

Rethinking Regulation of Advertising Aimed at Children

William A. Ramsey*

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*B.A., 2003, Indiana University–Purdue University Fort Wayne; J.D. Candidate, 2006, Indiana University School of Law–Bloomington. The Author would like to thank the Editorial Board of the *Federal Communications Law Journal* for its help in the editing process, and his family, Yvonne, Rick, Ed, and Katy, for support.

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I. INTRODUCTION: A BRIEF HISTORY OF THE REGULATION OF ADVERTISING AIMED AT CHILDREN

In the 1970s, both the Federal Communications Commission (“FCC”)¹ and the Federal Trade Commission (“FTC”)² completed extensive examinations of advertising directed at children. The FCC issued a policy statement asking networks to voluntarily limit the amount of commercial time aired during programs directed at children.³ The FTC compiled a staff report stating that it was fundamentally unfair for advertisers to direct commercials at children and issued a *Notice of Proposed Rulemaking* in 1978 that proposed major regulation of

1. Children’s Television Report and Policy Statement, *Decision and Report*, 50 F.C.C.2d 1 (1974) [hereinafter *Children’s Television Report*].

2. 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 6–8 (Mar. 2, 2004), <http://www.ftc.gov/speeches/beales/040312childads.pdf>.

3. Children’s Television Report, *supra* note 1, paras. 40–45.

advertisements aired during children's television.⁴ The FTC received harsh political and public response to this proposed rulemaking. The Washington Post called the proposal "a preposterous intervention that would turn the FTC into a great national nanny."⁵ Congress responded to the FTC's proposal not only by passing legislation limiting the FTC's power to enforce any rule relating to children's advertising, but also by failing to renew the FTC's funding, in effect shutting down the agency temporarily.⁶ After the FTC's unsuccessful attempt to regulate advertising aimed at children, there was not much governmental involvement in the area until 1990, when Congress passed the Children's Television Act ("CTA"),⁷ which instructed the FCC to enforce certain requirements for television broadcasters. At this time, the FCC was still opposed to government involvement in this area and preferred to let the market regulate itself.⁸

The two main requirements of the CTA are: (1) the FCC must establish standards for broadcasters regarding the amount of children's television programming aired;⁹ and (2) broadcasters must 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.¹⁰ This commercial limit applies to over-the-air commercial television broadcasters, as well as cable¹¹ and digital television suppliers.¹² The FCC adopted its rules to enforce the CTA in 1991¹³ and revised these rules in 1996.¹⁴ Neither of these actions affected the substantive nature of

4. The staff proposed either: (1) a complete ban on advertising directed at children eight and under; (2) a ban of all ads for foods linked to poor dental health directed at children twelve and under; or (3) a requirement that ads for foods linked to poor dental health contain disclosures of the health effects of the foods. Children's Advertising, *Proposed Trade Regulation Rulemaking*, 43 Fed. Reg. 17967, 17969 (Apr. 25, 1978); Beales, *supra* note 2, at 7.

5. Editorial, *The FTC as National Nanny*, WASH. POST, Mar. 1, 1978, at A22.

6. See Beales, *supra* note 2, at 10.

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

8. H.R. REP. NO. 101-385, at 4 (1991).

9. The FCC requires broadcasters to air three hours of "core" children's programming per week. Policies and Rules Concerning Children's Television Programming, *Report and Order*, 11 F.C.C.R. 10660, para. 4 (1996) [hereinafter *Policies Concerning Programming*].

10. 47 U.S.C. § 303a(b).

11. FCC Consumer Facts, <http://www.fcc.gov/cgb/consumerfacts/childtv.html> (last visited Mar. 12, 2006).

12. Children's Television Obligations of Digital Television Broadcasters, *Notice of Proposed Rule Making*, 15 F.C.C.R. 22946, para. 12 (2000), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-00-344A1.pdf.

13. Policies and Rules Concerning Children's Television Programming, *Memorandum Opinion and Order*, 6 F.C.C.R. 5093 (1991) [hereinafter *Children's Memo*].

14. *Policies Concerning Programming*, *supra* note 9, para. 1.

the commercial limits, and dealt mainly with methods of enforcing the rules.

While some members of Congress objected to the government imposing these commercial limitations,¹⁵ these limitations are much less stringent than those in place in other countries that have used legislation to address advertising to children. Sweden has banned all advertising aimed at children twelve and under.¹⁶ Norway and Finland have banned companies from sponsoring children's television shows.¹⁷ Belgium has banned commercials from appearing five minutes before, during, and five minutes after children's programs.¹⁸ Strict regulations appear to be forthcoming in England, where one of its major broadcasters, the British Broadcasting Corporation, has banned the use of cartoon characters in fast food ads.¹⁹

This Note does not address the overall effectiveness of the CTA and the FCC regulations made pursuant to the CTA, or the validity of the underlying premise that children benefit from the availability of a large amount of television programming aimed at them,²⁰ and will only discuss the effectiveness of the CTA's commercial limits. This Note will examine the potential harms of advertising to children and will analyze the effectiveness of the CTA under the Supreme Court's test for determining the constitutionality of restrictions on commercial speech.²¹ This Note will conclude that the commercial limitation of the CTA is probably constitutional. However, an analysis of the CTA under the Court's test will find that the CTA is not as effective as other regulations that could be adopted. Finally, this Note will suggest alternative regulations of commercials that would more effectively deal with the harms caused by advertising to children.

II. THE SCOPE OF THE CTA AND THE GOVERNMENT'S GENERAL PURPOSE IN PRESCRIBING COMMERCIAL LIMITS FOR CHILDREN'S TELEVISION PROGRAMS

Although the FCC and Congress's purpose for the three-hour mandate

15. See H. R. REP. NO. 101-385, at 22.

16. THE KAISER FAMILY FOUND., THE ROLE OF MEDIA IN CHILDHOOD OBESITY 8 (2004), <http://www.kff.org/entmedia/upload/The-Role-Of-Media-in-Childhood-Obesity.pdf> [hereinafter KAISER REPORT].

17. *Id.*

18. *Id.*

19. *Id.*

20. For a discussion of the negative effects of children viewing large amounts of television see *id.* at 9 (indicating that the Surgeon General and the American Academy of Pediatrics recommend limits on the amount of television that children watch).

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

was to increase the amount of beneficial television available to children,²² the increased amount of television aimed at children correspondingly increases the amount of advertising aimed at children.²³ This increased exposure includes not only direct advertisements, but also instances in which companies use popular TV characters to promote their products.²⁴ In all, the average child sees 40,000 television ads per year.²⁵ Also, over half of American children have television sets in their rooms, indicating that many children are watching a significant amount of television without direct parental supervision.²⁶

In addition to the evidence that children view large amounts of commercial material, considerable evidence indicates that children have difficulty distinguishing a commercial from the program that they are watching.²⁷ Congress recognized that children who cannot distinguish between commercials and programs will be harmed by excessive exposure to commercials; children who do not know they are watching a commercial “certainly cannot be expected to react aversively to an excessive amount of advertising by changing the channel or turning off the television.”²⁸ A 2004 study by the American Psychological Association (“APA”) supports this congressional finding. The study found an inverse relationship between children who understand the nature of commercials and children who trust all commercials and want to acquire all the products they see advertised on television.²⁹

While the overall goal of the CTA is to improve television for children sixteen and under, the commercial limitation aims to protect only younger children, whom Congress thought were being adversely affected by commercials.³⁰ Thus, the definition of “child” for the purpose of commercial limits differs from the definition in other areas of FCC

22. See S. REP. NO. 101-66, at 1 (1991).

23. See DALE KUNKEL ET AL., AM. PSYCH. ASS’N, REPORT OF THE APA TASK FORCE ON ADVERTISING AND CHILDREN: SECTION: PSYCHOLOGICAL ISSUES IN THE INCREASING COMMERCIALIZATION OF CHILDHOOD 2-3 (2004), available at <http://www.apa.org/releases/childrenads.pdf> [hereinafter APA TASK FORCE].

24. *Id.*

25. *Id.* at 1-2.

26. *Id.* at 3 (citation omitted).

27. See, e.g., Policies and Rules Concerning Children’s Television Programming, *Report and Order*, 6 F.C.C.R. 2111, para. 3 n.13 (1991) [hereinafter *Children’s Programming Report*]; APA TASK FORCE, *supra* note 23, at 5-8 (finding that children below ages four and five cannot distinguish between programs and commercials and that children up to ages seven and eight do not recognize that the purpose of commercials is to convince viewers to buy the product).

28. H. R. REP. NO. 101-385, at 6.

29. APA TASK FORCE, *supra* note 23, at 17.

30. *Children’s Programming Report*, *supra* note 27, para. 15.

regulation. For the purposes of other FCC regulations, “children” are considered sixteen and under, but for the purposes of identifying shows that face commercial limitations, “children” are considered twelve and under.³¹

For air time to be classified as “commercial” the broadcaster must have received consideration from the company that is advertising a product or service, and the announcement must have a promotional purpose.³² Thus, public service messages sponsored by nonprofit organizations, promotions for other television programs, or educational or “spot” announcements that are introduced by the speaker saying “sponsored by [a company]” are not considered commercial material for the purposes of the limitation.³³ In fact, the FCC seeks to encourage such announcements.³⁴

Particularly worrisome to the FCC and Congress are “program-length commercials,” programs in which a commercial for a product associated with the program airs during the program or within 60 seconds of its beginning or end.³⁵ If a broadcaster airs such a commercial during a program or within the 60-second window, the entire program will be considered commercial material.³⁶ For example, if a commercial for Burger King that featured characters from the cartoon “SpongeBob SquarePants” aired during or within 60 seconds of a “SpongeBob SquarePants” episode, the entire 30-minute program would count as a commercial. The FCC rejected the Action for Children’s Television (“ACT”) request to expand the scope beyond the 60-second window and found that “the short attention spans of children, particularly younger children most likely to confuse program and commercial material,” justified permitting commercials for products associated with television shows to be aired outside of the 60-second window.³⁷

The FCC indicated that when enforcing the CTA it would consider single and accidental violations of the act de minimis, but would assess penalties for “willful or repeated” violations.³⁸ The result of this policy is that neither the broadcaster’s intent nor its overall compliance with the CTA is the FCC’s primary concern. For example, an FCC investigation revealed that Oceanic-Time Warner Cable of Hawaii had aired thirty-one half hour programs during which commercials for products associated with

31. *Id.*

32. *Children’s Memo*, *supra* note 13, para. 11 (1991).

33. *Id.* para 9.

34. *Children’s Programming Report*, *supra* note 27, para. 7 (1991).

35. *Id.* paras. 44–45.

36. *Id.* para. 46.

37. *Id.* para. 45.

38. *Id.* para. 39 (citation omitted).

the program also aired, but that all the violations were inadvertent.³⁹ The FCC also found that Oceanic had not benefited financially by airing these commercials during the programs.⁴⁰ Still, the FCC required that International Family Entertainment, who had provided Oceanic with the programming, make a “voluntary contribution” of \$500,000 for the thirty-one inadvertent violations.⁴¹ In another proceeding, although Viacom, over its Nickelodeon channel, aired less than the maximum time of commercial material 85% of the time, and although its violations of the CTA were unintentional and due to “flawed internal procedures and human error,”⁴² the FCC still entered into a consent decree that required Viacom to not only fix the problems that resulted in violations, but also make a “voluntary contribution” to the U.S. Treasury of one million dollars.⁴³

III. THE HARMS CAUSED BY ADVERTISING TO CHILDREN AND THE NEED FOR FURTHER GOVERNMENTAL REGULATION

While the government states its purposes for protecting children in general terms—children are easily influenced and cannot tell advertising from regular programming—there are some specific and real harms that advertising can inflict upon children. Two of these harms, increased materialism and reinforcement of racial stereotypes, probably are not so substantial as to warrant governmental intervention. However, a growing amount of evidence indicates that advertising directed at children is a direct cause of obesity and health problems in children, making the issue of advertising directed at children a problem that the government should address with regulation.

While children may already want many of the products advertised to them, children who view commercials for such products exhibit a “statistically significant [increase in their] desire for the advertised merchandise.”⁴⁴ Also, when considering the effect of advertising on children, one must consider both the immediate effect of making children want the advertised product and the cumulative effect of children developing general habits.⁴⁵ That is, not only do toy and junk food

39. The commercials were aired due to flawed computer design and human error. Int’l Family Entm’t Inc., *Order*, 19 F.C.C.R. 20789, para. 4 (2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-04-3259A1.pdf.

40. *Id.*

41. *Id.* para. 12.

42. Viacom Int’l Inc., *Order*, 19 F.C.C.R. 20802, para. 4 (2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-04-3260A1.pdf.

43. *Id.* para. 12.

44. APA TASK FORCE, *supra* note 23, at 10.

45. *Id.* at 9.

commercials influence children to want those items featured in the commercials, they also influence children to want more toys and junk food in general.

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

The majority of advertisements directed at children are for food products, and most of these foods are unhealthful.⁴⁶ The number of ads directed at children has steadily increased over the last twenty years, and has roughly doubled since the 1970s.⁴⁷ The number of ads aired for foods such as frozen dinners, which are typically high in fat and sodium, has more than doubled in the last twenty years.⁴⁸ During this same period, the rate of obesity in children has more than tripled, rising from roughly 4% to roughly 15%.⁴⁹ Studies have found a relationship between this increase in ads for unhealthful foods and obesity in children.⁵⁰ Also, it appears that ads for food may have an even greater effect on children who are already overweight.⁵¹ Thus, exposure to advertisements for unhealthful foods may lead otherwise healthy children to develop unhealthful eating habits and become overweight and already overweight children to further exacerbate their weight problem.

Not only are there far more ads for unhealthful foods than for healthful foods, but also the influence of ads for unhealthful foods seems to be stronger than the influence of ads for healthful foods.⁵² These numerous food advertisements influence children to prefer particular candies, sodas, or fast food restaurants and to generally prefer candy, soda, and fast food over more healthful foods.⁵³

46. KAISER REPORT, *supra* note 16, at 5.

47. *See id.* at 4.

48. *Id.* at 5.

49. *Id.* at 1.

50. APA TASK FORCE, *supra* note 23, at 12 (citing W. Dietz, *You Are What You Eat—What You Eat Is What You Are*, 11 J. ADOLESCENT HEALTH CARE 76 (1990); K.B. Horgan, et al., *Television Food Advertising: Targeting Children in a Toxic Environment*, in THE HANDBOOK OF CHILDREN AND MEDIA 447–62 (D.G. Singer & J.L. Singer eds., 2001); R.P. Toriano & K.M. Flegal, *Overweight Children and Adolescents: Description, Epidemiology and Demographics*, PEDIATRICS, 101, 497 (1998)).

51. *See* Jason C.G. Halford et al., *Effect of television advertisements for foods on food consumption in children*, 42 APPETITE 221, 224 (2004) (finding that obese children remembered commercials for foods more frequently than other children and that “exposure to the TV food ads exaggerated already distinctive patterns of food choice.”).

52. APA TASK FORCE, *supra* note 23, at 12 (citations omitted).

53. *See* Gerard Hastings, Martine Stead & Laura McDermott, *How Food Promotion Influences Children*, EDUC. J., July 2004, at 14; Danny Kucharsky, *Targeting Kids*, MARKETING MAG., July 12, 2005, at 6 (citing a study that found a correlation between the amounts of sugary cereals consumed and viewing of commercials for these cereals).

Studies have found that commercials not only influence children to eat more of the foods that they do not need, but also cause them to eat less of the foods that they do need. A study that showed one group of children ads for fruit and fruit juice and another group of children ads for candy and Kool-Aid found a significant correlation between the ads the children watched and their food and drink choices.⁵⁴ Another study indicated that viewing ads for unhealthy foods may lead children to eat fewer fruits and vegetables.⁵⁵

The increase of obesity in children is a serious concern and should not be ignored by the government. Obesity causes health problems for children, and 80% of overweight children become overweight adults.⁵⁶ Currently, two-thirds of U.S. adults and nine million children in the United States are either overweight or obese.⁵⁷ Obesity is much more than a cosmetic problem. The health effects of obesity may be more severe than those of cigarette smoking.⁵⁸ Indeed, bad eating and exercise habits caused 400,000 deaths in the United States in 2000.⁵⁹ In addition to the deaths caused by obesity, obesity costs the American health care system seventy billion dollars per year.⁶⁰ The American Academy of Pediatrics states that the price of childhood obesity is “staggering.”⁶¹

B. Advertising's Effect on Children's Materialistic Nature

While the health effects of advertising to children are apparent and serious, commercials aimed at children also influence children to be more materialistic. The APA found a correlation between the amount of television a child watches and the child's number of requests for products.⁶² A study that compared children in Sweden, where advertising

54. APA TASK FORCE, *supra* note 23, at 12.

55. See KAISER REPORT, *supra* note 16, at 5.

56. *Id.* at 1.

57. Bruce Nixon, *Advertising and Marketing to Children: Everybody's Business*, INT'L J. OF ADVER. & MKTG TO CHILDREN, Apr.–June 2004, at 19–20.

58. KAISER REPORT, *supra* note 16, at 1 (referring to a report from the Surgeon General).

59. Nixon, *supra* note 57, at 20.

60. Dan Glickman, Agric. Sec'y, USDA, Remarks at USDA Symposium on Childhood Obesity: Causes and Prevention 62, 63 (Oct. 27, 1998), <http://www.usda.gov/cnpp/Seminars/obesity.PDF>.

61. The American Academy of Pediatrics Committee on Nutrition, *Policy Statement: Prevention of Pediatric Overweight and Obesity*, 112 PEDIATRICS 424, 425 (2003).

62. APA TASK FORCE, *supra* note 23, at 11; see also Karen J. Pine & Avril Nash, *Dear Santa: The effects of television advertising on young children*, 26 INT'L J. BEHAV. DEV. 529, 539 (2002) (“[Research] finds that increasing amounts of commercial television watched are matched by an increase in the overall amount of toys requested by children, and an increase in the number of branded products requested.”).

directed at children is illegal, to children in Great Britain, found that children in Great Britain requested more products than children in Sweden.⁶³ In addition to this increased materialism, the APA also found a correlation between the amount of television advertising observed and children's "acceptance of materialism."⁶⁴ Thus, exposure to advertisement influences not only children's behavior, but also their value system.

A problem related to the materialistic values adopted by children arises when parents deny these children's requests for products. Children generally become angry or upset with their parents when parents deny a request for a product that the child saw advertised on television.⁶⁵ The APA found that "the frequent purchase requests associated with children's advertising exposure may place strain on parent-child interaction."⁶⁶

C. Advertising's Role in Re-Enforcing Racial Stereotypes

While the advertising industry has made significant improvements in racial hiring practices over the last thirty years, advertisements aimed at children also can encourage racist tendencies or reinforce existing stereotypes. The "cultivation theory" indicates that "if children are repeatedly exposed to certain portrayals of an ethnic group, they may develop corresponding beliefs about the group."⁶⁷ The Children's Advertising Review Unit ("CARU")⁶⁸ recognized the power of advertisements to reinforce stereotypes and set guidelines indicating that advertisers should "incorporate minority and other groups in advertisements in order to present positive and pro-social roles and role models whenever possible."⁶⁹

While studies conducted over the previous thirty years revealed underrepresentation of minorities and placement of minorities in commercials for mainly low-cost products, a 2000 study showed improvement in the representation of minorities in advertisements aimed at

63. Pine & Nash, *supra* note 62, at 536.

64. APA TASK FORCE, *supra* note 23, at 11 (citation omitted).

65. *Id.* (citations omitted).

66. *Id.*

67. Hae-Kyong Bang & Bonnie B. Reece, *Minorities in Children's Television Commercials: New, Improved, and Stereotyped*, 37 J. CONSUMER AFF. 42, 43 (2003).

68. The National Advertising Review Council, an alliance between the Better Business Bureau and the advertising industry, created CARU "to promote responsible children's advertising and to respond to public concerns." BETTER BUS. BUREAU, SELF REGULATORY GUIDELINES FOR CHILDREN'S ADVERTISING 2, <http://www.caru.org/guidelines/index.asp> [hereinafter CARU Guidelines]. The CARU attempts to set guidelines so that the advertising industry may regulate itself.

69. *Id.* at 3.

children.⁷⁰ However, this study found that minorities were still underrepresented in toy commercials, and that this underrepresentation “may cultivate a belief that Black children are not ‘mainstream’ enough to appear in all types of commercials.”⁷¹ The study also found that minorities were rarely shown in a home or family setting, possibly contributing “to a stereotype that many Black people do not have strong family ties or that many Asian American parents are too busy at their workplace to have family time at home.”⁷² Also, minority adults were underrepresented in children’s commercials, possibly contributing to the stereotype “that the absence of adults in minority children’s life is quite widespread.”⁷³

While advertisers should continue to adjust their practices to ensure that they are not communicating messages to children that reinforce or create racial prejudices, advertisers seem to be making significant progress in this area and are legitimately attempting to regulate themselves. And though materialism and parent-child conflict are not normally considered desirable, these problems are not serious enough, by themselves, to warrant a reconsideration of the current government regulation of advertising aimed at children. However, the growing rate of obesity in America should be a governmental concern because of the cost it is inflicting on the health care system and the government’s general interest in improving Americans’ health. Because advertising directed at children has been shown to contribute to obesity, it is important to not only examine the constitutionality of the CTA, but also explore more effective ways in which the government could constitutionally regulate advertising aimed at children.

IV. A CONSTITUTIONAL ANALYSIS OF THE CTA

Speech regulated by the CTA is subject to lesser First Amendment protection because the speech is: (1) commercial in nature; (2) broadcast; and (3) aimed at children. Considering these characteristics, the CTA’s commercial restriction does not violate current First Amendment jurisprudence.

A. *The Lesser First Amendment Protection Given to the Speech Regulated by the CTA*

Television commercials directed at children fall into the category of commercial speech because they are “related solely to the economic

70. Bang & Reece, *supra* note 67, at 46–47.

71. *Id.* at 62.

72. *Id.*

73. *Id.* at 63.

interests of the speaker and its audience.”⁷⁴ The government is given an “ample scope of regulatory authority”⁷⁵ to regulate commercial speech and such speech has “a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.”⁷⁶

The Court, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, developed a four-prong test for regulations of commercial speech: (1) for the speech to be subject to First Amendment protection it must not mislead the consumer or promote unlawful acts; (2) the government must have a substantial interest in regulating the speech; (3) the regulation of speech must directly and substantially advance the government’s interest; and (4) the regulation of speech must not be more extensive and broad than necessary.⁷⁷

The first prong of the *Central Hudson* test gives the government power to regulate speech that it does not have in other contexts. Under this prong, the government can restrict commercial speech that does not “accurately inform the public about lawful activity.”⁷⁸ The rationale for treating commercial speech differently and allowing the government to suppress misleading statements is “the importance of avoiding deception and protecting the consumer from inaccurate or incomplete information in a realm in which the accuracy of speech is generally ascertainable by the speaker.”⁷⁹ Moreover, “[F]alse or misleading speech in the commercial realm also lacks the value that sometimes inheres in false or misleading political speech.”⁸⁰ Because of this lack of value, the Court has expressed its approval of statutes that ban forms of commercial speech that are

74. *Central Hudson*, 447 U.S. at 561 (citations omitted). Even commercials aimed at children that, in addition to promoting a product, contain messages or information of a noncommercial nature are considered commercial speech. See *Bd. of Trs. v. Fox*, 492 U.S. 469, 474–75 (1989).

75. *Fox*, 492 U.S. at 477.

76. *Ohralik v. Ohio State Bar Ass’n.*, 436 U.S. 447, 456 (1978).

77. *Central Hudson*, 447 U.S. at 566. Some current Justices have indicated that they feel the *Central Hudson* test is applied in inappropriate circumstances. See *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002). For example, Justice Thomas has consistently expressed his displeasure with the use of the *Central Hudson* test when “the government’s asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace.” *Greater New Orleans Brdcast. Ass’n v. United States*, 527 U.S. 173, 197 (1999) (Thomas, J., concurring) (internal quotations omitted). Justice Scalia has indicated that he has “discomfort with the *Central Hudson* test, which seems to me to have nothing more than policy intuition to support it.” *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring).

78. *Central Hudson*, 447 U.S. at 563.

79. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 493 (1995) (Stevens, J., concurring).

80. *Id.* at 496.

“fraudulent, deceptive, or coercive.”⁸¹ The FTC has developed a test to determine whether or not an advertisement is deceptive or misleading.⁸² In general, for a commercial to be considered deceptive, and thus outside of the scope of the First Amendment, the commercial must contain a representation that could mislead a reasonable consumer and affect that consumer’s decision to purchase a product.⁸³

In addition to its ability to restrict misleading or deceptive commercial speech, Congress empowered the FTC to restrict unfair speech.⁸⁴ For commercial speech to be unfair, the speech must be “likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”⁸⁵ The FTC may consider public policy, but may not make it the primary basis for finding a practice unfair.⁸⁶ When challenging a practice as unfair, the government must demonstrate that a regulation of the practice will reduce the harm caused; such an effect will not be presumed.⁸⁷

Also, the Court has allowed regulations that protect children to stand, when in other contexts the regulations would violate the First Amendment.⁸⁸ The Court held in *FCC v. Pacifica Foundation* that the government may protect the “well-being of its youth” through the “regulation of otherwise protected expression,” by restricting indecent speech on the radio that children are likely to hear.⁸⁹ When passing the CTA, Congress considered the Court’s willingness to limit speakers’ First Amendment protections in order to allow the government to protect

81. *Edenfield v. Fane*, 507 U.S. 761, 768 (1993). The *Edenfield* Court noted that statutes that encompass not only this misleading speech but also legitimate, nonmisleading speech would have to satisfy the remaining three prongs of the *Central Hudson* test. *Id.* at 769.

82. For the complete statement, see *Cliffdale Assoc., Inc.*, 103 F.T.C. 110, 176 (1984).

83. *Id.* at 168–70.

84. 15 U.S.C. § 45(a)(1) (2000) (“[U]nfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”).

85. § 45(n).

86. *Id.*

87. See *44 Liquormart*, 517 U.S. at 505.

88. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250–51 (2002) (holding that while the government may ban actual child pornography, it may not ban virtual child pornography, because virtual child pornography does not harm children in the way that actual child pornography does (citation omitted)); Dennis Crouch, Comment, *The Social Welfare of Advertising to Children*, 9 U. CHI. L. SCH. ROUNDTABLE 179, 186 (2002) (citing *New York v. Ferber*, 458 U.S. 747 (1982)).

89. *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978) (citing *Ginsberg v. New York*, 390 U.S. 629, 639–40 (1968)).

children.⁹⁰

Also, broadcast speech receives less First Amendment protection than other forms of speech.⁹¹ The Court has recognized the FCC's authority and power to regulate a broadcaster's speech if the regulation "would serve 'the public interest, convenience, and necessity.'"⁹² The *Pacifica* Court put forth two rationales for giving broadcast speech less protection than speech communicated over other mediums. First, broadcast speech is heard by people in their own homes, and in the home, "the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."⁹³ Second, broadcast speech is "uniquely accessible to children."⁹⁴ Both these rationales apply to commercials directed at children; these advertisements are viewed by children within their homes and are aired during programs to which children generally have access.

B. An Analysis of the CTA Under Central Hudson's Four-Prong Test

Keeping in mind the lesser protection given to the speech regulated by the CTA based on the speech's commercial nature, its direction at children, and the broadcast media over which it is aired, the Note will analyze the CTA under the four prongs of the *Central Hudson* test.

1. Prong One: Are Commercials Aimed at Children Misleading?

When determining if advertisements aimed at children are misleading or deceptive, advertisements should be looked at from the perspectives of the children at whom the advertisements are aimed. Thus, the "limited ability of children to detect exaggerated or untrue statements" will be considered.⁹⁵ The FTC typically challenges advertisements that lead to harms that "parents themselves generally cannot prevent or control."⁹⁶ Thus, advertisements found to be unfair have included those that show toys performing actions that they cannot perform or those that advertise 900 numbers that children can call to talk with characters from television

90. See H.R. REP. NO. 101-385, at 8 (1991).

91. See *Reno v. ACLU*, 521 U.S. 844, 868 (1997); *Action for Children's TV v. FCC*, 58 F.3d 654, 659 (D.C. Cir. 1995) (citing *Pacifica*, 438 U.S. at 748).

92. *Pacifica*, 438 U.S. at 748 (quoting 47 U.S.C. §§ 309(a), 312(a)(2)).

93. *Id.* at 748 (citing *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970)).

94. *Id.* at 749.

95. Roscoe B. Starek, III, FTC Commissioner, *The ABCs at the FTC: Marketing and Advertising to Children*, Summary of Prepared Remarks (July 25, 1997) (citation omitted), <http://www.ftc.gov/speeches/starek/minnfn.htm>.

96. FTC, *ADVERTISING TO KIDS AND THE FTC: A REGULATORY RETROSPECTIVE THAT ADVISES THE PRESENT* 5 (2004), www.ftc.gov/speeches/beales/040802adstokids.pdf.

shows.⁹⁷ However, J. Howard Beales, former FTC Director of Consumer Protection, expressed the view that “Kids’ pestering their parents with demands for ‘junk foods’ may be annoying and aggravating, but it is not unfair or deceptive under the FTC Act.”⁹⁸

On the other hand, the APA believes that advertising aimed at children is inherently unfair.⁹⁹ The APA based this opinion on research that revealed: (1) children generally cannot distinguish between a commercial and a program until the age of 4–5;¹⁰⁰ (2) children generally do not realize that the purpose of a commercial is to persuade the viewer to buy the advertiser’s product until the age of 7–8;¹⁰¹ and (3) even with training, children of this age generally cannot develop the ability to comprehend the persuasive purpose of commercials.¹⁰² Legislation requires that when a company advertises its products, the company must identify itself and make it clear that the company has paid for the advertisement.¹⁰³ The purpose of this requirement is to ensure that commercial viewers realize that what they are viewing has been paid for and know the identity of the person or company paying for the advertisement.¹⁰⁴ Based on this purpose, the APA opined: “If it is unfair and deceptive to seek to bypass the defenses that adults are presumed to have when they are aware that advertising is addressed to them, then it must likewise be considered unfair and deceptive to advertise to children in whom these defenses do not yet exist.”¹⁰⁵ The American Academy of Pediatrics also found that “advertising directed toward children is inherently deceptive and exploits children under 8 years of age.”¹⁰⁶ Not only do psychologists feel that advertising aimed at children is inherently deceptive, a survey of youth marketers found that 91% of these marketers think that companies advertise products to children in ways that children do not realize that they are being targeted.¹⁰⁷

In addition to the inability of children to distinguish between advertisements and television, it is increasingly common for advertising agencies to employ psychologists to help develop ads that will influence

97. *See id.*

98. Beales, *supra* note 2, at 7.

99. APA TASK FORCE, *supra* note 23, at 22.

100. *Id.* at 6.

101. *Id.* at 8.

102. *Id.* at 15.

103. 47 U.S.C. § 317(a) (2000).

104. National Broadcast Company Concerning Sponsorship Identification, 27 F.C.C.2d 75, 75 (1970).

105. APA TASK FORCE, *supra* note 23, at 21.

106. KAISER REPORT, *supra* note 16, at 8 (citation omitted).

107. Daren Fonda & Eric Roston, *Pitching it To Kids*, TIME, June 28, 2004, at 52–53.

children to buy products.¹⁰⁸ Some psychologists believe that their colleagues who work with advertisers violate the mission of the APA, and are basically “helping [advertisers] manipulate children.”¹⁰⁹ The APA Task Force, which extensively investigated advertising directed at children, agreed that the use of psychological research to develop commercials that will be particularly effective and will take advantage of the limited abilities of children is unfair, but noted that some psychological research in the area was acceptable.¹¹⁰ However, there is little that can be done to prevent advertisers from using research to exploit children’s tendencies. Even if psychologists were to refuse to work directly with companies, it would be nearly impossible to prevent advertisers from using existing psychological publications or research to help them design their ads to take advantage of the limited abilities of children.¹¹¹

The capacity of ads to mislead children is demonstrated by a study that found that 70% of children thought that fast food was healthful.¹¹² Another study showed children unhealthful foods and healthful foods and asked them to indicate which food was healthful; the more television that children watched, the more likely they were to choose the unhealthful food.¹¹³

If one believes the studies and opinions of groups such as the APA, the Kaiser Foundation, and the American Academy of Pediatrics—reputable groups whose opinions are highly valued on many subjects—then advertisements mislead children. The House Committee on Energy and Commerce made findings similar to those of the APA regarding the ability of children to discern and interpret advertisements and concluded that children “tend to place indiscriminate trust in television advertising.”¹¹⁴ When determining whether or not commercial speech aimed at children is inherently misleading and thus not subject to First Amendment protection, the Court would consider evidence that shows commercials do in fact mislead children.¹¹⁵ Thus, the studies and reports of the APA, the Kaiser

108. APA TASK FORCE, *supra* note 23, at 20.

109. Rebecca A. Clay, *Advertising to children: Is it Ethical?*, 31 MONITOR ON PSYCH. 8, (2000), available at <http://www.apa.org/monitor/sep00/advertising.html>.

110. APA TASK FORCE, *supra* note 23, at 22.

111. See Clay, *supra* note 109.

112. KAISER REPORT, *supra* note 16, at 5–6 (citation omitted).

113. *Id.* at 6 (citation omitted).

114. H.R. REP. NO. 101-385, at 6 (1991).

115. *In re R.M.J.*, 455 U.S. 191, 200 n.11 (1982), which stated:

The commercial speech doctrine is itself based in part on certain empirical assumptions as to the benefits of advertising. If experience proves that certain forms of advertising are in fact misleading, although they did not appear at first to be “inherently” misleading, the Court must take such experience into account.

Foundation, and the American Academy of Pediatrics would be relevant and should be persuasive. The Court would also consider relevant children's relative lack of knowledge when deciding whether advertising aimed at them is misleading.¹¹⁶

Because of their misleading nature, advertisements aimed at children should be considered outside the protection of the First Amendment under *Central Hudson*. Thus, the CTA does not violate the First Amendment and even more restrictive regulation would also be constitutional.

Despite the strong likelihood that advertisements directed at children deserve no protection from the First Amendment, an analysis of the CTA under the remaining three prongs of *Central Hudson* helps examine how the CTA advances its goal of protecting children. Moreover, if the Court finds that advertising to children is not inherently misleading, the government would merely be prohibited from completely banning advertising directed at children. If the Court finds that advertising to children is not inherently misleading, but merely has the potential to mislead, the state could still regulate advertising aimed at children subject to the *Central Hudson* test.¹¹⁷

2. Prong Two: Does the Government Have a Substantial Interest in Protecting Children from Advertising?

The CTA meets the second prong of the *Central Hudson* test because the government has a substantial interest in protecting children from the harms associated with advertising. As the House Bill accompanying the CTA indicated, "[I]t is difficult to think of an interest more substantial than the promotion of the welfare of children."¹¹⁸ Courts have also found that the protection of children is a substantial state interest.¹¹⁹

There is also substantial evidence that advertising harms children. The government must present evidence that advertising harms children in order to meet the second prong of *Central Hudson*; that is, the government

(citations omitted).

116. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) (noting that when considering whether restrictions on advertising by lawyers was misleading, because "the public lacks sophistication, concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." (citation omitted)). Therefore, because different audiences have different degrees of sophistication and knowledge, "different degrees of regulation may be appropriate in different areas." *Id.* at 384 n.37.

117. See *Peel v. Att'y Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 110 n.17 (1990).

118. H.R. REP. NO. 101-385, at 11 (1991).

119. E.g., *Pacifica*, 438 U.S. at 757-58.

cannot merely claim that something harms children without offering proof.¹²⁰ However, the government does not need to show absolute certainty or agreement within the scientific community that a certain type of speech harms children.¹²¹ The studies mentioned above linking childhood obesity and resulting health problems to advertising aimed at children should give the government ample evidence to satisfy the Court that commercial speech aimed at children is harmful and that the government has a substantial interest in preventing these harms.

3. Prong Three: Does the CTA Substantially Protect Children from the Harms of Advertising?

A restriction on commercial speech “may not be sustained if it provides only ineffective or remote support for the government’s purpose.”¹²² So, to satisfy the third prong of *Central Hudson*, the CTA must substantially protect children from the harms caused by advertising. A possible problem with finding that the CTA significantly reduces children’s exposure to advertising is that children are already exposed to numerous advertisements through billboards, print media, and the Internet. However, television advertisements reach more children than any other form of media, and advertisers rely on television ads more than ads through other mediums.¹²³ Thus, the existence of advertising over other mediums would probably not preclude a finding that regulating advertisements on television substantially protects children from advertising.

In addition to overtly advertising, companies also reach children through television by placing their products or brand names in television programs. Currently, there are no restrictions on products or brand names appearing on television programs.¹²⁴ The prominent placement of a product in a program could produce a persuasive effect on children similar to that of a commercial for that product featuring a character from the currently airing program. That is, a child viewing a show in which a character uses a

120. *Edenfield*, 507 U.S. at 771 (indicating that when regulating commercial speech, the government “must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”).

121. Indeed, when dealing with the regulation of indecent speech, “the Supreme Court has never suggested that a scientific demonstration of psychological harm [to children] is required” *Action for Children’s TV*, 58 F.3d at 661–62. The D.C. Circuit relied on *Ginsberg v. New York*, 390 U.S. at 642–43, in which the Court stated that the government did not need to show complete agreement within the scientific community that obscenity harms children in order to regulate indecent speech.

122. *Central Hudson*, 447 U.S. at 564.

123. See APA TASK FORCE, *supra* note 23, at 4.

124. *Children’s Programming Report*, *supra* note 27, para. 41 (reasoning that such a restriction would inhibit the creativity of writers).

certain product may think that the character endorses this product and thus assumes positive qualities about that product. However, while this possibility exists, no proof exists that producers or advertisers purposely employ this tactic.¹²⁵ While the FCC does not currently restrict the use of brand name products within a show, it has indicated that “[s]hould abuses occur . . . [it] will not hesitate to revisit this issue.”¹²⁶

A more serious problem with the constitutionality of the CTA arises when one considers whether limiting the amount of commercial time aired during programs aimed at children substantially reduces the amount of commercial material viewed by children. Significant numbers of children are watching television after 10:00 p.m.,¹²⁷ the time before which the FCC requires that stations air their core children’s television programs.¹²⁸ These children are likely watching television that is not aimed at children and is thus not subject to commercial limitations.¹²⁹ The concept of “children’s grazing” through channels while watching television also makes it difficult to control or know what children actually watch.¹³⁰ Thus, for the premise to hold true that limiting the amount of commercial time during individual shows aimed at children substantially limits the amount of commercial material that children view, children would have to watch primarily shows aimed at children and not flip through channels and view commercials during this “grazing.” This premise is difficult to accept. Children under eight generally do not really understand the point of commercials, and children five and under cannot even tell the difference between a commercial and a program.¹³¹ Also, children who view television without parental supervision may view significant amounts of television not aimed at them. Cartoons such as Fox’s “The Family Guy,” Comedy Central’s “South Park,” or cartoons that are part of The Cartoon Network’s “Adult Swim,” are not aimed at children. However, children may simply come across these shows and watch them because they are cartoons.

Even if it could be demonstrated that the CTA actually reduced the amount of commercial material viewed by children, there is a lack of evidence that reducing the quantity of commercials substantially reduces

125. *See id.* paras. 5, 41–42. “[A] program’s relationship to products is not necessarily indicative of commercial intent.” *Id.* para. 41.

126. *Id.* para. 44.

127. *Action for Children’s TV*, 58 F.3d at 657.

128. FCC Consumer Facts, <http://www.fcc.gov/cgb/consumerfacts/childtv.html> (last visited Mar. 12, 2006).

129. *See* H.R. REP. NO. 101-385 at 16 (1991); *cf. infra* Part V.B.2. (discussing children’s familiarity with characters that do not appear in programming aimed at children).

130. *Action for Children’s Television*, 58 F.3d at 668.

131. APA TASK FORCE, *supra* note 23, at 5–7.

the effect of commercials on children.¹³² In fact, evidence indicates that children may develop a preference for a particular brand or product after seeing a commercial only one time.¹³³

Other obstacles the CTA, as enforced by the FCC, faces with meeting the third prong are the FCC's exceptions to the commercial limitations.¹³⁴ The FCC's provision that "public service" and educational announcements do not count towards the total amount of commercial time makes sense and does not frustrate the purpose of the statute. However, the provision that excludes time spent on advertisements for other shows does not conform to the statute's purpose. If children are persuaded to watch more television, they will also view more ads. The Court has found that "[t]here is little chance that [an act] can directly and materially advance its aim, while other provisions of the same Act directly undermine and counteract its effects."¹³⁵ By exempting ads that encourage children to watch more television, and thus more commercials, the CTA, as enforced by the FCC, undermines its goal of reducing children's exposure to advertising.

Another exception in the CTA is its unexplained distinction between weekend television, during which broadcasters may only air 10.5 minutes of commercial material per hour, and weekday television, during which broadcasters may air 12 minutes per hour.¹³⁶ Data available at the time of the passage of the CTA indicated that children watch more television on weekdays than on weekends.¹³⁷ Because the purpose of the CTA is to reduce children's exposure to commercials, it would make more sense to set a higher commercial time limit for television broadcast on the weekends when fewer children are watching television. Thus, the higher limit of commercial material for weekday television cannot be justified in accordance with the overall purpose of the statute, and undermines the government's interest.

132. See H.R. REP. NO. 101-385, at 19-20 (1991) (indicating a disagreement among experts over whether harm was caused by "too many" commercials).

133. APA TASK FORCE, *supra* note 23, at 10 (adding that increased exposure may make it more likely for such a preference to develop); KAISER REPORT, *supra* note 16, at 5 (describing a study in which children developed preferences for advertised products after seeing only one program containing commercials).

134. Cf. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) (noting that exceptions to a statute prohibiting alcoholic beverage manufacturers from displaying the alcohol content on labels "bring into question the purpose of the labeling ban"); *Valley Brdcast. Co. v. United States*, 107 F.3d 1328, 1334-35 (9th Cir. 1997) (stating that the numerous exceptions to a statute banning advertising for gambling made it difficult for the statute to substantially advance its goal of reducing participation in gambling).

135. *Rubin*, 514 U.S. at 489.

136. See H.R. REP. NO. 101-385, at 20 (1991).

137. See *id.*

4. Prong Four: Is the CTA More Extensive Than Necessary to Achieve the Government's Goals?

The CTA passes the fourth prong of the *Central Hudson* test because it is not more extensive than necessary. The Court has clarified that this prong does not require that the government's regulation be the "least restrictive means" but only that it be "one whose scope is 'in proportion to the interest served'"¹³⁸ or that it is "narrowly tailored to achieve the desired objective."¹³⁹

Before the passage of the CTA, market forces already kept the amount of commercial material aimed at children at a level near or below those levels prescribed by the CTA.¹⁴⁰ A survey conducted by the National Association of Broadcasters two years before Congress passed the CTA indicated that broadcasters aired an average of eight minutes and thirty-eight seconds of commercial material per hour during children's programming,¹⁴¹ an amount significantly below the limits set by the CTA. Only 7.6% of children's programs in the top twenty markets averaged more than thirteen minutes of commercial material per hour.¹⁴² Thus, the CTA's commercial limitation caused broadcasters to adjust their commercial allowances for less than 10% of their children's programs, an insignificant adjustment considering that most broadcasters air much more programming aimed at adults than at children. While broadcasters also had to ensure that they did not air commercials featuring characters from the shows during which the commercials air, this restriction is less burdensome and extensive than other restrictions of commercial speech approved by the Court.¹⁴³

Indeed, the CTA has not caused much difficulty for broadcasters, perhaps explaining why broadcasters did not immediately challenge the CTA. The inconsistencies in the amount of time allowed and the exception for commercials for other programs benefit broadcasters in two ways. First by allowing them to air more commercials during shows that more children

138. *Fox*, 492 U.S. at 480 (quoting *In re R.M.J.*, 455 U.S. at 203).

139. *Id.*

140. See H.R. REP. NO. 101-385, at 6-7 (1991).

141. *Id.* at 7.

142. *Id.*

143. See, e.g., *United States v. Edge Brdcst. Co.*, 509 U.S. 418 (1993) (permitting a complete ban of commercials promoting gambling in a state where gambling was illegal, even though the commercials reached a significant number of people in a state where gambling was legal); *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986) (upholding a law that banned Puerto Rican casinos from advertising themselves to residents of Puerto Rico even though casino gambling was legal in Puerto Rico). The reasoning behind the *Posadas* decision has been questioned by the Court, but the Court has not stated that the result in the case was erroneous. *44 Liquormart*, 517 U.S. at 509-11.

watch, and second by allowing them to air ads for their own television shows that do not count towards the commercial limits, boost their own ratings, and increase the amount of money that advertisers pay for advertising spots. While these inconsistencies and exceptions are primary reasons that the statute should fail the third prong of *Central Hudson*, it would make little sense for broadcasters to bring a claim challenging the CTA based on an inconsistency or exception that benefits them.

V. BETTER WAYS TO ACHIEVE THE GOAL OF PROTECTING CHILDREN FROM THE HARMS CAUSED BY ADVERTISING AIMED AT CHILDREN

While the CTA has not overly burdened broadcasters, it has done little to protect children from the harms of advertising. Indeed, the amount of advertising directed at children continues to grow as does the amount of television watched by children.¹⁴⁴ Because the government has solidly accepted the premise that television viewing benefits children, and because parents increasingly place their children in front of the television or other electronic media through which advertisers can reach children instead of sending them outside to play or handing them a book, this trend seems likely to continue.¹⁴⁵

Thus, it is time to rethink the more extensive regulation of advertising directed at children that the FCC and FTC considered in the 1970s and that is currently in place in other countries. While several things must be done to address the harms caused by advertising, an important step is for the government to change the fundamental nature of its regulation of children's advertising and regulate content instead of quantity.

A. *The Reluctance of the FTC to Initiate Further Regulation*

The FTC seems reluctant to completely ban advertising aimed at children, as countries such as Sweden have done. This reluctance stems from two factors: (1) the past failure of the FTC to regulate advertising aimed at children; and (2) the political views of FTC commissioners. Former FTC Commissioner Orson Swindle feels that in this area, the government should stay uninvolved and allow the industry to regulate itself.¹⁴⁶ Former FTC Chairman Timothy Muris also felt that the government should not regulate this advertising, and that advertising is not

144. KAISER REPORT, *supra* note 16, at 1.

145. *See id.* (indicating that children spend roughly 5.5 hours per day in front of some sort of media).

146. Orson Swindle, Commissioner, FTC, Advertising Issues Before the Federal Trade Commission (Apr. 28, 2004), <http://www.ftc.gov/speeches/swindle/040428aaf.htm>.

the primary cause of childhood obesity.¹⁴⁷ Former Commissioner J. Howard Beales indicated that the ramifications of the FTC's attempt to regulate advertising aimed at children in the 1970s will dictate the FTC's current policies and that the FTC "will tread very carefully when responding to calls to restrict truthful advertising to children."¹⁴⁸

However, the FTC and other governmental organizations have regulated ads for tobacco and alcohol.¹⁴⁹ Former Commissioner Swindle indicated that the FTC was willing to regulate tobacco and alcohol because, "[i]f children purchase and consume alcohol or tobacco, it creates serious health risks for them—risks that they may well not fully comprehend."¹⁵⁰ This distinction between the harms caused by advertising alcohol or tobacco to children and the harms caused by advertising in general to children may have made sense at one time.¹⁵¹ However, deaths and health problems caused by obesity, to which advertising directed at children substantially contributes, are now nearly as serious and costly as those caused by the use of tobacco.¹⁵² Also, similarly to how children do not completely understand the consequences of alcohol and tobacco use, they also do not fully comprehend the consequences of making poor nutritional decisions.¹⁵³ While the harms caused by children drinking and smoking may be more obvious, the harms caused by children developing poor eating habits are no less serious.

B. The Government Should Regulate the Content Instead of the Amount of Commercial Material Aimed at Children

In the commercial context, the content of speech can be regulated.¹⁵⁴ Such content-based regulation does not have to pass the strict scrutiny

147. Kucharsky, *supra* note 53 (quoting Timothy Muir, "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.").

148. Beales, *supra* note 2, at 14.

149. See Orson Swindle, Commissioner, FTC, Remarks at the Aggressive Advertising and the Law Workshop (Feb. 22, 1999), www.ftc.gov/speeches/swindle/osbdasp.htm [hereinafter Aggressive Advertising Remarks]; Nixon, *supra* note 57, at 19.

150. Aggressive Advertising Remarks, *supra* note 149.

151. When the FTC issued its staff report in 1978, childhood obesity was at a much lower rate than it is today. KAISER REPORT, *supra* note 16, at 1. At the time the FTC issued its report, the primary harm of advertising to children was thought to be tooth decay. See Beales, *supra* note 2, at 6.

152. KAISER REPORT, *supra* note 16, at 1.

153. See *supra* Part III; see generally APA TASK FORCE, *supra* note 23; KAISER REPORT, *supra* note 16.

154. *Central Hudson*, 447 U.S. at 561 n.6.

analysis the Court usually applies to content-based regulations,¹⁵⁵ but need only pass the four-prong *Central Hudson* test for commercial speech. Some content-based regulation of commercials aimed at children already exists. For example, the FCC prohibits “host-selling,” the practice of using a character in a television show to appear in an advertisement that airs during the character’s show.¹⁵⁶ Also, statutes aimed at limiting children’s exposure to advertisements for alcoholic beverages have been held constitutional because of the state’s interest in preventing minors from drinking.¹⁵⁷

As Justice Stevens indicated, “[A]ny description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech’s potential to mislead.”¹⁵⁸ Because commercial speech aimed at children is misleading, all commercial speech aimed at children could be proscribed. Thus, content regulation of this speech would not cause the dangers inherent in other types of content-based regulation. As the Court said in *R.A.V. v. City of St. Paul*, “When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.”¹⁵⁹

It is not the number or duration of commercials that misleads children; it is the content of commercials. Thus, a regulation of content seems a more effective and logical angle from which to approach the problems caused by advertising to children. Market forces should usually prevent broadcasters from airing more commercial material than currently allowed by the CTA.¹⁶⁰ Moreover, regulation of content instead of amount would prevent broadcasters from being penalized for inadvertent violations of the time restrictions or program-length commercial proscription with which they have made good faith efforts to comply.¹⁶¹

155. For a government regulation to be constitutional regarding speech that is given full First Amendment protection, the regulation “must be narrowly tailored to promote a compelling Government interest.” *United States v. Playboy Entm’t Group*, 529 U.S. 803, 813 (2000). “If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.” *Id.* (citation omitted).

156. *Children’s Programming Report*, *supra* note 27, para. 44 n.147.

157. *See, e.g., Anheuser-Busch, Inc. v. Schموke*, 101 F.3d 325, 327 (4th Cir. 1996) (upholding a constitutional ban on billboard advertising of alcoholic beverages in certain parts of Baltimore).

158. *Rubin*, 514 U.S. at 494 (Stevens, J., concurring).

159. 505 U.S. 377, 388 (1992).

160. *See* H.R. REP. NO. 101-385, at 7 (1991) (indicating that at the time the CTA was enacted, most stations aired less commercial material per hour than the CTA allows).

161. *See* discussion *supra* Part II.

1. Commercials Aimed at Children Should Be Required to Contain Additional Information That Would Reduce the Commercials' Tendency to Mislead.

In the commercial context, the government may often “require[] affirmative disclosures that the speaker might not make voluntarily.”¹⁶² The Supreme Court has acknowledged that the general trend in federal policy is to require companies to make more disclosures than they might make on their own.¹⁶³ Indeed, the Court has indicated that with potentially misleading speech, an appropriate remedy is to require the speaker to clarify the speech by including additional information such as a disclaimer.¹⁶⁴

One way to effectively regulate the content of commercials would be to require advertisers to include certain information about their products in their commercials. Most commercials aimed at children do not provide product information, instead attempting only “to associate the product with fun and happiness.”¹⁶⁵ A 1997 study indicated that approximately only 2% of food commercials contained nutritional information.¹⁶⁶ A good place to start regulating commercials aimed at children would be to require that food companies disclose information about their products, such as fat content or high sodium levels.

Such disclosures may prove beneficial and lead children to make better nutritional decisions. Requirements that companies include nutritional information on product labels have led to a decrease in consumers' fat intake.¹⁶⁷ Also, a study indicated that when restaurants included nutritional information on their menus, customers ordered foods with lower amounts of fat and cholesterol.¹⁶⁸ While children may not comprehend nutritional information as completely as adults, a study indicated that children ages 4–7 “possess the ability to comprehend abstract concepts such as energy, a strong heart, that good foods keep germs out of the body, and that low fat keeps the heart healthy.”¹⁶⁹ Advertisements

162. *Rubin*, 514 U.S. at 492 (Stevens, J., concurring) (citations omitted).

163. *See id.* at 484 (citing Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353, as amended (requiring that companies include nutritional information on the labels of food products)).

164. *Peel*, 496 U.S. at 116 (Marshall, J., concurring) (citation omitted).

165. *See* APA TASK FORCE, *supra* note 23, at 4–5 (using the examples of McDonald's ads featuring Ronald McDonald and cereal ads featuring Tony the Tiger).

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

167. *Id.* (citations omitted).

168. *Id.* (citation omitted).

169. Susan Sharaga Swadener, *Nutrition Education for Preschool Age Children: A*

aimed towards children emphasizing the value of choosing healthful foods and lifestyles have been effective.¹⁷⁰ Also, regardless of children's comprehension of nutritional information, disclaimers about the nutritional value of foods would help parents discuss the healthfulness of advertised foods with their children.¹⁷¹

When making these disclaimers, advertisers should be required to use language that children can understand. Children do not understand the real meaning of phrases such as "some assembly required," or "part of a balanced breakfast."¹⁷² Instead, advertisers should use language such as "you have to put it together,"¹⁷³ or "be sure to eat Frosted Flakes along with milk, orange juice, and a banana." Including such language in commercials aimed at children would help reduce commercials' misleading nature.¹⁷⁴

2. Cartoon Characters and Celebrities Should Not Appear in Commercials Aimed at Children

A second way in which the government could regulate commercials aimed at children would be to ban the use of cartoon characters and celebrities in these commercials. While the Court generally indicates that restrictions on speech should be as limited as possible, the Court has found that some bans on certain methods of advertising would be acceptable. In the context of advertising of professional services, the Court has held that "when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely."¹⁷⁵ Two of the three justifications identified by the Court for allowing such restrictions justify a proscription of celebrities and cartoon characters in commercials

Research Review, <http://www.nal.usda.gov/fnic/usda/preschoolne.html> (citation omitted).

170. KAISER REPORT, *supra* note 16, at 9 (citation omitted). A media campaign that encouraged adults and children to use 1% or skim milk resulted in sales of 1% milk going up 21% and sales for skim milk going up 11%.

171. *Cf. Fatty Meals, Advertising Linked to Youth Obesity*, NATION'S HEALTH, Apr. 2004, at 7. Some restaurants have begun printing nutritional information on their menus in order to help children make informed decisions. Sen. Tom Harkin (D-Iowa) and Rep. Rosa DeLauro (D-Conn.) have introduced bills that would require restaurants to print nutritional information on their menus. In support of his bill, Harkin said, "Nutrition information on menus will help parents guide their kids food choices and their own as well." *Id.*

172. APA TASK FORCE, *supra* note 23, at 5.

173. *Id.*

174. *Cf. Peel*, 496 U.S. at 115 (Marshall, J., concurring) ("Facts as well as opinions can be misleading when they are presented without adequate information.").

175. In *re R.M.J.*, 455 U.S. at 203. This decision was unanimous.

aimed at children. The Court identified “[t]he public’s comparative lack of knowledge[] [and] the limited ability of the professions to police themselves” as relevant.¹⁷⁶ The studies discussed above have indicated the limited ability of children to interpret commercial messages. While the establishment of the CARU guidelines does present an attempt at self-regulation, advertisers have made no attempt to restrict the use of cartoon characters and celebrities in advertisements for children’s products. Indeed, many companies currently use characters from popular children’s television in their ads.¹⁷⁷ This widespread use of these characters in advertising indicates that companies realize the persuasive effect that these characters have over children.

Studies also show that the use of cartoon characters or celebrities increases commercials’ influence over children.¹⁷⁸ Children certainly recognize and retain images of cartoon characters—even those that do not appear in children’s shows—used in advertisements. A 1996 study revealed that nine and ten-year-olds were able to identify the Budweiser Frogs nearly as often as they were able to identify Bugs Bunny.¹⁷⁹ This fact is even more significant when one considers that these frogs do not even appear in commercials aimed at children. Thus, at least in theory, children should not have significant exposure to these commercials. Similarly, a 1991 study showed that as many six-year-olds could identify Joe Camel, the cartoon camel formerly used by Camel cigarettes, as could identify the Disney Channel logo.¹⁸⁰ In light of evidence of the influence that cartoons and celebrities hold over children, several British broadcasters have banned their use in food commercials aimed at children in an attempt to fight that country’s problem with childhood obesity.¹⁸¹

Congress recognized the persuasive effect of characters in children’s shows when it found that the practice of airing commercials during shows whose characters appear in the commercials “take[s] unfair advantage of the inability of children to distinguish between programming and commercial content.”¹⁸² The FCC has also indicated its awareness of the power wielded by the characters that appear in children’s television

176. *Id.* at 202. The third justification, “the absence of any standardization in the ‘product,’” does not apply to products advertised to children. *Id.*

177. See KAISER REPORT, *supra* note 16, at 6 (describing Burger King’s use of Teletubbies, Rugrats, Shrek, Pokemon, and SpongeBob SquarePants).

178. APA TASK FORCE, *supra* note 23, at 10 (citations omitted).

179. *Id.* at 13 (citation omitted).

180. *Id.*

181. KAISER REPORT, *supra* note 16, at 8; see also Jeremy Lee, *Cartoon characters to face child food ad ban*, CAMPAIGN (UK), July 30, 2004, at 10.

182. H.R. REP. NO. 101-385, at 16–17 (1991).

programs by banning host-selling. Significantly, these studies that indicate children's ability to recognize and recall characters undermine the FCC's rationale for allowing commercials featuring characters to air sixty seconds before or after a show featuring that character.¹⁸³

More support for the constitutionality of such a ban comes from the Court's view that, in some instances, the secondary effects of speech may be considered when upholding a ban on speech that does not receive full First Amendment protection.¹⁸⁴ Because commercials aimed at children that use cartoon characters or celebrities are commercial speech, aimed at children, and broadcast, they are subject to limited First Amendment protection. Thus, the secondary effects of these commercials—namely, the prevalence of childhood obesity—could be considered when determining the constitutionality of a ban of such commercials.

3. Regulation Should Apply to All Commercials Aimed at Children Instead of Only Commercials That are Aired During Programs Aimed at Children

In addition to changing its focus from regulating the amount of commercial material to the content of commercial material, the government should regulate all commercials that are aimed at children, not only commercials aired during shows aimed at children. The CTA's commercial limitation applies only to "programs originally produced and broadcast primarily for an audience of children twelve years old and under."¹⁸⁵ The limitation does not apply to "programs originally produced for a general or adult audience which may nevertheless be significantly viewed by children."¹⁸⁶ This distinction does not make sense. The House members who voiced dissenting opinions on the content of the CTA noted the irrationality of this distinction and asserted, "if you accept the premise of this legislation, commercial time limits should be applied to all programs, not just to those which are deemed to be 'children's programs.'"¹⁸⁷

In addition to making more logical sense, 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

183. The FCC used children's short attention span to justify the sixty-second window. See *Children's Programming Report*, *supra* note 27, para. 45.

184. See *R.A.V. v. St. Paul*, 505 U.S. 377, 388–89 (1992) (citations omitted).

185. H.R. REP. NO. 101-385, at 16 (1991).

186. *Id.*

187. *Id.* at 21.

children.¹⁸⁸ 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.¹⁸⁹ Indeed, the ban would not deny access to information at all. The ban would simply require that companies communicate the information in a manner less misleading to the children at whom the commercials are aimed.

Similarly, the Court stated in *Reno v. ACLU* that the “interest [in protecting children] does not justify an unnecessarily broad suppression of speech addressed to adults.”¹⁹⁰ FTC Commissioners have also expressed their desire not to regulate the content of commercials to a level that is suitable for children. As former Commissioner Swindle pointed out, “[N]ot every alcohol or tobacco ad that depicts a cartoon character, cute pet, or something that might appeal to children is necessarily targeted at children.”¹⁹¹ Recognizing that companies often use cartoon characters or celebrities in commercials aimed at adults, the regulation proposed here would not affect such commercials. Thus, commercials for products designed for adults could still contain cartoon characters or celebrities and would not be subject to any other restrictions placed on advertising that targets children.¹⁹²

VI. WAYS TO PROTECT CHILDREN FROM ADVERTISING OTHER THAN GOVERNMENT REGULATION

In addition to these suggested changes in governmental regulation of advertising aimed at children, cooperation from other institutions would help reduce the harms that advertising causes children. In order to effectively combat these problems, businesses that produce products aimed at children, the advertising companies that promote these products, and the government must all work together.¹⁹³

188. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001) (“[T]he governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults.”) (quoting *Reno v. ACLU*, 521 U.S. 844, 875 (1997)).

189. *See id.* at 564 (noting that while “[t]he State’s interest in preventing underage tobacco use is substantial, and even compelling . . . tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products.”).

190. *Reno*, 521 U.S. at 875.

191. Swindle, *supra* note 146.

192. However, if it was demonstrated that an ad for alcohol or tobacco caused minors to purchase the advertised product, the FTC has indicated its willingness to take action. *Id.*

193. *See Nixon*, *supra* note 57, at 22.

Advertisers have already made a significant attempt at self-regulation with the formation of CARU and its guidelines.¹⁹⁴ Companies tend to follow CARU's guidelines; a 1993 study found that 96% of ads met CARU's standards.¹⁹⁵ However, the study also found that "many of the guidelines were too vague and general to even be subject to empirical assessment."¹⁹⁶ Based on business's tendency to follow CARU guidelines, a possible way to reduce the harm caused to children would be for CARU to more clearly define, publicize, and enforce its guidelines.¹⁹⁷

Businesses can help fight some of the problems caused by advertising to children, particularly child obesity, by modifying the products they produce for children. Subway, which produces many healthful products, runs a "Fresh Step" campaign that attempts to influence children to make good eating and lifestyle decisions. The campaign features Jared Fogle, who has appeared in previous successful Subway ads targeting adults.¹⁹⁸

Other organizations have also attempted to promote ideals that counteract advertising for unhealthy foods. A campaign run by the Center for Science and the Public Interest that urged children to use skim or 1% milk instead of 2% or whole milk was successful; communities in which the campaign ran showed significant increases in the amount of 1% and skim milk purchased.¹⁹⁹ There are currently other attempts to promote a healthful lifestyle, but these campaigns lack adequate funding to effectively combat the advertising that influences children to make unhealthy diet and lifestyle decisions.²⁰⁰ A campaign ran by the National Cancer Institute had a \$3.5 million budget, while the annual advertising budget for McDonald's is \$665 million.²⁰¹ Increased government funding of organizations attempting to promote a healthful lifestyle would help these organizations effectively deliver their messages.

VII. CONCLUSION

Something clearly must be done about America's obesity problem. The regulation of commercials aimed at children, a practice that researchers

194. See CARU Guidelines, *supra* note 68.

195. APA TASK FORCE, *supra* note 23, at 19 (citation omitted).

196. *Id.* (citation omitted).

197. See BRIAN WILCOX ET AL., AM. PSYCH. ASS'N, REPORT OF THE APA TASK FORCE ON ADVERTISING AND CHILDREN: RECOMMENDATIONS 7 (2004), <http://www.asu.edu/educ/eps/CERU/Guidelines/CERU-0402-201-RCC.pdf>.

198. *Childhood Obesity; Subway restaurants use familiar figure to fight*, WOMEN'S HEALTH WKLY., Aug. 5, 2004, at 32.

199. KAISER REPORT, *supra* note 16, at 9 (citations omitted).

200. *Id.*

201. *Id.* (citation omitted).

have demonstrated leads to obesity, is a reasonable place to start. The regulations on commercial speech aimed at children suggested above conform to the rationales for allowing more extensive regulation of commercial speech that the Court identified in *44 Liquormart*: “When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.”²⁰²

One of the Court’s principal concerns with regulation of commercial speech is “aversion towards paternalistic governmental policies that prevent men and women from hearing facts that might not be good for them.”²⁰³ However, as Justice Scalia noted in his concurrence in *44 Liquormart*, “[I]t 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.”²⁰⁴ The regulations proposed here would not prevent adults from receiving information. Instead, they would require companies to make more complete disclosures regarding the nature of their products and communicate this information in a manner less misleading towards children. Thus, the proposed regulations are constitutional and in accordance with the Court’s view that “[t]he First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.”²⁰⁵

The proposed restrictions on advertising also take into account the programmers’ need to fund the programming that the FCC has deemed necessary for children’s development.²⁰⁶ Other countries have restrictions far stricter than those proposed here, and these countries still provide an adequate amount of television programs aimed at children.²⁰⁷ Indeed, these proposed regulations do not place any limit on the amount of commercial material broadcasters can air, and instead are aimed at reducing the misleading nature of the commercials aimed at children.²⁰⁸ A fundamental

202. *44 Liquormart*, 517 U.S. at 501.

203. *Id.* at 517 (Scalia, J., concurring).

204. *Id.*

205. *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771–72 (1976).

206. S. REP. NO. 101-66 (1991) (recognizing the expenses associated with producing educational television shows, including money for conducting research and hiring educators).

207. APA TASK FORCE, *supra* note 23, at 23.

208. Of course, the proposed regulations should not, and are not intended to increase the

problem with achieving further legislation regulating commercials, especially those for unhealthful foods, is that “[l]egislators tend to be on the side of the food industry.”²⁰⁹ Thus, the complete ban on advertising aired during shows for which children eight and under make up the majority of the audience that the APA recommends²¹⁰ is probably not a politically viable option at this time. Also, such a ban would give broadcasters little incentive to air any more programming for children than the three-hour minimum required by the FCC.

The suggestions for modified regulations set forth in this Note would not unduly burden companies, advertisers, or broadcasters. The suggested restrictions on commercial speech are not total bans on commercial speech directed at children. Instead, they leave advertisers free to direct truthful, nonmisleading commercial speech at children.²¹¹ Companies could still produce whatever legal products they choose and promote them to children. But, they would have to increase their disclosure of truthful information about these products and communicate the information in a manner that children can understand. Advertisers would have to modify the methods that they use to promote these products, but inventing new advertising techniques is already a fundamental part of the advertising business. Broadcasters could still air commercials during children’s programming in order to earn the revenue necessary to continue producing the programming that the FCC feels benefits children. In fact, the restrictions proposed here would make broadcasters’ jobs easier in some respects as they would not have to conform to rigid time restrictions on commercial material or face penalties for inadvertent placements of ads. Also, the concept of host-selling would disappear with the ban on celebrities or cartoon characters in ads aimed at children.²¹² In all, these proposed modifications to the CTA should not increase the burden on advertisers or broadcasters, and should decrease the amount of misleading commercial speech directed at children.

amount of commercial material aimed at children. The regulations are proposed while recognizing that marked forces should prevent broadcasters from significantly increasing the amount of commercials aired during children’s programs. *See supra* Part IV.B.4.

209. 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 (quoting Kelly D. Brownwell, director of Yale University’s Center for Eating & Weight Disorders).

210. APA TASK FORCE, *supra* note 23, at 22–23.

211. The Court has expressed its objection to complete bans on a type of commercial speech, noting that such bans “are particularly dangerous because they all but foreclose alternative means of disseminating certain information.” 44 *Liquormart*, 517 U.S. at 501.

212. Eliminating celebrities and cartoon characters from commercials aimed at children would make it impossible for a commercial to contain a character from a children’s show.

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