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White Papers

The Unconstitutional Nature of Product-Specific Bans and Taxes: The Case of Billboard Advertising

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Abstract

Many local governments have passed ordinances that ban the advertising of liquor and/or tobacco products on billboards. The state and federal governments have also passed taxes on these products that are not applied to other legal products. The purpose of this study is to examine the First and Fifth Amendment implications of such laws and taxes for freedom of expression. This study begins by examining the history of billboard bans and the case law surrounding them. Second, it demonstrates that the recent unanimous decisions in the *44 Liquormart* and *New Orleans Broadcast* cases, if applied consistently, would overturn many restrictions on billboards. Third, the study turns to the Fifth Amendment issue of "unjust taking" to argue that certain tax mechanisms, particularly those aimed at advertising of legal products, are unconstitutional and often chill speech.

The Unconstitutional Nature of Product-Specific Bans and Taxes: The Case of Billboard Advertising

In 1997 and 1998, a spate of major municipalities passed bans on the advertising of alcohol and/or tobacco products on billboards; they include New York,[1] Chicago, San Francisco, Los Angeles, San Diego, Oakland,[2] Baltimore, Las Vegas, Denver, Milwaukee, Detroit, Cincinnati and Cleveland. Furthermore, the agreement reached between the states attorneys general and the tobacco industry also calls for the elimination of advertising on billboards.[3] The banning of advertising on a product-specific basis raises important constitutional questions particularly with regard to time, place and manner, and content restrictions. The state and federal governments have considered and in some cases adopted tax measures that apply to these legal products but not to others.

This study examines whether federal, state and local attempts to restrict rights of producers of certain products through the use of billboard bans and taxation mechanisms are insidious and constitutionally flawed. This study begins by examining the history of billboard bans and the case law surrounding them. Second, it demonstrates that the recent unanimous decisions in the *44 Liquormart* and *New Orleans Broadcast* cases, if applied consistently, would overturn many restrictions on billboards. Such a result occurred in June of 2001 when the Supreme Court overturned a ban tobacco advertising imposed by Massachusetts. In *Lorillard v. Reilly* the Supreme Court ruled that cigarette advertisers have a right to use billboards and that they can not be precluded in the name of avoiding exposure of the product to children. Third, the study turns to the Fifth Amendment issue of "unjust taking" to argue that certain tax mechanisms, particularly those aimed at advertising of certain legal products, are unconstitutional and often chill speech.

Background

Historically, municipal, county and state governments have been allowed to ban billboards under only two rationales: First, they must be a public nuisance that is subject to time, place and manner restrictions that advance the public health, safety, peace, comfort or convenience. Second, they carry commercial speech which may be restricted in any ways that commercial speech is restricted in other media. Historically, land-use restrictions that are content neutral and advance the goals of a community have been upheld by the courts. In 1911, for example, the courts allowed a restriction on billboards because they provided hiding places for criminals.[4] In 1926 the Supreme Court's second major foray into this area came in a related case, *Village of Euclid v. Ambler Realty Co.*[5] The Court upheld a zoning ordinance based on the city's policing power to serve the general welfare of its citizens.

In ensuing cases, the courts struck down restrictions on billboards on purely aesthetic grounds, understanding that beauty is in the eye of the beholder and therefore, an arbitrary standard.[6] In *Berman v. Parker* in 1954, however, the Supreme Court did recognize the public's interest in beautifying certain areas in the name of "spiritual as well as physical" factors.[7] Since that time, the Supreme Court has linked aesthetic qualities to economic prosperity, arguing, for example, that tourism is affected by aesthetic attributes and therefore control through zoning laws is legal as long as they are content neutral. That is to say, all billboards must be banned, not just those carrying certain messages unless those messages are unprotected by the First Amendment for other reasons.

This issue was reinforced in *Metromedia v. City of San Diego*, wherein a plurality of justices held that the ordinance of the City of San Diego was unconstitutional because it exempted twelve kinds of billboards from its prohibition on outdoor advertising. San Diego sought to allow companies to advertise on-site as a means of informing consumers and soliciting business, but not off-site on billboards. Justice White, writing for the plurality, held that messages of billboards could not be the grounds for prohibition unless the ban could be justified on other First Amendment grounds, for example, that it was obscene: "Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages."[8]

The Court has been less clear on the second rationale for billboard bans: that commercial speech can be restricted. In 1942 the Supreme Court opened a can of worms when it ruled in *Valentine v. Chrestensen* that advocating "commercial transactions" did not enjoy the same First Amendment protection as other forms of speech. The decision, which overturned a century and half of tradition, was significantly eroded beginning in 1975. The resurrection of commercial speech began with the *Bolger* case, continued in *Virginia Pharmacy*, and culminated in the four part test provided in *Central Hudson Gas*. First, to be entitled to protection, statements "must concern lawful activity and not be misleading." The next three parts articulate standards for determining the degree of regulation permissible: "whether the asserted governmental interest is substantial," "whether the regulation directly advances the governmental interest asserted," and "whether it is not more extensive than is necessary to serve that interest," that is to say, the regulation must be "the least restrictive means" to achieve the end.[9] Below, the test will be applied to the question of banning billboard advertising since the*Central Hudson* test was recently and vigorously re-asserted by the Supreme Court in its unanimous *44 Liquormart* and *New Orleans Broadcast* decisions, and its *Lorillard v Reilly* decision of 2001. However, before we examine that application, it is important to determine how the Court made its way to the *44 Liquormart* decision of 1996.

Recent Cases Leading to *44 Liquormart*

In April of 1993 the Supreme Court ruled 8-1 in *Endenfield v. Fane* that accountants have a constitutional right to convey "truthful, non-deceptive information" about their services.[10] That they may do this on letterhead and business cards has direct application to advertising on billboards because the case argues that it is a fundamental right to advertise a legal product regardless of venue.

A month earlier, the Court held 6-3 in *City of Cincinnati v. Discovery Network* (1993) that cities may not restrict the space available for commercial papers if they allow newspaper stands for regular newspapers. This is an important time, place, and manner decision that could easily be extended to billboards.[11] The most important principle is that distinction in time, place, and manner cannot be made on the basis of content unless that content is illegal, obscene, fighting words, or a clear and present danger. Writing for the majority, Justice Stevens surmised:

> *In our view, the city's argument attaches more importance to the distinction between commercial and non-commercial speech than our cases warrant and seriously underestimates the value of commercial speech.... In sum, the city's news rack policy is neither content-neutral nor ... 'narrowly tailored.' Thus, regardless of whether or not it leaves open ample alternative channels of communication, it cannot be justified as a legitimate time, place, or manner restriction on protected speech.*[12]

Thus, by implication, using this precedent one could argue that billboards carrying commercial messages about legal products may not be banned on a product-specific basis.

44 Liquormart

In 1996 *44 Liquormart v. Rhode Island* directly addressed a state's attempt to ban the advertising of beer, wine, and liquor prices. Writing for the unanimous Court, Justice Stevens ruled that "[a] complete ban on truthful non-misleading commercial speech" is unconstitutional. The decision took direct aim at other court decisions by arguing that there is "no vice exception" such as alcohol or gambling to the First Amendment's protections.[13] Justice Stevens put it this way:

> *The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what government perceives to be their own good.... [T]he scope of any 'vice' exception to the protection afforded by the First Amendment would be difficult, if not impossible, to define. Almost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to 'vice activity.'... [A] 'vice' label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide principled justification for the regulation of commercial speech about that activity.*[14]

The decision struck down a Rhode Island statute and similar regulations in ten other states. Furthermore, to those who cite the infamous *Posadas* decision of 1985, Stevens wrote:

> *[O]n reflection, we are now persuaded that ... Posadas clearly erred in concluding that it was 'up to the legislature' to chose suppression over a less speech-restrictive policy. The Posadas majority's conclusion can not be reconciled with the unbroken line of prior cases striking down similarly broad regulations on truthful, non-misleading advertising when non-speech-related alternatives were available.... [W]e reject the assumption that words are necessarily less vital to freedom than actions, or that logic somehow proves that the power to prohibit an activity is necessarily 'greater' than the power to suppress speech about it.*[15]

Thus, *44 Liquormart* not only revived the*Central Hudson* test, it sent a strong warning that lawmaking bodies were not free to impose their values on the purchase of such legal products and services as liquor and gambling. The Rhode Island restriction was unconstitutional because "alternative forms of regulation that would not involve any restriction on speech" were available.[16]

However, the issue was not entirely laid to rest because the Supreme Court in May of 1997—a year after *44 Liquormart*—let stand a lower court decision which allowed the City of Baltimore to ban alcohol and tobacco billboard advertising where it might be viewed by minors. Furthermore, the Court said that Federal Cigarette Labeling and Advertising Act did not preempt a city ordinance which limited the location of billboards based on their content.[17] In these two cases of April 28, 1997, *Anheuser-Busch, Inc. v. Mayor and City Council* and *Penn Advertising of Baltimore, Inc. v. Mayor and City Council*, the City argued that advertising increases consumption and the restriction was narrowly tailored to advance a compelling interest, contentions clearly rejected in *44 Liquormart*.

The ruling was not only surprising because of *44 Liquormart* but because it is contrary to several other precedents.

For example, an ordinance allowing outdoor signs for the Olympics in non-industrial areas of Atlanta where no other signs were allowed was struck down because it was a content based rule.[18] A Minnesota ordinance prohibiting "point of sale" advertising of tobacco products was struck down because the Court believed it was preempted by the Federal Cigarette Labeling and Advertising Act.[19] In the case, the court mirrored a Second Circuit decision of 1994, *Vango Media v. City of New York*[20] which said that state law much give way to federal law on the issue of health statements regarding cigarettes. A separate rationale arouse in Boston when even the policy of the transportation authority not to allow ads in their subway and trolley cars which contain sexually explicit or patently offensive language to convey substantive messages was deemed not content neutral and, therefore, unconstitutional.[21] The transportation authority had refused to run condom ads which used words it found to be obscene. The courts, however, found that the ads had significant redeeming social value and that restricting their use to certain areas was a violation of the First Amendment. Furthermore, the trolleys and subways of Boston, by allowing advertising on many different subjects, had in effect become a "public forum" for policy debate. Therefore, the fact that some sexual language and innuendo would offend passengers was not enough of a justification to ban the ads.[22] Specifically with regard to a billboard ordinance banning advertising of tobacco and alcohol products in Chicago, Senior U.S. District Judge Milton I. Shadur ruled on July 29, 1998 that such ordinances are unconstitutional. Preferring the *Vango* precedent to the *Penn Advertising* precedent, he said the ordinance "proves to be built on quicksand."[23]

Taken together these lower court rulings flowing from *44 Liquormart* certainly would seem to bode well for any one wishing to advertise any legal product on a billboard, particularly where the billboard had existed for a period of time and had carried diverse messages. The Supreme Court unanimously re-affirmed that position in 1999 in *Greater New Orleans Broadcast Assn. v. United States*. In this case, the Court said that broadcasters could advertise gambling if gambling was legal in the state where they operated. The ruling struck down a ban on broadcast advertising of gambling and gaming that had been in effect since 1934. Again writing for the Court, Justice Stevens argued that if the product is legal, "the speaker and the audience, not the government, should be left to assess the value of accurate and non-misleading information" about it.

The exception is the *Penn Advertising* case. Many legal observers believe the Court refused to intervene in the *Penn Advertising* cases because they are waiting for a contrary ruling to bubble up in another circuit. Then the two cases will be heard together and a framework for interpreting *44 Liquormart* will be provided. To demonstrate what such a framework might look like, this study takes the case of banning the advertising of alcohol products on billboards[24] and applies the recently re-asserted precedent of*Central Hudson* to this case using *44 Liquormart* and *New Orleans Broadcast* as guides since they were unanimous rulings.[25]

1. Is the advertising in question misleading or concerned with an illegal product? This threshold requirement holds that the advertising in question must be legal and not misleading in order to qualify for protection under the next three parts of the test. For example, since alcohol beverages are legal products and their advertising is not misleading, proposed billboard bans of advertising of alcohol must pass the next three parts of the*Central Hudson* test as refined in *44 Liquormart*.

2. Is the government interest substantial? Of course, the government has a substantial interest in reducing alcohol abuse and its related problems. There are programs at all levels aimed at solving the problem; statistics indicate that progress has been made on many fronts. However, in the case of billboard bans, state and local governments have argued that billboards carrying advertising for alcohol beverages should be banned where children are likely to see them. That rationale was upheld in the Fourth Circuit's final decision in *Anheuser-Busch, Inc. v. Schmoke*. The majority ruled that while the ban in Baltimore "may also reduce the opportunities for adults to receive the information, we recognize that there were numerous other means of advertising to adults that did not subject children to 'involuntary and unavoidable solicitation [while] walking to school or playing in the neighborhood."[26] This opinion, however, violated the standards of *44 Liquormart* because it was not based on any statistical evidence and ignores evidence that could be used to counter it. For example, the National Institute for Drug Abuse reports that "the percentage of youth who reported they had ever used alcohol dropped dramatically from 1979 to 1990;" for those aged 12 to 17 there has been a steady drop since 1979; for those aged 18 to 25 there has been a steady drop since 1982.[27] Researchers at the University of Michigan reported in their 19th annual report that while drug use was up among high school students, alcohol use was down.[28] This is a particularly important finding since drugs are not advertised and alcohol products are.

   While the*Central Hudson* test only scrutinizes what the government argues is its "compelling interest," it might be argued that counter-balancing interests should be taken into account by the courts. For example, in this case, there is a second interest involved in this question: the interest of the consumer. Many studies have found that moderate alcohol consumption is associated with an overall reduction in the risk of coronary heart diseases. R. D. More and T.A. Pearson, for example, reached that conclusion in *Medicine* in 1986 after reviewing 165 studies over 50 years.[29] A study of over 30,000 people by insurance companies concluded that having one or two drinks a day was healthier than abstinence. Surely, insurance companies would want their clients to live the healthiest live possible. Said *Time* on February 17, 1997, "One or two drinks a day seem to cut by one-third the risk of developing clogged arteries in the legs—a painful, sometimes dangerous condition that tends to afflict the elderly. Alcohol probably helps the legs the same way it helps the heart—by raising good HDL cholesterol."[30] The most recent study was published in *The Archives of Internal Medicine*. It examined 14,125 males between 40 and 84. Compared with non-drinkers, men who drank daily had 44 percent low chance of having high cholesterol, heart attacks or strokes.

   Furthermore, beers with a lower calorie count, "light beers," may help with weight loss; weight reduction helps prevent heart disease, high blood pressure, and other killers. It would have been impossible for those products and their healthful effects to have broken into the consumers' awareness, let alone to win a share of the marketplace, without advertising including advertising on billboards. In fact the State of California recently passed a law which allows wineries to advertise on their labels the healthful benefits of wine.

3. Does the banning of billboard advertising directly advance the asserted government interest? We know that minors do not have the same level of First Amendment protection as adults and that the sale of alcohol to minors is illegal. Thus, government restrictions aimed exclusively at limiting exposure of minors to alcohol advertising may well constitute a legitimate time, place and manner restriction. However, the government may not reduce adults to the status of children by regulating expression directed primarily at adults on the grounds that minors may be exposed to it.[31] In overturning the Communication Decency Act in 1997, the Supreme Court said that the government's interest in protecting children from harmful materials "does not justify an unnecessary broad suppression of speech directed to adults.... [T]he government may not reduce the adult population to only what is fit for children."[32] If the government may not use this rationale to prohibit obscenity from the internet, it is very unlikely that this rationale could apply to advertising beer on billboards.

   Furthermore, in terms of *44 Liquormart*, advocates of billboard bans have the burden of proving that banning of advertising will lead to a significant reduction in alcohol abuse. In the case of the Baltimore ban, the city was under the obligation to show that a reduction in billboard advertising near schools and playgrounds would reduce alcohol consumption. No such evidence was presented.

   The fact of the matter is that the hard evidence says that this legislation will not materially and directly advance its goals. For example, the Department of Health and Human Services found that "research has yet to document a strong relationship between alcohol advertising and alcohol consumption."[33] The Federal Trade Commission concurred that there is "no reliable basis on which to conclude that alcohol advertising significantly affects alcohol abuse."[34] While advertising expenditures indexed to 1971 have increased more than 100%, per capita consumption has remained at basically the same level.[35] A Senate investigation and the Assistant Director of the Social Science Institute at Washington University, among others, came to the same conclusion.[36] Perhaps the most damning evidence on this point came from Hubert H. Humphrey, 3d, the Attorney General of Minnesota. Humphrey was one of the original Attorneys General to seek compensation from tobacco companies for state costs. But once the states reached an agreement with the tobacco companies, Humphrey wrote, "[J]udging from the experience of those countries where all advertising is banned but teen-agers still light up in droves, limits on advertising may not make much difference."[37]

   Advertising leads to shifts in the choices of those already in the market;[38] it does not increase the market size nor can it be shown to have an impact on teenagers. In the majority opinion in *44 Liquormart* in May of 1996, Justice Stevens embraced this line of argument by referring to this evidence and then applying it to the State of Rhode Island:

   > *Another study indicated that Rhode Island ranks in the upper 30% of States in per capita consumption of alcoholic beverages; alcohol consumption is lower in other States that allow price advertising.... Rhode Island's off-premises liquor advertising ban has no significant impact on levels of alcohol consumption in Rhode Island.*

   Thus, billboard bans of alcohol advertising currently fail the third part of the *Central Hudson Gas* test; banning advertising is not the way to reduce alcohol abuse because no correlation has been demonstrated between advertising and the abuse. In fact, in *Oklahoma Broadcasters Ass'n v. Crisp*, a federal court invalidated a state ban on liquor advertising as "irrational," and therefore impermissible because the evidence did not establish that the ban would have any effect on overall levels of alcohol consumption.[39] The government interest is "directly and materially" advanced by requiring the wearing of seat belts in all cars in all states, by enforcing drunk driving laws, by making it illegal to sell alcohol to minors, and by educational programs in schools and in the community. In fact, such slogans as "know when to say when" and "designate a driver" may have done more to advance the government's interest on this issue than banning commercial speech on billboards.

4. Is this legislation narrowly tailored to provide a reasonable fit between the legislation and the asserted government interest? Is there a match between its goal and its method?

   In the case of alcohol advertising, it can be argued that the legislation goes after the wrong target and is too "extensive" to meet this prong of the*Central Hudson* test. It affects advertising that goes to a wide audience in an effort to affect a small segment of that audience. Cities cannot pass a law that says all dogs must be killed to make sure that dangerous pit bulls are eliminated from society. The law must be tailored to meet only its goal, particularly in this case in which a second consumer interest can be argued.

   Central Hudson says that commercial speech can only be restricted if the product or service is illegal or makes false claims, or if there is a substantial government interest which is advanced "directly and materially" by the least restrictive means available. In the case of alcohol, abuse may be better controlled by labeling cans and bottles, by enforcing drunk driving laws, and by instituting educational programs.[40] Since these products are legal and beneficial, it may be unconstitutional to restrict their advertising for the vast bulk of society that uses the product in a responsible way, especially when no correlation has been established between banning advertising and reduced intake of alcohol.[41] Thus, targeting billboards on a product-specific basis violates the Constitution and does not serve the public interest. And that is precisely what the Supreme Court ruled in its *Lorillard v. Reilly* decision of 2001.

Unjust Taking

This study demonstrates that court precedent has significantly narrowed the ways by which billboards can be restricted. While local governments can ban all billboards for aesthetic reasons that are clearly correlated to economic income and safety, they can not ban them on a product-specific basis. To put it simply, where billboards are allowed, so is all legal and non-misleading commercial speech. For this reason, foes of alcohol and tobacco advertising have turned to other methods to "chill" this type of commercial speech.[42] These methods include direct taxes on a product-specific basis, and the disallowance of advertising deductions for certain products. The problem, as Daniel

Webster made clear in *McCulloch v. Maryland* (1819), is that "An unlimited power to tax involves, necessarily, a power to destroy because there is a limit beyond which no institution and no property can bear taxation."

The Fifth Amendment prohibits taking of property "without just compensation." The government must compensate those from whom it takes. Thus, some billboard advocates argue that restrictions on billboard advertising constitute an unjust taking. Earlier we examined cases in which it was determined that when a city regulates private property within its bounds of policing power, no compensation is necessary. Thus, the crucial question is what is within the legitimate policing power of a local government.

The problem began in 1922 in *Pennsylvania Coal Co. v. Mahon*[43] when the Supreme Court left open what constitutes going "too far" in determining local bounds on policing power. Since that time various theories have been used to justify "taking." For example, if the benefit to the community outweighs the harm of a loss, then the courts must decide if the owner is entitled to compensation. For years confusion reigned with many cases being decided on an individual basis highly dependent on the theory of the justices involved. The clearest case may be *Armstrong v. United States* (364 U.S. 40, 1960) which ruled that ship builders could recover just compensation for the value of uncompleted boat hulls and building materials conveyed to the United States. This decision relied the fundamental principles of fairness and justice that mandate that no one person shall be made to bear the entire burden when everyone receives a benefit.

In 1978 the Court tried to remedy the situation in *Penn Central Transportation Co. v. New York City*[44] wherein the City had designated Grand Central Station a landmark and prohibited Penn Central from building in the airspace above it. Writing for the majority, Justice Brennan ruled for the City using a complex balancing test that included 1) how permanent the regulation is or has been, 2) whether the regulation advances a state's interest, 3) whether the regulation prevents a harm, 4) whether the economic impact of the regulation is negative, and 5) whether the regulation is equitable and just. In a subsequent case, the courts recognized that "takings" occur when the government requires uses of property different from the expectations of property owners or which substantially diminish their value.[45] Two significant and very similar cases now guide the thinking of the courts in this matter. First, *Nollan v. California Coastal Commission* in 1987 established once and for all that "land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests.'"[46] That doctrine was refined in *Lucas v. South Carolina Coastal Commission* in 1992,[47] which ruled that depriving an owner of all economically beneficial use of his property is an unjust taking. Fearing that *Nollan* might give the states too free a hand, the Court in the *Lucas* case established three kinds of public interests that qualify as legitimate. First, the state may have a constitutional interest that outweighs the rights of the private property owner.[48] Second, immediate peril or emergency may justify state or federal actions.[49] Third, the state may move to rectify a situation wherein assets have become frozen.[50]

What was the case at bar in *Lucas*? After Lucas purchased of piece of property, the South Carolina legislature enacted a beachfront control act which effectively destroyed its value by prohibiting construction. Despite South Carolina's claim that building was disruptive to a sensitive environmental area, the Supreme Court, with Justice Scalia writing the majority decision, sided with the property owner. Despite the fact that environmental concerns were apparent, the deprivation of economic reward had to be compensated.

The impact of the *Lucas* case on billboards has not yet been set in precedent. If the standard is followed, when a city enacts a law abolishing billboards, thus depriving their owners of all economic benefit, that might constitute an unjust taking unless the city could prove that the interest it was advancing fell into one of the categories established by the *Lucas* case.

The Taxing Problem

A second means of eliminating advertising of specific products has been developed in certain legislative circles. It involves removing advertising expenses from tax deduction lists or raising the taxes on certain products. In *Simon & Schuster v. Members of the New York State Crime Victims Board* (1991), the Court made clear that a "statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."[51] The law at bar, aimed at preventing felons from making a profit by selling their stories, was ruled overly inclusive since it applied to works on any subject provided that they express the author's thoughts or recollections about his/her crime however tangentially or incidentally. The Court re-affirmed this position in *R.A.V. v. St. Paul* (1992) which said a law is "facially unconstitutional if it prohibits otherwise permitted speech solely on the basis of the subject the speech addresses."

In *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue* (1983), the Court overturned a law that imposed differential tax consequences on speech based on its content. In fact, the decision held that states could not single out media for taxation nor discriminate among media by imposing taxes.[52] Justice Sandra Day O'Connor wrote the majority opinion:

> *A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency.... When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute.*[53]

This ruling may protect such media as billboards since singling them out would violate the standard. As Justice O'Connor wrote, "[Minnesota] has created a special tax that applies only to certain publications protected by the First Amendment. [It] is facially discriminatory..."[54] Later she spoke directly to the issue under study here:

> *A second reason to avoid the proposed rule is that courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation. The complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burdens of taxes. In sum, the possibility of error inherent in the proposed rule poses too great a threat to concerns at the heart of the First Amendment, and we cannot tolerate that*

possibility.[55]

In *Arkansas Writers Project v. Ragland* (1987), the Court ruled that a general state tax that exempted newspapers and religious, professional, trade, and sports magazines was prejudicial.[56] A publisher claimed that subjecting the publisher's magazine to a state sales tax, while exempting newspapers and other magazines, violated the First and Fourteenth Amendments. The Court ruled that "[O]fficial scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press."[57] This ruling was particularly clear about selective taxation of various media; even if the state is not attempting to censor a medium, even if its intentions are well meaning, it may not discriminate in this way.[58] This decision protects such media as billboards from tax discrimination by state and local governments.

In 1991 the Court reinforced its position from a different direction when in *Leathers v. Medlock*[59] when it upheld a general state tax that exempted certain media. In other words, states and localities may not single out certain media for special taxes, but they may exempt certain media from general taxes. In either case, billboard advertising could not be singled out to be taxed.

Conclusion

Targeting on a product-specific basis violates this standard as does taxing advertisers of specific products. Justice Stevens in the *44 Liquormart* decision demonstrated an astute knowledge of history and American tradition when he wrote:

> *Advertising has been part of our culture throughout our history. Even in colonial days, the public relied on 'commercial speech' for vital information about the market. Early newspapers displayed advertisements for good and services on their front pages, and town criers called out prices in public squares. Indeed, commercial messages played such a central role in public life prior to the Founding that Benjamin Franklin authored his early defense of free press in support of his decision to print, of all things, an advertisement for voyages to Barbados.*

Legislators and local officials who seek product-specific advertising bans ought to ponder the tradition that Justice Stevens found so persuasive. They need also to understand the Court precedent established here. If a city allows billboard advertising at all, it must allow advertising of all legal products. If may not ban advertising copy for billboards, or any other media, on a product-specific basis, nor may it apply taxes in a prejudicial way in order to accomplish even the most noble ends.

Endnotes

This article is an update of a paper first presented at the National Communication Association's Annual Meeting in 1998.

[1]. In New York, the disputants have gone to court. See *Greater New York Metropolitan Food Council, Inc.* and *Advertising Freedom Coalition v. Guliani*, No. 98 CIV 251 (DAB) (S.D.N.Y. filed Jan. 14, 1998).

[2]. See *Eller Media Co. v. City of Oakland* (U.S. Dist. for Northern Cal., Nov. 25, 1998.)

[3]. See G. D. Bassuk, "Advertising Rights and Industry Fights: A Constitutional Analysis of Tobacco Advertising Restrictions in a Federal Legislative Settlement of Tobacco Industry Litigation," *Georgetown Law Journal*, 85 (1997): 715-49.

[4]. *St. Louis Gunning Advertising Co. v. City of St. Louis*, 137 W.W. 929, 938 (Mo. 1911).

[5]. 272 U.S. 365, 390-95 (1926).

[6]. R. Douglas Bond, Note. "Making Sense of Billboard Law: Justifying Prohibitions and Exemptions," *88 Michigan Law Review*. 2482, 2485 (1990).

[7]. 348 U.S. 26 (1954) at 33. This decision was reinforced in *People v. Stover*, 191 N.E. 2d 272 (N.Y.), appeal dismissed, 375 U.S. 42 (1963). The *Berman* case took place in Washington, D.C. where the Supreme Court resides. The Court may have ruled differently if it did not affect the members own backyards.

[8]. 453 U.S. 490 (1981).

[9]. 477 U. S. 562, 570-72, 577 (1980).

[10]. Justice Blackmun in concurring argued that the Court should go further and give commercial speech the same protection as speech about public affairs.

[11]. See also *Lakewood v. Plain Dealer Publishing* (1988).

[12]. 113 S. Ct. 1511.

[13]. In *Valley Broadcasting Co. v. United States* (107 F. 3d 1328 (Ninth Cir. 1997), cert. denied, 118 S. Ct. 1050 (1998)), the Ninth Circuit affirmed a lower court ruling that the federal ban on advertising gambling was unconstitutional as applied to legal casino advertising in Nevada: "... because Section 1304 permits the advertising of commercial lotteries by not-for-profit organizations, governmental organizations, and Indian Tribes, it is impossible for it materially to discourage public participation in commercial lotteries" (107 F. 3d at 1335). The Supreme Court denied certiorari without comment thereby freeing broadcasters in states where gambling is legal to advertise it.

[14]. 1996 U.S. Lexis 3020, 34. He also made the point aboutcommercial messages being an important provider of consumer information at 1996 U.S. Lexis 3020, 22.

[15]. 1996 Lexis 3020, 45, 48. Later in the decision, Stevens again ridiculed the "*Posadas* syllogism." 1996 Lexis 3020, 49.

[16]. 116 S.Ct. 1510.

[17]. Certiorari granted, vacated, 116 S.Ct. 2575.

[18]. See *Outdoor Systems Inc. v. City of Atlanta*, 885 F. Supp. 1572.

[19]. *Chigio v. City of Preston, Minn.* 909 F. Supp. 675.

[20]. 34 F.3d 68.

[21]. See *AIDS Action Committee of Massachusetts, Inc. V. Massachusetts Bay Transp. Authority*, 42 F. 3d 1.

[22]. See also *Brockway v. Shepherd*, 942 F. Supp. 1012; *New York Magazine v. Metropolitan Transportation Authority*, 136 F. 3d 123 (2d Cir. 1998), cert. denied, 119 S. Ct. 68 (1998).

[23]. *Federation of Advertising Industry Representatives v. City of Chicago*, 12 F. Supp. 2d 844 (N.D. Ill. 1998), quotation from LEXIS 11777. The Judge also upheld the federal pre-emption of tobacco advertising, saying only Congress could regulate it.

[24]. Alcohol advertising serves as the better example in this instance because tobacco has been compromised by he recent consent agreement reached by the major tobacco companies and the states attorneys general.

[25]. This is the approach used by the lower courts since the *44 Liquormart* decision. See, for example, *A.B.C. Home Furnishings, Inc. v. Town of East Hampton*, 947 F. Supp. 635, and *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162. For a close analysis of the *44 Liquormart* decision, see Craig R. Smith, "44 Liquormart: Unanimity without Consensus," *Free Speech Yearbook* 36 (1999): 1-13.

[26]. 101 F. 3d 325 (4th Cir. 1996), cert. denied, 65 USLW 3727 (1997).

[27]. See "National Household Survey on Drug Abuse: Highlights, 1990" (U.S. Department of Health and Human Services, Washington, D.C.), p. 41-42.

[28]. "Monitoring the Future Study," University of Michigan, 1994 as cited in 1995 *Information Please Almanac* (Boston: Houghton Mifflin Company, 1995), p. 455.

[29]. See "Moderate Alcohol Consumption and Coronary Artery Disease," *Medicine*, 65 (July, 1986), pp. 242-267. The American Heart Association has changed its Dietary Guidelines to reflect these findings.

[30]. p. 24.

[31]. See, for example, *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 131 (1989); *New York v. Ferber*, 458 U.S. 747 (1982).

[32]. *Reno v. ACLU*, 117 S. Ct. 2346 (1997).

[33]. See *Seventh Report to Congress on Alcohol and Health*, (Washington, D.C.: Government Printing Office, 1990). Even Surgeon General Koop supported this position in his *Sixth Report Congress on Alcohol and Health* (Washington, D.C.: Government Printing Office, 1989) when he wrote, "There is noscientifically rigorous study available to the public that provides a definitive answer to the basic question of whether advertising and promotion increase levels of tobacco consumption."

[34]. *Federal Trade Commission News Release*, April 16, 1985.

[35]. *Federal Trade Commission News Release*, April 16, 1985. For updated figures, 1971 to 1987, see *The Beer Institute, 1989 Report* (Washington, D.C.: The Beer Institute, 1989).

[36]. "Our subcommittee record contains no facts which would justify legislation to ban/censor advertising of beer and wine products or require counter advertising," said U.S. Senator Paula Hawkins, "Reporting the Findings of the Senate Subcommittee on Alcoholism and Drug Abuse Hearings, May 20, 1985." See also Donald E. Strickland, "The Advertising Regulation Issue: Some Empirical Evidence Concerning Advertising Exposure and Teenage Consumption Patterns" Paper presented to conference on Control Issues in Alcohol Abuse Prevent, September, 1981 (Professor Strickland, Ph.D., Assistant Director, Social Science Institute, Washington University.) Reginald G. Smart, "Does Alcohol Advertising Affect Overall Consumption? A Review of Empirical Studies," *Journal of Studies of alcohol*, (1988); Alan C. Ogborne and Reginald G. Smart, "Will Restrictions on Alcohol Advertising Reduce Alcohol Consumption?" *British Journal of Addiction*, 75 (1980): 293-296. In *44 Liquormart*, Justice Stevens referred to this kind of evidence and then applied it to the instance before the Court:

Rhode Island ranks in the upper 30% of States in per capita consumption of alcoholic beverages; alcohol consumption is lower in other States that allow price advertising.... Rhode Island's off-premises liquor advertising ban has no significant impact on levels of alcohol consumption in Rhode Island.

(1996 Lexis 3020, 18).

[37]. "Still a Health Threat," *New York Times* (November 24, 1998): A27.

[38]. Another study to make this point, "Advertising and the U.S. Market Demand for Beer", was completed by Professors Byunglak Lee and Victor J. Tremblay of the Department of Economics at Oregon State University. They conclude, "Although manyrespectable groups have argued that advertising promotes beer consumption, the empirical results of this study do notsupport this hypothesis. If social welfare is best served by reducing alcoholic beverage consumption, policies other than a restriction on advertising should be sought." (Corvalis ,

OR: Oregon State University, May 24, 1990), p. 9.

[39]. No. Civ-81-1756-W (W.D. Okla. May 30, 1986).

[40]. It should be noted that since the Cigarette Labeling and Advertising Act of 1965, the courts have consistently ruled that by complying with federal labeling requirements, cigarette manufacturers are immune from regulation by the states. This immunity was watered down in cases of damage suits in *Cipollonne v. Liggett Group, Inc.* but only in the case of fraud or breach of warranty.

[41]. In April of 1995, the Supreme Court ruled that federal government could not bar Coors Brewing from printing the alcohol content of its products on the label. In this case, the Court took a step toward the Founders' position that companies have a right to advertise as they see fit, as long as such advertising is truthful and not misleading.

[42]. See, for example, A. E. Gerencser, "Removal of Billboards: Some Alternatives for Local Governments," *Stetson Law Review*, 21 (1992): 899-930.

[43]. 260 U.S. 393.

[44]. 438 U.S. 104. See also, Jed Rubenfield, "Usings" *Yale Law Journal*, 102 (1993), 1077-1116.

[45]. See *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980). The Court has held that even in war time just compensation is due. In *United States v. Russell* (80 U.S 623, 1871) ruled that the "officer taking private property [even when] emergency is fully proved, is not a trespasser, [but] the government is bound to make full compensation to the owner." See also *National Board of Y.M.C.A. vs. United States*, 395 U.S. 85, (1969).

[46]. 483 U.S. 825, 834.

[47]. 112 S. Ct. 2886.

[48]. The Supreme Court consolidated several earlier decisions here, particularly *Krichberg v. Feenstra*, 450 U.S. 455, 1981.

[49]. This standard dates back to at least *United States v. Caltex, Inc.*, 344 U.S. 149 (1952), in which a Filipino company sought compensation for the destruction of its oil reserves by the retreating U.S. Army during World War II.

[50]. See, for example, *Texaco, Inc. v. Short*, 454 U.S. 516 (1982).

[51]. 502 U.S. 105. See *Constitutional Law*, Section 926, 2a, 2b.

[52]. 460 U.S. 575. See also *Grosjean v. American Press*, 297 U.S. 233 (1936). In Grosjean the Court overturned a Louisiana tax on newspapers that sold advertising and had a circulation of 20,000 or more.

[53]. 460 U.S. 585.

[54]. 460 U.S. 581.

[55]. 460 U.S. 589-590.

[56]. 481 U.S. 221.

[57]. 481 U.S. 230.

[58]. 481 U.S. 228.

[59]. 499 U.S. 439.

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