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Advertising to Children and the Commercial Speech Doctrine: Political and Constitutional Limitations

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I. INTRODUCTION

For the past forty years, efforts to limit or prohibit advertising to children have faced a powerful combination of political and constitutional limitations. The political will and pressure have not been exerted to enact and enforce meaningful regulations that curtail, in all media, the proliferation of advertising directed at children. Such advertising exploits the very market failures that governments around the world, including our own, seek to minimize. Yet even when restrictions on advertising are enacted, they are inevitably met with constitutional challenges. These two limitations—political and constitutional—rest, however, on faulty assumptions about human behavior in the marketplace. This Article demonstrates that removing faulty assumptions reduces the logic of constitutional challenges, even under existing case law.

Between the years 1990 and 2000, the amount of money spent by children doubled.[1] In 2000, children twelve years old and younger accounted for $28 billion in personal spending and influenced $250 billion in family expenditures.[2] The desire to advertise to children is further

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1. BARRIE GUNTER ET AL., ADVERTISING TO CHILDREN ON TV—CONTENT, IMPACT, AND REGULATION 2 (2005) (citing Lawlor & Prothero, *The Established and Potential Mediating Variables in the Child's Understanding of Advertising Intent: Towards a Research Agenda*, 18 J. MARKETING MGMT. 481 (2002)).

2. *Id.*

increased by the fact that children have the largest future market potential of any consumer group.[3] In addition, children in the United States spend an average of four to five hours per day watching some form of electronic media.[4] The hours in front of the television add up to one-sixth of a child's life, which is the equivalent of over sixty days per year of media influence.[5] While watching television, it is estimated that children view more than 40,000 advertisements every year.[6] Furthermore, the majority of the advertisements children see are for high-caloric or fatty foods, such as candy, sugary cereal, fast food, junk food, and soft drinks.[7]

Is this form of commercial speech beneficial to child consumers? Is advertising to children a form of discourse that increases product knowledge and helps children make informed decisions in the market? Most importantly, do children have enough knowledge and training to see through advertising ploys and biases and apply the proper weight to the seductive and misleading advertisements?[8] Does advertising to children also affect the way they perceive reality and society? Are children able to accurately perceive dangers and risks associated with the products they see on television?[9] Are commercials conditioning our children to act the way

3. *See* James U. McNeal, *Tapping the Three Kids' Markets*, AM. DEMOGRAPHICS, Apr. 4, 1998, at 37–39 (noting that brand loyalty is important to gain with children at a young age to ensure future consumption, and children have the most spending years ahead of them out of any age cohort).

4. R. Cook, *Kids and Media*, 2006 INT'L J. OF ADVER. AND MARKETING TO CHILDREN 29.

5. *See id.*

6. Dale Kunkel, *Children and Television Advertising*, *in* HANDBOOK OF CHILDREN AND THE MEDIA 375, 376 (Dorothy G. Singer & Jerome L. Singer eds., 2001) (citing D. Kunkel & W. Gantz, *Children's Television Advertising in the Multi-Channel Environment*, 42 J. COMM. 134, 134–52 (1992)).

7. E. Katherine Battle & Kelly D. Brownell, *Confronting a Rising Tide of Eating Disorders and Obesity: Treatment vs. Prevention and Policy*, 21 ADDICTIVE BEHAVS. 755, 761 (1996).

8. *See* Joel J. Davis, *Ethics and Environmental Marketing*, 11 J. BUS. ETHICS 81, 84 (1992) (arguing that regulations designed to protect consumers from the deceptive practices of businesses are often ineffectual or misused by companies). Even though the Federal Trade Commission restricts what advertisers can say about their products, advertisers continue to say things that technically may be true, but are misleading due to the omission or obscuration of facts necessary for the public to properly interpret the advertisements. *Id.* That is, "marketers have a history of pushing regulatory guidelines to their limits, relying on scientific truths to substantiate their claims and ignoring the manner in which the typical consumer will interpret the claim." *Id.*

9. *See generally* Karl A. Boedecker, Fred W. Morgan, & Jeffrey J. Stoltman,

advertisers desire?[10] The field of advertising assumes a rational consumer,[11] but what should a nation do when confronted with the

Excessive Consumption: Marketing and Legal Perspectives, 36 AM. BUS. L.J. 301 (1999) (outlining the dangers associated with excessive consumption of advertised products). Specifically, in trying to attract new customers to a market, advertisers may attract consumers who are less able than current customers to understand either how to use an item or the risks associated with the product. *Id.* at 302. For example, in 1990, Nabisco introduced a brand of cigarettes targeted at young, less-educated females. *Id.* Subsequently, experts criticized this strategy, arguing that the specific segment of smokers the ads targeted was more vulnerable than adults to glamorized smoking. *Id.*

10. *See* Omer Lee Reed, Jr., *The Psychological Impact of TV Advertising and the Need for FTC Regulation*, 13 AM. BUS. L.J. 171, 175–78 (1975) (noting the ways in which advertisers "condition" their audience to purchase products, just as psychologist Pavlov conditioned his dog to unknowingly salivate at the sound of a bell).

11. *See* Tamara R. Piety, *"Merchants of Discontent": An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech*, 25 SEATTLE U. L. REV. 377, 383 (2001). Marketers assume rationality to justify their advertisements. *Id.* If, indeed, consumers do not make rational decisions, it follows that advertisements would be deceptive *and* coercive, influencing consumers through immoral means. However, there is much debate over whether adults, let alone children, are rational consumers. Piety argues, "behavioral research has discovered that human beings' capacity to reason, even when employing what appears to be only 'reason,' is subject to predictable biases." *Id.* at 402 (citing JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982)). For instance, adults have the tendency to misread evidence as confirming their own previously established views, thus engaging in "confirmatory bias." *Id.* The tobacco industry relies heavily on the "optimistic bias," or "[t]he tendency to underestimate the probability that an undesirable occurrence . . . will happen to the individual." *Id.* at 403 (citing Jon D. Hanson & Douglas A. Kysar, *Taking Behaviorism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 658 (1999)). Piety further argues that advertising may rely most heavily on "availability and representativeness biases," or "[t]he tendency both to calculate probabilities on the basis of the most available, and often the most vivid, facts and to attribute greater weight to known occurrences than is appropriate." *Id.* This bias infiltrates commercials through the concept of "brand identification." *Id.* Thus, it is unclear if adults are the rational consumers the advertising industry claims they are.

Furthermore, there is a large body of research indicating the irrationality of consumers. *See generally* Aradhna Krishna & Maureen Morrin, *Does Touch Affect Taste? The Perceptual Transfer of Product Container Haptic Cues*, 34 J. CONSUMER RES. 807 (2008). Krishna and Morrin analyze the ways in which consumers perceptually transfer product packaging characteristics to judgments about the products themselves. For instance, does food taste better when served on fine china rather than paper plates? Rationally speaking, the product containers should not affect the actual quality or taste of the products within those containers; however, packaging still affects people's perceptions of the food's taste. *Id.* at 816–17.

The prevalence of superstitious beliefs is also evidence of irrational consumer behavior. *See* Thomas Kramer & Lauren Block, *Conscious and Nonconscious*

imbalance of power between large, deceptive advertisers and young children who are psychologically and intellectually at the opposite pole from the traditionally assumed rational consumer? This Article argues that advertising to children should be treated as a special category of advertising due to the unique nature of the audience and the detrimental effects advertising has on America's children.[12]

This Article is organized as follows: Part II explores the harmful effects of advertising directed at children. These adverse effects provide the evidence and reasons for stricter federal regulation of advertising to children and also provide courts with grounds to find that the state has a substantial interest in regulating such advertising. Part III looks at the role politics, Congress, the Federal Trade Commission (FTC), and the Federal Communications Commission (FCC) play in regulating advertising aimed at children. While Congress and federal agencies must be mindful of the constitutional limitations on their ability to regulate advertising, their ability to craft meaningful legislation and regulations is the crucial first step in the process. Part IV takes the next step and examines the history and current status of the "commercial speech doctrine," which guides the courts' analysis of the permissibility of the regulations promulgated by the various federal agencies. While the government has a substantial interest in protecting children from certain speech, the government must overcome other critical factors in crafting its regulations. Part V applies the constitutional test first developed in *Central Hudson Gas & Electric Corp. v. Public Service Commission* to evaluate hypothetical regulations on

Components of Superstitious Beliefs in Judgment and Decision Making, 34 J. CONSUMER RES. 783 (2008). The authors document the existence and the influence of these superstitions, and show that when they are permitted to operate on a subconscious level, they have a "robust effect . . . on consumers' satisfaction judgments and risk-taking behavior." *Id.* at 791. For many, market decisions are governed by everything from lucky numbers to feng shui. *See id.* at 783–85. Billions of dollars annually are spent on tarot cards, astrology readings, and trinkets from competing religions, at least some of which logically must be false. A perfectly informed actor would not spend his money on products that offered to do things they could not possibly do, like reveal the future or cast a spell on an enemy. There is, therefore, no assumption of perfectly informed rational calculation in Kramer and Block's account. *See id.*

12. *See* DALE KUNKEL ET AL., AM. PSYCHOLOGICAL ASS'N, REPORT OF THE APA TASK FORCE ON ADVERTISING AND CHILDREN 1 (2004) (explaining the American Psychological Association's evidence that confirms "children lack the cognitive skills and abilities . . . [to] . . . comprehend commercial messages in the same way as do more mature audiences" and concluding that children are "uniquely susceptible to advertising influence").

advertising to children.[13] Part V then concludes that increased government regulation can pass the courts' intermediate scrutiny for commercial speech. Part VI looks to Europe and Canada for ideas and ways to limit children's exposure to unwanted advertising. Part VII then anticipates and refutes the major counterarguments against increased regulation of advertising aimed at children.

II. THE DANGERS OF ADVERTISING TO CHILDREN: INDIVIDUAL AND SOCIETAL HARM

The vulnerability of children makes them especially deserving of protections from harmful influences. The American Academy of Pediatrics noted that children younger than eight years old "accept advertising claims at face value" and are therefore "cognitively and psychologically defenseless against advertising."[14] The harm and risk to children is particularly acute. A recent study estimates that a total ban on fast food advertising to children and adolescents "would reduce the number of overweight children ages [three to eleven] in a fixed population by 18 percent."[15] While arguments abound for a more robust commercial speech doctrine,[16] special attention needs to be paid to children.

An increased understanding of the direct and tangible harms that our children and society bear as a result of advertising aimed at this most vulnerable group of our community will increase the pressure to form meaningful regulations on advertising. We cannot ignore the future long-term risks that children face every time an advertiser broadcasts commercials directed at the youth of our nation.[17]

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13. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

14. Victor C. Strasburger et al., Policy Statement, *Children, Adolescents, and Advertising*, 118 PEDIATRICS 2563, 2563 (2006).

15. Shin-Yi Chou et al., *Fast-Food Restaurant Advertising on Television and Its Influence on Childhood Obesity*, 51 J.L. & ECON., 599, 599 (2008).

16. *See* Daniel E. Troy, *Commercial Speech: Defending the Language of Capitalism*, *in* SPEAKING FREELY: THE PUBLIC INTEREST IN UNFETTERED SPEECH 67–72 (1995) (arguing that information is not harmful but rather information allows people to understand their preferences and act in their best interests); *see also* Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748, 770 (1976) (suggesting society should "assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them").

17. *See* Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 220–25 (1995) (explaining that individuals make

A. *Advertisements Exploit Children's Lack of Understanding*

For doctors, parents, teachers, and legal scholars alike, "[t]he underlying concern about television advertising is whether it exploits children."[18] Adults consider children to be particularly vulnerable to advertising because they possess less knowledge about the intent of advertisers and the processes by which advertisements are created.[19] Children are not born with any knowledge of advertising techniques or economic systems.[20] Rather, their awareness of marketing develops only gradually with time and education.[21] Thus, the American Academy of Pediatrics declared that advertising is inherently deceptive because children below certain ages do not have the capacity to fully realize the nature and quality of advertisements.[22]

Children are more vulnerable to advertisements because unlike adults, they are not aware that the intended purpose of advertisements is to persuade people to buy products.[23] Conversely, adults understand that advertisements are intentionally created to present products to appear as attractively as possible and often contain misleading or biased information.[24] Furthermore, adults recognize "who pays for and produces advertisements" on television and that advertisements are "part of an economic system that depends on selling products."[25] Therefore, adults have the capability to react with informed decisions regarding television advertisements, but it is unclear if children possess the insight to interpret advertisements in the same context as adults do. Additionally, evidence suggests that young children generally do not comprehend the persuasive intent of advertisements, displaying no cynicism toward or critical

decisions and calculate risk based on unreliable sources and tend to "give too little weight to future benefits and costs as compared to present benefits and costs," and that consumers tend to underestimate risks associated with situations).

18. GUNTER ET AL., *supra* note 1, at 3.

19. *See generally* Caroline Oates et al., *Children's Understanding of Television Advertising: A Qualitative Approach*, 9 J. MARKETING COMM. 59 (2003) (exploring children's understanding of television using focus groups made up of children of different ages).

20. GUNTER ET AL., *supra* note 1, at 9.

21. *See* BARRIE GUNTER & ADRIAN FURNHAM, CHILDREN AS CONSUMERS: A PSYCHOLOGICAL ANALYSIS OF THE YOUNG PEOPLE'S MARKET 123–24 (1998).

22. Steven Shelov et al., Am. Acad. of Pediatrics, *Children, Adolescents, and Advertising*, 95 PEDIATRICS 295, 295 (1995).

23. GUNTER ET AL., *supra* note 1, at 9.

24. *Id.*

25. *Id.*

questioning of the information in advertisements that older children and adults display.[26] When asked about the purpose of advertisements, the majority of children below six years of age cannot explain the selling purpose, and are therefore more likely to perceive the advertisement as truthful.[27] However, the majority of children ages eight to twelve believe advertisements are truthful only some of the time, or not at all.[28] This demonstrates that with time, children do gain a greater understanding of the reality of advertising. The problem is that without life experiences and knowledge, many children see advertisements as providing unbiased information or entertainment programming rather than calculated salesmanship.[29] What children do not realize is that the advertisements are highly biased and employ technology and special effects designed to convince the consumer to buy into the advertisers' salesmanship.[30] For these reasons, advertising to children is often misleading or untruthful to the consumer.[31]

B. *Advertising's Role in Enforcing Negative Societal Stereotypes*

In addition to the concern that advertising exploits children's naiveté for economic gain, there is also the concern that advertising affects children's perceptions of social reality. Advertisers contribute to how and

26. GUNTER & FURNHAM, *supra* note 21, at 123.

27. *Id.*

28. *Id.* at 133.

29. *See* ROY F. FOX, HARVESTING MINDS: HOW TV COMMERCIALS CONTROL KIDS 50 (1996).

30. *See* M. Joseph Sirgy & Chenting Su, *The Ethics of Consumer Sovereignty in an Age of High Tech*, 28 J. BUS. ETHICS 1, 5–9 (2000) (arguing that in a market based on technologically advanced products, consumer sovereignty is a fiction because in the high-tech world, consumers do not have access to the technical information they need about products, and even if they did it would be difficult for them to process information about quality in a way that would aid their decision).

31. In *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 183 (1999), the Supreme Court affirmed that the government has a substantial interest in advertising that is not misleading. *See also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563–64 (1980) (holding that misleading commercial speech is not protected by the First Amendment). If the Supreme Court is saying the government has a substantial interest in truthful advertising, it follows that the government also has an interest in regulating misleading advertising. In other words, if advertising is misleading to child consumers, logically the government has a greater interest in regulating these advertisements. If advertising to children misleads them due to a lack of knowledge and understanding, ignorance concerning the intention of marketers, and overall unfamiliarity with market processes, it appears the government has a substantial interest in the regulation of such advertisements.

what we think about other people and ourselves. The danger is that advertising to children may encourage them to form unrealistic and clichéd opinions about society.[32] For instance, children as young as three who are television viewers have more rigid attitudes about what jobs are appropriate for men and women compared to their peers who watch less television.[33] Specifically, the nature of advertising in relation to gender generally demonstrates the following features: Men are shown in more roles than women; women are shown in more family roles; a man's world is outside the home; and women do activities in the home while men are the beneficiaries of these activities.[34] Furthermore, an article from the *New York Times* entitled "What Are Commercials Selling to Children?" answers with "[a] world where food is sweet and blond is best," girls like dolls, and "black children play supporting roles."[35]

C. *Advertising's Effect on Children's Health*

Special consideration for children's health is necessary because advertisements for food products make up the majority of advertisements directed at children, and most of the advertised foods are unhealthy.[36] Specifically, eighty percent of commercials directed toward children are for food.[37] Furthermore, one study indicates that only a small percentage of food commercials contain nutritional information about the product.[38] Thus, there is little disclosure about fat content or high sodium levels during advertisements directed at children.[39] In addition, the amount of children's advertising has not remained constant since previous decades.[40]

32. *See generally* GUNTER ET AL., *supra* note 1, at 130–32 (explaining the negative effects of advertising on stereotyping).

33. FOX, *supra* note 29, at 13.

34. *Id.* at 14.

35. John J. O'Conner, *What Are Commercials Selling to Children?*, N.Y. TIMES, June 4, 1988, at C20.

36. SUSAN ELLIOT ET AL., FED. TRADE COMM'N, FTC FINAL STAFF REPORT AND RECOMMENDATION 49–50 (1981).

37. Dan Glickman, Sec'y of Agric., USDA Symposium on Childhood Obesity: Causes and Prevention 4 (Oct. 27, 1998) (transcript available at http://www.usda.gov/news/releases/1998/10/0445).

38. *See* Aya Kuribayashi et al., *Actual Nutritional Information of Products Advertised to Children and Adults on Saturday*, 30 CHILDREN'S HEALTH CARE 309, 318–19 (2001).

39. *Id.*

40. *See* THE HENRY J. KAISER FAMILY FOUND., THE ROLE OF MEDIA IN CHILDHOOD OBESITY 1 (2004) (noting that in recent years there has been an "explosion in media targeted to children").

The number of advertisements directed at children has steadily increased over the past twenty years and has doubled since the 1970s.[41] During the same period, the rate of children's obesity more than tripled, rising from four to fifteen percent.[42] The important message when discussing advertising is that studies link the increase in advertisements for unhealthy foods directed at children with the growing rates of childhood obesity.[43] That is, evidence suggests that exposure to food advertising affects children's food preferences and eating behavior.[44]

Furthermore, a large body of evidence suggests that advertisers of unhealthy foods and sedentary entertainment products for children may be causing premature death by obesity and related diseases.[45] In particular, health conditions such as heart disease, diabetes, and stroke result from patterns of low levels of physical activity and a poor diet.[46] These dangers exist because not only does obesity cause health problems for children, but poor eating habits developed during childhood persist throughout one's life.[47] Obesity is not merely a personal problem—obesity is a governmental concern due to the high costs it is inflicting on the United States healthcare system.[48] Currently, obesity is the second largest contributor—only after tobacco use—to mortality rates in the United

41. *See id.* at 4 (stating that the average number of television commercials children viewed in the 1970s was approximately 20,000 per year and is currently estimated to exceed an average of 40,000 per year).

42. William A. Ramsey, Note, *Rethinking Regulation of Advertising Aimed at Children*, 58 FED. COMM. L.J. 361, 368 (2006).

43. KUNKEL ET AL., *supra* note 12 (citing W. Dietz, *You Are What You Eat—What You Eat Is What You Are*, J. ADOLESCENT HEALTH CARE, Jan. 1990, at 76; K. B. Horgan et al., *Television Food Advertising: Targeting Children in a Toxic Environment, in* THE HANDBOOK OF CHILDREN AND MEDIA 447, 450 (D.G. Singer & J.L. Singer eds., 2001)).

44. *See* COMM. ON FOOD MKTG. & THE DIETS OF CHILDREN & YOUTH, INST. OF MED. OF THE NAT'L ACADS., FOOD MARKETING TO CHILDREN AND YOUTH: THREAT OR OPPORTUNITY? 257–58 (J. Michael McGinnis et al. eds., 2006) [hereinafter THREAT OR OPPORTUNITY]; GERARD HASTINGS ET AL., CENTER FOR SOCIAL MARKETING, REVIEW OF RESEARCH ON THE EFFECTS OF FOOD PROMOTION TO CHILDREN: FINAL REPORT (2003).

45. Bill Jeffery, *The Supreme Court of Canada's Appraisal of the 1980 Ban of Advertising to Children in Quebec: Implications for "Misleading" Advertising Elsewhere*, 39 LOY. L.A. L. REV. 237, 238 (2006).

46. *Id.*

47. KUNKEL ET AL., *supra* note 12, at 12.

48. Jeffrey P. Koplan & William H. Dietz, *Caloric Imbalance and Public Health Policy*, 282 JAMA 1579, 1579 (1999) (noting that direct and indirect obesity costs contribute to approximately 10% of the United States healthcare budget).

States.[49] In addition to the hundreds of thousands of deaths caused by obesity each year, it is estimated that obesity costs the American healthcare system seventy billion dollars per year.[50]

These harms are well documented, and the link between obesity and advertising aimed at children is clear.[51] The World Health Organization, the Kaiser Family Foundation, the British Food Commission, and the Institutes of Medicine, just to name a few, all acknowledge the harmful health effects associated with junk food advertising targeting children.[52] "Food and beverage advertisers alone spend between $10 billion to $12 billion a year targeting youth."[53] Advertising harmful food to vulnerable children calls for meaningful regulation.

III. POLITICAL LIMITATIONS: THE FTC, FCC, AND CONGRESS

While case law defines the parameters of the commercial speech doctrine, it is the administrative agencies that have the regulatory power over advertising policy in the United States. Almost since the inception of television, Congress has provided the authority to regulate broadcasting. In 1934, Congress passed the Communications Act, requiring "that television be regulated for the 'public convenience, interest, or necessity.'"[54] However, the history of advertising regulations demonstrates an uneasiness about aggressively regulating commercial speech.[55] The two most powerful government agencies that oversee and enforce regulations effecting advertising directed at children are the FCC and the FTC.[56] Since

49. *Id.*

50. Glickman, *supra* note 37.

51. THREAT OR OPPORTUNITY, *supra* note 44, at 8–10 (presenting the committee's findings on the relationship between advertising and childhood obesity).

52. Susan Linn & Josh Golin, *Beyond Commercials: How Food Marketers Target Children*, 39 LOY. L.A. L. REV. 13, 14 (2006).

53. *Id.*

54. Matt Getz, *"Drowned in Advertising Chatter": The Case for Regulating Ad Time on Television*, 94 GEO. L.J. 1229, 1253 (2006) (quoting 47 U.S.C. § 307 (2000)).

55. Gaylord A. Jentz, *Federal Regulation of Advertising: False Representations of Composition, Character, or Source and Deceptive Television Demonstrations*, 6 AM. BUS. L.J. 409, 411 (1968) (explaining that the common law principle of caveat emptor, which allowed a marketer or producer to "huff and puff his wares," was fixed in U.S. law). Furthermore, "[t]he concept of privity of contract as a prerequisite for recovery also added to the plight of the consumer, thus the thought of regulation was even greeted with hostility." *Id.*

56. The FTC is the primary federal agency that regulates all advertising, while

at least the 1970s, both the FCC[57] and the FTC[58] have been aware of the dangers of advertising to children.[59] The FTC's authority to regulate advertising directed at children is derived from Section 5 of the FTC Act, which broadly prohibits unfair or deceptive acts or practices in commerce.[60] When an advertisement is targeted to a specific audience, such as children, the FTC determines the effect it has on a reasonable member of that group—an ordinary child.[61] Specifically, the FTC has the power to regulate misleading commercials.[62] The FTC has investigated numerous cases challenging deceptive performance claims in toy advertisements.[63] When considering regulation of commercials, it is important to note that in each of these cases, the advertisement was examined from the viewpoint of a child in the age group to which the toy was targeted, and while an adult

other advertising agencies exercise jurisdiction over certain products and forms of media. *See* Ross D. Petty, *FTC Advertising Regulation: Survivor or Casualty of the Reagan Revolution?*, 30 AM. BUS. L.J. 1, 1–2, 33 (1992) (explaining that states and other federal agencies are increasingly regulating advertising as well). Additionally, "[a]ll fifty states have 'little FTC acts' and several have other advertising statutes." *Id.* at 1 n.1.

57. Children's Television Report & Policy Statement, 50 F.C.C.2d 1, 11 (1974).

58. *See* J. Howard Beales III, Remarks at the George Mason Law Review 2004 Symposium on Antitrust and Consumer Protection: Competition, Advertising, and Health Claims: Legal and Practical Limits on Advertising Regulation 6 (Mar. 2, 2004) (transcript available at http://www.ftc.gov/speeches/beales/040312childads.pdf) (hereinafter Beales's Remarks).

59. Tracy Westen, *Government Regulation of Food Marketing to Children: The Federal Trade Commission and the Kid-Vid Controversy*, 39 LOY. L.A. L. REV. 79, 80–81 (2006) (noting that by 1977, the FTC knew that children saw at least 20,000 commercial television ads a year, and that the children could not distinguish between commercials and programs).

60. *See generally* 15 U.S.C. § 45 (2000).

61. *See In re* Cliffdale Assocs., Inc., 103 F.T.C. 110, 177–78 (1984) ("When representations . . . are targeted to a specific audience, the Commission determines the effect of the practice on a reasonable member of that group.").

62. *See* 15 U.S.C. § 45(a)(1) (empowering the Commission to prevent use of "deceptive acts . . . in or affecting commerce").

63. *See, e.g.*, *In re* Hasbro, Inc., 116 F.T.C. 657 (1993) (commercials and packaging used materially altered toys to advertise exaggerated features and characteristics); *In re* Lewis Galoob Toys, Inc., 114 F.T.C. 187 (1991) (false and misleading advertisements ranged from depicting toys doing things without human assistance to packaging showing additional toys that were not included); *In re* Gen. Mills Fun Group, Inc., 93 F.T.C. 749 (1979) (misleading advertisement implied children could control the speed and direction of the toy after launch); *In re* Mattel, Inc., 79 F.T.C. 667 (1971) (misrepresentations in packaging and advertising of Hot Wheels and Dancerina Doll).

viewer might not consider the commercial misleading, the advertisement may prove misleading to children.

Despite some recent successes in regulating misleading advertising in general, the FTC has not been entirely successful in regulating advertisements directed at children. In the United States, the first comprehensive efforts to regulate advertising to children were made in the 1970s.[64] Interest groups, such as Action for Children's Television (ACT), spearheaded the push for regulation of children's advertising in the United States.[65] Such petitions and lobbying prompted the FTC to investigate the effects of advertising on children from 1971 to 1973.[66] In 1978, the FTC issued a notice of proposed rulemaking, which recommended regulation of advertisements aired during children's television.[67] Four advocacy organizations—ACT, the Center for Science in the Public Interest, the Consumers Union of America, and the Committee on Children's Television—petitioned the FTC to act in the area of children's advertisements.[68] In its notice of proposed rulemaking, the Commission proposed the following:

> (a) Ban all television advertising for any product which is directed to, or seen by, audiences composed of a significant proportion of children who are too young to understand the selling purpose of or otherwise comprehend or evaluate the advertising;
>
> (b) Ban televised advertising for sugared food products directed to, or seen by, audiences composed of a significant proportion of older children, the consumption of which poses the most serious dental health risks;
>
> (c) Require televised advertising for sugared food products not included in Paragraph (b), which is directed to, or seen by, audiences

64. GUNTER & FURNHAM, *supra* note 21, at 184 (discussing FTC attempts to ban all advertising directed at young children).

65. Tracy Reilly, *The "Spiritual Temperature" of Contemporary Popular Music: An Alternative to the Legal Regulation of Death-Metal and Gangsta-Rap Lyrics*, 11 VAND. J. ENT. & TECH. L. 335, 369–73 (2009). The group has since disbanded but was responsible for numerous petitions to the Federal Communications Commission and for bringing several suits in federal court.

66. FCC Children's Television Report and Policy Statement, 50 F.C.C.2d 1, 1–2 (1974).

67. FTC, Children's Advertising, 43 Fed. Reg. 17967 (proposed Apr. 27, 1978).

68. *Id.* at 17968.

> composed of a significant proportion of older children, to be balanced by nutritional and/or health disclosures funded by advertisers.[69]

Public and political opposition to the FTC's idea of regulating children's advertisements ensued.[70] Consumer organizations, broadcasters, product manufacturers, advertising agencies, and individual consumers submitted hundreds of written comments, totaling 60,000 pages.[71] Subsequently, FTC staff terminated the rulemaking proceeding because workable solutions to regulate child-oriented television advertising were not available at the time.[72] Furthermore, the FTC determined that it lacked the resources to pursue further the regulation of children's advertising.[73] Even worse for the future of the FTC, the failed attempt at regulation was not taken lightly. The notice of proposed rulemaking led to "Congress [allowing] the agency's funding to lapse, and the agency was literally shut down for a brief time."[74] "It was more than a decade after the FTC terminated the rulemaking before Congress . . . reauthorize[d] the agency" to make policy regarding children's advertising or any substantially similar proceeding.[75] This proposed regulation was by far the most exhaustive examination ever undertaken to restrict advertising to children, and ever since the regulation's failure, a negative stigma has plagued the realm of advertising regulation.[76]

When considering the possibility for future regulations, it is important to note that "[t]he [current] FTC seems reluctant to completely ban advertising aimed at children" because of its past failure and the political

69. *Id.* at 17969. Children too young to understand the purposes of advertising were considered to be those under the age of eight. *Id.* Older children were considered to be those between the ages of eight and twelve. *Id.*

70. *See* Editorial, *The FTC as National Nanny*, WASH. POST, Mar. 1, 1978, at A22 (describing the FTC's proposed regulations as protecting children from the weakness of their parents, not from sugar-coated cereals).

71. ELLIOT ET AL., *supra* note 36, at 13.

72. FTC Children's Advertising, 46 Fed. Reg. 48710, 48713 (rulemaking proceeding terminated Oct. 2, 1981).

73. *Id.*

74. J. Howard Beales III, *Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present*, 12 GEO. MASON L. REV. 873, 879 n.3 (2004) (citing A.O. Sulzberger Jr., *After Brief Shutdown, F.T.C. Gets More Funds*, N.Y. TIMES, May 2, 1980, at D1) ("[S]hutting down a single agency because of disputes over policy decisions is almost unprecedented.").

75. *Id.* at 880.

76. *See* FTC, Children's Advertising, 43 Fed. Reg. 17967 (proposed Apr. 27, 1978).

views of FTC commissioners.[77] That is, many of the commissioners of the FTC are against any further regulation of advertising to children, and so the regulations are not pursued. Former FTC Chairman Timothy Muris believed that regulating advertising to children would not solve the "obesity epidemic" in the United States.[78] Similarly, former FTC Commissioner Orson Swindle believed that industry should lead efforts to regulate itself, with the government in a backup enforcement position.[79] Likewise, former Commissioner J. Howard Beales III believed that the ramifications of the FTC's attempt to regulate advertising aimed at children in the 1970s would dictate the FTC's current policies[80] and that the FTC "will tread very carefully when responding to calls to restrict truthful advertising to children."[81] Therefore, the current FTC stance does not provide much optimism for federal agency regulation of advertising to children in the near future. It remains to be seen whether the Obama administration appoints commissioners who are more willing to regulate advertising directed at children. Thus, children's advocates must increasingly look to Congress, and then the Supreme Court, for hope.

In the 1980s, pressure from consumer action groups such as ACT began to escalate again, and this time the pressure led the FCC to once again investigate advertising to children. However, in its subsequent report, the FCC stated that there was "no basis in the record to apply a national mandatory quota for children's programming."[82] Despite the attempts of ACT to get the FCC to limit advertising, advertising to children was still without regulation.

This lack of regulation gave rise to one of the first direct court challenges to children's advertising: *Action for Children's Television v.*

77. Ramsey, *supra* note 42, at 382.

78. Danny Kucharsky, *Targeting Kids*, MARKETING MAG., July 12, 2005, at 6. Former Chairman Muris elaborated: "'I think banning marketing is a distraction. Even our dogs and cats are fat . . . and it's not because they're watching too much advertising.'" *Id.*

79. Orson Swindle, Comm'r, Fed. Trade Comm'n, Advertising Issues Before the Federal Trade Commission (Apr. 28, 2004) (transcript available at http://www.ftc.gov/speeches/swindle/040428aaf.htm).

80. *See* Beales, *supra* note 74, at 880 (explaining that the FTC must recognize that grossly overreaching regulation was not well-received in the 1970s, and, considering the present ability of parents to control programming with technology, that task may be better left to parents).

81. Beales's Remarks, *supra* note 58, at 14.

82. Children's Television Programming & Adver. Practices, 96 F.C.C.2d 634, 656 (1984).

FCC (*ACT I*).[83] The court decided to uphold the FCC decision to deregulate children's television, effectively eliminating any enforceable regulations on advertising to children.[84] ACT again filed suit in 1987, challenging the deregulation decision of 1984.[85] *Action for Children's Television v. FCC* (*ACT II*) reversed the FCC's earlier decision finding market forces effectively regulated children's television.[86] This deregulation lasted roughly three years until increasing congressional pressures resulted in legislation.[87] Though there have been numerous attempts to pass legislation aimed at regulating advertising to children, the first successful attempt was the Children's Television Act of 1989.[88] However, the primary objective of this bill was to regulate children's television in general.[89] Advertising comprised only a small portion of the bill.[90] It was, instead, focused on increasing the amount of educational

83. Action for Children's Television v. FCC (*ACT I*), 756 F.2d 899 (D.C. Cir. 1985).

84. *Id.* at 901 (upholding the FCC's decision to deregulate children's television including lifting the limitations on advertising). The court held that the FCC was "within the broad scope of its discretion and was adequately explained by the 1984 Order." *Id.*

85. Action for Children's Television v. FCC (*ACT II*), 821 F.2d 741, 744 (D.C. Cir. 1987).

86. *Id.* at 745–50 (examining almost all of the relevant arguments present in the debate). Finding that children do deserve a special protection, the court stated: "In sum, we find that the Commission has failed to explain adequately the elimination of its long-standing children's television commercialization guidelines, and we therefore remand to the Commission for elaboration on that issue." *Id*. at 750. Before *ACT II*, the FCC found that:

> "commercial levels will be effectively regulated by marketplace forces . . . [and that] if stations exceed the tolerance level of viewers . . . the market will regulate itself. . . ." The Commission reached this overall conclusion notwithstanding ACT's evidence, presented in the notice-and-comment proceedings, that market forces do not effectually regulate the commercial content of children's television. Indeed, the Commission's 1984 Report failed to address that evidence or, for that matter, even to mention the children's television commercialization policy.

Id. at 744 (citations omitted).

87. *See* H.R. REP. NO. 101-385, at 12 (1989), *reprinted in* 1990 U.S.C.C.A.N. 1605, 1617 (describing attempts to pass legislation regulating children's television advertising).

88. *Id.*

89. *Id.* at 14.

90. *Id.*

programming and content.[91] But the regulation's success was short-lived. President Ronald Reagan exercised a pocket veto of the bill and ten days later the bill was dead.[92]

In the following session of Congress, the Children's Television Act was revived as the proposed Children's Television Act of 1990 (CTA).[93] With the exception of state-led actions against tobacco advertising to children, the CTA is the latest progression in the area of regulating advertising to children. The CTA instructed the FCC to enforce regulations for television broadcasters.[94] Specifically, the CTA required:

> (1) the FCC to establish standards for broadcasters regarding the amount of children's television programming aired; and
>
> (2) broadcasters to limit the amount of commercial time aired during children's television programs to 10.5 minutes per hour or less on weekends and 12 minutes per hour or less on weekdays.[95]

When passing the CTA, Congress considered the Supreme Court's willingness to limit speakers' First Amendment protections to regulate advertising for the purpose of protecting children,[96] as the Court did in *FCC v. Pacifica Foundation*.[97] Importantly, Congress passed the bill on the grounds that children have diminished capacity to understand the persuasive aim of advertising.[98] Congress believed a balance must be

91. *Id.* at 17.

92. James J. Popham, *Passion, Politics and the Public Interest: The Perilous Path to a Quantitative Standard in the Regulation of Children's Television Programming*, 5 COMMLAW CONSPECTUS 1, 7 (1997) (citing Irwin Motolotsky, *Reagan Vetoes Bill Putting Limits on TV Programming for Children*, N.Y. TIMES, Nov. 7, 1988, at A1).

93. *See generally* H.R. 1677, 101st Cong. (1990). The proposed act prescribed rulemaking procedures for the FCC, set standards for compliance, and ordered the FCC to proceed with children's advertisement regulation process. *See generally id.*

94. Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (1990) (codified as amended in scattered sections of 47 U.S.C.).

95. 47 U.S.C. §§ 303a(a)–(b) (2006).

96. H.R. REP. NO. 101-385, at 8–9.

97. FCC v. Pacifica Found., 438 U.S. 726, 749–50 (1978) (holding that the state's interest in protecting children justifies special treatment and regulation of otherwise protected expression).

98. *See* H.R. REP. NO. 101-385, at 5 (1989) (noting that the FCC had, in its 1974 policy statement, concluded that "children cannot distinguish conceptually between programming and advertising" and are "far more trusting of and vulnerable to commercial 'pitches' than are adults").

attained between the advertising revenue necessary to support children's television and protection of those children from overcommercialization.[99]

Unfortunately, in 1996 the FCC Task Force found that little had been done to change children's television since the enactment of the CTA in 1990.[100] The necessary balance between advertising revenue and regulations was hindering meaningful progress.[101] The incentive for broadcasters to regulate their advertisements in addition to increasing their children's programming was nonexistent. For these reasons, there remain few limits on the content of advertising to children.[102]

It should be mentioned that, in addition to FTC and FCC efforts to regulate, there has been self-regulation of advertising to children.[103] Until

99. *See* § 101, 104 Stat. at 996. The law notes, "the financial support of advertisers assists in the provision of programming to children," and that "special safeguards are appropriate to protect children from overcommercialization on television." *Id.*

100. *See* FEDERAL COMMUNICATIONS COMMISSION, POLICIES AND RULES CONCERNING CHILDREN'S TELEVISION PROGRAMMING, FCC 96-335 (1996), *available at* http://www.fcc.gov/Bureaus/Mass_Media/Orders/1996/fcc96335.htm.

101. *Id.* ¶¶ 29–34.

102. Little progress has been made on regulating advertising to children because many of the prospective laws never make it out of Congress. For example, the Voluntary Alcohol Advertising Standards for Children Act, H.R. 1292, 105th Cong. (1997), was introduced to curtail advertising by the alcohol industry that appealed to children and teens. Congress found that "[t]elevision advertising influences children's perception of the values and behavior that are common and acceptable in society." *Id.* § 2. Additionally, it noted that "[t]he most popular beer ads use animated characters, animals, or music which also amuse and attract children and teens." *Id.* The reasoning behind the bill was almost identical to the case law surrounding targeted advertising of alcohol and tobacco to children—protection and well-being of children. *Id.*; *see Pacifica Found.*, 438 U.S. at 749–50. However, the bill did not leave the House.

The Protect Children From E-Mail Smut Act of 2001, H.R. 2472, 107th Cong. (2001), was also enacted to protect vulnerable children. This bill was introduced to prevent children from receiving unsolicited e-mail advertisements about sexually oriented material. *Id.* § 2. Once again, the bill never left the House.

103. In addition to self-regulation, The Food and Drug Administration (FDA) has taken steps within its jurisdiction to protect consumers from advertising. *See, e.g.*, Department of Health and Human Services, 21 C.F.R. pts. 801, 803, & 807 (2009) (detailing the reporting and labeling requirements for medical devices). In 1996, the FDA passed an order restricting the advertising of tobacco products. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44396 (Aug. 28, 1996). The rule provided several limitations on tobacco advertising, including limitations on the placement of ads, the locations of billboard ads, tobacco industry involvement in sports, and the sale of branding merchandise. *Id.* at 44399. The FDA promoted such a rule due to the

1990, when the CTA was passed, the FCC was still in favor of letting the market regulate itself.[104] The Children's Advertising Review Unit (CARU), which works under the Better Business Bureau and advertising industry trade associations, monitors advertising directed to children and advertising which it views as likely to suggest that children undertake unsafe activities.[105] CARU has voluntary guidelines for advertising to children under the age of twelve.[106] Furthermore, because industry self-regulation is not government action, and therefore not subject to First Amendment protections, self-regulation may be more flexible and aggressive at addressing concerns about children's advertising.[107]

The trend toward greater First Amendment protection for commercial speech and government agencies' fear of tackling regulation for children's advertising highlights conflicting values and priorities between the public welfare of children and individual and commercial expression rights. The often contradictory views of the legislative and judicial branches create great turmoil in the ongoing discourse about advertising to children. Despite the Supreme Court's finding that the protection of children is a state interest, the United States is unable to forge new laws and regulations without the support and ingenuity of agencies and lawmakers.[108] Yet, public pressure and federal regulation remain the starting point and possibly the best avenue to pursue limits on advertising to children.[109]

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increase in underage tobacco use and growing popularity of tobacco advertisement figures. The FDA's order was responsible for the removal of many popular advertising methods and probably stemmed from the failed Senate bill to place limitations on alcohol and tobacco advertising. *See id.*

104. H.R. REP. NO. 101-385, at 3–4 (1989), *reprinted in* 1990 U.S.C.C.A.N. 1605, 1607–08.

105. Richard A. Kurnit, *Advertising and Unfair Competition Issues*, SF74 ALI-ABA 449, 476 (2001).

106. CHILDREN'S ADVER. REVIEW UNIT, COUNCIL OF BETTER BUS. BUREAUS, SELF-REGULATORY GUIDELINES FOR CHILDREN'S ADVERTISING 4 (2004).

107. Beales's Remarks, *supra* note 58, at 5.

108. *See* Getz, *supra* note 54, at 1258 ("First, the FCC can be capricious, and abandon its own longstanding rules . . . . Second, the FCC is prone to regulatory capture . . . . Third, when the FCC doesn't want to do something, it can delay for a long time.").

109. Joseph M. Price & Rachel F. Bond, *Litigation as a Tool in Food Advertising: Consumer Protection Statutes*, 39 LOY. L.A. L. REV. 277, 289–90 (2006) (noting that relying on litigation "to resolve the issues raised by food advertising to children requires courts to regulate business and juries to decide complicated issues of health and science—tasks that are better suited to the other branches of government").

This Article now turns to the Supreme Court and its jurisprudence to explore the constitutional and legal confines in which the FTC, FCC, and Congress must adopt meaningful regulations and laws. This Article argues for an expansion of authority by which the government may regulate advertising aimed at children.

IV. CONSTITUTIONAL LIMITATIONS: THE EVOLVING COMMERCIAL SPEECH DOCTRINE

The restriction of commercial speech, even for the protection of children, is vigorously debated in current litigation and throughout existing jurisprudence. Just as the interests of advertisers and children clash in the marketplace, commercial speech regulation and First Amendment rights clash within the courts. Examining the history of speech regulation reveals that the evolving limits on commercial speech regulation provide a better understanding of the current debate about advertising to children.

To begin, the text of the First Amendment makes no distinction between commercial and noncommercial speech.[110] The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[111] The Framers of the Constitution left open the full meaning of the First Amendment, leaving it to the courts and future generations to determine the freedoms afforded to commercial speech.[112] However, "[i]t has been clear since [the Supreme] Court's earliest decisions concerning the freedom of speech that the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest."[113] The balancing of freedom of speech and significant state interests is at the heart of advertising regulation.

In the twentieth century, "[t]he Supreme Court began to distinguish between speech which is afforded the most expansive First Amendment protection, such as political speech, and that which is afforded less or

110. *See* U.S. CONST. amend. I.

111. *Id.* cls. 1, 2.

112. ZECHARIAH CHAFFEE, JR., FREE SPEECH IN THE UNITED STATES 16 (1941) (noting that the drafters of the First Amendment found free speech important, but did not say much about its exact meaning). *See also* Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 749 (1993) (discussing the First Amendment failure to explain such critical words as speech, freedom, and abridging).

113. Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (citing Schenck v. United States, 249 U.S. 47, 52 (1919)).

possibly no protection."[114] The Constitution, the Supreme Court held, "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation."[115] The commercial speech doctrine has been a notoriously unstable and contentious domain of American jurisprudence,[116] and the Supreme Court Justices themselves remain divided on how to regulate commercial speech.[117]

In *Central Hudson*, the Supreme Court provided the analytical framework for evaluating the constitutionality of regulations on commercial speech.[118] The regulation must survive a four-part test.[119] As a threshold matter, the court must first inquire if the communication is "misleading" or "related to unlawful activity."[120] If it is not misleading or unlawful, the inquiry continues.[121] "The State must assert a substantial interest to be achieved by restriction on commercial speech," "the restriction must directly advance the state interest involved," and the restriction must not be "more extensive than is necessary to serve that interest."[122] The next section will discuss this test in greater detail, and demonstrate that more aggressive regulations aimed at curtailing or prohibiting advertising to children can withstand constitutional scrutiny.

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114. Robert Sprague, *Business Blogs and Commercial Speech: A New Analytical Framework for the 21st Century*, 44 AM. BUS. L.J. 127, 139 (2007) (stating that "in *Chaplinsky v. State of New Hampshire*, the Court provided examples of speech which are provided no protection: 'the lewd and obscene, the profane, the libelous, and the insulting or "fighting words"—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace'" (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942))).

115. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980) (citations omitted).

116. *See generally* Soontae An, *From a Business Pursuit to a Means of Expression: The Supreme Court's Disputes Over Commercial Speech from 1942 to 1976*, 8 COMM. L. & POL'Y 201 (2003).

117. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 575 (2001) (Thomas, J., concurring); Fla. Bar v. Went For It, Inc., 515 U.S. 618, 645 (1995) (Kennedy, J., dissenting); *Central Hudson*, 447 U.S. at 573 (Blackmun, J., concurring); *id.* at 580 (Stevens, J., concurring); *id.* at 597 (Rehnquist, J., dissenting).

118. *Central Hudson*, 477 U.S. at 566.

119. *Id.*

120. *Id.* at 564.

121. *See id.*

122. *Id.* at 564–66.

However, both before and after *Central Hudson*, the Court has developed its commercial speech doctrine. Examining this case law is beneficial to the argument for increased regulation of advertising to children because through examining court rulings, we can determine if increased regulation of advertising to children is feasible in our current legal environment. Understanding the parameters of commercial speech precedent provides the foundation necessary for drafting new public policy. It is essential for lawmakers to know where the courts stand on the protection of children and commercial speech before they can create constitutional regulations to shield children from the dangers of advertising. Furthermore, cases such as *FCC v. Pacifica Foundation* and *New York v. Ferber* provide the legal validation for arguing that the government's protection of children is a state interest.[123] Through an examination of case law relevant to commercial speech and advertising to children, this Article provides justification for the increased regulation of advertising to children. What follows is a brief summary of a few of the most important commercial speech cases affecting advertising to children since commercial speech was first recognized in 1942.

A. Valentine v. Chrestensen *(1942)*

In *Valentine v. Chrestensen*, the Supreme Court first made the distinction between commercial and noncommercial speech, with the former receiving no constitutional protection.[124] Chrestensen, a citizen of Florida, owned a former United States Navy submarine moored at a state pier in New York's East River, which he exhibited to spectators for profit.[125] To promote his venture, he distributed leaflets on the streets of New York advertising the submarine.[126] The respondent was subsequently confronted by city police and told that distributing leaflets for commercial gain violated the New York City Sanitary Code.[127] Chrestensen responded

123. *See* New York v. Ferber, 458 U.S. 747, 757–58 (1982) (holding that the physical and emotional health of children is a compelling interest); FCC v. Pacifica Found., 438 U.S. 726, 749–51 (1978).

124. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

125. *Id.* at 52–53.

126. *Id.* at 53.

127. *Id.* The New York law stated:

> *Handbills, cards and circulars.*—No person shall throw, cast or distribute or cause or permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever, in or upon any street or public place, or in a front yard or court yard, or on any stoop, or in the

by altering the handbills to include a protest announcement on one side of the leaflet so the handbill would be considered political speech.[128] Despite the alteration, the police prohibited the distribution of the leaflets, and the respondent then filed suit.[129]

The district and appellate courts both held that the New York City Code banning the distribution of the leaflets was unconstitutional.[130] The Supreme Court, however, reversed the lower court's ruling.[131] The Court declared that "[w]e are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent . . . such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment."[132]

Valentine sets the scene for our discussion of regulating advertising to children. After *Valentine*, any regulation on commercial speech protecting the nation's children would have been permitted by the Constitution because the Court had ruled it was within the legislature's judgment to decide to enact such laws.[133] However, changes in the commercial speech doctrine through subsequent Supreme Court cases prove it is much more difficult to create regulations on commercial speech today than immediately following the *Valentine* ruling.

B. Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations *(1973)*

Despite the ruling in *Valentine*, the constitutionality of regulating commercial speech continued to be fiercely debated.[134] Thirty years later,

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> vestibule or any hall of any building, or in a letterbox therein; provided that nothing herein contained shall be deemed to prohibit or otherwise regulate the delivery of any such matter by the United States postal service, or prohibit the distribution of sample copies of newspapers regularly sold by the copy or by annual subscription. This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter.

Id. at 53 n.1 (quoting New York Sanitary Code § 318).

128. *Id.* at 53.

129. *Id.* at 53–54.

130. *Id.* at 54.

131. *Id.* at 55.

132. *Id.* at 54.

133. *See id.*

134. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 262–63 (1964); Breard v.

in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, the Court reexamined the issue of commercial speech, this time concerning a violation of a ban of sexual discrimination.[135] Specifically, the Pittsburgh Commission on Human Relations determined that the Pittsburgh Press violated a city ordinance by placing help-wanted advertisements classified by gender in columns labeled "Male Interest," "Female Interest," and "Male-Female."[136] Pittsburgh Press contended that the ordinance prohibited the newspaper from exercising its constitutional rights to freedom of the press.[137] The Court upheld the commission's ban on sexually discriminatory advertising, comparing the illegality of sexual employment discrimination in jobs-wanted advertisements to the idea that a newspaper can constitutionally be forbidden to publish a want-ad proposing narcotics or prostitutes.[138] It is important to note that the Court focused primarily on advertising for illegal activities while acknowledging there might be another context in which commercial speech[139] could receive greater protection.[140] The Court concluded that advertisements for illegal activities do not fall under First Amendment protection.[141] Those in favor of regulating advertising to children can learn two lessons from *Pittsburgh Press Co*. First, it can be helpful to couch arguments in favor of regulation of commercials using the idea of nondiscrimination. That is, the Court found the newspaper's advertisements discriminating against men and women to be illegal and not warranting constitutional protection.[142] If proponents of regulation can amass evidence indicating commercials are discriminatory against minorities and women, perhaps there is an argument to be made in favor of regulating an advertiser's ability to send such discriminatory messages. Second, *Pittsburgh Press Co.* teaches us that

City of Alexandria, 341 U.S. 622, 625 (1951).

135. *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 378–79 (1973).

136. *Id.* at 379–80.

137. *Id.* at 380–81.

138. *Id.* at 388, 391.

139. *Id*. at 384, 385 (stating "speech is not rendered commercial by the mere fact that it relates to an advertisement"). Instead, the Court defined commercial speech as an expression that "did no more than propose a commercial transaction." *Id.* at 385.

140. *Id.* at 388–89.

141. *See id.* at 388, 391 ("We hold only that the Commission's modified order, narrowly drawn to prohibit placement in sex-designated columns of advertisements for nonexempt job opportunities, does not infringe the First Amendment rights of Pittsburgh Press.").

142. *See id.*

advertisements for illegal activities are not protected by the First Amendment.[143] Thus, perhaps a future avenue for increased regulation of advertisements would be stricter FTC enforcement of such unlawful advertisements.

C. Bigelow v. Virginia *(1975)*

Decades after its foundational ruling in *Valentine*, the Court began to turn away from its previous commercial speech precedent.[144] Whereas *Pittsburgh Press Co.* ruled on the amount of constitutional protection for *illegal* speech,[145] two years later in *Bigelow v. Virginia* the Court clarified the protection of commercial speech advertising for some *legal* activities.[146] The managing editor of a weekly newspaper circulated at the University of Virginia—in a state where abortions were illegal—was convicted of a misdemeanor[147] as the result of publishing a New York City organization's advertisement explaining the availability of abortions for young women if they traveled to New York—where abortions were legal and there was no residency requirement.[148] The state supreme court ruled in accordance with prior Supreme Court commercial speech precedent, asserting that because the abortion advertisements were commercial speech, the advertisements were subject to unrestrained governmental regulation.[149] However, the Supreme Court reversed that ruling and granted some First Amendment protection to legal commercial speech.[150] Furthermore, the Court described its ruling in *Valentine* as "distinctly a limited one" that merely upheld "a reasonable regulation of the manner in which commercial advertising could be distributed."[151]

In *Bigelow*, we see a shift in the Court's consideration of commercial speech protection, thus making it more difficult to create laws regulating

143. *See id.* at 388.

144. Bigelow v. Virginia, 421 U.S. 809, 819–22 (1975) (citing and narrowly interpreting the holdings of several cases, from *Valentine* to *Pittsburgh Press Co.*).

145. *Pittsburgh Press Co.*, 413 U.S. at 391.

146. *Bigelow*, 421 U.S. at 825–26.

147. The statute at that time read, "'[i]f any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor.'" *Id.* at 812–13 (quoting VA. CODE ANN. § 18.1-63 (1960)).

148. *Id.* at 812–14.

149. *Id.* at 814–15.

150. *Id.* at 825–29.

151. *Id.* at 819.

advertising to children. The opinion gave greater First Amendment rights to advertisers while lessening the Court's acquiescence to the legislature's control over commercial speech established in *Valentine*.[152] Despite providing more protection for commercial speech, however, *Bigelow* did not prohibit all regulations on commercial speech or advertising.[153]

D. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. *(1976)*

Relying and expounding on *Bigelow*, one year later the Supreme Court again considered the amount of constitutional protection that should be given to commercial advertisements.[154] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, a prescription drug user and two nonprofit organizations whose members were prescription drug users challenged, on First and Fourteenth Amendment grounds, a Virginia statute prohibiting pharmacists in Virginia from advertising prices for prescription drugs.[155] The district court decided that the statute violated consumers' First Amendment rights and was not adequately justified.[156] On direct appeal, the Supreme Court affirmed.[157] Relying on *Bigelow*, the Court determined that purely economic speech is not disqualified from protection under the First Amendment.[158] The Court further declared that society has "a strong interest in the free flow of commercial information" and that "[e]ven an individual advertisement, though entirely 'commercial,' may be of general public interest."[159] Therefore, in a landmark decision, the Supreme Court held that commercial speech regarding legal activities, even if it pertains to economic interests, is entitled to some First Amendment protection.[160] Furthermore,

152. *See id.* at 819, 825–26.

153. *See id.* at 826.

154. *See generally* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

155. *Id.* at 749–50, 753.

156. *Id.* at 755–56.

157. *Id.* at 773.

158. *Id.* at 760.

159. *Id*. at 764.

160. *Id.* at 771–73. International law has since refuted the Court's decision. *See* Peter Herzog, *United States Supreme Court Cases in the Court of Justice of the European Communities*, 21 HASTINGS INT'L & COMP. L. REV. 903, 907–08 (1998) (explaining that the Supreme Court's decision in *Virginia State Board of Pharmacy* was not persuasive to the Court of Justice, which held that de minimus advertising restrictions, such as in France, cannot be prohibited). Herzog wrote, "[t]hus, the

Virginia State Board of Pharmacy established an intermediate level of First Amendment protection for commercial expression.[161]

The intermediate level of First Amendment protection for commercial speech is important to consider when framing regulations for advertising to children. Regulations for commercials directed at children therefore are neither fully protected nor prohibited by the Court.[162] Understanding the First Amendment as a continuum allowing varying degrees of regulation can give hope from past failures to regulate commercial speech. For example, if a court strikes down a regulation in favor of more First Amendment protection, that does not necessarily mean all future regulations governing advertising to children are necessarily unconstitutional.[163] Many child advocates are easily upset at the failure of past regulations; however, they must keep in mind that regulations of commercial speech exist but are not absolute.

E. Bates v. State Bar of Arizona *(1977)*

In *Bates v. State Bar of Arizona*, the Court considered the limits of false or misleading commercial speech pertaining to legal advertising.[164] Despite an Arizona disciplinary rule prohibiting lawyers from publicizing themselves by commercial means, two attorneys placed an advertisement in a Phoenix newspaper stating that they "were offering 'legal services at very reasonable fees,'" and listing their fees.[165] As a result, the State Bar intervened and imposed penalties on the attorneys for violating the state disciplinary rule.[166] The appellants then sought review in the Supreme Court of Arizona, arguing that the disciplinary "rule infringed their First

reference to the U.S. Supreme Court's decision in *Virginia State Board of Pharmacy* did not seem to persuade the Court of Justice of the importance of completely free advertising for the untrammeled flow of trade in a common market." *Id.* at 908.

161. *See* Arlen W. Langvardt, *The Incremental Strengthening of First Amendment Protection for Commercial Speech: Lessons from* Greater New Orleans Broadcasting, 37 AM. BUS. L.J. 587, 588 (2000) (explaining that the intermediate level of First Amendment protection "exists somewhere between the 'full' First Amendment protection extended to most noncommercial expression and the complete absence of First Amendment protection for certain other speech, such as obscenity. Over the past quarter-century, the level of First Amendment protection extended to commercial speech has continued to be intermediate in nature.") (footnotes omitted).

162. *See infra* Part V.

163. *See infra* Part V.

164. *See generally* Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

165. *Id.* at 354.

166. *Id.* at 356.

Amendment rights."[167] The court rejected the First Amendment claims.[168] However, the United State Supreme Court reversed and declared that Arizona's disciplinary rule violated the First Amendment—a decision flowing from *Virginia State Board of Pharmacy*.[169] The Court rejected the Arizona State Bar's argument that advertising of legal services is inevitably misleading "because such services are so individualized with regard to content and quality . . . [and] . . . because the consumer of legal services is unable to determine in advance just what services he needs."[170] Rather, the Court held that false, deceptive, or misleading advertising is subject to restraint.[171] The "leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial speech arena."[172] The Court's ruling in *Bates* provides a foundational argument for the increased regulation of advertising to children. That is, if advertisements to children are inherently deceptive or misleading, according to *Bates*, they could be subject to regulation.[173] Therefore, *Bates* provides legal justification for protecting children from deceptive advertising.

F. FCC v. Pacifica Foundation *(1978)*

The pivotal Supreme Court cases regarding commercial speech and First Amendment protection discussed above did not directly involve the protection of children. However, in *FCC v. Pacifica Foundation*, the Court specifically addressed the issue of commercial advertising affecting children.[174] The case arose on a weekday afternoon at around two o'clock when a radio station aired a twelve minute monologue given by humorist George Carlin entitled "Filthy Words."[175] In the program, Carlin related his thoughts about words you could not say on the public airwaves and repeated, several times, a number of colloquial expressions for sexual and

167. *Id.*

168. *Id.*

169. *Id.* at 367–72 (analyzing *Virginia State Board of Pharmacy* as the starting point for determining whether Arizona's ban on attorney advertising could pass constitutional muster).

170. *Id.* at 372.

171. *Id.* at 383 (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771–72 (1976)).

172. *Id.*

173. *See infra* Part V.

174. FCC v. Pacifica Found., 438 U.S. 726 (1978).

175. *Id.* at 729.

excretory activities and organs.[176] A man complained to the FCC after his child heard the broadcast.[177] The FCC responded by issuing an order saying that the radio station owner could be subject to administrative sanction because the broadcast aired during a time of day when children were likely to be in the audience and the broadcast contained what the FCC deemed to be indecent language.[178] The court of appeals ruled the FCC's action was overly broad and constituted censorship[179] in violation of, and beyond the power granted by, the United States Code.[180] However, the Supreme Court reversed.[181] The rationale for the Court's decision included the belief that of all forms of communication, broadcasting has "the most limited First Amendment protection."[182] Specifically, broadcasting intrudes into "the privacy of the home" and furthermore is "uniquely accessible to children, even those too young to read."[183] Therefore, the Court held protecting children from offensive expression through special treatment of indecent broadcasting is justified.[184]

The Court's ruling in *Pacifica* is paramount to the argument for increased regulation of advertising to children. In other words, the Court established that all ears, particularly those of the youth of America, are not prepared to hear otherwise protected speech.[185] With age comes understanding, and, due to children's lack of understanding, it is manipulative and coercive to subject children to the same speech adults hear on a regular basis. Unregulated commercial speech allows advertisers to infiltrate the home and prey on the captive audience of children, which is similar to what the Court found impermissible in *Pacifica*.[186] Thus, commercial speech is not black and white. Rather, the Court considers commercial speech from *all* perspectives, including the perspective of the most innocent Americans—children. The Court's ruling in *Pacifica*

176. *Id.* at 732.
177. *Id.* at 730.
178. *Id.* at 730, 732.
179. *Id.* at 733.
180. *See* 18 U.S.C. § 1464 (2006) (prohibiting the broadcast of "obscene, indecent, or profane language"); 47 U.S.C. § 326 (2006) ("Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over radio. . . .").
181. *Pacifica*, 438 U.S. at 751.
182. *Id.* at 748.
183. *Id.* at 748–49.
184. *Id.* at 749–50.
185. *Id.* at 749.
186. *See id.* at 750.

provides the underlying assumptions needed to argue for increased regulation of advertising to children. If we believe children are a unique and naïve audience, as the Court did, it follows that increased regulation for their protection is necessary.

G. Central Hudson Gas & Electric Corp. v. Public Service Commission *(1980)*

In *Central Hudson*, one of the most influential Supreme Court cases regarding commercial speech, Central Hudson Gas and Electric Corporation challenged New York's ban on advertising for utilities.[187] The ban originated during a fuel shortage and required every electric utility in the state to cease all advertising promoting electricity use because the state's utility system did not have enough fuel to meet demand.[188] Three years later, when the fuel shortage eased but the ban continued, Central Hudson challenged the ban, claiming restraint of commercial speech in violation of the First and Fourteenth Amendments.[189] The Court of Appeals of New York upheld the prohibition on advertising, determining that "governmental interest in the prohibition outweighed the limited constitutional value of the commercial" advertisements.[190] However, the Supreme Court reversed the decision.[191] In its ruling, the Court established a four-part test for future courts to use when analyzing government restrictions on commercial speech.[192]

From the outset, courts must determine whether the speech "is protected by the First Amendment."[193] To pass this first prong, the speech "must concern lawful activity and [must] not be misleading."[194] The second prong requires the government to have a substantial interest in regulating a particular activity.[195] If the speech passes the first two prongs, the third prong questions whether the regulation advances the government's substantial interest.[196] The fourth prong asks whether the particular

187. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 560 (1980).
188. *Id.* at 559.
189. *Id.*
190. *Id.* at 561.
191. *Id.*
192. *See id.* at 566.
193. *Id.*
194. *Id*.
195. *Id.*
196. *Id.*

regulation is the least restrictive means of advancing the government's interest and whether the regulation is narrowly tailored.[197] If the speech passes all four prongs, it is protected by the First Amendment.[198] In *Central Hudson*, the Court determined the ban was more extensive than necessary, and therefore struck it down as unlawful.[199]

Central Hudson is an essential component to any proposed regulation regarding advertising to children. That is, the Court's ruling regarding commercial speech regulations necessarily includes laws regarding the protection of children. Therefore, when crafting public policy for advertising, lawmakers must keep the *Central Hudson* test in mind and cannot be overzealous in issuing regulations. The four prongs of the *Central Hudson* test are the parameters in which all regulations on advertising to children must fit.[200] If any of the prongs are not satisfied with respect to a regulation, that regulation would therefore be unconstitutional.

H. New York v. Ferber *(1982)*

New York v. Ferber is another Supreme Court case favoring the protection of children over commercial speech rights.[201] An adult bookstore owner was convicted under a New York statute for selling films depicting young boys masturbating.[202] As a result, Ferber was convicted on two counts of promoting sexual performances by children in violation of a New York statute.[203] The New York Court of Appeals reversed, holding that the statute violated Ferber's First Amendment rights.[204] The Supreme Court reversed and remanded the case, finding that "protecting the

197. *Id.*

198. *See generally* Arlen W. Langvardt & Eric L. Richards, *The Death of* Posadas *and the Birth of Change in Commercial Speech Doctrine: Implications of* 44 Liquormart, 34 AM. BUS. L.J. 483, 489–90 (1997) (explaining that the test was not received enthusiastically on a universal level and noting that opponents of the four prongs saw the test as too subjective for the courts to yield consistent results when applying).

199. *Cent. Hudson*, 447 U.S. at 561.

200. *See infra* Part V (demonstrating the application of the *Central Hudson* test to hypothetical regulations restricting advertising to children and hypothesizing that if the regulations could not pass the four prongs of *Central Hudson*, increased regulation would have no legal support).

201. *See* New York v. Ferber, 458 U.S. 747 (1982).

202. *Id.* at 752.

203. *Id.*

204. *Id.*

physical and emotional well-being of youth" is important "even when the laws have operated in the sensitive area of constitutionally protected rights."[205] Furthermore, the Court declared that "the care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network."[206]

Again, the Court's decision in *Ferber* provides a strong justification for increased regulation of advertising to children. Paired with *Pacifica*, the Court's decision further explains the sacredness of the youngest generation of citizens. *Ferber* shows that the Court's previous ruling in *Pacifica* was not merely a fluke or afterthought; rather, the Court considers the protection of children a vital component of its jurisprudence. The Court's stance on the protection of children cannot be taken lightly, and thus every subsequent case regarding the protection of children adds ammunition to the arsenal for further television regulation. Although the United States may not have laws on advertising to children as strict as those of many other industrialized democracies,[207] *Pacifica* and *Ferber*, along with subsequent Court rulings,[208] prove that the protection of children is not outside the scope of the United States' interest.

I. Posadas de Puerto Rico Associates v. Tourism Co. *(1986)*

Following the creation of the four-prong analysis in *Central Hudson*, the Supreme Court applied the test to subsequent commercial speech cases, suggesting that the test has predominance in determining the constitutionality of commercial speech. One of the first major cases to use the test was *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*.[209] Under a statute of the Commonwealth of Puerto Rico, casino gambling and advertising to tourists was legal, but no casino was authorized to advertise to residents of the commonwealth.[210] A hotel with

205. *Id.* at 757.

206. *Id.* (citation omitted).

207. *See infra* Part VI (discussing the regulations other nations place on advertising).

208. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 849, 879 (1997) (acknowledging that restrictions on Internet interactions with children advanced the state interest of protecting children, but noting that in this case, the regulations were not narrowly tailored). The Court also acknowledged children are more at risk when it comes to television than the Internet because an individual can choose not to enter a website, but often television advertisements intrude upon the home undesirably. *Id.* at 854.

209. Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328 (1986).

210. *Id.* at 331–32.

a casino was fined several times for not following the statute, and finally filed suit against the tourism company that enforced the statute.[211] The hotel asserted that the casino advertising statute "suppressed commercial speech in violation of the First Amendment, Equal Protection, and Due Process guaranties of the United States Constitution."[212] The Supreme Court of Puerto Rico upheld the statute, claiming that the limitations on advertising to residents and not tourists were constitutional.[213]

On appeal, the Supreme Court applied the four-prong analysis of *Central Hudson* and determined that the statute passed all four parts of the test, thus affirming the ruling of the Supreme Court of Puerto Rico.[214] It was undisputed that the commercial speech at issue—advertising of casino gambling aimed at the residents of Puerto Rico—concerned lawful activity and was not fraudulent or misleading.[215] Second, the substantial government interest behind the regulation, "as determined by the Superior Court [was] the reduction of demand for casino gambling by the residents of Puerto Rico."[216] Also, the Court agreed that gambling had strong connections with criminal activity, further indicating a sufficient governmental interest in protecting the health and welfare of its citizens.[217] Third, the Court affirmed the Puerto Rico Legislature's belief that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised, thus passing the third prong of *Central Hudson.*[218] To fulfill the fourth prong, the Court concluded that the challenged statute and regulations were no more extensive than necessary to serve the government's interest.[219]

211. *Id.* at 333–34.
212. *Id.* at 331.
213. *See id.* at 338.
214. *Id.* at 344.
215. *Id.* at 340–41.
216. *Id.* at 341.
217. *Id.*
218. *Id.* at 343.
219. *Id.* Despite the Supreme Court's yielding of power to the Legislative and Executive branches in *Posadas*, the Court emphasized the importance of passing the *Central Hudson* test in *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). In that case, the City of Cincinnati, motivated by a desire for an attractive appearance of its streets, banned the distribution of commercial flyers through news racks on public property. *Id.* at 412. The Supreme Court declared the ban to be in violation of the First Amendment. *Id.* The rationale for the Court's ruling was the city's failure to pass the fourth part of the *Central Hudson* test. *See id.* at 428. The fact that the city failed to address its concern about news racks by regulating their size, shape, appearance, or number indicated it did not carefully calculate the regulation. *Id.* at 417. Because the

Additionally, the Court reasoned that the power a government has to "completely regulate casino gambling necessarily includes the lesser power to ban the advertising of casino gambling."[220]

Ultimately, the long-term effect of *Posadas* was to weaken the commercial speech doctrine by affording deference to the states.[221] In doing so, the Court granted greater leeway to state governments for the regulation of advertising to children. If the State has the right to regulate the education and domestic well-being of children, it follows that the state also has the lesser right to regulate the intrusion of child marketers into the privacy of the home. Thus, *Posadas* strengthens the argument for increased regulation of advertising directed at our youth.

J. Board of Trustees v. Fox *(1989)*

Another important application of the four-part test established by *Central Hudson* was the Supreme Court's decision in *Board of Trustees of the State University of New York v. Fox*.[222] The University of New York established regulations governing the use of school property and dormitories, which banned private commercial enterprises from operating on campus.[223] In October 1982, a sales representative for kitchenware was conducting a products demonstration when campus police asked her to leave.[224] After she refused, the police arrested the representative, who then sued based on the claim that the University's ban violated her First Amendment rights.[225] The district court held that the speech regulations were constitutional.[226] On appeal, the case was reversed and remanded due to questions surrounding the fourth prong of the *Central Hudson* test—that is, whether the state's regulations were the least restrictive

ban on distributing commercial handbills in news racks did not seem to reasonably fit the city's goal for the aesthetics of the area, and because there was a lack of evidence to support such a stance, the Supreme Court declared the ban unconstitutional. *Id.* at 430–31. With the ruling, the Court thus strengthened the *Central Hudson* test, subsequently making it more difficult to regulate commercial speech and advertising to children.

220. *Posadas*, 478 U.S. at 346.

221. *See* Joshua A. Marcus, Note, *Commercial Speech on the Internet: Spam and the First Amendment*, 16 CARDOZO ARTS & ENT. L.J. 245, 266–67 (1998).

222. *See* Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 475 (1989).

223. *Id.* at 471–72.

224. *Id.* at 472.

225. *Id.*

226. *Id.*

regulation.[227] However, the Supreme Court reversed and remanded the case yet again, thus lessening the restrictive nature of the fourth prong of *Central Hudson* in favor of more regulation for commercial speech.[228] By declining to impose a least-restrictive-means requirement, the Supreme Court took into account the difficulty of establishing "the point when restrictions become more extensive than their objective requires."[229] As such, *Fox* provided the legislative and executive branches with latitude in the field of commercial speech regulation and diminished the strict interpretation of the commercial speech doctrine established in *Central Hudson*.[230]

Fox gave hope to advocates of regulation because the Court granted more power to legislatures to enact laws regarding commercial speech. Logically, if we apply the Court's reasoning to the regulation of advertising to children, it follows that regulations will pass the *Central Hudson* test more easily if they are subject to less scrutiny. However, as Part VII of this Article explains, *Fox* was short-lived, and now the courts require a more strict interpretation of *Central Hudson*. Therefore, after *Fox*, regulating advertising to children may have been easier; however, it is unclear whether that ease still exists today.

K. United States v. Playboy *(2000)*

In 2000, the question of how courts should balance the government interest of protecting children against First Amendment rights again was raised.[231] The Communications Decency Act (CDA), as discussed in *Reno v. ACLU*,[232] was again under scrutiny in *United States v. Playboy.*[233] The phenomenon of "signal bleed" occurs when a program not in a resident's cable package can be heard or seen despite the cable company's blockage

227. *Id.* at 472–73.

228. *Id.* at 479–81 (stating that the Court has "not gone so far as to impose upon [regulators] the burden of demonstrating that . . . the manner of restriction is absolutely the least severe that will achieve the desired end").

229. *Id.* at 480–81.

230. *See id.* at 481 (stating the Court was providing the Legislative and Executive branches the "needed leeway in a field (commercial speech) 'traditionally subject to governmental regulation'") (citation omitted).

231. United States v. Playboy Entm't Group, 529 U.S. 803, 806–07 (2000).

232. *See* Reno v. ACLU, 521 U.S. 844, 849 (1997) (citing U.S. CONST. amend. I) (holding that the "statute abridges 'the freedom of speech' protected by the First Amendment").

233. *Playboy Entm't Group*, 529 U.S. at 806.

of a channel.[234] The CDA required cable television providers to only transmit channels with sexually explicit adult programming between 10 p.m. and 6 a.m. or to fully block those channels, even during the eight-hour period at night when children would be unlikely to see the signal bleed.[235] Playboy Entertainment Group filed suit, claiming First Amendment violations because the statute was "unnecessarily restrictive content-based legislation."[236] Despite acknowledging the compelling government interest of protecting children, the district court ruled that the regulations were too restrictive in nature and therefore unconstitutional.[237] Similarly, the Supreme Court affirmed the decision, once again declaring that the regulations were not the least restrictive method available to protect children.[238] Because the regulations were not sufficiently narrowly tailored, the restriction of speech was not adequately justified and therefore was not permitted by the First Amendment.[239]

The implications of *Playboy* are great for our consideration of advertising to children. Most importantly, the Court reestablished in the twenty-first century the idea that the United States government has a substantial interest in protecting children. Although the Court often cites the state interest of the safety of children, Court rulings do not always remain static. However, through the history of the commercial speech doctrine, it is clear that the Court considers the protection of children to be a high and unwavering priority.[240] The Court's recent rulings seem to

234. *Id.*

235. *Id.*

236. *Id.* at 807.

237. *Id.* at 809–10.

238. *Id.* at 827. The *Central Hudson* test was not applied to the speech regulations because the regulation was a content-based speech restriction and could stand only if it satisfied strict scrutiny, which both the district and Supreme Court applied. *Id.* at 813. This case required the least restrictive means for regulations, whereas the intermediate scrutiny of *Central Hudson* requires only a proper fit between the means and the end.

239. *Id.*

240. *See* Reno v. ACLU, 521 U.S. 844, 874 (1997) (holding that the Communications Decency Act of 1996—regulating transmission of indecent communications using telecommunications devices—could be constitutionally valid if modified slightly); New York v. Ferber, 458 U.S. 747, 764 (1982) (holding child pornography will not receive First Amendment protection as long as conduct is sufficiently defined by state law); FCC v. Pacifica Found., 438 U.S. 726, 747, 749 (1978) (upholding FCC decision that radio broadcast of George Carlin's "Filthy Words" monologue was indecent and prohibited in part because it was uniquely accessible to children).

indicate that protecting children is here to stay. Thus, the current legal atmosphere in the United States is ripe for further regulation of advertising when such advertising is specifically directed at children. However, an important lesson that child advocates can learn from the Court's decision in *Playboy* is the essentiality of narrowly tailoring all regulations on commercial speech. Protecting children may be important, but recognizing that adults have the necessity of information in advertisements will be paramount to the specific tailoring of any child advertising regulation.

L. *Summary*

The Court has been divided through the decades on the question of how much constitutional protection to grant commercial speech. Despite the Court's creation of the *Central Hudson* framework in 1980, the Court has subsequently applied the four-prong test in a variety of ways.[241] What remains clear is that the Court has consistently ruled that the government has a substantial interest in protecting the safety and well-being of its citizens, so long as the regulations conform to the *Central Hudson* test. Overall, case law has attempted to handle advertising to children in a very selective way. Most cases do not directly attack questions about the legal

241. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (reflecting the Court's ruling for greater protection for commercial speech). Upon the Supreme Court's application of the *Central Hudson* test, the regulations desired in *Lorillard* did not stand. *Id.* at 554. The third and fourth prongs of *Central Hudson* were not satisfied. *Id.* at 566. Specifically, the state failed to provide conclusive evidence for how regulations advanced the state interest. *Id.* The regulations also failed the fourth prong because they were not narrowly tailored. *Id.* Therefore, when considering advertising to children, it is imperative that all regulations be adequately justified with evidence and are narrowly tailored to advance the state interest of protecting children. *See also* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996). In *44 Liquormart*, the Court ruled that the regulation of commercial speech in question failed the third and fourth prongs of the *Central Hudson* test. Specifically, although Rhode Island believed the statute furthered the state interest of reducing alcohol consumption, the state provided no empirical evidence suggesting advertising prices of alcohol (the issue at hand in the case) would lead to significantly greater alcohol consumption. *Id.* at 506–07. Furthermore, the Rhode Island regulation was not the least restrictive means to support temperance, so it was not narrowly tailored. *Id.* at 507–08. Therefore, the Supreme Court declared Rhode Island's regulations unconstitutional after failing the *Central Hudson* test. *Id.* at 508. *See also* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 188–90 (1999) (concluding the laws limiting advertisement of casinos failed the third and fourth prongs of the *Central Hudson* test). Although there was a state interest in reducing the amount of gambling by citizens, no substantial evidence was given that the regulations advanced the state interest. *44 Liquormart Inc.*, 517 U.S. at 507–08.

nature of this advertising, but rather address specific, pointed questions regarding specific regulations. There have been, and are, powerful interests involved on both sides of this debate. Industry giants and special interest groups are all putting up a significant fight and at this point in time, no side has been declared a clear winner.

As the Supreme Court continually professes the importance of protecting children, perhaps United States public policy will soon coalesce with the values expressed by the Justices. The Court's rulings in cases balancing the protection of children against commercial speech give hope that one day soon the United States will follow the lead of Canada and the European nations that protect the innocence of children. However, as the following section demonstrates, governmental agencies and the legislative branch have been unsuccessful and unwilling in past attempts to protect America's youth.

V. TAKING THE TEST: CHILD ADVERTISING REGULATIONS UNDER *CENTRAL HUDSON*

The *Central Hudson* test is the analysis that determines whether the government may constitutionally ban certain types or forms of advertising.[242] In *Central Hudson*, the Supreme Court established a four-prong test for evaluating whether a governmental regulation over commercial speech is protected.[243] By applying the four-part test to hypothetical regulations of advertising to children, we can predict whether further protection of children through advertising restrictions will be held to be constitutionally protected.

First, the *Central Hudson* test is applicable only to regulations that pertain to communication that is neither misleading nor unlawful—commercial speech that is misleading or unlawful is not protected by the First Amendment, and thus the *Central Hudson* test does not apply to such speech.[244] Without dispute, the sale of consumer goods, toys, food, and services to children is legal. While certain products or commercials may be deemed inappropriate for children, they are not illegal.

242. Despite disagreement among some Supreme Court Justices about applying the test in *44 Liquormart*, 517 U.S. at 517–18, the *Central Hudson* test is still widely used when determining whether a governmental regulation on commercial speech is constitutional.

243. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

244. *Id*. at 566.

While this first prong of the test is the least litigated, there is a growing push for the court to reevaluate its assumption that the advertisements are not themselves misleading, especially when they are focused on more vulnerable audiences, such as children. "If Congress were to pass [] proposed legislation based on its conclusion that product placement and celebrity spokes-character marketing in children's media were misleading or deceptive, the Supreme Court would likely uphold the restrictions under the first prong of the *Central Hudson* test."[245] The Court's basic assumption in its evaluation of what is "misleading"—that children are similar to adults—is flawed, and requires a more thorough and complete exploration.

Second, the state must demonstrate a substantial interest.[246] Furthermore, the substantial state interest cited must be justified through substantial evidence.[247] Regulations on advertising to children satisfy the

245. Angela J. Campbell, *Restricting the Marketing of Junk Food to Children by Product Placement and Character Selling*, 39 LOY. L.A. L. REV. 447, 492 (2006).

246. *Cent. Hudson*, 447 U.S. at 566. *See also* Langvardt, *supra* note 161, at 600 (explaining the ease at which the government has been able to establish the second prong of *Central Hudson*). Langvardt explains that the government has been able to easily establish this second prong by citing a number of cases: Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 186 (1999) (showing a "substantial government interest in reducing social ills associated with gambling"); *44 Liquormart, Inc*., 517 U.S. at 504 (finding a "substantial government interest in reducing public's consumption of alcoholic beverages"); Rubin v. Coors Brewing Co., 514 U.S. 476, 485 (1995) (holding there is a "substantial government interest in guarding against 'strength wars' among producers of alcoholic beverages"); United States v. Edge Broad. Co., 509 U.S. 418, 423, 426, 428 (1993) (finding "substantial government interest in accommodating competing public policies of lottery and non-lottery states"); Edenfield v. Fane, 507 U.S. 761, 768–69 (1993) (finding a "substantial government interest in protecting public against fraud by certified public accountants"); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 414, 416–18 (1993) (finding a "substantial government interests in enhancing safety on, and aesthetics of, public property"); Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 475 (1989) (finding substantial government interests in promoting sound educational environment at a state university and in protecting students against manipulative sellers of products); Posadas de P.R. Assocs. v. Tourism Co., 478 U.S. 328, 341 (1986) (finding a "substantial government interest in reducing demand for casino gambling and thereby minimizing related social ills"); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 71–75 (1983) (finding a "substantial government interest in helping parents maintain control over when and how to expose their children to sensitive subjects"); *Central Hudson*, 447 U.S. at 568–69 (finding "substantial government interests in promoting energy conservation and in attempting to ensure that utility rates are fair"). *Id.* at 600 n.90.

247. *See generally* O. Lee Reed, *Is Commercial Speech Really Less Valuable Than Political Speech? On Replacing Values and Categories in First Amendment*

second prong of *Central Hudson* because the government has a well-established and compelling interest in protecting children, recognized by the Court in the aforementioned case law. Generally, courts have recognized two compelling government interests in regards to children. First, the government has an interest in assisting parents in the supervision and rearing of their children.[248] Second, the government has an interest in shielding minors from physical and psychological abuse.[249] Furthermore, a House of Representatives bill indicates that "it is difficult to think of an interest more substantial than the promotion of the welfare of children."[250] Thus, the government can advance interests to be served by regulating advertising to children sufficiently to satisfy the second part of the *Central Hudson* test.[251]

Jurisprudence, 34 AM. BUS. L.J. 1, 31 (1996) (discussing the Supreme Court's increased concern with providing evidence for commercial speech to be restricted).

248. Ginsberg v. New York, 390 U.S. 629, 639 (1968) (upholding regulation of material that was obscene for children but not for adults and stating that it is proper for the state to enact laws to help parents protect their children's well-being).

249. New York v. Ferber, 458 U.S. 747, 755 (1982) (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).

250. H.R. REP. NO. 101-385, at 11 (1991), *reprinted in* 1990 U.S.C.C.A.N. 1605, 1616.

251. *See* Florida Bar v. Went for It, Inc., 515 U.S. 618 (1995) (providing an example of the proper evidence and justification needed to pass the second prong of *Central Hudson*). The Supreme Court applied the *Central Hudson* test to a Florida Bar Association ban on personal injury lawyers sending direct-mail advertisements to victims and their relatives for thirty days following an accident. *See id.* at 620, 623. John Blakely and a lawyer referral service that often distributed such advertisements filed suit claiming First Amendment infringement. *Id.* at 621. The first prong was not disputed because sending direct-mail advertisements was neither unlawful nor misleading. *Id.* at 623–24. For the second prong, the Supreme Court ruled the Bar had a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones and this substantial interest was well within the police powers of the state. *Id.* at 625. In support of its argument that its interest was substantial, the Bar submitted a 106-page summary of its two-year study of lawyer advertising, which contained both statistical and anecdotal data about the public views of soliciting families in the wake of an accident. *Id.* at 626. Twenty-seven percent of recipients of direct-mail advertising reported their regard for the legal profession as a whole was lowered as a result of receiving the direct mail. *Id.* at 627. In the end, the regulation passed all four prongs of *Central Hudson* and the Court upheld the regulation as constitutional. *Id.* at 635. However, without all of the detailed material evidence used to prove the second prong of *Central Hudson*, it is questionable whether the regulations would have passed. That is why in the debate over advertising to children, statistical and anecdotal evidence regarding the effects of advertising to children is necessary to demonstrate that the state has an interest in the protection of children.

Despite the ease of fulfilling the first two prongs of the *Central Hudson* test, the most difficult constitutional hurdles arise when such regulations are examined under the third and fourth prongs. The third prong requires the government to show that the restrictions directly advance the government's substantial interest.[252] In recent years, the Court has applied stricter scrutiny of regulation and required more firm evidence than in previous applications of *Central Hudson*.[253] For instance, the Court struck down restrictions in *44 Liquormart, Inc. v. Rhode Island* and *Greater New Orleans Broadcasting Association v. United States* partly because the Court was not convinced that limiting such advertising actually reduced consumption of the underlying products.[254] However, in the case of restrictions on advertising to children, hypothetical regulations appear to pass the third prong. For instance, a regulation limiting the amount of commercial time during programs aimed at children would substantially reduce the amount of commercial material viewed by children, thus furthering the government's interests to a material degree. The data indicates that children watch more television on weekdays than on

252. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

253. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 505–08 (1996) (stating that the Court was unable to find that a price advertising ban significantly advanced the State's interest without evidentiary support). Daniel E. Troy observed that in *44 Liquormart*, "even those Justices explicitly relying on the four-factored *Central Hudson* test appeared to apply stricter scrutiny . . . in the case than the *Central Hudson* test often requires." Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 YALE J. ON REG. 85, 140 (1999); *see also* Michael Hoefges & Milagros Rivera-Sanchez, "*Vice" Advertising Under the Supreme Court's Commercial Speech Doctrine: The Shifting* Central Hudson *Analysis*, 22 HASTINGS COMM. & ENT. L.J. 345, 372 (2001) (noting that the Court significantly tightened the third and fourth factors of the *Central Hudson* test in *44 Liquormart* and other cases that followed); Sean P. Costello, Comment, *Strange Brew: The State of Commercial Speech Jurisprudence Before and After* 44 Liquormart, Inc. v. Rhode Island, 47 CASE W. RES. L. REV. 681, 748 (1997) ("[I]t appears that the Court is now inclined to place commercial speech closer to the core of protected speech in some circumstances.").

254. Greater New Orleans Broad. Assoc. v. United States, 527 U.S. 173, 176, 189 (1999); *44 Liquormart, Inc.*, 517 U.S. at 505–07. Other writers have observed the Court moving toward a more stringent application of the commercial speech tests by requiring proof of the third part of the *Central Hudson* test. *See* William D. O'Neill, *Governmental Restrictions on Beverage Alcohol Advertising After* 44 Liquormart v. Rhode Island, 42 ST. LOUIS U. L.J. 267, 279–82 (1998); Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, SUP. CT. REV. 123, 124, 138–45 (1996); Marrie K. Stone, Note, *The Price Isn't Right:* 44 Liquormart Inc. v. Rhode Island *Promotes Free Speech in Commercial Advertising*, 18 LOY. L.A. ENT. L. REV. 133, 152–53 (1997).

weekends,[255] so a hypothetical regulation could require fewer commercials during weekday programming than on the weekends. This too would reduce the number of commercials that children view during children's programming, thus advancing the government's interest of protecting children. When considering whether regulations for advertising directed at children should be permitted under the third prong, it is appropriate to question the nature of information and the effects that the information has on society.[256] If the government further regulated advertising to children, the regulations would seem to directly advance the government's interest in protecting the children, especially considering the evidence detailing the psychological and physical effects of advertising on children.

Although the fourth prong of the *Central Hudson* test does not require the government to use the least restrictive means possible,[257] regulations that are substantially more restrictive than necessary fail the last requirement.[258] Therefore, when considering prospective regulations for advertising to children, there should be a reasonable fit between the means and ends.[259] Although a full ban of advertising to children like the bans in Sweden and Norway would not appear to be the least restrictive means,[260] lesser regulations would substantially further the government's interest while providing a justifiable means to that end. Hypothetical regulations would not be imposed during times when the FTC finds that children do not watch much television, so adults would be able to access commercial information during adult programs. In addition, "regulating commercials aimed at children, and not just those aired during shows aimed at children, would conform to the Court's policy against restricting the content of speech available to adults in order to make the speech appropriate for children."[261]

255. H.R. REP. NO. 101-385, at 20 (1989), *reprinted in* 1990 U.S.C.C.A.N. 1605.

256. *See Cent. Hudson*, 447 U.S. at 569.

257. *See id.* at 570–71.

258. *See* Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (stating that it had "not gone so far as to impose . . . the burden of demonstrating . . . that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a fit between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable . . ." (quoting Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 341 (1986))) (internal quotations omitted).

259. *See id*; *see also Cent. Hudson*, 447 U.S. at 566 (noting that the regulation must not be more extensive than necessary).

260. *See infra* Part VI.B.

261. *See* Ramsey, *supra* note 42, at 388.

In the more recent case of *Lorillard Tobacco v. Reilly*, the Supreme Court considered regulations that limited tobacco advertising.[262] The case is important here because of the similarities between tobacco advertising and fast food advertising to children. For example, *Lorillard* provides a window into the Court's analysis using *Central Hudson*'s four-part test.[263] The regulations in *Lorillard* prohibited tobacco advertisements within 1,000 feet of a school and regulated the height of in-store displays.[264] The first two parts of the *Central Hudson* test were not in dispute—smoking was legal, the advertisements were accurate, and the public's health was a substantial state interest.[265] The case was decided on the final two prongs: whether the regulations directly advanced this state interest, and whether the regulations were too restrictive or "more extensive than necessary."[266] The Court held that the regulations were too broad in that they restricted the right of adults to view the advertisements.[267] Specifically, the Court noted that "'the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults.'"[268] The Court failed to consider all of the other avenues that tobacco advertisers had to reach an adult audience.[269] The restriction was hardly a total ban, yet the Court found it too restrictive.[270]

For instance, "[a] ban on the use of cartoon characters and celebrities in commercials *aimed at children* would not present the same issues that the Court found impermissible in cases such as *Lorillard Tobacco*, because such a ban would not significantly deny adults access to truthful information concerning commercial decisions."[271] Nor would a hypothetical ban forbid consumer access to companies' websites, informational material, or product reviews; thus, the regulation should not appear too excessive. Further regulations would not prevent adults from receiving adequate information. Instead, companies would be required to make complete disclosures regarding their products, and to advertise this information in a

262. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).
263. *Id.* at 554–70.
264. *Id.* at 536.
265. *Id.* at 555.
266. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566, 569–70 (1980).
267. *Lorillard Tobacco Co.*, 533 U.S. at 565–66.
268. *Id.* at 564 (quoting Reno v. ACLU, 521 U.S. 844, 875 (1997)).
269. *See id.* at 561–66.
270. *See id.* at 565–66.
271. *See* Ramsey, *supra* note 42, at 388.

manner that is less misleading to children.

Therefore, increased hypothetical governmental regulations on advertising to children may pass the Court's four-prong *Central Hudson* test. Because of the Court's continued reliance on *Central Hudson*, it is imperative for anyone seeking to protect children through advertising regulation to determine if the specific regulation meets the four-part criteria. Because this Article does not propose a specific regulatory framework, but rather offers a broadly defined hypothetical example, it does not necessarily follow that every attempt to regulate advertising to children will successfully pass the *Central Hudson* test. New developments in law and public policy will ultimately determine the bounds of *Central Hudson* and how easily regulations can pass the test. However, regulators cannot neglect the current Court's specific interest in providing concrete and substantial evidence for the third and fourth parts of the test. For any regulation on advertising to children to pass, the necessity of such evidence remains undeniable.

VI. EUROPEAN AND CANADIAN APPROACHES TO REGULATING ADVERTISING DIRECTED AT CHILDREN

Our vision and our imagination extend only as far as our experience permits. If all we know is American law, we prevent ourselves from discovering insights that have developed elsewhere. Compared to several other industrialized countries, the United States lacks substantive regulations of advertising directed at children.[272] Throughout history, other nations have looked to the United States as a leader in constitutional law and public policy. When examining advertising law in other nations, however, it becomes evident that the United States has adopted a relatively laissez-faire approach compared to other industrialized democracies.[273]

A. *Canadian Commercial Speech—Advertising Ban in Quebec*

Canada lends itself to a comparative study with the United States because the two nations share many similarities in public policy and jurisprudence.[274] When regulating advertising, Canada is most notable

272. *See* Ross D. Petty, *Advertising Law and Social Issues: The Global Perspectives*, 17 SUFFOLK TRANSNAT'L L. REV. 309, 314–21 (1994).

273. *See id.*

274. *See* Seymour Martin Lipset, CONTINENTAL DIVIDE: THE VALUES AND INSTITUTIONS OF THE UNITED STATES AND CANADA, xvii (1990) ("[I]t is precisely because the two North American democracies have so much in common that they

because of a 1980 legislative ban on nearly all commercial advertising to children under the age of thirteen in the province of Quebec.[275] This ban on advertising to children also deserves special notice because it was the first such law in the twentieth century.[276]

When enacting the ban, the major concern was for the vulnerability of children, because they were thought to be easily misled and deceived and not reasonably capable of self-protection.[277] Lawmakers were particularly concerned about the health of children.[278] The specific regulations of the Quebec ban are as follows:

> Subject to what is provided in the regulations, no person may make use of commercial advertising directed at persons under thirteen years of age. To determine whether or not an advertisement is directed at persons under thirteen years of age, account must be taken of the context of its presentation, and in particular of
>
> (a) the nature and intended purpose of the goods advertised;
>
> (b) the manner of presenting such advertisement;
>
> (c) the time and place it is shown.[279]

To apply the above regulations and to help advertisers understand the above criteria, the Office of Consumer Protection created guidelines to follow when broadcasting advertisements on television. The chart below illustrates the guidelines:

permit . . . insights into the factors that cause variations.").

275. *See* Attorney Gen. of Que. v. Irwin Toy, Ltd., [1989] 1 S.C.R. 927, 938 (Can).

276. *See* CORRINA HAWKES, WORLD HEALTH ORG., MARKETING FOOD TO CHILDREN: THE GLOBAL REGULATORY ENVIRONMENT 20 (2004) (referencing bans on advertising to children in Sweden since 1991, Norway since 1992, and Quebec since 1980).

277. *See Attorney Gen. of Que.*, [1989] 1 S.C.R. at 987 (restating the rationale for the ban on advertising to children as "[t]he concern . . . for the protection of a group which is particularly vulnerable to techniques of seduction and manipulation abundant in advertising").

278. *See* Jeffery, *supra* note 45, at 239, 239 n.12.

279. Consumer Protection Act, R.S.Q., ch. P-40.1, §§ 248–49 (2009) (Can.), *available at* http://www.canlii.org/en/qc/laws/stat/rsq-c-p-40.1/latest/rsq-c-p-40.1.html.

Summary of Commercial Advertising Regulation[280]

Definition	Products and Services Exclusively Intended for Children. Includes: toys, some sweets, and food products.	Products and Services with a Marked Appeal for Children. Includes: "family" products, and products for teenagers: some cereals, desserts, and games.	Products and Services with No Appeal for Children
Can I Advertise During Children's Programs?	NEVER unless treatment of the advertisement is not likely to interest children.	NEVER unless treatment of the advertisement is not likely to interest children.	Always, but the commercial must be treated for adults.
Can I Advertise During Programs Other Than Children's Programs?	Only if the advertisement is "not designed to" appeal particularly to the instinctual needs of children so as to arouse their interest."	Only if the advertisement is not designed to appeal particularly to the instinctual needs of children so as to arouse their interest."	Always, but the commercial must be treated for adults.

Despite opposition to the Quebec restrictions on advertising, the Supreme Court of Canada upheld the ban on advertising to children, ruling

280. Jeffery, *supra* note 45, at 242. The chart summarizes Office de la Protection du Consummateur, Regulation Respecting the Application of Consumer Protection Act (2004) (Can.), which is an English version of the guide that discusses sections 248–249 of the Consumer Protection Act.

that the restrictions were an acceptable regulation of commercial freedom in *Attorney General of Québec v. Irwin Toy, Ltd.*[281] Specifically, the Court found that:

> the objective of regulating commercial advertising directed at children accords with a general goal of consumer protection legislation, *viz*. to protect a group that is most vulnerable to commercial manipulation . . . [is] reflected in general contract doctrine. Children are not as equipped as adults to evaluate the persuasive force of advertising and advertisements directed at children would take advantage of this.[282]

The *Irwin Toy* Court used the prior framework established by Canada's Supreme Court in *R. v. Oakes* to determine the constitutionality of the statutory restriction on commercial advertising directed at children.[283]

In *Oakes*, the Canadian Supreme Court created a framework for future courts to use when restricting speech, and that framework bears similarity to the *Central Hudson* test used in the United States.[284] First, all restrictions on commercial speech in Canada require a decision on whether the limitation is worthy enough to override the constitutionally protected commercial speech.[285] Next, the court must inquire whether the method

281. *Attorney Gen. of Que.*, [1989] 1 S.C.R. at 1004–05.

282. *Id.* at 990 (citations omitted).

283. *See id.* at 933; *see also* The Queen v. Oakes, [1986] 1 S.C.R. 103 (Can). In addition to the *Oakes* ruling, the court relied heavily on a 1981 United States Federal Trade Commission Final Staff Report and Recommendation, which found that children do not perceive bias in advertising and their life experience is insufficient to help them counter-argue when confronted with advertisements. *See Attorney Gen. of Que.*, [1989] 1 S.C.R. at 994–1000. Furthermore, children are not able to evaluate child-oriented advertising because commercials enhance the product through persuasive means. ELLIOT ET AL., *supra* note 36, at 25.

284. *Oakes* and *Central Hudson* are similar, but differ greatly in the first step of the process. In Canada, *all* speech is considered worthy of protection, and, therefore, all speech has the chance to be reviewed regardless of legality. On the other hand, in the United States, courts first determine whether the speech in question is legal and protected under the First Amendment. *Compare Oakes*, [1986] 1 S.C.R. at 138–40 (requiring a governmental measure to be of sufficient importance and the means employing it reasonable and justified), *with* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–64 (1986) (holding that to be regulated, speech must be found to be in a category subject to government regulation and that regulation must advance a substantial government interest).

285. The Queen v. Edwards Books & Art Ltd., [1986] 2 S.C.R. 713, 768 (Can.) (reiterating the *Oakes* analysis and further asserting that in order to pass the first step of *Oakes*, the restriction placed upon the speech "must bear on a 'pressing and substantial concern'") (citation omitted).

and process used to achieve the objective are proportional to the objective.[286] Because of the difficulty in determining proportionality, the court must consider whether the process used to restrict speech is rationally linked to the objective, whether the process impedes a constitutional right as little as possible, and whether the detrimental effects of the method used to achieve the objective are proportional to the salutary effects.[287] Since the Court's ruling in *Oakes*, the framework has been applied specifically to disputes governing the regulation of commercial speech directed at children, including to hold the Quebec ban on advertising to children constitutional.[288]

B. *European Solutions*

Similar to Canada, many European nations also regulate advertising to children more rigorously and strictly than does the United States. Within the European Union, no uniform advertising law exists pertaining to children, but each member state oversees its individual regulation. Although there is no uniform standard, most regulations fit within two broad categories. The first concerns the scheduling of advertising, which relates to the "timing, frequency, and the amount of advertising aimed at children."[289] The second category of regulations concerns the content of advertising, which places restrictions on advertisements for specific products such as toys, food, and medicines.[290] It is important to note that these regulations are not limited to television advertising, though that is their primary aim. The regulations also control sponsorships, children's clubs, and other means of directing advertising at children.[291]

The different regulatory schemes reflect the various value systems among European nations.[292] There are three predominant and related values that underlie European recognition of children as potentially vulnerable to commercial advertising: (1) "respect for children's

286. *Id.*

287. *Id.*; *see also* Rocket v. Royal Coll. of Dental Surgeons, [1990] 2 S.C.R. 232, 249–50 (Can.).

288. Attorney Gen. of Que. v. Irwin Toy, Ltd., [1989] 1 S.C.R. 927, 999 (Can.).

289. GUNTER ET AL., *supra* note 1, at 142.

290. *See id*.

291. *Id*. at 143.

292. *See generally* Brian Young et al., *Attitudes of Parents Towards Advertising to Children in the UK, Sweden and New Zealand*, 19 J. MARKETING MGMT. 475 (2003) (tracking cultural attitudes towards advertising to children in the United Kingdom, Sweden, and New Zealand).

developing educational needs," (2) "fairness, or not exposing children to sophisticated advertising messages before they develop awareness of persuasion," and (3) "avoidance of exposure to adult content."[293]

Some nations restrict the type of commercials directed at children, while others restrict the hours advertisers may utilize. For instance, in Belgium, all advertisements are banned within "five minutes before and after commercial-free programs for children under 12."[294] Austria takes the regulation even further, banning all advertisements during children's programs before 8:15 p.m.[295] German law also prohibits advertising breaks in children's programming and completely bans corporate sponsorship of programs directed at children.[296] On the other hand, Greece bans toy commercials between the hours of 7:00 p.m. and 10:00 p.m. and allows no advertisements for war toys during any time of programming.[297] With its unique law, "Finland mandates that children in commercials may not talk about the products [being advertised] and can only appear in a 'passive role' in advertisements for sweets."[298] In France, famous people may not appear in advertising to children, nor may they present any sort of sales pitch, or even wear colors associated with a specific brand.[299] The Netherlands requires that a toothbrush be pictured in all candy advertising.[300] Certainly, the creative regulations European nations use to protect their children deserve careful consideration in the United States. As demonstrated in Europe, the possibilities for regulating advertising are endless; with many foreign regulations as working examples, crafting a public policy catered specifically to the needs of the United States is possible.

The strongest regulations for advertisements directed at children can be found in Sweden. In Sweden, consumers are assumed to be vulnerable

293. GUNTER ET AL., *supra* note 1, at 142 (citing J. BLUMLER, TELEVISION AND THE PUBLIC INTEREST: VULNERABLE VALUES IN WESTERN EUROPE (1992)).

294. Janice H. Kang, *Barbie Banished from the Small Screen: The Proposed European Ban on Children's Television Advertising*, 21 Nw. J. INT'L L. & BUS. 543, 547 (2001); *see also* GUNTER ET AL., *supra* note 1, at 140 (indicating the same five-minute limitation before and after children's programs).

295. Kang, *supra* note 294, at 547.

296. James Geary, *Childhood's End?*, TIME INT'L. ED., Aug. 2, 1999.

297. Kang, *supra* note 294, at 545.

298. *Id.* at 547.

299. Laurel Wentz, *Next Challenge: Re-regulation*, ADVER. AGE, Sept. 10, 1990, at 59.

300. J.J. Boddewyn, *Advertising Regulation in The 1980s: The Underlying Global Forces*, 46 J. MARKETING. 27, 28 (1982).

in the marketplace; therefore, protecting the consumer is considered to be the job of the government.[301] Unlike in the United States, in Sweden public policy acknowledges that "there exist large groups of consumers who, owing to low incomes, deficient education and knowledge of the market, etc., are less well equipped than the average citizen for their role as consumers."[302] Swedish laws ban all television advertising targeting children below the age of twelve.[303] The ban includes not only toy advertisements, but also commercials for foods high in fat and sugar such as sweets and fast food.[304] In other words, advertisements for the products can be aired if the targets of the advertisements are not children.[305] For example, commercials for toys, sweets, and foods high in fat may be aired only if the advertisements are designed to attract and inform adults as opposed to children.[306] What may surprise many Americans[307] is that

301. *See* Ulf Bernitz, *Consumer Protection: Aims, Methods, and Trends in Swedish Consumer Law*, 20 SCANDINAVIAN STUD. IN L. 26, 28 (1976) (indicating that the trend in Sweden and other Nordic countries is to leave consumer protection to the state).

302. *Id.* at 14.

303. 7 ch. 4 § The Radio and Television Act (SFS 1996:844) ("Commercial advertising in a television broadcast may not be designed to attract the attention of children under 12 years of age.").

304. Nick Higham, *Industry Divided over Prospect of Ban on Children's Advertising*, MARKETING WK., July 8, 1999, at 17.

305. Richard Tomkins, *Selling to a Captivated Market*, FIN. TIMES, Apr. 23, 1999, *available at* PROQUEST, doc. ID 40779788.

306. *See id.*

307. The surprise derives from the fact that Americans are characterized by an intense individualism not common in European nations like Sweden. *See* EVERETT CARLL LADD, THE AMERICAN IDEOLOGY: AN EXPLORATION OF THE ORIGINS, MEANING, AND ROLE OF AMERICAN POLITICAL IDEAS 3–22 (1994) (explaining that there are vast differences between Americans and Europeans when it comes to individualism).

The United States' support of children as they enter higher education or the workplace is inadequate in comparison to European nations, including Sweden. *See* Thomas D. Cook & Frank Furstenberg, Jr., *Explaining Aspects of the Transition to Adulthood in Italy, Sweden, Germany, and the United States: A Cross-Disciplinary, Case Synthesis Approach*, 580 ANNALS. AM. ACAD. POL. & SOC. SCI. 272 (2002). The authors performed a comparative study of assistance provided to teenagers in many nations including the United States. *Id*. at 258. In Sweden, the state and businesses cooperate to help train young people for jobs. *Id*. at 267. The future workers are

> supported after high school to study at a university or to learn to work, with the clear expectation that this support is for promoting self-reliant individuals and active citizens . . . [w]hen unemployment occurs, past work will be rewarded but prolonged inactivity will not, though enough is provided to keep

almost ninety percent of Swedish advertising professionals are in favor of the ban on advertising to children.[308]—they recognize advertising to children as misleading because children do not understand the commercial nature and purpose of advertising.[309] Similarly, Norway has content-based regulation for protecting children which is as strict as Sweden's ban. The Norwegian ban broadly states that "[a]dvertisements may not be broadcast in connection with children's programmes, nor may advertisements be specifically directed at children."[310]

Studying laws of other industrialized nations on advertising to children gives legal scholars, politicians, and regulators in the United States the opportunity to explore the many possibilities available when shaping the contours of future commercial speech regulation. By examining the various strengths and weaknesses of policy in other nations, the best approach can be formulated. Canada, Sweden, Norway, and other European nations pave the way for the increased protection of children in the twenty-first century, providing the United States with models of possible regulation and of possible balances between free speech and the need for regulation.

VII. COUNTERARGUMENTS: THE NECESSITY OF ROBUST COMMERCIAL SPEECH PROTECTIONS

Because Congress and the Court have yet to take a definite stance on regulating advertising to children, the debate continues. However, before one can determine whether a regulation falls within the bounds of constitutionality, one must define those bounds. Therein lies the problem. The bounds of the First Amendment to protect speech can be defined in two ways: (1) as a positive grant of power, or (2) as a negative limitation on government authority.[311] Proponents of regulation subscribe to the first

life and limb together.

Id. at 272. Conversely, in the United States "the main assumption is that individuals should get ahead by themselves by virtue of their own willpower and initiative, provided that the institutions are in place from which they can benefit, primarily schools and colleges." *Id.* at 282.

308. Roger Harrabin, *A Commercial Break for Parents*, INDEPENDENT (U.K.), Sept. 8, 1998, *available at* http://www.independent.co.uk/arts-entertainment/a-commercial=break-for-parents-1196811.html.

309. *Id.*

310. Broadcasting Act of 4 Dec. 1992, No. 127, Sec. 3-1 (Norway).

311. *See* Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1258–59 (1994) (exploring whether the

position. Opponents of regulation reject this affirmative interpretation of the First Amendment. They perceive the Amendment's function as a limitation on government power.[312] The words "[C]ongress shall make no law" are interpreted as an express limit on the government's ability to regulate political speech.[313] Under this interpretation, the First Amendment does not grant the government any authority to regulate political speech.[314] The struggle between the positive power of the government and the negative limitation on government authority set the scene for opposing viewpoints on regulating advertising to children.

For the most part, those arguing in favor of regulations for advertising directed at children make this basic argument: Well-educated and informed children are essential for the promulgation of our nation and government. Children are not miniature adults, and they do not interpret and process information in the same manner as adults. Thus, children deserve special protection.[315] The argument focuses mainly on the amount

First Amendment can be conceptualized as a positive grant of power).

312. *See* Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 76 (1997) ("The plain purpose of the First Amendment was to limit the authority of the government to regulate speech."); *see also* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 225 (Geoffrey R. Stone et al. eds., 1992) (interpreting the purpose of the First Amendment to be protecting liberty of expression from government interference).

313. Smith, *supra* note 312, at 66 (noting that the "very language . . . government 'shall not' act, makes clear" that public debate was to be achieved by protecting liberty interests from government interference). Allowing an "activist government" to promote public debate would thus be inconsistent with the Amendment's principle. *See* Wanda Franz & James Bopp, Jr., *The Nine Myths of Campaign Finance Reform*, 10 STAN. L. & POL'Y REV. 63, 64 (1998). The first myth, according to Franz and Bopp, is: "The First Amendment is a Loophole Which Should be Narrowed or Closed." *Id.* The authors debunk this myth by arguing that the purpose of the First Amendment is to protect free speech and not to promote public debate. *Id.* The Amendment is thus not a loophole that needs to be closed; it should be as wide open as possible for it is "a guardian of our citizens' freedom" and a "safeguard[] not only [of] free speech, but [of] our entire system of representative self-government." *Id.*

314. *See* Barenblatt v. United States, 360 U.S. 109, 145 (1959) (Black, J., dissenting) (noting the importance of preserving the First Amendment right to free speech because it allows citizens to "praise, criticize or discuss . . . all governmental policies" under the auspices of the Constitution).

315. *See* Angela J. Campbell, *Ads2Kids.com: Should Government Regulate Advertising to Children on the World Wide Web?*, 33 GONZ. L. REV. 311, 320–25 (1997) (exploring purposes served by restricting advertising to children); *see also* Patricia Aufderheide, *Reregulating Children's TV*, 42 FED. COMM. L.J. 87, 91–92 (1989)

of time children spend, unattended, in front of the television, coupled with children's inability to distinguish advertising material from program content.[316] This argument's companion comes in a similar form but with different language. Because most proponents of regulation of children's television understand the financial nature of advertising,[317] they couple their arguments with one that is economically persuasive.[318] This argument attacks the basic premise of the economic model—rationality.[319] At their developmental level children cannot be said to be rational choosers. Targeting children with advertising campaigns therefore violates the market protections that are said to exist with rational choosers. Advertisers also have little incentive to target children because they lack both purchasing power and influence over parental purchasing decisions.[320]

One major concern that critics of regulating commercial speech cite is the tendency of the government to be paternalistic in regulation. Justices Antonin Scalia and John Paul Stevens share "aversion towards paternalistic governmental policies that prevent men and women from

(discussing the need for effective children's television regulation); Henry John Uscinski, *Deregulating Commercial Television: Will the Marketplace Watch Out for Children?*, 34 AM. U. L. REV. 141 (1984) (arguing that the FCC's decision not to specifically regulate advertising to children violates its duty to the public).

316. *See* Aufderheide, *supra* note 315, at 92; *see also* Diane Aden Hayes, *The Children's Hour Revisited: The Children's Television Act of 1990*, 46 FED. COMM. L.J. 293, 294 (1994) (stating that "[c]hildren's high susceptibility to advertising and lack of power in the marketplace have been the main justifications for regulating broadcasting aimed at them").

317. *See, e.g.*, Hayes, *supra* note 316, at 325 (indicating the market concerns for broadcasters when the FCC regulates).

318. *See, e.g.*, Uscinski, *supra* note 315, at 167 (explaining that "the child-audience has limited purchasing power, [and] its influence over an advertiser-supported medium is slight").

319. *See generally* Piety, *supra* note 11 (asserting that the extension of First Amendment protection in the Commercial Speech Doctrine rests on the assumption of rationality in the public). Advertising is protected because people are assumed to be rational enough to see through "puffing." *Id.* at 383. Advertising's fallacious affronts to reason are easily counterbalanced by people's ability to "sort out information from indoctrination." *Id.* The author asserts that the Supreme Court's stance in this regard is denial and wishful thinking. *Id.* Piety further draws parallels between advertising and the psychology of addiction. *Id.* at 422–37. She states, "[b]oth appear to be characterized by denial, escapism, narcissism, isolation, insatiability, impatience, and diminished sensitivity." *Id.* at 381.

320. *See* Uscinski, *supra* note 315, at 163–70 (exploring the perils that accompany attaching a marketplace model to children).

hearing facts that might not be good for them."[321] Justice Thomas sees regulation of advertising on the basis of the product's potential harm as a limitation of the right of free speech.[322] In other words, many opponents view the regulation of advertising to children as a form of undesirable paternalism. That is, the role of protecting and rearing children should be left to parents. This argument is essentially a policy proposal advocating parental intervention and oversight as a solution the problems associated with advertising to children.[323] This family-oriented solution, as opposed to a paternalistic, government-based remedy, has long been a part of American rhetoric.[324] However, as Justice Scalia noted in *44 Liquormart*, "it would also be paternalism for us to prevent the people of the States from enacting laws that we consider paternalistic, unless we have good reason to believe that the Constitution itself forbids them."[325]

The argument against regulating advertising to children, however, seems weak because there are many instances within the law in which children are afforded special, often paternalistic protection. For example, the attractive nuisance doctrine in tort law protects children from hazards on land despite their status as trespassers by giving owners a financial incentive to childproof their property.[326] Children are not allowed to sign contracts for the same reason that we do not want marketers influencing children—the bargain is skewed heavily in favor of the powerful agent.[327]

321. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 517 (1996) (Scalia, J., concurring).

322. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 590 (2001) (Thomas, J., concurring) (noting that when the state seeks to silence one advertiser of a harmful product or idea, the state may draw parallels to many other harmful products or ideas; however, "all are entitled to the protection of the First Amendment").

323. *See* Dennis Crouch, *The Social Welfare of Advertising to Children*, 9 U. CHI. L. SCH. ROUNDTABLE 179, 196 (2002) (questioning, however, whether an intra-family solution would solve the entire problem).

324. *See, e.g.*, MARY BETH NORTON, FOUNDING MOTHERS AND FATHERS: GENDERED POWER AND THE FORMING OF AMERICAN SOCIETY 57 (1996) (examining the role of family, community, and gender in the development of America's political and social structures).

325. *44 Liquormart*, 517 U.S. at 517.

326. *See* Henry v. Robert Kettell Constr. Corp., 194 N.E.2d 535, 537 (Ill. App. 1963).

327. *See* Eisenberg, *supra* note 17, at 212 (explaining that the enforcement of a contract with a child can be limited due to a child's lack of capacity). That is, a lack of capacity "exists when a party is not competent to understand the nature and consequences of his acts . . . . [H]e cannot make adequate judgments concerning his utility . . . ." *Id.* If contract law acknowledges that children cannot make adequate

Furthermore, governments place age restrictions on the purchasing of alcohol, cigarettes, and pornography. The very nature of what it means to be a child is to announce that one needs assistance—one needs a "parent." To raise a child it takes a family, teachers, business people, community leaders, and lawmakers—those who protect our health and safety—in essence, it takes a village to raise a child.[328] Rather than requiring parents to regulate potentially harmful situations, the government would be taking on a more guiding role in the protection of children.[329]

Furthermore, opponents argue that the FCC deemed the funding from advertisements necessary to continue children's education programming.[330] However, what opponents of such regulation fail to consider is that other countries have full bans on advertising, and those countries still provide funding for an adequate amount of television programing aimed at children.[331] A fundamental problem with achieving further regulation, especially regarding unhealthy foods, is that legislators tend to be on the side of big business and the food industry, making it difficult for interest groups to influence Congress.[332]

VIII. CONCLUSION

Regulations directed at advertising to children often strike a delicate balance with First Amendment rights. However, given the evidence that

judgments, should not advertising law acknowledge a minor's lack of capacity in an effort to help protect children from marketers?

328. *See* First Lady Hillary Clinton, Remarks at the Democratic National Convention (Aug. 27, 1996) (transcript available at http://www.cnn.com/ALLPOLITICS/1996/news/9608/27/hillary.speech/hillary.shtml); *see generally* NANCY FOLBRE, WHO PAYS FOR THE KIDS?: GENDER AND THE STRUCTURE OF CONSTRAINT 1, 248–62(1994).

329. *See* J. Morgan, *Religious Upbringing, Religious Diversity, and the Child's Right to an Open Future*, 24 STUD. IN PHIL. AND EDUC. 367, 370 (2005) ("If we influence a child such that the adult she becomes is incapable of considering important choices concerning her own life, then we have effectively diminished her opportunity for self-fulfillment"). Morgan suggests that children are particularly vulnerable in that they are subject to adult influences, and need to be directed in ways that do not limit the formation of their character and identity. *Id.*

330. Children's Television Act of 1990, Pub. L. No. 101-437, § 101, 104 Stat. 996, 996 (1990).

331. KUNKEL ET AL., *supra* note 12, at 23.

332. *See* David Kiley, *A Food Fight Over Obesity in Kids*, BUS. WK. ONLINE, Sept. 30, 2004, http://www.businessweek.com/bwdaily/dnflash/sep2004/nf20040930_0110_db035.htm (noting the influence that food companies have on legislative action and revealing that food companies have even influenced the USDA in matters concerning the Food Guide Pyramid).

advertising to children takes advantage of the naiveté of children, enforces negative stereotypes, and promulgates serious health risks and obesity, it seems reasonable to conclude that the benefits of regulating advertising outweigh the costs.

Because the FTC is reluctant to regulate for the protection of children due to its past failure, other government entities such as the FCC and Congress should have a greater role in regulating advertising to children. The history of commercial speech through case law, although at times contradictory, substantiates further protection of children. The Supreme Court has declared that the government has a substantial interest in protecting children through broadcast regulation, and applying the four-part test of *Central Hudson* to a hypothetical advertising ban provides positive results. The dangers wrought by advertising to children are palpable, and without further government regulation, future generations of children in the United States will face a life of manipulation, ill-informed consumerism, and poor health.