

Chapter 5

The New First Amendment and Its Implications for Combating Obesity Through Regulation of Advertising

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Introduction

For at least three generations, Americans have taken for granted that the government may pass laws governing food and product safety, truth in advertising, lending, and other important features of modern life. Today, however, policies that would have seemed unremarkable in the past are facing constitutional challenges. This development is the result of a campaign by large corporations to muster the First Amendment as a defense against governmental intervention in commercial activity.

The courts have been the major battleground in this campaign, and in recent years, industry groups have won major litigation victories that have upended settled expectations about the ability of government to regulate in the public interest. In just 2010 and 2011, the Supreme Court advanced the free speech rights of corporations by striking down a federal law barring independent corporate expenditures on electioneering communications¹; Vermont's prohibition on the sale of doctors' prescription histories to drug companies for direct marketing purposes²; and California's ban on the sale of violent video games to minors.³

Industry groups also invoke the First Amendment to dissuade policymakers from pursuing measures to promote public health and welfare. Obesity prevention advocates are finding that any policy proposal relating to junk food advertising—even

¹ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

² *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011).

³ *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729 (2011).

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government *recommendations* on the nutritional profile of foods that are appropriate to market to children⁴—will be met with aggressive objections that corporations’ expressive rights are under siege.⁵

Many might be surprised to learn that the First Amendment has *any* relevance to marketing—and it did not for the first 200 years of the country’s history. In the mid-1970s, however, the Supreme Court announced that the First Amendment limits what government can do about advertising, thus creating what has become known as the “commercial speech doctrine.”⁶ The doctrine began its life with the professed goals of advancing consumers’ interest in receiving truthful information and the general public’s interest in information flowing freely in the marketplace. Over time, the doctrine has morphed into a protective shield not only for the recipients of advertising but also, especially recently, for commercial “speakers.”

In this chapter, we explore the evolution and contours of the commercial speech doctrine, emphasizing how recent developments in the US Supreme Court may present significant First Amendment obstacles to addressing childhood obesity through government restrictions on marketing. We begin with a brief overview of the American system of constitutional law, focusing on how judicial interpretation works and why the pronouncements of the Supreme Court of the USA have such a profound impact on the ability of government to regulate in the public interest. Next, we describe the evolution of the commercial speech doctrine and the mechanics of how courts evaluate the constitutionality of laws regulating commercial speech. We then explore how recent Supreme Court decisions have reshaped various elements of the commercial speech doctrine, making it increasingly difficult for government to enact policy initiatives aimed at protecting children and public health. The chapter closes by highlighting policy ideas and strategic considerations for policymakers seeking to navigate constitutional rocks and shoals on the way to a healthier food environment.

The Constitutional Context

Before we consider the First Amendment it is useful to review how constitutional law works in the USA. The word “law” can actually mean several things: a federal or state constitutional provision; a statute passed by a legislature; a local ordinance; a regulation promulgated by an executive agency; a court’s interpretation of any of the above; or “common law” originating from courts that supplements the other

⁴ Federal Trade Commission (2011). *Interagency Working Group on food marketed to children: Preliminary proposed nutrition principles to guide industry self-regulatory efforts*. <http://www.ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf>.

⁵ See *In re Interagency Working Group on Food Marketed to Children*, Comments of Viacom, Inc., FTC Project No. P094513 (Jul. 14, 2011). Available at <http://www.ftc.gov/os/comments/foodmarketedchildren/07884-80045.pdf>; Redish, M. H. (2011). *Childhood obesity, advertising, and the first amendment*, *GMAonline.org* (Jun. 8, 2011). Available at http://www.gmaonline.org/file-manager/Health_Nutrition/childhood_advertising__firstamendment.pdf.

⁶ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

sources of law. Yet not all law is equal. Federal law overrides conflicting state and local law, and state law overrides conflicting local law. At the federal level, the Constitution trumps statutes, which trump regulations, all of which, if clearly applicable, may trump prior case law. The same tiers apply at the state level.

The Supreme Court is the final arbiter of questions of federal law, particularly constitutional law. This means that the Supreme Court's interpretation of the Constitution can invalidate efforts from the legislative and executive branches to address social problems such as obesity.

Let us take as an example the constitutional provision with which we are concerned. The First Amendment to the US Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."⁷ Merely reading the text of what is known as "the Free Speech Clause" provides little insight into how it might apply to, say, McDonalds' right to advertise Happy Meals on Nickelodeon. To answer that question one must look to case law *interpreting* the First Amendment—particularly the decisions of the US Supreme Court.

Most Supreme Court decisions are not unanimous,⁸ and they don't need to be. When a majority agrees on a holding, that opinion is considered the decision of the Court. Often one or more of the nine Justices will write a concurrence (agreeing with the outcome but not with the majority's analysis) or a dissent (disagreeing with the outcome and the majority's analysis).

In theory, the Supreme Court is bound by "precedent," that is, its own past decisions. The fact that a type of problem has been resolved a certain way in the past is generally viewed as a basis for continuing to do so. Because it might undermine the legitimacy of the Court if it seemed as if the decisions of the Court veered this way and that too often, or that they rested on merely political grounds, the Court rarely *explicitly* overrules precedent. When it does, the Court will generally provide a rationale for doing so⁹—either referring to evolving social and political norms, or noting that recent errant cases deviated from an earlier valid precedent. More commonly, the Court will only *implicitly* overrule precedent, articulating a new rule while suggesting that the decision flows from earlier cases.¹⁰

The US political system relies on law, especially constitutional law, to provide continuity and predictability. We need the law to clearly delineate the boundaries between legal and illegal conduct and to give us a shared, stable link to our civic history. At the same time, the law must adapt to new challenges as they arise—challenges stemming from technological developments, changes in social customs, scientific discoveries, and the like. Courts generally resolve the tension between the goals of stability and flexibility by incorporating changing realities slowly. In this

⁷ US Const. amend. I.

⁸ Epstein, L., Landes, W. M., Posner, R. A. *Unanimous decisions in the Supreme Court* (rev. Jun. 19, 2011), <http://epstein.usc.edu/research/unanDecisions.pdf>.

⁹ See, e.g., *Citizens United v. Fed. Election Com'n*, 130 S. Ct. 876 (2010) (overruling precedent set in *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990)).

¹⁰ See Schauer, F. (2008). Has precedent ever really mattered in the Supreme Court? *Ga. St. U. L. Rev.*, 24, 381.

sense, the law is inherently conservative—not necessarily politically, but rather in the dictionary definition of “tending or disposed to maintain existing views” and “marked by moderation or caution.”¹¹ There are times, though, when the Court (and thus the law) will make a more abrupt move that significantly changes the landscape of the past. Something like this happened in the 1970s with respect to the law’s treatment of commercial advertising.

Emergence of the Commercial Speech Doctrine

The First Amendment was included in the Bill of Rights to ensure the freedom of speech from excessive government intervention. The Free Speech Clause is commonly understood to protect individuals against unreasonable interference by the government in their artistic, political, and other expressive interests.¹² First Amendment protection for advertising, however, is a relatively new idea. From the adoption of the Bill of Rights through the first half of the 20th century, advertising regulations were constitutionally indistinguishable from basic regulations of business activities. There was no First Amendment protection for advertising at all.¹³ Commercial advertising was thought to be at best somewhat informative and at worst a fraudulent force aimed at misleading consumers and inflating prices.¹⁴ But courts’ views evolved in the mid-twentieth century, perhaps due to a combination of changing public perceptions and a growing body of scholarly work about the value of advertising.¹⁵

Whatever the reason, in the early 1970s the Supreme Court began to look differently at advertising and in 1976 flatly held that advertising—which the Court now deemed “commercial speech”—was protected by the First Amendment. The case that heralded this change, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, was brought by a consumer group opposing a Virginia law that

¹¹ *Conservative – Definition and More from the Free Merriam-Webster Dictionary*, Merriam-Webster Online, <http://www.merriam-webster.com/dictionary/conservative> (last visited Jan. 31, 2012).

¹² Cf. Barry, B. (2007). *Speechless: The Erosion of Free Expression in the American Workplace* (explaining that private actors such as employers are free to restrict speech they find disagreeable).

¹³ See *Valentine v. Christensen*, 316 U.S. 52 (1942), *abrogated by Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

¹⁴ See Calfee, J. E. (1997). *Fear of persuasion: A new perspective on advertising and regulation 5* (the common view was that advertising was wasteful, “distorted consumer information and preferences and was a tool for creating or buttressing monopoly power.”). See also Posner, R. A. (1969). *The Federal Trade Commission*, 37; Chi, U. (1969). *L. Rev.* 47–89; Posner, R. A. *Regulation of advertising by the FTC* (American Enterprise Institute 1973).

¹⁵ See, e.g., Coase, R. H. (1974). *The market for goods and the market for ideas. American Economic Review*, 64, 384; Redish, M. H. (1971). *The first amendment in the marketplace: Commercial speech and the values of free expression. George Washington Law Review*, 39, 429; Calfee, *supra* note 14; Posner, *supra* note 14.

prohibited pharmacies from engaging in price advertising.¹⁶ The state defended the law on the grounds that price advertising was likely to result in price wars which would, in turn, lead pharmacies to cut corners, thus endangering patient well-being and safety. The plaintiffs, a consumer group, countered that price was a critical piece of information, particularly to those with low incomes, and that it was inappropriate for the state to “protect” people from this critical piece of information for their own good. The Supreme Court agreed, rejecting what it called the law’s “highly paternalistic approach”¹⁷ of shielding people from the truth and instead adopting a new constitutional standard for commercial speech.

From then on, the Court announced in *Virginia Pharmacy*, truthful commercial advertising would have some degree of First Amendment protection. The Court found that advertising merited a certain amount of protection under the First Amendment because it helps consumers make well-informed purchasing decisions.¹⁸ In the Court’s view, the free flow of commercial information benefits not only individual consumers but also society at large:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.¹⁹

Virginia Pharmacy marked the Supreme Court’s announcement of what is known today as the “commercial speech doctrine.” A few years later, in the *Central Hudson* case of 1980,²⁰ the Court codified the doctrine into a four-prong test for courts to use when considering whether a governmental regulation of commercial speech restriction is valid under the First Amendment.

The *Central Hudson* test begins with a threshold question that is unusual in the First Amendment context: Is the speech false, or actually or inherently misleading, or about an illegal subject matter? If so, it is not entitled to First Amendment protection at all. An advertisement gets no First Amendment protection if it claims “this pill guarantees you’ll lose five pounds per week” when in fact the pill does not work. Outside the commercial speech context, the Court has generally avoided imposing a truth test for First Amendment protection, finding that protecting some false speech is necessary to maintain overall freedom of expression.²¹

The Court has justified the lack of protection for false and misleading *commercial* speech on the grounds that speakers hoping to make a profit from selling something should be capable of backing up their claims about their products and services.²²

¹⁶ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

¹⁷ *Id.* at 770.

¹⁸ *Id.* at 763.

¹⁹ *Id.* at 765.

²⁰ *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

²¹ *See, e.g., N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (protecting false speech made regarding a public figure on matter of public concern so long as it was not made knowingly or recklessly).

²² *Virginia State Bd. of Pharmacy*, 425 U.S. at 777 (Stewart, J., concurring).

Table 5.1 Levels of Review

Level of Review	Applies to Regulations of:	Likelihood of Regulation Surviving a Court Challenge:
Strict scrutiny test	“Core” speech about art, politics, and other ideas	Very low
Intermediate scrutiny test <i>Central Hudson</i>)	Truthful, nonmisleading advertising, and other commercial speech	In between
Rational basis test	Commercial practices and products	Very high
Full deference to government	Advertising about illegal activity, false or inherently misleading advertising	Almost always upheld once the court finds the advertising to be unprotected

Moreover, because they have an economic motive, commercial speakers will likely continue to advertise to whatever degree is permissible and are unlikely to be unduly “chilled” by appropriate regulation which requires that their claims be truthful and not misleading.²³

In the commercial context, then, the First Amendment extends protection only to truthful, nonmisleading commercial speech about a legal activity. The first prong of the *Central Hudson* test holds that commercial speech that is false, or which is actually or inherently misleading, is not entitled to any First Amendment protection and the government is free to ban it outright.

The remaining prongs of the *Central Hudson* test require that:

1. The law limiting commercial speech address a “substantial” state interest;
2. The law “directly advance” that substantial state interest; and
3. The law not limit speech more than necessary to accomplish its purpose.²⁴

In legal parlance the *Central Hudson* test entails a form of “intermediate scrutiny.” It gives the government more leeway to restrict advertising than the “strict scrutiny” test that applies to governmental attempts to regulate political or artistic speech. Strict scrutiny has been described as “strict in theory, but fatal in fact”²⁵ because it almost always results in the invalidation of a regulation. At the same time, intermediate scrutiny gives the government less room than the “rational basis” test applicable to most business regulations.²⁶ Rational basis review usually results in upholding the law in question because it grants a great deal of deference to the legislature. The chart above sets forth the various possibilities (Table 5.1).

At first the intermediate-level *Central Hudson* test fell somewhere close to the middle of the continuum. However, over time, the Supreme Court’s application of

²³ *Id.*

²⁴ *Central Hudson*, 447 U.S. at 566.

²⁵ Gunther, G. (1972). Foreword: in search of evolving doctrine on a changing court: A model for a newer equal protection. *Harvard Law Review*, 1, 8 (1972).

²⁶ *See United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938).

Central Hudson has crept closer to strict scrutiny in practice if not in name,²⁷ making it harder for the government to enact commercial speech regulations that can stand up in court.²⁸ And along the way, the doctrine has become increasingly speaker-centric, recognizing not only *listeners'* interests in the information conveyed in advertising but also commercial *speakers'* interests in conveying the information.

Because the level of judicial review tends to predict the outcome of a First Amendment case, consumer advocates and corporations naturally vie over how to define the categories of speech that are subject to each level of review. The two sides have differing visions of where the boundaries fall between the different categories. Both sides agree, however, that defining what makes speech “commercial” and thus subject to an intermediate standard of review is critical.

The Supreme Court has not clearly articulated how commercial speech differs from core speech. A sensible approach would be to define any speech by a commercial entity as “commercial speech.”²⁹ But the Court has clearly rejected this approach in its most recent decisions.³⁰ Some industry commentators and even some Justices have advocated eliminating the distinction between core speech and commercial, making it all subject to strict scrutiny.³¹

In terms of the boundary between commercial speech and other business practices, industry generally would like to place as many commercial activities and products as possible under the rubric of commercial speech—particularly given that the new, stricter interpretation of the *Central Hudson* test offers significant protection from government interference. So, for instance, industry has argued that free tobacco samples,³² the toy in a fast-food restaurant children’s meal,³³ and a database of doctors’ prescription records³⁴ all constitute commercial “speech,” even though an average observer might think that each instance involved a noncommunicative product. In its 2011 opinion in *Sorrell v. IMS Health Inc.*, the Supreme Court observed that there is “a strong argument” to be made that a database of doctors’ prescription records is protected commercial speech.³⁵ That suggestion does not bode well for the view that samples, toys, and databases are products subject to routine sales practice regulations.

²⁷ Vladeck, D. C. (2004). *Lessons from a story untold: Nike v. Kasky Reconsidered*. *Case Western Reserve Law Review*, 1049, 1059.

²⁸ See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 377 (2002); *Sorrell*, 131 S. Ct. at 2673 (2011).

²⁹ Piety, T. R. (2006). Free advertising: The case for public relations as commercial speech. *Lewis and Clark Law Review*, 10, 367–413. See also Piety, T. R. (2012). *Brandishing the first amendment: Commercial expression in America*. University of Michigan Press.

³⁰ *Citizens United* (2010). 130 S. Ct. at 898–99.

³¹ See, e.g., Thomas, J. (concurring). *Lorillard Tobacco*, 533 U.S. at 572.

³² *Ky, W. D.* (2010). *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512.

³³ *McDonald’s Happy Meal Toy Lawsuit Review*, <http://mbaindc.blogspot.com> (last visited Jan. 31, 2012).

³⁴ *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011).

³⁵ *Id.* at 2667.

Another disputed boundary surrounds the category of unprotected commercial speech—advertising that is false, actually or inherently misleading, or about illegal activity. As described above, government is free to ban this category of speech outright without having to meet the final three prongs of the *Central Hudson* test. The category is smaller than it might seem at first. Although a lot of advertising is hyperbolic, impressionistic, and designed to appeal to emotion instead of logic, the law over the past hundred years or so has developed a fairly limited class of ads that it deems actually false or actually misleading.³⁶

The *Central Hudson* test is a classic example of how interpretation matters deeply in constitutional law. Since the inception of the commercial speech doctrine, consumer advocates and corporations have wrangled over the definitions, contours, and boundaries of the doctrine. Over the last couple of decades, industry has won most of those fights. Although the law in this area is still in flux, the current Supreme Court appears inclined to continue expanding the First Amendment as a safe haven for industry from government restrictions on advertising and other marketing activities. However, since the Court has not yet applied the commercial speech doctrine to a restriction on solely youth-targeted advertising,³⁷ there may yet be room for well-tailored regulations of junk food advertising and marketing to children.

Challenges Posed by the Commercial Speech Doctrine for Public Health

Until such time as the Supreme Court reconsiders or clarifies the commercial speech doctrine, the obesity prevention movement will have to shape proposals for reform with an eye to the challenges posed by existing law. Here, we explore the four prongs of the *Central Hudson* test, identifying nuances that have arisen in recent Supreme Court decisions that may affect policy initiatives to safeguard children and public health. We follow with a discussion of why the Court's decision in *Sorrell v. IMS Health, Inc.* raises serious questions about the continuing viability of the *Central Hudson* test.

Prong One: Unprotected Commercial Speech

Under the First Amendment, certain categories of speech—such as making false promises in an advertisement, yelling obscenities on the radio, or crying fire in a crowded theater—are unprotected because they are of extremely low social value or

³⁶Piety, T. R. (2007) Market failure in the marketplace of ideas: Commercial speech and the problem that won't go away. *Loyola of Los Angeles Law Review*, 41, 181.

³⁷*Cf.* *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (ruling that Massachusetts' tobacco advertising restrictions, though ostensibly directed at advertising received by children, in fact prohibited a great deal of speech intended for adults).

trigger immediate, serious danger.³⁸ For decades, public health and child advocates have argued that advertising to children ought to be categorized as unprotected speech because it carries serious risks of being misunderstood by children, may shape lifetime preferences for dangerous products, may undermine parental authority, or may interfere with healthy development.³⁹ Congress, however, has not enacted regulations based on these arguments. The reasons are political, not constitutional. For example, the FTC's attempt in the late 1970s to propose stricter regulation of advertising to children engendered a firestorm of lobbying opposition from industry (including, it should be noted, the tobacco industry), which ultimately led Congress to curtail the FTC's authority.⁴⁰

The food, advertising, and entertainment industries predictably object to the notion that advertising to children should be considered unprotected speech, and they are now drawing fodder from a 2011 Supreme Court case. *Brown v. Entertainment Merchants Association*⁴¹ involved a California law prohibiting the sale or rental of violent video games to minors. The law applied to games involving killing, maiming, dismembering, or sexually assaulting an image of a human being in a manner that a reasonable person would find appeals to a deviant or morbid interest of minors. The Supreme Court rejected California's argument that violent video games should be considered unprotected speech when directed at children. The Court refused to add a "wholly new category" to the list of categories that have been unprotected by "longstanding tradition."⁴² *Brown* almost surely forecloses the possibility of establishing a new category of unprotected speech called, say, "harmful advertising to children."

Crucially, however, *Brown* did not upend existing categories of unprotected speech, including inherently deceptive advertising. If advertising directed at children can be shown to be inherently deceptive—and it can—then regulations targeting only that advertising should be constitutionally defensible.

An extensive body of scientific research amassed over three decades and backed by the American Academy of Pediatrics⁴³ and the American Psychological Association⁴⁴ compels the conclusion that advertising directed to children under twelve is inherently misleading. The evidence shows that a child's full comprehension of advertising requires three levels of understanding: the child must be able to distinguish media content from commercial advertising; the child must be able to recognize the selling intent of advertising messages; and the child must be able to recognize that the selling intent

³⁸ See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

³⁹ See, e.g., Westen, T. (2006). Government regulation of food marketing to children: The Federal Trade Commission and the Kid-Vid Controversy. *Loyola of Los Angeles Law Review*, 39, 79.

⁴⁰ *Id.* at 83–84.

⁴¹ *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

⁴² *Id.* at 2736.

⁴³ Committee on Communications (2006). Policy statement: Children, adolescents and advertising. *Pediatrics*, 118(6), 2563.

⁴⁴ Kunkel, D., et al. (2004). Report of the APA task force on advertising and children (American Psychological Association 2004). Available at <http://www.apa.org/pi/families/resources/advertising-children.pdf>.

leads to inherent bias in advertising.⁴⁵ Children generally do not master all three levels of understanding until eleven to twelve years of age because, even if they can identify an advertisement and its selling intent, they cannot apply the appropriate skepticism to the advertisement because they do not grasp exaggeration and embellishment in marketing messages.⁴⁶ The research suggests that *there is no plausible way to advertise to a young child in a nonmisleading way* and thus that the government should be able to restrict all advertising to young children—or, if it chooses, a subset of advertising to children that is deemed particularly harmful—without raising First Amendment concerns.⁴⁷

As for adolescents, as some of the other contributions to this book discuss, a burgeoning field of scientific study is exposing their vulnerability to certain digital marketing techniques that are heavily employed by food companies. Neurological studies reveal that adolescents are significantly more vulnerable than adults to advertising messages because the part of the brain that directs impulse control, risk taking, and maturity of judgment does not fully develop until adulthood.⁴⁸ Furthermore, the proliferation of interactive and immersive marketing to teens is specifically designed to trigger subconscious, emotional reactions—bypassing rational consideration of product information.⁴⁹ These psychological tactics are particularly powerful when used to elicit positive associations with hard-to-resist, obesogenic food products.⁵⁰ To the extent these tactics can be shown to be actually or inherently misleading, the government should be free to regulate them under the first prong of the *Central Hudson* test.⁵¹

In summary, the first prong of the *Central Hudson* test—whether speech is truthful and not misleading—is unexplored territory as it pertains to junk food advertising to young people. Those concerned about junk food advertising may want to focus on bringing to light the degree to which such advertising is inherently or actually misleading and thus unprotected by the First Amendment from government interference. This is a worthwhile pursuit. For if an advertising regulation is subject to the remainder of the *Central Hudson* test—if the speech it regulates is, for example,

⁴⁵ Kunkel, D. (2010). Commentary: Mismeasurement of children's understanding of the persuasive intent of advertising. *Journal of Children and Media*, 4(1), 109.

⁴⁶ Mills, C. M., & Keil, F. C. (2005). The development of cynicism. *Psychological Science*, 16, 385.

⁴⁷ Graff, S., Kunkel, D., Mermin, S. (2012). Government can regulate food advertising to children because cognitive research shows it is inherently misleading. *Health Affairs*, 31(2), 392–398.

⁴⁸ Pechmann, C., Levine, L., Loughlin, S., Leslie, F. (2005). Impulsive and self-conscious: Adolescents' vulnerability to advertising and promotion. *Journal of Public Policy and Marketing*, 24(2), 202; see also Harris, J. L., Brownell, K. D., Bargh, J. A. (2009). The food marketing defense model: Integrating psychological research to protect youth and inform public policy. *Social Issues and Policy Review*, 3(1), 211.

⁴⁹ Pradeep, A. K. (2010). The buying brain: Secrets of selling to the subconscious. *Mind*. John Wiley & Sons; Binet, L., Field, P. (2009). Empirical generalizations about advertising campaign success. *Journal of Advertising Research*, 49(2), 130

⁵⁰ Harris, Brownwell & Bargh, *supra* note 49.

⁵¹ Harris, J., & Graff, S. (2012). Protecting young people from junk food advertising: Implications of psychological research for first amendment law. *American Journal Public Health*, 102(2), 214.

only “potentially misleading”—the chances of passing constitutional muster are significantly reduced.

Prong Two: Substantial Government Interest

Prong two of the *Central Hudson* test has not typically presented serious difficulties for policymakers. Supreme Court precedent establishes a relatively low hurdle for the government to clear in order to establish that there is an important governmental interest.⁵² In commercial speech cases, industry litigants have often offered only tepid opposition to the government’s claim of a substantial interest in the asserted goal for a particular regulation. More often they concede that the government has substantial reasons for enacting the challenged regulation—preferring to battle it out on prongs three and four of the *Central Hudson* test.

However, the prong two inquiry is not without teeth. In the 1995 case of *Rubins v. Coors Brewing Company* and again in the 2011 case of *Sorrell v. IMS Health, Inc.*, for example, the Supreme Court struck down consumer protection laws because it doubted the validity or coherence of the government’s stated interests. These cases are significant for our purposes because the Court, in other opinions, has expressed serious doubts about some of the types of government interests that might motivate a restriction on junk food advertising to children.

On the one hand, the Supreme Court has traditionally affirmed the government’s interest in regulating to protect the health, safety, and welfare of the public⁵³—particularly of children.⁵⁴ Reducing childhood obesity is obviously a substantial governmental interest. Indeed, despite his hostility to the idea of regulating advertising to protect children and public health, Justice Thomas himself noted a decade ago that obesity was the second “largest contributor to mortality rates”⁵⁵ and was a problem that was “rapidly growing worse.”⁵⁶ Nothing has changed in that respect since 2001. As the other chapters in this book illustrate so forcefully, obesity in the USA among children is a problem of epidemic proportions.

On the other hand, the Court has shown increasing skepticism toward what it deems “paternalistic” regulations designed to “keep people in the dark for what the government perceives to be their own good.”⁵⁷ In the 2011 *Brown* case, the entertainment software industry successfully persuaded the Court to bring its anti-paternalistic sensibilities to bear on a law designed to safeguard children from violent

⁵² See e.g., Thomas, J. (concurring). *Lorillard Tobacco*, 533 U.S. at 587.

⁵³ *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

⁵⁴ *Lorillard Tobacco*, 533 U.S. 525; *Ginsberg v. State of New York*, 390 U.S. 629 (1968); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

⁵⁵ *Lorillard Tobacco*, 533 U.S. at 587 (citations omitted).

⁵⁶ *Id.*

⁵⁷ *44 Liquormart v. Rhode Island*, 517 U.S. 484, 503, 510 (1996).

video games. California attempted to defend the law on the grounds that violent video games were like pornography in that there was a special state interest in restricting the dissemination of this material to children. The Court rejected that argument and distinguished its past decisions upholding laws shielding children from obscene materials, observing that those earlier decisions did not grant the government “a free-floating power to restrict the ideas to which children may be exposed.”⁵⁸ The Court also looked askance at government’s substituting its own judgment for that of parents: “While some of the legislation’s effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents *ought* to want.”⁵⁹

The Court’s analysis in *Brown* technically should not inform a situation involving a junk food advertising regulation because the speech at issue in *Brown* was “artistic” and therefore subject to the highest level of First Amendment protection. But food marketers began invoking *Brown* in their own defense within days after the decision came down.⁶⁰ The marketers’ arguments decry paternalism—conveniently ignoring the obvious distinction that any regulation aimed at protecting *children* is, appropriately and by definition, “paternalistic.”

(*Brown*’s shift in focus to parents is familiar to obesity prevention advocates. When confronted with evidence that children are not rational consumers, food and beverage companies recast the debate in terms of parental choice and claim that no matter what advertisers say to children, parents are the gatekeepers. This argument suggests that the industry is investing nearly \$2 billion each year marketing to children in order to drum up demand among a group of consumers who have absolutely no role to play in purchasing decisions).

As documented in other chapters of this book, evidence about the seriousness of the governmental interests in reducing junk food marketing to children is abundant and compelling. That said, under prong three, the government must be able to show that the proposed regulation will do something to actually fix the given problem. Therefore, drafters of any legislation regulating commercial speech would be well advised to assess applicable studies and other data when deciding how to frame their interests in testimony and legislative findings. The closer the stated purposes of the law dovetail with the evidence mustered in its support, the better chance the government has of convincing a court that the law has a significant impact on the identified problem.

Prong Three: Evidence of Causation

Assuming a commercial speech regulation survives the first two prongs of the *Central Hudson* test, prong three requires the government to establish that its regulation has a direct

⁵⁸ *Brown v. Entm’t Merchs.*, 131 S. Ct. at 2736.

⁵⁹ *Id.* at 2741.

⁶⁰ *See* In re Interagency Working Group, *supra* note 5, at 9.

impact on the problem it is trying to address. The Supreme Court has indicated that the government will be in a stronger position if it is able to muster convincing scientific evidence establishing this causal relationship.⁶¹ Like tobacco companies before them, food and beverage corporations take every opportunity to cast doubt on the impact of junk food marketing on childhood obesity (and therefore the impact of any future restrictions on such marketing), claiming that their marketing affects only brand preferences. Their rhetoric focuses on direct causality and they correctly assert that scientific studies have been unable to show a one-to-one causal relationship between food marketing and the overall diets and weight status of children.⁶² Nevertheless, marketing is clearly an important factor in the creation of an overall environment in which deeply unhealthy food preferences are formed—most likely for life.

In 2005, the Institute of Medicine (IOM) released a systematic review of decades of applicable peer-reviewed studies and determined that food marketing to children is out of balance with a healthful diet, contributing to an environment that puts child health at risk.⁶³ Researchers speak of the evidence in terms of risk factors, not direct causality, because the consensus is that no one factor single-handedly causes high obesity rates.⁶⁴ Risk factors are identified when there is a convergence of empirical data from laboratory experiments and correlational data from the real world.⁶⁵ If a court requires government, under the third prong of *Central Hudson*, to show that junk food marketing to youth directly and unequivocally “causes” obesity, the government will likely be unable to meet the mark. On the other hand, if a court requires only that government establish that exposure to junk food marketing is a significant risk factor in predicting obesity, then the government may well succeed.

The challenge, then, is convincing a court to take a “risk factors” approach to assessing a regulation for purposes of prong three of *Central Hudson*. That may be a difficult task—especially in light of the Supreme Court’s approach to the evidence in the 2011 *Brown* decision. California’s main justification for banning the sale of violent video games to minors was that such games increase the likelihood that children will be violent. The majority opinion focuses on the question of causality, finding that the studies offered by California were not compelling:

These studies have been rejected by every court to consider them, and with good reason: They do not prove that violent video games *cause* minors to act *aggressively* (which would at least be a beginning). Instead, “[n]early all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology.”⁶⁶

⁶¹ Lorillard Tobacco, 533 U.S. at 556–61, *Edenfield v. Fane*, 507 U.S. 761, 771 (1993).

⁶² In re Interagency Working Group, *supra* note 5, at 24, n.42.

⁶³ Michael McGinnis, J. (2006). Food marketing to children and youth: Threat or opportunity? Institute of Medicine 2006.

⁶⁴ See, e.g., Mokdad, A. H., et al. (2003). Prevalence of obesity, diabetes, and obesity-related health risk factors. *Journal of American Medical Association*, 289(1), 76.

⁶⁵ See, e.g., Christopher, J. L., Murray, Lopez, A. D. (1997). Global mortality, disability, and the contribution of risk factors: Global burden of disease. *Lancet*, 349, 1436.

⁶⁶ *Brown v. Entm’t Merchs.*, 131 S. Ct. at 2739 (first emphasis added; second in the original) (quoting *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 964 (9th Cir. 2009)).

The Court seized on ambiguities in the evidence to conclude that there was no consensus at all in the relevant scientific community. In doing so, it disregarded the conclusion of leading academics who had asserted that most researchers in the field had indeed arrived at a consensus that “the effect of media violence on aggressive and violent behavior was real, causal, and significant.”⁶⁷

In a dissent, Justice Breyer took a less demanding view of the amount of evidence that would be necessary to conclude that a causal relationship existed between violent videos and violent behavior in children. He surveyed the literature—from longitudinal studies to laboratory experiments, from neuroscientific studies to meta-analyses—and determined that the weight of the evidence supported the conclusion that violent video games are harmful to minors.⁶⁸ He found it particularly noteworthy that several eminent professional associations (including the American Academy of Pediatrics, the American Academy of Child & Adolescent Psychiatry, and the American Psychological Association) had released a joint statement that the research pointed “overwhelmingly” to the conclusion that there was a connection between such entertainment and aggression.⁶⁹ Justice Breyer acknowledged, “I, like most judges, lack the social science expertise to say definitively who is right.”⁷⁰ Therefore, he wrote that his inclination was to defer to the judgment of knowledgeable professional organizations along with the legislative findings of the State of California.

Given the majority’s exacting treatment of the evidence in *Brown*, it may be challenging to establish a proposed regulation’s effectiveness under prong three of *Central Hudson* even though *Central Hudson* is an intermediate rather than strict scrutiny standard. *Brown* teaches that the more comprehensive and conclusive the studies supporting the intervention, the better.

Prong Four: Tailoring

The challenge grows greater still with the fourth and final prong of the *Central Hudson* test, the requirement that the government’s means of achieving its interest “fit” its ends. Under prong four, the government cannot limit commercial speech more than necessary to accomplish its stated purpose.⁷¹

As the Supreme Court toughened up the *Central Hudson* test over the years, an apparent conflict between prongs three and four emerged. For example, in the 2001 case of *Lorillard v. Reilly*, Massachusetts passed a law prohibiting outdoor tobacco

⁶⁷ Anderson, C. A., et al. (2003). The influence of media violence on youth. *Psychological Science*, 4(3), 81, 82.

⁶⁸ *Brown v. Entm’t Merchs.*, 131 S. Ct. at 2761 (Breyer, J., dissenting); see also *id.* at 2771–78 (appendices to the dissent collecting literature on the topic of psychological harm resulting from playing violent video games).

⁶⁹ *Id.* at 2769.

⁷⁰ *Id.*

⁷¹ *Lorillard Tobacco*, 533 U.S. at 563.

advertisements within a 1,000 foot radius of a school or playground.⁷² The Supreme Court reviewed evidence linking tobacco advertising to youth consumption and found that the regulation passed prong three. The Court nevertheless struck the law down under prong four, finding that it limited more speech than was necessary to advance the government's stated interest. The Court felt it could not uphold a law which would have the effect of a near-complete ban on the communication of truthful information about tobacco products to adults in some, largely urban, geographical areas: "[T]he governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults."⁷³

The outcome in *Lorillard* exemplifies the paradox facing governments seeking to protect children from commercial speech that is potentially harmful to them. In order to satisfy prong three of the *Central Hudson* test, the proposed regulation must be broad enough to have a measurable impact on the desired audience—in this case, children. However, prong four requires that the regulation not be overly broad in its impact on adults.

Threading the needle between prongs three and four promises to be difficult for policymakers attempting to craft a restriction on junk food advertising to young people that will survive the full *Central Hudson* test. To increase the chance that a particular initiative will "directly advance" the government's goal of reducing childhood obesity, the regulation might be drafted to have the greatest possible reach—for instance, by banning all advertising for high-calorie, low-nutrient food. This type of full-scale ban would be more likely to have a demonstrable impact on childhood obesity rates. But, under the current interpretation of *Central Hudson*, it would almost certainly also run afoul of prong four because it would prohibit more speech than is "necessary" to address the goal. To avoid problems under prong four, an alternative regulation might forbid junk food advertising only during children's television programming. But opponents could then point to prong three of *Central Hudson*, questioning how this regulation would make any difference to children's obesity rates given myriad other sources of children's exposure to such advertising.⁷⁴

Prong four is the obstacle on which most commercial speech regulations have foundered.

Speakers' Interests May Trump All

Although *Central Hudson* nominally remains the standard of review for commercial speech cases, the 2011 Supreme Court decision in *Sorrell v. IMS Health* raised new questions about the future of the commercial speech doctrine. The Court in *Sorrell* struck down a Vermont statute forbidding pharmacies from selling physicians' prescription

⁷² *Id.* at 535–36.

⁷³ *Id.* at 564.

⁷⁴ *See, e.g.,* Westen, *supra* note 40, at 85.

records to drug manufacturers for the purpose of marketing drugs to individual physicians. Simply put, the law prohibited sales reps from using a doctor's prescription history without the doctor's consent to tailor a pitch to that doctor. But the law did not restrict other uses of the records by, for example, academic researchers or health insurers.

The Court held that because the law barred only one type of speech—marketing—by one type of speaker—one with a marketing interest—it discriminated on the basis of content and viewpoint and therefore violated the First Amendment. The Court's concern about "discriminating" against "disfavored" speakers had been central to cases involving core political and artistic speech, but unknown in previous commercial speech cases. This rhetoric turns the original rationale for the commercial speech doctrine upside down. It moves from the focus in *Virginia Pharmacy* on consumers' interest in access to information, to speakers' interest in having free range to target whomever with whatever messages. *Sorrell* represents a culmination of what one First Amendment expert has called a "paradigm shift" from "consumer-protection rationales to speaker-protection rationales."⁷⁵

Although the Court in *Sorrell* ultimately applied the *Central Hudson* test, it continued a decade-long trend sliding commercial speech closer to political and ideological speech for purposes of First Amendment protection. Walking through the four prongs of the *Central Hudson* test, the Court confusingly used the term "heightened scrutiny" in place of "intermediate scrutiny" to describe the standard of review.⁷⁶ The use of "heightened scrutiny" to encompass both "strict" and "intermediate" scrutiny could be read to blur the line between the two standards, signifying a novel standard that is more stringent than intermediate scrutiny. Or it could simply be a shorthand way of stating "whichever standard applies."

What remains to be seen is how lower courts will interpret *Sorrell*. It may well be that courts will gravitate to the familiar *Central Hudson* test and continue to apply it in its traditional form. But it is equally conceivable that courts will latch onto *Sorrell's* antidiscrimination approach and heightened-scrutiny catchphrase to eliminate any remaining distinction between intermediate and strict scrutiny in the commercial speech context. The most likely outcome, unless or until the Supreme Court speaks again, is a combination of both.

Conclusion: The Implications for Restrictions on Food Marketing to Children

These developments—the increasingly stringent level of scrutiny applied to commercial speech regulations; the broadening definition of "speech" in the marketing context; the rising distaste for government paternalism; the exacting demand

⁷⁵ Smolla, R. D. (2004). Free the Fortune 500! The Debate over Corporate Speech and the First Amendment. *54 Case Western Reserve Law Review*, 1277, 1292.

⁷⁶ *Id.*

for direct, causal evidence; the challenge of designing regulations that will directly advance a government goal without being overbroad; and the growing strength of corporate speech rights—suggest that opportunities may have narrowed for legislative efforts to protect children from the onslaught of junk food marketing. But policymakers do have strategies at their disposal that as of now are constitutionally promising.

One is to concentrate on the deceptive aspect of marketing to children. Inherently misleading advertising continues to be unprotected, so it is worth focusing on the argument that all advertising to children, and many techniques targeted at adolescents, can be regulated without raising First Amendment problems.

Also, the First Amendment clearly affords no protection to non-speech-related commercial activities. It is probably safe to say that corporate free speech rights are not implicated by most sales and use taxes, land use laws, government-imposed nutrition standards, or other basic regulations of products and operations. Policymakers should not be dissuaded from addressing food marketing just because companies may now threaten to challenge almost any public health legislation as a violation of their “expressive rights.”

In addition, there are niches of First Amendment precedent outside the commercial speech doctrine that may provide cover to certain types of marketing-related policies—such as those limiting food and beverage marketing in schools; restricting *all* advertisements in a particular area, regardless of what they are advertising; mandating factual disclosures or warnings; or providing for government health-related messages.

Public health and child advocates should expect that many efforts to regulate junk food marketing will encounter First Amendment challenges. It is important to be wary of drawing lawsuits that generate bad precedent—that is, decisions that could hamper future policy efforts to address the childhood obesity epidemic. On the other hand, the epidemic is of such pressing urgency that it may be worthwhile testing the limits of the law to clarify, and hopefully expand, the available policy tools for improving the food marketing environment. It is, after all, entirely appropriate to be “paternalistic” in furtherance of children’s welfare. And the potential negative consequences of attempting to act must be weighed against those of standing by and allowing corporate “speech” interests to trump the health and well-being of our nation’s children.