

# Know When to Say When: An Examination of the Tax Deduction for Alcohol Advertising that Targets Minorities

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## Introduction

Alcohol use and abuse is pervasive in minority<sup>1</sup> populations.<sup>2</sup> Some commentators describe alcohol as the new "liquid crack" that flows through the streets of the inner city neighborhoods.<sup>3</sup> The de-

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1. This article focuses on the effects of alcohol consumption and alcohol beverage targeting of African-American, Hispanic, and American Indian populations and excludes Asians. See Arthur W.K. Chan, *Racial Differences in Alcohol Sensitivity*, 21 ALCOHOL & ALCOHOLISM 93 (1986)(indicating that Asians consume less alcohol when compared to Caucasian populations (citing, *inter alia*, K. Singer, *Drinking Patterns and Alcoholism in the Chinese*, 67 BRIT. J. ADDICTIONS 3,14 (1972)). See also Ingrid Swenson et al., *Birth Weight, Apgar Scores, Labor and Delivery Complications and Prenatal Characteristics of Southeast Asian Adolescents and Older Mothers*, 21 ADOLESCENCE 711-22 (1986) (stating that the virtual absence of alcohol consumption among southeast Asians may account for healthier babies in this population); Jerald G. Bachman et al., *Racial/Ethnic Differences in Smoking, Drinking, and Illicit Drug Use Among American High School Seniors, 1976-1989*, 81 AM. J. PUB. HEALTH 372, 374 (1991)(stating that Asian American teenagers had significantly lower rates of alcohol consumption when compared to other ethnic groups). See also generally *infra* part I.

2. The OTA [Congress's Office of Technology Assessment] noted "significantly higher rates of alcohol and drug use [among Indian youth] relative to non-Indian adolescents." Daniel Inouye, *Indian Adolescent Mental Health*, NEWS FROM INDIAN COUNTRY, Aug. 15, 1991, at 25. See also James Alan Neff & Baqar A. Husaini, *Stress-Buffer Properties of Alcohol Consumption: The Role of Urbanicity and Religious Identification*, 26 J. HEALTH & SOC. BEHAV. 207, 219 (1985) (stating that "heavy drinking may be particularly common among urban blacks" (citing Lee N. Robins et al., *Drinking Behavior of Young Urban, Negro Men*, 29 Q. J. STUD. OF ALCOHOL 657-684 (1968)); Don Cahalan & Robin Room, *Problem Drinking Among American Men*, RUTGERS CENTER OF ALCOHOL STUDIES, (New Brunswick, N.J.) (1974); Lee N. Robins & Samuel B. Guze, *Drinking Practices and Problems in Urban Ghetto Populations*, (1971), in RECENT ADVANCES IN STUDIES OF ALCOHOLISM: AN INTERDISCIPLINARY SYMPOSIUM, (1978); Don Cahalan et al., *American Drinking Practices*, RUTGERS CENTER OF ALCOHOL STUDIES, (1969); FREDERICK D. HARPER, ALCOHOL ABUSE AND BLACK AMERICA, (1976)). See also generally *infra* part I.

3. Barnett Wright, *Special Report: 'Liquid Crack': Fortified Beer Pours into Black Community*, PHILADELPHIA TRIB., Apr. 30, 1993 at 1A (stating that "[m]any

struction that ensues from excess alcohol consumption hits hardest on the overall health of minority peoples. Per capita, the minority health risk complication rate resulting from alcohol use is higher than the same rate for whites.<sup>4</sup> For example, minority communities are disproportionately afflicted, as compared to the white community, with increased incidence of diseases such as Fetal Alcohol Syndrome,<sup>5</sup> alcoholism<sup>6</sup> and cirrhosis.<sup>7</sup>

Despite the adverse social and health effects of alcohol on minority communities, alcohol beverage companies have not failed to seize the opportunity to cultivate the higher minority consumption of potent alcohol beverages such as malt liquor beers.<sup>8</sup> In fact, the

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doctors feel [malt liquor] is replacing crack as the drug of choice in the Black Community").

4. Minority populations are plagued with a core set of diseases which are much less prevalent among white populations. See *infra* part I discussion. Alcohol is a risk factor for several of these diseases so that the increased consumption among minority people translates into greater alcohol related health problems for minorities as compared to the white population. See e.g., Michael R. Phillips & Thomas S. Inui, *The Interaction of Mental Illness, Criminal Behavior and Culture: Native Alaskan Mentally Ill Criminal Offenders*, 10 CULT. MED. & PSYCHIATRY 126 (1986) (stating that "[c]ompared to White Alaskans, Native Alaskans are . . . 6.9 times more likely to be treated in an alcohol treatment center"); Antonia C. Novello, *Crazy Horse Malt Liquor Beverage: The Public Outcry to Save the Image of a Native American Hero*, 38 S.D. L. REV. 14 (1993) (describing the serious health problems experienced by Native Americans due to alcohol misuse and abuse).

5. Fetal Alcohol Syndrome is "among the top three leading causes of birth defects and the only one that can be prevented." *Oneidas Intensify Efforts Against Fetal Alcohol Syndrome*, 6 NEWS FROM INDIAN COUNTRY, Feb. 15, 1992 at 24. "[T]he prevalence of fetal alcohol syndrome among Native American babies can range up to thirty times the national average, a sad commentary about how alcohol problems may literally begin with life, as well as lead to death." Novello, *supra* note 4, at 16 (citing *Fetal Alcohol Syndrome*, NATL. INST. ON ALCOHOL ABUSE AND ALCOHOLISM, ALCOHOL ALERT DOC. No. PH297, at 2 (July 1991)).

6. In 1988, the age-adjusted alcoholism death rate for American Indians and Alaska Natives was at its highest level since 1981. "It was 33.9 deaths per 100,000 population or 5.4 times the U.S. All Races Population rate of 6.3." US DEPT. OF HEALTH AND HUMAN SERVICES, PUBLIC HEALTH SERVICE, INDIAN HEALTH SERVICE, OFFICE OF PLANNING, EVALUATION, AND LEGISLATION, DIVISION OF PROGRAM STATISTICS, *TRENDS IN INDIAN HEALTH-1991*, at 49 (1991) [hereinafter *TRENDS IN INDIAN HEALTH*].

7. There are increased rates of cirrhosis and resulting mortality among non-white populations due to its association with alcoholism. Edgar P. Nace, M.D., *Epidemiology of Alcoholism and Prospects for Treatment*, 35 ANN. REV. MED. 293, 305 (1984)(citing H. Malin et al., *An Epidemiologic Perspective on Alcohol Use and Abuse in the United States*, NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM: ALCOHOL CONSUMPTION AND RELATED PROBLEMS (Alcohol and Health Monogr. No. 1) 99-153, DHHS Publ. No. (ADM) 82-1190, (1982), R.J. Vanmberg, *A Study of 50 Women Patients Hospitalized for Alcohol Addiction*, 4 DIS. NERV. SYST. 246-51 (1943), and E.L. Rogers et al., *Increasing Frequency of Esophageal Cancer Among Black Male Veterans*, 49 CANCER 610-17 (1982)).

8. Malt liquor is commonly sold in 40 ounce containers for between \$1.50 and \$2.80 with an alcohol content of 5.6 to 8 percent: "The Marin Institute for the Prevention of Alcohol and other Drug Problems in San Rafael, California found that 40

alcohol industry has purposely targeted this consumer group by producing beverages that promise a cheap high.<sup>9</sup> This market strategy is carried out in the face of minority opposition to alcohol producers who profit from minority disease.<sup>10</sup>

The federal government frustrates community efforts to reduce such targeting by permitting alcohol beverage companies to deduct advertising expenditures from their taxable income.<sup>11</sup> In effect, such alcohol beverage campaigns are subsidized by the government through this tax deduction.<sup>12</sup> This subsidization strengthens the health of the alcohol industry,<sup>13</sup> reducing their taxable income<sup>14</sup> and ultimately increasing profits made from the perpetuation of alcohol-related diseases in minority populations. Lack of governmental response to this situation effectively contributes to the poorer overall health of minorities in this country as the risks of

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ounces of one popular brand of beer that contains 8 percent alcohol — one of the most powerful — has more alcohol than a six-pack of standard beer, and roughly the same amount as five 5-ounce glasses of wine or five 1.5-ounce glasses of mixed drinks." Wright, *supra* note 3, at 1A. "[M]alt liquor does sell best in black and other ethnic markets." Ira Teinowitz, *Fighting the 'Power', Heileman's New Malt Liquor Draws Government's Ire*, 62 ADVERTISING AGE, Jun. 24, 1991, at 3, 61 [hereinafter Teinowitz, *Fighting the Power*]. See generally Ira Teinowitz & S.W. Colford, *Targeting Woes in PowerMaster Wake*, 62 ADVERTISING AGE, Jul. 8, 1991, at 35 [hereinafter Teinowitz & Colford, *Targeting Woes*] (noting G. Heileman's agreement to drop PowerMaster, a beer targeted at blacks on the basis of its alcohol content).

9. Frank Rose, *"If it Feels Good, it Must be Bad" Selling Sin to Blacks*, FORTUNE Oct. 21, 1991, at 21 [hereinafter Rose, *Selling Sin to Blacks*]. See *infra* discussion part I.

10. Jeffrey Zack, *Anheuser-Busch: Is the King of Beers a Tyrant?* 83 BUS. & SOC. REV. 34, 36 (1993) (stating that "[c]ommunity activists, pointing to the disproportionate level of alcoholism and alcohol-related health problems in inner cities, raise sobering questions about the availability and marketing of beer"). "In New York's Harlem neighborhood, on Chicago's South Side and in inner-city areas in Baltimore and Houston, community activist organizations have been complaining about what they see as an overabundance of outdoor ads for tobacco and alcohol products in low-income neighborhoods." Scott Hume, *Regulate Outdoor Ads: Poll, Most Want Local Control, but Balk at Defacing 'Offensive Boards'*, 61 ADVERTISING AGE, Aug. 13, 1990, at 20. There is also evidence of communities fighting back by defacing such advertisements. *Id.*

11. See *infra* notes 90-97 and accompanying text.

12. Expense deductions can be seen as subsidies. See e.g. *Regan v. Taxation*, 461 U.S. 540, 544 (1983) (stating that "[b]oth tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system"). The court again rejected the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the state." *Id.* (quoting *Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J. concurring)).

13. See Carlos Seiglie, *A Theory of the Politically Optimal Commodity Tax*, 28 ECONOMIC INQUIRY 586 (1990) (discussing how tax rates are influenced by the existing ownership structure of the liquor industry, consumption externalities associated with drinking, the earmarking of tax revenues and the enforcement of regulations).

14. EDGAR K. BROWNING & JAQUELENE M. BROWNING, *PUBLIC FINANCE AND THE PRICE SYSTEM* 330 (3d ed. 1987).

morbidity and mortality related to excess alcohol consumption increase.<sup>15</sup>

This article argues that states, under the Twenty-First Amendment, have the power to constitutionally impose an excise tax on alcohol beverage advertising expenditures. This solution works best to offset the subsidy created by the federal advertising deduction used to calculate taxable income.<sup>16</sup> An excise tax on alcohol advertising is less intrusive than an outright elimination of the advertising deduction as it would not distort the existing federal tax scheme.<sup>17</sup>

Part I of this article describes the overall disparate impact alcohol use has on the health of minority communities. The scope of disease and death caused by alcohol is surveyed, as well as the higher rates of use by this population. This section then exposes how the alcohol industry aggressively seeks to cultivate minority alcohol consumption through targeted advertising campaigns and sponsorships. Part I then highlights the efforts of community leaders to organize and fight against the powerful influence of the alcohol industry to free their neighborhoods of such advertisements. Finally, this section outlines how alcohol advertising expenditures avoid taxation via a federal deduction.

Part II highlights the limited First Amendment protection advertising has been afforded under the evolution of the Commercial Speech Doctrine. This section demonstrates the heightened state authority under the Twenty First Amendment to regulate and control commercial speech incident to alcohol promotion. This authority, coupled with limited commercial speech protection, provides the

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15. See *infra* part I.A. (describing specific diseases that occur at higher rates in minority populations and are exacerbated by increased levels of alcohol consumption. Collectively, alcohol and related diseases contribute to the overall inferior health of minority populations).

16. Targeting the federal tax deduction for alcohol advertising is not novel or new. See generally Mark A. Conrad, *Board of Trustees of the State University of New York v. Fox — The Dawn of a New Age of Commercial Speech Regulation of Tobacco and Alcohol*, 9 CARDOZO ARTS & ENTERTAINMENT L. J. 61, 104 (1990) (noting that Surgeon General Koop proposed, among other things, eliminating the tax deduction for advertising of alcohol (citing *Koop Urges Ad Restrictions, More Taxes to Cut Drinking*, N.Y. TIMES, June 1, 1990, at A20, col. 1)); Steven W. Colford, *Two Groups Rip Alcohol, Smoke Ads*, 61 ADVERTISING AGE 49, Nov. 26, 1990, at 22 [hereinafter Colford, *Two Groups Rip Alcohol*] (stating that the National Commission on Drug Free Schools, in response to a Congressional directive, issued a report calling for an outright ban of alcohol and tobacco advertising if it were found that the advertisements targeted minors). The AAA Foundation for Traffic Safety released a study that also recommended a prohibition of ads that target youth. *Id.*

17. See *infra* part III (illustrating why a removal or reduction of the tax deduction for advertising would create distortive effects to the tax scheme which could be avoided by an offsetting tax on alcohol advertisement expenditures).

foundation which imposes constitutionally valid restraints on alcohol advertising.

The analysis under Part III shows how the proposed state excise tax on alcohol advertising would offset the subsidy afforded by the federal tax deduction for such advertisements. This section displays a brief economic model to demonstrate how the proposed tax would work to correct the market by accounting for the cost to society-targeted alcohol advertising wages. Lastly, this part illustrates how the proposed tax passes constitutional muster under the First Amendment.

## Part I

### Overall Impact of Unleashed Alcohol Promotion Aimed at Minorities

#### A. *Alcohol Use has a Greater Negative Impact on Minorities*

Rates of alcohol consumption and alcoholism are generally higher in minority populations than they are in the white majority population.<sup>18</sup> The higher rates have most often been attributed to poverty, despair, lack of education, deprivation, and discrimination.<sup>19</sup> Limited research suggests that minorities may drink as part of an escape mechanism.<sup>20</sup> Regardless of the reasons that mo-

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18. "Native American youth on average report greater use of alcohol and other drugs than any other subgroup." Bachman et al., *supra* note 1, at 372. See Inouye, *supra* note 2 at 25 (noting higher rates of alcohol use among Native American youth).

19. There are no controlled studies that answer definitively why minorities consume more alcohol. Thorough discussion of these reasons is beyond the scope of this paper which focuses on proven health disparities attributed to alcohol consumption by minorities. See Hal Horne, *Native American Professionals Assemble to Treat Alcohol and Drug Dependency*, NEWS FROM INDIAN COUNTRY, Sept. 15, 1991, at 22 (quoting Michael Smith, Community Psychiatric Center Director and a mentor of the Navajo tribe, who stated that in order "[t]o cope with unemployment, lack of education, racial discrimination and cultural differences, many Indians have turned to alcohol and drugs"); *Policy-Makers Mark First Meeting of Panel to Examine Alaska Native Crisis*, 23 CHAR-KOOSTA NEWS, Mar. 13, 1992, at 7 ("An increasing number of Alaska Natives face grave risks and declining economic opportunity. In many native villages, the rates of health and social problems, including alcohol abuse, suicide, crime, and poverty are abnormally high, and are growing worse."). Varying values placed on alcohol in different communities may be one reason for disparate rates in use. See also Raul Caetano, *Ethnicity and Drinking in Northern California: A Comparison among Whites, Blacks and Hispanics*, 19 ALCOHOL & ALCOHOLISM 40, 39 (1984) [hereinafter *Ethnicity and Drinking*] (citing a survey of White, Hispanic and Black populations which indicated that Hispanics and Blacks have a more liberal view of alcohol consumption than Whites). This may be a contributing factor to higher rates of alcoholism in these groups.

20. Neff & Husaini, *Properties of Alcohol*, *supra* note 2 at 219 (stating that "problems related to drinking may be more prevalent among blacks than whites")

tivate the prevalence of their alcohol use, minorities have a unique vulnerability to alcohol-related diseases.

Alcohol consumption and alcoholism are leading causes of poor health, disease, and birth defects within minority populations.<sup>21</sup> Because minorities have more problems with alcohol,<sup>22</sup> they suffer

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(citing Lee N. Robins & Samuel Guze, *Drinking Practices and Problems in Urban Ghetto Populations*, in RECENT ADVANCES IN STUDIES OF ALCOHOLISM: AN INTERDISCIPLINARY SYMPOSIUM, (1968); Don Calahan & Robin Room, PROBLEM DRINKING AMONG AMERICAN MEN, New Brunswick, N.J.: Rutgers Center of Alcohol Studies (1974); Lee N. Robins, et al., *Drinking Behavior of Young Urban, Negro Men*, 29 Q. J. STUD. ALCOHOL 657-684 (1968)). "[A]mong drinkers, 'escape drinking' tends to be higher among U.S. non-whites than among any other socio-demographic group." Neff & Husaini, *supra* note 2, at 219 (citing Don Calahan, et al., AMERICAN DRINKING PRACTICES, (1969)). "Such findings are consistent with conceptual treatments of alcohol use among blacks as a mechanism to escape the stresses of poverty, discrimination, and deprivation." Neff & Husaini, *supra* note 2, at 219 (citing George L. Maddox & Jay R. Williams, *Drinking Behavior of Negro Collegians*, 29 Q. J. STUD. ALCOHOL 117-129 (1968); Franklin E. Frazier, BLACK BOURGEOISIE (1962); John R. Larkins, ALCOHOL AND THE NEGRO (1965); Frederick D. Harper, ALCOHOL ABUSE AND BLACK AMERICA (1976)); James Alan Neff & Sue Keir Happe, *Acculturation and Drinking Patterns among U.S. Anglos, Blacks, and Mexican Americans*, 27 ALCOHOL & ALCOHOLISM 293 (1992) (citing D. Calahan et al., *American Drinking Practices*, RUTGERS CENTER OF ALCOHOL STUDIES, (1969), (suggesting "relatively high rates of heavy and 'escape' drinking, and drinking problems among U.S. 'Non-whites' and 'Latin Americans'. . . .").

21. See, e.g., *Alcohol Damages Babies, Part 2*, 24 CHAR-KOOSTA NEWS, May 14, 1993, at 7 (explaining that Fetal Alcohol Syndrome (FAS) results when babies are exposed to alcohol at crucial developmental stages before birth. The irreversible effects may include inability to develop intellectually or emotionally beyond the age of seven to nine years old). See Novello, *supra* note 4, at 16 (stating that FAS prevalence among Native American babies is up to 30 times higher than the national average). See generally Novello, *supra* note 4 (describing the negative impact alcohol has on Native American health). See also *infra* notes 22, 23 and accompanying text (describing the poor health of minority populations resulting from alcohol).

22. See William C. Cockerman, *Patterns of Alcohol and Multiple Drug Use Among Rural White and American Indian Adolescents*, 12 INT. J. ADDICT. 274, 285 (1977) (stating that "rural Indian youth are somewhat more prone than rural White youth to be involved with alcohol, marijuana, and hard drugs." The article further states that "[t]here is a high arrest rate on the reservation of Indian adolescents for alcohol-related offenses." *Id.* (citing M.A. FORSLUND ET AL., DRUG USE, DELINQUENCY AND ALCOHOL USE AMONG INDIAN AND ANGLO YOUTH IN WYOMING (1974); Dan Blazer et al., *Alcohol Abuse and Dependence in the Rural South*, 44 ARCH. GEN. PSYCHIATRY 736 (1987) (noting that the odds of alcohol abuse and dependence amongst rural blacks are elevated). See generally Gerald J. Connors et al., *Racial Factors Influencing College Students' Ratings of Alcohol's Usefulness*, 21 DRUG ALCOHOL DEPEND 247, 250 (1988) (A survey of drinking habits across ethnic groups indicates that black female college students ascribe a greater utility to higher amounts of alcohol than either white females or black males.); Kenneth R. Olson et al., *Correlates of Alcohol Arrests in a Rural State*, 13 INT. J. ADDICT. 423 (1978) (reporting a study conducted in Wyoming of counties with larger Native American populations that reported higher arrest rates for public intoxication and liquor law violations). "Mortality measures undoubtedly do not measure the full spectrum of consequences of alcohol abuse. Marital disruption, spouse and child abuse, loss of employment, lowered self-esteem, disrupted education, and imprisonment must surely take a heavy toll on those reservation communities where alcoholism is high." Fred Beauvais &

greater morbidity and mortality related to alcohol than comparable white populations.<sup>23</sup> In 1988, for example, the American Indian age-adjusted mortality rate due to alcoholism was 438 percent greater than the same rate for U.S. all races population.<sup>24</sup>

Not only are the minority alcoholism rates higher, but the prognosis for recovery is worse in these populations,<sup>25</sup> thereby contributing to other alcohol-related diseases among minority communities. Fetal Alcohol Syndrome (FAS), a phenomenon causing preventable birth defects in mothers who drink alcohol during pregnancy,<sup>26</sup> occurs on Native American reservations at the rate of ap-

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Steve LaBoueff, *Drug and Alcohol Abuse Intervention in American Indian Communities*, 20 INT. J. ADDICT. 139, 149 (1985) (citing P.A. May, *Substance Abuse and American Indians: Prevalence and Susceptibility*, 17 INT. J. ADDICT. 1185-1209 (1982) and P.A. May & D.W. Broudy, *Health Problems of the Navajo Area and Suggested Interventions*, NAVAJO HEALTH AUTHORITY, 2d ed. (1980).

23. The average life expectancy at birth of the Native American population is 67 years for males and 75 years for females, as compared to 70 and 78 years for white males and females, respectively. *Trends in Indian Health-1991*, *supra* note 6, at 3-4. See also Rose, *Selling Sin to Blacks*, *supra* note 9, at 100 (stating that the average life expectancy for blacks was 69.2 years compared to 75.6 for whites in 1991 as reported by the U.S. Department of Health and Human Services). Additionally, "blacks also suffer higher instances of tobacco and alcohol-related illnesses than whites." *Id.* "Extensive mortality data are available and these results are unequivocal." Beauvais & Laboueff, *supra* note 22, at 148. (The age adjusted death rates for selected causes for Indians and U.S. populations per 100,000 are as follows: motor vehicle accidents: Indian 94.1 v. U.S. 21.5, other accidents: 76.4 v. 21.7, respectively, cirrhosis of the liver: 61.4 v. 13.3, respectively.) "[T]he following percentages of death are directly related to alcohol: motor vehicle, 50-65%; other accidents, 15-50%; cirrhosis of the liver, 85%." Beauvais & Laboueff, *supra* note 22, at 149.

24. TRENDS IN INDIAN HEALTH, *supra* note 6, at 3.

25. Native Americans suffer "poorer prognostic rates of alcoholism recovery." Philip John Flores, *Alcoholism Treatment and the Relationship of Native American Cultural Values to Recovery*, 20 INT. J. ADDICT. 1707 (1985). "In 1979 . . . [it was] reported [that the] Native American death rate from alcoholism [was] 59.8 per 100,000 for the period between 1974 and 1976 [and t]he comparable death rate in the general population for that period was 8.6 per 100,000." Roland J. Lamarine, *Alcohol Abuse Among Native Americans*, 13 J. COMMUNITY HEALTH 143 (1988) (citing *Alcohol and American Indians*, NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM, (1980)). Current studies may not properly reflect the true extent of impact of alcoholism on minority communities. See generally R.L. Hubbard, *Patterns of Alcohol and Drug Abuse in Drug Treatment Clients from Different Ethnic Backgrounds*, 472 ANN. N.Y. ACAD. SCI. 73 (1986) ("[o]ne-third of the clients in all ethnic groups could be classified as heavier drinkers . . . in the period immediately prior to treatment. [R]egardless of the pattern of development, similar proportions of the clients in all ethnic groups reported heavier drinking levels by the age 21-30. . . . Despite having similar levels of drinking, black and Hispanic ethnic groups did not appear to recognize alcohol as a problem or to report alcohol-related problems to the extent that whites did.").

26. *Oneidas Intensify Efforts against Fetal Alcohol Syndrome*, *supra* note 5, at 24. ("FAS. . . [includes] growth deficiencies, facial abnormalities, malformed organs and mental retardation.") See Damian McShane, *An Analysis of Mental Health Research with American Indian Youth*, J. ADOLESCENCE 87-116 (1988) (stating that "[c]urrently Fetal Alcohol Syndrome is believed to be the second most frequent birth defect in the U.S. and the number one cause of mental retardation").

proximately 1 in 750 births.<sup>27</sup> FAS is also more prevalent in African American births, with the overall rate of 0.48 per 1000 as compared to 0.29 per 1000 in whites.<sup>28</sup> These statistics indicate that despite its preventability, FAS is at epidemic levels in these two populations.

Another disease that plagues the minority community in phenomenal proportions, especially among Native Americans, is cirrhosis, a liver disease.<sup>29</sup> "The age adjusted death rates for . . . Native Americans caused by cirrhosis is 61.4 out of 100,000, compared to 13.3 in the overall U.S. population."<sup>30</sup> In fact, "[d]ata on cirrhosis mortality rates from 1975 to 1977 in seven urban areas showed a 44% higher cirrhosis mortality rate for nonwhites compared to whites."<sup>31</sup> It is well known that alcohol consumption contributes to the severity of cirrhosis and provides some explanation why higher rates of this disease are experienced by minority populations.<sup>32</sup>

Alcohol causes or is linked to a variety other diseases. A

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27. "The prevalence of FAS is estimated at 1 in 750 live births, [on] . . . reservations of the southwestern United States." Ann Pytkowicz Streissguth et al., *A MANUAL ON ADOLESCENTS AND ADULTS WITH FETAL ALCOHOL SYNDROME WITH SPECIAL REFERENCE TO AMERICAN INDIANS*, 4 (2d ed., 1988). See generally MICHAEL DORRIS, *THE BROKEN CORD: A FAMILY'S ONGOING STRUGGLE WITH FETAL ALCOHOL SYNDROME* (1989) (detailing one family's introduction to and understanding of FAS).

28. Ernest L. Abel & Robert J. Sokol, *A Revised Conservative Estimate of the Incidence of FAS and its Economic Impact*, *ALCOHOL CLIN. EXP. RES.* 514-24 (1991). See generally Cheryl J. Stephens, *Alcohol Consumption During Pregnancy Among Southern City Women*, 16 *DRUG ALCOHOL DEPENDENCY* 19-29 (1985) (Citing a survey of black women in a southern city which noted black women's increased and more frequent high maximum drinking during pregnancy. This population is thus at greater risk for adverse fetal outcomes related to alcohol consumption during pregnancy).

29. "As the fourth leading cause of death among Native Americans, cirrhosis accounts for almost six percent of all deaths, while the comparable figure for the general population is 1.7%." Lamarine, *supra* note 25, at 144 (citing *Alcohol and American Indians*, NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM, (1980)).

Cirrhosis is the seventh leading cause of death in the United States, and it has been estimated that cirrhosis is associated with alcoholism in 90-95% of cases. . . . From 1949 to 1973 cirrhosis mortality increased fourfold among nonwhite males. Whites, both male and female, and black females also showed a rise during this period but it was not as sharp. Since 1973, blacks and whites have begun to show a decline [in cirrhosis mortality rates], but mortality for black males remains disproportionately high, especially in urban areas. Data on cirrhosis mortality rates from 1975 to 1977 in seven urban areas showed a 44% higher cirrhosis mortality rate for nonwhites compared to whites. For the younger age range (25-34 years), nonwhites die from cirrhosis of the liver 10 times more frequently than whites.

Nace, *supra* note 7, at 304.

30. Beauvais & LaBoueff, *supra* note 22, at 149.

31. Nace, *supra* note 7, at 304.

32. JEAN D. WILSON, M.D., et al., *HARRISON'S PRINCIPLES OF INTERNAL MEDICINE*, 1340 (12th ed., 1991)[hereinafter *INTERNAL MEDICINE*].

greater proportion of minority people than whites suffer from conditions such as oral pharyngeal and esophageal cancers, acute and chronic pancreatitis, cardiovascular disease, diabetes, and hypertension,<sup>33</sup> all of which are either directly related to, or exacerbated by, excess alcohol consumption.<sup>34</sup>

Alcohol affects the health of minorities beyond mere physical diseases. Minority death and injury due to alcohol-related accidents exceed levels experienced by white people.<sup>35</sup> For example, among Navajos, "[t]rauma from assaults is the leading cause of monocular blindness [and] [m]ost [assaults] are associated with alcohol ingestion."<sup>36</sup> Urban Blacks and Native Americans are at a higher risk of homicide involving the incidence of alcohol than any other population.<sup>37</sup> Finally, suicide, also alcohol-related, is the sec-

33. *Id.* at 1102, 1247, 1248, 1374, 1378, 1002, 1740, & 1002.

34. Elisa T. Lee et al., *The Strong Heart Study. A Study of Cardiovascular Disease in American Indians: Design and Methods*, 132 AM. J. EPIDEMIOLOGY 1141-55 (1990)(Stating that cardiovascular disease is the leading cause of death in American Indians. Although there is limited evidence as to the correlation of alcohol and this disease, it is suggested that alcohol consumption is a risk factor); Richard N. Winickoff & Paul K. Murphy, *The Persistent Problem of Poor Blood Pressure Control*, 147 ARCHIOLOGY OF INTERNAL MEDICINE 1393, 1394 (1987)(stating that "[a] further contributor to the control of BP [blood pressure] and compliance is the use of alcohol"); Nace, *supra* note 7, at 305 ("[A]n increase in frequency of esophageal cancer has been noted between 1975 and 1979 in a black veteran population. Heavy alcohol use and urbanization were the two risk factors differentiating this sample of black males with esophageal cancer from the controls.").

35. "Unintentional injuries are the leading cause of death for American Indian men younger than forty-five, and the second leading cause of death overall." Novello, *supra* note 4, at 15 (citing SECRETARY OF HEALTH, TASK FORCE ON BLACK AND MINORITY HEALTH 132 (1985). "An estimated seventy-five percent of these injuries are alcohol-related." *Id.* at 15-16 (citing *Health Promotion and Disease Prevention, Disease / Health Promotion*, in THE FACTS 234 (1987)). See e.g., Lamarine, *supra* note 25, at 144 ("One of the leading causes of death among Native Americans is accidents. An estimated 75% of all accidental deaths within this population are alcohol related" (citing E.R. Rhoades et al., *The Indian Burden of Illness and Future Health Interventions*, 102 PUBLIC POLICY REPORTS 361-68 (1987)); Louis W. Sullivan, *Health Commentary: Healthier Lives: The Big Payoff*, 83 THE NEW PITTSBURGH COURIER, Dec. 23, 1992, at A-9 (stating, as former U.S. Department of Health and Human Services Secretary, that blacks suffer disproportionately more alcohol-related deaths and that black health, overall, is lower than that of whites); Beauvais & LaBoueff, *supra* note 22, at 149 (citing additional mortality statistics related to motor vehicle and other accidents).

36. R. Friederich, *Eye Disease in the Navajo Indians*, 14 ANN. OPHTHALMOLOGY 38 (1982).

37. Phillips & Inui, *supra* note 4, at 126 ("Compared to White Alaskans, Native Alaskans are . . . 3.1 times more likely to die by homicide [and are] 10.5 times more likely to die of alcoholism. . . . Alcohol is . . . a factor in the homicide rate, which is at least sixty percent higher than for the general population.). See Kenneth Tardiff et al., *A Study of Homicides in Manhattan*, 1981, 76 AM. J. PUB. HEALTH 139 (1986)(stating that black and Latino men are at a higher risk of being victims of homicide, and that such risks for men are the result of disputes in 37.6 % of the cases and that "homicide is currently the leading cause of death for Black men and women ages 25-34 years . . . and that the role of alcohol and firearms appear to be impor-

ond leading cause of death for Native American and Alaskan youth.<sup>38</sup>

These data paint a grim picture of minority health because of the sickness and death brought on by alcohol consumption. Acknowledgement of the disparate impact of alcohol on minority communities highlights the need to eliminate subsidizing alcohol beverage advertising that targets minorities. In effect, the alcohol industry, by encouraging minority consumption, is profiting from the disease, morbidity and mortality of people of color.

### *B. Alcohol Advertisers Purposefully Target Minority Populations*

There is strong evidence that alcohol beverage companies purposely target minority groups with their advertising.<sup>39</sup> Although Blacks drink less per capita than the national norm, the Black population constitutes up to 50 percent of U.S. sales for some premium liquor brands.<sup>40</sup> Thus, such liquor companies have a strong financial incentive to target minority populations.<sup>41</sup> The ethical implica-

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tant."); Novello, *supra* note 4, at 16 (stating that alcohol is factor in the homicide rate, which is 60% higher for Native Americans than the general population (citing SECRETARY OF HEALTH, TASK FORCE ON BLACK AND MINORITY HEALTH 132 (1985))).

38. The OTA (Congress's Office of Technology Assessment) found that: "Suicide is the second leading cause of death for American Indian and Alaska Native adolescents. In fact, the rates among 10 to 14 year olds is about four times higher than of all races." Inouye, *supra* note 2, at 25. See Phillips & Inui, *supra* note 4, at 126 (stating that "[c]ompared to White Alaskans, Native Alaskans are . . . 1.9 times more likely to die by suicide"); Lamarine, *supra* note 25, at 144 (stating that "[t]he suicide death rate of 2.9% [for Native Americans] is more than double the national average. It is estimated that 80% of these deaths are alcohol related" (citing *Alcohol and American Indians*, NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM, (1980))). "[S]uicide occurs at an overall rate that is twenty-eight percent higher than the national rate, and in some Indian Nations it is ten times higher." Novello, *supra* note 4, at 16.

39. See generally Kendall Wilson, *She Fights Malt Liquor Ads with Education Ads*, PHILADELPHIA TRIB., Oct. 9, 1992, at 2b.

The targeted [billboard] advertising sparked protests from community leaders in Philadelphia and other urban centers, who claimed that Black neighborhoods were already overwhelmed with the consequences of substance abuse and addiction. Black health advocates pointed out that alcohol and cigarettes served little purpose other than increasing the chances for lung cancer and heart disease, two of the leading causes of death among African-Americans.

*Id.* OLCC *Should Be Praised*, PORTLAND SKANNER, Nov. 13, 1991, at 4 (describing a poster targeted at youth that was later criticized as creating "racial and class discrimination").

40. "Studies show that Blacks, who make up 12.1 percent of the U.S. population, drink less per capita than the national norm. But among some premium liquor brands, Blacks account for up to 50 percent of U.S. sales. Consequently, the industry is paying more attention to Black consumers, devoting an increasing share of its \$1.2 billion annual advertising budget to reach them." Wright, *supra* note 3, at 1A.

41. "Some [advertisers] . . . began to test the market with beer and cigarette

tions of such detrimental targeting does not seem to deter the alcohol companies.

The most pervasive methods of targeting include large billboard campaigns in areas heavily populated with minorities.<sup>42</sup> "a 1987 survey conducted by the city of St. Louis found twice as many billboards in black neighborhoods as white. Almost 60 percent of the billboards in the black neighborhoods advertised cigarettes and alcoholic beverages."<sup>43</sup>

Advertisements often show minorities drinking alcohol in situations that exaggerate symbols of status. For example, the PowerMaster campaign tried to target African Americans by appealing to racist stereotypes of African American male virility and dominance.<sup>44</sup> There is also evidence of such targeting in a sexist,

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[advertisements] targeted directly to Blacks." Wilson, *supra* note 39, at 2b. See generally, Kathryn A. Kelly, *The Target Marketing of Alcohol and Tobacco Billboards to Minority Communities*, 5 U. FLA. J. L. & PUB. POL'Y 33 (1992) (stating "alcohol . . . products are more heavily advertised in minority communities than elsewhere" (citing EDWARD T. McMAHON & PATRICIA TAYLOR, CENTER FOR SCIENCE IN THE PUBLIC INTEREST, CITIZEN'S ACTION HANDBOOK ON ALCOHOL AND TOBACCO BILLBOARD ADVERTISING (1990))).

42. "The size and number of billboards in minority communities create a most intrusive form of advertising." Kelly, *supra* note 41, at 34. See *About Those Alcohol Billboards*, 101 BALTIMORE AFRO-AMERICAN, May 15, 1993, at 4A ("For too long our community has allowed itself to be victimized by the plethora of billboards suggesting the 'good life' achievable when one imbibes one alcoholic product or another. While we often wondered about the inordinate number of these billboards in our neighborhoods we are clearly outraged if . . . it is true that we have the greatest concentration of such billboards than any other community in the entire state"); Wright, *supra* note 3, at 1A (noting that "[f]or example, of 73 billboards along a 19 block stretch of Ridge Avenue from Broad Street to 33rd [black neighborhood in Philadelphia], 60 advertise cigarettes or alcohol"); Elaine M. Johnson, *Business And Society Review Symposium: Distilling the Truth About Alcohol Ads; Harmful Targeting*, 83 BUS. & SOC. REV. 16 (1992)[hereinafter Johnson, *Harmful Targeting*](("According to a 1989 survey by the Abell Foundation, 70 percent of the 2,015 billboards documented in the city of Baltimore advertised alcohol or tobacco products. Three-fourths of the billboards were in predominately African-American, usually poor, neighborhoods. In some ways, billboards are more intrusive than magazine or newspaper advertisements because exposure to them is difficult to escape.").

43. *Business And Society Review Symposium: Distilling the Truth About Alcohol Ads; Killer Billboards*, 83 BUS. & SOC. REV. 14 (1992)[hereinafter *Killer Billboards*]. ("As the most visible form of alcohol and tobacco advertising, billboards are unique in their ability to reinforce drinking and smoking as social norms."). See generally Kelly, *supra* note 41, at 59-60 and n.215-217 (citing Diana Hackbarth, et al., Chicago Lung Association, *Booze and Butts Billboards in Fifty Chicago Neighborhoods: Market Segmentation to Promote Dangerous Products to the Poor* (1991)).

44. In 1991 G. Heileman Brewing Company planned to market a new malt liquor called 'PowerMaster'. Kelly, *supra* note 41, at 57-58 (citing *Priests Call for Boycott of G. Heileman Products*, UPI, June 21, 1991, (LEXIS, Nexis Library, UPI File)). "[T]he ads for PowerMaster showed a Black model next to a bottle of beer larger than his head." Kelly, *supra* note 41, at 58 (citing *Two Chicago Ministers Arrested at Brewery*, UPI, June 26, 1991, (LEXIS, Nexis Library, UPI File)). "[M]alt liquor are

controversial poster depicting the famous African American rap singer Ice Cube with a malt liquor in his hand singing, "[w]hy don't ya grab a six-pack and get your girl in the mood quicker . . . with St. Ides malt liquor," alluding to the power of men to seduce women through the use of alcohol.<sup>45</sup>

In addition, alcohol beverage companies capitalize on the high consumption of malt liquor by minority people.<sup>46</sup> Malt liquors intensify the intoxicating effects of alcohol<sup>47</sup> at a lower cost.<sup>48</sup> Malt liquor can cost as little as \$1.50 for a forty ounce bottle, containing the equivalent amount of alcohol as a six-pack of standard beer.<sup>49</sup> Examples include the malt liquors PowerMaster,<sup>50</sup> a remake of Colt

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rife with macho power claims." Rose, *Selling Sin to Blacks*, *supra* note 9, at 100. "We can ill afford to allow our children to continue to be inundated with images and messages that one's manhood or sexual prowess is found in a can or bottle of an alcohol product." Reverend Jesse W. Brown, *Business And Society Review Symposium: Distilling the Truth About Alcohol Ads; Marketing Exploitation*, *Bus. & Soc. Rev.* 17 (1993)[hereinafter Brown, *Marketing Exploitation*].

45. *OLCC Should be Pleased*, *supra* note 39, at 2. See also Raul Caetano et al., *Black Drinking Practices in Northern California*, 10 *AM. J. DRUG ALCOHOL ABUSE*, 571-87 (1984)[hereinafter Caetano, *Black Drinking Practices*](suggesting that "drinking patterns among Blacks are influenced more by internal norms originated from common cultural and socio-political characteristics than from norms associated with class affiliations in the larger society"). It will be argued in this article that the alcohol beverage companies purposely target blacks with advertisements that attempt to appeal to the status created by the internal culture of blacks rather than to simply use generic ads that appeal to the general population. See also Wayne Brown, *Blacks, Malt Brew Makers At Odds Over The Sale Of Liquor*, 109 *PHILADELPHIA TRIB.*, Jun. 9, 1992, at 1A (Reporting that "[r]ecently, rapper Chuck D. Public Enemy sued the parent company of St. Ides Malt Liquor, McKensie River of San Francisco, for \$5 million for the unauthorized use of his voice in a St. Ides commercial. Chuck D. has long been critical of the malt liquor industry and has termed the sale of the drink 'Black exploitation.'").

46. See generally Wright, *supra* note 3, at 1A (stating that "[m]any doctors feel [malt liquor] is replacing crack as the drug of choice in the Black community").

47. People often believe that they are less at risk by choosing malt liquor over hard liquor, however, both are equal contributors to liver disease and pancreatitis. Wright, *supra* note 3, at 1A. See also Fara Warner, *Feds Censure Pabst for Olde English Ads (Forbids Olde English 800 Malt Liquor to Make Claims about Its Strength)*, 32 *ADWEEK'S MARKETING WK.*, Nov. 4, 1991, at 5 (describing activists who maintain that the G. Heileman Company targets minorities with their PowerMaster malt liquor); Rose, *Selling Sin to Blacks*, *supra* note 9, at 100 (stating that malt alcohol liquors have an alcohol content well above the 3.7 percent alcohol content of the average beer and that such ads are "aimed squarely at inner-city dwellers seeking a cheap high").

48. Wright, *supra* note 3, at 1A.

49. *Id.*

50. The label for PowerMaster, a product of G. Heileman Brewing Company, was originally approved by the BATF (Bureau of Alcohol, Tobacco, & Firearms) under the Federal Alcohol Administration Act, but approval was later withdrawn after Reverend Michael Pfleger and Calvin Butts argued that the product was targeted at minorities. Warner, *supra* note 47, at 5. The name was prohibited because it violated the Federal requirement that no words such as power or strength may be used in alcohol ads. 27 U.S.C. § 205(e)(2), (f)(2). Yet the BATF failed to enforce the same law

45,<sup>51</sup> Olde English 800,<sup>52</sup> and Schlitz,<sup>53</sup> all which are primarily advertised in areas with large minority populations.<sup>54</sup>

Alcohol advertisers also concentrate their efforts to appeal to Native American communities by promoting products such as the Hornell produced Crazy Horse Malt Liquor,<sup>55</sup> which combines alcoholic potency<sup>56</sup> and stereotypes of the historical Native American to attract Indian interest.<sup>57</sup> Such imagery, because it runs counter to much of the teaching within the Native American community, is

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against Pabst for three years, when it advertised the product Olde English 800 with the slogan "It's the power." Warner, *supra* note 47, at 5. The BATF delayed enforcement out of concern for the financial implications if Pabst were forced to end prematurely long-term contracts for billboard advertising. Warner, *supra* note 47, at 5.

51. In June 1991, the G. Heileman Brewing Company announced its marketing plan to launch its new product, Colt 45 PowerMaster, a remake of Colt 45 which has an alcohol content of 5.9 percent, compared to Colt 45 at 4.5 percent. Teinowitz, *Fighting the Power*, *supra* note 8, at 3. The planned campaign included themes such as "Bold, not harsh," and print material depicted a "bold" horse image surrounded by lightning. Teinowitz, *Fighting the Power*, *supra* note 8, at 61. Shortly after campaign plans were announced, the U.S. Bureau of Tobacco and Firearms removed approval for the label because it advertised the alcohol strength. Teinowitz, *Fighting the Power*, *supra* note 8, at 3. Mr. Jack Killorin, BATF spokesman indicated that the "questions about targeting black consumers are 'not our concern'". *Id.* at 61.

52. The alcohol content of Olde English 800, a Pabst Brewing Company product, is 4.5 percent. Teinowitz, *Fighting the Power*, *supra* note 8, at 61. *See also* Warner, *supra* note 47, at 5 (stating that in 1991, the BATF warned that the use of the line "It's the power" violated the Federal Alcohol Administration Act). Despite the warnings, Pabst continued to post the signs in inner-city neighborhoods. Warner, *supra* note 47, at 5. Ultimately, the slogan was given a deadline for discontinuance of December 31, 1991. Warner, *supra* note 47, at 5.

53. This is a malt liquor product produced by the Stroh's Brewery. Rose, *Selling Sin to Blacks*, *supra* note 9, at 100.

54. Wright, *supra* note 3, at 1A.

55. "G. Heileman Brewing Co. brews the malt liquor . . . for Hornell." Novello, *supra* note 4, at 14 (quoting *Crazy Horse Liquor Called Insulting*, SIOUX FALLS ARGUS LEADER, Apr. 23, 1992, at C1).

56. *See supra* note 8 (describing the heightened alcohol content of malt liquor at a lower price).

57. Hornell Brewing Company, makers of Crazy Horse Malt Liquor, targets Native Americans through its marketing since the label refers to a famous and legendary leader of the Oglala Sioux. Novello, *supra* note 4, at 44. Former Surgeon General Antonia Novello "citing the twin tragedies of alcohol abuse and the stigmatizing stereotype that had linked alcohol use to Native American culture and religion, a link that would only help to perpetuate alcoholism in an already beleaguered community," asked the producers to stop. Novello, *supra* note 4, at 14. "Dr. Carol Lujan of Arizona State University has recently noted in the *Journal of the American Medical Association* that stereotypes actually help to perpetuate alcohol problems within Native American communities." Novello, *supra* note 4, at 16 (citing C.C. Lujan, *Alcohol Related Death of American Indians*, 267 JAMA 1384 (Mar. 11, 1992)). "[G]eneralized drinking patterns based on studies of border towns re-enforce negative stereotypes and can have the unintended impact of promoting excessive drinking among Indians." Novello, *supra* note 4, at 16-17 (quoting from C.C. Lujan, *Alcohol Related Death of American Indians*, 267 J. AM. MED. ASS'N. 1384 (Mar. 11, 1992)).

particularly disturbing.<sup>58</sup> In response to the Crazy Horse label, Former Surgeon General Antonia Novello stated that it is "a harmful cultural advertising technique, guaranteed to *degrade* the health status of Native Americans."<sup>59</sup> Despite community outcry and the Surgeon General's pleas, Hornell successfully challenged, on First Amendment grounds,<sup>60</sup> a congressional regulation specifically proscribing the Crazy Horse label.<sup>61</sup> The culturally biased label continues, therefore, to perpetuate the already enormous disparate impact caused by alcohol within the Native American community.<sup>62</sup>

In addition to African American and Native American targeting, alcohol companies have also focused their attention on Latino Americans through Spanish language slogans and culturally specific ad campaigns.<sup>63</sup> The fact that Latino immigrants are the fastest growing demographic group in the United States has not gone unnoticed by alcohol beverage companies that specifically target the youth of this population.<sup>64</sup>

The alcohol beverage industry also exploits minority communities by masking their campaigns for alcohol with efforts that claim to support these communities.<sup>65</sup> Alcohol companies fre-

58. "The marketing scheme for 'Crazy Horse' is also gravely misleading, because substance abuse counselors in the Native American community often use the teachings of Crazy Horse to fight dependence on alcohol and other drugs . . . . Novello, *supra* note 4, at 18. Novello further noted that such labeling indicates "insensitivity to Native American Culture and a profound disregard for the health problems facing Native Americans." Novello, *supra* note 4, at 18 (quoting from C.C. Lujan, *Alcohol Related Death of American Indians*, 267 J. AM. MED. ASS'N. 1384 (Mar. 11, 1992)).

59. Novello, *supra* note 4, at 21. See generally *Confronting the Impact of Alcohol Labeling and Marketing on Native American Health and Culture*, HEARING BEFORE SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, HOUSE OF REPRESENTATIVES, 102nd Congress, 2d Sess. (1992) (documenting presentations by community leaders regarding the impact of alcohol on the community and the harmful effects caused by the Crazyhorse campaign to the Native American Community).

60. Hornell Brewing Company, Inc. v. Brady, 819 F. Supp. 1227 (E.D. N. Y., 1993) (invalidating ban of label under the third and fourth prongs of *Central Hudson* test, that a substantial government interest was not sufficiently advanced by the measure and that the government had not established a narrowly tailored means.) See *infra* part II (discussing the application of this test to state imposed alcohol advertising restrictions).

61. "[T]he Bureau of Alcohol, Tobacco, and Firearms (ATF) shall deny any application for a certificate of label approval, including a certificate of label approval already issued, which authorizes the use of the name Crazy Horse on any distilled spirit, wine, or malt beverage product . . . ." Pub. L. 102-393, § 633 (Oct. 6, 1992).

62. See *supra* notes 18-38 and accompanying text (describing the disparate health impact alcohol has on Native Americans).

63. *Business And Society Review Symposium: Distilling the Truth About Alcohol Ads: Targeting Latinos*, 83 BUS. & SOC. REV. 13 (1992). "Other targeting mechanisms include event sponsorship and contributions to community causes." *Id.*

64. *Id.*

65. In exchange for sponsorship of the Gathering of Nations Pow-Wow, Coors

quently offer monetary donations to support holidays,<sup>66</sup> celebrations,<sup>67</sup> events,<sup>68</sup> or programs<sup>69</sup> that allegedly promote the community. The alcohol producers are motivated, in part, by an interest in the promotion of goodwill within a very profitable segment of their market.<sup>70</sup> The amount spent by Miller Brewing "each year

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required that "Coors banners had to be visible at four locations, an announcer had to plug Coors over the public address system about every two hours, dancers had to wear numbers bearing the Coors logo." Samuel Leah, *MBAC Hopes to End Alcoholism & Drunk Driving*, 13 THE CIRCLE, Mar. 1992, at 23 [hereinafter Leah, *MBAC Hopes*]. Additionally, "a Coors representative [had to be included] in [the] awards ceremony." *Id.* Coors also requested to be included on the insurance policy and wanted free tickets. *Id.* The whole concept of alcohol sponsorship is contrary to the Pow-Wow that requires that all dancers be sober. *Id.* See also Hilary Abramson, *Gathering of Nations Changes Sponsorship*, 14 MICH. CITIZEN, Jun. 16, 1992, at A6; William Dejong & Laurence Wallack, *The Role of Designated Driver Programs in the Prevention of Alcohol-Impaired Driving: A Critical Reassessment*, 19 HEALTH EDUCATION Q. 429-442 (1992) (highlighting how impaired-driving campaigns detract attention from other social and health problems resulting from alcohol consumption. The authors also note the alcohol industry's participation in such campaigns to detract from their activities, especially when the industry suspects that restrictions on alcohol may be adopted).

66. Hispanos Unidos, a California group, ended the sponsorship of Anheuser-Busch of the holiday Cinco de Mayo in 1991 because the organizers felt that they "couldn't afford to continue to be a front for the beer industry." Abramson, *supra* note 65, at 23. See generally *On Kwansaa and Good Taste*, 111 RICHMOND AFRO-AMERICAN, Dec. 5, 1992, at A4 (This article describes the exploitation of an African American holiday by a Beefeater Gin campaign advertising the "Art of Good Taste" and claims that "[g]in has historically been one of the most popular substances to use as libation . . . . We can only guess as to the reason why, but gin's dual properties of potency and pungency are likely major contributing factors." The authors conclude that "Beefeaters is attempting to hoodwink us with patronizing gestures while their sole intent is to siphon greenbacks from our wallets and purses.").

67. Four years ago the Gathering of Nations Powwow was sponsored by Coors, which was replaced by Borden. Abramson, *supra* note 65, at 23.

68. The National Indian Finals Rodeo eliminated its Coors sponsorship three years ago when Coors demanded that the name be changed to the Coors Indian Rodeo. Abramson, *supra* note 65, at 23.

69. "Mount Everest Wholesale [beer distributor] is recruiting minorities for positions from shareholder to salesman, and will donate \$1 million per year in profits to job training, substance abuse and child development programs. . . . Ninety-five percent of Chicago's \$100 million annual malt liquor sales come from black customers, and the distributor finds the arrangement mutually beneficial." Kelly, *supra* note 41 at 58-59 n. 212 (citing Rick Bryant, *Malt Liquor Debate Brewing*, SOUTHTOWN ECON., June 24, 1992, at A3).

70. Cynthia Moore, Regional Manager for Corporate Affairs for Anheuser-Busch Company stated that "Anheuser-Busch is committed to giving back to the people who are keeping them in business . . . . It feels great to be able to support a number of viable and worthwhile activities of the African-American community." Wayne Brown, *Blacks Find Gold in Corporate Support*, PHILA. TRIB., Aug. 18, 1992, at A1 [hereinafter Brown, *Blacks Find Gold*]. Toni Foster, formerly with Coors, says that "[i]t was no coincidence that the alcohol industry was one of the first industries to make the correlation between the Black consumer market and reinvestment. . . . It . . . just makes good business sense to do so." *Id.* Foster estimated that Coors distributed more than \$2 million in grants and sponsorships of African-American organizations during her work with them. *Id.* See also William Garth, *Miller Brewing*

to promote its Thurgood Marshall Scholarship Fund [is] \$300,000 [whereas the] [a]mount it spends . . . to endow the scholarship [is a mere] \$150,000."<sup>71</sup> These media and attention-seeking ploys are designed to dissuade recipients of these benefits from organizing against the pervasive advertising of alcohol in their neighborhoods.<sup>72</sup>

*Minority Communities Fight Back Against Alcohol Advertisers*

"Not since the opium wars of China, can you point to such a massively extensive drugging of a designated portion of the populous. Liquor has played a key role in the shift of land and subsequently power in the United States."<sup>73</sup>

Minority communities recognize the damage done to their people as a result of alcohol<sup>74</sup> and are struggling to halt the negative

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*Company Receives Recognition Award*, CHI. CITIZEN, Nov. 25, 1991, at 5. In 1991 Miller Brewing Company received a recognition award from a non-profit organization of senior level black executives. The award was granted in recognition of black hiring and promoting and supporting African-American education. *Id.* Leonard J. Goldstein, the President and CEO of Miller, in accepting the award, said that:

At Miller we believe that a diverse work force and a sensitivity to cultural diversity are . . . essentials for growth. Multi-cultural diversity enables us to compete and achieve our goals . . . and it is by taking advantage of the opportunities presented by multi-cultural diversity, that we will succeed in increasing the involvement of all ethnic groups on the economy and making our country stronger.

*Id.*

71. *Harper's Index*, HARPER'S, Jan. 1994, at 13.

72. Deborah Fair, President of the Michigan Black Alcoholism Council, sums up this dilemma by stating that "[i]f I'm accepting \$1 million a year from the alcohol industry, . . . I'm not going to feel free to speak against them as clearly." Leah, *MBAC Hopes*, *supra* note 65, at A6; *see also* Abramson, *supra* note 65, at 23 (stating that the decisions of community leaders to end alcohol beverage sponsorships are deliberate despite "losing members, forfeiting annual scholarship awards, and accepting debt and an uncertain future"). *See generally* Matthew Grimm, *Bud, Coors Mull 'Media' Strategy to Blunt Critics*, ADWEEK'S MARKETING WK., Nov. 11, 1991, at 5 (A 1991 strategy by beer and liquor advertisers threatened to pull their collective budget of \$750 million for advertising if legislation further restricting advertising was passed. A representative of the television and broadcast industry stated that this gives them no choice other than to lobby against the bill that restricts alcohol advertising.).

73. Asadullah Samad, *Weaning a Community from a Drunken Stupor*, BIG RED NEWS, Sept. 25, 1992, at 10 (narrating a thoughtful essay of the destruction on the community by the alcohol industry and efforts by the community to address the problem).

74. In 1991, church leaders called on G. Heileman Brewing Co. to drop its marketing of PowerMaster (prior to the Bureau of Alcohol, Tobacco and Firearms (ATF), ban of the label). Laura Bird, *An Uptown Remake Called PowerMaster (Heileman's High Alcohol Malt Liquor Targeting Inner-City Consumers)*, ADWEEK'S MARKETING WK., Jul. 1, 1991, at 7. The leaders threatened to boycott Heileman products, and whitewash the advertisers' billboards. *Id.* *See* Frank Rose, *If it Feels Good, it Must Be Bad*, FORTUNE, Oct. 21, 1991, at 91 [hereinafter Rose, *If It Feels Good*] (describing

impact alcohol has on their communities.<sup>75</sup> There are many community programs, especially aimed at Indian youth and families, designed to respond to the devastation wrought by alcohol consumption.<sup>76</sup> Nationwide, minority communities have organized programs to battle not only alcoholism but also the alcohol beverage companies that exacerbate the problem by encouraging and promoting minority consumption.<sup>77</sup>

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a protest led by Reverend Calvin Butts in which protesters whitewashed inner-city billboards advertising alcohol and while doing so chanted, "Drugs kill! . . . Alcohol and tobacco! All drugs!"). Former Surgeon General Antonia Novello also recognized the damage:

[A]ll Americans concerned about improving the health of all of our people must speak out against marketing schemes that target minority communities. . . . We must tell the alcohol industry and their highly paid marketers that we have had enough disease, enough disability, enough addiction, and enough death. We must not let a proud Indian Nation be brought to its knees by alcoholism and other health problems.

Novello, *supra* note 4, at 21 (citing from Novello's presentation, *Suggested Remarks for Antonia C. Novello, M.D., Surgeon General of the Public Health Service*, CRAZY HORSE PRESS CONFERENCE, Apr. 22, 1992, at 4).

75. A few examples of community programs to battle alcoholism and related problems include Blacks Against Drunk Driving (BADD) and National Black Alcoholism Council. Leah, *MBAC Hopes*, *supra* note 65, at A-6; see also *East Oakland Fighting Back Wins Grant to Fight Substance Abuse*, 48 SUN REPORTER, Jan. 5, 1992, at 4 (describing the East Oakland Fighting Back organization that has a "community based campaign against the proliferation of targeted advertising of cigarettes and alcohol"); *Pouissant to Keynote Health Conference*, 18 PORTLAND SKANNER, Apr. 7, 1993, at 1 (stating that the Fourth Annual Minority Health Conference, held in 1993, sponsored a workshop entitled, "The Impact of Crack Cocaine and Alcohol Abuse on the Family and Community"); Nathaniel K. Wilkes, *SAI Working to Make Cleveland Drug, Alcohol Free*, 78 CALL AND POST (Cleveland), Jan. 7, 1993, at 4A (describing the Substance Abuse Initiative (SAI) of Cleveland which focuses on bringing greater awareness to drug and alcohol abuse in the community).

76. For example, the Flathead Reservation has organized the "Reservation-wide Collaborative Prevention Effort" group to focus on issues such as tribal alcohol abuse. Maggie Plummer, *Reservation-wide Prevention Effort Gearing up with Monthly Meetings*, 22 CHAR-KOOSTA NEWS, Nov. 29, 1991, at 4. See generally *Tribal Drug, Alcohol Program Builds Self-Esteem in Youth*, 16 CHEROKEE ADVOCATE, Apr. 39, 1992, at 12 (describing program approaches to respond to alcoholism and drug problems in Native American youth); *Sobriety Leaders Honored*, 23 CHAR-KOOSTA NEWS, Jul. 3, 1992, at 6 (describing local gathering to send message of sobriety and recognizing community efforts in encouraging alcohol-free lifestyles).

Although alcoholism is less prevalent in Hispanic communities, Hispanic leaders are also acting to fight the problems of targeting by alcoholic-beverage companies and the lasting effects of alcohol consumption in the larger Hispanic community. See Elaine Johnson, *Reaching Hispanics with Messages to Prevent Alcohol and Other Drug Abuse*, 104 PUBLIC HEALTH REPORTS 588-594 (1989)[hereinafter Johnson, *Reaching Hispanics*]; Raul Caetano, *Responding to alcohol-related problems among Hispanics*, 15 CONTEMPORARY DRUG PROBLEMS 363 (1988)[hereinafter Caetano, *Responding to Alcohol*].

77. See Rose, *If It Feels Good*, *supra* note 74, at 100 (describing how Reverend Calvin Butts, the former black militant who now leads Harlem's Abyssinian Baptist Church, has called for a ban on billboard advertising of alcohol and cigarettes); Warner, *supra* note 47, at 5 (describing how the BATF responded to the actions of

Minority leaders have organized groups such as the Coalition Against Billboard Advertising of Alcohol and Tobacco, which specifically focuses on alcohol and tobacco advertisements that appear disproportionately in inner-city neighborhoods.<sup>78</sup> Churches have staged protests of billboard ads<sup>79</sup> and boycotts of the offending companies' liquors.<sup>80</sup> Many community newspapers indicate the impact of such advertising on the communities and the negative reaction in the communities to such exploitation.<sup>81</sup> Alcohol companies have been under attack for targeting youth, and many minority leaders fear that such targeting has a doubly negative impact on minority youth<sup>82</sup> who hold the future of minority communities.<sup>83</sup>

Minority community activism against alcohol advertising that targets minority areas shows that any proposed policy against targeted alcohol advertising is not simply a form of governmental paternalism or special protection of "helpless" minorities.<sup>84</sup> Rather,

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minority community leaders who demanded that the PowerMaster label be outlawed); *Greens and A.I.M. Unite Boycott Heileman Brewing Co.*, 13 THE CIRCLE, Jul. 1992, at 7 (reporting boycott by Native American organizations in response to use of Crazy Horse label on malt liquor to promote Native American sales).

78. Samuel Leah, *Anti-tobacco Groups protest at Exhibit*, 13 MICH. CITIZEN, Nov. 23, 1991, at 5 [hereinafter Leah, *Anti-Tobacco Groups*].

79. Reverend Calvin Butts of Harlem has led a campaign to whitewash billboards advertising alcohol. Laurie Peterson, *From the Streets to Our Living Rooms*, 32 ADWEEK'S MARKETING WK., Aug. 26, 1991, at 9.

80. See Bird, *supra* note 74, at 7.

81. See generally Melanie Haiken, *Liquor Ads Targeted at Indians Dismay Some Tribal Leaders*, WASHINGTON POST, Sep. 22, 1992, Sec. WH at 11.

82. Former Surgeon General Antonia Novella accused beer ads of "mislead[ing] and target[ing]" . . . youth. Grimm, *supra* note 72, at 43; see also *Billboard Control Coalition Launches Citizens' Campaign*, 84 NEW PITTSBURGH COURIER, Jan. 27, 1993, at A-1 (stating that African American groups organized to join the group Philadelphiers against billboards which advocates bans on tobacco and alcohol ads near, amongst other places, schools).

83. Claudia Skenandore, Chair of the Oneida Sobriety Task Force, states: "Native traditions hold children as sacred, as our most precious gift of hope for the future. How can we survive if we overlook Fetal Alcohol Syndrome and its debilitating effect on our community for decades to come?" *Oneidas Intensify Efforts against Fetal Alcohol Syndrome*, *supra* note 5, at 24.

84. Although this article does not argue for special protection, it does demand that special attention be accorded to minority individuals who are members of a suspect class under the Constitution. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). This classification was created in recognition that race is "discrete and insular," and that such membership in a racial minority group often translates into an overall inability to organize and have one's interests protected through the democratic process. *Id.* See generally Daniel H. Lowenstein, "Too Much Puff": *Persuasion, Paternalism, and Commercial Speech*, 56 U. CINN. L. REV. 1205, 1208 (1988) (discussing the issue of paternalism).

[R]egulations [the Court] has struck down are not actually paternalistic in their major thrust, but rather are designed to withhold information from the consumer for the purpose of benefiting some other person or group or the public generally. When the regulation is genuinely paternalistic — that is, when its purpose seems genuinely to be to protect

a policy to eliminate such targeting would *aid* communities that are doing their best to protect themselves from the harm alcohol causes their neighborhoods and families.

Currently minority activism is undermined by the federal taxation policy that caters to the strong alcohol and advertising lobbies at the expense of community well-being.<sup>85</sup> It is clear that the alcohol industry does not respond to governmental or community pleas to halt advertisements aimed at minority populations.<sup>86</sup> This overt disregard<sup>87</sup> illustrates an unchecked industry.<sup>88</sup> This is especially

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the consumer from whom the advertising is being withheld — the Court is more likely to uphold it.

*Id.* at 1208.

85. See, e.g., Steven W. Colford, *Healthcare Plan May Imperil Ad Deduction*, ADVERTISING AGE, Apr. 19, 1993, at 2 [hereinafter Colford, *Health-Care Plan*] (describing the involvement of the Advertising Tax Coalition, consisting of 10 advertiser and media trade organizations); Dan Coughlin, *Tobacco Money Lights Up Congress*, 83 BUS. & SOC'Y REV. 19 (1992) stating:

In Harlem, alcohol and tobacco related illness is the leading cause of death. . . . Part of the reason is easy to see. In Harlem, the virtues of alcohol and tobacco are trumpeted from every corner. . . . Less visible are the hefty campaign contributions made to black Congress members by the alcohol and tobacco lobbies. . . . The tobacco and alcohol industries cast a wide net of political influence, but nowhere has it had a more devastating effect than in the black community.

See generally Patricia A. Morgan, *Power, Politics and Public Health: The Political Power of the Alcohol Beverage Industry*, J. PUB. HEALTH POL'Y, 177 (1988) (explaining how the alcohol beverage industry organizes to promote a favorable image of alcohol and alcohol problems).

86. Cf. Gary Levin, *Alcohol Group Pushes Responsibility*, ADVERTISING AGE, May 27, 1991, at 34. The alcohol industry, in 1991, founded the Century Council which set out guidelines called the Code of Responsible Marketing & Advertising Practices for the industry that members pledged to honor. Such members include wineries, distilleries, and brewers. The Code prohibits glamorizing alcohol use and targeting of minors. Targeting of minority groups is not addressed. *Id.* See also Alison Fahey, *Outdoor Spending Slips in '90*, ADVERTISING AGE, Apr. 1, 1991, at 6 (stating that the Outdoor Advertising Association of America in 1990 instituted a policy that encouraged members to declare certain areas as off limits for alcohol and tobacco related ads, but did not include areas of high minority populations); Teinowitz, *Fighting the Power*, *supra* note 8, at 67 (calling for the industry's voluntary elimination of advertising that appeals to blacks).

87. See Warner, *supra* note 47, at 5 (Alcohol beverage companies ignore repeated requests to stop using words such as "strong" in advertisements. For example, in 1989, Pabst ignored such requests from BATF in reference to its promotion of Olde English 800.). See also *Crazy Horse Brewer May Go to Court*, NEWS FROM INDIAN COUNTRY, Oct. 15, 1992, at 3 (stating that the makers of Crazy Horse Malt Liquor, Hornell Brewing Company, ignored pleas by Native American community leaders of the Oglala Sioux to change its label or withdraw its product. In fact, Hornell suggested that the tribe compensate them for any financial loss that would ensue if they agreed to change the product's name.).

88. As the devastating effects of alcohol on the African-American community become clearer, it becomes equally clear that there are no real checks and balances on the behavior of alcohol corporations. It is also clear that the alcohol industry doesn't hold itself accountable to any real standard of behavior that contributes to increasing the quality of life of all Americans, especially African-Americans.

true in light of the huge benefit that the government provides by way of the tax deduction which works only to frustrate community efforts and strengthen the already forceful strangle-hold of alcohol producers.<sup>89</sup>

#### D. Tax Deduction for Advertising Serves as a Subsidy

The Internal Revenue Code provides a tax deduction for business expenditures, including those monies spent on advertising and goodwill.<sup>90</sup> The U.S. tax scheme is based on taxes levied against taxable income.<sup>91</sup> To arrive at the net income figure, the Tax Code provides for a number of business expenditure deductions, one of which is advertising.<sup>92</sup> When calculating actual annual income, taxed entities are permitted to reduce their annual income figure by

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Brown, *Marketing Exploitation*, *supra* note 44, at 17.

89. It is unrealistic to expect that the alcohol industry will modify its successful advertising campaigns without an incentive to do so. There is a strong alcohol beverage lobby which is well organized and has a significant amount of support and funding. The Broadcasters Association and American Advertising Federation work together to strengthen this lobby. See Grimm, *supra* note 72, at 5. For example, in 1991 Surgeon General Antonia Novella put pressure on beer and alcohol companies to stop targeting youth in their advertisements and threatened to rally support for the Sensible Advertising and Family Education Act that would require health warnings for all alcohol beverage ads. Beer marketers Anheuser-Busch and Adolph Coors planned to shift the burden to the media by threatening to pull their entire ad schedule if the bill was passed); Grimm, *supra* note 72, at 5. See also Gary S. Becker, *Higher 'Sin' Taxes: A Low Blow to the Poor*, BUS. WK., Jun. 5, 1989, at 23 (describing the strength and influence of the alcohol lobby in this country). See generally Bob Cohn & Mary Hager, *The Power of Sin: How the Liquor and Beer Lobbies Vied to Limit the Tax Hit on Their Industries*, NEWSWEEK, Oct. 4, 1993, at 51 (describing the strength and influence of the alcohol lobby).

90. IRS §§ 1622.14, 1624.355 (Advertising; Expenses), 26 C.F.R. § 1.62-1(a)(1993) ("business expenses deductible from gross income include . . . advertising"). IRC § 197. Only since 1993 is goodwill depreciable as a separate business asset. IRS § 197. See generally Craig W. Friedrich, *Recent Developments*, J. CORP. TAX'N, Autumn 1993, at 301-05 (Reports a revenue ruling which confirms that advertising, in general, remains deductible. The ruling was issued after *Indopco, Inc. v. Commissioner*, 112 S.Ct. 1039 (1992) was decided, which put the status of the tax deduction for advertising into question.); Murray Alter, *Tax Briefs: Advertising Costs Deductible?*, 18 SMALL BUS. REP., Feb. 1993, at 66-67 (reporting that the Revenue Ruling 92-80 continues to allow brand advertising to fall under the tax deductible category of business expense despite the fact that it confers a long-term benefit to the advertiser); Steven W. Colford, *Clinton Attempts to Calm Ad Industry*, ADVERTISING AGE, May 3, 1993, at 1, 52 [hereinafter Colford, *Clinton Attempts*] (Reporting that on April 14, 1993, the Ad Tax Coalition sent a letter to President Clinton regarding the deductibility of advertising to which he responded that this area was not a priority for new revenue sources. There was no guarantee made, although, as to the status of the deductibility. This could suggest that the President would consider elimination of the deductibility for reasons other than revenue generation, such as to reduce the targeting of minority communities by alcohol producers.).

91. BROWNING & BROWNING, *supra* note 14, at 323.

92. See *supra* note 90.

expenditures for advertising.<sup>93</sup> This deduction then serves as a benefit to companies that advertise, as it provides an incentive to allocate their monies to this category of deductible expenditures.<sup>94</sup>

The benefit enjoyed by companies serves as sort of an advertising subsidy.<sup>95</sup> It is a subsidy because the reduced taxable income for alcohol advertisers generates less taxable revenue. The negative implication is that the government is giving up its opportunity to collect this revenue, which is no different than the government paying money to encourage the harmful behavior.<sup>96</sup> By legitimizing this allocation of resources, the government is effectively under-

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93. The remaining taxable income then falls within a particular bracket that corresponds to an applicable tax rate. BROWNING & BROWNING, *supra* note 14, at 330; IRC § 11.

94. See Seigle, *supra* note 13, at 587. "[O]ver the past fifteen years an economic approach to political behavior has emerged which emphasizes the role the political market serves in redistributing wealth." *Id.* at 586. This may explain why the government leaves intact the tax deduction for advertising since politically, corporations are assumed to have strength in influence. "[T]axation is important for two reasons. First, it provides the legislature with the revenues needed for public spending and thereby gaining support from the beneficiaries of these expenditures. Second, the level and incidence of taxes alters the support forthcoming from the affected groups." *Id.* at 587.

95. In *Regan v. Taxation With Representation*, a case involving the limitation of lobbying expense deductibility, then Justice Rehnquist following *Cammarano v. United States*, 358 U.S. 498 (1959) (upholding a treasury regulation that denied deductibility for lobbying activities), stated that "Congress is not required by the First Amendment to subsidize lobbying." 461 U.S. 540, 546 (1983). Rehnquist stated that "[b]oth tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system." *Id.* at 544.

96. See generally *Sixty Eight Ways to Cut the Budget*, WALL ST. J., Jan. 17, 1994, at A8 (Stating, under the caption of "Miscellaneous Industry Tax Subsidies", that "[E]nd[ing] firms' right to fully expense advertising costs" would save 17.5 billion dollars over 5 years). See Colford, *Healthcare Plan*, *supra* note 85, at 2 (quoting U.S. Rep. Tom Foglietta, a member of President Clinton's Healthcare Task Force, who stated that "[i]t defies common sense for the federal government to give a tax deduction for advertising products that are known health hazards.").

Tax expenditures are a major example of . . . Government allocat[ion] [of] resources. In recognition of this, the Congressional Budget Act of 1974 requires that the budget 'shall set forth the levels of tax expenditures . . . . The act defines tax expenditures as those revenue losses attributable to provisions of the Federal income tax laws which allow a special exclusion, exemption or deduction from income . . . . Tax expenditures are instruments of public policy and, to varying degrees, can be viewed as alternatives to other types of fiscal activity . . . Most tax expenditures . . . encourage certain economic activities.

MICHAEL J. GRAETZ, *FEDERAL INCOME TAXATION* 40 (1988). Cf. Steven W. Colford, *New Ad Tax Bill Zeros in on Tobacco Biz*, ADVERTISING AGE, Mar. 2, 1993, at 1, 51 [hereinafter Colford, *New Tax Ad Bill*] (Noting industry challenge to bills proposing elimination of alcohol advertising tax deduction to affect behavior through the Federal tax code. Senator Bradley, a sponsor of one of the bills, defends its validity by stating that "[t]his bill would not prohibit anyone from saying what they want. But there is no constitutional right to receive a federal subsidy, and that is what a business deduction is.").

writing such activities by foregoing otherwise taxable revenue.<sup>97</sup>

Several scholars and politicians alike have suggested curbing the deductibility of alcohol advertising as a possible means to raise revenue against the national deficit and finance the national health care plan.<sup>98</sup> However, the use of the Federal Tax Code to affect advertising behavior is challenged by industry supporters on First Amendment grounds. The American Civil Liberties Union and the Washington Legal Foundation warned at a news conference that bills that propose elimination of tax deduction for alcohol or tobacco advertising pose an unconstitutional abridgement of commercial speech.<sup>99</sup>

## Part II

### Alcohol Advertising and Limited First Amendment Protection

#### A. *Evolution of Commercial Speech Doctrine*

Historically, the Constitution was not interpreted to protect commercial speech.<sup>100</sup> It was not until 1976 that the Supreme

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97. The government may, but need not, subsidize speech. See Theodore C. Hirt, *Why the Government is Not Required to Subsidize Abortion Counseling and Referral*, 101 HARV. L. REV., 1895, 1900 (1988) (arguing the validity of the Adolescent Family Life Act, which banned abortion counseling by federally supported clinics on the grounds that the "government cannot be compelled to subsidize conduct inconsistent with [preferred social] policy" and that abortion was against public policy. Title X, Public Health Service Act, § 1008). The Supreme Court later upheld the Act stating that abortion speech was beyond its scope since the purpose of the Act was pregnancy prevention. *Rust v. Sullivan*, 500 U.S. 173 (1991). Thereafter, *Rust v. Sullivan* was overruled by an Executive Order. See also Remarks on Signing Memorandums on Medical Research and Reproductive Health and on Exchange with Reporters, 3 WEEKLY COMP. PRES. DOC. 85-87 (Jan. 22, 1993); Memorandum on Title X "Gag Rule," 3 WEEKLY COMP. PRES. DOC. 87-88 (Jan. 22, 1993). The federal government may therefore elect whether to subsidize speech depending on whether it is found to be contrary to public policy. See *supra* part I (framing alcohol advertising that targets minorities as contrary to public policy).

98. Colford, *Healthcare Plan*, *supra* note 85, at 2 (indicating that tobacco and alcohol advertising may be targeted to help finance White House health plan proposal); see also Steven W. Colford, *Congress Likely to Examine Deductible Ad Issue*, ADVERTISING AGE, Feb. 1, 1993, at 3, 8 [hereinafter Colford, *Deductible Ad Issue*] (Indicating that advertising has been targeted since the 1986 federal tax reform-fight as a potential source for billions of currently un-taxed dollars. Senator Harkin was expected to reintroduce legislation that proposed limiting tobacco advertising deductibility to 50 percent, which indicates acceptability of targeting certain industries to generate revenue.).

99. Colford, *New Ad Tax Bill*, *supra* note 96, at 1.

100. *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (upholding a municipal prohibition of dissemination of handbills advertising a submarine tour). See *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955) (standing for the contention that challenges to regulations of commercial speech attract only a rational basis test analysis). Cf. *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992) (detailing the standard to be applied for strict scrutiny review of restrictions that burden free speech).

Court, in *Virginia Pharmacy Bd. v. Virginia Consumer Council*,<sup>101</sup> extended protection to speech that it described as proposing a commercial transaction.<sup>102</sup> This case radically changed the traditional limitation of the First Amendment that had previously provided protection only to expression of a political nature or for public debate.<sup>103</sup> The Court, in effect, expanded protection to include commercial speech for the purpose of freedom of flow of information,<sup>104</sup> but it did not indicate the parameters for such protection until 1980, when it decided *Central Hudson Gas v. Public Service Commission*.<sup>105</sup>

In *Central Hudson*, the Court introduced a four-prong test to determine the constitutionality of restrictions on commercial speech.<sup>106</sup> First, in adopting the bare minimum requirement for First Amendment protection established by *Virginia Pharmacy*,

101. 425 U.S. 748 (1976)(striking ban on price advertising for prescription drugs).

102. *Id.* at 760-61. The court defined commercial speech as that which proposes a commercial transaction. *Id.* at 762.

103. *Virginia Pharmacy* held that business advertising that does no more than solicit a commercial transaction may no longer be regulated on same terms as any other aspect of the marketplace. 425 U.S. at 759. In his dissent, Justice Rehnquist expressed his fear of the "real dangers that general advertising for . . . drugs might create." *Id.* at 788-789. See Jeffrey A. Berman, *Constitutional Realism; Legislative Bans on Tobacco Advertisements and the First Amendment*, 1986 U. ILL. L. REV. 1193, 1221 (1986) expounding on Rehnquist's dissent:

The *Virginia Pharmacy* opinion is inexplicable under traditional first amendment principles. Ordinary business advertising does not advance the goal of individual self-fulfillment through free expression. Furthermore, commercial speech, by definition, contributes nothing to political decision making in a representative democracy . . . [N]o justification exists for protecting constitutionally irrelevant speech in order to preserve speech that is constitutionally protected. Thus, the *Virginia Pharmacy* opinion is incorrect under traditional first amendment values.

See generally Conrad, *supra* note 16, at 69 (The article discusses criticism on the constitutionalization of commercial speech, some critics argue that "applying first amendment principles to commercial speech is irrelevant to any political decision making, but rather serves as a vehicle to permit greater economic benefits for merchants, advertisers and consumers.") (citing Thomas H. Jackson & John C. Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV., 125 (1976)). "This sort of Re-Lochnerization" contradicts the 'settled idea that the Constitution tolerates extensive regulation of the economy' " Jackson & Jeffries at 32.

104. The Court rejected the central premise of the commercial speech doctrine of that time by holding that a state may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon its disseminators and its recipients. *Virginia Pharmacy*, 425 U.S. at 758. The Court noted that although there was protection under the Constitution for commercial speech, it was not protected to the same degree as other speech. *Id.* at 771.

105. 447 U.S. at 566 (striking a state ban on ads that encouraged use of electricity). Rehnquist dissented stating his dissatisfaction with the majority curbing the state's power to regulate business. *Id.* at 589.

106. *Central Hudson*, 447 U.S. at 566-570.

*Central Hudson* requires that the expression not be misleading or deceptive and the underlying product that is advertised or referred to must be legal.<sup>107</sup> Second, only regulations that serve to promote a substantial government interest will be upheld.<sup>108</sup> Third, the *Central Hudson* test requires that the regulation in question directly advance the asserted government goal.<sup>109</sup> Fourth, the regulation must be narrowly tailored so that it is "not more extensive than necessary to serve the interest asserted."<sup>110</sup>

In 1986, in another landmark case, *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*,<sup>111</sup> the Supreme Court claimed to apply the *Central Hudson* test in upholding a prohibition on gambling advertising that targeted local residents.<sup>112</sup> Instead of actually applying the third and fourth prong criteria of *Central Hudson*, the Court deferred to the legislature's determination that the ban was the least restrictive measure to directly advance a gov-

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107. *Central Hudson*, 447 U.S. at 563-64 (adopting *Virginia Pharmacy* requirement that First Amendment protection requires the commercial speech to relate to a lawful product and that the expression be truthful and not misleading). The advertisements promoting legal electricity use were accepted as not misleading. *Id.* at 566. Note that all advertisements arguably fail this prong to a certain degree. Advertisers may hypothetically rebut this by asserting that advertisements simply state opinions, not fact, and so therefore cannot be found to be false or misleading. See generally Sylvia A. Law, *Addiction, Autonomy, and Advertising*, 77 IOWA L. REV. 909 (1992) (stating that implicit claims that smoking, drinking, driving a particular car, or using a particular shampoo will make an individual rich or sexy clearly cannot be defended as 'true' in any verifiable or rational sense). But Cf. Bird, *supra* note 74, at 7 (indicating that the targeting of minorities by campaigns such as the one for Powermaster were referred to by former Surgeon General Antonia Novella as "deceitful acts on populations at risk").

108. *Central Hudson*, 447 U.S. at 564. The governmental interest in conservation of energy was held substantial. *Id.* at 568-569.

109. "There is an immediate connection between advertising and demand for electricity. *Central Hudson* would not contest the advertising ban unless it believed that promotion would increase its sales." *Id.* at 564, 569.

110. The Court found that the advertising restriction failed this prong because the defendant did not demonstrate that no less restrictive measure would achieve the substantial government interest. *Id.* at 565, 570-571. Justice Rehnquist, in his dissent, expressed dissatisfaction that the scrutiny applied to commercial speech raised it to the level of scrutiny applied to pure speech. *Id.* at 591 (Rehnquist, J., dissenting).

The four-part test, as defined and applied in *Central Hudson*, illustrates a level of scrutiny that is not as strict as that applied to pure, non-commercial expression. *Id.* at 566. The level of scrutiny is, however, greater than a rational basis test, so that it reflects an intermediate level scrutiny. *Id.* at 573 (Blackmun, J., concurring). Cf. *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992) (detailing the standard to be applied for strict scrutiny review of restrictions that burden free speech).

111. 478 U.S. 328, 344 (1986).

112. *Id.* Rehnquist, writing for the Court, recognized the proffered governmental interest in reducing demand for gambling among residents as substantial. *Id.* at 341. Cf. Conrad, *supra* note 16, at 67 (discussing the Rehnquist dissent in *Virginia Pharmacy* advocating state power to more heavily regulate commercial speech by lowering the level of scrutiny applied to such regulations).

ernmental goal by virtue of the ban's enactment.<sup>113</sup> Effectively, once the *Posadas* Court determined that the Puerto Rican government had a substantial interest in discouraging local residents from gambling,<sup>114</sup> it concluded that the method chosen by the legislature was not to be disturbed by the Court.<sup>115</sup> The alleged application of *Central Hudson* amounted to a rational basis test due to its ultimate deference to the legislature.<sup>116</sup> The result of the *Posadas* decision was to return to the low level of protection afforded to commercial speech prior to *Virginia Pharmacy*,<sup>117</sup> which paves the way for restrictions on alcohol advertising.<sup>118</sup>

The Court in *Posadas* also held that the power to ban the underlying product necessarily includes the power to regulate, even ban, the corresponding advertising of the product.<sup>119</sup> The *Posadas* Court reasoned that since the government could proscribe gambling, then it must also be able to proscribe gambling advertising so as to not "frustrate legislative efforts of regulation."<sup>120</sup>

113. *Posadas*, 478 U.S. at 341-44. The *Posadas* Court did not question whether there existed any other less intrusive measure to achieve the same result. *Id.* at 341-42, 344.

114. Justice Rehnquist stressed the importance of the state regulation in the interest of "health, safety and welfare." *Id.*

115. *Id.* at 344.

116. *Id.* at 341-44.

117. The ultimate deference to the legislature does not really even encompass an intermediate level of scrutiny, suggesting that the status of commercial speech has reverted to that of pre-*Virginia Pharmacy*. See *supra* note 100.

118. See Helen Athan, *Commercial Speech: Is It Just A Roll Of The Dice? Posadas De Puerto Rico Associates v. Tourism of Puerto Rico*, 106 S.Ct. 2968 (1986), 16 STRESON L. REV. 35 ("Under the *Posadas* decision, advertisement of [alcohol] products may be banned. There is even greater initiative to prohibit the advertisement of these items due to their harmful effects on human health.").

119. *Posadas*, 478 U.S. at 345-346 (Stating "[t]he greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling, and *Carey & Bigelow* are hence inapposite."). The Court distinguished the invalidation of advertising bans in *Bigelow v. Virginia* and *Carey v. Population Services Int'l* because access to, and sale of, the underlying products/services are protected under the Constitution. *Id.* See also *Bigelow v. Virginia*, 421 U.S. 809 (1975) (reversing criminal conviction for advertisements of an abortion clinic); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) (striking ban on contraceptive advertising).

120. Legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, has varied from outright ban on the one hand . . . to legalization of the product or activity with restrictions on stimulation of its demand on the other hand . . . . To rule out the latter, intermediate kind of response would require more than we find in the First Amendment.

*Posadas*, 478 U.S. at 346-47. See generally Berman, *supra* note 103 (Arguing that the *Posadas* application of *Central Hudson* resembles that of the rational basis test used to review economic legislation and that this is more appropriate in cases involving commercial expression promoting dangerous products that require extensive fact finding for review; arguing that for these reasons, such cases involving issues of economic and social welfare demand deference to the legislature).

A few years after *Posadas*, the Court in *Board of Trustees of the State University of New York v. Fox*<sup>121</sup> liberalized *Posadas* in upholding a challenged ban of certain commercial activities on a state university campus.<sup>122</sup> The *Fox* Court restated its understandings of the criteria of the fourth prong of *Central Hudson*, which tested if the regulation in question was sufficiently narrow to pass constitutional muster.<sup>123</sup> Basically, the *Fox* Court read "not more extensive than necessary" to be less than a "least restrictive means standard," requiring only that the legislature determined its goal be "substantial" and that the legislature "carefully calculated" the cost of the regulation.<sup>124</sup>

Any regulation restricting alcohol advertising will have to pass the *Central Hudson* test, as weakened by *Posadas* and *Fox*, to be constitutionally permissible. The issue turns on whether the federal or state governments are in a better position to regulate alcohol advertising.

### B. Federal or State Regulation to Address Harmful Targeting

After the end of Prohibition,<sup>125</sup> the Bureau of Alcohol, To-

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121. 492 U.S. 469 (1989) (upholding state ban on commercial soliciting and dialogue on university campus).

122. *Id.* at 475 (holding governmental interest in maintaining educational atmosphere and safety on campus held to be substantial. The Court adopted the "reasonable fit" standard stated in *Posadas*. *Id.* at 480 (citing *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328, 341 (1986)).

123. *Id.* at 476-80. The *Fox* Court cited three previous commercial speech cases to support its proposition that "necessary" (in the "not more extensive than is necessary" prong of *Central Hudson*) should be interpreted loosely so that only substantially excessive measures will be struck down. *Id.* at 479-80 (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (striking blanket ban on attorney advertising)); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (finding ban on billboard ads permissible under First Amendment but struck on other grounds); *Posadas*, 478 U.S. at 343-44 (upholding ban on casino gambling advertisements).

124. 492 U.S. at 477-80. The Court attempted to distinguish this new standard from the rational basis test. *Id.* at 480.

Fox's weakening of the constitutional protection afforded commercial speech is unmistakable. . . . More directly, Fox's diminishing of the fourth requirement of *Central Hudson* to that of a precise, yet 'reasonable' fit between ends and means, will indeed allow many governmental regulations of commercial speech to withstand constitutional scrutiny, particularly those based on health and safety considerations. Tobacco and alcohol advertising will be particularly affected.

Conrad, *supra* note 16, at 88.

125. U.S. CONST. amend. XVIII; National Prohibition Act, (Title 27 Chapters 1-4), Oct. 28, 1919 (ch 85, 41 Stat. 305), dependent on the 18th Amendment, inoperative by the 21st Amendment on Dec. 5, 1933, by repealing the 18th Amendment); U.S. CONST. amend. XXI § 1 (stating: "[t]he [E]ighteenth [A]rticle of [A]mendment to the Constitution of the United States is hereby repealed."). See generally Seiglie, *supra* note 13, at 591 (Stating that "[f]ederal taxes on liquor provided for the majority of

bacco, and Firearms (BATF)<sup>126</sup> within the Treasury Department<sup>127</sup> of the U.S. Government was created to promulgate a uniform policy of labeling, advertising, and licensing for distribution of alcoholic beverages.<sup>128</sup> The Federal Alcohol Administration Act (FAAA) was amended in 1988 to include the Anti-Drug and Alcohol Act mandating that health warnings be placed on labels of alcoholic beverages.<sup>129</sup>

Two recent decisions put the federal control over alcohol advertisements and labels under the FAAA into question. In 1987 Adolph Coors Company successfully challenged the constitutionality of federal regulations proscribing labels displaying alcohol strength on malt liquor beverages.<sup>130</sup> The Tenth Circuit Court of

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the government's Internal Revenues until the introduction of the income tax in 1913. Coinciding with this decline in the importance of liquor taxes was the increased influence of the Temperance Movement, which resulted in passage of the 18th Amendment to the U.S. Constitution (Prohibition).

126. "Department of the Treasury Order 221 of July, 1972, established the Bureau of Alcohol, Tobacco and Firearms and transferred to it the alcohol and functions of the Internal Revenue Service." Title 27-Intoxicating Liquors, Subchapter I Federal Alcohol Administration. 27 CFR § 19.3 Title 27—Alcohol, Tobacco Products and Firearms, Chapter I—Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury.

127. "Federal Alcohol Administration, the offices . . . are abolished, and their functions shall be administered under the direction and supervision of the Secretary of the Treasury through . . . [the] Internal Revenue [Service] in the Department of the Treasury. . . ." Reorg. Plan No. III of 1940, F.R. 2107, 54 Stat. 1232 (1940).

128. The content of the actual label is within the jurisdiction of the BATF which, until recently, limited the use of certain words on labels or in advertisements alluding to the alcoholic strength of the beverage. *Adolph Coors Co. v. Bentsen*, 2 F.3d 355 (10th Cir. 1993); 27 U.S.C. § 205 (e) (1993). The BATF restriction that precluded alcoholic content on liquor labels was struck down as unconstitutional. *Bentsen*, 2 F.3d at 356. See *infra* notes 130-35 and accompanying text (analyzing the *Adolph Coors* challenge). The BATF restriction that precluded alcohol beverage labeling using the word *Crazy Horse* was challenged in *Hornell Brewing Co. v. Brady*, and was held to be an unconstitutional infringement on free speech. 819 F. Supp. 1227 (E.D. N.Y. 1993); Treasury, Postal Service, & General Government Appropriations Act of 1993, Pub. L. No. 102-393, § 633 (Oct. 6, 1992). See *infra* notes 143-150 and accompanying text (analyzing *Hornell*).

129. BATF responsibility includes implementing the 1988 Anti-Drug Abuse Act as it relates to warning labels on alcohol beverages. Pub. L. No. 100-690, 102 Stat. 4181, (1988) (to be codified at 21 U.S.C. § 1501 et seq.). Alcoholic Beverage Labeling Act of 1988, 27 U.S.C. 201.

130. *Bentsen*, 2 F.3d at 359. (affirming remand ruling of District Court of Colorado).

It shall be unlawful for any person engaged in business as a distiller, . . . producer, . . . wholesaler, of distilled spirits, wine, or malt beverages . . . [t]o sell . . . any distilled spirits, wine, or malt beverages . . . unless such products are bottled, packaged, and labeled in conformity with such regulations, to be prescribed by the Secretary of the Treasury, with respect to packaging, marking, branding . . . (1) as will prohibit deception of the consumer . . . (2) as will provide the consumer with adequate information as to the identity and quality of the products, the alcoholic content thereof (except that statements of, or statements

Appeals reversed and remanded the District Court grant of summary judgment on the basis that a genuine issue of material fact remained regarding compliance with the third and fourth prongs of the *Central Hudson* test.<sup>131</sup> On appeal the Tenth Circuit in *Adolph Coors Co. v. Bentsen*<sup>132</sup> affirmed the District Court's ruling that the malt liquor label regulation directly advanced the government interest.<sup>133</sup>

The Tenth Circuit in both *Adolph Coors Co. v. Brady* and *Adolph Coors Co. v. Bentsen* accepted the District Court's finding that the governmental interest in preventing and discouraging alcohol content-based buying decisions and "strength wars"<sup>134</sup> was substantial.<sup>135</sup> The *Brady* Court, influenced by the subsequent *Fox* liberalization of *Central Hudson*, reversed and remanded<sup>136</sup> the case for resolution as to whether the governmental interest was directly advanced and if there was a reasonable fit between the substantial interest and the measure chosen.<sup>137</sup>

The District Court on remand found that the governmental prohibition neither directly advanced their substantial interest nor reasonably fit their goal to combat strength wars.<sup>138</sup> In affirmance of the lower court finding, the Tenth Circuit announced its adoption of the then recently decided *Edenfield v. Fane*<sup>139</sup> case in which the Supreme Court announced an even tougher standard for proof of the direct advancement prong of the *Central Hudson* test.<sup>140</sup> This

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likely to be considered as statements of, alcoholic content of malt beverages are prohibited . . .).

27 U.S.C. § 205(e)(2) (1988)

131. *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1550-1554 (10th Cir. 1991).

132. 2 F.3d 355 (10th Cir. 1993).

133. *Id.* at 358.

134. Competition amongst producers based on alcoholic strength. *Brady*, 944 F.2d at 1548.

135. *Adolph Coors Co. v. Bentsen*, 2 F.3d 355, 357 (acknowledging *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1547-49).

136. *Brady*, 944 F.2d at 1552 (citing Board of Trustees of the State University of New York v. Fox, 492 U.S. 469 (1989) and remanding for fact finding based on the new interpretation of the *Central Hudson* test).

137. *Brady*, 944 F.2d at 1551-54. The court required that there be "real evidence" that the ban directly advance the goal of prevention of strength wars recognized as substantial. *Brady*, 944 F.2d at 1548-49. In other words, the Tenth Circuit stated that *Central Hudson* requires immediate connection and the government has the burden to establish the link. *Id.* at 1549-50.

138. *Bentsen*, 2 F.3d at 357.

139. 113 S.Ct. 1792 (1993).

140. "[T]he courts must determine 'whether the challenged regulation advances [governmental interests] in a direct and material way.' . . . [and] that the party restricting commercial speech carries the burden [of justification and that] '[t]his burden is not satisfied by mere speculation or conjecture.'" *Adolph Coors Co. v. Bentsen*, 2 F.3d 355, 357 (citing *Edenfield v. Fane*, 113 S.Ct. 1792 (1993)). The *Bentsen* Court did not reach the disposition of the fourth prong of the *Central Hudson* test since the

final review destroyed the government's hope of success in persuading the Tenth Circuit of a more liberal reading of the *Central Hudson* test under *Posadas*.<sup>141</sup> The affirming invalidation in *Bentsen* of the federal measure to restrict commercial speech demonstrates the difficulty the federal government has in restricting alcohol beverage ads in the interest of promotion of safety and health.<sup>142</sup>

In the second case fatal to federal liquor legislation, *Hornell Brewing Co. v. Brady*,<sup>143</sup> a District Court, also on First Amendment grounds, struck a recent amendment to the FAAA prohibiting use of the name "Crazy Horse" on labels of any alcoholic beverages.<sup>144</sup> This regulation was enacted to discontinue exploitation of the late Native leader especially known for his contempt for alcohol use amongst his people.<sup>145</sup> Despite the court's recognition of the government's substantial interest in "prevention of enhanced appeal of alcohol use among Native Americans,"<sup>146</sup> the regulation was held to violate the First Amendment.<sup>147</sup> Although the court cites *Fox* as authority in applying the *Central Hudson* test<sup>148</sup> the court contrarily second-guessed the assertions made by the federal government in its defense of the measure.<sup>149</sup> Based on a failure to consider "al-

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third prong failure rendered the federal regulation unconstitutional. *Bentsen*, 2 F.3d at 359.

141. *Bentsen*, 2 F.3d at 357.

142. Cf. *supra* notes 116-19 and accompanying text (describing more liberal treatment of state regulations of alcohol advertising).

143. *Hornell Brewing Co., Inc. v. Brady*, 819 F. Supp. 1227, (E.D.N.Y. 1993).

144. *Id.* at 1228 (adopting recommendation of Magistrate Judge). Treasury, Postal Service and General Gov't Appropriations Act of 1993, Pub. L. No. 102-393, § 633 (Oct. 1, 1992) ("Upon the date of enactment of this Act, the Bureau of Alcohol, Tobacco, and Firearms (ATF) shall deny any application for a certificate of label approval, including a certificate of label of approval already issued, which authorizes the use of the name Crazy Horse on any distilled spirit, wine, or malt beverage product. . . .").

145. *Hornell*, 819 F. Supp. at 1236. See *supra* notes 57-58 (relating the significance of Crazy Horse to Native Americans).

146. The court accepted "the protection and preservation of the health, safety, and welfare of Native Americans by preventing the enhanced appeal of alcohol use among Native Americans due to the use of the name Crazy Horse on a malt liquor" as a substantial government interest. *Hornell*, 819 F. Supp. at 1235. Yet the court qualifies this acceptance by stating that "[w]hile Crazy Horse may not exacerbate alcohol use, the government's interest in preventing further alcohol abuse and its resultant problems is most certainly substantial . . . [T]he court defers to the asserted interest of the government and finds that the prevention of the enhanced appeal of alcohol use among Native Americans is substantial." *Id.* at 1236.

147. *Hornell*, 819 F. Supp. at 1237, 1239.

148. *Id.* at 1233 (citing *Board of Trustees v. Fox*, 492 U.S. 469, 476-81 (1989)).

149. The *Hornell* court cited *Adolph Coors* in requiring the government to demonstrate an "immediate connection" between the prohibition and the government's asserted interest to meet *Central Hudson*'s third prong. *Hornell*, 819 F. Supp. at 1236 (citing *Adolph Coors Co., Inc.*, 944 F.2d at 1549; *Central Hudson*, 447 U.S. at 566). "Here there is no comparable precedent that suggests, let alone establishes, an immediate connection between the use of one specific Native American name, Crazy

ternative measures that "were more narrowly tailored to the government's interest," the Crazy Horse ban was invalid under the fourth prong of *Central Hudson*.<sup>150</sup>

*Hornell Brewing Co.*, in addition to *Adolph Coors Co.*, illustrates the relatively strong First Amendment protection afforded commercial speech in the alcohol advertising field. The ability of the federal government to respond to destruction caused by harmful alcohol marketing strategies appears limited.<sup>151</sup>

State governments are in a better position to restrict alcohol advertisements by virtue of the Twenty-First Amendment which, enacted in 1933, repealed the Eighteenth Amendment and granted the states power to regulate the transportation and sale of alcohol.<sup>152</sup> The additional control granted to states by the Twenty-First

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Horse, and increased consumption of alcohol by Native Americans." *Hornell*, 819 F. Supp. at 1237. The government's theory, in short, is too remote and speculative to satisfy the direct advancement prong. *Id.* Additionally, the *Hornell* court refused to rely on *Posadas* on two counts. *Id.* at 1237. One, because the *Posadas* ban was partial, relating only to casino gambling, and two, because *Posadas* was able to "defer to the legislature on the basis of precedent." *Id.* The Court then cited *Dunagin* and *Crisp* as precedent that was available, presumably only to *Posadas* to "establish the causal link between advertising and consumption." *Id.* (citing *Dunagin v. City of Oxford*, 718 F.2d 738,744-750 (5th Cir. 1982), cert. denied 467 U.S. 1259 (1984); *Oklahoma Telecaster Ass'n v. Crisp*, 699 F.2d 490, 498 (10th Cir. 1983)(reversed on grounds other than the first amendment), sub nom. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984)(establishing the causal link between advertising and consumption)).

150. *Hornell*, 819 F.2d at 1238-39 (citing the *Fox* interpretation of *Central Hudson* requiring that there be a "reasonable fit" between the substantial interest and the regulation and that the cost of burdening speech be "carefully calculated," *Fox*, 492 U.S. at 480; *Central Hudson*, 447 U.S. at 566 (1980)). In applying this interpretation, the court found that the label restriction would only benefit a small segment of the population so that more narrow alternatives would suffice. *Hornell*, 819 F. Supp. at 1238.

151. Federal regulations do not directly answer to the general issue of advertisements that target minority populations by the use of harmful messages. The Surgeon General appears to have some influence over regulation of the alcohol industry but this role is limited. "The Secretary shall . . . consult and coordinate the health awareness efforts of the labeling requirements of this subchapter with the Surgeon General of the United States." Title 27-Intoxicating Liquors; Subchapter II Alcoholic Beverage Labeling; Section 215 Labeling requirement; (d) Powers of Secretary; rules and regulations; consultation and coordination with Surgeon General. 27 U.S.C.A. § 215 (West Supp. 1993). See generally Ira Teinowitz & Steven W. Colford, *Brewers Fight Back, Angry Brewers will Meet with Surgeon General*, 62 ADVERTISING AGE, Iss. 48, Nov. 11, 1991, at 67 [hereinafter Teinowitz & Colford, *Angry Brewers Fight Back*] (stating that Surgeon General Antonia Novello asked brewers to discontinue ads that targeted youth which proves federal recognition of targeting of another group at risk). See generally *supra* notes 57, 58, 86 (describing the futile efforts of the Surgeon General in attempting to dissuade Hornell Brewing Company from using the Crazy Horse Label for its malt liquor beverage).

152. U.S. CONST. amend. XXI § 1 (stating in part "[t]he eighteenth article of Amendment to the Constitution of the United States is hereby repealed."); § 2 (stating in part "[t]he transportation or importation into any State, Territory, or posses-

Amendment results in a more liberal treatment of state alcohol advertising restrictions as compared to federal attempts to restrict the same.<sup>153</sup>

The additional grant of power conferred to states in the field of alcohol regulation by the Twenty-First Amendment necessarily influences review of state restrictions on alcohol advertising.<sup>154</sup> In *Queensgate Investment Co. v. Liquor Control Commission*,<sup>155</sup> the Ohio Supreme Court upheld an Ohio ban on price advertising for liquor by certain licensees.<sup>156</sup>

The *Queensgate* Court found that the state's interest in curbing alcohol consumption under the Twenty-First Amendment was substantial and that the measure met the pre-*Fox Central Hudson* fourth prong requirement that it be no more extensive than necessary.<sup>157</sup> Later, the Tenth Circuit followed *Queensgate's* lead and upheld a ban on transmission of in-state alcohol ads in *Oklahoma Telecaster Ass'n v. Crisp*.<sup>158</sup> The Tenth Circuit restated the power of the state to regulate in this field and balanced the limited First Amendment rights of the advertisers with those of the state under the Twenty-First Amendment.<sup>159</sup> The court deferred to the legislature's determination that promoting temperance was substantial<sup>160</sup> and that the ban on broadcasted alcohol advertisements was no more extensive than necessary under *Central Hudson*.<sup>161</sup>

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sion of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.").

153. *E.g.*, *Dunagin v. City of Oxford*, 718 F.2d 738, 744-750 (5th Cir. 1983) *cert. denied*, 467 U.S. 1259 (1984) (presuming state regulation of alcohol valid under interpretation of Twenty-First Amendment); *Oklahoma Telecaster Ass'n v. Crisp*, 699 F.2d 490, 498 (10th Cir. 1983) (reversed on grounds other than the first amendment), *rev'd sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (granting broad authority to states to regulate alcohol under the Twenty First Amendment).

154. U.S. CONST. amend. XXI. See generally Law, *supra* note 107 (commenting on the unique constitutional status Twenty First Amendment confers onto alcohol advertising restrictions as compared to tobacco advertising restrictions).

155. 433 N.E. 2d 138 (1982), *appeal dismissed*, 459 U.S. 870 (1982).

156. *Id.* at 142.

157. *Id.*

158. *Crisp*, 699 F.2d at 498 *rev'd sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (reversed on grounds other than the first amendment).

159. *Crisp*, 699 F.2d at 498.

160. *Id.* at 501.

161. *Id.* at 500-02 (finding ban on alcohol ads did not prohibit broadcast of other ads nor publication of alcohol advertisements so that it was no more broad than necessary). The Tenth Circuit watered down the interpretation of the *Central Hudson* third prong by deferring to the legislature in finding that it "does not require that we determine . . . whether the means chosen by the legislature, however objectionable any court may find them, directly advance the asserted state interest." *Id.* at 500. The court found that the regulation did not need to directly affect alcohol consumption as long as it was reasonably related to reducing alcohol consumption and related problems. *Id.* at 501.

In *Dunagin v. City of Oxford*,<sup>162</sup> the United States Court of Appeals for the Fifth Circuit relied on *Crisp* and *Queensgate* to uphold a Mississippi ban on liquor advertising.<sup>163</sup> In applying *Central Hudson*, the court presumed the validity of the measure because of the Twenty-First Amendment power of the state.<sup>164</sup> The *Dunagin* court ignored expert testimony in contradiction of the legislative measure and implicitly found that the method directly advanced the state's interest.<sup>165</sup> The Fifth Circuit approach in *Dunagin* amounts to total deference to the state determination of what is harmful,<sup>166</sup> which mirrors the *Posadas* liberal approach to state regulation.<sup>167</sup>

### Part III

#### Proposed Solution: State-Imposed Excise Tax on Alcohol Advertising Expenditures

Constitutional analysis demonstrates the unusual success that states have over the federal government in restricting alcohol-related commercial speech.<sup>168</sup> The special control conferred onto state governments to regulate alcohol advertising strengthens a state approach to offset the subsidy<sup>169</sup> granted by the Federal Tax Code for advertising expenditures.

One of the government's roles is to redistribute income.<sup>170</sup>

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162. *Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1982), cert. denied, 467 U.S. 1259 (1984).

163. *Id.* at 747. (citing *Crisp*, 699 F.2d at 501 and *Queensgate*, 433 N.E.2d at 142).

164. *Id.* at 744, 750.

165. *Id.* at 749, 750. The court recognized a link between advertising and consumption. *Id.* at 747-51 (citing *Central Hudson*, 447 U.S. at 569) finding that advertisers would not spend money to promote unless there was a connection.

166. Conrad, *supra* note 16, at 101.

167. *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328, 344 (1986) (granting great legislative leeway in determining appropriate means to advance governmental interest). See generally Louis M. Ciavarrà, *Constitutional Law-State Regulation of Alcoholic Beverage and Advertising under the First and Twenty First Amendments*, 18 SUFFOLK U. L. REV. 815 (1984) (stating that "by injecting consideration of the twenty-first amendment into its overall analysis . . . the Dunagin majority in effect applied a lower standard than that mandated by the Central Hudson Court").

168. See *supra* part II.B (demonstrating increased power of states to control alcohol advertising as interpreted by the courts).

169. See *supra* notes [part III, last section] and accompanying text (framing the tax deduction for advertising as a subsidy).

170. BROWNING & BROWNING, *supra* note 14, at 225; See also Seigle, *supra* note 13.

In practice, when welfare economists refer to an exogenous institutional change they are usually referring to a policy instrument (e.g., a new tax or tariff, or a new government program requiring a change in expenditures). The objective of welfare economics is to evaluate the social desirability of changes in certain, heretofore, exogenous institu-

State governments hold the power to correct the balance by reducing the federal incentive to advertise alcohol through an advertising tax.

#### A. State Excise Tax Offsets Federal Subsidy

The external cost of targeted alcohol advertising is the destruction of minority health and wellness.<sup>171</sup> The incentive to advertise, tax free, allows alcohol beverage companies to destroy a population for profit without accountability. The social and health cost is greatest for minority communities,<sup>172</sup> but has reverberating effects onto the American society as a whole.

The state-imposed tax on alcohol advertising would reduce the federal government subsidy for this activity and offset external costs of minority health degradation.<sup>173</sup> Like industries that pollute as a byproduct of production, alcohol advertisers pollute minority health as a byproduct of promotion of consumption.<sup>174</sup> The cost of alcohol beverage production is artificially low because it does not account for the cost that society bears from the harm caused to targeted minority communities.<sup>175</sup> Taxing the advertising discour-

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tional variables which result in alternative economic states, where each state is characterized by both a different allocation of resources and a different distribution of costs and benefits of economic activity.

NICHOLAS MERCURO & TIMOTHY P. RYAN, LAW, ECONOMICS AND PUBLIC POLICY, (Vol.3 1984) (citing JAMES M. HENDERSON & RICHARD E. QUANDT, MICROECONOMIC THEORY 254-255 (1971)).

171. "Economic actors can be expected to pollute. It is a basic concept of microeconomics that rational enterprises . . . operating in a free market will not pay to replace common goods that they appropriate or degrade, such as clean air, i.e., 'negative externalities.'" Richard A. Westin, *Understanding Environmental Taxes*, 46 TAX LAW 327, 331 (1993). See *supra* part I (describing the degradation of minority health as a result of promoted alcohol consumption).

172. See *supra* part I and accompanying text.

173. Many industries that pollute are required to compensate society by offsetting external costs by the levy of a tax on the polluting activity. JACK HIRSHLEIFER, PRICE THEORY AND APPLICATIONS 450 (1976). See generally Lawrence H. Summers, *The Case for Corrective Taxation*, 44 NAT'L TAX J. 289, 290-91 (1991) (describing a carbon tax proposal as a measure to correct externality costs by discouraging certain activities).

174. The alcohol advertisers are equated to polluters in the sense that the manner in which they advertise results in great cost to society, specifically to minority groups that bear the internal costs of consumption on a disparate basis as compared to the majority society. See Westin, *supra* note 171, at 331-34 (discussing external costs of production).

Not only are minorities burdened with the disparate impact alcohol use and abuse has on their health; society as a whole is affected as this important resource is diminished and as costs increase to care for individuals affected by alcohol use and abuse. See *supra* part I (setting forth the various health related costs levied upon the minority populations).

175. "[O]pen access to common goods means market prices of products do not reflect the full cost of pollution. The consequences are greater than optimal levels of

ages the harmful behavior by making it more expensive to produce the advertised product.<sup>176</sup>

Increasing the costs of production of alcohol beverages by effectively making advertising more expensive may force the industry to internalize the tax imposed costs,<sup>177</sup> which may result in an increased cost of consumption passed onto the consumer.<sup>178</sup> The benefit of the federal tax deduction subsidy will be reduced by a state tax increasing the cost of production.

The generalized increase in consumer price of all alcohol beverages will serve to decrease demand, so that a new equilibrium in the market will be reached causing less alcohol to be consumed at a higher price.<sup>179</sup> This will reflect the corrected cost of alcohol production as it accounts for the social and health destruction caused

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production and consumption. The result is classified as a 'market failure.' " Westin, *supra* note 171, at 331.

176. Edgar K. Browning, *Subsidies Financed with Distorting Taxes*, 46 NAT'L TAX J. 121, 122 (1993). See A. M. Polinsky, AN INTRODUCTION TO LAW AND ECONOMICS 113-114 (1983); Summers, *supra* note 173, at 289-90.

A tax placed on the generation of a harmful externality will tend to reduce the amount of externality imposed on others. An ideal corrective tax would add to the private Marginal Cost, the cost recognized by the polluting producer in his own self-interest, a penalty that is just enough to balance the harm suffered, on the margin, by others.

HIRSHLEIFER, *supra* note 173, at 450. See also Westin, *supra* note 168, at 331-33, stating that

[m]icroeconomists have designed a theoretical tax to eliminate market failure. The idea is to increase the price of the product to a level that includes its full implicit marginal environmental cost, thereby reducing the amount of production that will in fact take place. . . . The result should be to choke back production and consumption.

*Id.* at 333.

177. The industry, of course, could also decrease promotion. This would have a negative economic impact on the industry which would serve as a disincentive to offset the incentive created by the deduction.

178. Under the environmental model, pollution taxes that increase costs of production are optimally internalized by the polluters. In other words, these costs are not passed onto the consumer via a price increase in the product. The environmental model is premised on free market competition so that individual producers, in order to remain competitive, will not raise their prices. In the alcohol advertising model, increased production cost, incorporating advertising as a cost of production, will likely be passed onto the consumer unless neighboring states elect not to impose such a tax on advertising. The fragmented imposition of the tax would give rise to competition that would force internalization. If all states were to impose a comparable alcohol advertising tax, lack of price competition would force a uniform passing of cost onto the consumers.

179. This presumes price elasticity of alcohol beverages in the market.

The higher the social cost and the less 'elastic' the demand curve, the higher the revenues. Elasticity relates to sensitivity of purchases to prices. If purchasers are sensitive to price, the demand curve is said to be elastic. Note that one can achieve the same result in terms of suppression of consumption and production by imposing a sales tax.

Westin, *supra* note 171, at 333.

by alcohol advertising that targets minorities.<sup>180</sup>

Governments tax to encourage industry production measures that avoid increased pollution.<sup>181</sup> The proposed tax levied against alcohol advertising would dissuade such behavior<sup>182</sup> that is costly to society.<sup>183</sup> Furthermore, the government would also generate revenue at the state level that could be allocated to alcohol prevention, counter-advertising, education, and health facilities.<sup>184</sup> The proposed state tax could be especially attractive to states with large minority populations to serve as a potentially strong tool to battle targeting by alcohol advertisers on a local level.<sup>185</sup>

A state-levied tax would also avoid disruption of the federal income tax scheme. Since the deduction for advertising expenses

180. *Id.* See *supra* note 174 (marginal cost).

181. See generally Ian J. Irvine and William A. Sims, *The Welfare Effects of Alcohol Taxation*, 52 J. PUB. ECON. 83, (1993) (stating that an example of goods to which social costs are associated with production is "goods which involve the emission of pollution as by-product or goods such as alcohol or tobacco, the consumption of which may result in negative consequences for society").

182. "Simply put, all taxes discourage something. Why not discourage bad things such as pollution?" Summers, *supra* note 173, at 289. "[A] strong case exists for corrective taxation in a wide variety of other areas, including 'sin'." *Id.* at 292. See generally Irvine & Sims, *supra* note 181, at 99 ("[T]axation of alcoholic beverages is important because it generates considerable revenue for governments and because it can moderate adverse effects associated with excessive consumption").

183. See HIRSHLEIFER, *supra* note 173, at 450 (describing the effects of redistributions of wealth to reduce externalities). See also Seiglie, *supra* note 13, at 586 (Stating that there "has been substantial literature on the role of taxation in achieving a vast array of objectives. . . . [This] emphasizes the role of taxes in reducing externalities."); Summers, *supra* note 173, at 289 (stating that "[t]he idea of corrective taxes as a way to address externalities is standard in economic theory"); Browning, *supra* note 176, at 121 (stating that "[a]n important part of government spending is devoted to the subsidization of the production (or consumption) of particular goods and services. [Positive] [e]xternalities are often cited as justification for such subsidies . . . ."). This article frames the deduction for advertising as a subsidy for this activity, the exercise of which results in negative externalities which preclude justification for the subsidy. Therefore, an excise tax levied against the activity of alcohol advertising would reverse the unjustified subsidy effect.

184. See generally Kelly, *supra* note 41, at 66 (arguing that counterspeech would provide the solution to the targeting problem); Colford, *Two Groups Rip Alcohol*, *supra* note 16, at 22 (stating that the U.S. Department of Education released a report that proposed that the alcohol and tobacco advertisers be forced to fund counter-advertising. The AAA Foundation for Traffic Safety also released a study that recommended the requirement of counteradvertising).

185. Colford, *Two Groups Rip Alcohol*, *supra* note 16, at 22. See also Colford, *Health Care Plan*, *supra* note 89, at 2 (quoting U.S. Rep. Tom Foglietta, a member of President Clinton's Healthcare Task Force, who stated that "[i]f we eliminate the deduction of advertising for tobacco and alcohol products, we would save as much as \$950 million each year, which then could be used to fund a federal commitment to universal access to quality healthcare."). Increasing prices in order to reflect social costs without actually repairing the corresponding damage does not assure significant environmental benefits, even though the market failure has been cured. That is, the tax cures market failure prospectively, but it does not assure that the damage done in the past or future will be corrected.

serves to reduce income to arrive at the taxable income figure,<sup>186</sup> its wholesale removal or direct reduction would result in a distortion of the elaborate tax scheme designed to tax income minus expenses.<sup>187</sup>

For example, an alcohol company that spends relatively little on advertising may nevertheless be bumped up into a higher income bracket without the deduction because its taxable income may lie just below the higher bracket.<sup>188</sup> Pushing the company into the higher income bracket would also result in a higher tax rate applied to the higher taxable income.<sup>189</sup>

On the other hand, a different alcohol company that may spend significantly more on advertising would not be bumped into the higher bracket if its taxable income resides in the middle of the range.<sup>190</sup> The taxable income would then be increased in absence of the deduction but would not attract a higher rate.<sup>191</sup>

The wholesale removal of the deduction, by virtue of the tax calculation, works a disparity between companies in the two situations that does not necessarily correspond to the amount of money allocated to alcohol advertising. Because of the distortion, removal of the deduction would not necessarily have the desirable disincentive effect on alcohol advertising that would be brought about by a direct tax on alcohol advertising.

### B. *Constitutionality of State Excise Tax on Alcohol Advertising*

Most importantly, a state tax on alcohol advertising would not contravene the First Amendment protection afforded commercial speech. The *Central Hudson* test, as modified by *Fox* and *Posadas*, survives as the formalized approach to commercial speech regulations. Alcohol advertising, referring to a legal product,<sup>192</sup> falls within the definition of commercial speech as restated in *Central Hudson*.<sup>193</sup> Further, the *Central Hudson* first prong renders truthful and non-misleading alcohol advertising worthy of protection as

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186. See *supra* notes 90 and 173.

187. See *supra* note 176.

188. IRC § 11 (1994) (application of tax rates to taxable income of corporations in general).

189. IRC § 11(b)(1) (1994).

190. *Id.*

191. *Id.*

192. U.S. CONST. amend. XXI § 1 (repeal of prohibition).

193. *Central Hudson Gas v. Public Service Commission*, 447 U.S. 557, 561 (1980) (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience").

commercial speech under the First Amendment.<sup>194</sup> The second prong requirement is met by the state government's substantial interest in discouraging alcohol ads that target minorities.<sup>195</sup> The power under the Twenty-First Amendment strengthens the validity of the state government's assertion of this interest.<sup>196</sup>

The language of the third prong in *Central Hudson*, demanding that the challenged measure directly advance the government interest, as interpreted by *Posadas*, requires only that the government simply assert such a link or causal connection.<sup>197</sup> The alcohol advertising excise tax would advance the governmental goal of discouraging promotion of alcohol use;<sup>198</sup> therefore, the proposed tax passes the third prong of the *Central Hudson* test.<sup>199</sup>

Before the *Fox* and *Posadas* decisions, the fourth prong of the *Central Hudson* test potentially presented the most difficulties for the constitutionality of state restrictions on alcohol advertising. *Central Hudson* states that in order to be upheld, the excise tax must not be "broader than necessary to directly advance the governmental goal."<sup>200</sup> But since the *Posadas* decision, the government need only assert that a tax on all alcohol advertising is the

194. *Id.* at 566-68.

195. *Id.* at 568-69.

196. U.S. CONST. amend. XXI § 2. See also *Dunagin v. City of Oxford*, 718 F.2d 738, 744, 750 (5th Cir. 1982), *cert. denied*, 467 U.S. 1259 (1984) (recognizing a presumption of validity of state alcohol regulations under the Twenty First Amendment); *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (recognizing broad authority of states to regulate alcohol under the Twenty First Amendment).

197. *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328, 341-42 (1986). See generally *Tobacco 'Revolt' Conference: Health Groups Gather to Acknowledge Successful Anti-Smoking Programs and Individuals*, 29 SACRAMENTO OBSERVER, Oct. 14, (1992), at F3 (quoting Former Surgeon General Antonia Novello: "we've known for a long time that advertising is directly related to consumption.").

198. The proposed tax creates a disincentive to promotion of alcohol to minorities by creating an offset to the federal subsidy derived from the income tax deduction for advertising.

199. The only arguable difficulty is that an alcohol advertising tax may not directly reduce the incidence of targeted ads, but may rather just reduce all alcohol advertising ads. This article contends that an overall reduction would be positive, and if this results in a decline of targeted ads, the costs are worth it. Note that the *Fox* interpretation of *Central Hudson* collapsed the third and fourth prongs to require only that the government assert a substantial goal and that the costs be carefully calculated. *Fox*, 492 U.S. at 480. See generally *Berman*, *supra* note 103, at 1211 stating that:

[w]hether an advertising ban directly advances the state's health interests is a legislative policy judgment. Courts should not engage in substantive review of such legislative determinations . . . [because of the] difficulties courts encounter in conducting such inquiries . . . [D]eference to the legislature is an inherent feature of the CENTRAL HUDSON analysis when harmful substances are involved.

200. *Central Hudson Gas v. Public Service Commission*, 447 U.S. 569, 570 (1980).

most efficient means available to promote the legitimate government interest of promoting overall health for minority communities.<sup>201</sup> *Fox* adopted the *Posadas* modification of the fourth prong of *Central Hudson* to state that the fit between the measure and the goal need not be so perfectly tailored so long as it is reasonable.<sup>202</sup> Although the proposed tax will attach to all alcohol advertising, it will not restrict alcohol advertising to the extent that an outright ban would. The tax would merely discourage expenditures for alcohol advertising in order to decrease the incidence of targeted ads.<sup>203</sup> Therefore the excise tax, as levied against all alcohol advertisements, will survive the fourth prong of the *Central Hudson* test, as modified by *Fox*.<sup>204</sup> Thus, a state tax on alcohol expenditures would survive a First Amendment challenge.

The States also have the Twenty-First Amendment to justify their exercise of police power to regulate alcohol.<sup>205</sup> The States have the power to control, within their borders, the sale, transpor-

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201. *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328, 341-42 (1986).

Under the fourth prong of *Central Hudson*, the proposed regulation taxing all alcohol advertising may be held to tax too much speech in order to reduce only the harmful targeted advertisements. A more narrow regulation that would tax only targeting ads could be regarded as less burdensome on free speech to reach the desired end and therefore might more easily pass the fourth prong of the test.

It may be very difficult, however, to prove that ads in question actually target the minority populations for purposes of application of the tax to these ads. The burden to prove such targeting is on the alleged infringer of First Amendment rights; in this case, the state government. *Widmar v. Vincent*, 454 U.S. 263 (1981). Since the typical ads play on stereotypes and are not based on concrete facts, the burden may prove impossible for the government to successfully bear. This type of regulation, due to the necessity of screening and scrutinizing each ad based on its content could potentially fail to serve its purpose. This is especially true in light of the subtle messages and stereotypes that would make it prohibitive to establish workable guidelines.

Furthermore, by tailoring the tax to apply only to alcohol ads that target minorities, discretion based on the content of the ads could potentially invoke strict scrutiny. See *Hornell Brewing Co. v. Brady*, 819 F. Supp. 1239, 1240 (1993) (stating that it was not necessary to analyze the alcohol label restriction under the strict scrutiny analysis of *R.A.V. v. St. Paul* because the label was held not to meet the less stringent test set forth in *Central Hudson*; 112 S.Ct. 2538 (1992)). The tax, as proposed, avoids strict scrutiny because its employment is not dependent on the content of the speech involved.

It is arguable that a tax on only targeted ads could survive the *RAV* strict scrutiny test on the basis of the limited non-political commercial speech protection coupled with governmental ability to suppress speech contrary to public policy under *Rust v. R.A.V.*, 112 S.Ct. at 2538; *Rust*, 111 S.Ct. 1759 (1991).

202. *Fox*, 492 U.S. at 480 (citing *Posadas*, 478 U.S. at 341).

203. The tax is less intrusive than a ban, as it acts only to discourage harmful behavior not prohibit it.

204. *Fox*, 492 U.S. at 479-80. This interpretation avoids the above-mentioned difficulties of administrative discretion, so that all ads are taxed regardless of whether they target minorities.

205. U.S. CONST. amend. XXI, § 2.

tation and regulation of alcohol under the Twenty-First Amendment.<sup>206</sup> The only limitation on the States' power under the Twenty-First Amendment is that enacted measures under this authority do not operate to infringe other constitutional rights.<sup>207</sup> Because protection of the right to free commercial speech is limited, the danger of the state infringing this right by imposition of an excise tax against alcohol advertising is quite unlikely.<sup>208</sup> Furthermore, since the states retain the right to prohibit the sale of alcohol,<sup>209</sup> *Posadas* mandates that states can also restrict the advertising of alcohol, even if they do not prohibit the sale of alcohol itself.<sup>210</sup> *Posadas*, coupled with the Twenty-First Amendment power, grants the State more power to regulate alcohol and tax alcohol advertising expenditures.<sup>211</sup>

## Conclusion

Alcohol producers should no longer enjoy a federal subsidy by

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206. *Id.*

207. *Craig v. Boren*, 429 U.S. 190, 204-09 (1976) (Twenty First Amendment power in conflict with equal protection rights of the Fourteenth Amendment); *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (broad state police power over use and transfer of liquor in conflict with the Due Process Clause of the Fourteenth Amendment); *Larkin v. Grendel's Den, Inc.*, 103 S.Ct. 505, 510 n.5 (1982) (explaining that the Twenty First Amendment is limited by the Establishment Clause of the First Amendment).

208. *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328, 345-46 (1986), *Fox*, 492 U.S. at 477-80 (lowering commercial speech protection provided under *Central Hudson Gas v. Public Service Commission*, 447 U.S. 557 (1980)); *Cf. California v. LaRue*, 409 U.S. 109, 116 (1972) (presuming validity of Twenty First Amendment power that requires application of rational basis test as state may promulgate broad rules banning sexually explicit entertainment at liquor licensed taverns). *LaRue* demonstrates state power to invade free speech guarantees when the speech in question is accorded less protection than pure speech under the Constitution. *Cf. NY State Liquor Authority v. Bellanca*, 452 U.S. 714, 715-716 (1981) (holding that the power to entirely ban alcohol under the Twenty First Amendment, includes the power to ban sale with topless dancing notwithstanding the infringement of a protected First Amendment activity).

209. A state has absolute power under the Twenty First Amendment to prohibit totally the sale of liquor within its boundaries. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939). Unlike abortion and contraception, alcohol is not a fundamental right protected under the constitution. *Roe v. Wade* 410 U.S. 113 (1973), and *Griswold v. Connecticut*, 381 U.S. 479 (1965). For example, the Mississippi legislature enacted a local option law in 1966 that allows counties and judicial districts to continue prohibition if they so choose. *MISS. CODE ANN. §§ 67-1-1 to 67-1-91* (1991).

210. *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. at 345-346. Note that the excise tax does not follow *Posadas* to its furthest extreme; it merely discourages alcohol advertisements that are potentially targeted at minorities for consumption.

211. "Alcohol restrictions have an additional legal advantage that tobacco restrictions do not: the twenty-first amendment to the Constitution permits a state to broadly regulate the delivery and use of alcoholic beverages." *Conrad, supra* note 16, at 98.

way of a tax deduction to promote targeting of minority communities. Governmental subsidies of such damaging advertisements only undermine the efforts of minority communities to reduce the destruction alcohol has on their health. Alcohol advertising, harmful on the whole, and most particularly when it targets minority groups, must be curbed. A blanket state tax levied against this activity would have an overall effect of dissuading this harmful behavior and have an indirect penalizing effect for the abuse of the limited right of freedom of commercial speech in targeting alcohol advertising towards minorities.<sup>212</sup> This state-levied tax would also generate revenue on a local level to re-allocate resources to respond to minority health needs resulting from the disparate impact alcohol has on minorities. The tax would also avoid any proffered offense to the First Amendment.

Alcohol beverage companies have an economic free license to pursue any market strategy that increases their profits under our market system. The government and tax-payers need not support a harmful activity by way of a deduction that exacerbates minority disease and mortality. State governments and tax-payers have the right and the power to impose their own "sin" tax in an attempt to curb alcohol advertising that targets minorities.

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212. This is similar to the "polluter pay" principle. See generally Westin, *supra* note 171.