

Is Ronald McDonald the Next Joe Camel? Regulating Fast Food Advertisements That Target Children in Light of the American Overweight and Obesity Epidemic

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I. INTRODUCTION

In 1995, the battle against tobacco industries reached a new frontier. After countless failed lawsuits, public skepticism, and decades of tobacco industry internal exposure, attorney generals from various states attempted to certify a nationwide class action against the five largest tobacco companies based on the “novel” theory first acknowledged in *Cipollone v. Liggett Group, Inc.*¹ that tobacco was an addictive drug. In this proposed class action,² instead of seeking damages attributable to smoking-related illnesses, the plaintiffs sought compensation for economic losses due to the injury of nicotine addiction, including emotional distress and funds expended in efforts to stop smoking.³ This mass torts case was anticipated to be one of the largest class actions attempted in federal court and was well on its way to taming the tobacco beast.

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¹ 893 F.2d 541, 563 n.19 (3d Cir. 1990) (stating that if a plaintiff can show that he or she became addicted to nicotine as a result of smoking, then a jury can consider the effects of cigarettes smoked after addiction when determining whether a tobacco company’s “conduct proximately caused [a plaintiff’s] lung cancer”).

² *Castano v. American Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995), *rev’d*, 84 F.3d 734 (5th Cir. 1996). The district court certified the class as “all nicotine-dependent persons in the United States, its territories, possessions and the Commonwealth of Puerto Rico, who have purchased and smoked cigarettes manufactured by the defendants.” Notwithstanding, the class complaint was later dismissed due to the problem with proceeding to trial on the alleged new theory and due to the procedural difficulties with applying various state laws. *Id.*

³ *Id.*

However, in November 1998, the five largest tobacco companies -- recognizing the prohibitive costs associated with multi-state proceedings -- developed a settlement strategy that would collectively resolve all the lawsuits in one Master Settlement Agreement.⁴ The terms of the agreement required the tobacco industry to pay an average of ten billion dollars per year to each of the forty-six states into the indeterminate future and also restricted cigarette advertising and marketing.⁵ With one week to accept the offer, and with thirteen states already signed on to the tentative agreement, the other states quickly agreed to the terms.⁶

Although settlement funds were intended to pay for tobacco related public health measures, and educate children against smoking, the money has not served this purpose, due to state budget shortfalls, and a lack of legal incentive for states to keep their promises.⁷ Consequently, the tobacco industry continues to thrive, outspending and outsmarting states' efforts to underscore the hazards of smoking.⁸ Despite anti-tobacco efforts and forty years of building awareness, fighting skepticism, and creating social change, the smoking epidemic continues to smolder, killing hundreds of thousands of Americans a year.⁹

Unabashed by anti-tobacco litigation failures, anti-fast-food litigators embarked on their own crusade in the name of suffering overweight and obese people of the United States. They, undoubtedly, will encounter many of the same roadblocks anti-tobacco once faced: public hostility, scientific doubt, political disregard, and more. Advocates remain hopeful, however, as they focus on the one group that undeniably needs their support and protection: children. Because children spend too much time in front of the television, not enough time exercising, and continue to eat too many meals at fast food establishments, the percentage of overweight and obese children is rising

⁴ Robert L. Kline, *Tobacco Advertising After the Settlement: Where We Are and What Remains to be Done*, 9 KAN. J.L. & PUB. POL'Y 621, 622 (2000).

⁵ *Id.* at 621.

⁶ *Id.* at 622.

⁷ Pete Du Pont, *Youths Remain Lit Up*, WASH. TIMES, Dec. 28, 2000, at A15; Thomas Farragher, *Up in Smoke/First of Two Parts; Little of \$246B Deal Fights Tobacco*, BOSTON GLOBE, Aug. 9, 2001, at A1; Robert E. Pierre, *Tobacco Tempts States in Financial Need; Settlement Funds, Tax Increases Help Make Ends Meet*, WASH. POST., June 30, 2002, at A03.

⁸ Farragher, *supra* note 7, at A1. "The firms are now spending more than ever, about \$8 billion annually, to promote their products. That's more than 10 times the amount states are spending to underscore the hazards of smoking."

⁹ Dr. Alan Blum; Eric Solberg; Howard Wolinsky, *Precious little progress in war on smoking*, CHICAGO SUN-TIMES, Jan. 11, 2004, at 38.

at a disturbing rate.¹⁰ Moreover, children are particularly vulnerable to the infiltration of fast food marketing, which research shows directly affects children's eating habits.¹¹ The question remains, if anti-tobacco litigators can fight Joe Camel and win, surely anti-fast food litigators can fight Ronald McDonald. Or, can they?

After a brief look at recent fast food litigation, this Comment will first present an overview of the current overweight and obesity crisis among children, and its connection with the rise in fast food marketing directed at them. The next two sections examine the potential avenues of legal recourse modeled after tobacco litigation, and the limitations and regulation blockades preventing restrictions on advertisements. Finally, after predicting a doubtful future for an absolute ban on advertisements targeting children, this Comment concludes that anti-fast food advocates must present legal solutions to balance adult free-speech rights and vulnerable children's right to protection from exposure to fast-food advertisement. Moreover, major policy changes and political and social vigilance is needed to prevent complete inundation of fast-food commercial marketing to America's children.

II. A NATION IN CRISIS

A. *The Epidemic of Overweight and Obese Americans*

The American obesity epidemic¹² is no longer an emerging issue in news and politics; it has arrived.¹³ Although Americans have been

¹⁰ Meredith May, *Treatment costs rise with number of obese children; Figure on overweight kids doubles to 13 percent in 10 years*, THE SAN FRANCISCO CHRONICLE, May 2, 2002, at A3; Aline Mendelsohn, *Body/Tipping Scales Weight in Children Is a Delicate Balance*, THE SUNDAY OREGONIAN, Oct. 7, 2001, at L01.

¹¹ See e.g., Laura Fording, *Food For Thought: Why are Restaurant Menus for Kids Oozing with Fat?* Newsweek Web Exclusive, April 24, 2004, at <http://www.msnbc.msn.com/id/4361797/>; Elizabeth Lee, *Psychologists Call for Restrictions on Ads Aimed at Children; Every Kids' Menu Offers Fried Chicken, Nuggets or Burgers*, THE TORONTO STAR, Feb. 27, 2004, at F03; Liz Kowalczyk, *For Kids, A Steady Diet of Food Ads TV, Net Marketing Blitz Studied For Links To Childhood Obesity*, THE BOSTON GLOBE, Feb. 25, 2004, at C1.

¹² "Overweight" is defined as a body mass index (BMI) value of 27.3 percent or more for women and 27.8 percent or more for men. "Obesity" is defined as a BMI of 30 and above. A BMI of 30 is about 30 pounds overweight. These terms are based on an analysis of BMI relative to the risks of disease and death, generally signify the extent of obesity, and are not different "types" of fatness. However, obesity is much more likely to cause serious health problems compared to being overweight. For stylistic purposes this comment may only refer to one or the other, but should be read as referring to the

gaining weight for decades, the latest movement against excessive weight-gain and obesity emerged in 1999 when the U.S. Department of Health reported that 61% of American adults were overweight, 13% of children and adolescents were overweight, and obesity caused approximately 300,000 deaths a year.¹⁴ In this report, the Surgeon General, Dr. David Satcher, predicted if the number of overweight and obese Americans continued to grow, unabated, the epidemic would “cause as much preventable disease and death as cigarette smoking.”¹⁵ Three years later, his prediction came to fruition when Congress reported the costs of treatment, prevention, and health-related incidents related to overweight and obese Americans, an estimated \$117 billion, exceeded the costs of health-related incidents related to tobacco.¹⁶

Irrespective of these alarming statistics, the federal government is slow, and perhaps unwilling, to address the effects of the fast food industry on the expanding American waistline.¹⁷ The closest move

unique health risks of both. *Defining Overweight and Obesity*, available at <http://www.cdc.gov/nccdphp/dnpa/obesity/defining.htm> (last visited May 20, 2004); *Overweight and Obesity Guidelines*, at <http://www.medicinenet.com/script/main/art.asp?articlekey=6870> (last visited May 20, 2004).

¹³ Robert Dodge, *Battle to Reduce Nation's Waistline Overwhelms Political Landscape*, THE DALLAS MORNING NEWS, November 9, 2003. Deirdre Byrne, an analyst tracking politics of the obesity epidemic at the National Conference of State Legislatures states this issue “is not emerging. It is already here.”

¹⁴The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity [hereinafter “Call To Action”] § 1 (U.S. Dept. of Health & Human Servs., 2001), at XIII, 1, 11, available at, <http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf>. The National Institutes for Health's definitions of overweight and obesity adopted by the Surgeon General states that an adult with a Body Mass Index (BMI) between 25kg/m and 29.9 kg/m is typically overweight and an adult with a BMI of 30 kg/m or more is typically obese. *Id.* at 11. See also, Ali H. Mokdad et al., *The Continuing Epidemic of Obesity and Diabetes in the United States*, 286 J. AM. MED. ASS'N 1196 (2001).

¹⁵ Call To Action, *supra* note 14, at XIII.

¹⁶ Improved Nutrition and Physical Activity Act, H.R. 5412, 107th Cong. § 2(1)(2002).

¹⁷ Perhaps the greatest example of Congress' competing loyalty to the fast-food industry is Senator Mitch McConnell proposed “Commonsense Consumption Act of 2003.” This bill introduced in July 17, 2003 would “prohibit civil liability actions from being brought or continued against food manufacturers, marketers, distributors, advertisers, sellers, and trade associations for damages or injunctive relief for claims of injury resulting from a person's weight gain, obesity, or any health condition related to weight gain or obesity.” Commonsense Consumption Act of 2003, S. 1428, 108th Cong. (2003). This bill, renamed the “Personal Responsibility in Food Consumption Act and known on Capitol Hill as “The Cheeseburger Bill,” was criticized by Democrats as unnecessary and a misplaced priority for the Republican majority.

toward government regulation was initiated in November of 2003, when both the House of Representatives and the Senate proposed legislation requiring chain restaurants to provide nutritional information and labeling for the food served.¹⁸ On November 5, 2003, Connecticut Congresswoman Rosa DeLauro introduced the “Menu Education and Labeling Act,” a proposed regulation that would require food establishments, with twenty chain restaurants or more, to “list, adjacent to each food item listed, on menus, menu boards, and other signs, the total number of calories, grams of saturated plus trans fat, and milligrams of sodium per menu item, as offered for sale, in a clear and conspicuous manner.”¹⁹

Opponents of litigation, governmental regulation, and proponents of “personal responsibility” continue to criticize this bill as an attempt to scapegoat fast food restaurants for people’s poor personal choices, and as an impractical method for combating obesity.²⁰ On March 10, 2004,

However, backed heavily by the National Restaurant Association and the National Federation of Independent Businesses, this bill was championed by 221 Republicans and 55 Democrats. Carl Hulse, *Vote in House Offers a Shield In Obesity Suits*, N.Y. TIMES, March 11, 2004, at section A, page 1.

¹⁸ H.R. 3444, 108th Cong. (2003).

¹⁹ *Id.*

²⁰ Dodge *supra* note 13. Dodge reports:

Steven Anderson, president of the National Restaurant Association, said he hopes Americans understand the complexity of weight-gain and will not turn restaurants into scapegoats. He commented that people need to take responsibility for their diet and exercise. “We do strongly believe in moderation and balance in a diet,” he said. “You do not have to eat everything that is put in front of you.” The sharp rhetoric of food company defenders like Berman, indicates that they expect a long and contentious fight on both judicial and public opinion battlegrounds. Berman, a longtime political operative, used confrontational tactics on behalf of the food and beverage industry to take on anti-drunk driving and anti-tobacco groups. Now he has focused on the obesity debate: “[e]verybody knows that when they go into a Burger King or McDonald’s they are not eating tofu.” Restaurants, he said, sell tasty, inexpensive and convenient food demanded by consumers. “So, should the answer be that they sell food that is hard to get, expensive and tastes like crap?” *Id.*

See also, Andrew Martin, *Nutrition Labels for Restaurant Meals Urged; But Firms Doubt It Will Curb Obesity*, CHICAGO TRIBUNE, Nov. 21, 2003, at 9, zone C. Martin reports:

politicians opposing “frivolous lawsuits” against the manufacturers, distributors, and sellers of food, responded by passing “The Personal Responsibility in Food Consumption Act.”²¹ Dubbed the “Cheeseburger Bill,” this law would block lawsuits from being filed against restaurants in federal or state courts and is co-sponsored by well over ten times the number of representatives that supported DeLauro’s bill.²² In addition, the White House endorsed the bill, stating that “food manufacturers and sellers should not be held liable for injury because of a person’s consumption of legal, unadulterated food and a person’s weight gain or obesity.”²³

Most Americans agree with the White House, responding to efforts to regulate unhealthy eating habits as paternalistic infringements on autonomy, and resisting governmental interventions to regulate the fast food industry.²⁴ Therefore, unlike risky behavior related to smoking

Addressing an FDA-sponsored conference to analyze the links between nutrition labels and obesity, Mats Lederhausen, president of McDonald’s Business Development Group, said the restaurant chain opposes any labeling campaign that creates negative attitudes about its food. “Guilt, fear and anxiety are not good motivators,” Lederhausen told an audience of regulators, nutritionists and academics. That’s why most anti-smoking, anti-drinking and driving campaigns do not change behavior.” He also said he doubted the labels would have any impact because obesity rates have increased in the dozen years since nutritional labels were required on packaged foods. Linda Bacin, vice president of Bella! Bacino’s pizza chain in Chicago, said nutritional labeling at the chain’s eight restaurants would be impossible because patrons customize their orders. Just recently, she said, a customer on the Atkins diet ordered a spinach pizza without the crust.

²¹ David Lightman, *Personal Duty vs. Public Duty; Policymakers Debate Legislation on Issues of Responsibility*, THE HARTFORD COURANT, Apr. 8, 2004, at A1.

²² Personal Responsibility in Food Consumption Act, H.R. 339, 108th Cong. (2003); Siobhan Morrissey, *Food Fight: Cheeseburger Bill Triggers Debate Over Restaurant Liability When Diners Get Fat*, A.B.A. J. EREPORT (March 19, 2004), available at www.abanet.org/journal/ereport/m19printer.html.

²³ Hulse, *supra* note 17.

²⁴ Note: *The Elephant in the room: Evolution, Behaviorism, and Counter-advertising in the Coming War Against Obesity*, 116 HARV. L. REV. 1161 (2003). See also, *Weight Loss Expert To Testify in Congress on the Role of Personal Responsibility in America’s Obesity Debate; Expert Testimony Strives to Protect the Food Industry from Future Abusive Litigation*, BUSINESS WIRE, Oct. 16, 2003, at www.businesswire.com. According to a July 21, 2003 Gallup poll most Americans – nine out of 10 (89 percent) – do not think the fast food industry is legally responsible for diet-related problems. *Id.*

and alcohol consumption, unhealthy eating habits remain largely unregulated.²⁵

B. The Fat Tort

*Pelman v. McDonald's Corporation*²⁶ is the most well known attempt to hold fast food restaurants accountable for America's weight problems. The suit, brought by children and their parents who consumed meals regularly at McDonalds, alleged violation of consumer fraud provisions, deceptive advertising, and failure to adequately disclose nutrition information for foods high in fat, salt, sugar, and cholesterol.²⁷ United States District Judge Robert Sweet, an advocate of legalizing recreational drug use, and a firm believer of the "right to self-determination,"²⁸ posed the question, "[w]here should the line be drawn between an individual's own responsibility to take care of herself, and society's responsibility to ensure that others shield her?"²⁹ The Court did not fully answer this question, holding instead that the plaintiffs failed to sufficiently show the addictive nature of McDonald's food, or that plaintiffs' ingestion of their food proximately caused their own health problems.³⁰ Judge Sweet dismissed the complaint with leave to amend.³¹

In *Pelman*, Judge Sweet took represented what he considered the political and social majority. He opined the American juror is equally skeptical about fast food litigation and supported his opinion with recently collected statistics.³² Accordingly, recent fast food litigation produced a negative backlash, as the "masses have expressed their incredulity at and contempt for the litigious kids and parents – who won't take responsibility for a lifetime of chowing down Happy Meals."³³ Moreover, Marie Beaudette from the Legal Times reports:

A large majority of jurors think suits against fast-food companies are bogus, according to a study of juror attitudes

²⁵ *Id.*

²⁶ 237 F. Supp. 2d 512 (2003).

²⁷ *Id.* at 515.

²⁸ *Id.* at n. 2, 516.

²⁹ *Id.* at 516.

³⁰ *Id.* at 539-43.

³¹ *Id.* at 542-43.

³² *Id.* at n. 5, 518.

³³ *Id.* citing Debra Goldman, *Consumer Republic: Common Sense May Not Be McDonald's Ally for Long*, ADWEEK-E. ED., Dec. 2, 2002.

released [in October 2003] by the Defense Research Institute [DRI] and DecisionQuest. The study found that 89 percent of 2,119 participants didn't support fast-food suits, and 83 percent didn't think fast-food companies were responsible for addicting customers.³⁴

However, studies also indicate that American jurors are less forgiving of direct solicitation of children or misleading advertisements, in general. DRI's study concluded that 56 percent of jurors believe fast food advertisers should not target children, and 36 percent think fast-food restaurants should warn customers about the risks of eating their food.³⁵ "Jurors might believe a lawsuit against fast-food companies for causing obesity is ridiculous, yet they could support a lawsuit that punishes the company for not warning customers about the food's fat content," says DecisionQuest CEO Philip Anthony.³⁶

In addition, jurors react differently when presented with all the evidence in court. "Many new or novel theories originally sound crazy," says John Banzhaf, III, professor of law at The George Washington University.³⁷ Professor Banzhaf, a radical public interest lawyer, widely considered the "Ralph Nader of Junk Food," successfully sued McDonald's for failing to disclose its French fries were cooked in animal fat and later settled for \$12.5 million.³⁸ "One of the most effective ways to get social change is to sue people . . . If I go to Congress and say, 'Do something about obesity,' I wouldn't have the slightest chance in hell," comments Banzhaf, who previously led the charge against the tobacco industry, which resulted in hundreds of billions of dollars in settlements.³⁹

Regardless of litigation failures, successes, and public skepticism, cases of this ilk significantly affected fast food companies over the past year. Already, food companies motivated by changing consumer sentiments, and fears of class-action lawsuits, are cutting portion sizes, and offering healthier menus.⁴⁰ Schools are banishing snack foods and

³⁴ Marie Beaudette, *Junk [Food] Science*, LEGAL TIMES, Oct. 20, 2003, at O3.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Judith Weinraub, *The Blame Game; Is It Our Fault We Like Bad Fats?* WASH. POST, December 10, 2003, at F01.

³⁹ Deb Price, *Obesity fight heads from fork to court; Opponents try to ban suits against food industry*, THE DETROIT NEWS, Dec. 14, 2003, at 15A.

⁴⁰ *Id.*; see also, Alice Lesch Kelly, *Can We Downsize? Americans Have Long Asked for Small Portions; now They're Here*, L.A. TIMES, Apr. 5, 2004, at Part F, pg. 1. See also,

sodas, and policymakers are looking for ways to pry children from Playstations and send them back to the playground.⁴¹ Notwithstanding these efforts, the new movement's hype has not curtailed fast-food advertising, especially advertising targeting children.

C. *A "Fast Food Nation"*

Eric Schlosser, author of *Fast Food Nation*, attempted to expose the fast food industry as a dominating and infiltrating "dark side of the all-American meal."⁴² Schlosser details the multifaceted injurious consequences of fast food consumption to Americans and American culture, ranging from obesity to labor abuse. Almost as pervasive as the food itself, are the sophisticated and penetrating advertising and marketing strategies cultivating the fast food nation pop culture. Schlosser is especially concerned about the bombardment of advertisements toward children, and dramatic reports of public school districts selling advertising rights in their hallways to accommodate for revenue shortfalls.⁴³ Students are forced to look at ads, and even digest solicitation incorporated into classroom instruction, to fund their education.⁴⁴ In their free time children need only visit Internet sites, including Ronald.com and burgerking.com, to make the connection that fun, games, toys, and the Internet are synonymous with the joys of eating fast food.⁴⁵ Schlosser appeals to Congress for a change:

McDonald's Corporation Announces Worldwide Nutrition Director, McDonald's Corporate Press Release 10/08/2003, available at www.mcdonalds.com/corporate/press/corporate/2003/10082003/index.html. Kathy Kapica, as Worldwide Nutrition Director, will help "guide McDonald's nutrition and lifestyles initiatives." *Id.*

⁴¹ Dodge, *supra* note 13.

⁴² ERIC SCHLOSSER, *FAST FOOD NATION* (Perennial 2002). Beginning in the 1950's when hamburgers and French fries became the quintessential American meal, American families embraced the cheap, convenient and quick meal as an answer to the demanding and busy American lifestyle. Indeed, the proliferation of fast food chain restaurants coincided with the rapid expansion of the developing interstate highway system throughout the country. Today, the typical American consumes approximately three hamburgers and four orders of French fries every week. In 2001, Americans spent more than \$110 billion on fast food, as compared to 1970 when they spent \$6 billion.

⁴³ *Id.* at 31-57.

⁴⁴ *Id.*

⁴⁵ See Ronald.com, available at <http://www.ronald.com> (last visited May 20, 2004); BK® Kids, available at <http://www.burgerking.com/BigKids/index.aspx> (last visited May 20, 2004).

Today the health risks faced by the nation's children far outweigh the needs of its mass marketers. Congress should immediately ban all advertisements aimed at children that promote foods high in fat and sugar. Thirty years ago Congress banned cigarette ads from radio and television as a public health measure - and those ads were directed at adults. Smoking has declined ever since. A ban on advertising unhealthy foods to children would discourage eating habits that are not only hard to break, but potentially life-threatening. Moreover, such a ban would encourage the fast food chains to alter the recipes for their children's meals. Greatly reducing the fat content of Happy Meals, for example, could have an immediate effect on the diet of the nation's kids. Every month more than 90 percent of the children in the United States eat at McDonald's.⁴⁶

In contrast, on October 28, 2003, the British Parliament introduced a bill that would ban fast food companies from advertising to preschool children as an attempt to curtail Britain's own rising problems with childhood weight-gain and obesity.⁴⁷ Debra Shipley, a Labour party representative who introduced the bill, stated, "irresponsible food and drink manufacturing ruthlessly target children through television advertising and clever marketing strategies . . . no mention is made of the fact that high fat, high sugar and high salt food and drink can cause obesity and diabetes."⁴⁸ "My bill," says Shipley "will prevent these kinds of foods from being foisted onto preschool children who have no understanding of the nature of advertising."⁴⁹

European countries, in general, are more open to tighter restrictions on television advertising targeting children, and, in light of their own rising weight and obesity problems among adults and children, these countries lead in protecting children from fast food advertisements.⁵⁰ The regulation of television advertising to children does, however, vary widely between the countries within the European

⁴⁶ Schlosser, *supra* note 42, at 262.

⁴⁷ *Fast Food Firms Face Screen Test*, THE GUARDIAN NEWSPAPER (London), Oct. 23, 2003, at 19.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See Janice H. Kang, *Barbie Banished from the Small Screen: The Proposed European Ban on Children's Television Advertising*, 21 NW. J. INT'L L. & BUS. 543 (2001).

Union.⁵¹ Nonetheless, that any regulations are promulgated starkly contrasts Congress's inaction.

III. FAST FOOD ADVERTISING AND TOBACCO ADVERTISING

A. *Joe Camel and Ronald McDonald*

McDonald's, the Nation's largest fast food restaurant, spends more money on advertising and marketing than any other brand.⁵² Long before other companies had the notion, McDonald's developed an innovative advertising strategy to build a relationship with children that would last a lifetime.⁵³ Since the explosion of advertising targeting children during the 1980's, it is not uncommon for companies, driven by efforts not only aimed at present consumption, but a lifetime of future consumption and brand loyalty, to target children before they can talk. "Twenty-five years ago, only a handful of American companies directed their marketing at children -- Disney, McDonald's, candy makers, toy makers, manufacturers of breakfast cereal. Today children are being targeted by phone companies, oil companies, and automobile companies, as well as clothing stores and restaurant chains."⁵⁴ Thus, many children recognize logos before they can pronounce their own name.⁵⁵

Fast food manufacturers engage in targeted advertising very similar to tobacco advertising used before the success of anti-tobacco litigation and federal regulation.⁵⁶ Vulnerable groups, such as the poor, minorities, and children, once the target of tobacco advertisements, are now actively pursued demographics of fast-food advertising.⁵⁷ Resultantly, Ronald McDonald is recognized by 96% of all American schoolchildren, regardless of race or family income, and is second only to Santa Claus as the most recognized fictional character.⁵⁸

Similarly, in 1991, the Journal of American Medical Association reported Joe Camel, the mascot of Camel cigarettes produced by Reynolds Tobacco Company, was as famous to children as Mickey

⁵¹ *Id.*

⁵² Schlosser, *supra* note 42, at 4.

⁵³ *Id.* at 40-41.

⁵⁴ *Id.* at 42.

⁵⁵ *Id.* at 43.

⁵⁶ John Alan Cohan, *Obesity, Public Policy and Tort Claims Against Fast-Food Companies*, 12 WIDENER L.J. 103, 110-114.

⁵⁷ *Id.*

⁵⁸ Schlosser, *supra* note 42, at 4.

Mouse.⁵⁹ This alarming fact, along with the dramatic rise in adolescent smoking, sparked social and political advocates to challenge the Joe Camel advertising campaign. Shortly thereafter, anti-smoking legal advocates in California brought suit against Reynolds Tobacco Company.⁶⁰ The tobacco company attempted to dismiss the suit, claiming The Federal Cigarette and Labeling Act preempted the plaintiff.⁶¹

Nevertheless, the Supreme Court of California held:

As early as 1891, the Legislature cared deeply enough about smoking and minors that it prohibited the sale of cigarettes to them, just as it earlier had banned minors from houses of prostitution and would later ban them from prizefights. For over a century, with watchful eye, in its role as *parens patriae*, it has maintained a paternalistic vigilance over this vulnerable segment of our society. It is now asserted that plaintiff's effort to tread upon Tobacco Road is blocked by the nicotine wall of congressional preemption. The federal statute does not support such a view. Congress left the states free to exercise their police power to protect minors from advertising that encourages them to violate the law.⁶²

After the plaintiff survived the summary judgment challenge, defendants quickly settled, saying goodbye to "Old Joe."⁶³ But, the war against tobacco advertising raged on throughout the country and in various other forums with political, social, and public support.⁶⁴

Few will deny the seductive images promoted a lifelong addiction and impeded children's right to be free from advertisements enticing them to

⁵⁹ Paul Fischer, et al., *Brand Logo Recognition by Children Aged 3 to 6 years: Mickey Mouse and Old Joe the Camel*, J. AM. MED. ASSOC., 3145, 3147 (Dec. 11, 1991). A survey of 229 children, ages three to six years old, found that the Disney Channel logo was significantly more recognizable (86.1%) than Joe Camel (30.4%). However, by age six there was no statistically significant difference between recognition of the Disney Channel logo (100%) and the Joe Camel logo (91.3%).

⁶⁰ Mangini v. R.J. Reynolds Tobacco, 875 P.2d 73 (Cal. 1994).

⁶¹ *Id.*

⁶² *Id.* at 83.

⁶³ William Booth, *California Sends Joe Camel To an Earlier Retirement*, WASH. POST, Sept. 10, 1997, at A10.

⁶⁴ See Jeff I. Richards, *Politicizing Cigarette Advertising*, 45 CATH. U.L. REV. 1147 (1996).

act illegally.⁶⁵ Even tobacco advertisers' First Amendment Constitutional rights yielded to the public policy of protecting children from destructive influences.⁶⁶

B. First Amendment Protection of Commercial Advertisement

The First Amendment provides citizens with a fundamental right to free speech, but historically, the Supreme Court has struggled with how much protection to afford to commercial speech.⁶⁷ At one point, the Court declined to give any First Amendment protection to commercial speech.⁶⁸ Thirty years later, that decision was repudiated by *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, when the Court explained that speech “which does no more than propose a commercial transaction” is protected by the First Amendment.⁶⁹

In 1980, the Supreme Court further explained previous commercial speech cases by articulating a four-part test to analyze the appropriate regulation of commercial advertisements in *Central Hudson Gas & Electric v. Public Service Commission*.⁷⁰ To determine whether a given restriction on commercial speech is permitted under the First Amendment: (1) the proscribed expression must be a lawful activity and must not be misleading; (2) the asserted government interest must be substantial; (3) the regulation must directly advance the asserted governmental interest; and (4) the regulation is not more extensive than is necessary to serve the interest.⁷¹

The Supreme Court's loyalty to the four-part test provides fairly reasonable and predictable results over time.⁷² Most of the Supreme

⁶⁵ Donald W. Garner and Richard J. Witney, *Protecting the Children From Joe Camel and his Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation*, 46 EMORY L.J. 479, 486-487 (1997).

⁶⁶ *Id.*

⁶⁷ David S. Modzeleski, Note, *Lorrillard Tobacco v. Reilly: Are we Protecting the Integrity of the First Amendment and the Commercial Free Speech Doctrine at the Risk of Harming our Youth?*, 51 CATH. U.L. REV. 987 (2002).

⁶⁸ See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (“The Constitution imposes [no] restraint on government as respects purely commercial advertisement.”)

⁶⁹ 425 U.S. 748, 762 (internal quotations omitted).

⁷⁰ 447 U.S. 557 (1980) (holding that a New York regulation that flatly prohibited electric utilities from promoting the use of electricity was unconstitutional).

⁷¹ *Id.* at 566.

⁷² Garner, *supra* note 65, at 493 - 496. *But see*, *Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), which expanded the Central Hudson test beyond the four-part test by creating a “vice” exception to the commercial speech doctrine.

Court's commercial speech decisions applying the four-part test turned on application of the third and fourth factors.⁷³ However, in 1996, a divided court provided for an additional prong to the test in *44 Liquormart, Inc. v. Rhode Island*, stating that where the government completely prohibits dissemination of truthful, non-misleading consumer information, such as price or availability, the First Amendment applies, and government regulation will be almost certainly struck down as unconstitutional.⁷⁴

By the year 2000, the commercial speech doctrine largely confronted issues regarding restrictions on what adult consumers may hear or see in advertisements, but did not address restrictions on advertisements targeting children.⁷⁵ At that time, the Supreme Court had not squarely considered whether a governmental body possessed greater authority to restrict commercial speech when its purpose was to shield children from potentially harmful commercial messages.⁷⁶ The *Lorillard Tobacco Co. v. Reilly*⁷⁷ decision "had enormous legal and historical significance as the first in which the Supreme Court decided the constitutionality of an advertising restriction aimed at protecting children, and the first in which the Court directly decided the constitutionality of government attempts to restrict tobacco advertising."⁷⁸

C. *Lorillard Tobacco Co. v. Reilly*

In *Lorillard Tobacco*, the Attorney General of Massachusetts promulgated a comprehensive regulation restricting the advertising and sale of cigarettes, smokeless tobacco, and cigars in specific outdoor locations for the general purpose of combating underage cigarette smoking and tobacco use.⁷⁹ A group of tobacco manufacturers and

This test was never followed in subsequent cases and was later rejected. Garner, *supra* note 65, at 493 – 496.

⁷³ Michael Hoefges, *Protecting Tobacco Advertising Under the Commercial Speech Doctrine: The Constitutional Impact of Lorillard Tobacco Co.*, 8 COMM. L. & POL'Y 267, 275 (2003).

⁷⁴ 517 U.S. 484 (1996). Two liquor retailers challenged Rhode Island laws that prohibited all advertising of the price of alcoholic beverage, except within the premises of the establishment.

⁷⁵ Hoefges, *supra* note 73, at 269.

⁷⁶ *Id.*

⁷⁷ 533 U.S. 525 (2001).

⁷⁸ Hoefges, *supra* note 73, at 269.

⁷⁹ *Lorillard Tobacco Co.*, 533 U.S. at 533.

retailers, including the top four U.S. cigarette manufacturers -- Philip Morris Cos., Inc., R.J. Reynolds Tobacco Holdings, Inc., Brown & Williamson Tobacco Co., and Lorillard Tobacco Co. -- immediately filed suit challenging the regulation.⁸⁰ The defendants asserted several defenses, including preemption by the Federal Cigarette Labeling and Advertising Act (FCLAA), which mandated health warnings for cigarette packaging and advertisement, and violation of the First and Fourteenth Amendments.⁸¹

The Supreme Court ruled separately on different aspects of the Massachusetts law in a complex, and divided, decision. The Court held 5-4 the FCLAA pre-empted Massachusetts from regulating outdoor and retail point-of-sale cigarette advertising.⁸² However, it found FCLAA did not apply to cigar and smokeless tobacco advertising, and therefore, the regulation required analysis under the *Central Hudson* commercial advertisement doctrine.⁸³ Since neither party contested the advertisers' entitlement to First Amendment protection or the State's interest in combating the use of tobacco products by minors, only the last two steps of the *Central Hudson* analysis applied; specifically, (3) whether the regulation directly advances the governmental interest asserted, and (4) whether the regulation is not more extensive than is necessary to serve the interest.⁸⁴

I. Third Test—"Directly Advances"

"The third step of *Central Hudson* concerns the relationship between the harm that underlies the State's interest and the means identified by the State to advance that interest."⁸⁵ Under the third test, the courts require proponents of a restrictive regulation to justify the relationship between the regulation and the public policy it serves through studies or empirical data.⁸⁶ The regulation must have the power to produce the desired effect in meeting its asserted goal.⁸⁷

The smokeless tobacco and cigar petitioners contended the Massachusetts' regulation did not satisfy this third step due to "lack of

⁸⁰ *Id.* at 536-37.

⁸¹ *Id.* at 537.

⁸² *Id.* at 551.

⁸³ *Id.* at 553.

⁸⁴ *Id.* at 555.

⁸⁵ *Id.*

⁸⁶ Hoefges, *supra* note 73, at 279.

⁸⁷ *Id.* ("The [Supreme] Court [remains] deeply divided on the quantity and quality of the evidence needed to meet the burden of proving direct advancement.").

parity” between problems caused by cigarette and smokeless tobacco.⁸⁸ They also challenged the Attorney General’s lack of evidence that advertising was causally linked to tobacco use and questioned whether limiting advertisements would materially alleviate the problems of underage use of their products.⁸⁹ Justice O’Connor, writing for the majority, found ample evidence to support the Attorney General’s position, and concluded that regulation of smokeless tobacco and cigars passed the third test.⁹⁰

2. *Fourth Test—“Narrowly Tailored”*

The *Central Hudson* fourth step examines whether the restricted commercial advertisement regulation “is not more extensive than necessary to serve the interest that supports it.”⁹¹ To withstand the fourth test, the government must prove the regulation is narrowly tailored to achieve the desired objective by demonstrating that less restrictive means are either unavailable, or ineffective to meet legislative goals.⁹² As Justice Clarence Thomas pointed out in his concurrence in *44 Liquormart*, the evolution of the fourth prong of *Central Hudson* to the “narrowly tailored” objective renders restrictions on commercial advertisements more difficult, if not impossible, to surpass.⁹³

Unsurprisingly, Justice O’Connor found the outdoor and point-of-sale advertising regulation proposed by Massachusetts’ Attorney General did not satisfy the fourth prong.⁹⁴ Four justices, Breyer, Ginsburg, Souter, and Stevens, disagreed with the majority’s decision on the fourth factor, concluding the record did not support the claim that the Massachusetts law overreached.⁹⁵

3. *Thomas’s Concurrence and “Strict Scrutiny”*

⁸⁸ *Lorillard Tobacco*, 533 U.S. at 556-57.

⁸⁹ *Id.*

⁹⁰ *Id.* at 561.

⁹¹ *Id.* at 556, citing *Greater New Orleans Broad Ass’n v. United States*, 527 U.S. 173, 188 (1999) (holding that a ban on broadcast casino gambling advertising was too broad because government could directly regulate casinos by other methods).

⁹² Hoefges, *supra* note 73, at 281-82.

⁹³ *Id.* at 302.

⁹⁴ *Lorillard Tobacco* 533 U.S. at 570. The sales practice regulation that restricted tobacco products accessibility to salespersons only, was upheld.

⁹⁵ Hoefges, *supra* note 73, at 299-300.

Justice Thomas concurred with the majority's decision, but maintained his strong opposition to the *Central Hudson* test, in favor of a "strict scrutiny" test. Under Thomas' strict scrutiny test, "the advertising ban may be saved only if it is narrowly tailored to promote a compelling government interest."⁹⁶ If that interest could be served by an alternative, less restrictive of speech, the State must instead use the alternative.⁹⁷

Justice Thomas also responded in dictum to the Attorney General's claim that tobacco companies covertly targeted children in their advertising, as opposed to fast food's forthright advertisement. Justice Thomas conceded that although fast food is not as addictive as tobacco, children who are exposed to its advertisements suffer irreversible and "deleterious consequences":⁹⁸

Although the growth of obesity over the last few decades has had many causes, a significant factor has been the increased availability of large quantities of high-calorie, high-fat foods. Such foods, of course, have been aggressively marketed and promoted by fast food companies . . . there is considerable evidence that [fast food marketing campaigns] have been successful in changing children's eating behavior. The effect of advertising on children's eating habits is significant for two reasons. First, childhood obesity is a serious health problem in its own right. Second, eating preference formed in childhood tend to persist in adulthood.⁹⁹

Despite Justice Thomas' acknowledgment that cigarette advertisement tactics differ little from fast food advertisements, he deeply opposes restricting commercial advertisements that threaten public health or public morals.¹⁰⁰

4. *The Minority Opinion*

Justices Ginsburg, Breyer, and Souter joined Justice Stevens, in concurring in part and dissenting in part, to the majority decision.¹⁰¹

⁹⁶ *Id.* at 570-82.

⁹⁷ *Id.* at 582, citing *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

⁹⁸ *Id.* at 588.

⁹⁹ *Id.* at 587-88.

¹⁰⁰ *Id.* at 589-90.

¹⁰¹ *Id.* at 590.

Specifically, Justice Stevens strongly disagreed with the majority as to whether a state or locality, through its police powers to protect the health and safety of minors, and through the power to regulate land usage, may pass regulations that prevent the placement of cigarette advertisements, especially if placed near a school.¹⁰² Justice Stevens explained:

There was . . . no need to interfere with state or local zoning laws or other regulations prescribing limitations on the location of signs or billboards. Laws prohibiting a cigarette company from hanging a billboard near a school in Boston in no way conflict with laws permitting the hanging of such a billboard in other jurisdictions. Nor would such laws even impose a significant administrative burden on would-be advertisers, as the great majority of localities impose general restrictions on signage, thus requiring advertisers to examine local law before posting signs whether or not cigarette-specific laws are preempted.¹⁰³

Although the Supreme Court remains deeply divided on how to apply the *Central Hudson* analysis in commercial speech cases targeting children, there is room for regulating fast food advertisers through local and state powers, albeit in very limited circumstances, such as on school grounds or within a school zone. The problem of overweight and obese children, as evidenced by the most recent statistical findings, sufficiently establishes the need for direct advancement of a governmental interest under the third *Central Hudson* factor. However, under the fourth factor, “narrow tailoring,” the Court suggests that legislators must find more direct, narrow, and efficacious means of solving serious social and political problems, other than through limitations on commercial speech.¹⁰⁴ Even when a compelling regulatory goal of protecting children from the harms of tobacco usage exists, the government has little constitutional leeway to broadly restrict non-misleading commercial communication about lawful products and services.¹⁰⁵

IV. FEDERAL TRADE COMMISSION: REVISITING THE FTC’S ATTEMPT TO REGULATE ADVERTISEMENTS THAT TARGET CHILDREN

¹⁰² *Id.* at 591.

¹⁰³ *Id.* at 594.

¹⁰⁴ Hoefges, *supra* note 73, at 311.

¹⁰⁵ *Id.*

In 1978, the FTC attempted to ban all television ads directed at children, age seven and younger.¹⁰⁶ Compelling research indicated that young children, trusting that advertisement claims were true, could not delineate between television programming and commercials.¹⁰⁷ Michael Pertschuk, the head of the FTC, at the time, believed children should be shielded from advertising that preyed upon their immaturity, and was extremely vocal about his beliefs.¹⁰⁸ On April 27, 1978, the FTC proposed restrictions regarding television advertisements directed at children.¹⁰⁹

Shortly thereafter, advertisers, broadcasters, and the toy and food industries, waged a war against proposed restrictions through heavy Congressional lobbying, directly targeting Pertschuk. On May 8, 1978, a variety of advertisement agencies petitioned Pertschuk to recuse himself from participating in the children's advertisement inquiry because of his biased personal beliefs.¹¹⁰ Although advertisers failed to succeed in legally attacking Pertschuk, the influential lobbying group pressured Congress to block the proposed FTC regulations.¹¹¹ On May 28, 1980, Congress passed a law blocking the FTC from preventing advertisers

¹⁰⁶ Federal Trade Commission Staff Report on TV Advertising to Children [hereinafter FTC Staff Report] (1978), reprinted in *ADVERTISING AGE*, Feb. 27, 1978, at 73-77.

¹⁰⁷ Linda E. Demkovich, *Pulling the Sweet Tooth of Children's TV Advertising*, NAT'L J., January 7, 1978.

¹⁰⁸ See *Ass'n. of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1188-92 (D.C. Cir. 1979). Specifically, the dissent cites various public comments made by Chairman Pertschuk's, in which he refers to the "moral myopia of children's television advertising," and condemns advertisers, "for using sophisticated techniques like fantasy and animation [to]... manipulate children's attitudes." The dissent argued that the Pertschuk exhibited bias and prejudice against advertisers, quoting Pertschuk as stating, "[s]houldn't society apply the law's strictures against commercial exploitation of children, and the law's solicitude for the health of children to ads that threaten to cause imminent harm which ranges from increasing tooth decay and malnutrition to injection unconscionable stress into the child-parent relationship?" *Id.*

¹⁰⁹ FTC Staff Report, *supra* note 106, at 75.

¹¹⁰ *Ass'n of Nat'l Advertisers*, 627 F.2d at 1154. On appeal, the court held that the Appellee advertisers failed to show, by clear and convincing evidence, that Pertschuk "ha[d] an unalterably closed mind on matters critical to the disposition of the rulemaking."

¹¹¹ 15 U.S.C.S. § 57a(i) (1991). "Restriction on rulemaking authority of Commission respecting children's advertising proceedings pending on May 28, 1980. The Commission shall not have any authority to promulgate any rule in the children's advertising proceeding pending on the date of the enactment of the Federal Trade Commission Improvements Act of 1980 [enacted May 28, 1980] or in any substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice in or affecting commerce."

from targeting children, which remains the law today.¹¹² Although the FTC possesses some control over false advertising, it remains powerless to combat “non-misleading” advertising targeting children, despite research that proves children are incapable of discerning falsity from truth.¹¹³ The Congressional block on FTC regulation coincides with the explosion of advertisements in the early 1980’s, which continues to expand and remains unhindered today.¹¹⁴ A reconsideration of this policy is long overdue.

V. CONCLUSION

Kelly Brownell, Director of Yale’s Center for Eating and Weight Disorders, and author of, *Food Fight: The Inside Story of the Food Industry, America’s Obesity Crisis, and What We Can Do About It*,¹¹⁵ believes the American environment makes it very difficult for consumers to exert the personal responsibility necessary to combat unhealthy weight gain.¹¹⁶ According to Brownell, “if the environment provides reasonable access to a variety of healthy foods, we adjust and maintain good health. We choose. But when the environment becomes toxic, with heavy promotions, and good-tasting, high-calorie inexpensive foods the body can’t adjust, except in few cases where people exert extraordinary control.”¹¹⁷ Brownell believes the solution to the weight epidemic is to change the environment by making it easier to be responsible: “As a nation, we owe it to people to offer an environment where it’s easy to be healthy. We owe children schools where healthy foods are available, where there are no sugar snacks and soft drinks.”¹¹⁸

The question is, does the legislature care deeply enough about problems associated with children’s fast-food consumption to place restrictions on advertisements targeting children? And, can litigators challenge the constant bombardment of fast food advertising targeting children -- including Ronald McDonald -- as effectively as the equally seductive image of “Old Joe”? There are several reasons why anti-fast food advocates may not be able to imitate the success of anti-tobacco litigation.

¹¹² *Id.*

¹¹³ American Academy of Pediatrics, Policy Statement: Children, Adolescents, and Television, 95 PEDIATRICS 295, 295 (1995).

¹¹⁴ See Part IIA.

¹¹⁵ Contemporary Books 2003.

¹¹⁶ Weinraub, *supra* note 38.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

First, although the similarities of the advertising methods are uncanny, public sentiments regarding fast food advertising targeting children has not reached the same level of intensity and vigilance as that directed toward tobacco advertising. Undoubtedly, the health risks and concerns of fast food consumption by children have surpassed tobacco.¹¹⁹ Consumer advocates, ethicists, and public health researchers call for government intervention based on alarming health data, and psychological research establishing that children do not understand the context and meaning of advertisements they observe.¹²⁰ However, public and political outcries have not reached the level of emotional arousal that smoking advertisements once evoked, and sparked a successful legal movement.¹²¹

Moreover, consumers tend to believe fast-food consumption in moderation is not as harmful as smoking in moderation, which eventually promotes an addictive habit. According to Dale Romsos, a professor of nutritional sciences at Michigan State University, solid, scientific evidence that fast-food is an addiction driving the nation to obesity has not been produced.¹²² Many believe the harm caused by eating fast food is indirect, remote, or caused by intervening circumstances, such as lack of exercise, too much television, poor personal and independent choices, or genetics.¹²³

Banzhaf, the most visible and outspoken advocate of fast food litigation, does not agree:

It seems to me people can reasonably be expected to exercise personal responsibility only if the manufacturers of products provide meaningful disclosure and adequate warnings . . . Without that, people have no idea how dangerous trans fat is. Without a reference, a context,

¹¹⁹ See *supra* Part I.

¹²⁰ Denis Crouch, *Comment: The Social Welfare of Advertising to Children*, 9 U. CHI L. SCH. ROUNDTABLE 179 (2002).

¹²¹ *Id.* at 481. Civil disobedience tactics by outraged urban communities throughout the entire nation, Chicago, Baltimore, Dallas, Philadelphia, Detroit, and Oakland, protested against smoking and alcohol campaigns in targeted poor and minority neighborhoods. See also, Gary Ruskin, *The Fast Food Trap: How Commercialism Creates Overweight Children; Special Report: Kids and Corporate Culture*, MOTHERING, November 1, 2003. Ruskin calls on state and local officials to protect children by prohibiting fast food marketing in schools. He also lists “recent victories” of local legislatures that have passed bans on “junk food” sale in schools in Los Angeles, Oakland, Nashville, New York City, Philadelphia.

¹²² Garner, *supra* note 65.

¹²³ Cohan, *supra* note 56.

simply telling people something contains trans fat isn't enough. Despite the best of intentions, warnings are not just for the best and the brightest, but for all people -- forgetful, tired, fatigued. . . . And children too. It's hard to argue that a 9-year-old exercises personal responsibility.¹²⁴

Another hurdle litigators face is the legality of fast-food. Cigarette and alcohol consumption by minors, as a result of targeted advertisements, is illegal,¹²⁵ and clearly affronts parental authority and autonomy. Obviously, fast-food does not have the same legal consequences. Despite warnings, many families enjoy fast-food dining three or four times a week, adults and children alike; especially poor families who benefit from an inexpensive dining experience they could not otherwise afford.¹²⁶

However, some advocates believe "junk-food marketing" affronts parental authority. Michael Jacobson, executive director of the Center for Science in the Public Interest, continues to advocate against fast-food marketing to protect children's health:

Parents do have a big responsibility [in preventing children from eating at fast food outlets], but all of this marketing puts parents in a very unfair position. Companies are going directly to kids and saying "Eat this, eat this, drink this, drink this, it's yummy, you'll love it," and parents have to say, "No, no, no, no, no." And how many parents want to say "No" a thousand times It's totally unfair to allow these big companies who use the slickest advertising techniques they can devise to go around [parents], to go directly to our kids and say "Hey, Johnny, don't you want to eat junk food? Don't you want -- it's so good." That's simply unfair. Twenty-five years ago, the government tried to get junk-food advertising off of the children's television, but they were stopped by the toy industry, the food

¹²⁴ Weinraub, *supra* note 38.

¹²⁵ See generally, Mangini, *supra* note 60, at 78 (California Law); see also, Lorillard Tobacco, *supra* note 77, at 589 (underage drinking).

¹²⁶ See, e.g., Sonder Wolfer, *Big Health Concern; Bronx City In Obesity & Diabetes, Study Finds*, DAILY NEWS (N.Y.), March 16, 2003, at 1; Susan G. Zepeda, *Too Much and Not Enough; To Fight Childhood Obesity, We Must Learn From Our Mistakes*, L.A. TIMES, Aug. 5, 2001, at 17. "For those lower-income families who may have limited access to cooking facilities, or to markets that stock a full range of nutritious food, franchise fast food seems an attractive and affordable option."

industry, the broadcasting industry and the advertising industry. It's time to take another crack at that.¹²⁷

Finally, a restriction on commercial advertisements restricts free speech. To withstand Constitutional scrutiny, public policy concerns to protect children must sufficiently outweigh First Amendment rights.¹²⁸ *Lorillard Tobacco* left room for state and localities to create zoning laws restricting advertisements near school zones.¹²⁹ However, many localities are faced with budget shortfalls for public schooling, forcing them to decide between funding public education and limiting advertising.¹³⁰ Further, *Lorillard Tobacco* and its predecessors posits that any blanket attempt to restrict commercial speech targeting children, regardless of the moral, political or social concerns, fails *Central Hudson* scrutiny.¹³¹

Notwithstanding, overemphasis in law and politics on the protection of freedom of expression should not encumber parents and local communities from protecting their children from insidious fast-food advertising.¹³² Children, parents, and communities have a crucial welfare interest to combat obesity that effect -- and should limit -- freedom of expression.¹³³ Moreover, it is unreasonable to expect that "personal responsibility" or "common sense" can shield children from the bombardment of advertising they face on television, the Internet, and at school.¹³⁴ To avoid anti-tobacco advocates' failures in *Lorillard Tobacco*, and to limit the reach of Ronald McDonald and his progeny, legal advocates must challenge the political doctrine of free-speech rights for adults, in favor of the claims of vulnerable children to be protected from exposure to harmful cultural material, especially fast-food advertisement.¹³⁵

¹²⁷ Michael Jacobson, *Executive director of the Center for Science in the Public Interest Discusses His Campaign to Stop Junk-Food Marketing to Kids*, *The Early Show* (CBS television broadcast, Nov. 11, 2003).

¹²⁸ *See supra* Part II.C.

¹²⁹ *See supra* Part II.C.4.

¹³⁰ *See* Part I.C.

¹³¹ *See* Part II.C.

¹³² Colin M. Macleod, Symposium: *Do Children Have the Same First Amendment Rights As Adults?: A Liberal Theory of Freedom of Expression For Children*, 79 CHI.-KENT. L. REV. 55, 56 (2004).

¹³³ *Id.* at 72.

¹³⁴ *Id.* at 73; *see also, supra* Part I.

¹³⁵ *Id.* at 55.

Major policy changes, and political and social vigilance, are material to empowering the public, politicians, and judges, to prevent a complete inundation of fast food commercial marketing in the lives of American children. Anti-tobacco advocates paved the road, fighting for more than forty years, but have not come close to winning the war against tobacco industries. Anti-fast food advocates have only just begun and a long road lay ahead, especially in light of the popular political resistance to regulation and litigation.¹³⁶

¹³⁶ *See supra* Part I.A.