 Liquormart test warns against the unconstitutional promotion of illegal or misleading products or forms of conduct. 183 Tobacco use is currently legal in the United States. The counter-argument to this point is that, while legal, tobacco advertisements are misleading because they depict smokers enjoying a healthy lifestyle. 184 Even President Clinton has chimed in about the “misleading” advertisements which the tobacco industry employs, stating that the ads routinely “show rugged men and glamorous women lighting up and blissful couples sharing their cigarettes.” 185 However, the basic premise of advertising is to promote the joys of a product, as well as the user's contentment with that product. Accordingly, advertising which is merely suggestive cannot be declared unconstitutional. 186 Additionally, the adverse health effects of continued tobacco use are mandatorily disclosed by law, thereby “precluding any deceptive or misleading component of tobacco advertising.” 187

182. 44 Liquormart, 517 U.S. at 504.
183. See Central Hudson, 447 U.S. at 566.
184. See Joachim, supra note 21, at 551 (citing Wendy Fox, The President's Plan to Prevent Teen-Age Smoking is Controversial, BOSTON GLOBE, Sept. 4, 1995, at 13).
185. See id. (citing Wendy Fox, The President's Plan to Prevent Teen-Age Smoking is Controversial, BOSTON GLOBE, Sept. 4, 1995, at 13).
186. See id. (citing Alex Kozinski & Stuart Banner, Who's Afraid of Commercial Speech?, 76 VA. L. REV. 627, 627-28 (1990)).
187. See id.
2. The Second Prong

The second prong of the *44 Liquormart* test militates against a government statute that completely proscribes the dissemination of completely truthful and non-misleading consumer advertising information.\(^{188}\) Justice Stevens warned against “blanket bans” over the dissemination of otherwise truthful advertising.\(^{189}\) Additionally, in the case of *Reno v. ACLU*, the Court held that Internet access to certain web-sites cannot be completely banned in order to protect children from prurient materials.\(^{190}\) The legislation must take into account the differing interests which exist between children and adults.\(^{191}\) In a similar fashion, the tobacco settlement, as it applies to films, places a blanket ban over the dissemination of otherwise legal tobacco advertising. The ban does not differentiate between, for example, G-rated movies and R-rated movies. This blanket ban, therefore, makes the proposal unconstitutional under *44 Liquormart*.\(^{192}\)

3. The Third Prong

Under the third prong, the government must show a substantial interest in regulating the commercial speech.\(^{193}\) The government’s primary interest lies in protecting children and teens from the harmful bombardment of tobacco placement in movies. This interest is evident in President Clinton’s protestations against tobacco use in the movies.\(^{194}\) In discussing the tobacco proposal, David Kessler, former commissioner of the Food & Drug Administration and Clinton’s long-time friend, stated that, “[w]hat the President has cared about from the beginning is reducing the number of kids who smoke.”\(^{195}\) Furthermore, the First Lady, befitting her traditional role as the United States’ chief social worker and

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188. *44 Liquormart*, 517 U.S. at 500.
189. *Id.*
191. *See* *id.*
192. *44 Liquormart*, 517 U.S. at 500-01.
193. *See* *Central Hudson*, 447 U.S. at 566.
benefactor of children, has arduously campaigned against tobacco use among children and teens.\textsuperscript{196}

4. The Fourth Prong

Under the fourth prong of 44 Liquormart, the government must show that its interests will be advanced in a "direct and material way."\textsuperscript{197} If the government claims that its primary interest is to reduce smoking among children and teens, then a blanket ban upon paid or unpaid tobacco placement on the silver screen is unconstitutional because the proscription is a lateral attack upon that goal. The Court held this type of lateral attack unconstitutional in 44 Liquormart,\textsuperscript{198} and it should likewise be held unconstitutional here. The Court stated that: "the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends."\textsuperscript{199} In addition, empirical evidence must be proffered which shows the harm would be significantly alleviated.\textsuperscript{200} Numerous studies have been conducted which fail to show a direct connection between the advertisement of tobacco products and future use.\textsuperscript{201} The only empirical evidence which has been positively adduced is that tobacco advertisements encourage the changing of cigarette brands by already established smokers.\textsuperscript{202} Without positive, scientific proof, the Court would most likely be unwilling to engage in

\textsuperscript{196} See Klein, supra note 4.


\textsuperscript{198} 44 Liquormart, 517 U.S. at 511-12.

\textsuperscript{199} Id. at 512. Justice Stevens went to great lengths to denigrate lateral attacks upon freedom of speech in order to suppress an otherwise legal form of conduct or behavior: "As a venerable proverb teaches, it may prove more injurious to prevent people from teaching others how to fish, than to prevent fish from being sold." Id. at 511.


\textsuperscript{201} See Wood, supra note 7 (stating that: "The problem is that no study has been conducted that proves advertising motivates any child to take up smoking. Studies that have been performed show that peer pressure and sibling and parental examples are the primary reasons a child begins to smoke."). Id.

\textsuperscript{202} See Wood, supra note 7. But see, Study Finds Ads Draw Teens Into Smoking, S. F. CHRON., Feb. 18, 1998, at A4 (reporting a recent study performed by the University of California at San Diego which, for the first time, reaches an opposite conclusion. The study found that tobacco ads and promotions, not peer pressure and family use, lure a significant proportion of teens into smoking. Id.
“speculation or conjecture” regarding the harmful effects of tobacco advertising.  

5. The Fifth Prong

Under the fifth prong of the 44 Liquormart test, a restriction on speech must be narrowly tailored to achieve the desired objective. Encompassed within this prong is the need to show that there is no viable alternative which would have a substantially similar effect, without the same burden.

The restriction on tobacco use in films is not narrowly tailored. First, the Court has stated complete bans “fail[] to leave open ‘satisfactory’ alternative channels of communication.” Therefore, by applying a complete ban on tobacco placement, the government has necessarily abandoned the possibility of alternative channels of communication. In the context of liquor regulation, the Supreme Court has held that a complete ban on the advertising of liquor prices, with a goal of decreasing alcohol consumption, is unconstitutional because other alternatives to satisfying that goal exist. Specifically, the Court offered alternate solutions, such as: 1) educational programs, and 2) moderate drinking. It is highly probable that the Court would reach the same conclusion when the governmental goal is to reduce smoking, and suggest the use of educational programs, higher taxes on tobacco products, and tougher, more ubiquitous warnings.

Additionally, the proscription on paid or unpaid tobacco placement would place a large burden on an administrative body to consistently audit the payment of money to film producers. The restriction against specific brand-name use will conflict with an actor’s use of a cigarette to illuminate her nature and character. Richard Masur, president of the Screen Actors Guild, said that “cigarettes are the single most expressive tool an actor may employ to convey emotions

203. See, e.g., 44 Liquormart, 517 U.S. at 507.
204. See Central Hudson, 447 U.S. at 566.
205. 44 Liquormart, 517 U.S. at 507.
206. Id. at 501.
207. See id. at 509.
208. Id.
ranging from anxiety to pleasure to sensuality. If tobacco placement were completely banned, it could be argued that any tobacco use in movies, even if used merely to develop a character, is banned, which would lead to a “chilling effect” upon the producer, director, and/or actor, as well as the audience. This “chilling effect” could lead to serious limitations upon freedom of expression, the likes of which Hollywood has not endured since the 1950's. This effect would lead to the exact result which Justice Douglass warned against in the case of Superior Films v. Department of Education.

Finally, as discussed earlier, if the real goal is to decrease smoking in movies, to protect our children and teens, then this is not a direct regulation to achieve that goal. Rather, the settlement attempts to reach this goal laterally, by attacking the constitutionally protected freedom of speech. According to 44 Liquormart, this is unconstitutional.

VII
Conclusion

The Federal Government's attempts at regulating tobacco placement in movies are unconstitutional. The complete, blanket ban over tobacco placement in movies is unconstitutional because it is too broad and would proscribe traditionally protected creative expression, whether the movie

210. The McCarthy era was, in no small degree, characterized by Ronald Reagan and Jack Warner's utter cowardice in the face of the McCarthy hearings. For further information on this era, see OTTO FRIEDRICH, CITY OF NETS: A PORTRAIT OF HOLLYWOOD IN THE 1940'S 291-338 (1986).
211. See supra Part IV.B.2. and accompanying text.
212. Additionally, the Court held in the case of Reno v. ACLU, 117 S. Ct. 2329 (1997), that speech to adults may not be reduced to that appropriate for children: "[i]t is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults . . . . The Government may not reduce[] the adult population . . . . to . . . only what is fit for children." Id. at 2346-47. See also Butler v. Michigan, 352 U.S. 380, 383 (1957) (complete ban on sale to adults of books deemed harmful to children unconstitutional); Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 73 (1983) (ban on mailing of unsolicited advertisements for contraceptives unconstitutional); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989) (ban on “dial-a-porn” messages unconstitutional).
was intended for child audiences or adult audiences. The
government's primary interest is in protecting children and
 teens, but the settlement, instead, proposes a complete ban.
Tobacco placement on the silver screen should not be subject
to a climate of repression similar to the repression which
existed during the McCarthy era. Paternalism and
 suppression are not constitutional vehicles for the government
to employ in order to restrict the free flow of information. The
First Amendment vitiates against this type of repression. Until
tobacco placement in movies evolves into a situation which
can be properly termed an emergency, no prohibitions should
be allowed. "Only an emergency can justify repression."213

213. 44 Liquormart, 517 U.S. at 498.