



## PERMISSIBLE STATE RESTRICTIONS ON TOBACCO PRODUCT MARKETING What Can States Do Given the 1st Amendment (and Federal Preemption)?

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The 2001 *Lorillard Tobacco Co. v. Reilly* case is still the U.S. Supreme Court's only ruling specifically on the constitutionality of state government restrictions on tobacco marketing. It confirmed that in appropriate circumstances the First Amendment allows state governments to restrict commercial speech, such as advertising, if done carefully to advance a substantial or compelling government interest.<sup>1</sup> State restrictions on tobacco marketing to protect the public health of children, for example, must be carefully tailored, scientifically proven measures to protect children from tobacco-product addiction, harm, and premature death to survive constitutional challenge, and must leave the tobacco industry still able to communicate to its legal adult customers.

The *Lorillard v. Reilly* ruling also confirmed that, whether or not state laws restricting marketing pass constitutional muster, some state efforts to restrict cigarette advertisements, promotions, or package labeling for anti-smoking purposes are directly blocked or preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA). At the same time, it is clear that FCLAA applies only to restrictions on cigarette advertising and labeling done for smoking and health purposes, and states are not federally preempted from restricting the advertising and labeling of other tobacco products or from implementing such restrictions for purposes unrelated to smoking and health. Moreover, the recently passed FDA tobacco legislation sharply curtailed the scope of FCLAA preemption, permitting state and local governments to restrict or regulate the time, place or manner (but not content) of cigarette advertising and promotion without any risk of preemption. In addition, FCLAA preemption has never blocked states from regulating the distribution, sale, or use of cigarettes. Nor does FCLAA preempt state laws that restrict broad categories or types of advertising that apply to both cigarettes and other non-tobacco products.

### **Lorillard Tobacco Co. v. Reilly and Federal Preemption**

The Supreme Court ruled in *Lorillard* that the Federal Cigarette Labeling and Advertising Act (FCLAA) preempts any state restrictions on cigarette advertising or promotion done for public health purposes “based on smoking and health” – but does not block or preempt state regulation of the sale and use of cigarettes. More specifically, the court stated that “FCLAA does not pre-empt state laws prohibiting cigarette sales to minors” (or related criminal conduct such as solicitation, conspiracy and attempt), and it did not preempt the Massachusetts law forbidding any self service displays of any tobacco products, including cigarettes, at non-adult-only retail outlets.

### **Lorillard Tobacco Co. v. Reilly and the 1<sup>st</sup> Amendment Central Hudson Four-Part Test**

In *Lorillard*, the Supreme Court found that the First Amendment invalidated a range of state laws restricting tobacco-product advertising, including a ban on prohibited tobacco-product advertising within 1,000 feet of schools and playgrounds.<sup>2</sup> The Supreme Court made its First Amendment ruling by applying the four-part test for restrictions of commercial speech established in *Central Hudson Gas and Electric v. Public Service Commission* and subsequent cases.<sup>3</sup> This four-part test applies as follows:

1. To qualify for First Amendment protection, the commercial speech must concern lawful activity and not be misleading. If the speech is lawful and not misleading, the First Amendment still allows the government to restrict it so long as the following three parts of the *Central Hudson* test are satisfied.
2. The government's asserted interest in restricting the speech must be substantial.

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\* In *Lorillard*, the tobacco companies urged the Court “to reject the *Central Hudson* analysis and apply strict scrutiny” (the standard used for non-commercial speech) but the Court stated, quoting an earlier Supreme Court decision, that “we see ‘no need to break new ground. *Central Hudson*, as applied in our more recent commercial free speech cases, provides an adequate basis for decision.” In a subsequent ruling on commercial free speech, *Thompson v. Western States Medical Center et al.* 535 U.S. 357 (April 29, 2002), the Supreme Court again refused to reject the *Central Hudson* standard, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=535&invol=357>.

3. The restriction must directly advance the government's asserted interest.
4. The restriction must not be more extensive than necessary to serve the asserted government interest.

In *Lorillard*, the Court did not formally consider the first part of this test because the State did not formally claim that the commercial speech targeted by its regulations (advertising for smokeless tobacco and cigars) was unlawful or misleading. In other situations, however, a state might avoid First Amendment problems by showing that its new restrictions or requirements placed on cigarette or other tobacco product advertising operated only to prevent misleading advertising, such as ads leading consumers to believe that certain tobacco products were safe. Similarly, state advertising and labeling restrictions could avoid First Amendment problems if it could be shown that they operated to prevent ads from engaging in unlawful activity, such as trying to get kids to purchase or use the advertised brands.

The Court also did not consider part two of the *Central Hudson* test because the tobacco companies did not contest “the importance of the State’s interest in preventing the use of tobacco products by minors.” More importantly, the Court firmly established that “The State’s interest in preventing underage tobacco use is substantial, and even compelling.” More generally, it is unlikely that any court would find that trying to prevent and reduce tobacco use and its harms and costs is not a substantial state interest.

Presenting broader criteria behind the third part of the *Hudson* test, the Court quoted previous decisions stating that “a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree.” “We do not, however, require that ‘empirical data come . . . accompanied by a surfeit of background information. . . [W]e have permitted litigants to justify speech restrictions by references to studies and anecdotes pertaining to different locales altogether, or even . . . to justify restrictions based solely on history, consensus, and simple common sense.”

Applying these standards, the Court ruled that the Massachusetts restrictions on tobacco advertising passed the third part of the *Hudson* test because there was ample documentation of a tobacco use problem among youth, evidence that “preventing targeted campaigns and limiting youth exposure to advertising will decrease underage use,” and no basis to conclude that Massachusetts’ decision to regulate advertising of tobacco products to combat their use by minors was based on “mere speculation and conjecture.”<sup>4</sup> Taken together with the Court’s statements on part two of the *Hudson* test, the Supreme Court appears to have ruled that any government restrictions on tobacco advertising that reduces youth exposure and is done to reduce youth tobacco use will pass the second and third hurdles of the *Hudson* test. It also appears likely that any state restrictions on tobacco product advertising that intends to prevent and reduce overall tobacco use and its related harms and costs and appears to have some chance of doing so will also pass these two parts of the test.

Moving to the final part of the *Hudson* test, the Court noted that the government regulation need not be “the least restrictive means possible” for serving the asserted government interest but only a “reasonable ‘fit between the legislature’s ends and the means chosen to accomplish those ends, . . . a means narrowly tailored to achieve the desired objective.” Nevertheless, the Court found (5-4) that the Massachusetts restrictions of tobacco-product advertising within 1,000 feet of schools and playgrounds failed to meet this standard because “in some geographical areas, these regulations would constitute a nearly complete ban on the communication of truthful information about smokeless tobacco and cigars to adult customers.” Focusing on how the restrictions could have been more carefully tailored, the Court (5-4) expressed concerns that the Massachusetts restrictions:

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<sup>4</sup> The sale of tobacco products to children is illegal throughout the United States and underage purchases, possession, or consumption of tobacco products is illegal in more than 40 states. That could be enough for a court ruling that tobacco advertising, to the extent that it encourages kids to smoke and increases youth smoking levels, concerns illegal activity and does not qualify for First Amendment protection. The argument that tobacco advertising does not qualify for First Amendment protection because it is inherently misleading might be even stronger. As the *Lorillard* dissent points out, in the context of state restrictions on commercial speech the Supreme Court has previously held that “[M]uch commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We see no obstacle to a State’s dealing effectively with this problem.” Accordingly, evidence that tobacco-product advertising misleads and deceives kids (or adults) about its immediate health consequences, addictiveness, or longer-term health harms could enable state or federal advertising restrictions to overcome any First Amendment impediments.

- Reached beyond outdoor advertising, also banning in-store advertising that was visible from outside.
- Reached beyond visual advertisements and also banned audible ads and oral statements.
- Banned ads of any size.
- Applied the 1,000 feet standard equally in all areas of the state, which would produce an almost total ban on outside or externally visible tobacco ads in cities or urban sectors with relatively high densities of schools and playgrounds (with suburban or rural sectors having smaller portions of their overall area affected).
- Did not target the advertising ban to those types of ads or characteristics of ads that studies have found to appeal to youth most.

While largely agreeing with the Court's legal analysis regarding the First Amendment and the 1,000 feet rule, four of the nine Supreme Court justices stated that the case should have been sent back to the District Court with an instruction that the advertising restrictions should be upheld, despite not being more narrowly tailored, if the District Court found that they still left adequate "alternative avenues of communication" available to tobacco-product merchants.

Since the *Lorillard* case, the Supreme Court in *Thompson v. Western States Medical Center* applied the four-part *Hudson* test to a another First Amendment challenge to a government restriction on commercial speech, unrelated to tobacco products, with the 5-4 majority opinion noting that "we have made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so."<sup>5</sup> It is possible that this new case makes the fourth part of the *Hudson* test even harder for states to overcome.

### **Passing the Central Hudson Test**

States may be able to use the first part of the *Central Hudson* test to avoid First Amendment problems – by establishing that tobacco product advertising does not merit First Amendment protection because it pertains to unlawful activity or is misleading. But even if that does not work, the *Lorillard* ruling suggests that tobacco product advertising restrictions should readily pass the second and third parts of the *Hudson* test, leaving the fourth part as the only remaining hurdle (besides the FCLAA preemption) for state restrictions of tobacco product marketing. That fourth test requires a "reasonable 'fit between the legislature's ends and the means chosen to accomplish those ends, . . . a means narrowly tailored to achieve the desired objective.'" More specifically, the *Lorillard* ruling indicates that the Supreme Court would allow significant restrictions on tobacco advertising that reduce youth exposure so long as they do not constitute in some geographical areas "nearly a complete ban on the communication of truthful information about [tobacco products] to adult consumers."

For example, restrictions on outdoor and point-of-sale tobacco-product advertising to black print on white background do not restrict what can be said about tobacco products or otherwise block the communication of truthful information about tobacco products to adult consumers but only make the ads less attractive or alluring to kids (and these restrictions do not even apply to tobacco ads in adult-only locations). In fact, the advertising of financial investments has previously been limited to black and white text-only ads without any constitutional objections. In addition, the Court in *Lorillard* specifically mentioned that efforts to restrict or eliminate those components of specific forms of tobacco advertising that most influence kids, without blocking the transmission of product information to adults, would be preferable to an outright ban, and eliminating colors and images does just that.

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\* The Court also ruled 6-3 that the State's ban on tobacco-product ads placed lower than five feet from the floor of any retail establishment within 1,000 feet of a school or playground failed to satisfy either the third or fourth steps of the *Hudson* test, stating that Massachusetts may target tobacco advertisements and displays that entice children but the blanket height restriction does not fit that goal: "Not all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings." At the same time, it appears that the Massachusetts Attorney General presented very little evidence or argument as to how the five foot limit would reduce youth smoking or reduce youth exposure or susceptibility to tobacco product marketing. If such evidence were presented, the height restriction might have passed constitutional muster since it would still "leave open alternative avenues for vendors to convey information about products."

Similarly, bans on the public distribution of free tobacco products, the sale or distribution of non-tobacco merchandise with tobacco-product brand markings, the distribution of non-tobacco merchandise in exchange for tobacco-product purchases, and the tobacco brand-name sponsorships of sporting or entertainment events, teams, or performers also do nothing either to restrict the content of tobacco ads or to interfere with the communication of truthful information about tobacco products to adult customers – especially if these prohibitions do not apply to tobacco products distributed or sold in adult-only locations. It is quite possible that such measures would qualify as efforts to regulate the distribution, sale, or use of tobacco products (and not as marketing restrictions), thereby making the First Amendment inapplicable.

Similarly, the Court in *Lorillard* upheld the Massachusetts ban on self-service displays not in adult-only locations as not being a restriction of commercial speech (much less one that violates the First Amendment), and the Court's reasoning would apply directly to permit parallel bans on self-service displays and tobacco-selling vending machines. Similarly, the *Lorillard* ruling explicitly stated that laws prohibiting sales to minors are fully permissible, which paves the way for related requirements relating to checking the age and identity of potential tobacco product buyers.

It is also possible that the *Lorillard* ruling against the Massachusetts ban on outdoor tobacco ads within 1,000 feet from schools or playgrounds would not prohibit similar but less restrictive laws – such as a prohibition that reached only outdoor tobacco-product advertising within the 1,000-foot radius but did not reach, as the Massachusetts law did, oral statements, ads inside retail establishments that are visible from outside, or ads in enclosed stadiums. If these differences were not sufficient to pass the fourth part of the *Hudson* test, the *Lorillard* ruling indicates that additional adjustments – such as limiting the ban to signs over a certain size; reducing the 1,000 foot ban radius in areas with lots of schools and playgrounds, or allowing simple outdoor signs at retail outlets to inform passers-by that certain tobacco product sales were available for sale at listed prices – could create a constitutionally valid law.\* As four of the Supreme Court Justices noted, the Massachusetts outdoor advertising ban, unchanged, would also be likely to survive any First Amendment challenge if the state had presented evidence that showed that tobacco-product sellers were still left with adequate “alternative avenues of communication.”

#### **Even If They Did Not Pass the *Hudson* 4-Part Text, Restrictions on Tobacco Product Advertising Might Still Be Found Constitutional**

A strong argument can be made that the constitutional protections for commercial speech relating to tobacco products are significantly weaker than those for any other legal products and that tobacco product advertising restrictions that did not pass the *Hudson* test should still be found Constitutional. Because tobacco products are the only legal commercial products that cause serious harm and even death when used exactly as intended, and are also highly addictive with use typically starting before the minimum legal age, First Amendment standards for government restrictions of tobacco product advertising should be weaker than for other forms of commercial speech. Moreover, the government has an entirely valid interest in using constraints on tobacco product advertising to help reduce their consumption all the way down to nothing – which is entirely different and more powerful than the government's interest in relation to restricting the advertising of any other commercial products. Presented with these arguments as supporting evidence, it would be completely logical for courts to find that advertising restrictions may be imposed on tobacco product advertising, especially tobacco product advertising that reaches youth, that would not pass muster if applied to other commercial product advertising. This basic argument was persuasively made in the Institute of Medicine's 2007 publication *Ending the Tobacco Problem: A Blueprint for the Nation*:

“The [Institute of Medicine Committee on Reducing Tobacco Use] acknowledges that smokers have a legitimate interest in receiving accurate information from the manufacturers regarding the characteristics of their product and from the retailers regarding the prices of those products. In addition, the tobacco companies have a correlative interest in supplying such information, subject to appropriate regulation to prevent deceptive and unfair competition. Indeed, truthful, non-misleading information about tobacco products . . . can promote the public health. However, in the committee's

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\* Voluntary international advertising restrictions adopted by Philip Morris, British American Tobacco, Japan Tobacco, and other tobacco companies include a ban on all billboard advertising within 100 meters (328 feet) of schools. [Lewis, J., “New Criticism, New Resolution,” *Tobacco Reporter*, October 2001.]

view, the tobacco industry does not have a constitutionally protected interest in encouraging or promoting smoking, recruiting new smokers or sustaining the demand of existing smokers. . . .

[T]obacco appears to be the only lawful consumer product for which the acknowledged governmental objective is to suppress all consumption. In this light, it would be constitutionally confusing if the tobacco companies' desire to promote smoking were held to have any constitutional value under the First Amendment in the context of a public policy aiming to suppress consumption. . . . The underlying issue, in a nutshell, is whether the U.S. constitutional system creates a fundamental contradiction – empowering the government to take aggressive measures to discourage smoking while simultaneously denying it the authority to restrict industry efforts to promote smoking. To put it another way, is the government barred by the First Amendment from restraining the marketing of an inherently harmful, although legal, product? . . . On this point, the committee believes that the First Amendment protects the interests of sellers and buyers in conveying information about the product but does not protect the interest of sellers in promoting the use of a product that the government has a compelling interest in suppressing.”<sup>6</sup>

***Campaign for Tobacco-Free Kids, September 2, 2009 / Jessica Guilfoyle***

**More information on how states can effectively prevent and reduce tobacco use is available at [http://www.tobaccofreekids.org/facts\\_issues/fact\\_sheets/policies/prevention\\_us\\_state/save\\_lives\\_money/](http://www.tobaccofreekids.org/facts_issues/fact_sheets/policies/prevention_us_state/save_lives_money/).**

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<sup>1</sup> *Lorillard Tobacco Co., et al. v. Reilly, Attorney General of Massachusetts, et al.*, 533 U.S. 525 (June 28, 2001), <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=533&page=525>.

<sup>2</sup> Because the Court ruled (5-4) that, in most cases, FCLAA preempts states from passing their own restrictions on cigarette labeling or advertising, the court's 1<sup>st</sup> Amendment analysis focused only on the Massachusetts restrictions on smokeless and cigar advertising. Now, with the scope of FCLAA preemption sharply reduced, the *Lorillard* Court's 1<sup>st</sup> Amendment applies to state restrictions of cigarette advertising, as well.

<sup>3</sup> *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=447&invol=557>. See, also, *44 Liquormart, Inc. v. Rhode Island* 517 US 484 (1996), <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=U10183>.

<sup>4</sup> In fact, the evidence presented by Massachusetts to show that tobacco-advertising restrictions reduce underage tobacco use was much more extensive than the evidence provided to show compliance with the third part of the *Hudson* test in any other case where the Supreme Court has upheld government advertising restrictions on commercial speech – and extensive supporting evidence exists for many other types of advertising restrictions to prevent and reduce youth use (such as the enormous amount of supporting evidence provided for the 1996 FDA Rule on tobacco advertising). See, e.g., *United States v. Edge Broadcasting Co.*, 113 S.Ct. 2696 (1993); *Edenfield v. Fane*, 113 S.Ct. 1792 (1993); *Florida Bar v. Went for It, Inc.*, 115 S.Ct. 2371 (1995).

<sup>5</sup> 535 U.S. 357 (April 29, 2002), <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=535&invol=357>.

<sup>6</sup> Bonnie RJ, et al. (eds), Committee on Reducing Tobacco Use, Institute of Medicine, *Ending the Tobacco Problem: A Blueprint for the Nation*, May 2007, <http://www.iom.edu/CMS/3793/20076/43179.aspx>.