Regulating Tobacco Marketing: A “Commercial Speech” Flowchart for State and Local Governments
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Regulating Tobacco Marketing:
A “Commercial Speech” Flowchart for State and Local Governments

1. **Is what is compelled expression?**
   - **Yes**
     - **Expression**
       - Is the expression speech or conduct?
         - **Yes**
           - **Speech**
             - Is the speech from the government?
               - **Yes**
                 - **No 1st Amendment Concern**
               - **No**
                 - **O'Brien test**
         - **No**
           - **Expressive Conduct**
             - Is the compelled speech fact or opinion?
               - **Fact**
                 - Example: Law requiring point-of-purchase ad stating “Smoking causes lung cancer” or a required warning on smokeless tobacco packages
                 - **Zauderer test**
               - **Opinion**
                 - Example: Law requiring point-of-purchase ad stating “Smoking isn’t cool”
                 - **Central Hudson test OR strict scrutiny**
   - **No**
     - **Not Expression**
       - Example: Excise tax
       - **No 1st Amendment Concern**

2. **Does the law* compel or restrict activity?**
   - **COMPEL**
     - **Expression**
       - Is the expression speech or conduct?
         - **Yes**
           - **Speech**
             - Is the speech from the government?
               - **Yes**
                 - **No 1st Amendment Concern**
             - **No**
               - **Speech**
                 - Is the speech fact or opinion?
                   - **Fact**
                     - Example: Law requiring point-of-purchase ad stating “Smoking causes lung cancer” or a required warning on smokeless tobacco packages
                     - **Zauderer test**
                   - **Opinion**
                     - Example: Law requiring point-of-purchase ad stating “Smoking isn’t cool”
                     - **Central Hudson test OR strict scrutiny**
           - **Expressive Conduct**
             - Example: Requiring tobacco packages to be shelved so the tax stamp is visible
             - **O'Brien test**
   - **RESTRICT**
     - **Is what is restricted expression?**
       - **Yes**
         - **Expression**
           - Example: Restricting advertising and other tobacco marketing
           - **No 1st Amendment Concern**
         - **Expressive Conduct**
           - Example: Ban on self service tobacco displays**
           - **O'Brien test**
       - **No**
         - **Speech**
           - Example: Ban on in store advertising
           - **Central Hudson test**

* Chart assumes the expression regulated is commercial and is not preempted by FCLAA.
** The Supreme Court in *Lorillard v. Reilly* didn’t expressly hold that self service tobacco displays constitute expressive conduct, but was willing to assume so.
About the Tobacco Control Legal Consortium

The Tobacco Control Legal Consortium is a network of legal programs supporting tobacco control policy change throughout the United States. Drawing on the expertise of its collaborating legal centers, the Consortium works to assist communities with urgent legal needs and to increase the legal resources available to the tobacco control movement. The Consortium’s coordinating office, located at William Mitchell College of Law in St. Paul, Minnesota, fields requests for legal technical assistance and coordinates the delivery of services by the collaborating legal resource centers. Our legal technical assistance includes help with legislative drafting; legal research, analysis and strategy; training and presentations; preparation of friend-of-the-court legal briefs; and litigation support.