Television Food Marketing to Children Revisited: The Federal Trade Commission Has the Constitutional and Statutory Authority to Regulate

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I. Introduction

In response to the obesity epidemic, much discussion in the public health and child advocacy communities has centered on restricting food and beverage marketing practices directed at children.[1] A common retort to appeals for government regulation is that such advertising and marketing constitutes protected commercial speech under the First Amendment. This perception has allowed the industry to function largely unregulated since the Federal Trade Commission (FTC)'s foray into the topic, termed KidVid, was terminated by an act of Congress in 1981.[2] The FTC has since focused on self-regulation as a potential solution to such concerns.[3] However, this method of control has proven ineffective to protect children,[4] and has led to growing recognition that federal regulation may be necessary.

Since KidVid, the evidence has only mounted that children are uniquely vulnerable to the effects of advertising. Over the same time period, the exposition of commercial speech jurisprudence has plateaued, as the Supreme Court has not decided a pure commercial speech case since 2002. Congress has become increasingly interested in marketing to children,[5] and in 2006, it instructed the FTC to submit a report on the "marketing activities and expenditures of the food industry targeted toward children and adolescents."[6] The results were striking. With the passage of the American Recovery and Reinvestment Act in February 2009, the new administration created an Interagency Working Group on Food Marketing to Children.[7] In the midst of this new political climate, it is now advantageous to examine the FTC's authority to regulate marketing to children consistent with the First Amendment.

The following focuses on the constitutionality of FTC regulation of marketing directed at children via rulemaking in accordance with its authority to rectify deceptive acts and practices in commerce.[8] FTC action pursuant to its deception authority is currently politically, statutorily, and constitutionally more viable than pursuant to its unfairness authority in this context.[9]

The following provides a brief overview of the science on the influence of marketing over children, and a background of relevant FTC action and the commercial speech doctrine. The paper goes on to examine First Amendment jurisprudence, which holds that deceptive and misleading speech about commercial products is not protected by the First Amendment.[10] It explores the theory that because young children do not and cannot comprehend that they are being advertised to, this form of communication is inherently conducive to deception and coercion.[11] The specific marketing techniques employed by the food and beverage industry to advertise to children further demonstrate that this form of communication should not be considered protected by the First Amendment. FTC rulemaking in this area would thus be consistent with the First Amendment's lack of protection for such speech. Although the argument may apply to marketing for all products, this paper relies on the science relevant to children and food marketing so the current analysis is limited to the FTC's authority to restrict food marketing directed at youth.

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II. Marketing's Influence on Children

The scientific literature is robust and consistent in finding that food and beverage (hereinafter food) marketing influences children's nutrition related beliefs and behaviors and that young children cannot perceive the difference between marketing intended to influence them and regular programming or purely factual information. The Institute of Medicine (IOM) sought to determine the influence of food marketing on children and youth and published its findings in its 2006 report, *Food Marketing to Children and Youth: Threat or Opportunity*.[12] The committee reviewed 123 published empirical studies[13] and found "strong evidence" that television advertising affects the food and beverage requests and preferences of children ages two to eleven.[14] The committee also found that food advertising increased children's consumption of the advertised foods, at least in the short term.[15] Similarly, Gerard Hastings et al. found strong evidence that food promotion affects children's food purchasing-related behaviors and reasonably strong evidence that it influences their food preferences.[16] Jennifer L. Harris et al. reported that the evidence indicates that television food advertising increases children's preferences for the foods advertised and their requests to parents for those foods at both the brand and category level.[17] Mary Story and Simone A. French reported that studies consistently show that children exposed to advertising will choose advertised foods significantly more than those who were not exposed, and purchase requests for specific brands or categories reflect those products' advertising frequencies.[18] In fact, the authors found that children most often request breakfast cereal, snacks, and beverages by brand name.[19] This reflects the items most marketed to children on television.[20]

Because the vast majority of food marketed to children is unhealthy, the net effect is that children are developing poor nutrition-related beliefs and behaviors as a result of their exposure to such communication. Constant portrayals of children and beloved fictional characters eating, playing, or having fun with unhealthy food normalize unhealthy eating behaviors,[21] which has been found to contribute to childhood obesity.[22]

The scientific literature also reveals that unlike for adolescents and adults, young children do not know that advertisements are intended to influence them. Marketing directed at young children may be manipulative due to this lack of understanding. The IOM's review of the scientific literature led the committee to conclude that "most children ages 8 years and under do not effectively comprehend the persuasive intent of marketing messages, and most children ages 4 years and under cannot consistently discriminate between television advertising and programming."[23] The American Psychological Association's Task Force on Advertising and Children (APA Task Force) similarly found that "young children who lack the ability to attribute persuasive intent to television advertising are uniquely vulnerable to such effects. Children below age 7-8 years tend to accept commercial claims and appeals as truthful and accurate because they fail to comprehend the advertiser's motive to exaggerate and embellish."[24]

Perhaps the seminal paper on children's development as consumers is Deborah R. John's analysis of 25 years of consumer socialization research on children.[25] John found that an understanding of advertisers' intent emerges around seven to eight years of age.[26] However, the fact that older children understand advertisers' persuasive intent and can "recognize bias and deception in ads" does not mean that they can automatically defend against such advertising.[27] John found that older "children's advertising knowledge can serve as a cognitive defense only when the knowledge is accessed during commercial viewing."[28] Thus, because children generally have difficulty retrieving stored information, studies show that they need a prompt to access the skepticism of advertising's persuasive intent, and still lack knowledge about the nature and efficacy of advertising.[29] Further, newer forms of marketing, such as product placements, viral marketing, and sponsorships, circumvent active processing of advertising information, and thus, deactivate skepticism or other defenses an older child may employ.[30]

A final issue involved in the unique nature of marketing directed at youth is that marketers openly use their campaigns to encourage children to influence the purchases made by their parents. This has been called "pester power,"[31] "the nag factor,"[32] and "kidinfluence"[33] by the industry responsible for marketing to children. The Report of the APA Task Force explained it as follows:

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> Along with the growth in marketing efforts directed toward youth has come an upsurge in the use of psychological knowledge and research to more effectively market products to young children. There [are] an increasing number of companies headed by people trained as child psychologists that specialize in market research on children.... [Publications] draw upon principles in developmental psychology and apply them to the goal of more effectively persuading children to want advertised products and to influence their parents to purchase these products.... [One study by marketers] was designed to determine which message strategy would most effectively induce children to nag their parents to buy the advertised product ('The old nagging game'). [34]

These marketing techniques are effective partially due to the fact that young children are uniquely susceptible to the persuasive influence of marketing. Marketers are thus able to manipulate children to effectively request advertised products.

The accumulation of evidence reveals a true deficit in young children's ability to comprehend the intent of marketing techniques, which makes them vulnerable to both unintentional deception and deliberate overreaching by advertisers.

It is important to note that most research on marketing has been into traditional media venues and focus on children. New emerging research reveals distinct concerns for marketing via digital media and that adolescents are uniquely vulnerable to marketers' influence due to neurobiology susceptibility and their early adoption of digital media.[35] Although these issues carry important public health repercussions, more scientific research is needed in this area and the First Amendment implications are outside the scope of this paper.

III. Background of FTC Action

Section 5 of the FTC Act makes unfair or deceptive acts or practices in or affecting interstate commerce unlawful.[36] The FTC has the authority to bring cases against companies for unfair or deceptive advertising under this section of the Act, and it further has the authority to promulgate rules to address pervasive abuses.[37]

In 1978, out of a concern over dental caries in children, the FTC initiated the proposed rulemaking, KidVid, on the theory that the televised advertising of sugared products to children may be both unfair and deceptive under the FTC Act.[38] Evidence had emerged at this juncture to show that young children have a "limited ability to comprehend the nature and purpose of advertising."[39] Therefore, the FTC questioned "whether advertising to young children should be restricted or banned as a protective measure."[40]

However, the rulemaking procedure did not progress to fruition. In response to political pressure, Congress intervened and passed the FTC Improvements Act of 1980, which withdrew the FTC's authority to regulate advertising to children as unfair. Congress likely targeted the FTC's unfairness authority due to the fact that at the time, unfairness actions (unlike deception actions) could be brought pursuant to violations of public policy, rather than based on consumer injury, as is the case now.[41] The FTC considered Congress' intervention a drastic blow to its authority and terminated the proposed rulemaking without action in 1981.[42] This gap in the FTC's ability to establish rules addressing unfair marketing practices directed at children remains today.[43] Since KidVid, however, the evidence has compounded that marketing influences children's nutrition-related beliefs and behaviors, and that young children have a limited capacity to understand the persuasive intent of advertising.[44]

In July 2005, the FTC and the Department of Health and Human Services jointly sponsored a public workshop on food and beverage marketing to children, self-regulation, and childhood obesity.[45] Because the agencies received relatively little empirical data addressing the extent of food and beverage marketing to children,[46] the President signed a bill appropriating funds to the FTC at the advice of the Senate.[47] The Senate Committee was "concerned about the growing rate of childhood and adolescent obesity and the food industry's marketing practices for these populations."[48] Through this law, Congress instructed the FTC to prepare a report on the food industry's marketing practices directed at children and adolescents.[49] In response, the FTC took an unprecedented step and subpoenaed 44 food and beverage companies to understand their marketing practices directed at youth.[50]

The FTC reported its findings that in 2006, approximately $870 million was spent on child-directed marketing, and a little more than $1 billion on marketing to adolescents, with about $300 million overlapping between the two age groups.[51] Carbonated beverages, quick service restaurants, and breakfast cereals accounted for $1.02 billion of the $1.6 billion, or 65% of the total amount spent on marketing to youth ages 2-17 by these companies.[52] The majority of the remaining 35% was spent on marketing other beverages, snack foods, and candy. The public health concern associated with food marketing is multiplied by the obesogenic quality and paucity of nutrients in the foods and beverages most marketed to youth.[53]

In light of the foregoing, the new administration included a provision in the American Recovery and Reinvestment Act directing the FTC, the Centers for Disease Control, the Food and Drug Administration, and the Secretary of Agriculture to establish an Interagency Working Group on Food Marketed to Children.[54] The Working Group is required to conduct a study and develop recommendations for standards addressing food marketed to children under eighteen.[55] The group was instructed to consider the nutrient profile of the foods marketed and the evidence concerning the foods' role in the development of obesity among youth.[56] The group has begun its work and is required to submit a report to Congress by July 15, 2010.

The political climate has changed markedly since Congress intervened during KidVid in 1980. Politically, the FTC is again in a position to consider rulemaking to address deceptive marketing practices directed at children. However, a substantial barrier to the FTC using its authority is that rulemaking under Section 18 of the FTC Act is quite onerous and time-consuming.[57] Unlike other federal agencies that can rule-make under the Administrative Procedures Act,[58] by virtue of the Magnum-Moss Act of 1975, the FTC must undertake an extensive notice, comment, and hearing procedure.[59] Under these requirements, rulemaking has taken the FTC almost ten years to complete,[60] as opposed to the relatively short one year it has taken under the Administrative Procedures Act.[61] Advocates and the FTC itself have petitioned Congress to revise the FTC Act to alleviate this burden and allow FTC rulemaking under the Administrative Procedures Act.[62] If this comes to fruition, or if Congress instructs the FTC to rule-make under the Administrative Procedures Act, and the Commission is prepared to promulgate rules regulating food marketing to children, it must do so in accordance with its statutory authority and the U.S. Constitution. As such, it is important to analyze First Amendment jurisprudence relevant to potential restrictions on such marketing practices under the FTC Act.

IV. The First Amendment and Commercial Speech

The Supreme Court defines commercial speech as "expression related solely to the economic interests of the speaker and its audience"[63] and "speech that *proposes* a commercial transaction."[64] Because advertising and marketing generally constitutes commercial speech, the First Amendment protects such communication from unnecessary government interference.

Speech uttered for profit,[65] however, can be regulated, as noted by the Supreme Court:

> Numerous examples could be cited of communications that are regulated without offending the *First Amendment*, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees. Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity. [Cases protecting commercial speech do not] cast doubt on the permissibility of these kinds of commercial regulation.[66]

Although the Court did not address whether or to what degree the regulated speech garners First Amendment protection, the Court did confirm the government's ability to regulate commercial activities deemed publicly harmful despite the potential inclusion of a restriction on commercial speech.[67] When the government targets commercial communication directly, however, the restriction is directly subject to scrutiny under the First Amendment.

A. Deceptive and Misleading Commercial Speech Is Not Protected by the First Amendment

Restrictions on marketing are subject to an intermediate First Amendment test developed in the case of *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*.[68] Under this test a court must first confirm whether the speech at issue is protected by the First Amendment, meaning that it must not be false, deceptive, or misleading. Not all Justices have embraced the *Central Hudson* test;[69] however, the full Court consistently holds that false, deceptive, and misleading speech proposing a commercial transaction is not protected by the First Amendment to ensure "that the stream of commercial information flow cleanly as well as freely."[70] Thus, even if the *Central Hudson* test is not adhered to by a subsequent majority of Justices, this lack of protection for false, deceptive, and misleading speech would remain.

The Court explained that "the public and private benefits from commercial speech derive from confidence in its accuracy and reliability."[71] Thus, because "the First Amendment's concern for commercial speech is based on the information function of advertising,...there can be no constitutional objections to the suppression of commercial messages that do not accurately inform the public about lawful activity."[72]

The requirement that commercial speech must not be misleading in order to garner First Amendment

protection focuses on the audience and their relative inability to verify the truth about the products advertised.[73] The government's ability to regulate misleading speech has been explained to "focus on the specific conditions that might be understood to render consumers dependent and vulnerable."[74] The Court emphasizes the First Amendment interests of the listener,[75] and ability of the commercial actor to rectify false or misleading statements about its products and services.[76] In this context the audience of commercial speech typically receives their sole source of information from the commercial actor itself.[77] Thus, because there is no outside tool for immediate verification to correct the deception,[78] the consumer is left to purchase at his or her own peril.[79]

The Court tends to use the terms deceptive and misleading interchangeably in this context and has differentiated among several different types of misleading speech:

> Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But 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. But the States may not place an absolute prohibition on certain types of potentially misleading information...if the information also may be presented in a way that is not deceptive. Thus,...the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation.[80]

Thus, courts seek to categorize the speech as either inherently misleading, actually misleading (i.e., proven in fact to be misleading), or potentially misleading in order to determine whether the government rectified the deception within its constitutional boundaries. For both actually and inherently misleading commercial speech, the government may prohibit the form of communication entirely. This is because the government "may ban forms of communication more likely to deceive the public than to inform it."[81]

Actually misleading speech is the category that is most easily identified. It is speech that has "proved to be misleading in practice."[82] This is an empirical inquiry that requires evidence of deception.[83] Commercial speech is actually misleading "when the record contains evidence that recipients of commercial speech 'actually have been misled by the statement,'"[84] or when "experience has proved that in fact such advertising is subject to abuse."[85] Governments attempting to ban actually misleading speech must therefore present factual "finding[s] of actual deception or misunderstanding."[86]

More elusive is the determination of inherently misleading speech.[87] The Supreme Court has sought to determine whether "the particular content or method of the advertising suggests that it is inherently misleading."[88] In an effort to explain this criterion, the Fifth Circuit consolidated the Justices declarations of this standard from the plurality opinion in *Peel v. Attorney Registration and Disciplinary Commission*:

> A statement is 'inherently' misleading when, notwithstanding a lack of evidence of actual deception in the record, 'the particular method by which the information is imparted to consumers is inherently conducive to deception and coercion.' Included is 'commercial speech that is devoid of intrinsic meaning.' In her dissent, Justice O'Connor added that 'inherently misleading' means 'inherently likely to deceive the public.'[89]

Without evidence of deception, lower courts have teetered between finding speech inherently or potentially misleading.[90] Courts often base this determination on whether "the information also may be presented in a way that is not deceptive," as suggested by the Supreme Court in *In re R.M.J.*[91] If it cannot, then the speech is considered inherently misleading. (If it can, it is potentially misleading, discussed below.) Thus, for "a particular mode of communication to be inherently misleading, it must be incapable of being presented in a way that is not deceptive."[92] Beyond these statements, applying the definition has not been straightforward.[93]

Lower courts most often find speech to be inherently misleading when advertisers use terms without any inherent meaning in the specific advertising context.[94] This is due to the Supreme Court's reliance on *Friedman v. Rogers* to establish the inherently misleading category.[95] In *Friedman*, the Court addressed an optometrist's First Amendment challenge to a state law that prohibited the practice of optometry under a trade name. [96] The Court sustained the law, explaining that because a "trade name conveys no information about the price and nature of the services offered by an optometrist until it acquires meaning over a period of time by associations formed in the minds of the public," it has "no intrinsic meaning." [97] As is the case for actually misleading speech, when "the particular content or method of the advertising suggests that it is inherently misleading," the "advertising may be prohibited entirely."[98]

If speech is not found to be actually or inherently misleading, but the potential for deception remains, then a court will find the speech to be potentially misleading. Unlike for the former two categories, potentially misleading speech cannot be banned. It is considered protected by the First Amendment, and restrictions on such speech must be analyzed under the remaining three prongs of the *Central Hudson* test.[99] Since the government "may not place an absolute prohibition on certain types of potentially misleading information,"[100] courts will often prescribe further disclosure or explanation as a cure for the potential misunderstanding.[101]

In order to determine if speech is potentially misleading courts follow the standard discussed above from *In re R.M.J.* and seek to determine "if the information also may be presented in a way that is not deceptive."[102] This is not an unambiguous test, but it is clear that hypothetical concerns of possible deception[103] or merely calling something "potentially misleading" do not make it so.[104] Lower courts look to see whether the information may be presented in a way that is not deceptive;[105] if it can, a court will consider it potentially misleading and seek to cure the deception through disclosures or explanations. It is expected that providing clarifying information will cure the misunderstanding so disclosure requirements are the common judicial remedy for potentially misleading speech.

B. Marketing Directed at Young Children Is Deceptive to Them

The First Amendment requirement that commercial communications must not be deceptive or misleading focuses "on the specific conditions that might be understood to render consumers dependent and vulnerable."[106] Marketing practices directed at a vulnerable population creates the condition that the intended listener is being misled. Since studies show that young children cannot "comprehend the persuasive intent of marketing"[107] and "tend to accept commercial claims and appeals as truthful and accurate,"[108] these children cannot differentiate between commercial and noncommercial speech. They do not understand that commercial speech is motivated by the economic interests of the speaker.[109] They cannot differentiate between puffery and fact because they "lack the ability to attribute persuasive intent"[110] of speech proposing a commercial transaction. Young children are thus, "uniquely vulnerable"[111] to commercial advertising because they do not understand the purpose behind such speech.

If children under a certain age cannot understand that the communication is intended to persuade them, then this is a deceptive and misleading way to propose a commercial transaction to them. Because the marketing messages cannot be presented in a way in which they could understand the intent of advertising due to their limited cognitive abilities, such speech cannot be corrected as would be the case if it were only potentially misleading. Commercial speech directed at children too young to understand its persuasive intent may be considered inherently, if not already proven to be actually, misleading speech. Therefore, by definition, a disclosure requirement cannot cure the deception.[112] Due to children's inability to comprehend the difference between commercial and non-commercial speech, marketing directed at them is misleading and deceptive. Such communications are precisely the type sought to be weeded out from First Amendment protection by the initial inquiry under the *Central Hudson* test.

The specific marketing techniques used for advertising directed at children further support the theory that marketing to young children is misleading.[113] The APA Task Force found that the "most persuasive advertising to children is to associate the product with fun and happiness, rather than to provide any factual product-related information."[114] Likewise, a recent article on the subject documented that in addition to tastiness, "the most common product benefits communicated include fun, happiness and being 'cool.'"[115] Other researchers found that the "cool factor" is a dominant message for products marketed to children, and this can include "anti-adult" themes.[116] Marketers' appeal to emotion has been documented for Saturday morning children's television programming[117] and even for preschool programming on sponsor-supported net-

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works, where advertisers associate fast-food with fun and happiness.[118] Increasingly, children are simply being appealed to "on the basis of social value or coolness of the [junk food] product."[119]

These marketing practices are not providing an information function, which is one of the rationales for protecting commercial speech in the first place.[120] Like the trade name in *Friedman v. Rogers*, modern marketing practices directed at children "convey[] no information about the price and nature of the services offered."[121] Although similar tactics are used on adults, their ability to differentiate between fact and persuasion allows them to guard against manipulation and make purchase decisions based on the actual properties of the product, rather than any supposed "cool" factor or which celebrity or character is promoting it. Further, current marketing practices are especially conducive to deception and coercion[122] because children are susceptible to being manipulated into requesting products for reasons unrelated to the product's true properties.[123] This is a particular concern for unhealthy foods and beverages that are equated with being cool and fun, but provide no nutritional value and contribute to obesity in youth.[124] The marketing practices' lack of informative purpose[125] supports the conclusion that marketing to young children is deceptive and misleading.[126]

C. Protection of Vulnerable Populations

The Supreme Court has long recognized that children are a vulnerable population whom the state has an interest in protecting.[127] Based on this understanding the Court confirmed that divergent application of the First Amendment should apply to children.[128] The FTC has likewise recognized the particular vulnerability of children when ads are directed at them: "False, misleading and deceptive advertising claims beamed at children tend to exploit unfairly a consumer group unqualified by age or experience to anticipate or appreciate the possibility that representations may be exaggerated or untrue."[129]

While the Supreme Court routinely rejects as "paternalistic" regulations that ban advertising to keep adults "in the dark for what the government perceives to be their own good,"[130] it has expressly sanctioned the state's ability to protect children for paternalistic purposes.[131] The Court confirmed that the First Amendment right to receive speech does not adhere to children in the same way as it does for adults.[132] In the case of *Ginsberg v. New York*, the Court upheld a state ban on the sale of material not considered obscene for adults, but about which the state considered harmful to minors under the age of seventeen years.[133] In that case, the Court confirmed that the state has the power to protect children "even where there is an invasion of protected freedoms...that reach beyond the scope of its authority over adults."[134] In support of its finding, the Court quoted a *Yale Law Journal* article with approval for the proposition that:

> The world of children is not strictly part of the adult realm of free expression.... [R]egulations of communication addressed to them need not conform to the requirements of the first amendment in the same way as those applicable to adults.[135]

In his concurring opinion, Justice Stewart observed that a child "is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights changed changed — the right to marry, for example, or the right to vote — deprivations that would be constitutionally intolerable for adults."[136]

The Court has indeed recognized three justifications for concluding that "the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[137] These justifications are at stake here.

First, the Court has found that the government "has an independent interest in the well-being of its youth," particularly because children are vulnerable and subject to abuse.[138] As discussed above, young children are "uniquely vulnerable" to marketing practices because they are unable to distinguish the intent of advertising,[139] and all children are vulnerable to the new "stealth" marketing techniques of modern advertisers.[140] Because childhood obesity has drastic health consequences, their particular vulnerability to outside influences encouraging an unhealthy diet is worthy of government intervention.

Second, children are unable to make decisions in an informed, mature manner.[141] The holding in *Ginsberg* is premised on the understanding that a child "is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."[142] During KidVid, the FTC sought to regulate marketing to children because "they lack the ability to understand long-term serious health consequences — they can't balance the desire for immediate gratification versus the hazards" of consuming sugared products.[143] These concerns remain today. Children are not considered independent and rational consumers[144] who can make informed and reliable decisions,[145] especially in the face of persuasive marketing.[146] This

second justification is clearly relevant in the case of food marketing directed at children.

Finally, modern food marketing techniques interfere with the "'parents' claim to authority in their own household.'"[147] As discussed in section II, marketers openly use their campaigns to encourage children to influence the purchases made by their parents.[148] The APA Task Force found that "an important side effect of the influence of advertising on children's desire for products is the parent-child conflict that emerges when refusals occur in response to children's purchase-influence attempts."[149] Several studies confirmed that child disappointment, anger, and arguing were common responses to parental refusals for food products at the supermarket.[150] The APA Task Force concluded that the marketers' use of psychological techniques to "induce children to nag their parents to buy the advertised product"[151] "may place strain on parent-child interaction."[152] Since much of the advertising directed at children is actually geared towards psychologically manipulating them to influence their parents, this interferes with the parent-child dynamic and undermines the parental role in childrearing.[153]

All three justifications for concluding that the constitutional rights of children are not equal to that of adults are relevant in the food marketing context and support the enactment of regulations to protect children. Divergent application of the First Amendment to children has occurred most often in the obscenity[154] and school contexts;[155] but differing constitutional applications to children are not confined to those areas.[156] Even outside the context of minors, there is Supreme Court precedent upholding the government's ability to protect vulnerable populations from overreaching by highly persuasive speech made for profit.

The Supreme Court specifically sanctioned government restrictions on "forms of aggressive sales practices that have the potential to exert 'undue influence' over consumers."[157] For example, the Court explained that securities regulations "are to protect the weak, the uninformed, the unsuspecting, and the gullible form the exercise of their own volition."[158] And the Court upheld the state's ability to ban in-person solicitations by lawyers, "trained in the art of persuasion," of "vulnerable" accident victims.[159] These cases are based on the understanding that consumers have "little interest in being coerced into a purchasing decision."[160] Thus, when communication can be regulated consistent with the First Amendment, "the mere fact that, as a consequence, some human utterances' or 'thoughts' may be incidentally affected does not bar the State from acting to protect legitimate state interests."[161]

Even if the Court rejects the argument that marketing directed at children is not protected speech under the First Amendment, regulations aimed at restricting such communications should garner greater judicial deference due to the Court's recognition that children are a vulnerable population worthy of protection. Thus, properly drafted restrictions would have a greater likelihood of being upheld as constitutional because the Court has confirmed that the state has an independent interest in protecting its youth.

V. Federal Trade Commission Action

FTC action over deceptive marketing practices directed at youth would have to be in accordance with both its statutory authority and the constitution. The following reviews the FTC's authority to find marketing practices directed at children deceptive according to the FTC Act, and analyzes the constitutionality of FTC action under the First Amendment.

Statutory Authority

The FTC has the ability to regulate unfair and deceptive acts and practices by bringing individual actions or by undertaking rulemaking procedures authorized by the FTC Act.[162] The FTC Act codified the FTC's authority to prescribe "interpretive rules and general statements of policy" with respect to deceptive acts or practices in or affecting commerce[163] and rules which specifically define acts or practices which are deceptive.[164] Rulemaking is preferable in the food marketing context because it can reach pervasive acts and practices as opposed to individual actions targeting specific practices that can only result in discrete remedial orders.[165]

Since the FTC Improvements Act of 1980, the FTC can only rule-make under its deception jurisdiction in the child-marketing context. Because rulemaking in this context fits well within the FTC's deception authority, the Commission's lack of jurisdiction over unfair marketing to children is not an actual barrier to action. If Congress wanted to encourage a rulemaking effort, it is less necessary for it to address this jurisdictional issue, but rather it should grant the Commission rulemaking authority under the Administrative Procedures Act, as opposed to the current authority under FTC Act.

As a federal regulatory agency, the FTC would be in the best position to enact such a regulation because courts' level of deference to agency decisions is higher[166] than that of legislatures due to the understanding that agencies have a distinct ability to resolve "exceedingly complex and technical factual issues."[167] FTC action under its deceptive authority is not only the only statutorily viable method to address marketing to youth, but the deceptive standard is consistent with both the factual circumstances of marketing practices directed

at children and First Amendment jurisprudence. [168] Thus, Commission action pursuant to its deception authority fits the facts of the food marketing context, meets the statutory elements required under the FTC Act, and would likely survive judicial review under the First Amendment. [169]

According to the FTC's Policy Statement on Deception, there are three elements to finding deception: (1) there must be a representation, omission, or practice that is likely to mislead a consumer; (2) that is analyzed from the perspective of a consumer acting reasonably in the circumstances; and (3) the representation, omission or practice must be material.[170] Food marketing directed at young children would meet the definition of deceptive under the Act.

First, there must be a representation, omission, or practice that is likely to mislead the consumer.[171] The issue here is whether the act or practice, taken as a whole, "is likely to mislead," rather than whether it actually misled anyone.[172] In its Policy Statement on Deception, the FTC pointed to a case where an encyclopedia salesman used tactics to disguise his role as a salesman in order to initiate contact with prospective consumers.[173] In that case, the target of the speech did not understand the commercial speaker's intent to initiate a commercial transaction. The FTC required that the salesmen disclose their purpose of business to correct the deception.[174] The Seventh Circuit affirmed this disclosure requirement to correct the misrepresentation.[175]

As discussed above, modern marketing practices directed at children are more than just "likely" to mislead them. Like the prospective customers of the encyclopedia salesman, children do not understand marketers' intent to persuade them into a commercial transaction. Since studies suggest that marketing directed at children is more akin to actually or inherently misleading speech, it is not similarly amenable to curing through disclosure requirements. During KidVid, the FTC found that factual disclosures could not cure the deceptive nature of marketing directed at children and rejected mandatory disclosures as a viable alternative to bans on advertising because children "have trouble understanding (and sometimes even perceiving) such disclosures."[176] Modern marketing practices directed at children are indeed likely to deceive the intended audience and pass the first inquiry.

Second, the FTC examines the practice from the perspective of a consumer acting reasonably under the circumstances. It explained that "if the representation or practice affects or is directed primarily to a particular group, the Commission examines reasonableness from the perspective of that group."[177] (The Supreme Court likewise takes this approach with misleading speech.[178]) Thus, when the target is children, the FTC determines whether the advertisement is misleading based on the "sophistication" of that audience.[179] In one case where children were the target of the speech, the FTC adopted the following finding: "False, misleading and deceptive advertising claims beamed at children tend to exploit unfairly a consumer group unqualified by age or experience to anticipate or appreciate the possibility that representations may be exaggerated or untrue."[180] Because children are more vulnerable to deceptive marketing practices, the FTC would analyze the practice from their perspective. As analyzed above, modern marketing techniques are deceptive when directed at children.

Third, the representation, omission, or practice must be "material," which means that it is "likely to affect the consumer's conduct or decision with regard to a product or service." [181] Materiality occurs when the misrepresentation or practice influences a consumer's decision to purchase the product or when it "affect[s] conduct other than the decision to purchase a product."[182] Thus, because marketing directed at children is actually intended to manipulate them into goading their parent for the product, it affects and influences their conduct and that of the parent. Because a parent might not have purchased the product "but for" the deceptive marketing directed at their child, this should satisfy the materiality requirement.[183] Additionally, the FTC has found that in many instances materiality can be presumed from the nature of the practice.[184] The FTC "considers claims or omissions material if they significantly involve health, safety, or other areas with which the reasonable consumer would be concerned."[185] Marketing in this area encourages consumption of unhealthy food and beverage products. Thus, since health and safety are immediate concerns with respect to food, deceptive advertising in this area may be presumed to be material on its own.[186]

B. Judicial Review

In reviewing FTC action, courts will only set aside the FTC's factual conclusion "if it is not supported by substantial evidence in the rulemaking record taken as a whole, or if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[187] Thus, if FTC action is challenged, courts "must accept the Commission's findings of fact if they are supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"[188] Historically, the FTC has been thorough in utilizing its rulemaking authority, and judicial review of rules previously promulgated by the Commission has been highly deferential.[189] In contrast, legal issues relevant to rulemaking are subject to *de novo* judicial review.[190]

Therefore, if the rule is challenged, it would be subject to First Amendment scrutiny.

Courts typically strike down commercial speech restrictions when the law interferes with adults' ability to receive commercial communications.[191] For example, in the 2001 case of *Lorillard v. Reilly*, the Court analyzed several commercial speech restrictions aimed at protecting children from tobacco advertisements.[192] Although this would seem relevant to restricting food marketing practices directed at children on television, the advertisements in that case were for products children are not legally able to purchase, and therefore, the speech was analyzed as targeted to an adult audience who have a constitutional right to receive the speech, rather than the children the state sought to protect.[193]

Under the First Amendment, restrictions on commercial speech are reviewed under the intermediate standard set forth in *Central Hudson*.[194] The *Central Hudson* test is a four-prong inquiry, under which a court must determine the following: (1) whether the expression is protected by the First Amendment, meaning that it must relate to a lawful activity and not be false, deceptive, or misleading; (2) whether the government asserted a substantial interest to be achieved by restricting commercial speech; (3) whether the regulation directly advances this interest; and (4) whether the restriction is not more extensive than necessary to serve this interest.[195] At this juncture, courts would analyze a restriction on marketing to children under this test.

The first part of this paper extensively analyzed whether marketing directed at children should be considered speech protected by the First Amendment and concluded that it was not. Under this theory, since young children cannot understand the difference between persuasive commercial speech and factual information, all food marketing directed at them would be amenable to restriction. The FTC could initiate a ban on food marketing to children as regulating inherently or actually misleading and deceptive speech that is not protected by the First Amendment. If a court were to accept this argument, the judicial review of FTC regulation under the *Central Hudson* test would end here because the speech did not pass prong one of the test and thus, is not constitutionally protected. Conversely, if a court does not find that such marketing qualifies as inherently or actually misleading and deceptive communication, then FTC regulation would be subject to the remaining three prongs of the *Central Hudson* test.[196] The government should be able to present a strong case that its speech restriction passes this test.

Under prong two of the *Central Hudson* test, the government must have a substantial interest to be achieved by the speech restriction. The government may assert several interests; as long as the court accepts one as substantial, the regulation will pass this part of the test.[197] The government has substantial interests in protecting public health and also protecting children from commercial exploitation.[198] The Court consistently recognizes the validity of the government's interest in protecting the health, safety, and welfare of its citizens, and this asserted interest has passed prong two in the past.[199] Further, in the commercial speech context, the Court previously recognized as substantial the government's interest in preventing the commercial exploitation of college students;[200] the protection of young children from commercial exploitation should garner the same acceptance.[201] The government's interests in public health and protecting children from commercial exploitation would likely pass prong two.[202]

Prong three requires that the speech restriction directly and materially advance the asserted governmental interest.[203] In terms of the interest in advancing public health by reducing children's demand for harmful products, the Court has acknowledged the theory that product advertising stimulates demand for products and that suppressing advertising may have the opposite effect.[204] However, the Court requires evidence to pass prong three.[205] In *Lorillard v. Reilly*, the Court found that an advertising restriction passed prong three because the state established that limiting youth exposure to advertising would decrease underage use of tobacco products through evidence submitted in reports by government agencies and the IOM.[206]

In the present case, the Commission has similar evidence to support a regulation. Based on 123 published empirical studies, the IOM concluded that there was "strong evidence" that television advertising influences the food and beverage preferences and requests of children 2-11 years old and also their consumption in the short-term.[207] Likewise, Story and French reported that a child's first request for a product occurs at 24 months of age, that children exposed to advertising choose advertised foods significantly more than those who were not, and that purchase requests for specific brands or categories reflect the frequency of product advertising.[208] Other recent reports and studies also support these findings.[209]

However, the FTC would have one hurdle not present in *Lorillard*, and that is to tailor the restriction to address harmful products. To effectively pass prong three, the FTC will want to address the poor nutrient and obesogenic food marketed to children. The American Recovery and Reinvestment Act directed the Working Group to consider the nutritional quality

of the foods advertised to children and this report may assist the FTC to draft an appropriate regulation.

If, on the other hand, the FTC relied on the rationale that food marketing directed at children is a form of commercial exploitation, it may be able to promulgate a regulation broadly targeting food marketing directed at this vulnerable population. Studies show that marketing can be "exploitive because young children do not understand that commercials are designed to sell products and do not yet possess the cognitive ability to comprehend or evaluate the advertising."[210] Researchers have found that the "advertising techniques that exploit children's developmental vulnerabilities," include "commercials that encourage kids to turn to food for empowerment, or to be popular, or for fun."[211] Similarly, the use of brand licensing exploits children's vulnerability because once "a program or its characters are associated with a particular brand, the program itself becomes an ad for that food."[212] In addition, much of the marketing is designed to manipulate children psychologically to pester their parents,[213] exploiting their immaturity and using them as miniature marketing tools. Only by restricting such communication or banning certain highly exploitive techniques[214] can the government advance its interest in protecting children from commercial exploitation.

Finally, the government would have to show that the restriction is not more extensive than necessary to achieve its goal.[215] This means that the FTC will have to tailor the restriction to ensure that it regulates ads targeting children without suppressing speech directed at adults.[216] The Supreme Court has indeed made it clear that the government cannot protect children by suppressing speech directed at adults and that adults have a constitutional right to receive.[217]

To pursue rulemaking, the FTC will have to determine the age range of children the regulation should seek to protect. [218] Legal scholars have suggested that the demarcation for First Amendment purposes should come at the age between childhood and adolescents because it is during adolescents that most begin to assert their "free speech rights."[219] Quebec banned advertising directed at children who are less than 13 years old.[220] The Canadian Supreme Court affirmed the ban based on the following rationale: "The concern is for the protection of a group which is particularly vulnerable to the techniques of seduction and manipulation abundant in advertising....'Children experience most manifestly the kind of inequality and imbalance between producers and consumers which the legislature wanted to correct.'"[221] In the U.S., the FTC previously advocated for the adoption of nutritional standards for marketing directed at children under 12 years of age.[222]

In its report on food marketing, the IOM divided the world of minors into two groups: children, who are ages 2 to 11 and teens who are ages 12 to 17 (tweens were 9 to 13).[223] Marketers divide children into similar categories for purposes of market research. For example, Nickelodeon hosts a panel of 2 to 11 year olds called the Zoom Room Panel to provide information and opinions to the company.[224] Another marketing agency hires children between the ages of 6 and 17 and divides the groups into "kid engineers" who are 6 to 12 years old and "1317 teens" who are ages 13 to 17.[225]

Based on most studies on the subject, it is clear that protection from deception is certainly warranted, at a minimum for children less than eight years old. However, the need for paternalistic regulations is likely necessary for older children as well.[226] There seems to be a general understanding that children less than 12 or 13 may be more subject to exploitation and in greatest need for protection. It certainly can be argued, however, that children of all ages are vulnerable to the negative effects of food marketing and therefore in need of protection. Congress and the President may have recognized this by requiring the Interagency Working Group on Food Marketed to Children to study and develop recommendations for standard for food marketed to all children less than eighteen years.[227] In fact, some in the public health community consider older children "more vulnerable than younger kids because they have more options to make choices out of their parents' supervision."[228]

In its report on Food Marketing to Children and Adolescents, the FTC considered factors relevant to tailoring restrictions including: the percent of the audience under 12, the total number of children reached, the time of day and venue that the advertising appears, whether there are characters or celebri-

Because children are being deceived due to their inability to distinguish the intent of advertising, the government should regulate such practices as deceptive, and thus, not protected by the First Amendment.

ties who are popular with children, and whether the advertising contains themes, language, or other attributes designed to appeal to children.[229] With these considerations in mind, the FTC could tailor the restriction by determining the percent of children in the age range it wishes to target among child directed audiences. It could then ban marketing directed at this young demographic. An alternative tailoring mechanism would be to identify the programs most watched by the children in the target age range that may also have a wider viewership among older children, but not also adults. Therefore, for example, a cartoon show watched by 2- to 14-year-olds would be subject to regulation, but family programming with adult and child viewership (e.g., American Idol) may not.

In this vein, certain programming is clearly directed at a child audience. In 2006, Nickelodeon had the top ten shows for children aged 2 to 11; the Disney Network ranked second.[230] Commercials shown during programming on such children's networks and those slotted during Saturday morning cartoons are clearly directed at this youth audience.[231] Further, most advertisements during the Saturday morning cartoon time slot use an average of two marketing techniques specifically intended to entice children: the use of cartoon characters, toy giveaways, costumed characters, and animation.[232] Ads during such programming are prime targets for regulation because the marketing is both directed at children, intended to reach them, and does reach them. Regulations that specifically reach these ads should satisfy the final inquiry of the *Central Hudson* test.

An additional potential mechanism to restrict marketing to children would be to target practices clearly intended for a child audience but shown during family programming. In order to capture more commercials likely to deceive children, the FTC could further regulate ads that have one or more of the following techniques that are clearly geared towards children: the use of cartoon characters, toy giveaways, costumed characters, or animation. Ads shown during family programming that include young children in the audience could be limited using this modifier. Thus, companies could still market products intended for children during family programming, but be required to craft the ads to the adult audience rather than to the children.[233] So for example, if Kellogg's wanted to advertise Honey Smacks during American Idol, the restriction would ban the use of the cartoon "Dig 'em Frog" so the ad would not target young children,[234] but at the same time allow Kellogg's to propose their transaction with adults in the audience who can make the rational decision whether the product is suitable for their families.[235] Conversely, if Kellogg's wanted to appeal to adults' nostalgia with the "Dig 'em Frog," it could utilize this cartoon character during adult programming. This tailoring mechanism should likewise satisfy the final prong of the *Central Hudson* test.

The FTC would be constitutionally supported in regulating these marketing practices directed at children as materially deceptive for the intended audience. By restricting speech directed at children, the government will still leave open alternative channels for commercial actors to communicate with the adults during adult and mixed audience programming about the same products.[236] However, where the speech is transmitted to children and clearly aimed at children (e.g., using cartoon characters), there can be no cognizable argument that such a restriction would unnecessarily impinge on speech intended for adults.[237] Therefore, such a carefully drafted regulation should pass the four prongs of the *Central Hudson* test.

VI. Conclusion

The Court's rationale for First Amendment protection of commercial speech envisioned a "free enterprise economy," functioning through "intelligent and well informed" "private economic decisions."[238] This free market economy is premised on rational and informed consumers who have confidence in commercial information's accuracy and reliability. Thus, communications that propose a commercial transaction through misleading or deceptive techniques are not protected by the First Amendment. Similarly, conditions that render the consumer vulnerable and subject to overreaching undermine the public and private benefit of protecting commercial speech.

Food and beverage marketing practices are misleading and deceptive when directed at young children. Children do not have the ability to differentiate between puffery and fact and cannot understand that what they are receiving is commercial speech intended to persuade them. Such communications are a misleading way to propose a commercial transaction to them and undermine a cleanly functioning free market economy. Because children are being deceived due to their inability to distinguish the intent of advertising, the government should regulate such practices as deceptive, and thus, not protected by the First Amendment.

The government has historically protected vulnerable populations from overreaching by those seeking to make a profit from them. The Supreme Court confirmed that children's vulnerability and their inability to make informed choices permit the government to regulate speech directed at them. Modern marketing practices' use of psychological manipulation renders children dependent and vulnerable, making this pre-

cisely an area where government intervention is warranted. The government's interest in protecting its youth supports its ability to enact protective measures, consistent with the First Amendment.

The FTC can constitutionally and statutorily regulate marketing practices directed at youth under its deception authority in the FTC Act. The Obama administration and Congress have acted on their expressed interest in this topic and have advocated for progressive government action. Congress should further intervene to give the FTC the authority to rule-make under the Administrative Procedures Act, as is the case for other federal agencies. Childhood obesity is a public health catastrophe in need of such interventions.

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77. K. M. Sullivan, "Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart," *Supreme Court Review*

123 (1996): 156-161 ("[T]he consumer is not expected to have the competence or access to information needed to question the advertiser's claim, and the correction is not to be left to competitors and mere government counterspeech.").

78. The Federal Trade Commission is responsible for regulating the truth or falsity of food advertising. See FTC Act of 1938, 15 U.S.C. §§5, 12, 13; Memorandum of understanding between the Federal Trade Commission and the Food and Drug Administration, 1971, *available at* <http://www.fda.gov/oc/mous/domestic/225-71-8003.html> (last visited January 2, 2009). The FTC monitors food marketing practices, responds to outside complaints and brings administrative lawsuits. See FTC Division of Advertising Practices, *available at* <http://www.ftc.gov/bcp/bcpap.shtm> (last visited January 2, 2009). These are time consuming processes and procedures.
79. See *Rubin v. Coors Brewing*, 514 U.S. 476, 496 (1995) (Stevens J. concurring) ("[T]he consequences of false commercial speech can be particularly severe: Investors may lose their savings, and consumers may purchase products that are more dangerous than they believe or that do not work as advertised. Finally, because commercial speech often occurs in the place of sale, consumers may respond to the falsehood before there is time for more speech and considered reflection to minimize the risks of being misled. The evils of false commercial speech, which may have an immediate harmful impact on commercial transactions, together with the ability of purveyors of commercial speech to control falsehoods, explain why we tolerate more governmental regulation of this speech than of most other speech.") (internal citation omitted).
80. *In re R.M.J.*, 455 U.S. 191, 203 (1982).
81. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* 447 U.S. 557, 563, *citing Friedman v. Rogers*, 440 U.S. 1, 13, 15-16.
82. *In Re R.M.J.*, 455 U.S. 191, 206 (1982).
83. The evidence presented much actually support the government's position. See e.g., *Snell v. Engineered Systems & Designs*, 669 A.2d 13, 21 (Supreme Court Delaware 1995) (rejecting a three-year-old poll taken in Missouri but acknowledging that "it is well accepted that current surveys are persuasive when they canvas the geographic area in which the challenged use occurs, or a geographic area reasonably close to that site").
84. *Joe Conte Toyota v. Louisiana Motor Vehicle Comm'n*, 24 F.3d 754, 756 (5th 1994) (quoting *Peel v. Attorney Disciplinary Commission,* 496 U.S. 91, 106, 112 (1990); *see also Piazza's Seafood World, LLC v. Odom*, 2004 U.S. Dist. LEXIS 25991 at *13, (E.D. La. December 22, 2004) (Commercial speech is "'actually misleading' only where the record contains actual evidence of deception.") (quoting *Joe Conte Toyota,* 24 F.3d at 756).
85. *In Re R.M.J.*, 455 U.S. 191, 203 (1982).
86. *Peel v. Atty. Registration & Disciplinary Comm'n,* 496 U.S. 91, 101 (1990).
87. See *Peel v. Atty. Registration & Disciplinary Comm'n,* 496 U.S. 91, 108 (1990) (whether speech is inherently misleading is a question of law).
88. *In Re R.M.J.*, 455 U.S. 191, 203 (1982).
89. *Joe Conte Toyota v. Louisiana Motor Vehicle Comm'n*, 24 F.3d 754, 756 (5th Cir. 1994) (citing *Peel v. Attorney Disciplinary Commission,* 496 U.S. 91, 110 S. Ct. 2281, 110 L. Ed. 2d 83 (1990) (internal citations omitted)).
90. See e.g., *Bioganic Safety Brands v. Ament*, 174 F. Supp. 2d 1168, 1182 (D.Co. 2001).
91. *In re R.M.J.*, 455 U.S. 191, 203 (1982).
92. See *Bioganic Safety Brands v. Ament*, 174 F.Supp.2d 1168, 1180 (D.Co. 2001) (quoting *Revo v. Disciplinary Bd of the Supreme Ct*, 106 F.3d 929, 933 (10th Cir. 1997).
93. Even the Justices explanations can be confusing. In his concurrence in *Peel v. Attorney Disciplinary Commission*, Justice Marshall attempted to clarify inherently misleading speech doctrine: "The Court has also suggested that commercial speech that is devoid of intrinsic meaning may be inherently misleading, especially if such speech historically has been used to deceive the public." 496 U.S. 91, 112 (1990) Justice Marshall concurring (citing *Friedman v. Rogers*, 440 U.S. 1 (1979) and *In re R.M.J.*, at 202)).This reference to the "historically" deceptive nature leaves the inherently misleading doctrine and veers into actually misleading speech. If speech was historically likely to deceive, it could be considered misleading in practice, or actually misleading.
94. *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1108 (9th Cir. 2004) ("board certified"); *Joe Conte Toyota v. Louisiana Motor Vehicle Commission*, 24 F.3d 754, 758 (5th Cir. 1994) ("invoice"); *NC State Bar v. Culbertson*, 177 N.C.App. 89, 96 (Court Appeals NC 2006) ("published").
95. *Friedman v. Rogers* was decided prior to *Central Hudson* but the Court has used it as a basis for its prong one analysis and it has applied its import in the context of the test. This may cause or at least add to some of the confusion in the inherently misleading doctrine.
96. *Friedman v. Rogers*, 440 U.S. 1, 4 (1979).
97. *Friedman v. Rogers*, 440 U.S. 1, 12 (1979).
98. *In Re R.M.J.*, 455 U.S. 191, 203 (1982).
99. *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1107 (9th Cir. 2004); see also, *Mason v. Florida Bar*, 208 F.3d 952, 955 (11th Cir. 2000).
100. *In re R.M.J.*, 455 U.S. 191, 203 (1982).
101. C.f. *Borgner v Brooks*, 284 F. 3d 1204, 1214 (11th Cir. 2002) (finding disclosure requirement for "potentially misleading" dentist's advertisement constitutional); *Simm v. Louisiana State Board of Dentistry*, 2002 U.S. Dist. LEXIS 3195, *14 (E.D. La Feb. 22, 2002).
102. *In re R.M.J.*, 455 U.S. 191, 203 (1982).
103. *Peel v. Attorney Disciplinary Commission*, 496 U.S. 91, 111 (1990).
104. *Mason v. Florida Bar*, 208 F.3d 952, 956 (2002) ("A state cannot satisfy its burden to demonstrate that the harms it recites are real and that its restrictions will alleviate the identified harm by rote invocation of the words 'potentially misleading.'").
105. *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1107 (9th Cir. 2004).
106. See Post, *supra* note 66 ("Such an approach would shift judicial attention away from the content of particular communications and instead direct judicial scrutiny to the structural preconditions of consumer rationality and independence."). C.f. *Cincinnati v. Discovery Network*, 507 U.S. 410, 433 (1993) (Blackmun J. concurring) (the "listener…has little interest in being coerced into a purchasing decision.") (citing *Ohralik v. Ohio State Bar Assn*., 436 U.S. at 457.).
107. See IOM, *supra* note 12, at 309.
108. See Kunkel et al., *supra* note 24, at 16.
109. See *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561 (1980).
110. See Kunkel et al., *supra* note 24, at 16.
111. *Id.*
112. See Kunkel et al., supra note 24 ("studies make clear that young children do not comprehend the intended meaning of the most widely used disclaimers."); c.f., *Zauderer v. Office of the Disciplinary Counsel*, 471 U.S. 626, 653 n.15 (1985) (upholding a disclosure requirement to explain the meaning of technical terms; finding it was reasonable to conclude that the omission created the potential for deception).
113. See A. Campbell, "Restricting the Marketing of Junk Food to Children by Product Placement and Character Selling," *Loyola of Los Angeles Law Review* 39 (2006): 447-506, 487.
114. See Kunkel et al., *supra* note 24, at 6.
115. See Harris et al., *supra* note 17.
116. J. B. Schor and M. Ford, "From Tastes Great to Cool: Children's Food Marketing and the Rise of the Symbolic," *Journal of Law, Medicine & Ethics* 35, no. 1 (2007): 10-21, at 16.
117. See A. Batada, M. D. Seitz, M. G. Wootan, and M. Story, "Nine Out of 10 Food Advertisements Shown During Saturday Morning Children's Television Programming Are for Foods High in Fat, Sodium, or Added Sugars, or Low in

Nutrients," *Journal of the American Dietetic Association* 108, no. 4 (2008): 673-678. ("Emotional appeals, such as fun or being hip or cool were [found in 86% of] the Saturday morning food advertisements.")

118. S. M. Connor, "Food-Related Advertising on Preschool Television: Building Brand Recognition in Young Viewers," *Pediatrics* 118, no. 4 (2006): 1478-1485.
119. See Schor and Ford, *supra* note 116, at 15.
120. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563 (1980) ("the First Amendment's concern for commercial speech is based on the information function of advertising").
121. *Friedman v. Rogers*, 440 U.S. 1, 12 (1979).
122. *Peel v. Attorney Disciplinary Commission*, 496 U.S. 91, (1990) (Marshall, J. and Brennan, J., concurring) (A statement is inherently misleading when "the particular method by which the information is imparted to consumers is inherently conducive to deception and coercion.").
123. See e.g., K. D. Brownell, *Food Fight* (New York: McGraw-Hill, 2004): at 106-107 (tells the anecdotal story of a four-year-old seeing Betty Crocker's Disney Princess Fruit Snacks with Cinderella, Snow White, and the Little Mermaid on the box, saying, "I want that." The mother asks "What is it?" and the child responds, "I don't know.").
124. See IOM, *supra* note 12, at 9. ("Statistically, there is strong evidence that exposure to television advertising is associated with adiposity in children ages 2-11 years and teens ages 12-18 years.").
125. Cf. S. A. Law, "Addiction, Autonomy, and Advertising," *Iowa Law Review* 77 (1992): 909-955, 931-932 (rejecting regulation in the context of marketing addictive products to adults, reasoning that the "vast majority of advertising is not informational," but rather "beautiful, fast paced, funny, sensuous, provocative, or entertaining"); but see, *United States v. Wenger*, 427 F.3d 840, 847 (10th Cir. 2005) (The Securities Act of 1933 regulates communication about stock for consideration, and although that communication may have "elements of entertainment," it is considered commercial speech and may be regulated.); see also, *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 70 (1973) (Douglas J. dissenting) (comparing obscenity to "[a]rt and literature,"); *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 57 (1973) (citing *Miller v. California*, 413 U.S. 15 (1973)) (holding that obscenity is subject to regulation by the states).
126. See also *Dunagin v. City of Oxford*, 718 F.2d 738, 743 (5th 1983) (The state argued that liquor advertising "falsely identifying alcohol with 'the good life' instead of disclosing the personal and social disasters it threatens" was not protected speech.); see also, V. Blasi and H. P. Monaghan, "The First Amendment and Cigarette Advertising," *JAMA* 256, no. 4 (1986): 502-509 (proposing a ban on all tobacco advertising, arguing that the ads were misleading and deceptive because they exploited the psychological vulnerabilities of their audience, were image-oriented, and failed to disclose the lethal and addictive qualities, while providing little to no factual information about the product).
127. *Bellotti v. Baird*, 443 U.S. 622, 634-635 (1979); *Ginsberg v. New York*, 390 U.S. 629, 640-641 (1968).
128. *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).
129. FTC Policy Statement on Deception, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 181 (1984) (quoting *Ideal Toy*, 64 F.T.C. 297, 310 (1964)).
130. *44 Liquormart v. Rhode Island*, 517 U.S. 484, 503 (1996); see also *Peel v. Attorney Disciplinary Commission*, 496 U.S. 91, 105 (1990) ("We reject the paternalistic assumption that the recipients of petitioner's letterhead are no more discriminating than the audience for children's television."); see also *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 562 (1980) ("[W]e have rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech.").
131. *Ginsberg v. New York*, 390 U.S. 629, 640-641 (1968).
132. *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).
133. *Ginsberg v. New York*, 390 U.S. 629 (1968).
134. *Ginsberg v. New York*, 390 U.S. 629, 638 (1968).
135. *Ginsberg v. New York*, 390 U.S. 629, 639 n.6 (1968) (quoting T. I. Emerson, "Toward a General Theory of the *First Amendment*," *Yale Law Journal* 72, no. 5 (1963): 877-956, at 938, 939).
136. *Ginsberg v. New York,* 390 U.S. 629, 649–50 (1968) (Stewart, J., concurring). See *Video Software Dealers Association v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009) (In addressing government regulation of violent video games to minors, the 9th Circuit limited the holding of *Ginsberg* to the obscenity context of sexually-explicit material. Even under this interpretation, the underlying premise that children warrant protection by the state remains intact, along with the understanding that children's First Amendment rights are not identical to that of adults.).
137. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).
138. See *Ginsberg v. New York*, 390 U.S. 629, 640-641; *c.f. Association of National Advertisers v. Lungren*, 44 F.3d 726, 732 (9th Cir. 1994) (Focusing on commercial speech's "potential for deception in light of the lessons of experience and the nature of the target audience.").
139. See Kunkel et al., *supra* note 24, at 16.
140. See Harris et al., *supra* note 17; see also, Eisenberg, *supra* note 30.
141. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).
142. *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring).
143. See Westen, *supra* note 2.
144. See Post, *supra* note 66.
145. *Ginsberg v. New York*, 390 U.S. 629, 636-637 (1968) ("[W]e inquire whether it was constitutionally impermissible for New York,...to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see. We conclude that we cannot say that the statute invades the area of freedom of expression constitutionally secured to minors.").
146. See *Tennessee Secondary School Athletic Association v. Brentwood Academy*, 127 S.Ct. 2489, 2495 (2007) (quoting *Ohralik*, 436 U.S., at 458, 98 S. Ct. 1912, 56 L. Ed. 2d 444.).
147. *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978).
148. If we were to take the Supreme Court at its word and consider only speech proposing a commercial transaction to be commercial speech, see *Cincinnati*, 507 U.S. 410, 423 (1993), then I question whether such speech can meets the definition of commercial speech because there can be no expectation of a commercial transaction. Young children lack the financial and legal means to contract for most products. See *Restatement of the Law, Second, Contracts, § 12 Capacity to Contract (1981) (An infant lacks the* "legal capacity to incur contractual duties."*); Restatement of the Law, Second, Contracts, § 14 Infants (1981) (*"Unless a statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person's eighteenth birthday."). Speech seeking to make profit and directed at children is often relating to the economic interest of the commercial actor and the child's guardian, who has the capacity to purchase the product. The child — the recipient and intended audience of the speech — is not on the purchasing side of the transaction. A child must rely on the parent to contractually purchase the product and therefore the recipient of the speech lacks an economic interest in the communication. See *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561 (1980). A commercial actor cannot have a reasonable expectation of a completed commercial transaction with the intended receiver of its speech about its products. However, the Court has increasingly accepted a variety of communication as commercial speech rather than strictly relying on its definition.
149. See Kunkel et al., *supra* note 24, at 11.
150. *Id.*

151. *Id.*, at 20.
152. *Id.*, at 11.
153. S. Linn and C. L. Novosat, "Calories for Sale: Food Marketing to Children in the Twenty-First Century," *Annals of the American Academy of Political and Social Science* 615, no. 1 (2008): 133-155, at 136-137 ("child-targeted marketing has become so ubiquitous and sophisticated that it presents a challenge to parental influence over children's food choices.").
154. *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).
155. *Morse v. Frederick*, 127 S.Ct. 2618 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266-267 (1988).
156. See *Bellotti v. Baird*, 443 U.S. 622, 633-639 (1979) (discussing varying contexts where constitutionally children are treated differently under the law); see also L. Cunningham, "A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status under Law," *U.C. Davis Journal of Juvenile Law & Policy* 10 (2006): 275-377.
157. *44 Liquormart v. Rhode Island*, 517 U.S. 484, 498, 501 (1996) ("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.").
158. *Paris Adult Theater v.Slaton*, 413 U.S. 49, 64 (1973).
159. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 465 (1978); see also *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995) (upholding a 30-day restriction on targeted direct-mail solicitations of accident victims and their relatives); but see *Tennessee Secondary School Athletic Association v. Brentwood Academy*, 127 S.Ct. 2489, 2492 (2007) (declining to extend the holding of *Ohralik* beyond the attorney-client context).
160. *Cincinnati v. Discovery Network*, 507 U.S. 410, 433 (1993) (Blackmun J. concurring) (citing *Ohralik v. Ohio State Bar Assn., 436 U.S. at 457.*).
161. *Paris Adult Theater v.Slaton*, 413 U.S. 49, 67 (1973).
162. See FTC Act of 1938, 15 U.S.C. §§5, 12, 13; Memorandum of Understanding between the Federal Trade Commission and the Food and Drug Administration, 1971, *available at* <http://www.fda.gov/oc/mous/domestic/225-71-8003.html> (last visited January 2, 2009).
163. 15 U.S.C. 57a(a)(1)(A).
164. 15 U.S.C. 57a(a)(1)(B).
165. See Pomeranz, *supra* note 9.
166. See *Novartis Corp. v. FTC*, 223 F.3d 783, 787 n. 4 (DC App. 2000); *Kraft v. FTC*, 970 F.2d 311, 317-318 (7th Cir. 1992).
167. *Kraft v. FTC*, 970 F.2d 311 (7th Cir. 1992) (quoting *Zauderer v. Office of the Disciplinary Counsel*, 471 U.S. 626, 645 (1985).
168. See Pomeranz, *supra* note 9.
169. *Id.*
170. See FTC 1984, *supra* note 129, at 170-171.
171. *Id.*, at 170.
172. *Id.*, at 172.
173. *Id.*, at 175-176, fn15 (citing *Encyclopedia Britannica*, 87 F.T.C. 421, 497 (1976), aff'd, 605 F.2d 964 (7th Cir. 1979), cert. denied, 445 U.S. 934 (1980), modified, 100 F.T.C. 500 (1982).).
174. *Encyclopaedia Britannica, Inc. v. FTC*, 605 F.2d 964, 967-968 (1979).
175. *Encyclopedia Britannica*, 87 F.T.C. 421, 497 (1976), aff'd, 605 F.2d 964 (7th Cir. 1979), cert. denied, 445 U.S. 934 (1980), modified, 100 F.T.C. 500 (1982).).
176. M. M. Mello, "Federal Trade Commission Regulation of Food Advertising to Children: Possibilities for a Reinvigorated Role," *Journal of Health, Politics, Policy and Law* (2010) (in press). (quoting Federal Trade Commission. 1978. FTC staff report on television advertising to children. Washington: Federal Trade Commission.) ("The conclusion that only restrictions or bans on advertising to young children would constitute a sufficient remedy is supported by the American Psychological Association, which has reported that 'studies make clear that young children do not comprehend the intended meaning of the most widely used disclaimers.'") (quoting Kunkel et al., *supra* note 24).
177. See FTC 1984, *supra* note 129, at 171.
178. See *Bates v. Arizona*, 433 U.S. 350, 383 n.37 (1977)).
179. See FTC 1984, *supra* note 129, at 181 (quoting *Bates v. Arizona*, 433 U.S. 350, 383 n.37 (1977)).
180. *Id.*, at 181 (quoting *Ideal Toy,* 64 F.T.C. 297, 310 (1964)).
181. *Id.*, at 171.
182. *Id.*, at 188.
183. *Id.*, at 191-192 ("A finding of materiality is also a finding that injury is likely to exist because of the representation, omission, sales practice, or marketing technique.... Injury exists if consumers would have chosen differently but for the deception. If different choices are likely, the claim is material, and injury is likely as well. Thus, injury and materiality are different names for the same concept.").
184. *Id.*, at 171.
185. *Id.*, at 190.
186. See *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (1992); see also, *National Commission on Egg Nutrition v. FTC*, 570 F.2d 157, 162 (7th Cir. 1977) ("The fact that health is involved enhances the interests of both consumers and the public in being assured 'that the stream of commercial information flow cleanly as well as freely.").
187. *Pennsylvania Funeral Directors Assn, Inc. v. FTC*, 41 F.3d 81, 85-86 (3rd Cir. 1994).
188. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986); *see also* 15 U.S.C. 45(c).
189. See e.g., *Pennsylvania Funeral Directors Assn, Inc. v. FTC*, 41 F.3d 81 (3rd Cir. 1994); *American Financial Services Assn v. FTC*, 767 F.2d 957 (Ct. App. DC 1985).
190. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986) (Any "legal issues presented – that is, the identification of governing legal standards and their application to the facts found," are for the courts to resolve.); see also *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 422 (5th Cir. 2008) ("We review *de novo* all legal questions pertaining to Commission orders."); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1063 (11th Cir. 2005) (same); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 934 (7th Cir. 2000) (same).
191. But see, *Florida Bar v. Went For It*, 515 U.S. 618 (1995) (Upholding a 30 day commercial speech restriction to protect the personal privacy of accident victims and their families from intrusive letters by attorneys).
192. *Lorillard Tobacco Co., v. Reilly*, 533 U.S. 525 (2001).
193. *Id.*
194. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564 (1980).
195. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564 (1980).
196. See Pomeranz, *supra* note 9 (If Congress reinstated the FTC's authority to pursue rulemaking as unfair in this area, any FTC action would likely be subject to the full *Central Hudson* test because "unfair" commercial speech is not traditionally in the category of speech that the Supreme Court has removed from First Amendment protection.)
197. *Florida Bar v. Went For It*, 515 U.S. 618, 625 n.1 (1995) ("[A] single substantial interest is sufficient to satisfy *Central Hudson's* [second] prong.") (*citing Rubin v. Coors Brewing Co.,* 514 U.S. 476, 485 (1995) (deeming only one of the government's proffered interests "substantial")).
198. The government's interest cannot be framed as advancing speech restrictions for a product it considers problematic because there is no vice exception to the First Amendment. See *44 Liquormart v. R.I.,* 517 U.S. 484, 513-514 (1996) ("Almost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to 'vice activity.' Such characterization, however, is anomalous when applied to products such as alcoholic beverages, lottery tickets, or playing cards, that may be lawfully purchased on the open market... For these reasons, a

'vice' label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled justification for the regulation of commercial speech about that activity."); see also, *Lorillard v. Reilly*, 533 U.S. 525, 589 (2001) (Thomas J. concurring).

199. *Rubin v. Coors Brewing*, 514 U.S. 476, 485 (1995) ("Government here has a significant interest in protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength, which could lead to greater alcoholism and its attendant social costs."); see also *Florida Bar v. Went for it*, 515 U.S. 618, 625 (1995) (As part of states' "'power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.'") (quoting *Goldfarb v. VA State Bar*, 421 U.S. 773, 792 (1975)); see also Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint*, 2nd ed. (Berkeley: University of California Press, 2008): at 79-80 (The police power of states and their political subdivisions includes the power to enact laws, promulgate regulations, and take action to protect, preserve, and promote public health, safety, and welfare.).
200. *Board of Trustees v. Fox*, 492 U.S. 469, 475 (1989) (Finding the asserted government interests to be "substantial: promoting an educational rather than commercial atmosphere on SUNY's campuses, promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquility.").
201. See also, The World Health Organization's *Global Strategy on Diet, Physical Activity and Health* was endorsed by the 57th World Health Assembly in 2004 (recommending that "food and beverage advertisements should not exploit children's inexperience or credulity," should discourage messages that promote less healthful dietary practices, and should encourage positive healthful messages).
202. Cf. *FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 313 (1934) (upholding the FTC's determination that the sale of candy involving "chance" was "shown to exploit consumers, children, who are unable to protect themselves").
203. *Lorillard v. Reilly*, 530 U.S. 525, 555 (2001).
204. *Lorillard v. Reilly*, 530 U.S. 525, 557 (2001).
205. Cf. *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 628 (1995) (stating the Court does not require "empirical data" under prong three); but see *Edenfield v. Fane*, 507 US 761 (1992) (striking ban on in-person solicitation by CPAs because the board presented not evidence); see also, *44 Liquormart v. R.I.*, 517 U.S. 484, 505 (1996) (ban on advertising alcohol prices struck down because the state did not present evidence of its potential efficacy).
206. *Lorillard v. Reilly*, 530 U.S. 525, 561 (2001).
207. See IOM 2006, *supra* note 10, at 8, 227 and References at 309-318.
208. See Story and French, *supra* note 18, at 3, 11.
209. See Hastings et al., *supra* note 16; see Harris et al., supra note 12; see also, Westen, *supra* note 2, at 84 ("60,000 pages of expert testimony" were archived).
210. See Story and French, *supra* note 18, at 3.
211. See Linn and Novosat, *supra* note 153, at 150.
212. *Id.*, at 137.
213. See Kunkel et al., *supra* note 24, at 20.
214. See Campbell, *supra* note 113 (arguing that product placement and character selling are deceptive techniques when used to market to children).
215. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564 (1980).
216. *Reno v. ACLU*, 521 U.S. 844, 874 (1997).
217. *Lorillard v. Reilly*, 533 U.S. 525, 565 (2001) (invalidating the speech restrictions because "governmental interest in protecting children from harmful materials does not justify an unnecessarily broad suppression of speech addressed to adults") (citing *Reno v. ACLU*, 521 U.S. 844, 875 (1997)).
218. See Cunningham, *supra* note 156, at 286 (Noting that under United States law, the age of majority is 18 years old; however, in many states, a child can drive at 16, be sentenced to adult prison for certain offenses at 14, but cannot purchase alcohol until age 21.).
219. M.-R. Papandrea, "Dunwody Distinguished Lecture in Law: Article: Student Speech Rights in the Digital Age," *Florida Law Review* 60 (2008): 1027-1102, 1082 ("Certainly if by 'children' we mean persons from birth to age eighteen, claims that children are emotionally and mentally less mature and more vulnerable than adults are obvious. Most of the students asserting their free speech rights, however,...are at least twelve years old, and the vast majority are in high school. Thus, when considering the free speech rights of students,...the discussion is about the free speech rights of adolescent students."); c.f. Cunningham, *supra* note 156, at 360-363 (The Court applied different First Amendment standards to children between 8 and 14 years of age in the public school context).
220. B. Jeffery, "The Supreme Court of Canada's Appraisal of the 1980 Ban on Advertising to Children in Quebec: Implications for 'Misleading' Advertising Elsewhere," *Loyola of Los Angeles Law Review* 39 (2006): 237-276, at 239-240, n. 13.
221. *Id.* (Jeffery), at 239-240, n. 13 (translating the words of the Attorney General).
222. See FTC, *supra* note 20.
223. See IOM, *supra* note 12, at 25.
224. J. B. Schor, *Born to Buy: The Commercialized Child and the New Consumer Culture* (New York: Simon & Schuster Scribner, 2004): at 108.
225. *Id.*, at 106.
226. C. Pechmann, L. Levine, S. Loughlin, and F. Leslie, "Impulsive and Self Conscious: Adolescents' Vulnerability to Advertising and Promotion," *American Marketing Association* 24, no. 2 (2005): 202-221.
227. See Government Appropriations Act 2009, Division D (Financial Services and General), at 39, *available at* <http://www.rules.house.gov/111/LegText/omni/jes/divdjes_111_hromni2009_jes.pdf> (last visited January 12, 2010).
228. I. Teinowitz, "FTC Could Set Standards for Food Marketing Aimed at Teens: Omnibus Appropriations Bill Calls for Study, Broadens Scope," *Advertising Age*, March 11, 2009.
229. See FTC, *supra* note 20, at Executive Summary at 10.
230. G. Fabrikant, "Nickelodeon Sees Mouse Ears Over Its Shoulder," *New York Times*, October 14, 2006 (in 2006, on average, children watching Nickelodeon: 1.2 million; and Disney Channel: 863,000).
231. See R. E. Hundt, Chairman, "Speech to the Center For Media Education's Press Conference on the New Children's Television Act Rules, Federal Communications Commission," Washington, D.C., September 18, 1997 (For the 1997/1998 Season: "On any given Saturday morning at 10 am, there are 11 million kids age 2-11 watching TV."), *available at* <http://www.fcc.gov/Speeches/Hundt/spreh751.txt> (last visited January 12, 2010).
232. See Batada et al., *supra* note 117.
233. See *44 Liquormart v. Rhode Island*, 517 U.S. 484, 499 (1996) (quoting *Linmark Associates v. Township of Willingboro*, 431 U.S. 85, 96 (1977) (Stating that the government retains more regulatory authority when commercial speech restrictions strike at the "commercial aspect" of the speech, i.e., "with offerors communicating offers to offerees," rather than at the substance of the communication.).
234. See Kellogg's Honey Smacks nutrition facts panel, *available at* <http://www2.kelloggs.com/ServeImage.aspx?BID=38303&MD5=f484914d935a3d67b411830064555980> (last visited January 12, 2010); Honey Smacks contains 15 grams of sugar per serving which is one of the highest of any cereal. See S. Boyles, reviewed by E. Klodas, "Kids' Cereals: Some Are 50% Sugar: Consumer Reports Rates Nutritional Winners and Losers," WebMD Health News, October 1, 2008, *available at* <http://www.webmd.com/food-recipes/news/20081001/kids-cereals-some-are-50-percent-sugar> (last visited January 12, 2010).

235. See *Reno v. ACLU*, 521 U.S. 844, 865 (1997) (citing *Ginsberg v. New York*, 390 U.S. 629 (1968)).
236. See *Linmark Associates v. Township of Willingboro*, 431 U.S. 85, 93 (1977) (quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976).
237. C.f. *Lorillard v. Reilly*, 533 U.S. 525, 565 (2001) (invalidating speech restrictions because "governmental interest in protecting children from harmful materials does not justify an unnecessarily broad suppression of speech addressed to adults"); *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (striking down Communications Decency Act, which sought to deny minors access to potentially harmful speech on the internet, but "effectively suppresse[d] a large amount of speech that adults have a constitutional right to receive and to address to one another."); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73, 75 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."); *Butler v. Michigan*, 352 U.S. 380 (1957) (invalidating a Michigan statute that made it a crime to sell literature that was inappropriate for minors to the general public because such a statute would "reduce the adult population of Michigan to reading only what is fit for children").
238. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).