Model Preventive Counseling Services for Children of Alcoholics and Addicts Act

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Policy Statement

Children who are members of a family with an alcoholic, addicted, or alcohol or drug abusing parent, guardian, or other adults, can suffer painful consequences from that relationship. Research and clinical evidence indicate that children of alcoholics or addicts are at higher risk for initiating drug use, are at higher risk for developing alcoholism and other drug dependencies, are at greater risk of physical and sexual abuse, and are more likely to have school, health, and behavior problems than other children.

Education, prevention, and counseling services can enable children of alcoholics and addicts to better understand the disease of alcoholism and its attendant effects, to learn ways to cope with alcoholic or addicted family members and their problems, and to empower themselves to improve their own lives. Services for such children can reduce the emotional and physical damage caused by their parents' drinking and reduce the risk of future alcohol and other drug abuse.

However, barriers limit the access of children of alcoholics and addicts to potentially helpful services. First, the denial of alcohol and other drug problems by an alcoholic or drug addicted parent and by other members of the family often serves to keep alcoholism or addiction a family secret. Children of alcoholics and addicts often are urged by family members not to disclose these family problems. In certain circumstances, the children may fear violent reactions to disclosure of this family secret. They may also believe that any disclosure somehow betrays their family members.

Second, in many states, children lack the legal right to receive preventive alcoholism and addiction services without prior permission from a parent or legal guardian. A study by the Children of Alcoholics Foundation found that most states have laws governing whether and in what circumstances minors may consent to their own health care; however, great variation exists in the application of these laws to children of alcoholics and other drug abusers. Some states require parental consent for virtually all services that a minor may need. Other states provide minors with varying degrees of autonomy. Only a few states clearly allow access to preventive services without parental consent. At times, this confusion of laws and rights also inhibit other adults from acting on behalf of the child, for fear of legal action against them.

State consent laws need to take into account the special needs of children of alcoholics and other drug abusers. Given the circumstances of denial and stigma in which children of alcoholics find themselves, consent laws must clearly permit minor children of alcoholics and other drug abusers to receive preventive alcoholism or addiction counseling without obtaining parental consent. The model legislation provides that when requesting parental consent is not in the child's best interest,

counselors may help children if they document the reasons for providing services, keep complete records of the services, and periodically evaluate the desirability of contacting the parents. Family participation in alcoholism and addiction counseling is recommended, but should not be allowed to form a barrier to needed services.

This legislation primarily is directed towards children who make self-referrals for preventive alcoholism and addiction counseling. A companion bill, the Model School Intervention for Students with Substance Abuse Problems Act, primarily is directed towards children who are referred to counseling or treatment by teachers, school administrators, or student assistance professionals. However, neither piece of legislation is meant to exclude the other situation and it is intended that they should be considered in tandem.

This model legislation and policy statement reflects the work of the Children of Alcoholics Foundation. Both the legislation and this policy statement are based on the findings of the Foundation's study of state parental consent laws, entitled "Parental Consent: Helping Children of Addicted Parents Get Help."

Highlights of the Model Preventive Counseling Services for Children of Alcoholics and Addicts Act

ASSUMPTIONS AND REMEDIAL GOALS

- Recognizes that children who are members of a family with an alcoholic, addict, or alcohol- or drug-abusing parent, guardian, or other adults, can suffer painful consequences from that relationship.
- Recognizes the potential long-term impact of the alcoholism and/or addiction of a family member on a child.
- Recognizes the importance of education, prevention, and counseling programs targeted at children of alcoholics and addicts in reducing the risk of developing future substance abuse problems.
- Recognizes the denial inherent in the disease of alcoholism and addiction and children's fear of confronting parents about those problems as barriers to the provision of needed services.
- Recognizes that parental consent should not be a mandatory prerequisite to children's ability to obtain counseling.
- Recognizes that in most states, minor children of addicted parents often face substantial difficulty obtaining preventive alcoholism or addiction counseling services without the involvement or permission of their parents.

SPECIFIC RECOMMENDATIONS

- Provides that a facility licensed by the [single state authority on alcohol and other drugs] may provide preventive alcoholism or addiction counseling services to a child without parental consent if a child refuses permission to contact parent(s) to seek consent, and if a qualified professional reasonably determines in good faith and based on independent evidence that seeking parental consent would not be helpful and would be deleterious to the child.
- Provides that the child must provide a written statement stating the reasons for seeking counseling and the written consent of the child for such services.
- Provides that the facility advise the child of the purpose and nature of the counseling, inform the child that a written record of the services will be maintained, and inform the child that he or she may withdraw consent and cease participating in the counseling at any time.
- Provides certain requirements for the facility to maintain records of the child's assessment, counseling services, and other information.
- Provides for the encouragement of parental and other family involvement in preventive counseling where appropriate.
- Provides a limitation of liability for preventive counselors and those who assist children seeking counseling in order to encourage appropriate, good faith intervention on behalf of children of alcoholics and addicts.
- Provides for the [single state authority on alcohol and other drugs] to establish mechanisms for compensating organizations, programs, and individuals who provide preventive counseling services in cases where children are unable to meet payments.
- Provides for the confidentiality of patients, records, and all other information maintained in connection with the provision of preventive counseling services in accordance with federal and state confidentiality laws and regulations.

Model Preventive Counseling Services for Children of Alcoholics and Addicts Act

Section 1. Short Title.

The provisions of this [Act] shall be known and may be cited as the "Model Preventive Counseling Services for Children of Alcoholics and Addicts Act."

Section 2. Legislative Findings.

(a) Children who are members of a family with an alcoholic, addict, or alcohol- or drug-abusing parent, guardian, or other adults, can suffer painful consequences from that relationship. Often, these adverse effects continue into adulthood. Research and clinical evidence indicate that children of alcoholics are at higher risk for developing alcoholism and other drug dependencies.

(b) Education, prevention, and counseling programs targeted at children of alcoholics and addicts can help reduce the risk of developing future substance abuse problems and their many social and economic costs.

(c) The availability and accessibility of competent, sympathetic, and caring preventive alcoholism and addiction counseling by qualified professionals is essential for the well-being of these children and society at large.

(d) While parental and other family involvement in counseling is often beneficial to the entire family and should be strongly encouraged, parental consent should not be a mandatory prerequisite to children's ability to obtain counseling. Parental refusal to permit counseling, due to denial inherent in the disease and children's fear of confronting parents to ask for permission, should be eliminated as barriers to providing needed services.

(e) In most states, minor children of addicted parents often face substantial difficulty obtaining preventive alcoholism or addiction counseling services without the involvement of their parents. Most state consent laws do not take into account the special needs and confidentiality concerns of children of alcoholics and drug abusers.

Section 3. Purpose.

This [Act] is intended to provide legal accessibility to competent preventive alcoholism and addiction counseling for minor children of alcoholics and drug addicts. This [Act] also intends to insure that minor children of alcoholics and addicts receive counseling from credentialed professionals with experience in the treatment of alcoholism, addiction, and other alcohol- and drug-related problems.

Section 4. Definitions.

As used in this [Act]:

(a) "Child" means any person under 18 [and/or use state definition].

(b) "Facility" means an entity licensed by the [single state authority on alcohol and other drugs] to provide outpatient services and that has on its staff one or more qualified professionals who specialize in the treatment of alcoholism, addiction, and other alcohol and drug-related problems.

(c) "Parent" means a biological or adoptive parent, or a legal guardian or other person authorized under state law to act in the minor's behalf.

(d) "Preventive alcoholism and addiction counseling" means services provided by a qualified professional, including individual and group counseling and education about alcohol and other drugs and their effects; general guidance and support, and service coordination, provided to a child of an alcoholic, addicted, or alcohol or other drug-abusing individual in order to prevent alcoholism, addiction, alcohol and drug abuse or related physical, emotional, or mental health problems.

(e) "Qualified professional" means a licensed physician or nurse, credentialed alcoholism or addiction counselor, credentialed social worker who has at least one year's experience in the treatment of alcoholism, addic-

tion, and other alcohol and other drug-related problems, or a licensed psychologist who has at least one year of experience in the treatment of alcoholism, addiction, and other alcohol- and drug-related problems.

(f) "[Single state authority on alcohol and other drugs]" means the state agency designated by the governor to plan, manage, monitor, and evaluate alcohol and other drug treatment services in the state.

(g) "Willful and wanton misconduct" means conduct that is committed with an intentional or reckless disregard for the safety of others or with an intentional disregard of a duty necessary to the safety of another or another's property.

COMMENT

Some states may have different titles or categories for qualified professionals or may choose to include other professionals in this definition. The intent of this section is to insure that children of alcoholics and addicts receive counseling from credentialed professionals with experience in the treatment of alcoholism, addiction, and other alcohol and other drug-related problems. Such professionals will be best equipped to properly identify and address the counseling needs of the child and any necessary interventions on behalf of the child.

Section 5. Consent Requirements for the Provision of Preventive Alcoholism or Addiction Counseling Services to a Child.

(a) A facility may provide preventive alcoholism or addiction counseling services to a child without parental consent if a child refuses permission to contact parent(s) to seek consent, and if a qualified professional reasonably determines in good faith and based on independent evidence that seeking parental consent would not be helpful and would be deleterious to the child.

(b) Before providing preventive alcoholism or addiction counseling to any child pursuant to subsection (a), the facility shall obtain from the child a statement of his or her reasons for seeking counseling and the written consent of the child for such services.

(c) When requesting a child's written consent for providing preventive alcoholism or addiction counseling, the facility shall:

(1) Advise the child of the purpose and nature of the counseling;

(2) Inform the child that the facility will maintain a written record of the services provided; and

(3) Inform the child that he or she may withdraw consent and cease participating in the preventive alcoholism and addiction counseling at any time.

(d) The written record of the preventive services provided shall include the reasons for the counseling without parental consent and the attempts made to obtain such consent.

COMMENT

This section outlines the primary purpose of this [Act]. Preventive alcoholism or addiction counseling may be provided to a child without parental consent if that child refuses permission to contact parent(s) to seek consent. Recognizing the special circumstances of children of alcoholics or addicts, notably the denial inherent in those diseases, the provision seeks to avert any potential negative consequences of the child's attempts to secure and participate in preventive alcoholism or addiction counseling.

Section 6. Facility Requirements.

Any facility that provides preventive alcoholism or addiction counseling services to a child without parental consent shall at a minimum:

(a) Develop an initial assessment and evaluation to determine the extent of the preventive alcoholism and addiction counseling services needed.

(b) Prepare a written plan for the provision of preventive alcoholism or addiction counseling services based on the individual assessment and evaluation of the child's needs.

(c) Provide preventive alcoholism and addiction counseling services in accordance with the written plan.

(d) Maintain a written record of the services provided that shall include periodic notes relating to the child's progress.

(e) Write a closing summary of the preventive alcoholism or addiction counseling services provided when it has been determined such services are no longer necessary or the child withdraws from the program.

COMMENT

In cases where seeking parental consent is not in the child's best interest, counselors may help children if they document the reasons for providing services, keep complete records of the services, and periodically evaluate the desirability of contacting the parents. This section establishes the record keeping necessary to protect the interests of the counselors and the children receiving the counseling.

Section 7. Encouragement of Family Involvement in Counseling.

Whenever possible, parental and other family involvement in preventive alcoholism or addiction counseling shall be sought. Involvement of [a] parent(s), family member(s), or other(s) close to the child in such counseling shall be sought only with the written consent of the child and in conformity with the confidentiality requirements of this [Act].

Section 8. Limitation of Liability for Preventive Counselors and Those Who Assist Children Seeking Counseling.

Regardless of whether or not the parent(s) of the child are aware of or give permission to a child to receive preventive counseling, any individual who refers, recommends, offers advice, supports, or in any other way assists a child to obtain preventive alcoholism or addiction counseling shall be rebuttably presumed to be acting in good faith. An individual found to be acting in good faith in compliance with this [Act], and absent willful or wanton misconduct, shall be immune from any liability, civil or criminal, that might otherwise be incurred or imposed as a result of actions taken pursuant to this [Act]. Similarly, any qualified professional who provides in accordance with this [Act] any preventive alcoholism or addiction counseling without the permission of the child's parent(s) shall be rebuttably presumed to be acting in good faith. A professional found to be acting in good faith in compliance with this [Act], and absent willful or wanton misconduct, shall be immune from any liability, civil or criminal, that might otherwise be incurred or imposed as a result of action taken pursuant to this [Act].

COMMENT

This section provides immunity from liability for any individual who in good faith assists or enables a child to receive preventive alcoholism or addiction counseling. The same immunity from liability is extended to any qualified professional who provides such counseling in good faith. This immunity is extended to those individuals to encourage appropriate, good faith intervention on behalf of children of alcoholics or addicts.

Section 9. Fees for Service.

If the child refuses permission to bill the parent(s) for any reason, fees for preventive alcoholism or addiction counseling may be billed to the child. Such fees should be based on the child's ability to pay. To address the issue of children unable to pay for services, the [single state authority on alcohol and other drugs] shall, to the extent that funding is available, establish mechanisms for compensating organizations, programs, and individuals who provide such counseling services.

COMMENT

An alcoholic or drug-addicted parent may refuse to permit counseling of a child, due to the denial inherent in the disease. Similarly, some children will not confront their alcoholic or addicted parent to ask permission to receive preventive counseling, for fear of parental reprisal. In cases where a child refuses permission to bill the parent(s) for any preventive counseling, the child, and not the parent(s), should be billed.

Most [single state authorities on alcohol and other drugs] receive funds for treatment of the destitute. It is intended that the [single state authority on alcohol and other drugs] make every effort to identify public or private funding for the compensation of the child's counselor.

Section 10. Confidentiality.

Identity of patients, records, and all other information maintained in connection with the provision of preventive alcoholism or addiction counseling shall be confidential and may not be disclosed except in compliance with the federal and state laws and regulations mandating confidentiality of the records of alcohol and other drug abuse patients. [Federal cite: 42 U.S.C. 290dd-3 and ee-3, 42 C.F.R. Part 2].

Section 11. Severability.

If any provision of this [Act] or any application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the [Act] that can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

Section 12. Effective Date.

This [Act] shall be effective on [reference to normal state method of determination of the effective date] [reference to specific date].

Appendix C

HEARING ON

THE SENSIBLE ADVERTISING AND FAMILY EDUCATION ACT

S. 674

CONSUMER SUBCOMMITTEE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

Prepared Testimony of

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May 13, 1993

(Professor Steven Shiffrin presented the following testimony before the Senate Consumer Subcommittee in support of Senate Bill 674 (Thurmond), the Sensible Advertising and Family Education Act. (A similar bill, H.B. 1823 (Kennedy), was proposed in the House of Representatives.) The Commission's Model State Sensible Advertising and Family Education Act mirrors these bills at the state level.)

I am a Professor of Law at Cornell University. I have also taught in the law schools at Boston University, Harvard University, the University of Michigan, and UCLA. I am the author of The First Amendment, Democracy, and Romance (Harvard University Press 1990) (winner of the Thomas J. Wilson Award) and numerous articles on the first amendment. I am also the co-author of Constitutional Law (7th ed. 1991), one of the most widely used casebooks in the field and a co-author of The First Amendment (1991), the most extensively used casebook in the field.

* * *

I very much appreciate the opportunity to testify concerning the constitutionality of S. 674. I will try to summarize my prepared remarks and would request that they be placed in the record. I have read the findings and warnings set out in the bill. I am no expert on the subject of those findings and warnings, but I am prepared to assume they are reasonable. Assuming that, the bill is constitutional.

For most of the history of this republic, commercial speech has received no protection whatsoever. Today it occupies a subordinate position in the hierarchy of first amendment values. As Justice Clark said some years ago, there is no war between the Constitution and common sense. Nothing in the commercial speech doctrine prevents Congress from taking reasonable steps to address the genuine public health problems associated with alcohol, and it has every reason to believe that those problems are materially aggravated by the advertising of alcoholic beverages. It is entitled to the judgment that the millions of teenagers who watch untold numbers of beer commercials are not uninfluenced by that experience. It is entitled to assume that if fewer people consume alcohol, fewer people will abuse alcohol. And, in any event, Congress is on sure footing in assuring that Americans are aware of the risks associated with the consumption of alcohol.

My understanding, however, is that the bill's opponents claim that the bill is unconstitutional. In support of this claim, some of them apparently contend that corporations can not be forced to disclose the risks associated with their products in their advertising. Drawing upon notions of private property and notions of compelled speech (sometimes even invoking images of school children being forced to salute the flag), they say that corporations can not be forced to use their resources to say what they do not want to say.

But private property is not an absolute and corporations are not school children. Tobacco advertisers are currently forced to carry warnings in their messages; alcoholic beverage manufacturers are currently required to carry the Surgeon General's warnings on their products. Nothing in the Constitution prevents Congress from requiring the manufacturers of drugs (including alcohol) to disclose the risks of their products in their advertising.

Others contend that the required disclosures are so burdensome that they would cause the alcoholic beverage industry to cease advertising on television. More than one observer will greet these predictions with a substantial dose of skepticism,[1] but even if they were more than posturing, even if the legislation caused every last beer advertiser to abandon television advertising, the bill would still pass constitutional muster. Consistent with the first amendment, Congress has the power either to ban alcoholic beverage advertising altogether or to require health warnings.

[1] It is hard, for example, to understand, how the industry could cease advertising without collusion in violation of the antitrust laws. Otherwise, even though the bill may impose an unwelcome burden, some beer manufactures would be tempted to resort to the broadcast media to pick up market share, and then the others would be forced to join.

The Constitutionality of Health Warnings

The law of required disclosures or warnings in commercial speech cases is generally quite clear. Government has broad latitude to require advertisers to make disclosures they do not want to make. The leading case is Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985). There Zauderer, an attorney, argued against disclosures that the state sought to impose in his commercial advertising. He argued that the required disclosures should be subject to the same test the Court had employed in certain other commercial speech cases, a test which we shall later see is itself somewhat relaxed. The Court's response is worth quoting at some length:

> "[Zauderer] suggests that the State must establish either that the advertisement, absent the require disclosure, would be false or deceptive or that the disclosure requirement serves some substantial governmental interest other than preventing deception; moreover, he contends that the State must establish that the disclosure requirement directly advances the relevant governmental interest and that it constitutes the least restrictive means of doing so. Not surprisingly, appellant claims that the State has failed to muster substantial evidentiary support for any of the findings required to support the restriction.
>
> "Appellant, however, overlooks material differences between disclosure requirements and outright prohibitions on speech. In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present." Id. at 650.

Justice White's opinion for the Court then added:

> "Ohio has not attempted to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.' The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of [including] purely factual and uncontroversial[2] information * * *. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal." Id. at 650-51 (citations omitted; emphasis in original).

The Court did not altogether abandon constitutional protection in this area. It recognized that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." Id. at 651.

[2] I do not know if the opponents of the bill contest the underlying substance of the warnings. Clearly they do not doubt that the warnings reflect the position of the Surgeon General. If there were a genuine controversy about the underlying substance, the issue would become closer. Nonetheless, the Court would be loathe to second-guess, not only the view of Congress, but also that of the Surgeon General. I find it overwhelmingly likely the Congress would be upheld if its judgment were better supported than that put forward by the opponents of the bill.

Preventing deception of consumers was the only interest asserted in Zauderer. Other interests such as the public health would certainly qualify as substantial enough to warrant required disclosures.[3] Moreover, nothing in Zauderer suggests that government's power to require disclosures is subject to a crabbed conception of deception. If experience showed that consumers were purchasing a product without sufficient awareness of the risks involved, government under Zauderer could appropriately require disclosures.[4]

On its face it seems obvious that S. 674 is "reasonably related" to the interest of assuring that people who decide to consume alcohol are sufficiently aware of the risks. An advertiser's interest in not providing such information is "minimal." This is not a close question.

Indeed, it should be observed that the legislation calls only for the warnings to be given. Consumers are only to be informed of the Surgeon General's judgment. Zauderer itself would go further and allow the government to "prescribe orthodoxy"[5] in the commercial sphere. That is exactly what happens when government prevents the dissemination of advertising on the ground that it is false or misleading, or when it forces an advertiser to express agreement with the warning in its advertisement. The bill before you does neither of those things.

The Constitutionality of a Total Ban

Opponents of the bill contend that the disclosure requirements of the bill are so burdensome that broadcast advertising of alcoholic beverages would be foreclosed. They assume that would render the bill unconstitutional as applied to the broadcast media.

Their assumption is ill-founded for two reasons. First, Congress has the power to ban the advertising of alcoholic beverages altogether. Second, even if it could not ban such advertising altogether, it might well be able to do so in the broadcast medium.

[3] Indeed, as I discuss below, the interest in public health would support a total ban. Indeed, the Court has recognized that interests such as conservation (Central Hudson, cited infra and maintaining the independence of accountant, Edenfield v. Fane, cited infra) are sufficient to support a ban when appropriate showings were made.

[4] See SEC v. Wall Street Institute, 851 F.2d 365, 373 (D.C.Cir. 1988) ("[D]isclosure requirements have been upheld in regulation of commercial speech even when the government has not shown that 'absent the required disclosure, [the speech would be false or deceptive] or that the disclosure requirement serves some substantial government interest other than preventing deception.'"

[5] In Zauderer (White, J., Rehnquist, C.J., and Stevens, J., dissenting) have voted to uphold the requiring of corporations to help spread controversial messages they oppose even in a non-commercial speech context. Pacific Gas & Electric v. Public Utilities Commission, 475 U.S. 1 (1987). The plurality opinion authored by Powell, J., joined by Burger, C.J., Brennan and O'Connor, JJ., stated in that non-commercial-speech context that Zauderer could not be cited for the proposition that corporations can be required to carry messages contrary to their views. Id. at 15.

Even apart from the non-commercial context in which the plurality's statement was made, there are several reasons to believe that it was not intended to apply in a commercial speech of cases holding that persons could not be forced to support ideologies to which they were opposed on the ground that they were not commercial speech cases. The PG&E plurality, which included two justices who had joined the Zauderer opinion, relied on that line of cases. Having already decided that commercial speech cases were distinguishable from other forced speech cases in that the government can prescribe orthodoxy in the commercial sphere, it would be ungenerous to interpret the plurality to assert that Zauderer does not say what it clearly says.

Second, Justice O'Connor, for example, has consistently voted to uphold bans in commercial speech cases (see, eg., the Posadas case and the Peel case, discussed infra). It is hard to believe that Justice O'Connor would allow Congress to ban advertising for alcoholic beverages, but would strike down legislation that would permit advertising for alcoholic beverages only if certain warnings were given.

Significantly, Justice O'Connor is the only member of the majority in PG&E remaining on the Court today. Its continuing validity is open to question. See, Meese v. Keene, 481 U.S. 465 (1987) (approving controversial disclosure requirements in certain political movies).

First, Congress has the power to ban the advertising of alcoholic beverages altogether. To be sure, commercial speech is now afforded a measure of first amendment protection. On many occasions, however, the courts have made it clear that even nonmisleading commercial speech for a legal product can be outlawed if the government directly and materially advances a substantial state interest by means no more extensive than necessary to serve that interest (see eg., Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557 (1980)) or by means reasonably tailored to serve that interest. Edenfield v. Fane, 53 CCH S. Ct. Bull. B2110, B2117 (1993).[6]

The most important case for our purpose is Posadas De Puerto Rico Associates v. Tourism Co., 478 U.S. 328 (1986). In Posadas, a gambling casino in Puerto Rico objected to legislation that prohibited gambling casinos from advertising to Puerto Rican residents. The Court squarely held that Puerto Rico had a substantial interest in discouraging its residents from engaging in excessive casino gambling, that an advertising ban directly advanced that interest, that the ban was no broader than necessary, and that these considerations were substantial enough to overcome any first amendment concerns.

The Puerto Rican scheme was an odd patchwork. Puerto Rico permitted advertising of other forms of gambling to its residents including advertising for horse racing, cockfighting, and the lottery. The scheme also permitted the casinos to advertise to non-residents. Thus, casinos could advertise in the New York Times, but not in the San Juan Star. Nonetheless, despite the patchwork ad hoc character of the Puerto Rican program, and even without legislative findings, the Court exhibited substantial deference to the Puerto Rican legislative scheme and upheld it.

I submit that if the Court would accept Puerto Rico's determination to ban casino gambling advertising in the context of a patchwork scheme even without legislative findings,[7] the Court would accept a considered Congressional judgment to proceed with a disclosure bill even if it functioned as a de facto ban[8] on the broadcast advertising of alcoholic beverages. Indeed, the Posadas Court explicitly mentions alcoholic beverages in its opinion:

> "It would .... be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through adver-

[6] The statement of the test is variously phrased in various cases. On any statement of the commercial speech test, however, this legislation (or even a total ban) would meet the necessary requirements.

[7] Among other things the Puerto Rican legislature made no finding that the casino advertising in fact stimulated demand for the product. "The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one, and the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view. Id. at 341-2 (emphasis added). The Court also quoted from Central Hudson, supra, at 569: "There is an immediate connection between advertising and electricity. Central Hudson would not contest the advertising ban unless it believes that promotion increases its sales."

[8] Again, I am making this assumption for purposes of argument. I have seen no reason to credit it otherwise. In addition to assuming that beer advertisers would withdraw from the airwaves, I am also assuming that legislation resulting in advertiser withdrawal from the airwaves is a "ban" and not an industry cover for evasion of the antitrust laws or the occasion of a voluntary decision to redirect budgets. Alcoholic beverage advertising may stimulate enough demand to cause social problems, but not enough demand to justify the cost of the advertising.

> tising on behalf of those who would profit from such increased demand.[9] Legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, has varied from outright prohibition on the one hand .... to legalization of the product or activity with restrictions on stimulation of its demand on the other .... To rule out the latter, intermediate kind of response would require more than we find in the First Amendment." Id. at 346-7 (emphasis added)

Posadas thus makes it clear: A total ban on the advertising of alcoholic beverages would be constitutional.[10]

Advocates for the tobacco, alcoholic beverage, and advertising industries point to cases subsequent to Posadas and argue that they undermine its authority. But the cases they point to have nothing to do with the advertising of harmful products. In those cases the Court held that Illinois could not interfere with an attorney's right to state on his letterhead that he was certified by a nationally prominent body (Peel v. Attorney Registration and Disciplinary Comm'n, 496 U.S. 91 (1990); that Florida could not prevent a certified public accountant from soliciting new business clients without an invitation from them to do so (Edenfield v. Fane, 53 CCH S. Ct. Bull. B2110, B2117 (1993)); and that Cincinnati could not categorically ban commercial newsracks from its sidewalks in circumstances where the harm from non-commercial newsracks was equally great (City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1520 (1993)).

Nothing in these decisions bear on the advertising of alcoholic beverages or anything close to it.[11] To vote, for example, to uphold Peel's right to tell the truth about his certification is a far cry from interfering with reasonable efforts by a coordinate branch of government to discourage demand for a product that has a long history of tragic abuse with severe consequences for the nation's health and safety, not to mention its economy. Not only do these cases have nothing to do with the advertising of harmful products, these cases taken together reaffirm the principle that nonmisleading commercial speech for a legal product can be outlawed if the government directly and materially advances a substantial state interest by means reasonably tailored to serve that interest. Edenfield

[9] I personally do not accept this "greater includes the lesser" style of argument. In my view it sweeps in too much. But a ban on alcoholic beverage advertising would meet the more conventional test articulated and applied in Posadas. That is, it would directly advance a substantial public interest (public health) by means no broader than necessary to serve that interest.

[10] Advocates for the tobacco, alcoholic beverage, and advertising industries have struggled mightily to claim otherwise. Last year, for example, an advocate tried in a hearing before the subcommittee to pass Posadas off as a "narrow case, dealing with an improperly targeted audience. If alcohol advertising is directed at children, the Federal Trade Commission should do something about it. That is not protected speech. But Posadas dealt with improperly targeted speech. It, therefore, does not control the advisability of this statute."

The desperate and insulting suggestion that Puerto Rican residents are like children was no part of the Court's opinion. It was the product of the advocate's fertile imagination. The feeble character of the argument does go to show this: Every once in a while there comes a case which even distinguished advocates can not distinguish. Posadas is one such case.

The claim that there is no principle to Posadas is equally remarkable. The principle is that commercial speech can be banned if the appropriate constitutional showings are made. Whatever the merits of the showing made in Posadas, the findings in this bill are more than sufficient.

[11] Nor do these cases do anything to change the law regarding disclosure requirements.

v. Fane, 53 CCH S. Ct. Bull. B2110, B2117 (1993). Posadas is not questioned in these opinions. Indeed the fact situations are so far removed from Posadas that the case is not even mentioned.[12] It borders on the bizarre to suggest that Posadas has been overruled by any of these decisions.[13]

Instead the most important post-Posadas opinion is Justice Scalia's majority opinion in Board of Trustees v. Fox, 492 U.S. 469 (1989). A number of commentators had observed that Posadas had applied extremely lax standards in reviewing the Puerto Rican statute by comparison with cases like Central Hudson which had applied a least restrictive means test. In Fox, Justice Scalia's opinion for the Court confronts the differential treatment and rejects the least restrictive means test. In doing so, he cites the Posadas case with approval at some length:

> "[O]ur decisions upholding the regulation of commercial speech cannot be reconciled with the doctrine of least restrictive means. In Posadas, for example, where we sustained Puerto Rico's blanket ban on promotional advertising of casino gambling to Puerto Rican residents, we did not first satisfy ourselves that the governmental goal of deterring casino gambling could not adequately have been served (as the appellant contended) 'not by suppressing commercial speech that might encourage such gambling, but by promulgating additional speech designed to discourage it.' Rather, we said that it was 'up to the legislature to decide' that point so long as its judgment was reasonable." Id. at 479 (emphasis in original).

Despite the several prior decisions stating a view more protective of commercial speech, Justice Scalia concluded that all the holdings of the cases actually required was a reasonable fit between the legislature's ends and the means chosen to accomplish those ends:

> "What our decisions require is a '"fit" between the legislature's ends and the means chosen to accomplish those ends,' [citing Posadas, 478 U.S. at 341] — a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served' [citing In re R.M.J., 455 U.S. 191, 203 (1982)]; that employs not necessarily the least restrictive means, but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within these bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed." 492 U.S. at 480-81.

Justice Scalia's reaffirming Posadas is not surprising. Eight members of the current Court recognize the principle that nonmisleading commercial speech for legal product or services can be outlawed if the comparatively relaxed standards for commercial speech are satisfied.[14] No member of the

[12] For a case on the Court's docket that is closer to the mark, see note 15 infra.

[13] In addition, there may be an important difference between the informational speech evident in Peel, (information about certification by a nationally recognized body) Edenfield, (information about the character of an accountant's services) and Discovery Network (information about the availability of real estate properties and about adult educational, recreational, and social programs to individuals in Cincinnati) and the universe of beer commercials which seems to consist more of catchy tunes, inviting scenarios, and concocted joy than of informational text.

[14] Despite his own reservations about the application of the commercial speech standard to such a fact situation, the ninth member Blackmum, J., thinks "it highly unlikely that according truthful, noncoercive commercial speech the full protection of the first amendment will erode the level of that protection. I have predicted that 'the Court will never provide child pornography or cigarette advertising the level of protection customarily granted political speech.'" City of Cincinnati v. Discovery Network, Inc. 113 S.Ct. 1505, 1520 (1993) (Blackmum, J., concurring) (citations omitted).

Court including the dissenters in Posadas has ever stated that the advertising of harmful products like tobacco and alcoholic beverages enjoy a privileged immunity from Congressional prohibition. Posadas is currently the law. It has not been overruled. There is no good reason to believe it ever will.[15]

The Special Characteristics of Broadcasting

There is a final possibility. Even, in the unlikely event that Posadas were overruled, there would be a separate questions as to whether a ban on commercial speech might be upheld in the broadcast media wholly apart from the question of whether such a ban could be sustained in other contexts. The Court has applied a less speech protective test in considering speech prohibitions in the broadcast media. See FCC v. League of Women Voters, 104 S.Ct. 3106 (1984) (ban on editorializing by public broadcasters invalidated but subjected to a lower degree of scrutiny because "broadcast regulation involves unique considerations"); See also FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (upholding broadcast ban on indecent speech in part to protect youth while noting that the same material could be sold in record stores).

In this connection it is obviously important to mention that the Court has upheld the Congressional ban on cigarette advertising in the broadcast medium. Capital Broadcasting Co. v. Mitchell, 333 F.Supp. 582 (D.D.C. 1971), aff'd sub nom. Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972). Although some commentators have contended that Mitchell does not survive

[15] United States v. Edge Broadcasting, 20 Media L. Rptr. 1904 (1992) (unpublished), cert. granted, 113 S.Ct. 809 has been argued this term and is awaiting decision. At issue is an FCC regulation that has the effect of forbidding a North Carolina broadcast station from advertising the Virginia lottery in circumstances where (1) North Carolina's laws forbid gambling, but (2) the audience for the border station's broadcasts are estimated to be 92.2 percent from Virginia, and (3) Virginia stations are permitted under the regulation to advertise the lottery. The lower court struck down the regulation as applied to this unusual factual circumstance. It is conceivable that the Supreme Court will not revisit Posadas in this case (the residents in North Carolina who receive Edge broadcasting's signal are deluged with advertisements from Virginia stations, so it is argued that the regulation does not advance much).

If the justices revisit Posadas in Edge Broadcasting, it will be reaffirmed. Even supporters of the advertising industry have recognized that. See Colford, Justices' Questions Seem to Favor FCC Gambling Limit, ADVERTISING AGE 12 (April 26, 1993) (counting Rehnquist, C.J., and O'Connor, Scalia, Thomas, and White, JJ., as likely votes in favor of the ad ban in light of the oral argument).

Rehnquist, C.J., O'Connor, and White were part of the Posadas majority and are certain votes to reaffirm it if the issue is presented. Scalia, J., cited Posadas with approval in Fox. He is most unlikely to turn against that decision. Thomas, J., dissented in Discovery Network along with Rehnquist, C.J., and White, J. That vote shows he accords commercial speech an extremely low place in the hierarchy of first amendment values. Those are the five votes even Advertising Age counts in the Posadas corner.

In addition, Souter, J., voted with the majority in Discovery Network and Edenfield, but he is respectful of precedent and does not lightly overturn it. Moreover, those cases did not involve harmful products. Although Justice Kennedy voted to protect commercial speech in Peel, Discovery Network, and Edenfield, he joined Justice Scalia's opinion in Fox which cites Posadas with approval. Stevens, J., who dissented in Posadas, has explicitly left open how he would decide a case involving a ban of harmful products or services: "Whether a State may ban all advertising of an activity that it permits but could not prohibit — such as gambling, prostitution or the consumption of marijuana or liquor — is an elegant question of constitutional law. It is not, however, appropriate to address that question in this case because Puerto Rico's rather bizarre restraints on speech are so plainly forbidden by the First Amendment." 478 U.S. at 359.

That leaves Blackmum, J., who is prepared to afford more generous protection to truthful advertising than anyone on the Court. But again, even Justice Blackmum thinks "it highly unlikely that according truthful, noncoercive commercial speech the full protection of the first amendment will erode the level of that protection. I have predicted that 'the Court will never provide child pornography or cigarette advertising the level of protection customarily granted political speech.'" City of Cincinnati v. Discovery Network, Inc. 113 S.Ct. 1505, 1520 (1993) (Blackmum, J., concurring) (citations omitted).

If the issue is reached by the Court in Edge Broadcasting, the question is not whether Posadas will be reaffirmed, but by what margin.

the creation of the commercial speech doctrine in Virginia State Board of Pharmacy v. Virginia Citizens Council, 425 U.S. 748 (1976), the Virginia Pharmacy case itself stated that in protecting commercial speech it was dealing with a circumstance in which the "special problems" of the electronic medium were not presented. Id. at 773. See also, eg., Posadas, 478 U.S. at 344, citing Mitchell with approval.

My own view is that given the current structure of the broadcast medium, Congress rightly has greater power to add to the broadcast marketplace, but should have no greater power to ban speech in the broadcast medium than it does elsewhere. I do not believe, save special cases, that there are "special problems" or "unique considerations" justifying any greater ability to prohibit speech in the broadcast medium.

But that is my view, not the Court's. Given what the Court has already done in the broadcast area, a ban of alcoholic beverage advertising would seem to be on quite secure footing. Given the history of alcohol abuse in this country, for example, it would be exceedingly odd if government could protect children from the broadcast of indecent language, but not from the thousands of commercials encouraging them to believe that the consumption of alcohol is an integral part of the good and merry life.

Conclusion

The first amendment protects the dissenters, those who would challenge existing customs, habits, and institutions. It protects the citizen critic participating in a democracy. But commercial speech has always been a stepchild in the first amendment family. Indeed, for most of our history, speech hawking products has been afforded no first amendment protection; it has never received generous first amendment protection.

The existing case law plainly supports the constitutionality of S. 674.[16] Specifically, consistent with the first amendment:

- Congress has the power to require the Surgeon General's warnings to appear in commercial advertisements for alcoholic beverages;
- Congress has the power to ban commercial advertisements for alcoholic beverages in all media;
- Congress has special power to protect children from advertisements for alcoholic beverages in the broadcast media.

[16] I do not necessarily believe it would be upheld in all its applications. The question of whether the sanctions of the Federal Trade Commission Act could be constitutionally applied to the press that carries an advertisement for alcoholic beverages as opposed to or in addition to the advertiser is more complicated than the easy commercial speech issues that the bill primarily presents. Compare Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) with Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973). Even if the bill could not be constitutionally applied to the press in such a circumstance, the thrust of the bill would remain unscathed.