BANNING KIDS’ FOOD ADS: AN UNCONSTITUTIONAL AND UNNECESSARY ANTI-OBESEITY POLICY PRESCRIPTION

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Obesity is a problem of staggering proportions in this country. Even more alarming is the high incidence of childhood obesity, which has climbed from 4% to 15% since 1978.¹ One proposed solution to this epidemic, which has gained some traction recently, is to ban food advertisements to children, under the theory that food advertisements may cause children to prefer high fat, high calorie foods over other such foods. According to some proponents of this theory, the only way to curtail this preference is to ban food advertising to children in a manner similar to the ban of alcohol or tobacco advertising to children.²

This WORKING PAPER demonstrates that a complete and total ban on food advertising to children is an unconstitutional and unnecessary solution to the serious public health concerns of childhood obesity. Part I explores briefly the background of this problem, including the common justifications for a ban on children’s food advertising. Part II discusses the nature and state of children’s advertising in America. Part III then analyzes why a complete ban on the advertising of specific food products to children is unconstitutional. Finally, Part IV shows that a total ban on children’s food advertising is unnecessary because a
plethora of strategies are available to policymakers that do not present legal or constitutional problems.

I. A LOOK AT THE FACTS

Childhood obesity has risen dramatically in the last twenty five years,³ and over the same time period, the number of food advertisements to which children are exposed on television has also increased.⁴ Thus, some advocates say, the connection is clear – greater food advertising has led to an increase in childhood obesity.⁵ However, the fact that advertising and obesity have both risen during this time period does not create a causal relationship between the two. Rather, a variety of factors have led to an increase in overweight children (including genetics, family and social factors, and inactivity).⁶ Moreover, the same children who are viewing the advertisements are also spending more time doing sedentary activities like watching television or surfing the Internet.⁷

A. Obesity is a Serious Public Health Concern

The fact that childhood obesity has risen to such great heights in recent years is troubling enough, but when one considers the fact that obese children have significantly higher risk of becoming overweight or obese adults, the public health ramifications are simply daunting. Obese people have a significantly higher risk of serious medical conditions such as diabetes, hypertension, and
coronary artery disease, which can cost society billions in public health care expenses.  

B. More Media Must Mean More Advertisements

In addition to seeing a rise in childhood obesity, the United States has also seen an “explosion” in the media by which advertising is delivered. Today’s children spend roughly five and a half hours per day using various media outlets, including television, the Internet, blogs, advergames, etc. With the increase in media accessible by children, it is not surprising that some studies show that children today are exposed to ads through a greater variety of media than children were twenty-five years ago. Yet the fact that children interact with a greater variety of media does not tell the entire story.

C. The Missing Link – Are Kids Actually Watching Advertisements?

Notwithstanding the fact that there are a vast number of ways in which ads may be delivered, some studies show that children’s exposure to advertising during the last thirty years has actually decreased. The media that are traditionally dominated by advertising (i.e. television and radio) now share the stage with video games, DVDs, and the Internet, which present advertisements in ways wholly unlike television and radio. According to the Mercatus Center at George Mason University, the average child in the late 1970s watched more than four hours of television per day. That number declined to about two and three-
quarters hours per day in 1999 as other forms of media exposure with less advertising have increased their presence in popular culture.\textsuperscript{14}

Thus, the question as to whether the increase in advertising media is causally linked to the increase in childhood obesity is still open.\textsuperscript{15} More research is needed to determine whether food advertising is a cause of, or even a contributing factor to, the increase in childhood obesity.\textsuperscript{16} Until such a causal connection is proven, one cannot assume that a complete ban on food advertising to children will have any positive effect on the growing obesity problem in this country.

\section*{II. CONSTITUTIONAL PROTECTIONS FOR COMMERCIAL SPEECH}

While First Amendment protections on commercial speech are not absolute, they are strong enough to thwart a complete ban on advertising food products to children, just as various tobacco restrictions have been rebuffed in the past.

\subsection*{A. An “Intermediate” Amount of Protection for Commercial Speech}

The First Amendment protects, among other things, the right to speak and publish ideas freely.\textsuperscript{17} Historically, commercial speech, generally defined as speech that proposes a business transaction,\textsuperscript{18} was unprotected by the First Amendment.\textsuperscript{19} This paradigm gradually shifted over time, and today commercial
speech is entitled to some protection under the First Amendment, as developed through the case law succeeding the *Central Hudson* case.\textsuperscript{20}

*Central Hudson* provides that so long as an activity is legal, and the public is not misled by commercial speech about that activity, then the speech is entitled to First Amendment protection.\textsuperscript{21} In the case of a ban on food advertisements, this entitlement can be overcome if the government can show a substantial interest that is furthered by the ban, and that the ban is no more extensive than necessary to advance that interest.\textsuperscript{22} While a ban need not employ the “least restrictive means possible,” a ban that is over-inclusive or is likely to chill speech that does not further the government’s interest will be found unconstitutional. Consequently, the four factors that must be met in order for a government’s restriction on commercial speech to be found constitutional are: (1) the speech must be entitled to First Amendment protection (*i.e.*, it must concern lawful activity and must not be misleading); (2) there must be an asserted governmental interest; (3) the restriction on the speech must advance the governmental interest; and (4) the regulation must be narrowly tailored to serve that governmental interest.\textsuperscript{23}

\textbf{B. Restrictions on the Advertising of “Vices”}

The *Central Hudson* factors have been applied to a variety of different advertisements, but perhaps the most difficult cases have been those products that could be characterized as vices – tobacco and alcohol products. After the
Attorney General of Massachusetts promulgated comprehensive regulations governing the advertising and sale of tobacco, the Supreme Court in *Lorillard Tobacco Co. v. Reilly*, applied the *Central Hudson* formulation and held that the advertising ban at issue was unconstitutional.

1. **Lorillard’s “Ignored” Majority Opinion**

The majority’s decision in *Lorillard* is downplayed by ban supporters because the opinion hurt the chances of a future ban being constitutional in two ways. First, *Central Hudson* is the proper standard by which to judge an advertising ban, even when the government alleges that the ban protects the public health. Second, the Court employs a very restrictive form of *Central Hudson* analysis when complete bans are at issue, and is significantly more likely to find a complete ban as overly inclusive rather than acceptable.

The Supreme Court does not take issue with public health being a serious governmental interest or that an advertising ban would substantially advance the government’s interest in limiting that harm. The Supreme Court, however, employed a restrictive interpretation of *Central Hudson* in *Lorillard*, especially in deciding whether the means were “narrowly tailored” to the interest at issue. While one part of the ban was upheld (the requirement that tobacco products be placed behind a counter), the other two restrictions (prohibiting advertising near schools and playgrounds and requiring that advertisements be places higher than five feet above the floor) were thrown out because neither was “narrowly tailored.”
2. In the Words of Justice Thomas

In his *Lorrilard* concurrence, Justice Clarence Thomas intimates that food advertising should be more “acceptable” than tobacco advertising:

> Respondents have identified no principle of law or logic that would preclude the imposition of restrictions on fast food and alcohol advertising similar to those they seek to impose on tobacco advertising. In effect, they seek a “vice” exemption to the First Amendment. . . . No such exception exists.28

In his powerful opinion, Justice Thomas sets up ban proponents for a big win, then “pulls the football away from us just before we kick.”29 Still, many ban supporters identify the foundation of a constitutional ban in the words of this concurring opinion. The concurrence identifies both actual harm and government interest, and approves of the conceptual link between the two; however, Justice Thomas utilized a very strict review of the advertising ban, concluding that the ban was not narrowly tailored to promote a compelling government interest.30

III. A BAN ON FOOD ADVERTISING TO CHILDREN WOULD BE UNCONSTITUTIONAL

The government must, under *Central Hudson*, have an interest in regulating childhood obesity, the restriction on food advertising to children must advance that interest in curbing childhood obesity, and this restriction must be narrowly tailored to serve that governmental interest. The government does have an interest in preventing childhood obesity; however, the restriction on food
advertising to children is unconstitutional because (1) there is no proof that restricting food advertising will advance that interest and (2) this restriction is not sufficiently narrowly tailored to serve that governmental interest.

A. Is the Speech Misleading?

Some food ad ban proponents argue that advertising to children is inherently misleading, not protected by the First Amendment and, consequently, restrictions against it are not entitled to Central Hudson review. If a particular audience to whom the advertisement is made is vulnerable to misinterpreting nuance or disclosures, then the advertising is more likely to be deceptive, they argue.31 They add that certain advertisements mislead children into thinking that the foods are healthful when in fact they are high in fat and calorie content.32 Children are a vulnerable audience – they are less likely to understand nuance, and disclosures not have a great effect on the child’s overall understanding of the ad.33

This line of argument fails. First, many food products are not unhealthful if eaten in moderation. Second, even if we were to assume that some fast advertised food products are completely unhealthful (which is an untenable and unproven assumption), there might be a justification to ban only those particular advertisements, not all food advertising directed at children. One bad apple does not, in this case, spoil the bunch.
B. Failure to meet requirements of the *Central Hudson* test

Banning food advertising to children does not pass *Central Hudson* scrutiny. First, banning food advertisements to children will not necessarily advance the government interest in reducing childhood obesity.34 Second, a ban on food advertisements to children does not pass the “narrowly tailored” restriction. There are more than 320,000 food products sold or served by thousands of different manufacturers and restaurants; proving that a person’s obesity or health problems are solely caused by any particular item or place is impossible.35 Additionally, banning the advertising of food to children would require banning the advertising of all high fat, high calorie foods. If you argue that only the high-calorie, high fat food advertisements to children should be banned, how you do deal with products that are neither healthy food nor junk food (*i.e.* Quaker Granola Bars) and are marketed toward a variety of age groups? For a sedentary child who is parked in front of the television all day, these “healthy” snack choices could lead to excess calorie intake and could also be a significant source of weight gain.
IV. NON-RESTRICTIVE ALTERNATIVES TO BANNING ADVERTISING EXIST AND MUST BE ATTEMPTED

A ban on food advertising to children is not only unconstitutional, but is also unnecessary. A significant number of other approaches exist, which, under Supreme Court jurisprudence, must be attempted before a ban on speech.

A. Strengthen the Time, Place, and Manner Restrictions of the Children’s Television Act.

The Children’s Television Act (“CTA”) is one example of a constitutional and effective means of enforcing certain restrictions on advertising. The CTA imposes a limit on the amount of commercials (10.5 minutes per hour on weekends and 12 minutes per hour on weekdays) that broadcasters are allowed to air during children’s television programs. These restrictions are not so extensive that they are impossible to implement, and by not regulating content, they do not infringe on First Amendment protections. Further reducing the amount of commercial time per hour in children’s broadcast television programming will result in less exposure to food advertisements.

B. Greater State-Level Mandates on School Nutrition

Since children spend such an abundance of time in school, and consume roughly 40% of their daily calories at school, another approach toward preventing childhood obesity would be for state governments to more closely regulate school nutrition. California, for instance, recently passed a number of
laws that specify the types of beverages to be sold in schools, impose restrictions on portion sizes and kinds of food sold, and establish a program that requires the distribution of fruits and vegetables at school breakfasts. This type of regulation can address needs of school students in particular states and will add another layer of education about healthy eating in the school environment.

C. Focus on Self-Regulatory Efforts

Self-regulatory efforts are powerful mechanisms to combat childhood obesity, and great strides are being made in both the food and advertising industries. In 2006, The Children’s Advertising Review Unit updated its Self-Regulatory Program for Children’s Advertising, which requires advertisers to not only acknowledge that they have special responsibilities in advertising to children, but to also explore ways that advertising to children can serve an educational role. Additionally, ten of the largest food and beverage companies have signed onto the Children’s Food and Beverage Advertising Initiative, a self-regulation program that encourages advertising healthy food choices to children.

D. Parental Education

In choosing what food to buy, parents play a significant role in the eating habits of their children. Consequently, efforts to educate parents about nutrition for themselves and for their children could have a strong effect on the
eating habits of their children. After all, a three year old cannot walk into a Giant supermarket and buy the newest high-sugar cereal that she saw advertised on television. Her parent must acquiesce to her request, and as a result starts bad eating habits that will last a whole lifetime.

CONCLUSION

As this WORKING PAPER has demonstrated, a ban on food advertising to children is both unconstitutional and unnecessary. Although there may be a correlation between children who view more advertising and those who are obese, this could be a result of those children leading a more sedentary lifestyle of watching television, surfing the Internet, etc., and not simply the result of the advertisements they see. The complexity of the childhood obesity epidemic requires a multifaceted approach to combating it. Banning advertising of food products to children does not eliminate the source of the problem.
ENDNOTES


2. Calls for this type of broad regulation come from medical groups, consumer advocacy groups, and the like. The American Academy of Pediatrics has called on Congress to pass legislation prohibiting junk food commercials on TV shows aimed at children. See Jessica Fraser, *Pediatricians call for ban on junk food advertising to children*, Dec. 12, 2006, http://www.naturalnews.com/021278.html (last visited June 27, 2008). Additionally, the Campaign For A Commercial-Free Childhood, a consumer advocacy group that works to limit marketing to children, has also called for greater regulation. Dr. Susan Linn, the Director of the CCFC, has argued several times that Congress should consider strong regulation of food advertising to kids. See Campaign for a Commercial Free Childhood Home Page, http://www.commercialexploitation.org (last visited Dec. 13, 2007).

3. News Release, U.S. Dep’t of Health and Human Servs., HHS Launches Childhood Overweight and Obesity Prevention Initiative (Nov. 27, 2007) available at http://www.hhs.gov/news/press/2007pres/11/pr20071127a.html (last visited Dec. 18, 2007). Today, almost 14% percent of children between the ages of 2 and 5 are considered obese; the incidence level increases to just under 19% for those aged 6 to 11. According to the National Health and Nutrition Examination Survey conducted from 1976 to 1980, children aged 2-5 had an obesity incidence level of 5%. The same study found that 6.5% of children aged 6-11 were obese. Thus, the average incidence rate of obesity in children aged 2-11 was 5.75% in 1980. Id. Between 2003-2004, a similar study was conducted. The results were staggering – 13.9% of children aged 2-5, and 18.8% of children aged 6-11, were obese. This yields an average obesity level of 16.5% for children between the ages of 2 and 11. Comparatively, this represents a 287% increase between 1980 and 2004. Id More information on the National Health and Nutrition Examination Surveys can be found at http://www.cdc.gov/nchs/nhanes.htm.

4. Wendy E. Parmet and Jason A. Smith, *Free Speech and Public Health: A Population-Based Approach to the First Amendment*, 39 Loy. L.A. L. Rev. 363, 395 (2006) (summarizing research that showed a drastic jump of television ads viewed by children per year, from 20,000 in the 1970s to about 40,000 in the 1990s). Additionally, the authors cite a study that reports that in the 1980s, the cost of advertising directed at children totaled 100 million, and in 2006 this total jumped to $15 billion. Id.

5. Ramsey, supra note 1, at 367.


10. Id.

11. Brooke Courtney, Is Obesity Really the Next Tobacco? Lessons Learned from Tobacco for Obesity Litigation, 15 Annals Health L. 61, 70 (2006). Television alone may account for as many as 40,000 ads annually, with roughly 19% of these ads seen promoting food and drink products. Id. Roughly 19% of these are advertisements promoting food and drink products. Kaiser Family Foundation, Food for Thought: Television Food Advertising to Children in the United States 11 (March 2007), available at http://www.kff.org/entmedia/upload/7618.pdf (last visited June 27, 2008) [hereinafter Kaiser 2007 Report]. On child-specific cable networks, the advertising of candy and snack products accounts for 52 seconds of every broadcast hour. Id.

12. Mercatus Center, supra note 7, at 5.

13. Id.


15. Mercatus Center, supra note 7, at 5. Although the Mercatus Center does identify some potential causes for the correlation between childhood obesity and television-watching in children, they do not believe there is a causation relationship, stating “Due to the difficulty of finding a causal relationship . . . there is no consensus as to why television viewing correlates so strongly with obesity. We believe, however, that there is little evidence that advertising causes obesity.” Id.


17. U.S. Const., amend. I.

19. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (stating that, in contrast to the freedom of speech in public places, subject to appropriate regulation for the public interest, “the Constitution imposes no such restraint on government as respects purely commercial advertising”).


21. *Id.*


23. Willette, *supra* note 6, at 569.


25. *Id.*

26. *Id.* at 561.

27. *Id.* at 564-567.

28. *Id.* at 587-590.


30. *Lorillard*, 533 U.S. at 584 (Thomas, J., concurring).


34. *Kaiser 2004 Issue Brief*, supra note 9, at 10. It has been noted that the influence of advertising varies greatly depending on the age of the child. Children under 12 years old are much more likely to be influenced by food marketing than children between the ages of 12 and 18. *Kaiser 2007 Report*, *supra* note 11, at 7.

36. See Ramsey, supra note 1, at 362, 365.


41. Mercatus Center, supra note 7, at 7.

42. Willette, supra note 6, at 575.

43. Mercatus Center, supra note 7, at 9.