expensive. At many firms they will not be approved, even if they reduce harmful emissions or reduce costs, unless they bring a return on capital invested equal to or greater than alternative investments.

- *Product analysis*. Products can be examined to reduce adverse environmental impacts. Eastman Kodak makes a life-cycle assessment. It looks at factors such as raw materials used, energy consumed, fugitive emissions, and potential for recycling. SC Johnson uses a "greenlist" to rate ingredients for household products. Its chemists have many raw material choices for the surfactants, solvents, propellants, fragrances, and other ingredients that go into brands such as Raid, Off!, Drano, Saran Wrap, and Windex. Before choosing one, they look at a scorecard ranking substances from 0 to 3 based on estimates of toxicity. A 0 means "restricted use" and requires higher management approval, 1 is "acceptable," 2 is "better," and 3 is "best." Chemists try to achieve higher scores as they formulate products. In 2001 the company had an average score of 1.23 and set a goal of raising its score to 2.0. By 2008 it had achieved a score of 1.62.[55]
- *Environmental marketing*. The presence of environmental risks creates markets. Sale of pollution control equipment is an old example. Innovative companies create new demand. Swiss Re, a colossus of the insurance industry, saw global warming as an opportunity. It now sells weather derivative contracts that work like put or call options, allowing buyers such as agricultural corporations to hedge against crop losses from warmer weather. It also sells catastrophe bonds that insure against disasters such as a giant U.S. hurricane or a major European windstorm. These bonds pay investors high interest rates, but if the catastrophe happens, they lose some or all of their principal.[56] Other companies find opportunities in their current business models. Walmart's mission is "saving people money so they can live better." It set a goal of selling 100 million compact fluorescent bulbs every year and achieved this by 2007. It estimates this saves customers $3 billion in annual electricity costs and it expects to get some of these savings back in customer purchases—in effect, stealing revenue from utility corporations.
- *Environmental metrics*. In the past, few companies had environmental goals. Activities that posed risks were largely unmeasured. That is changing. In 2003 a group of investors combined with the United Nations to measure CO_2e emissions in the largest 500 global corporations. Then a little more than 40 percent reported emissions; by 2009 the percentage had doubled to 82 percent. Today, companies measure environmental performance toward environmental goals. Office Depot uses a "dashboard" that matches objectives with key performance indicators. One of its objectives is to "increasingly be green" and a corresponding indicator is "CO_2 emissions from store deliveries." Since measurement started, these emissions have fallen from 91,300 tons in 2006 to 53,200 tons in 2009.[57]

55 SC Johnson & Sons, *2009 Public Report: Doing Our Part* (Racine, WI: SC Johnson, 2009), p. 23.

56 Bernard Belk and Roman Hohl, "Agribusiness Corporates Can Insure against Volatility in Grain Volumes," *Trade Finance*, February 2009, p. 6; and Ian McGugan, "Insuring Catastrophe," *Financial Post*, December 5, 2009, p. FP11.

57 "2009 Office Depot Environmental Dashboard & Key Indicators," at www.officedepotcitizenship.com/environmental_dashboard.php.

Dow Chemical issues quarterly updates of its performance on a set of environmental goals it intends to achieve by 2015. One goal is to cut the transportation of hazardous chemicals by 50 percent. By 2009 the number of ton-miles (one ton of freight moved one mile) dropped from 1,400 million to 851 million since 2005 when measurement began. Walmart has asked its 100,000 suppliers to calculate the full environmental costs of each product it sells. It plans to tag store items with a simple sustainability index.

CONCLUDING OBSERVATIONS

In the previous chapter we described how industrial activity harms the environment and explained major regulatory programs to mitigate the damage. In this chapter we looked more deeply into the methods underlying this regulation. We began with a story about railyard diesel exhaust to illustrate one molecular-level danger to human health in modern industrial society. Then we explained how such a danger is evaluated and how a regulatory approach is then chosen to mitigate it. We also give some illustrations of how companies are greening their operations.

The discussion emphasizes the strengths and weaknesses of both science-based risk assessment and a range of regulatory approaches. Command regulation is the most powerful, effective tool in the regulatory arsenal. Market approaches are more flexible and less expensive but have permitted companies to pay and continue polluting. Voluntary regulation is inexpensive, but often accomplishes little. Finally, voluntary corporate action can bring slow and modest, but widespread change. As thousands of companies around the world set out to measure their environmental impact and reduce it, their actions may be sufficient to slow the growth of pollution, if only in a small way.

In sum, much progress has been made in protecting both ecosystems and human health. Notwithstanding, the sum of human action is so far inadequate to avert rising global damage. The consequences of this failure will fill future chapters.

Harvesting Risk

This is the story of a scavenger. Ascending on shrewdness, Amvac Chemical Corporation has expanded from a small Los Angeles pesticide company into a multinational corporation with revenues of more than $200 million.[1] It keeps expanding. In the last several years it has added five new product lines, two foreign sales offices, and two factories.

Amvac's growth is based on a singular strategic vision. It stands apart from agrichemical industry giants as they create and market new pesticides. It waits while the big companies build brand names and markets for these molecules. Then, when a product has aged or become less attractive to the original owners, Amvac offers to buy it. Once Amvac has the brand rights, it pushes sales in remaining niche markets or, sometimes, opens new markets by registering additional crop applications or exporting to foreign customers. In this way, as the global behemoths shed shrinking, failing, dangerous, or obsolete products,

[1] Amvac operates as a wholly owned subsidiary of a holding company named American Vanguard Corporation and is the company's main business.

the opportunistic scavenger captures fresh streams of revenue.

Amvac's goal is to acquire one or two niche product lines every year and in recent years it has done so. Big agricultural chemical companies discard pesticides for many reasons. As they integrate businesses after mergers, they may decide to drop redundant brands. When Novartis and AstraZeneca merged their agribusinesses in 2000, Amvac got two vegetable crop insecticides and a herbicide used in cranberry fields. Sometimes big companies cast aside products when sales are inadequate. In the 1990s DuPont created a soil insecticide named Fortress that effectively controls corn rootworms, the most destructive cornfield pests. But sales missed targets. So Amvac bought Fortress in 2000 and with it entry into the Midwest corn market. It built a new sales team and within a year Fortress sales that would have disappointed DuPont were adding materially to Amvac's revenues.

In some cases products have matured or become outdated. Larger firms at the forefront of advancing biotechnology are shifting their focus from chemical poisons to genetic lines of insect-resistant seeds. As they do, Amvac has acquired older pesticides, including some organophosphates belonging to a family of pesticides that is on the way out in the industry.

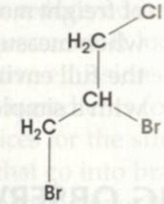
Organophosphate molecules are effective pest killers and still widely used, but they are being superceded by both biotechnology products and by pesticides that better target pests and pose less risk. Some organophosphates are exceptionally dangerous to human health in terms of both acute and long-term exposures. A few are so toxic that they defy safe use, leading to personal injury lawsuits and regulatory crackdowns. Even in these instances Amvac sees opportunity. Faithful to the logic of its niche strategy, it has acquired rights to some of the most poisonous brands even as bigger companies cease their production. Then, it has sought new markets for them while defending them against alarmed regulators. Here are several stories about Amvac pesticides.

DIBROMOCHLOROPROPANE

Dibromochloropropane, or DBCP, is a chemical soil fumigant that kills parasitic worms feeding on fruit and vegetable crops (see Exhibit 1). It belongs to an aging class of organochlorine pesticides developed after World War II. Most of these molecules, which include DDT, are used now only in a few poor countries. They are stable molecules that linger in the environment and accumulate in human tissue. Beginning in the 1960s, DBCP was used in the United States and around the world on cotton, potato, banana, and pineapple crops. Dow and Shell manufactured it until 1977, when it was discovered to cause sterility in men at formulating plants.[2]

EXHIBIT 1 Dibromochloropropane

Source: National Institutes of Health, http://ntp.niehs.nih.gov/ntp/htdocs/structures/2d/TR028.gif.



Chemical Formula: $C_3H_5Br_2Cl$

Regulators immediately banned DBCP in California. On the day of the ban, Dow and Shell suspended its production and marketing. Although the story of worker infertility got extensive media coverage, many farmers still wanted to use DBCP. So Amvac stepped in to fill the void and became its leading maker. Due to bad publicity, domestic sales had fallen, so Amvac supplied foreign markets. It replaced Dow and Shell as a supplier for Dole Fruit and other companies using DBCP on large banana plantations in Central America and the Caribbean.

By 1979 the EPA had gathered extensive data on DBCP and concluded it had no safe uses. The agency proposed a ban. Amvac disputed the evidence and finally persuaded regulators to allow an exception for Hawaiian pineapple crops. It agreed to promote safe application and to monitor local groundwater for contamination. In 1983 Amvac applied for a temporary exemption from the regulatory ban in South Carolina so that DBCP could be used in peach orchards. The EPA agreed, basing its decision on university research sponsored by Amvac. Outraged environmentalists stopped the exemption with a lawsuit.[3] Two years

[2] Helen Dewar, "Workers at Pesticide Plant Found Sterile in California Tests," *The Washington Post*, August 5, 1977, p. A3.

[3] Ward Sinclair, "The Return of DBCP," *The Washington Post*, February 1, 1983, p. A1.

later, Hawaiian wells for drinking water were found contaminated by runoff from pineapple fields and the EPA finally banned all applications of DBCP anywhere in the United States.

By this time evidence of DBCP's dangers was strong and before the end of the decade a substantial body of research backed up the agency's decision. DBCP causes sterility in both animals and humans. Studies showed that men who inhaled small concentrations produced fewer sperm and were more likely to father girls. With longer exposures their testicles atrophied and sperm production fell to zero.

DBCP is so dangerous that current regulations set safe inhalation exposure for workers at one part per billion over an eight-hour day. DBCP also causes cancer in rats and is classified as "reasonably anticipated" to be a human carcinogen. Like other molecules in the organochlorine family, it persists in the environment. After application it slowly evaporates from soil or surface water into the air, where it resides for up to three months before breaking down. In soil, it can linger for several years.[4]

DBCP bore a crop of lawsuits for Amvac. Villagers who drank contaminated water in Hawaii sued Amvac, along with Dow, Shell, and Dole Food Company, after researchers found unusual clusters of breast cancer, heart defects, learning disabilities, and infertility among them.[5] Amvac settled its part of the case for $500,000 in 1999. With the others, it was also named in multiple actions by Nicaraguan plantation workers charging that the companies continued to sell DBCP in developing nations after it was banned in the United States despite knowing it caused sterility, testicular atrophy, and other injuries.

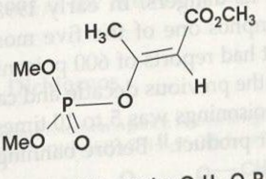
These workers opened a broad legal war against Amvac and the others but it has fizzled. The last of the banana workers cases were dismissed in 2010 after the discovery that attorneys had engaged in widespread fraud, recruiting plaintiffs by sending men to labs that faked sperm tests to show sterility.[6] Another case, by banana and pineapple workers in the Ivory Coast, alleged the companies used DBCP for genocide and crimes against humanity. However, because the workers could not prove the companies intended to commit genocide they lost the decision.[7]

MEVINPHOS

Mevinphos (see Exhibit 2) is an insecticide developed by Shell in 1954.[8] It protects fruit and vegetable crops against aphids, leaf miners, mites, grasshoppers, cutworms, and caterpillars. It belongs to the organophosphate family of pesticides, which disrupt transmission of nerve impulses by blocking the action of critical enzymes. Organophosphates are unstable and break down rapidly in the environment so growers can use them to combat infestations that come just before harvest. Their drawback is an extreme and broad toxicity. They poison any living organism with a nervous system, including humans, fish, and animals. Consequently, large agrichemical companies are moving away from organophosphates to newer molecules that not only are less toxic but also more narrowly target pests.

EXHIBIT 2 Mevinphos

Source: Environmental Protection Agency, *Report on Tolerance Reassessment Progress and Risk Management Decision*, EPA 738-R-00-014, September 2000, p. 4.



Chemical Formula: $C_7H_{13}O_6P$

[4] U.S. Public Health Service, Agency for Toxic Substances and Disease Registry, *Toxicological Profile for 1,2-Dibromo-3-chloropropane* (Washington, DC: Public Health Service, September 1992); and Environmental Protection Agency, "1,2-Dibromo-3-chloropropane (DBCP) (CASRN 96-12-8), Integrated Risk Information System, at www.epa.gov/iris/, last revised October 28, 2003.

[5] Malia Zimmerman, "Water Quality Lawsuits Target Chemical and Agricultural Giants," *Pacific Business News*, October 8, 1999, p. 4.

[6] Steve Stecklow, "Fraud by Trial Lawyers Taints Wave of Pesticide Lawsuits," *The Wall Street Journal*, August 19, 2009, p. A1.

[7] *Abagninin v. Amvac*, 545 F. 3d 733 (2008).

[8] Mevinphos is technically an alpha or beta isomer of 2-carbomethoxy-1-methyl-vinyl dimethyl phosphate. Exhibit 2 shows alpha-Mevinphos. It has been sold under the trade name Phosdrin in at least four formulations. See Department of Pesticide Regulation, *Mevinphos: Risk Characterization Document* (Sacramento: California Environmental Protection Agency, June 30, 1994), p. 5.

After their introduction in the 1950s, organophosphates such as mevinphos were second choice pesticides. Growers preferred to use organochlorines until concerns about the inability of nature to break them down turned the market toward the shorter-lived organophosphates. By the late 1970s mevinphos was being sold in large quantities. DuPont held the rights to it. Amvac manufactured some mevinphos at its Los Angeles factory under contract for DuPont.

As mevinphos was used more widely, concerns about its safety grew. Multiple reports of farmworkers sickened by contact with it alarmed regulators. In 1978 the EPA restricted its use, so that only certified applicators could spray it on fields.

In 1988 the leader of the United Farm Workers, César Chávez, held a 36-day hunger strike to protest the use of organophosphate pesticides, including mevinphos, on grapes. He believed their use recklessly endangered the health of field hands. In fact, subsequent research confirms multiple effects in exposed farmworkers. For example, after prolonged exposure they show deficits in coordination, information processing, and other neurologic symptoms.[9] Children of Latina women in agricultural communities show impaired behavioral development.[10]

A few months after Chávez's hunger strike, DuPont ended mevinphos production. Amvac, however, was willing to embrace it. DuPont sold its exclusive rights to Amvac, which continued to sell mevinphos even as the EPA was gathering further evidence of its dangers. In early 1993 the agency called mevinphos one of the five most dangerous pesticides. It had reports of 600 poisonings and five deaths over the previous decade and calculated that the rate of poisonings was 5 to 10 times higher than for any other product.[11] Before banning mevinphos, however, it allowed Amvac to suggest risk-reduction measures that might allay its concerns.[12]

César Chávez, president of the United Farm Workers, receives a small piece of bread from Ethel Kennedy, widow of former Attorney General Robert Kennedy. Her symbolic action ended a 36-day hunger strike in 1988 undertaken to protest the exposure of grape pickers to mevinphos and other pesticides.
Source: © Bettmann/CORBIS.

Meanwhile, Amvac saw a new market opportunity. Large agrichemical companies had taken several other organophosphate insecticides off the market to placate the EPA. Apple growers in Washington were concerned that they would be unable to fight off ruinous late-season aphid infestations. Amvac believed that mevinphos could be safely used, even though regulators in Washington allowed pesticides to be mixed in open vats before spraying. Other states, for example California, required closed-vat mixing. Amvac negotiated with Washington's regulators, promising to train workers in the use of respirators and safe application.

That summer there were immediate reports of mevinphos poisonings in Washington orchards. In all, there were 26 documented cases. No one died, but seven workers were hospitalized. Martin Martinez, who later sued Amvac, was told to mix a concentrate of mevinphos with water, load a sprayer, and apply it. "My vision started to get blurry," he said. "I started to get nauseous. I began to vomit."[13] These are classic symptoms of organophosphate poisoning. He was hospitalized for seven days.

[9] Joan Rothlein et al., "Organophosphate Pesticide Exposure and Neurobehavioral Performance in Agricultural and Nonagricultural Hispanic Workers," *Environmental Health Perspectives*, May 2006.

[10] Brenda Eskenazi et al., "Organophosphate Pesticide Exposure and Neurodevelopment in Young Mexican-American Children," *Environmental Health Perspectives*, May 2007.

[11] David Holmstrom, "Control of Farm Chemicals Needs Overhaul," *Christian Science Monitor*, October 6, 1994, p. 7; and *Andrews Litigation Reporter*, "Settlement Reached between Farm Workers and Pesticide Maker," May 31, 2002, p. 1.

[12] Environmental Protection Agency, *R. E. D. Facts: Mevinphos*, EPA-738-F-94-020, September 1994, p. 2.

[13] Arthur C. Gorlick, "Orchard Workers File Lawsuit," *Seattle Post-Intelligencer*, September 13, 1995, p. B4.

Martinez and others had been trained. They were supposed to wear respirators, face shields, and chemical-resistant clothing. However, mevinphos is so toxic that even a slight mistake is very dangerous. Some poisonings took place in hot weather, when applicators shed articles of clothing. Absorption through skin is rapid. Ten drops of concentrate spilled on flesh is a lethal exposure for a 150-pound person. Inhalation is also dangerous. A 150-pound person who failed to adjust a respirator properly would begin to show effects such as dilation of the pupils after breathing little more than one ten-thousandth of an ounce.[14]

Once inside the body, mevinphos interferes with the regulation of nerve impulses, disrupting the central nervous system and major organs. One of the earliest symptoms of exposure is compromised reasoning ability, which compounds the danger because a worker loses the ability to appreciate an urgent peril. High exposure eventually leads to irregular heart beat, convulsions, unconsciousness, and death. Breathing air with only 10 parts per million of mevinphos over one hour killed 50 percent of rats in one study.[15]

Three orchard workers, including Martinez, sued Amvac alleging that mevinphos was a defectively designed product. It was so unsafe, they argued, that it should never have been marketed for orchard use. At one point, the case went to the Supreme Court of Washington, which handed down a ruling on a point of product liability law. It noted that a pesticide, by its nature, was a dangerous product. Its costs to society could be eliminated only by sacrificing the lethal qualities that made it effective. The question was, when was a pesticide too dangerous, too lethal?

The court ruled that a pesticide could be sold as an unavoidably unsafe product if its advantages greatly outweighed the risks posed by its use.[16] It would be up to a lower court to decide if mevinphos passed this test. However, Amvac ended the lawsuit by settling with the orchard workers for approximately $750,000. According to one of their lawyers, Amvac "was willing to sacrifice farmworker's lives and safety for profits. It had to be held accountable."[17]

Meanwhile, Amvac defended mevinphos before the EPA but was unable to convince the regulators it could be safely used. All pesticides must have EPA registration for legal use. With the agency prepared to cancel registration of mevinphos, Amvac voluntarily requested its withdrawal.

The EPA now classifies mevinphos as hazardous waste and bans any agricultural use in the United States. Nevertheless, Amvac continued to sell it in Mexico, South Africa, and Australia.[18]

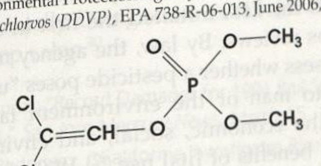
DICHLORVOS

Dichlorvos, or DDVP (see Exhibit 3), is another aging member of the organophosphate family abandoned by the big agrichemical firms but still sold by Amvac. It was synthesized in the late 1940s and first marketed by Shell in 1961. It targets a broad range of insect pests including flies, fleas, ticks, mites, cockroaches, chiggers, caterpillars, moths, and weevils. Like other members of the organophosphate family, it disrupts transmission of nervous impulses.

At first DDVP had many agricultural applications. It was used in silos, hoppers, and tobacco warehouses to protect stored crops. In feedlots it was sprayed over animals to control fleas and ticks. Farmers mixed it in feed to deworm horses and pigs. Canning and packing facilities applied it to control insects. It was sprayed over wide areas for mosquito control and used as the active ingredient in popular

EXHIBIT 3 Dichlorvos

Source: Environmental Protection Agency, *Interim Reregistration Eligibility Decision for Dichlorvos (DDVP)*, EPA 738-R-06-013, June 2006, p. 11.



Chemical Formula: $C_4H_7C_{12}O_4P$

[14] Based on a "no observable effect level" in humans of 0.025 mg/kg, see Department of Pesticide Regulation, *Mevinphos: Risk Characterization Document*, p. 1.

[15] Ibid., p. 1.

[16] *Guzman v. Amvac Chemical Corporation*, 141 Wn.2d 493, at 509–10.

[17] Co-lead counsel Richard Eymann, quoted in "Precedent-Setting Farm Worker Pesticide Poisoning Suit Settles," *Public Justice*, Summer 2002, p. 11.

[18] T. Christian Miller, "Pesticide Maker Sees Profit When Others See Risk," *Los Angeles Times*, April 8, 2007, p. A1.

household insecticides. Resin strips impregnated with DDVP were placed in homes, public buildings, buses, aircraft, and ships to control pests such as cockroaches.

By the late 1970s many companies manufactured it, including Amvac. Total annual output in the United States rose as high as 4.2 million pounds.[19] Then, scientific studies raised doubts about its safety and by the early 1980s annual use fell below 1 million pounds.

Like all organophosphate pesticides, dichlorvos poisons the nervous system. Acute exposure causes perspiration, nausea, vomiting, diarrhea, headache, and fatigue. Long-term, low exposures can also bring on these symptoms. Very high exposures cause convulsions and loss of consciousness. However, compared with similar pesticides, dichlorvos does not pose exceptional risks from contact during application. The main concern has been that it may cause cancer in humans.

Studies show it is an animal carcinogen. Rats and mice that inhale or ingest high doses of dichlorvos produce thyroid, adrenal, pituitary, and stomach tumors. Epidemiological studies suggest that dichlorvos can also cause cancer in humans. One showed a significantly elevated risk of leukemia among farmers in Iowa and Minnesota who used dichlorvos, even when they had used it as long as 20 years in the past. Another showed an elevated rate of non-Hodgkin lymphoma among Nebraska women who had used dichlorvos. Still a third found a "significantly increased risk" for brain cancer among children in homes using Amvac's No-Pest Strips.[20] The statistical power of these and similar studies is weak because they are based on small numbers of people with likely exposures to multiple pesticides. Nevertheless, they have ominous implications.

In 1980 the EPA initiated the first in a series of dichlorvos reviews. By law, the agency must regularly reassess whether a pesticide poses "unreasonable risk to man or the environment taking into account the economic, social, and environmental costs and benefits of [its] use."[21] With this criteria, even very dangerous pesticides can stay on the market if their risks are controlled and outweighed by their utility.

After the first review in 1980, the EPA classified dichlorvos as a "suspected" human carcinogen that acted by mutating genetic material in cells. A second review seven years later led to its classification as a "probable" human carcinogen. This bad news caused the market for it to shrink even more. One by one, agrichemical firms stopped selling it until only Amvac was left. The company was determined to keep it on the market.

Amvac has a large budget for supporting the registration of its older pesticides in the face of doubts by increasingly skeptical regulators. In 1995 the EPA sought to cancel most uses of dichlorvos. Amvac responded by submitting supportive data, but the agency found it unpersuasive. So Amvac agreed to cancel almost two dozen applications, including aerial spraying and all uses in restaurants and food processing plants.[22]

Meanwhile, Congress in 1996 required the EPA to review pesticides under a new, tougher standard that required a "reasonable certainty of no harm."[23] The agency finally finished its dichlorvos review in 2006. It allowed continued marketing, but further restricted its uses. Amvac agreed to cancel registration for more applications, including all home uses except impregnated resin strips. In 2010 it agreed to cancel five additional fogging and spray applications.[24]

Dichlorvos can no longer be applied on lawns and turf, in cracks and crevices, and with handheld foggers. In addition, dichlorvos-impregnated pest strips in homes are limited in size. Larger strips containing more than 16 grams can be used only in garages, sheds, and crawl spaces occupied less than four hours a day. They can be used in vacation homes and cabins only if the dwellings are vacated for four months after use. Smaller strips and flea and tick collars for cats and dogs that contain less than 16 grams of dichlorvos are still in use. According to the EPA, the air concentration of dichlorvos in a room where a

[19] Renu Gandhi and Suzanne M. Snedeker, "Critical Evaluation of Dichlorvos' Breast Cancer Risk," *Program on Breast Cancer and Environmental Risk Factors in New York State,* Critical Evaluation #7, March 1999, p. 1.

[20] Ibid., p. 3.

[21] Federal Insecticide, Fungicide, and Rodenticide Act of 1947 (as amended), 7 U.S.C §136(bb)(1).

[22] Environmental Protection Agency, "Dichlorvos (DDV); Deletion of Certain Uses and Directions," 60 FR 19480-19581, April 19, 1995.

[23] This was the Food Quality Protection Act of 1996.

[24] Environmental Protection Agency, "Product Cancellation Order for Certain Pesticide Registrations," 75 FR 26227, May 11, 2010.

dog or cat is wearing one of these collars averages less than one-fortieth of the exposure level at which poisoning symptoms are detectable.[25] Recently, Amvac has targeted customers trying to control bedbugs with ads for hanging dichlorvos-impregnated strips that release vapors into a room.

Exposure of the U.S. population to dichlorvos is estimated as infinitesimal, 0.000007 milligrams per kilogram of body weight each day.[26] Even so, regulators believed that dichlorvos residues in food posed a cancer risk to the general population and that there were unacceptable risks to the nervous systems of those who mixed, handled, and applied it. The greatest danger is from skin contact. Based on animal studies, estimates are that short-term absorption of as little as 0.25 ounce of dichlorvos through the skin would cause death in 50 percent of applicators weighing 150 pounds.[27] This makes dichlorvos one of the most toxic pesticides in use.

Inhalation toxicity is lower, but still greater than most other pesticides. Current EPA estimates are that inhaling 198 parts per million over an eight-hour period would be fatal to 50 percent of exposed adults. Overall, the EPA believed that these risks outweighed the benefits for all but a few remaining applications.

Meanwhile, other countries have banned dichlorvos. In 2002, the United Kingdom rejected evidence submitted by Amvac and suspended all uses. Angola, Fiji, Denmark, and Sweden have also banned it. Amvac continued exporting dichlorvos to Australia, Canada, and Mexico.

COSTS AND BENEFITS OF PESTICIDES

Poisonous agrichemicals have high social and environmental costs. Their use on crops and in homes causes tens of thousands of acute exposure injuries each year. Long-term exposure from residues in foods, drinking water, and soil causes an unknown number of chronic illnesses including cancer, birth defects, liver poisoning, and neurological deficits. Many pesticides, especially the older organochlorines and organophosphates, do not discriminate between pests and other forms of life. They kill wildlife and pets along with target insects. An accurate calculation of monetary losses from such problems is infeasible.

Accidents increase the cost burden. Years ago a Southern Pacific freight train derailed on a steep curve above the Sacramento River north of Mt. Shasta in California. One tank car carried 13,000 gallons of metam sodium, a herbicide manufactured by Amvac. The resulting spill virtually sterilized a long stretch of the river, annihilating life right down to the moss on the rocks. It killed 200,000 fish and wiped out a celebrated trout-fishing area.[28] Lawsuits claimed that Amvac failed to identify properly and label its shipment, and it agreed to pay $2 million, although it bore no responsibility for the train's derailment.

A later mishap with metam sodium is more typical of accidental exposures. In Arvin, California, 72 workers processing carrots and 178 town residents were sickened when metam sodium manufactured by Amvac drifted from fields where it was being sprayed.[29] The applicator paid a $60,000 fine.

If the costs of pesticide use are great, so are the benefits. The major benefit is availability of a bountiful, affordable food supply. Pesticides control fungal infections, insects, and weeds that would otherwise decimate U.S. crop yields. Without control measures, 50 to 90 percent of fruit and vegetable crops would rot from fungal infections before harvest. To protect them, growers use about 100 million pounds of fungicides annually. Doing so saves an estimated $13 billion in crop value.[30]

[25] Ibid., p. 165. This figure is based on a margin of exposure of 39 for infants, who are presumed more sensitive to dichlorvos vapor than adults. Margin of exposure is the ratio of the dose at a "no observable adverse exposure level" to an observed or estimated dose.

[26] Environmental Protection Agency, *Interim Reregistration Eligibility Decision for Dichlorvos (DDVP)*, EPA 738-R-06-013, June 2006, app. J, p. 151. There are 31,000 milligrams in one ounce.

[27] Ibid., table 4.1a, Guideline No. 870.1200, p. 123.

[28] Scott Thurm, "Record Damages for 1991 Rail Spill Settlement," *San Jose Mercury News*, March 15, 1994, p. A1.

[29] Robert Rodriguez, "California Investigates Rise in Pesticide-Caused Illnesses in 2002," *Fresno Bee*, February 27, 2004, p.1; and Miller, "Pesticide Maker Sees Profit When Others See Risk," p. A25.

[30] Statement of Jay Vroom, in *Review of the EPA Pesticide Program*, Hearings before the Subcommittee on Conservation, Credit, Rural Development, and Research of the Committee on Agriculture, U.S. House of Representatives, 109th Congress, 2nd Session, September 28, 2006, p. 50.

Pesticides kill mosquitoes, ticks, rats, and other vectors that carry illnesses such as the plague, Lyme disease, and encephalitis. They make human habitations more comfortable by controlling cockroaches, mold, mildew, termites, ants, and spiders.

Herbicides reduce soil erosion, save water, and reduce fuel and labor costs for growers. Their use facilitates increasingly popular no-till agriculture in which farmers poison weeds rather than plowing them under. With less plowing there is less erosion, which means lower water treatment costs, less flood damage, and larger reservoir capacity.

Herbicides also kill unwanted growth that competes with crops for water. Without them, crop protection would require as many as 1.1 million hours of hand weeding in peak growing season. The labor force to employ at this job does not exist. Organic farmers, who cannot use herbicides, spend $1,000 per acre weeding their crops compared with only $50 for growers using chemical weed controls. One study estimated the overall benefits of herbicides at $26 billion in 2005.[31]

Finally, pesticides preserve wildlife habitats and protect endangered species. Without their use vastly expanded acreage would be required to grow necessary food crops. More land would be converted from its native state to farms, ranches, plantations, and orchards.

So pesticides clearly have both great costs and great benefits. There are other methods for controlling agricultural pests, but they complement pesticides rather than replace them. Cultivation techniques such as tilling and crop rotation make environmental conditions less favorable for destructive organisms. Biological control methods include release of insect predators such as wasps, lacewings, or lady bugs and the spread of friendly bacteria that compete with damaging strains. In the 1990s, big companies launched bioengineered seeds and their use has soared. Some crops are bred to have insect-resistant traits. Others are genetically manipulated to survive specific herbicides, giving farmers more alternatives for fighting weeds that over time become resistant to popular chemicals.

The rise of biological alternatives has not ended long-term growth in pesticide sales, which have risen an average of 11 percent a year since 1995 and reached a high of $10 billion in 2007.[32] For the time being, pesticides are still needed to protect the food supply and quality of life to which Americans are accustomed. In the words of an agricultural researcher:

> [S]ome people want a total ban on pesticides, but they must be ready to accept termites in their houses, fleas in their carpets, moldy vegetables, food-borne toxins, food shortages with soaring prices, and outbreaks of long-forgotten diseases.[33]

AMVAC MOVES AHEAD

Amvac now has more than 40 pesticide brands. It manufactures them at four plants in California, Idaho, Missouri, and Alabama and sells them in the United States and through foreign sales offices in Costa Rica, Mexico, Brazil, Switzerland, and the United Kingdom.

Amvac emphasizes profitability. Three directors—its two founding entrepreneurs and the son of one founder, now president and CEO—own 22 percent of its stock. Compensation of its president and CEO, which was $806,303 in 2009, is based on four factors: "achieving financial results that equal or exceed" targets, introducing new compounds, controlling manufacturing costs, and defining "a clear vision and strategy."[34] The ongoing shift to biological pest controls sustains its strategy. As industry giants continue to discard older pesticides, they create opportunities for Amvac.

Amvac adopted a seven-page Code of Conduct and Ethics in 2006. It states: "[O]ur efforts are focused on achieving the business and personal ethical standards as well as compliance with the laws and regulations that are applicable to our business." It intends its code to "ensure decisions that reflect care for all of

[31] Ibid., p. 50.

[32] Bureau of the Census, *Statistical Abstract of the United States: 2010*, 129th ed., table 813.

[33] Keith S. Delaplane, "Pesticide Usage in the United States: History, Benefits, Risks, and Trends," Cooperative Extension Service, University of Georgia College of Agricultural and Environmental Sciences, *Bulletin 1121*, November 2000, p. 1.

[34] American Vanguard Corporation, *Notice of Annual Meeting and Proxy Statement*, April 27, 2010, pp. 18 and 21.

our stakeholders."[35] The only mention of the environment is this brief section.

> The Company is committed to doing all that it can to assist in minimizing the degradation of our natural environment. Accordingly, employees should always take care in disposing of any waste materials or releasing any discharges into the air or water and comply with all applicable regulations and procedures required by law and by Company Code. If an employee is unclear about what is required, he/she must not dispose of any material or release any discharges until he/she has determined what procedures apply.[36]

A recessionary climate beginning in 2008 weakened Amvac. Sales dropped as farmers had difficulty getting credit and distributors cut their inventories. But by cutting costs, reducing long-term debt, and cutting its dividend, the company maintained a strong balance sheet, positioning itself for renewed growth and predicting rising pesticide demand when prosperity returned.

Amvac's presence is a lesson in capitalism. Legal opportunities for profit elicit the requisite effort. Actions are justified by their overall utility. Doubtless Amvac's strategic thinkers would be inspired by the words of a Robert Frost poem.

> But a crop is a crop,
> And who's to say where
> The harvest shall stop?[37]

Questions

1. Does Amvac have an ethical strategy? Does it pursue its strategy in an ethical manner?
2. Do you believe that Amvac is faithful to its ethics code? Does the code adequately address the consequences of its operations? What might be added or changed to improve it?
3. Should the law prohibit Amvac and others from exporting pesticides barred from use in the United States?
4. Is the value to society of pesticides such as dibromochloropropane, mevinphos, and dichlorvos great enough to warrant the risks they pose?
5. If economic and market conditions remain favorable for Amvac's strategy, would you buy its stock?

[35] American Vanguard Corporation, *Code of Conduct and Ethics*, adopted March 8, 2006, at www.amvac-chemical.com., p. i.
[36] Ibid., p. i.
[37] "Gathering Leaves," in Edward Connery Lathem, ed., *The Poetry of Robert Frost* (New York: Holt, Rinehart and Winston, 1969), p. 235.

drop high-risk products such as off-road vehicles, medical implants, football helmets, drugs, and vaccines, some of which are valuable to society. An unknown number of new products and innovations never come to market because their liability potential scares manufacturers. In the pharmaceutical industry, funds that might go into developing new drugs are regularly diverted to litigation expenses. In other cases, liability insurance and litigation costs are simply passed on to consumers—like an extra tax on the products they buy. Sometimes liability costs even have the perverse effect of reducing safety. Extension ladders for home use now carry such a high price premium for product liability costs that many people just go on using deteriorating older ladders.[66]

CONCLUDING OBSERVATIONS

Consumerism is a word with two meanings. It refers both to an ideology and to a protective movement. In this chapter we discuss trends related to both meanings. First, consumerism as a way of life is spreading around the world because the conditions that support it are becoming more common. Where it is already established, it is strengthening its grip. Second, consumers in the United States are now more protected from injury, fraud, and other abuses than in the past because of stronger government regulation and more consumer-friendly common law doctrines.

These trends seem likely to continue. As the ideology of consumerism tightens its hold, responsible governments will expend more resources on issues raised by shopping for, purchasing, using, and displaying material objects. These issues will be more complex as populations grow, product choices expand, new technologies change products, and marketing becomes more amplified and pervasive.

[66] Michael Krauss, "Tort-Eating Contest," *The Wall Street Journal,* May 2, 2007, p. A20.

Alcohol Advertising

Anheuser-Busch had high hopes for Spykes. When the product was introduced in 2005, the giant brewer was losing market share to distilled spirits. In 2001 spirits makers had ended a long-standing voluntary policy against aggressive advertising. Liquor ads filled cable channels, then appeared on network affiliates. At NASCAR races lettering for Jim Beam and Jack Daniels appeared on the cars. More drinkers, notably young adults between 21 and 30 years old, found novelty in new brands, drinks, and mixes marketed by the distillers. Drinking tastes were changing. The trend in bars and clubs was moving away from domestic beers such as Anheuser-Busch's Budweiser.

Chairman August A. Busch III thought the company needed something "fun and new and innovative" to put into the hands of young drinkers.[1] That product was Spykes, a caffeinated malt liquor beverage that was 12 percent alcohol. It came in a 1.7-ounce bottle for \$0.75 or a 2-ounce bottle for \$1. Spykes included caffeine to capitalize on the popularity of mixing energy drinks with alcohol and it came in multiple flavors—Spicy Lime, Spicy Mango, Hot Melons, and Hot Chocolate. Drinkers could down it as a shot or experiment by mixing the flavors in beer or cocktails.

Anheuser-Busch tried to build the brand slowly through word of mouth at the local level. It set up a

[1] Quoted in Victor Reklaits, "Anheuser-Busch Unveils Product Aimed at 21- to 30-year Olds," *Daily Press-Newport,* December 2, 2005, p. 1.

brightly colored Web site with recipes for Spykes. "Try it as a shot. Spice up your beer. Invent a new cocktail. Mix two or more together for a new flavor."[2] Visitors downloaded music mixes, ringtones, and screen savers. A message board let users interact with the site. One exchange of ideas was, "I wonder if it still tastes good if you heat it up lol," followed by, "I'm gonna try putting one in the microwave . . . lol."[3]

By early 2007 Spykes had been rolled out in 32 states. Then a mighty eruption rose from the precincts of those self-appointed to protect the public from the evils of alcohol. It began with a press release from the Center for Science in the Public Interest, a watchdog group founded by Ralph Nader. In it, George A. Hacker, head of the group's alcohol campaign, unloaded a vicious attack on Spykes, calling it "the latest attempt by Anheuser-Busch to get children interested in alcohol." "This is a shameful ploy to market malt liquor to the Lunchables set," he said. "It's hard to imagine an adult purchasing this beverage, unless they were bringing it for a surprise date with Chris Hansen on Dateline NBC."

The evidence that Spykes targeted underage drinkers included its sweet flavors, the lack of age-verification and "teen-friendly" attractions on its Web site, and its caffeine (because energy drinks are popular with teenagers). Hacker called on the company to "immediately pull Spykes off of shelves, apologize to parents, and hope that in the meantime, no young person wraps his or her car around a tree after being Spyked once too often at the prom."[4]

The Center for Science in the Public Interest is at the forefront in a coalition of antialcohol groups that faults the alcoholic beverage industry for social problems caused by drinking. Others in this coalition piled on. Project Extra Mile, which fights underage drinking, expressed concern that minors could hide small Spykes bottles in pockets and purses.[5] Another leading antialcohol group, the Marin Institute, called the product "egregious."[6]

Anheuser-Busch was taken by surprise. "Frankly," said a spokeswoman, "we're perplexed at this criticism. These professional critic groups need to stop the fear mongering and focus on reality."[7]

Concern spread. The Michigan State Police put its officers on alert for small bottles of Spykes, especially in women's purses. A county coroner in Illinois warned parents to "check your teen on prom night" because Spykes can "fit easily into a tux jacket pocket or . . . a purse for prom night 'fun.'"[8] The attorneys general of 28 states wrote to Anheuser-Busch expressing "serious concern" about Spykes and its marketing. Soon after receiving this letter, the company gave up. Due to what it called "unfounded criticism" by "perennial anti-alcohol groups" it announced the end for Spykes.

In fact, Spykes was just the opening skirmish in a war over caffeinated alcoholic beverages. It was an important product innovation in a highly competitive industry. Its success had illuminated a lucrative niche market. In fact, Anheuser-Busch had two similar caffeinated brands, Tilt and Bud Extra. MillerCoors was readying a brand named Sparks. And by 2008 more than two dozen smaller companies marketed products with colorful names such as Liquid Charge, Max Fury, Evil Eye, Joose, Four Loco, and Moonshot.

This proliferation was a red flag for antialcohol activists who felt caffeinated alcoholic beverages posed serious risks. These drinks contained less caffeine than a cup of coffee and met federal guidelines of 200 parts per million or less for caffeine in soft drinks. Nonetheless, the critics believed that caffeine stimulated drinkers, leading them to drink more and leaving them less aware they were impaired by alcohol. Studies confirm this. A professor in Florida, for example, found that patrons in a college bar district who consumed alcohol mixed with energy drinks were three times more likely to leave a bar highly

[2] Donna Leinwand, "Beermaker Urged to Pull Spykes," *USA Today*, April 10, 2007, p. A3.

[3] Quoted in Kari Huus, "A Booze Buzz for Teenyboppers?" MSNBC, April 3, 2007 at www.msnbc.msn.com/id/17862137/37273872.

[4] "CSPI Urges Nationwide Recall of Spykes 'Liquid Lunchables,'" Center for Science in the Public Interest, April 4, 2007, at www.cspinet.org.

[5] Jim Osborn, "Tiny Flavored Drink a Worry," *Columbus Telegram*, May 4, 2007, p. 1.

[6] David Lazarus, "Spykes Is No Longer Buzzing," *San Francisco Chronicle*, May 27, 2007, p. G1.

[7] Francine Katz, Anheuser-Busch vice president of communications, quoted in "Anheuser-Busch Product Criticized," *AFX News Limited*, April 6, 2007.

[8] Blog of Dr. Richard Keller, "Live from the Coroner's Office: Spykes, May 4, 2007, at http://coronerlakecountyil.blogspot.com/.

intoxicated and four times more likely to drive home.[9] Critics thought marketing claims duped young drinkers into complacency and they engaged in more risky behavior, from sexual aggression to drunk driving. The products were dangerous, their marketing execrable.

After Spykes, Anheuser-Busch was an easy target. In 2008 it was attacked by 11 state attorneys general who alleged that the labels on Tilt and Bud Extra failed accurately to disclose health risks and that ads for the products illegally targeted minors. The company agreed to reformulate the products, removing caffeine. MillerCoors was next. The attorneys general subpoenaed documents on Sparks, a new caffeinated brand MillerCoors was prepared to market. The Center for Science in the Public Interest sued the company, alleging it used unapproved ingredients that posed health and safety risks for consumers. Eventually MillerCoors gave in and agreed to remove caffeinated ingredients from Sparks.

Next in line was Constellation Brands, which sold a caffeinated schnapps, named Wide Eye. It was advertised with images of a woman boxer. One ad said, "this is your wake-up call." Another stated: "When you party with the world's first caffeinated schnapps it'll seem like the rest of the world is sleepwalking through life."

After receiving complaints from "consumers," the Federal Trade Commission issued a complaint against Constellation Brands, accusing it of saying "expressly or by implication, that consumers who drink Wide Eye will remain alert when consuming alcohol," and charging the statements were "false and misleading."[10] In a settlement the company agreed to stop making misleading claims. In fact, it had already stopped producing the brand.

Late in 2009 the Food and Drug Administration, responding to pressure from activists, sent a letter to 27 companies still making caffeinated alcoholic beverages asking them to explain why they believed caffeine is a safe ingredient. The agency reminded the companies that the Federal Food, Drug, and Cosmetic Act gave it jurisdiction over ingredients added to drinks and that unless the companies provided data showing caffeine was "generally recognized as safe," it had the power to ban its use.[11]

They failed to do so and a year later the FDA notified them that the caffeine added to their beverages was an "unsafe food additive." The agency cautioned consumers to avoid caffeinated brands. Some of the companies continued to market them anyway, inviting the FDA to proceed toward a ban. If it does, it will write the final chapter in the caffeinated alcoholic brand story.

No matter, the industry and its opponents carry on a ceaseless cat-and-mouse game in which companies find new product and marketing innovations to replace initiatives blunted by critics and regulators. A new fight will emerge.

THE ATTACK ON ALCOHOL MARKETING

In the late 1800s temperance groups launched a noble crusade against the evils of alcohol. Eventually, they dragged the nation into a brief Prohibition era. In 1919 the Eighteenth Amendment banned production and sale of "intoxicating liquors," but the widely evaded ban lasted only until 1933, when the Twenty-First Amendment repealed it. Since then, prohibition attitudes have faded, but not vanished.

Since the end of Prohibition the majority of Americans have been drinkers. In a 1939 Gallup poll 58 percent of adults reported they drank alcohol. The number is a little higher today, 64 percent in a 2010 Gallup poll, and virtually unchanged over a decade.[12] Of the 33 percent who abstain about a third are neoprohibitionists who believe that drinking alcohol "can never be justified."[13]

The alcoholic beverage industry must live with these opponents. Although prohibition is a moribund idea, a strong, well-organized antialcohol movement marches on. Its strength lies in dozens of church,

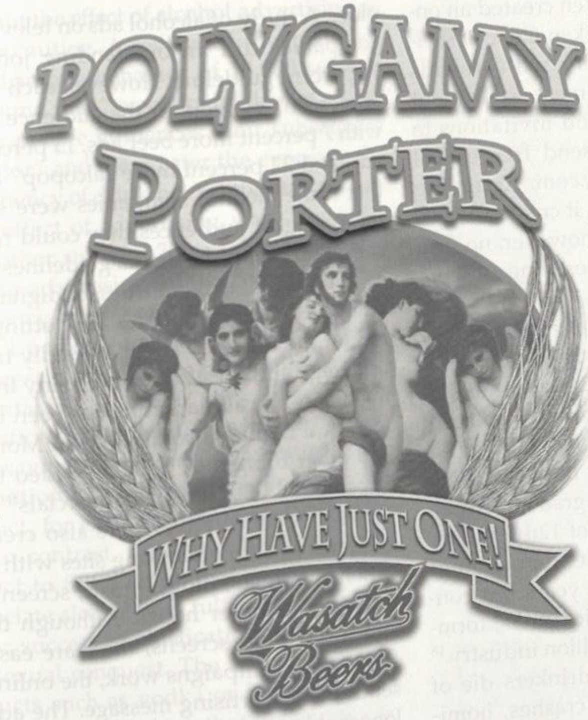
[9] Dennis L. Thombs, et al., "Event-Level Analysis of Energy Drink Consumption and Alcohol Intoxication in Bar Patrons," *Journal of Addictive Behaviors* 11, no. 4 (2009).

[10] Federal Trade Commission, Complaint in the matter of Constellation Brands, Inc., No. C-4266, (2009), pp. 2–3.

[11] See, for example, the letter to City Brewing, undated, at www.fda.gov/Food/FoodIngredientsPackaging/ucm190387.htm.

[12] Gallup Poll, "Alcohol and Drinking," July 8-11, 2010, at http://www.gallup.com/poll/1582/alcohol-drinking.aspx.

[13] Princeton Survey Research Associates International, "Pew Forum 10 Nation Survey of Renewalists," USPSRA, 100506RENEW R29F, November 7, 2006.



Polygamy Porter, a brand marketed by Wasatch Brewing Co., is a parody of the Mormon custom, now banned, of taking multiple wives. The ad campaign features the slogan "Why have just one!" This kind of appeal is condemned by the antialcohol movement for encouraging more consumption. Source: Courtesy of Wasatch Brew Pub.

health, consumer, and citizens' groups such as Mothers Against Drunk Driving. Its greatest successes have been getting all states to raise the legal drinking age to 21 and establishing a national drunken-driving standard of .08 blood alcohol content. It persists in trying to ban or restrict alcoholic beverage advertising. The movement's indictment against alcohol ads is based on four beliefs.

First, advertising increases consumption. Many ads are designed to attract new drinkers and promote additional drinking. Miller Lite's classic "Tastes Great–Less Filling" spots attempted to reposition beer as a competitor to soft drinks, telling consumers that light beer is a low-calorie drink that can be consumed more often than regular beer. The Michelob beer campaign based on the slogan "Put a little weekend in your week" encouraged weekend social drinkers to think of all days of the week as drinking occasions. And Polygamy Porter states, "Why Have Just One!"

Studies of the effect of advertising on consumption produce mixed evidence. Generally, national studies find no correlation between overall spending for alcohol ads and consumption.[14] The number of drinkers in the United States reached an all-time high of 71 percent in 1976, and per capita consumption reached its all-time high of 28.8 gallons a year in 1981. Although ad spending by the industry has steadily risen since then, the percentage of drinkers and per capita consumption have fallen. Some studies of local areas and small groups show that increased advertising does raise consumption. For example, a study of 139 women in Central Harlem found that alcohol dependence and abuse were associated with the density of outdoor alcohol ads in their neighborhoods.[15] Specific ad campaigns may

[14] See Henry Saffer, "Studying the Effects of Alcohol Advertising on Consumption," *Alcohol Health & Research World* 20, no. 4 (1996); and Hae-Kyong Bang, "Analyzing the Impact of the Liquor Industry's Lifting of the Ban on Broadcast Advertising," *Journal of Public Policy & Marketing,* Spring 1998.

[15] Naa Oyo A. Kwate and Ilan H. Meyer, "Association Between Residential Exposure to Outdoor Alcohol Advertising and Problem Drinking Among African American Women in New York City," *American Journal of Public Health,* February 2009.

also be successful. Recently, Heineken created an online virtual universe named Heineken City. Participants could buy apartments there with awards earned from playing branded games. Apartment owners received "keys" by mail and invitations to special events. They also could send free e-mail through a special domain, @heicity.com. According to the agency behind the campaign, it created 10,000 new Heineken drinkers.[16] Overall, however, no firm conclusion about the effect of advertising on consumption is warranted.

Second, ads encourage underage drinking. Underage alcohol consumption is a serious problem. Survey data show that by the 12th grade 72 percent of students have experimented with alcohol and 55 percent have been drunk at least once. Binge drinking, defined as five or more drinks in a row in the previous week, is reported by 8 percent of 8th graders, 16 percent of 10th graders, and 25 percent of 12th graders. About 40 percent of college students report binge drinking.[17] Overall, youth under 21 years old consume about 20 percent of all alcoholic drinks, forming an $8 billion market for the $40 billion industry.[18]

Each year some 5,000 underage drinkers die of alcohol-related injuries, most in car crashes, homicides, and suicides. Underage drinking is associated with academic failure, risky sexual behavior, and illicit drug use. New evidence shows that alcohol has pernicious effects on the developing adolescent brain.[19]

There is little proof that alcohol advertisers target minors in a calculated way, but there is enough evidence on which to base at least some suspicion. For example, all three segments of the alcohol industry—beer, wine, and distilled spirits—have agreed to voluntary media guidelines that require companies to buy ad placement only when at least 70 percent of the audience is expected to be 21 years of age or older. A study of alcohol ads on television found that companies did an outstanding job following the 70 percent guideline. However, each 1 percent rise in adolescent viewers in the audience was associated with 7 percent more beer ads, 15 percent more spirits ads, and 22 percent more "alcopop" ads, suggesting that some alcohol companies were seeking at least the youngest audiences they could reach while still complying with the media guidelines.[20]

In addition, expenditures for digital marketing are rising. Alcohol companies are putting more alcohol ads on the Internet, a realm heavily trafficked by an underage audience. There are many Internet marketing tactics. Viral marketing has been used for Miller Lite, Bud Light, Absolut, Captain Morgan, Smirnoff, and other brands. A YouTube video titled "Banned Super Bowl 2007 Bud Commercials" had 9 million views.[21] Alcohol advertisers also create sponsored sites and social networking sites with games, applications, widgets, blogs, music, screen savers, drink recipes, and other hooks. Although they often use age verification screens, these are easily bypassed. When viral campaigns work, the online community sends the advertising message. The advertiser is no longer able to screen recipients for age.

Activists claim that companies target underage drinkers not only with advertising but also with products designed to attract youth. These include flavored malt beverages like Spykes, often called "alcopops," single-serving vodka and tequila cocktails with names such as Yellin Melon Balls and Blue-Dacious Kamikaze, and novelty products such as cups of strawberry gelatin containing vodka. Other questionable marketing gimmicks include spring break promotions, brand placements in films seen by children, and brand logos on T-shirts and toys. A recent study showed that elementary school children who played with alcohol-themed toys tended to start drinking earlier.[22]

16 "Heineken: "Heineken City," *Advertising Age*, September 15, 2008, p. S4.

17 Figures are from Lloyd D. Johnson, et al., *Monitoring the Future: National Survey Results on Drug Use*, 1975–2008, Vol. II (Bethesda, MD: National Institutes of Health, 2009), pp. 22–23.

18 Leslie B. Snyder, et al., "Effects of Alcohol Advertising Exposure on Drinking among Youth," *Archives of Pediatric and Adolescent Medicine*, January 2006, p. 18.

19 Department of Health and Human Services, *The Surgeon General's Call to Action to Prevent and Reduce Underage Drinking: 2007* (Rockville, MD: Office of the Surgeon General, pp. 1–11 and 19–20.

20 Paul J. Chung, et al., "Association Between Adolescent Viewership and Alcohol Advertising on Cable Television," *American Journal of Public Health*, March 2010, p. 555.

21 Jeff Chester, Kathryn Montgomery, and Lori Dorfman, *Alcohol Marketing in the Digital Age* (Oakland, CA: Public Health Institute, May 2010), p. 10.

22 Erica Weintraub Austin, "Why Advertisers and Researchers Should Focus on Media Literacy to Respond to the Effects of Alcohol Advertising on Youth," *International Journal of Advertising* 25, no. 4 (2006), p. 542.

Research about the effect of alcohol advertising on youth points to caution. A review of seven studies following the drinking behavior of 13,000 subjects aged 10 to 26 found that "exposure to alcohol advertising in young people influences their subsequent drinking behavior" and the greater the exposure the greater the frequency of drinking. Yet the study counseled that the effect of advertising was "generally modest."[23] Another study of 200 adolescents found that exposure to advertising influenced subsequent drinking frequency, but very little. It was responsible for only about 1 percent of variation. Peer influence was the strongest factor in drinking behavior, followed by parental influence.[24]

Third, sophisticated lifestyle advertising used by alcohol makers is manipulative because it locks into inner drives. Informational advertising presents details about a product, for example, its price, availability, and quality. In contrast, lifestyle advertising positions a product to fulfill emotional needs. Pictures and copy associate alcohol with fulfillment of desires for popularity, success, sophistication, rebellion, romance, and sexual conquest. The ads endow commodity products such as vodka or lager beer with brand images. Then by drinking that brand, the consumer adopts and projects the brand image. These ads convey little or no objective information about the beverage, only an emotional theme. Sexual images are a stable of alcohol marketing. However, one study of alcohol ads in magazines during a 14-year period found that other appeals predominated over sexual imagery. In *Life*, for example, prestige and social acceptance were more frequent themes.[25] Whatever the image, critics believe that since lifestyle ads play on emotion, they are highly manipulative. Consumers who respond to them are being tricked into fulfilling inner needs by drinking.

[23] Lesley A. Smith and David R. Foxcroft, "The Effect of Alcohol Advertising, Marketing and Portrayal on Drinking Behavior in Young People: Systematic Review of Prospective Cohort Studies," *BMC Public Health*, February 2009, p. 11.

[24] Brian R. Kinard and Cynthia Webster, "The Effects of Advertising, Social Influences, and Self-Efficacy on Adolescent Tobacco Use and Alcohol Consumption," *Journal of Consumer Affairs*, March 2010, p. 39.

[25] Geng Cui, "Advertising of Alcoholic Beverages in African-American and Women's Magazines: Implications for Health Communication," *Howard Journal of Communications*, October 2000, p. 288.

Fourth, alcohol advertising is targeted not only at young drinkers but, sometimes inappropriately, at other groups too. Critics object, for example, to endless ads for malt liquors in inner-city black neighborhoods and in black media. Malt liquor has a higher alcohol content than regular beer, and advertisements for it appeal to drinkers seeking inebriation. United States Beverage Company faced this criticism when it introduced a new brand named Phat Boy with graffiti-style ads for a "new malt liquor with an attitude." Phat Boy came in 40-ounce bottles, each having as much alcohol as a six-pack of regular beer. After an outcry by activists, the company dropped the brand. Hispanics are also targets. Perhaps because 40 percent of Hispanics in the United States are under 21 years old, Hispanic neighborhoods are filled with beer billboards. In Chicago, neighborhoods of elementary schools with more than 20 percent Hispanic children have 6.5 times more alcohol advertising than those with lower percentages.[26]

Young women are also targeted. Companies have introduced sweet-flavored drinks appealing to their tastes. Barton Brands sells a brand of vodka martini called Cocktails by Jenn in Blue Lagoon, Lemon Drop, and Appletini flavors. The drinks come in four-packs instead of six packs because they are lighter and easier for women to carry. Around their necks, the bottles have small metal charms such as a high-heeled shoe, diamond ring, or perfume bottle.[27] Only about 25 percent of women drink beer, so they are a huge growth market for brewers, who target them with lighter and flavored malt beverages such as Molson Coors' orange-flavored wheat beer Blue Moon and Anheuser-Busch's blueberry-flavored Wild Blue.

ALCOHOL MARKETERS DEFEND THEIR ADVERTISING

Alcoholic beverages are a mature industry. Due to population aging and health consciousness, per capita consumption is in a slow, long-term decline, dropping by an average 4 percent a year from 1998 to 2008. Still, Americans today drink a lot of alcohol,

[26] Keryn E. Pasch, et al., "Does Outdoor Alcohol Advertising Around Elementary Schools Vary by the Ethnicity of Students in the School?" *Ethnicity & Health*, April 2009.

[27] "Welcome to the World of Cocktails by Jenn," at www.oropesacreative.com/cbj/cocktails_750_d.htm.

about 26 gallons per capita in recent years, compared with 24 gallons of coffee and 21 gallons of milk.[28] And because the population is growing, industry sales grew from $29 billion in 1998 to $40 billion in 2008, a 39 percent increase.[29]

Amid overall market growth, industry segments compete fiercely for market share. Beer dominates, but since 1998 its sales have dropped from 63 percent of all alcoholic beverages to 49 percent. The wine sector picked up 10 percentage points to 34 percent and distilled spirits added 4 percentage points, rising to 17 percent.[30] Two implications of these figures for advertising are clear. First, if per capita consumption is stagnant but the overall population is growing, ads to recruit new and younger drinkers pay off. Second, if sales of industry segments are in flux, ads that promote brand loyalty can be used to protect or seize market share. Both conclusions lie behind the industry's heavy advertising. It defends its ads against the attacks of critics with these basic arguments.

First, ads are not the cause of alcohol abuse. As noted, studies fail to show that advertising increases consumption. So commercials and billboards cannot be blamed for car accidents, teen suicides, sexual aggression, spousal abuse, binge drinking, and alcoholism. Alcoholism, for example, is a complex disease caused by personality, family, genetic, and physiological factors rather than by viewing ads. Restraints would only deprive moderate drinkers of product information, not relieve social problems. As one advertising executive noted, trying to stop problem drinking with an ad ban "makes as little sense as trying to control the Ku Klux Klan by outlawing bed linens."[31] Ad restrictions would also muzzle a competitive weapon. Without advertising, starting a new national brand would be almost impossible and established brands would have an insurmountable advantage.

Second, antialcohol groups assume the public is too stupid to decide responsibly. The idea of curbing ads is condescending. Consumers are intelligent and skeptical. They are not duped by the association of alcohol with attractive images. Does anyone expect brewers and vintners to associate their products with root canals, traffic congestion, or taxes? The rejection of lifestyle advertising is also condescending. If a marketer positions a brand to satisfy emotional needs for sophistication, popularity, or sexual attractiveness, who is to say the consumer who finds gratification in the brand is wrong? No one would criticize a woman for feeling glamorous while she is wearing perfume, though the perfume is simply a chemical, nonessential to healthy life, and the glamour is created by imagery. Advertising also has the power to endow alcoholic beverages with emotional benefits for drinkers. The critics assume there is no merit to a product beyond its utilitarian qualities. What a dull world it would be if all products were marketed and used on this basis.

Third, the beer, wine, and spirits industries have voluntary codes to regulate advertising behavior. The policies in these codes are extensive and specific. For example, the Beer Institute's Advertising and Marketing Code prohibits depictions of excessive consumption, intoxication, and drinking while driving. Models in beer ads must be over 25 and "reasonably appear" to be over 21 years old. Beer ads should never have "any symbol, language, music, gesture, or cartoon character intended to appeal primarily to persons below the legal purchase age." No depictions of Santa Claus or sexual promiscuity are permitted.[32] The Wine Institute's Code of Advertising Standards has similar guidelines. It also prohibits showing the Easter bunny.[33] The Distilled Spirits Council of the United States' *Code of Good Practice for Distilled Spirits Advertising and Marketing* is similar to the two other codes. It allows advertisers to "depict affection or other amorous gestures," but forbids them to "rely upon sexual prowess or sexual success as a selling point," perhaps a fine distinction.[34]

[28] Department of Agriculture, Economic Research Service, "Data Sets: Beverages," February 1, 2010, at www.ers.usda.gov/Data/FoodConsumption/Spreadsheets/beverage.xls. Figures are for 2008.

[29] Department of Commerce, *Annual Survey of Manufactures, 2002 and 2009* (Washington, DC: Bureau of the Census, 2002 and 2009), sector 31.

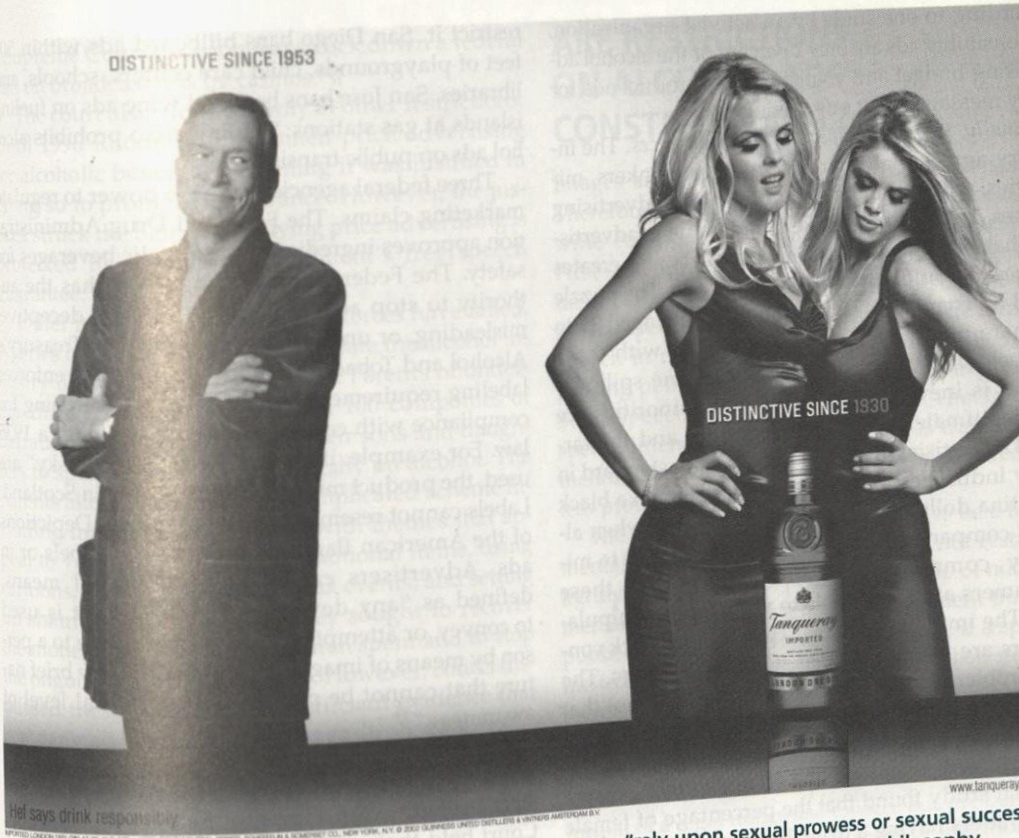
[30] Ibid., sector 31.

[31] James Kuras of McCann-Erickson, quoted in Eric Clark, *The Want Makers* (New York: Viking Press, 1988), p. 285.

[32] At www.beerinstitute.org/tier.asp?bid=249, January 2006 edition.

[33] At www.wineinstitute.org/initiatives/issuesandpolicy/adcode, revised September 2005.

[34] At www.discus.org/pdf/61332_DISCUS.pdf, January 2009, p. 8.



Although the distiller's advertising code warns advertisers not to "rely upon sexual prowess or sexual success as a selling point," this ad links a brand of gin with Hugh Hefner, mastermind of the *Playboy* philosophy.
Source: © The Advertising Archives.

All three codes are backed by mechanisms to investigate possible violations. The Distilled Spirits Council, for example, convenes a 10-member Code Review Board to look at complaints. All the board members are industry executives and its rulings can be gentle, but it raps knuckles too. Recently it received a complaint from a company about a vodka print ad run by White Rock Distilleries. The ad depicted a man in a rabbit costume and two women in bikinis around a card table drinking vodka and playing strip poker. As the man smiled one woman removed her top. The complaint alleged that the ad violated the industry code's prohibition against using "sexual prowess or sexual success as a selling point." The board decided the ad violated the code "insofar as the female models are either partially clad or completely unclad in a strip poker game where the male model is fully clad in a rabbit costume with a lascivious facial expression."[35] White Rock Distilleries stopped running the ad.

Fourth, alcohol makers promote responsible consumption. Companies broadcast public service announcements to preach moderation and safe driving. They sponsor designated-driver programs such as Anheuser-Busch's Alert Cab, which gives free taxi rides to restaurant and bar patrons who have been drinking. The Distilled Spirits Council funds college programs in which students teach other students about moderation. It also trains bartenders to serve drinks responsibly. These efforts, while important, do not get nearly the funding of brand advertising.

[35] Distilled Spirits Council of the United States, *Semiannual Code Report*, 10th ed. (Washington, DC: DISCUS, September 2009), p. 9.

According to one study by an activist organization, responsibility ads are only 2 percent of the alcohol advertising budget and youths see 239 product ads for every message about safe driving.[36]

Finally, targeting respects diverse audiences. The industry agrees that it targets younger drinkers, minorities, women, and other groups with advertising themes. Young adult drinkers find value in advertising that informs them of new products and creates images that fulfill their emotional needs. The puzzle faced by companies is that young adults aged 21 to 25 share many interests and behaviors with those just below the legal drinking age. Some spillover appeal is inevitable. Ads aimed at minorities are also legitimate. Market segmentation and the targeted advertising that makes it work are standard in many industries. When toy companies make black or Latina dolls, social critics applaud, but when alcohol companies make products that appeal to minority communities, critics argue that these consumers are too gullible to withstand manipulation. The implication is that Hispanic or black consumers are not as astute as white consumers. The real problem is that the product is alcohol, not that the ads have ethnic or racial appeal. Finally, there is no evidence that targeting raises consumption. Despite concerns over targeting young women, a large national study found that the percentage of female 12th graders having a drink in the past 30 days declined from 47 percent in 1998 to 41 percent in 2008 and the number of young women aged 19 to 28 who drank a flavored alcohol beverage in the past 30 days declined from 30 percent in 2004 to 27 percent in 2008.[37]

RESTRICTING ALCOHOL ADVERTISING

Alcohol advertising is highly regulated. Companies must navigate a labyrinth of restrictions. Approximately half the states restrict ad placements. Arizona prohibits it on school buses. Ohio bans it near churches, schools, and playgrounds. Many cities also restrict it. San Diego bans billboard ads within 500 feet of playgrounds, child care centers, schools, and libraries. San Jose bans beer and wine ads on fueling islands at gas stations. San Francisco prohibits alcohol ads on public transit.[38]

Three federal agencies have the power to regulate marketing claims. The Food and Drug Administration approves ingredients in alcoholic beverages for safety. The Federal Trade Commission has the authority to stop advertising that is false, deceptive, misleading, or unfair. The Department of Treasury's Alcohol and Tobacco Tax and Trade bureau enforces labeling requirements and monitors advertising for compliance with certain requirements under a 1935 law. For example, if the words "Scotch whisky" are used, the product must be manufactured in Scotland. Labels cannot resemble a postage stamp. Depictions of the American flag cannot appear on labels or in ads. Advertisers cannot use subliminal means, defined as "any device or technique that is used to convey, or attempts to convey, a message to a person by means of images or sounds of a very brief nature that cannot be perceived at a normal level of awareness."[39]

Originally, the law prohibited statements of alcohol content on labels so that companies could not start strength wars. However, in 1995 the Supreme Court held that censoring this information violated bottlers' speech rights, so alcohol content can now be printed on labels and is required on distilled spirits labels.[40]

Altogether, the body of government regulation covering alcohol advertising imposes significant restraints. But critics want stronger, more uniform measures. In the 1990s several bills were introduced in Congress to limit alcohol ads, for example, by banning them near schools and playgrounds, in publications with large youth readerships, on college campuses, and during prime-time television hours.[41] The prospect for such measures faded after

[36] Center on Alcohol Marketing and Youth, *Drowned Out: Alcohol Industry 'Responsibility' Advertising on Television, 2001–2005* (Washington, DC: CAMY, 2005), p. 1.

[37] Lloyd D. Johnson, et al., *Monitoring the Future: National Survey Results on Drug Use*, 1975–2008, vol. I, table D-70 and vol. II, table 5-3.

[38] Marin Institute, *Out of Home Advertising: A 21st Century Guide to Effective Regulation* (San Rafael, CA: Marin Institute, March 2009), pp. 9–11.

[39] 27 CFR §5.65(h), 2010.

[40] *Rubin v. Coors Brewing Company*, 514 U.S. 618 (1995).

[41] See, for example, the "Voluntary Alcohol Advertising Standards for Children Act," H. R. 1292, 105th Congress, 1st Sess. (1997), introduced by Rep. Joseph P. Kennedy II (D-Massachusetts).

a Supreme Court decision that struck down a federal ban on broadcast ads by casinos.[42]

The court also chipped away at other restrictions. Until 1996 Rhode Island banned price advertising for alcoholic beverages, claiming it was justified in doing so to promote temperance. However, the justices struck the ban down, saying price advertising is protected by the First Amendment's free speech guarantee.[43]

Other initiatives by antialcohol forces have failed. A series of lawsuits sought to regulate the alcohol industry using product liability law. Parents of underage drinkers accused more than 100 companies of defrauding them by attracting their sons and daughters to spend family money illegally on alcohol. The parents alleged injury from a complicated scheme including marketing "alcopops" with themes that appeal to youth, distributing promotional items, using cartoons, sponsoring spring break events, and setting up sham regulatory codes. They sought to recover the money their underage children spent and to stop the ongoing seduction of youth. However, courts dismissed these lawsuits for insufficient evidence that company actions caused underage alcohol abuse.[44]

Some countries go further than the United States in national restrictions. India and Thailand ban all alcohol advertising. Ireland prohibits distilled spirits ads on television and radio and prohibits beer and wine ads before sports events. France bans alcohol ads on television and restricts ad content in other media. Norway, Sweden, Denmark, and Finland prohibit advertising beverages with more than a certain alcohol content ranging from 2.2 to 3.5 percent, less than regular beer or wine. Italy, Spain, and Portugal restrict televised alcohol ads before 8:00, 9:00, and 10:00 p.m., respectively. Greece limits the number of broadcast ads per brand per day. Russia prohibits the appearance of people and animals in television ads. When alcohol companies skirted these rules with offscreen voices and animated bottles, it banned that too. Such restrictions might not work in the United States due to constitutional protections for free speech.

[42] *Greater New Orleans Broadcasting Association, Inc., v. U.S.*, 527 U.S. 173 (1999).

[43] *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996).

[44] See, for example, *Hakki v. Zima Company*, 03-0009183 (Sup. Ct. Dist. Col., November 14, 2003); and Eisenberg v. Anheuser-Busch, Inc., *1:04 CV 1081* (N.D. Ohio, February 1, 2006).

ARE RESTRICTIONS ON ALCOHOL ADS CONSTITUTIONAL?

Images and statements in advertising are speech. Therefore, proposals for muzzling liquor, beer, and wine companies raise constitutional issues. The First Amendment protects all speech from government curbs, but courts have distinguished *noncommercial* speech from *commercial* speech. The former is speech in the broad marketplace of ideas, encompassing political, scientific, and artistic expression. Such speech is broadly protected. The latter is speech intended to stimulate business transactions, including advertising. This kind of speech receives less protection.

The right of free speech is assumed to be a fundamental barrier against tyranny and is not restricted lightly. Courts will not permit censorship of noncommercial speech unless it poses an imminent threat to public welfare, as it would, for example, if a speaker incited violence or a writer tried to publish military secrets.

With respect to commercial speech, however, various restrictions are allowed. For example, ads for securities offerings can appear only in the austere format of a legal notice and tobacco ads are barred on radio and TV. Would courts approve additional restrictions on alcoholic beverage advertising?

The most important legal guidelines for weighing restraints on commercial speech are those set forth by the Supreme Court in 1980 in the *Central Hudson* case.[45] Here the Court struck down a New York regulation banning advertising by public utilities, a regulation intended to help conserve energy. Justice Lewis Powell, writing for the majority, set forth a four-part test to decide when commercial speech could be restricted.

- The ad in question should promote a lawful product and must be accurate. If an ad is misleading or suggests illegal activity, it does not merit protection.
- The government interest in restricting the particular commercial speech must be substantial, not trivial or unimportant.

[45] *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557.

- The advertising restriction must directly further the interest of the government. In other words, it should demonstrably help the government reach its public policy goal.
- The suppression of commercial speech must not be more extensive than is necessary to achieve the government's purpose.

All government actions to ban or restrict alcohol ads could be challenged by industry and would have to pass the four-part *Central Hudson* test to survive.

ALCOHOL ADVERTISING IN PERSPECTIVE

The mainstream antialcohol campaign today is to restrict advertising more. The Prohibition Party argument that alcohol is immoral, sinful, and unhealthy has few advocates now. But those who still believe it have seized on underage drinking as a weapon to attack the alcohol industry. Since underage drinking is a genuine social problem, antialcohol activists find many allies.

Alcohol advertising is creative, witty, and clever. Evidence is strong that children and teenagers are attracted to alcohol ads and increasing exposure is associated with more future drinking. Some of this drinking leads to tragedy for families. Such serious concerns are to be weighed against other factors. Some studies show the influence of ads is very modest. Most Americans drink alcoholic beverages. Advertising limits would reduce information about products. And the constitution, while permitting restrictions, protects advertisers from needless and sweeping government actions. What dangers of alcohol ads justify what restrictions?

Questions

1. Were Spykes and Wide Eye bad products? Do you think they were marketed in objectionable or misleading ways? Do you think companies should be allowed to market other caffeinated alcoholic beverages?
2. Do alcoholic beverage companies fulfill their ethical duty to be informative and truthful in advertising? Do they generally uphold their ethical duty to minimize potential harm to society from underage drinking?
3. Are some beer, wine, or spirits ads misleading? What examples can you give? What is misleading in them? Do some ads contain images and themes that go too far in appealing to an audience under the legal drinking age? Can you give examples?
4. Do you believe there is a need for more restrictions on alcohol advertising? If so, what limits are needed? Explain how a ban or any restrictions could meet the *Central Hudson* guidelines.

Chapter Sixteen

The Changing Workplace

Ford Motor Company

The history of the Ford Motor Company is told in the changing experiences of its workers. Their story illustrates how powerful forces discussed in this chapter act to change the workplace.

Henry Ford (1863–1947) was a brilliant inventor. After incorporating the Ford Motor Company in 1903, he designed one car after another, naming each chassis after a letter of the alphabet. In 1908, he began selling the Model T, a utilitarian, crank-started auto that came only in black. An early Model T cost $850, but Ford introduced the first moving auto assembly line and, by 1924, mass output lowered the price to $290. The assembly line was a new, revolutionary technology that changed work at Ford, turning assemblers from craftsmen into interchangeable parts like those in the cars they put together.

Ford sold 15.5 million Model Ts before production ended in 1927. Despite a warning in the form of fast-dropping market share in the mid-1920s, Ford failed utterly to anticipate a sea change in the auto market. The company clung to the spartan Model T even as consumers turned to the styling changes, closed body design, and brand hierarchy offered by General Motors. Finally, Ford had to suspend production, stilling its great River Rouge assembly plant for seven months while the Model A was hurriedly designed. More than 100,000 idled workers felt the sting of hardship that came from competition not well met.

Henry Ford was an obstinate man, obsessed with power, iron-willed, dictatorial, and cynical about human nature. He spied on his employees in their homes to see if they smoked or drank. Believing that workers were motivated by fear, he created a tense atmosphere marked by arbitrary and capricious dismissals. Managers knew they had been fired when they came to work and found their desks chopped into splinters. Sometimes two managers were given the same duties and the one failing to thrive in the competition was fired. In his autobiography, Ford wrote that a "great business is really too big to be human."[1] As the firm grew, his authoritarian style

[1] Henry Ford, *My Life and Work* (Garden City, NY: Doubleday, 1923), p. 263.

know a lot about diversity, but they understand numbers. They can tell the difference between a facility with 1,000 points on the best-practices index, and a facility with 500 points."[96] Today at PepsiCo the CEO chairs a high-level diversity council and the company collects data from a worldwide, biennial survey of all employees designed to reveal diversity issues.

6. *Policy changes* establish new rules. South African mines, where workers come from many countries and tribes, are a cacophony of languages. To avoid confusion in dangerous work the miners speak Fanagolo, a simplified language that fuses Zulu, the language of the dominant South African tribe, with English and Afrikaans, the language spoken by the country's white settlers. When the large mining company Anglo American learned that younger black miners regard Fanagolo as a racist affront, it decided to convert to English. Accordingly it has enrolled miners in English classes.
7. *Reward systems* encourage managers to achieve diversity goals. Diversity can be one element of performance reviews. Division managers at ExxonMobil are required at annual reviews to present career development plans for 10 females and 10 minority males. At Lockheed Martin each business unit is ranked using a mathematical "diversity maturity model" that includes surveys of employees. Part of each manager's bonus is tied to the unit's score.[97]

Despite decades of efforts to manage diversity tensions remain. There are many reasons. Problems related to diversity are complex. Attitudes and prejudices are deep rooted. Being resistant to change based on short training sessions, they linger. Diversity programs are now institutionalized in large corporations, but that has often turned them into empty rituals lacking any special support from top management. They are also resisted by employees who feel a threat to their status. Corporate cultures change very slowly; in fact, it is difficult to make them change at all. One diversity management practitioner with long experience suggests that even in the best of circumstances "only so much harmony is possible" and that as workplaces become more diverse those in them should learn to accept "eggshell situations" as inevitable.[98]

CONCLUDING OBSERVATIONS

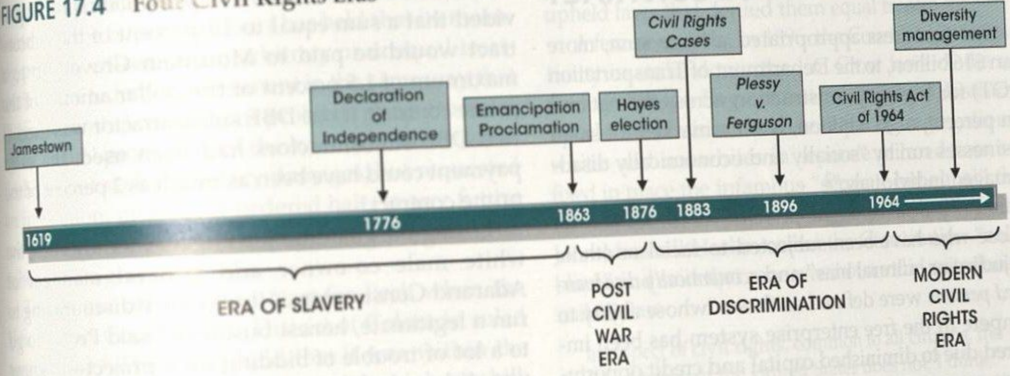
This chapter covers four civil rights eras in American history, as shown in Figure 17.4. Workplace discrimination has existed through all of them. It began with a long era of slavery extending 244 years and ending when President Abraham Lincoln signed the Emancipation Proclamation. It was followed by a short post-Civil War era in which the liberated slaves were protected by new laws and constitutional amendments extending "equal protection" to all citizens. For a brief,

[96] I. Charles Mathews, vice president of diversity management, cited in Margaret A. Hart, *Managing Diversity for Sustained Competitiveness* (New York: The Conference Board, 1997), p. 8.

[97] Jill Dutt, "Taking an Engineer's Approach at Lockheed Martin," *The Washington Post,* May 1, 2006, p. D1.

[98] Thomas, *World Class Diversity Management*, p. 80.

FIGURE 17.4 Four Civil Rights Eras



incandescent hour the freed slaves enjoyed extensive federal protection of their liberties.

Unfortunately, these liberties, particularly the right to vote, could no longer be protected after President Rutherford B. Hayes removed federal troops from the South in a corrupt bargain to secure his election. And the climate of civil rights deteriorated further as the Supreme Court eviscerated the Fourteenth Amendment in the *Civil Rights Cases* and the *Plessy* decision. The nation now entered a third era, a long spell of widespread discrimination that spread across both North and South.

After 88 years that era ended with the Civil Rights Act of 1964. Its passage began a fourth era, lasting now almost 50 years, during which the climate of civil rights in society and in the workplace has greatly and continuously improved. Now, the accumulated corpus of antidiscrimination law is massive, complex, and well enforced.

Although there is far less blatant discrimination today than in the past, it is not eradicated. Every year tens of thousands of workers still file claims against their employers. Nevertheless, it has receded enough that attention has turned to more finely grained, indirect forms of exclusion that many corporations now address with efforts such as diversity programs.

Adarand v. Peña

This is the story of an affirmative action case that made its way to the U.S. Supreme Court. When the Court announced it would hear *Adarand v. Peña*, there was considerable speculation about the outcome. The plaintiff, a white male, argued that preferential treatment for minority and female contractors was unconstitutional. Would the justices agree?

In due course, the nine-member Court issued a lengthy (21,800 words) split decision, showing itself to be as fractured as the public in its thinking. It divided five to four, with six separate opinions—a majority opinion, two concurring opinions, and three dissents. The result? Affirmative action lived on but became harder to justify. With the support of affirmative action foes in the legal community, Adarand Constructors tried to carry the case further; refusing to give up until the Court killed affirmative action in all its forms. The case bounced around the federal court system for another six years until fizzling out in 2001 when the Supreme Court dismissed it.

THE GUARDRAIL SUBCONTRACT

In 1987 Congress appropriated a huge sum, more than $16 billion, to the Department of Transportation (DOT) for highway construction across the nation.[1] Ten percent, or $1.6 billion, was earmarked for small businesses run by "socially and economically disadvantaged individuals."[2]

Socially disadvantaged persons were defined as "those who have been subjected to racial or ethnic prejudice or cultural bias" and *economically disadvantaged persons* were defined as those "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged."[3]

It was to be presumed that black, Hispanic, Asian Pacific, subcontinent Asian, and Native American persons and women were both socially and economically handicapped. Any small business with 51 percent or greater ownership by persons in these categories could be certified as a *disadvantaged business enterprise*, or DBE. Then, Congress put monetary incentives to hire DBEs into the highway construction law. The story here illustrates how these incentives worked.

In 1989 Mountain Gravel & Construction Company received a $1 million prime contract to build highways in the San Juan National Forest of southwest Colorado. It requested bids from subcontractors to install 4.7 miles of guardrails. Two small companies that specialize in guardrail installation responded. Adarand Constructors, Inc., a white-owned company, submitted the low bid, and Gonzales Construction Company, a firm certified as a DBE, submitted a bid that was $1,700 higher.

Ordinarily, Mountain Gravel would have chosen the low bidder, but the prime contract provided that it would be paid a bonus, up to 10 percent of the guardrail subcontract, if it picked a DBE.

On this subcontract, the bonus payment was approximately $10,000, so even by accepting a bid $1,700 above the low bid, Mountain Gravel came out $8,300 ahead. Gonzales Construction got the nod.

The part of the prime contract that caused Mountain Gravel to reject Adarand Constructors' low bid was called a *subcontractor compensation clause*. It provided that a sum equal to 10 percent of the subcontract would be paid to Mountain Gravel, up to a maximum of 1.5 percent of the dollar amount of the prime contract, if one DBE subcontractor was used. If two DBE subcontractors had been used, the extra payment could have been as much as 2 percent of the prime contract.

Losing the guardrail job angered Randy Pech, the white male co-owner and general manager of Adarand Constructors. "It was very discouraging to run a legitimate, honest business," said Pech, "to go to a lot of trouble of bidding on a project—to know you did a great job and come in the low bid—and then find out they can't use you because they have to meet their 'goals.'"[4] Pech's lawyer, William Pendley, spoke more bluntly about the subcontractor compensation clause. "It works like a bribe," he said.[5]

This was not the first time Adarand Constructors had faced this situation. It was one of only five Colorado contractors specializing in guardrails. The other four, Cruz Construction, Ideal Fencing, C&K, and Gonzales Construction, were minority-owned and, by virtue of that, designated as DBEs. These four competitors were all stable businesses at least 10 years old, and on nonfederal highway projects, they sometimes beat Adarand Constructors with lower bids. Yet when federal highway dollars were being spent, Adarand Constructors frequently lost—even with the lowest bid.

Later it would be documented that because of the subcontractor compensation clause, prime contractors had rejected the company's low bids five times to favor its DBE competitors. Mountain Gravel's bid estimator verified that Adarand Constructors' low bid on the 4.7-mile guardrail job would have been accepted if the extra payment had not existed. Fed up, Randy Pech sued the federal government.

In his suit, Pech claimed that the subcontractor compensation clause violated his constitutional right to equal treatment under the law. This right is found in the Fifth Amendment, which reads: "No person shall . . . be deprived of life, liberty, or property, without due process of law." Although this wording does

[1] The Surface Transportation and Uniform Relocation Assistance Act of 1987, P.L. 100–17.

[2] Section 106(c)(1).

[3] Section 106(c)(2)(B).

[4] Marlene Cimons, "Businessman Who Brought Lawsuit Praises Ruling by Justices," *Los Angeles Times*, June 13, 1995, p. A15.

[5] David G. Savage, "'Colorblind' Constitution Faces a New Test," *Los Angeles Times*, January 16, 1995, p. A17.

not literally state that citizens are entitled to equal treatment, the Supreme Court has held that its meaning protects citizens from arbitrary or unequal treatment by the federal government in the same way that the Fourteenth Amendment prohibits states from denying "equal protection of the laws" to their citizens. Pech did not seek monetary damages, but requested an injunction, or a court-ordered halt, to any future use of contract clauses providing extra payments on subcontracts given to DBEs.

Things got off to a bad start for Pech when the U.S. District Court for the District of Colorado ruled against him.[6] The court held that it was within the power of Congress, when it enacted the highway bill, to use race- and gender-based preferences to compensate for the harmful effects of past discrimination. Pech appealed to the Tenth Circuit Court of Appeals, but, two years later, it affirmed the district court's decision.[7] Pech then took the next step and appealed to the Supreme Court, which agreed to decide the case. Because the lawsuit named Transportation Secretary Federico Peña as a defendant, it was entitled *Adarand v. Peña*.

THE CONSTITUTION AND RACE

The Court was being asked to decide whether classifying citizens by race in order to treat them differently was constitutionally respectable. This was not a new question; neither was it one that has ever been resolved with clarity. Affirmative action has deeply divided the Court, but it is not the first race-based classification scheme to raise constitutional problems.

Between 1884 and 1893, the Court decided a series of challenges to exclusionary laws passed by Congress stopping the immigration of Chinese laborers and restricting the civil rights of resident Chinese. At first, the justices struck down laws that treated Chinese differently from American citizens.[8] Eventually, however, the Court went along with a wave of public hysteria over the Chinese and in key decisions upheld laws that denied them equal treatment.[9]

A few years later, in 1896, the Court had an opportunity to strike down the Jim Crow laws of the old South in *Plessy v. Ferguson* but failed to do so. Instead, it upheld the Louisiana statute requiring segregation of whites and nonwhites in separate railroad cars and fixed in place the infamous "separate but equal" doctrine. In a lone dissent that rang across decades, Justice John Marshall Harlan called the Constitution "colorblind" and said that race was not a valid criterion for making law.

> In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights . . . [T]he common government of all shall not permit the seeds of race hate to be planted under the sanction of law.[10]

During World War II, the Court was once again called upon to decide the question of a race-based government action. In early 1942, President Franklin Roosevelt issued an executive order, which Congress ratified, requiring the relocation of 70,000 persons of Japanese descent, both American citizens and resident aliens, from homes on the West Coast to inland evacuation camps.

This policy was challenged as depriving the Japanese Americans of their Fifth Amendment guarantee of equal protection of the laws. However, the Court once again upheld a racial classification scheme. In the majority opinion, Justice Black conceded that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and must be subjected "to the most rigid scrutiny."[11] Nevertheless, the evacuation order passed this "rigid scrutiny," because the president and Congress were taking emergency actions in time of war to prevent sabotage and avert grave danger. In dissent, Justice Frank Murphy argued that the evacuation "goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism."[12]

In 1954 the Court finally reversed its decision in *Plessy*. In the landmark school desegregation case *Brown v. Board of Education*, it agreed that under the

[6] *Adarand Constructors, Inc. v. Samuel K. Skinner*, 790 F. Supp. 240 (D.Colo. 1992). Then-Secretary of Transportation Skinner was named as the defendant.

[7] *Adarand Constructors, Inc. v. Federico Peña*, 16 F.3d 1537 (10th Cir. 1994). By this time, Peña was secretary of Transportation.

[8] *Chew Heong v. United States*, 112 U.S. 536 (1884); and *United States v. Jung Ah Lung*, 124 U.S. 621 (1888).

[9] *Lee Joe v. United States*, 149 U.S. 698 (1893).

[10] 163 U.S. 554, 560.

[11] *Korematsu v. United States*, 323 U.S. 214.

[12] 323 U.S. 242.

"separate but equal" doctrine, the states had provided grossly unequal schools for blacks.[13] During oral arguments in the case, Thurgood Marshall, destined to be the first black Supreme Court justice, invoked the principle of a color-blind Constitution. A unanimous Court struck down "separate but equal" as a violation of the Equal Protection Clause in the Fourteenth Amendment.

The *Brown* decision, however, did not mean that the Court saw a completely color-blind Constitution. In the 1970s, suits by whites who had suffered reverse discrimination as a result of affirmative action began to reach its docket. In the first such cases, a divided Court upheld affirmative action, but was obviously troubled by it and tried to define its limits. There was also an ideological split among the justices, with a liberal bloc condoning race-based affirmative action and a conservative bloc inclined to severely limit or prohibit it.

THE FULLILOVE CASE

In 1980 the Court heard for the first time a challenge to a set-aside program for minority businesses. In the Public Works Employment Act of 1977, Congress authorized $4 billion for public works projects such as dams, bridges, and highways. At least 10 percent of this sum was set aside for businesses owned by "minority group members," who were defined as "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."[14]

The law was challenged by several associations of white contractors, who claimed to have lost business and argued that the set-aside violated their constitutional rights to equal protection. But in *Fullilove v. Klutznick*, the Court held that Congress could use racial classification schemes to strike at racist practices used by prime contractors on federal projects.[15]

Over the years, courts have developed standards for testing the constitutional validity of laws that classify citizens. All such laws must withstand one of three levels of scrutiny by a skeptical judiciary.

The lowest level is *ordinary scrutiny*, which requires that government prove its classification scheme is "reasonably" related to a "legitimate interest." For example, classifying citizens by income for purposes of tax collection would pass this minimum test.

The second level is *intermediate scrutiny*, a heightened standard requiring that the law be "substantially related" to an "important government objective." In the past, intermediate scrutiny was typically used for laws related to gender, for example, the law drafting men for military service but not women.

The final, and most exacting, level of scrutiny, called *strict scrutiny*, is reserved for racial classifications regarded as pernicious and undesirable. When strict scrutiny is used, it is presumed that the law in question is unconstitutional unless it passes a specific two-part test. The government must prove that it (1) serves a "compelling" government interest and (2) is "narrowly tailored," that is, not more extensive than it needs to be to serve its purpose.

There are no fixed definitions of the words "reasonably," "substantially related," and "compelling," but they represent an escalating standard of proof.

The majority opinion in *Fullilove* showed that neither Chief Justice Warren Burger nor the five other justices who joined and concurred with him were particularly alarmed about race-based set-asides for minority contractors. The chief justice subjected the minority business program in the Public Works Employment Act to only an intermediate level of scrutiny.

THE CROSON AND METRO CASES

After *Fullilove*, nine years passed before the Court looked at set-asides again. In 1989 the Court struck down an affirmative action plan used by the city of Richmond, Virginia, requiring that 30 percent of construction work be awarded to minority contractors. In *Richmond v. Croson*, the Court held that because the city's plan was a suspect racial classification, it should be subject to strict scrutiny.[16] And when the two tests required by strict scrutiny were applied, the plan could not pass constitutional muster.

First, although the population of Richmond was 50 percent black and less than 1 percent of city contracts were awarded to black firms, the city had not proved a "compelling" interest because it had never conducted studies to show that this statistical discrepancy was caused by race discrimination. Without proof of past discrimination, no "compelling" justification for raced-based remedial action existed.

[13] *Brown v. Board of Education*, 347 U.S. 483.

[14] Public Works Employment Act of 1977, Section 103(f)(2).

[15] 448 U.S. 448.

[16] *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).

And second, the plan was not "narrowly tailored"; in addition to giving preference to black contractors, it entitled Hispanic, Asian, Native American, Eskimo, and Aleut contractors located anywhere in the United States to take advantage of preferential bidding rules. This scheme of inclusion was too broad. The Court ruled that for white contractors, the Richmond plan violated the Fourteenth Amendment guarantee of equal protection under the law.[17]

In the wake of the *Croson* decision, more than 200 set-aside plans around the country were dropped or changed for fear that they would be challenged and struck down. In Richmond, the percentage of contract dollars awarded to minority businesses plummeted from 30 percent to "the low single digits."[18]

A year later, in 1990, the Court confronted a case in which white-owned broadcasters challenged a congressional statute requiring that the Federal Communications Commission give certain preferences to minority radio and television companies when it issued broadcast licenses. Congress declared that its purpose was to promote diversity in programming. In *Metro Broadcasting v. FCC*, a five-member majority of the Court composed of four remaining liberals and the usually conservative Justice Byron White held that "benign race-conscious measures" undertaken by Congress to compensate victims of discrimination need be subject only to the standard of "intermediate scrutiny."[19] Creating diversity in broadcasting was an "important governmental objective," and preferences for nonwhite and female broadcasters were "substantially related" to achieving this objective. In dissent, Justice Anthony M. Kennedy sought to refocus the Court on the mistake made in the *Plessy* case. "I regret," he wrote, "that after a century of judicial opinions we interpret the Constitution to do no more than move us from 'separate but equal' to 'unequal but benign.'"[20]

[17] The Fourteenth Amendment protects American citizens from unjust actions by state governments. It reads: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The City of Richmond, being chartered by the state of Virginia, was therefore a governmental actor falling under the reach of the Fourteenth Amendment.

[18] Paul M. Barrett and Michael K. Frisby, "Affirmative-Action Advocates Seeking Lessons from States to Help Preserve Federal Programs," *The Wall Street Journal*, December 7, 1994, p. A18.

[19] *Metro Broadcasting v. FCC*, 497 U.S. 547.

[20] 497 U.S. 637–38.

TWO LINES OF PRECEDENT

This was where matters stood until 1994, when *Adarand* came before the Court. The Supreme Court likes to follow precedent and generally adheres to the rule of *stare decisis* (STARE-ray da-SEE-sis), a Latin term meaning to stand as decided. The judicial system is based on the principle that once a matter of law is settled, courts should follow the established path. Judges believe that this should be the case even though a court would decide the question differently if it were new. *Stare decisis* preserves one of the law's primary virtues, its predictability.

However, two different precedents had been established for minority preferences in contracting. In *Croson*, the Court had applied strict scrutiny to a city plan and declared it unconstitutional. But *Adarand* was not about a city plan; it involved a plan enacted by Congress. Traditionally, the Supreme Court recognizes that Congress represents the will of the American people and thus its actions deserve great deference. The line of precedent closest to the issue in *Adarand* was that emerging from *Fullilove* and *Metro*. In both cases, the Court had applied only intermediate scrutiny to congressional affirmative action plans and in both cases the plans were upheld. This result was consistent with the Court's studied deference toward Congress.

THE DECISION

Attorneys for each side in *Adarand v. Peña* presented 30 minutes of oral argument before the nine justices on January 17, 1995.[21] On June 12, 1995, the Supreme Court released a five-to-four decision in favor of Adarand Constructors.[22] The majority opinion, written by Justice Sandra Day O'Connor, departed from the line of precedent running from *Fullilove* and *Metro* and instead returned to *Croson* and ruled that the Department of Transportation plan giving preferences in bidding to minority subcontractors would have to withstand the test of strict scrutiny. It held that the plan was a race classification and presumed to be unconstitutional unless it was "narrowly tailored"

[21] Listen to this oral argument by visiting the Oyez Project Web site at www.oyez.org/cases/1990-1994/1994/1994_93_1841.

[22] *Adarand v. Peña*, 132 L. Ed. 2d 158, 515 U.S. 200 (1995).

to meet a "compelling government interest." Justice O'Connor wrote as follows.

> [W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that *Metro Broadcasting* is inconsistent with that holding it is overruled.[23]

She justified departing from the *Fullilove* and *Metro* precedents by citing Justice Felix Frankfurter, who 55 years earlier had written that "*stare decisis* is . . . not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."[24] The Court's longstanding, deep suspicion of any race classification, wrote O'Connor, should override the recent efforts of some liberal justices to apply more lax scrutiny to forms of discrimination they called "benign."

However, the majority was unwilling to say that no scheme of race-conscious preferences could withstand strict scrutiny. Using affirmative action might still be possible for the government. O'Connor wrote:

> Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact . . ." The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.[25]

This completed the majority opinion. The Court did not uphold or strike down the Transportation Department's subcontractor bidding clauses. Instead, it remanded, or returned, the case to the Tenth Circuit to be redecided using the strict scrutiny test instead of the lesser test of intermediate scrutiny.[26] The result of this tougher review would determine whether the equal protection rights of Randy Pech at Adarand Constructors had been violated. Thus, as in many cases that come before the high court, the justices avoided deciding the specific question and decided only matters of law.

JUSTICE SCALIA CONCURS

Justice Antonin Scalia, a conservative and longtime foe of affirmative action, wrote a concurring opinion in which he agreed with the application of strict scrutiny but took the extreme position that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."[27] He elaborated:

> Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. The concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.[28]

Justice Scalia concluded that it was very unlikely and probably impossible that the Department of Transportation program could pass the strict scrutiny test.

JUSTICE THOMAS CONCURS

Justice Clarence Thomas, the Court's only black member, agreed with the majority opinion, but wrote separately to underscore the principle that the Constitution requires all races to be treated equally. In his eyes, there was no moral difference between a law designed to subjugate a race and a law passed to give it benefits.

> That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged.[29]

23 132 L. Ed. 2d 182.

24 132 L. Ed. 2d 184, citing *Helvering v. Hallock*, 390 U.S. 106, at 119.

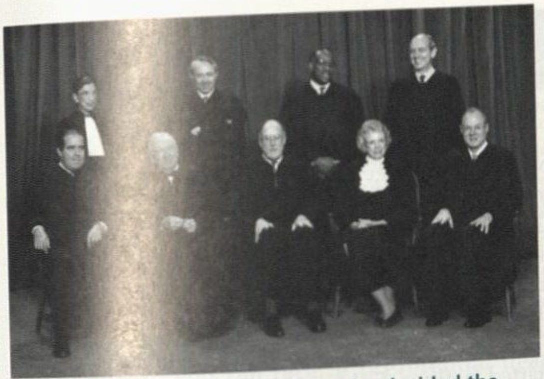
25 132 L. Ed. 2d 188.

26 16 F.3d 1537, vacated and remanded.

27 132 L. Ed. 2d 190.

28 Ibid.

29 Ibid.



The nine Supreme Court justices who decided the *Adarand* cases. Front row, left to right, are Antonin Scalia, John Paul Stevens, William Rehnquist (Chief Justice), Sandra Day O'Connor, and Anthony Kennedy. Back row, left to right, are Ruth Bader Ginsburg, David Souter, Clarence Thomas, and Stephen Breyer.
Source: © Reuters/CORBIS.

Thomas also argued that affirmative action degrades the very individuals it tries to help.

> So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.[30]

THE DISSENTERS

Three separate dissenting opinions were written, joined in by four justices. In the first, Justice Stevens, joined by Justice Ginsburg, objected to the departure of the majority from established precedent and argued that the Court had a duty to uphold the intermediate scrutiny standard. Stevens also disagreed with the majority that all discrimination was the same in principle.

> There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority.

[30] 132 L. Ed. 2d 191.

> Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to "govern impartially" . . . should ignore this distinction . . . The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat.[31]

A second dissent by Justice Souter, in which Justices Ginsburg and Breyer joined, objected to the Court's departure from the *Fullilove* and *Metro* precedents. He argued that more deference was owed to Congress and affirmed his approval for laws that try to redress persistent racism.

The third dissenting opinion came from Justice Ginsburg, joined by Justice Breyer. She wrote to underscore the lingering effects of "a system of racial cast" in American life. According to Ginsburg:

> White and African-American consumers still encounter different deals. People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders. Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts. Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.
>
> Given this history and its practical consequences, Congress surely can conclude that a carefully designed affirmative action program may help to realize, finally, the "equal protection of the laws" the Fourteenth Amendment has promised since 1868.[32]

THE CASE MOVES ON

The Supreme Court elected to decide principles of law. It declined to settle the specific question of whether the subcontractor compensation clause was constitutional. Therefore, it sent the case back to the Tenth Circuit, with instructions to decide the constitutionality question. The Tenth Circuit, in turn, sent the case down to the U.S. District Court in Colorado where it had originated in 1992.

In 1997, almost two years after the Supreme Court's decision, the district court issued an opinion. Judge John L. Kane Jr. applied the strict scrutiny test to the subcontractor compensation clause, and the

[31] 132 L. Ed. 2d 192, 193.

[32] 132 L. Ed. 2d 212.

result invalidated the clause. The clause passed the part of the test requiring the government to show a compelling interest. Judge Kane stated that there was sufficient evidence of bias in contracting before Congress when it passed the law.

However, the clause failed the test of narrow tailoring. Judge Kane held that basing social and economic disadvantage solely on race was unfair. Under the existing criteria for selecting DBEs, a multimillionaire who immigrated from Hong Kong and became a U.S. citizen one day before applying would automatically qualify, but a poor white man who had lived in the United States his entire life could not. So the set-aside program was overinclusive and unconstitutional. Since Colorado was administering the program for the federal government, Judge Kane issued an injunction ordering the state to stop using the objectionable regulation.[33]

Pech and his company had won, but defenders of affirmative action wanted to put up a fight. The Department of Transportation appealed the decision back to the Tenth Circuit. Then Colorado refused to comply with Judge Kane's ruling. Governor Roy Romer argued, disingenuously, that a federal court order did not apply to a state government.

Adarand Constructors immediately sued the state to force its obedience. When the case came before Judge Kane, Colorado argued that it had changed its contracting program. It no longer used the subcontractor compensation clause, and it allowed all contractors, including white males, to get DBE status if they could show disadvantage.

Judge Kane was furious at the recalcitrance of Colorado officials. Instead of retrying the entire issue, he declared that Adarand Constructors had suffered years of discrimination and financial hardship at the hands of a government enforcing an unfair, unconstitutional law. He decreed that the company was eligible for DBE status.[34] Pech applied for it, and it was granted by Colorado in 1998.

Meanwhile, the *Adarand* decision sparked a national debate. The federal government had approximately 160 preference programs for businesses certified as disadvantaged. In the year that *Adarand* was decided, $10 billion in contracts earmarked for minority and female vendors was distributed through various preference schemes. Opponents of affirmative action felt that, because of the decision, such practices should cease.

There was no doubt that *Adarand* cast a shadow over these arrangements, but their supporters had no intention of conceding defeat. Instead, President Bill Clinton promised to "mend, not end" affirmative action. What he had in mind was revising preferential treatment rules so that the programs would withstand legal challenge.

Congressional opponents of affirmative action started a floor fight trying to kill the 10 percent set-aside provision in a new highway funding bill. In March 1998 strident debate erupted in the Senate over an amendment to delete the set-aside, but the amendment was defeated, leaving more than $17 billion of new highway funds earmarked for DBEs.[35]

In 1999 the Department of Transportation issued revised rules for awarding federal highway contracts to DBEs.[36] They stated that the 10 percent of highway funding reserved for DBEs was not a "quota" or a "set-aside" but an "aspirational goal at the national level." The DBE participation level in each state receiving highway funds could be higher or lower. To meet DBE goals, the states were required to first use "race-neutral" measures, that is, to do things to help all small businesses, including both DBEs and white-male-owned companies.

These measures did not require race–gender classifications and included, for example, training and advice in bidding and contract work, bonding assistance, and breaking large contracts into pieces that small businesses could more easily handle. However, if such methods did not fully achieve DBE goals and "egregious" discrimination existed, then "race-conscious" methods that gave preferences to DBEs, including set-asides on which only DBEs could bid, could be used.

The states were required to do studies pinpointing discrimination, so that there would be a compelling rationale for race-conscious actions if they were needed. The rules also tightened qualifications for persons designated as "economically disadvantaged." This

[33] *Adarand Constructors, Inc. v. Peña*, 965 F. Supp. 1556 (D. Colo. 1997).

[34] *Adarand Constructors, Inc. v. Romer*, Civ. No. 97–K–1351 (June 26, 1997).

[35] Amendment No. 1708, 144 Cong. Rec. S1395.

[36] Department of Transportation, "Participation by Disadvantaged Business Enterprises in Department of Transportation Program," 64 FR 5096–5148, December 9, 1999.

Who Is Disadvantaged?

Any person who is a citizen and falls into one of the following categories is presumed to be socially and economically disadvantaged (beginning in 1999, persons with a net worth of $750,000 or more were disqualified). If the person has 51 percent ownership or greater in a company applying for a federal highway construction contract, that company qualifies as a "disadvantaged business enterprise" and can receive preferential treatment on federal highway contracts.

Black Americans. Includes persons having origins in any black racial groups in Africa.

Hispanic Americans. Includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race.

Native Americans. Includes American Indians, Eskimos, Aleuts, or Native Hawaiians.

Asian-Pacific Americans. Includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong.

Subcontinent Asian Americans. Includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal, or Sri Lanka.

Women. All women are included.

Source: 49 CFR §26.5 and §26.67 (2000); 64 FR 5126, Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999; 68 FR 35553, June 16, 2003. Current as of January 2011.

status was from now on denied to persons with a net worth of $750,000 or more (calculated as personal net worth minus the value of a primary residence and the ownership interest in the contracting business). The rules allowed white males to apply for socially or economically disadvantaged status. However, unlike minorities and women who are still automatically included (unless worth more than $750,000), the burden is on white males to prove that they have suffered financial hardship from discrimination.

These changes significantly scaled back affirmative action in highway programs. Later, President Clinton issued an executive order introducing similarly constricted affirmative action methods in all federal contracting.[37]

ADARAND KEEPS GOING

Although the use of preferences was being scaled back, through it all Pech persisted in the belief that any race- and sex-based preferences at all were unconstitutional. The case continued its odyssey through the federal courts.

The Department of Transportation had appealed Judge Kane's 1997 ruling that the subcontractor compensation clause was unconstitutional. In 1999 the Tenth Circuit ruled that the case was now moot because Colorado had changed its contracting guidelines and no longer used the bonus clause. In addition, the court noted that Colorado had classified Adarand Constructors as a DBE.[38] Adarand, which argued that the Colorado guidelines were still unconstitutional, appealed to the Supreme Court. In 2000 the Supreme Court reversed the Tenth Circuit's decision and sent the case back with instructions to decide the constitutionality of the Colorado contracting guidelines.[39]

Later that year, the Tenth Circuit responded, deciding that although the original Colorado highway contracting rules had been unconstitutional, the states' new rules were narrowly tailored to meet a compelling

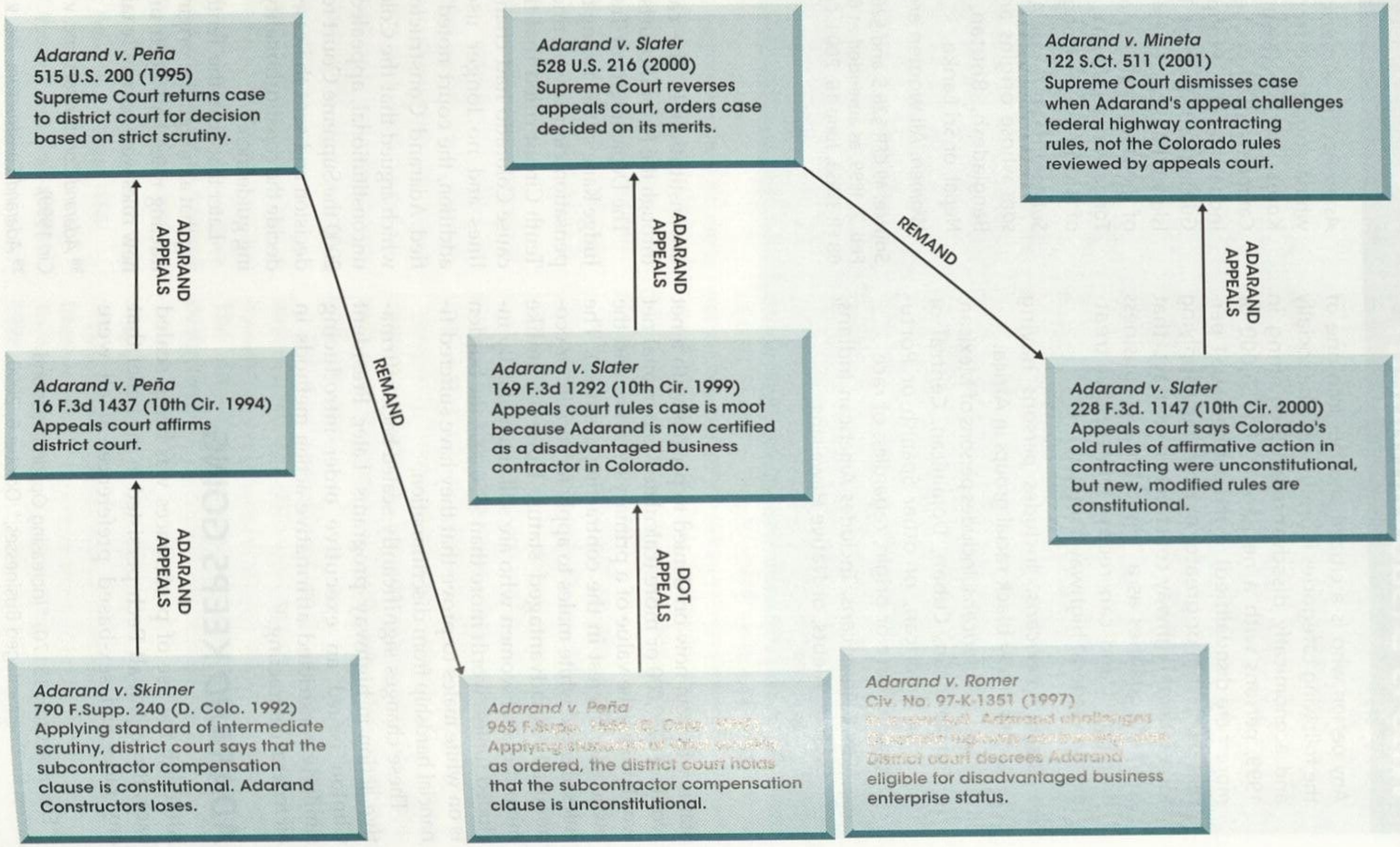
[37] Executive Order 13170, "Increasing Opportunities and Access for Disadvantaged Businesses," October 6, 2000.

[38] *Adarand Constructors, Inc. v. Slater*, 169 F.3d 1292 (10th Cir. 1999).

[39] *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000).

EXHIBIT 1 **The *Adarand* Odyssey.**

This diagram shows the path of the case as it moved through levels of the federal court system over nine years. Twice the Supreme Court remanded the case, that is, sent it back to a lower court for deliberation consistent with legal principles it set forth. Name changes occurred as each new Secretary of Transportation was named as the defendant.



government interest and, therefore, constitutional. Again, Adarand Constructors appealed the decision to the Supreme Court, which took the case under review. Adarand argued that the Tenth Circuit had erred in its constitutional analysis because no rules that used race or sex as a criterion for awarding government funds could pass the strict scrutiny standard. In its brief, it argued the arbitrariness of the rules:

> [E]very single legally admitted permanent resident or citizen of the United States who happens to be female or who can trace his origins to any of 42 specifically designated countries is automatically presumed to have attempted to enter the American highway construction business and to have experienced racial prejudice that somehow hindered that attempt.[40]

Adarand Constructors urged the Court to adopt the position of Justice John Marshall Harlan that the Constitution is color-blind. It believed that both Congress and the states continued to "trample the constitutional rights of countless innocent individuals."[41] Conservative foes of affirmative action cheered the case on. John O'Sullivan, writing in *National Review*, articulated their view.

> Today . . . preferences bestow benefits on something like 65 percent of Americans by extracting a sacrifice from the remaining 35 percent who happen to be white males. Their injustice is now real and concentrated. In other words, they are now plainly and undeniably [victims of] an official program of negative discrimination against a minority: the sole remaining example of institutionalized racism in the United States.[42]

Adarand was a major challenge to affirmative action, but there would be no decision on it. In late 2001 the Supreme Court, after hearing oral arguments, dismissed the case without a decision, saying it should never have accepted it in the first place. The reason was something of a technicality. In an unsigned opinion, a unanimous Court explained that, in the case, Adarand Constructors was not challenging the Tenth Circuit's decision about Colorado's contracting rules. Instead, it was arguing that federal guidelines were unconstitutional. The Tenth Circuit decision had not addressed federal guidelines. Therefore, since the Supreme Court was "a court of final review and not first review," it declined to take up the merits of Adarand's arguments and the case was "dismissed as improvidently granted."[43]

With this dismissal the litigation epic of the *Adarand* case, shown in Exhibit 1, came to sudden end. The merits of its final appeal are still up for debate, if not for a formal decision.

While the *Adarand* decision lives on, making affirmative action in government contracting harder to justify, minority contractors continue to struggle. For example, in 1996 California voters passed a proposition banning affirmative action in state contracting. Over the next 10 years, the dollar amount of contracts awarded to minority-owned contractors by the California Department of Transportation fell more than 50 percent and two-thirds of these contractors went out of business.[44]

Questions

1. What constitutional issue is raised in the *Adarand* litigation?
2. After the Supreme Court's 1995 decision in *Adarand v. Peña* what requirements did an affirmative action program have to meet to be constitutional?
3. Was the decision of the Court majority correct? Why or why not?
4. In a concurring opinion, Justice Scalia said that race classifications by government were never legitimate. In dissenting opinions, Justices Stevens, Souter, and Ginsburg argued that race-conscious remedies were justified. What were their arguments? With whom do you agree? Why?
5. Following *Adarand v. Peña*, the district court held that the affirmative action program in federal highway contracts was unconstitutional. Do you agree with this decision? Why or why not?
6. Do you believe that the Department of Transportation's current rules for helping DBEs get highway construction contracts pass the strict scrutiny requirement?

[40] Petitioner's Brief on the Merits, June 11, 2001, p. 11.

[41] Ibid., pp. 19–20.

[42] John O'Sullivan, "Preferred Members," *National Review*, September 3, 2001, p. 20.

[43] *Adarand Constructors, Inc. v. Mineta*, 122 S. Ct. 511, at 514 and 515. Norman Mineta, a new secretary of Transportation, was now the respondent.

[44] Monique W. Morris et al., *Free to Compete: Measuring the Impact of Proposition 209 on Minority Business Enterprises* (Berkley, CA: Discrimination Research Center, 2006), p. 42.