

COMMENT

THE “WAR ON CHILDHOOD”: COMMERCIALISM IN SCHOOLS AND THE FIRST AMENDMENT*¹

Advertising to children is . . . a kind of immoral war on childhood, waged for the profit of adults who should be childhood’s guardians. When advertising is conducted in schools, the immorality is compounded because the power of the state is twisted to the service of special interests, the ethical standing of educators is compromised, and the orientation of the school is shifted toward miseducative experiences.²

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* J.D. Candidate, University of Houston Law Center, 2018. I would like to thank my parents Robert and Sun for their unwavering belief in me, my son Alex for understanding when I don’t have time to hang out because of work and school, my best friend Michelle Meuhlen for listening to me rant for months on end about commercialism in schools, and Professor Ronald Turner for his invaluable advice even though I did not heed all of it (any error in the First Amendment analysis is all mine). Finally, I would like to thank the editors of the Houston Law Review for their hard work in preparing this Comment for publication.

1. “War on childhood” is a term of art borrowed from ALEX MOLNAR, SCHOOL COMMERCIALISM: FROM DEMOCRATIC IDEAL TO MARKET COMMODITY 86 (2005).

2. *Id.*

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I. THE WAR ON CHILDHOOD

Hasbro, a maker of toys and games, spends more than \$400 million per year on advertising.³ Mattel, another toy company,

3. Shareen Pathak, *Competition From Everywhere Has Hasbro, Mattel in Toyland Showdown: The Giants of the Industry Are Creeping Onto Each Other's Turfs*, ADAGE (Dec. 2, 2013), <http://adage.com/article/news/tech-competition-mattel-hasbro-tug-o-war-top/245477/> [https://perma.cc/WCX5-ZHWG]; HASBRO, <http://www.hasbro.com/en-us/> [https://perma.cc/HXA2-468U].

spends more than \$700 million per year.⁴ Food and beverage companies spend upwards of approximately \$1.7 billion per year marketing to youth and teenagers.⁵ Why spend so much on a group who does not have their own source of significant income?⁶

The truth is that children are big business.⁷ Children ages four to twelve, as a group, have an income of almost \$28 billion per year.⁸ Teenagers have an aggregate income of approximately \$91 billion per year.⁹ Sources of income include allowances, working outside the house, and gifts.¹⁰ In addition to having their own money, they also directly and indirectly influence family spending to the tune of over \$300 billion annually.¹¹ And the earlier companies can get children to recognize their brands, the greater the lifetime payout because “we cling to the brands we liked as children well into our adult lives.”¹² Children as young as two years old are able to recognize brands and, by three or four years of age, show a preference for one brand over another.¹³

The competition for this money is fierce.¹⁴ According to author Juliet Schor:

One clue to the marketing mentality is industry language. It’s a war out there. Those at whom ads are directed are “targets.” . . . Printed materials are called “collateral.” . . . The industry is heavily into the metaphor of biological warfare, as in the terms “viral marketing” and “sending out a virus.”

. . . .

4. Pathak, *supra* note 3; MATTEL, <http://play.mattel.com/> [<https://perma.cc/4MXW-HQ5G>].

5. FED. TRADE. COMM’N., A REVIEW OF FOOD MARKETING TO CHILDREN AND ADOLESCENTS: FOLLOW-UP REPORT 5 (2012).

6. JAMES U. MCNEAL, THE KIDS MARKET: MYTHS AND REALITIES 29 (1999).

7. *Id.*

8. *Id.* at 67.

9. *Teenage Consumer Spending Statistics*, STATISTIC BRAIN, <http://www.statisticbrain.com/teenage-consumer-spending-statistics> [<https://perma.cc/DK9B-DXM5>].

10. MCNEAL, *supra* note 6, at 69.

11. *Id.* at 86.

12. MARTIN LINDSTROM, BRANDWASHED: TRICKS COMPANIES USE TO MANIPULATE OUR MINDS AND PERSUADE US TO BUY 17 (2011). “It has been suggested, for example, that lifetime revenue from one customer for a pizza company—retailer or producer—might be \$8,000. Since it is relatively easy for a pizza marketer to develop a relationship with children, this target of \$8,000 should be manageable.” MCNEAL, *supra* note 6, at 211.

13. MCNEAL, *supra* note 6, at 202–03.

14. See generally JULIET B. SCHOR, BORN TO BUY: THE COMMERCIALIZED CHILD AND THE NEW CONSUMER CULTURE 20–22 (2004) (discussing the different tactics of how marketers target children).

Researchers have chopped up the 52 million plus children in the age-twelve-and-under demographic into discrete age, gender, ethnic, and product segments, each with tailored messages. . . . It has snared and dissected these strange creatures we call our children and is ready to sell that information to anyone with cash to spend.¹⁵

The war on childhood is not new—even in the early 1900s, companies recognized the importance of targeting youth and looked for new ways to reach them, particularly by infiltrating the school setting.¹⁶ Marketing in schools is especially attractive because it already segments children into the target age groups, is relatively free from competing advertisers, benefits from the implied approval of trusted authorities, and provides a captive audience.¹⁷ Perhaps the biggest reason of all, though, is that schools welcome these advertisers into their environment.¹⁸

This Comment looks at commercialism in schools, the forms it takes, and why it is a concern.¹⁹ It also examines whether the government can limit commercial speech in a public-school setting without violating the First Amendment.²⁰ It concludes by urging the government to protect our children from this war waged against them.²¹

15. *Id.* at 20–21.

16. *See, e.g.*, NAT'L EDUC. ASS'N, REPORT OF THE COMMITTEE ON PROPAGANDA IN THE SCHOOLS (1929) (reporting on the advantages and disadvantages of the relatively new trend of marketing in schools); Myron H. Watrous, *How Shredded Wheat Uses School Chart to Build Future Sales*, 6 *PRINTER'S INK MONTHLY* 112 (May 1923) (discussing the development of materials for use in schools because “[i]f we can establish the Shredded Wheat habit among the children we build up a class of prospective users of our product”).

17. MOLNAR, *supra* note 1, at 6–7; SCHOR, *supra* note 14, at 20–21; *see also What is EFP adNet?*, EDUC. FUNDING PARTNERS, <http://www.edufundingpartners.com/wp-content/uploads/2017/10/EFP-adNet-Holiday-Sales-Sheet-101017-1.pdf> [https://perma.cc/E3C2-93EP] (“[Education Funding Partners] bring [business’s] marketing campaign and message to engaged parents as purchasers and teachers as influencers . . . [and] provides an uncluttered environment for . . . digital advertising in a network which provides unprecedented marketing opportunities.”)

18. NAT'L EDUC. ASS'N, *supra* note 16, at 4–5; *see also* DAVID L. SIEGEL ET AL., THE GREAT TWEEN BUYING MACHINE: MARKETING TO TODAY'S TWEENS 104–05 (2001) (explaining why shortfalls in school funding is a “win-win situation[] for some marketers and educational institutions”); *see generally* JOHANNA LOCKHART, HOW TO MARKET YOUR SCHOOL: A GUIDE TO MARKETING, COMMUNICATION, AND PUBLIC RELATIONS FOR SCHOOL ADMINISTRATORS 5 (2011) (providing schools a “how-to” guide for soliciting corporate sponsorships).

19. *See infra* Part II (outlining types of commercialism in schools and the negative consequences of such activities).

20. *See infra* Part III (examining if the government can limit commercial speech in schools without violating the Constitution).

21. *See infra* Part IV (arguing the government should limit commercialism in schools).

II. COMMERCIALISM IN SCHOOLS

Although commercialism has been in schools for quite some time, it has grown exponentially since the 1990s with an in-class television news program called Channel One leading the way.²² The types of marketing in schools vary widely.²³ Although there are some arguments supporting corporate involvement in schools, there are many more arguments against the practice.²⁴

A. *Types of Commercialism in Schools*

The types of commercialism in schools can take many forms.²⁵ Alex Molnar, a prominent researcher and author on commercialism in schools, has identified seven categories in which corporations infiltrate the education system: “(1) appropriation of space on school property, (2) exclusive agreements, (3) sponsored programs and activities, (4) digital marketing, (5) incentive programs, (6) sponsorship of supplementary educational materials, and (7) fundraising.”²⁶

1. *Appropriation of Space on School Property.* Appropriation of space occurs when schools allow corporations to use their space to advertise.²⁷ Advertisements cover everything from athletic scoreboards to school buses to lockers.²⁸ A more

22. MOLNAR, *supra* note 1, at 18; *see infra* text accompanying notes 48–54 (discussing Channel One); *see also* SCHOR, *supra* note 14, at 85 (discussing the increase in commercialism in schools since the 1990s).

23. *See infra* Part II.A (discussing the types of commercial activities in schools).

24. *See infra* Part II.B (discussing the arguments against commercial activities in schools).

25. *See, e.g.*, Jef I. Richards et al., *The Growing Commercialization of Schools: Issues and Practices*, 557 ANNALS AM. ACAD. POL. SCI. 148, 152–54 (1998) (providing in Table 1 specific examples of marketing activities in schools).

26. ALEX MOLNAR ET AL., NAT’L EDUC. POLICY CTR., SCHOOLHOUSE COMMERCIALISM LEAVES POLICYMAKERS BEHIND—THE SIXTEENTH ANNUAL REPORT ON SCHOOLHOUSE COMMERCIALIZING TRENDS: 2012–2013, 17 (2014).

27. MOLNAR, *supra* note 1, at 22.

28. *See, e.g.*, *2016 Digital Display Scoreboard Advertising Opportunity*, EDISON HIGH SCHOOL CHARGER FOOTBALL, <http://edisonchargerfootball.com/wp-content/uploads/2016/07/Scoreboard-Advertising-football.pdf> [<https://perma.cc/4CPR-3MPZ>] (soliciting advertisements to display on the football scoreboard); *2016 School Bus Action Center*, CAMPAIGN FOR A COMMERCIAL-FREE CHILDHOOD, <http://www.commercialfreechildhood.org/action/2016-school-bus-action-center> [<https://perma.cc/4R8E-5K9U>] (reporting the states that currently allow advertisements on school buses); Tammy Sakry, *Students Benefit from Locker Ads, But for How Long?*, ABC NEWSPAPERS (Jan. 26, 2012, 12:30 PM), <http://abcnewspapers.com/2012/01/26/students-benefit-from-locker-ads-but-for-how-long/> [<https://perma.cc/2B3U-HTN3>] (discussing the money schools receive for allowing advertisements on lockers); *see also* MOLNAR, *supra* note 1, at 22 (providing examples of the types of advertising considered as appropriation of space).

recent trend is allowing businesses to name school buildings.²⁹ In 2001, an elementary school in Brooklawn, New Jersey became the first public school to sell the naming rights to school property.³⁰ A business owner paid \$100,000, payable over twenty years, for the right to have an elementary school's sports center named ShopRite of Brooklawn Gymnasium.³¹ More recently, Colorado school districts are considering selling naming rights to raise money.³²

2. *Exclusive Agreements.* Exclusive agreements are contracts into which schools enter with a company to use or sell only their product.³³ Sometimes these agreements are also an appropriation of space,³⁴ such as when schools agree to have vending machines from only one beverage company, also referred to as pouring-right contracts.³⁵ In 2015, the Centers for Disease Control and Prevention (CDC) published a study of school health programs, which included their nutrition programs.³⁶ The results showed the percent of schools, including elementary schools, that have exclusive agreements.³⁷ Based on the CDC's percentage and the number of public schools in the U.S. during the same timeframe, approximately 10,535 schools had exclusive agreements with fast food companies, 24,908 schools "[r]eceive[d] a specified percentage of soft drink sales receipts" with 21,463 of

29. MOLNAR, *supra* note 1, at 22; *see, e.g.*, Jason Blevins, *Aspen School District May Sell Naming Rights for Public School Buildings*, DENVER POST, <http://www.denverpost.com/2016/03/28/aspen-school-district-may-sell-naming-rights-for-public-school-buildings/>, [<https://perma.cc/8AAH-DZ2B>] (discussing a Colorado school district's consideration regarding the sale of naming rights); Robert Strauss, *Education; P.S. (Your Name Here)*, N.Y. TIMES (Dec. 16, 2001), <http://www.nytimes.com/2001/12/16/nyregion/education-ps-your-name-here.html> (discussing the reasons Brooklawn, New Jersey sold the naming rights to an elementary school gym).

30. Strauss, *supra* note 29.

31. *Id.*

32. Blevins, *supra* note 29.

33. MOLNAR, *supra* note 1, at 21.

34. MOLNAR ET AL., *supra* note 26, at 18.

35. Tom Philpott, *80 Percent of Public Schools Have Contracts With Coke or Pepsi*, MOTHER JONES (Aug. 15, 2012, 5:01 AM), <http://www.motherjones.com/tom-philpott/2012/08/schools-limit-campus-junk-food-have-lower-obesity-rates>. [<https://perma.cc/KUC3-AJ7Q>] Pouring-right contracts "usually involve large lump-sum payments to school districts and additional payments over 5 to 10 years in return for exclusive sales of one company's products in vending machines and at all school events."

MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* 203 (10th ed. 2013).

36. *See generally* U.S. DEPT OF HEALTH AND HUMAN SERVICES CTRS. FOR DISEASE CONTROL & PREVENTION, *RESULTS FROM THE SCHOOL HEALTH POLICIES AND PRACTICES STUDY 2014 6–7* (2015) (reporting on the status of school health programs in 2014).

37. *Id.* at 2–3.

those schools allowed to sell soft drinks from only one beverage company.³⁸

3. *Sponsored Programs and Activities.* Corporate sponsored programs and activities are examples of events that companies help fund.³⁹ Some funded events support educational goals, such as providing grants for field trips⁴⁰ or allowing students to tour their facilities.⁴¹ Other events provide grants for a school's general use.⁴² One of the more recent trends in sponsored events is the highly controversial *McTeacher's Night*,⁴³ a sponsored program where principals and teachers work for free at McDonald's in exchange for a donation to their schools.⁴⁴ Although the schools get a portion of all sales made while working, the sales are typically

38. Compare *id.* at 61, 72 (showing in Tables 3.2 and 3.17 the percent of schools that participate in certain commercial activities: 10.7% “[offer] brand name fast foods” and 25.3% receive money for the sale of soft drinks, 21.8% of which have exclusive agreements with beverage companies) with *Digest of Education Statistics: 2015*, NAT'L CTR. FOR EDUC. STATISTICS, https://nces.ed.gov/programs/digest/d15/tables/dt15_105.50.asp [<https://perma.cc/8WRN-SNZN>] (showing in Table 105.50 the number of U.S. public schools as 98,454 in 2012-13).

39. MOLNAR, *supra* note 1, at 21.

40. See, e.g., *Field Trip Grants*, TARGET, <https://corporate.target.com/corporate-responsibility/grants/field-trip-grants> [<https://perma.cc/Q8P2-N753>] (providing dates for when the field trip grant applications are due and publishing the most recent grantees).

41. Field Trip Factory pairs schools with businesses for tours of their facilities. *About Field Trip Factory*, FIELD TRIP FACTORY, <http://www.fieldtripfactory.com/FTFHome/AboutUs.aspx> [<https://perma.cc/96JB-PA2S>]. The program is free for schools and paid for by sponsors. TREVOR NORRIS, CONSUMING SCHOOLS: COMMERCIALISM AND THE END OF POLITICS 44 (2011). While it is important for children to have experiences outside of the school walls, the field trips are to “spaces of consumption.” *Id.* at 44–45. Current available tours are mostly to grocery stores and supermarkets, including Ralph's (a division of Kroger supermarkets), H-E-B (a supermarket based in Texas), an aquarium supply store, and a utility company. *Our Community Partners*, FIELD TRIP FACTORY, <http://www.fieldtripfactory.com/FTFHome/OurPartners.aspx> [<https://perma.cc/8F9U-AJKY>].

42. In 1998, Coca-Cola Bottling Company sponsored a contest in which schools could win grants. ASSOCIATED PRESS, *The Media Business; A Pepsi Fan is Punished in Coke's Backyard*, N.Y. TIMES (Mar. 26, 1998), <http://www.nytimes.com/1998/03/26/business/the-media-business-a-pepsi-fan-is-punished-in-coke-s-backyard.html>. One school planned to submit a group photo of all the “students lined up to spell out ‘Coke.’” *Id.* A student, at the last minute, pulled off his shirt to reveal another shirt with “Pepsi” written on it. *Id.* The student was sent home and suspended for jeopardizing the school's chance at receiving the \$10,000 prize. *Id.*

43. See, e.g., *McTeacher's Night*, MCDONALD'S OF ST. LOUIS, <http://mcdonaldsstl.com/community/mcteachers-night/> [<https://perma.cc/FX8S-BQ3M>] (promoting *McTeacher's Night* in St. Louis, Missouri).

44. SCHOR, *supra* note 14, at 90; see, e.g., *Fundraisers*, RICHARDS ADVANTAGE, <http://mcdonaldsadvantage.com/fundraisers/> [<https://perma.cc/5G4Q-M6QY>] (discussing how *McTeacher's Night* works); Tom Philpott, *McDonald's Asked Teachers to Serve Fries for Free. Now the Teachers Are Fighting Back.*, MOTHER JONES (Sept. 28, 2016, 10:00 AM), <http://www.motherjones.com/environment/2016/09/la-teachers-rebel-against-mcdonalds-mteacher-nights> [<https://perma.cc/6XNE-B7X6>] (reporting about how teachers are refusing to participate in *McTeacher's Night*).

from students and their families.⁴⁵ Teachers are pushing back and refusing to participate, though, saying that the program “exploits the trust between teachers and students to promote its junk food”⁴⁶

4. *Digital Marketing.* Digital marketing provides schools with electronics and software in exchange for the ability to advertise to students.⁴⁷ One of the earliest forms of digital marketing entered schools in the late 1980s to early 1990s with the introduction of Channel One.⁴⁸ Channel One offers free in-class televisions and electronic equipment if schools agree to show Channel One news programming to students.⁴⁹ The news program contains twelve minutes of news covered “from a young perspective”⁵⁰ and two minutes of advertisements.⁵¹ Although schools initially were challenged in courts for televising Channel One in their classrooms, many courts held that the decision to use such material is reserved for the states, which may in turn give the authority to local districts.⁵²

In addition, parents are given the ability to opt-out of child participation, circumventing any potential First Amendment violations.⁵³ Channel One is alive and well today and has opened the door for other digital marketing efforts,⁵⁴ including, now defunct programs, such as ZapMe!, which provided computers for student use in exchange for online banner advertisements,⁵⁵ and YouTube

45. *Fundraisers*, *supra* note 44 (“The kids love to come out and see their teacher’s ‘working at McDonald’s!’”).

46. Tom Philpott, *supra* note 44; *see also* Valerie Strauss, *Why Educators are Asking McDonald’s to Stop Holding McTeacher’s Nights*, WASH. POST (Oct. 15, 2015), https://www.washingtonpost.com/news/answer-sheet/wp/2015/10/15/why-educators-are-asking-mcdonalds-to-stop-holding-mcteachers-nights/?utm_term=.313e744782f7 (discussing the reasons why teachers are against participating in *McTeacher’s Night*).

47. MOLNAR, *supra* note 1, at 24.

48. *Dawson v. E. Side Union High Sch. Dist.*, 34 Cal. Rptr 2d 108, 111 (Cal. Ct. App. 1994); *State v. Whittle Commc’n*, 402 S.E.2d 556, 557 (N.C. 1991).

49. *Id.*

50. *About Us*, CHANNEL ONE NEWS, <https://www.channelone.com/about-us/> [<https://perma.cc/MN5N-S4MU>].

51. *Dawson*, 34 Cal. Rptr. at 111; *Whittle Commc’n*, 402 S.E.2d at 557.

52. *Whittle Commc’n*, 402 S.E.2d at 564 (“[State statutes] give local school boards the authority, without seeking approval of the State Board of Education, to enter into contracts for supplementary instructional materials which involve commercial advertising.”).

53. *Dawson*, 34 Cal. Rptr. at 129 (“[P]ublic school students cannot be compelled to watch classroom video advertising.”).

54. *About Us*, *supra* note 50 (“Every day, our newscast plays to more than 6 million students in thousands of classrooms across the country.”); Constance L. Hays, *Channel One’s Mixed Grade*, N.Y. TIMES, Dec. 5, 1999, § 3, at 14 (“Schools that granted entry to Channel One broke down a longstanding fence protecting the educational experience from free-market commerce. Since then, other businesses have followed.”).

55. U.S. GOV’T ACCOUNTABILITY OFF., GAO/HEHS-00-156, PUBLIC EDUCATION: COMMERCIAL ACTIVITIES IN SCHOOLS 27 (2000) [hereinafter GAO/HEHS-00-156] (stating

for Schools, which offered additional administrator controls to allow schools to restrict certain content.⁵⁶ However, other online video sites, such as SchoolTube, have taken YouTube's place.⁵⁷

5. *Incentive Programs.* Incentive programs provide funding in exchange for students completing certain tasks.⁵⁸ An example is Pizza Hut's *Book It!* Program.⁵⁹ The *Book It!* program encourages elementary children to read by rewarding them with free personal-sized pizzas when they meet set reading goals.⁶⁰ A major criticism of the program is that parents must drive their children to redeem their free pizza, which forces parents to buy pizza for the rest of the family.⁶¹ Similar incentive programs include rewards for good class attendance, grades, and citizenship.⁶²

6. *Sponsorship of Supplementary Educational Materials.* Some businesses provide instructional material, also called supplementary or sponsored educational materials (SEMs), for teachers to use in the classrooms.⁶³ Teachers can request material,

that schools could only receive the free computer equipment if the computers were used four hours a day during school hours); John Schwartz, *Offer of Free Computers for Schools is Withdrawn*, N.Y. TIMES (Nov. 2, 2000).

56. Stephanie Strom, *YouTube Subtracts Racy and Raucous to Add a Teaching Tool*, N.Y. TIMES, Mar. 9, 2012, at A14. YouTube for Schools was discontinued in July 2016. Matt Ward, *More Ways for Schools & Organizations to Manage YouTube*, GOOGLE: THE KEYWORD (Apr. 26, 2016), <https://blog.google/topics/education/more-ways-for-schools-organizations-to/> [<https://perma.cc/QY2T-VTCQ>] (announcing the July 2016 sunset of YouTube for Schools).

57. *Contact Us*, SCHOOLTUBE, <https://www.schooltube.com/advertise/> [<https://perma.cc/G47F-CR8R>] (stating in its Media Kit for sponsors that “[e]very month, SchoolTube reaches hundreds of thousands of students and educators *during the day*” and “can offer high quality brands access to [their] engaged, [sic] audience during typically hard to reach segments of the day—and without significant competition from other advertising messages.”).

58. MOLNAR, *supra* note 1, at 22.

59. BOOK IT!, <http://www.bookitprogram.com/>, [<https://perma.cc/2HLV-2JKX>].

60. *Frequently Asked Questions*, BOOK IT!, <http://www.bookitprogram.com/contact/default.asp> [<https://perma.cc/4L5E-FFVW>].

61. GAO/HEHS-00-156, *supra* note 55, at 30.

62. See, e.g., *Community Partners Program*, JASON'S DELI, <http://www.jasonsdeli.com/about-us/community-partners-program> [<https://perma.cc/8QWY-R67J>] (discussing the various ways Jason's Deli supports the community, including a program “to reward academic performance and good citizenship”); *Wendy's Partners In Education Program (PIE)*, LDF COMPANIES, <http://www.ldfcompanies.com/foodgroup/community.php?commID=4> [<https://perma.cc/AF88-BCS3>] (discussing Wendy's various fundraising and incentive programs—“[t]he incentive is for a Frosty Dessert, which is always a favorite with kids”); see also SCHOR, *supra* note 14, at 90 (2004) (discussing various incentive programs).

63. MOLNAR, *supra* note 1, at 22; *Captive Kids: A Report on Commercial Pressures on Kids at Schools (PART ONE)*, CONSUMERS UNION, <http://consumersunion.org/news/captive-kids-a-report-on-commercial-pressures-on-kids-at-schools-part-one/> [<https://perma.cc/CT8B-YD62>] [hereinafter *Captive Kids: Part One*].

but the corporations may also deliver them without any solicitation.⁶⁴ Teachers often welcome the material because it reduces their out-of-pocket expenses for supplemental instruction materials.⁶⁵ Not all SEMs contain product placement, but a majority contain biased or inaccurate information.⁶⁶

7. *Fundraising.* Fundraisers can take many forms; they can be sales drives,⁶⁷ incentive programs like the *Box Tops for Education* program,⁶⁸ or sponsored events, such as *McTeacher's Night*.⁶⁹ Sales drives are considered "traditional fundraising activities."⁷⁰ What started as car washes and bake sales⁷¹ has morphed into a way for corporations to sell products.⁷² Businesses, such as Yankee Candle and Krispy Kreme Doughnuts, make it easy for schools to raise money by selling their goods.⁷³ Distributor-like businesses now exist that represent several companies to give more choices, from cookies to jewelry, from which schools can choose.⁷⁴ Incentive programs, like the *Box Tops*

64. *Captive Kids: Part One*, *supra* note 63.

65. *Id.* at 3–4.

66. *See infra* Part II.B.2 (discussing the results of a study conducted on SEMs).

67. *Captive Kids: A Report on Commercial Pressures on Kids at Schools (PART TWO)*, CONSUMERS UNION, <http://consumersunion.org/news/captive-kids-a-report-on-commercial-pressures-on-kids-at-schools-part-two/> [<https://perma.cc/3B5W-MSEM>] [hereinafter *Captive Kids: Part Two*] (stating that "[f]und-raisers turn kids into salespeople").

68. *See infra* notes 75–76 and accompanying text (discussing how the Box Tops for Education program incentivizes product purchases through per-purchase school donations from General Mills).

69. *See supra* text accompanying notes 43–46 (discussing *McTeacher's Night*).

70. GAO/HEHS-00-156, *supra* note 55, at 17.

71. *Captive Kids: Part Two*, *supra* note 67; *see also* Ilona Bray, *How to Hold a Fundraising Car Wash: Tips and Strategies to Make Money for Charity by Washing Cars*, NOLO.COM, <http://www.nolo.com/legal-encyclopedia/how-hold-fundraising-car-wash.html> [<https://perma.cc/V4QF-CMKF>] ("Car washes are a standby of grassroots nonprofit fundraising efforts. This is particularly true among schools . . ."); Stacy Whitman, *Rethinking the School Bake Sale: Is This Fundraising Sweetheart Really the Best Way to Bring in Dollars?*, SCHOOL BITES (Aug. 28, 2012), <http://school-bites.com/rethinking-the-school-bake-sale-is-this-fundraising-tk-all-that-its-cracked-up-to-be/> [<https://perma.cc/52F8-YE8P>] ("[T]he school bake sale: It's an age-old tradition that countless schools rely upon to raise funds for student programs and activities.").

72. *Captive Kids: Part Two*, *supra* note 67.

73. *Fundraising*, YANKEE CANDLE, <http://www.yankeecandle.com/about-us/fundraising> [<https://perma.cc/XP4A-AXJE>]; *Welcome to Our PTO Page*, KRISPY KREME DOUGHNUTS, <http://www.krispykreme.com/Fundraising/Home> [<https://perma.cc/YXP8-DV42>].

74. *Captive Kids: Part Two*, *supra* note 67 ("[m]ore than 100 fund-raising companies representing candy makers, magazine publishers, and others supply the schools with products to sell . . ."); *see, e.g.*, Cherrydale Fundraising, CHERRYDALE, <https://cherrydale.com/> [<https://perma.cc/TB3W-E68G>] (displaying the various products that can be sold for fundraising); GREAT AMERICAN OPPORTUNITIES, <http://gafundraising.com/> [<https://perma.cc/2HHE-RESA>] (providing fundraising ideas).

for *Education* program, encourage families to spend money to collect box tops symbols from General Mills products, which can be submitted for a donation to the school.⁷⁵ The box tops symbol can be found on products such as frozen vegetables and non-food products, but also sugary cereals and processed foods.⁷⁶

B. *Why Commercialism in Schools is Bad Business*

The help corporations provide is much needed—each year school budgets are cut.⁷⁷ Teachers spend hundreds to thousands of dollars of their own money to help supplement the supplies no longer afforded through the school budget.⁷⁸ Corporate sponsorship helps fill that gap.⁷⁹ However, unchecked corporate spending in public schools has serious consequences, such as promoting materialism and consumerism, containing biased or inaccurate information, and furthering socioeconomic and racial discrimination.⁸⁰ Critics argue that state-mandated attendance requirements have created a captive audience of children. The marketing efforts imply endorsement by school authorities, and such efforts do not generate as much revenue for schools as expected.⁸¹

75. See *Learn More About Box Tops for Education*, BOX TOPS FOR EDUCATION, <http://www.boxtops4education.com/about> [https://perma.cc/5UDX-4F5W] (explaining that if families purchase General Mills products, each collected product label generates a \$0.10 school donation from the company).

76. *Participating Products*, BOX TOPS FOR EDUCATION, <http://www.boxtops4education.com/earn/participating-products> [https://perma.cc/3CVH-JJX5].

77. See, e.g., Michael Leachman et al., *Most States Have Cut School Funding, and Some Continue Cutting*, CTR. ON BUDGET & POLICY PRIORITIES (last updated Jan. 25, 2016), <http://www.cbpp.org/research/state-budget-and-tax/most-states-have-cut-school-funding-and-some-continue-cutting> [https://perma.cc/QJ5H-P7NV] (noting that school funding was less in 2014 than in 2008, when the U.S. experienced a recession). In 2001, Maryland tried to pass the Captive Audience/Stop Commercialism in School Act. S.B. 435, 415th Gen. Assemb., Reg. Sess. (Md. 2001); Carolyn VanderSchee, *The Privatization of Food Services in Schools: Undermining Children's Health, Social Equity, and Democratic Education, in SCHOOLS OR MARKETS? COMMERCIALISM, PRIVATIZATION, AND SCHOOL-BUSINESS PARTNERSHIPS* 1, 24 (Deron R. Boyles ed., 2005). Much of the opposition to the bill came from schools claiming that the loss of the money generated from commercial activities would financially harm them. *Id.*

78. Rebecca Klein, *Teachers Spend Way Too Much Of Their Own Money On School Supplies, And Here's Proof*, HUFFINGTON POST, https://www.huffingtonpost.com/entry/teacher-spending-school-supplies_us_55e49091e4b0c818f618a6c7 (last updated Sept. 3, 2015) (showing teachers' Twitter posts of how much they spent out of their own pockets for school supplies); *Captive Kids: Part One*, *supra* note 63 (“Where 10 years ago, a teacher might be allowed \$400 or \$500 a year to buy extra ‘goodies’ for the classroom . . . the teacher might now get a fraction of that, or none at all. In many schools teachers make up the difference by dipping into their own pocketbooks . . .”).

79. See *supra* Part II.A (discussing the various ways corporate sponsorship helps aid schools).

80. See *infra* Parts II.B.1, II.B.2, and II.B.3.

81. See *infra* Parts II.B.4, II.B.5, and II.B.6.

1. *Promotes Materialism and Consumerism.* Commercial marketing to children, in general, promotes materialism and consumerism.⁸² A recent study in the Netherlands showed that advertising increases materialism in children.⁸³ One study conducted by psychologist Tim Kasser found that those who value materialism are more depressed, have low self-esteem, are of poorer health, and are more likely to engage in risky behavior⁸⁴ because “[materialism] . . . promotes the idea that they can and should derive identity, fulfillment, self-expression, and confidence through what they buy.”⁸⁵ Sociologist Juliet Schor confirmed that higher exposure to media results in these same traits in children.⁸⁶

In addition, commercial marketing in schools promotes a culture of consumerism, which is directly adverse to the purpose of education.⁸⁷ The purpose of marketing is to appeal to the impulsivity of the consumer and the desire to fit in, not to encourage critical thinking.⁸⁸ Edward Broome recognized this back in 1929 when he presented the Report of the Committee on Propaganda in the Schools:

The function of propaganda is to gain acceptance of a particular opinion, doctrine, or course of action, under circumstances designed to curb the individual’s freedom of thought and action. The function of education, on the other hand, is to acquaint the individual with a variety of opinions, doctrines, or courses of actions, so as to equip him, intelligently to do his own thinking and to select his own courses of action. The main purpose of propaganda, therefore, is to teach *what to think*, while the guiding purpose of education is to teach *how to think*.⁸⁹

2. *Contains Biased or Inaccurate Information.* As discussed earlier in this Comment, many corporations provide free or low-cost

82. See generally Suzanna J. Oprea et al., *Children’s Advertising Exposure, Advertised Product Desire, and Materialism: A Longitudinal Study*, 4 COMM’N. RES. 717, 729 (2014) (presenting the results of a recent study on children and materialism).

83. *Id.* at 729 (“Children who were frequently exposed to television advertising became more materialistic than those who were less frequently exposed.”).

84. TIM KASSER, *THE HIGH PRICE OF MATERIALISM* 11–15 (2002).

85. MOLNAR ET AL., *supra* note 26, at 11 (citing Jean Kilborne, *Jesus is a Brand of Jeans*, NEW INTERNATIONALIST (Sept. 2006), <https://newint.org/features/2006/09/01/culture/> [<https://perma.cc/7LFV-RWB6>]).

86. SCHOR, *supra* note 14, at 167–72.

87. NAT’L EDUC. ASS’N, *supra* note 16, at 5.

88. See ROB WALKER, *BUYING IN: WHAT WE BUY AND WHO WE ARE* 31–32, 40–41 (2008) (explaining the impulsive nature of consumer purchases influenced by a “host of nonconscious factors,” and behavioral economics applied to the success of marketing to brand-communities).

89. NAT’L EDUC. ASS’N, *supra* note 16, at 5.

SEMs to cash-strapped teachers and schools.⁹⁰ In the mid-1990s, Consumer's Union, the advocacy division of Consumer Reports,⁹¹ conducted a study on SEMs in school.⁹² Of the SEMs reviewed, more than three-fourths contained information that was incomplete or skewed in favor of the sponsor.⁹³ Examples included the suggestion that fat content is the only concern in the healthiness of foods (ignoring sugar and sodium) and the promotion of disposable over cloth diapers as better for the environment.⁹⁴

3. *Furtherers Socioeconomic and Racial Discrimination.* Corporate sponsorships have the most impact on schools in poorer communities and in communities with higher ratios of racial minorities.⁹⁵ Districts with the highest poverty rates and those with the most racial minorities receive the least amount of government funding.⁹⁶ Based on 2010–2012 data, schools in poorer districts receive approximately 10% less than those in higher income communities.⁹⁷ School districts that serve greater numbers of racial minorities receive 15% less government funding, on average, than those that have fewer numbers of racial minorities.⁹⁸ This amounts to up to a million dollars in lost funding.⁹⁹ Consequently, schools in these districts are more likely to accept corporate help.¹⁰⁰

90. See Part II.A.6 (discussing the use of SEMs).

91. *About Us*, CONSUMERS UNION, <http://consumersunion.org/about/> [https://perma.cc/S3AY-YQUB].

92. *Captive Kids: Part One*, *supra* note 63 (finding that “thousands of corporations were targeting school children and their teachers with marketing activities ranging from teaching videos, guidebooks, and posters to contests, product giveaways, and coupons”).

93. *Id.*

94. *Id.* Some researchers support the claim that cloth cotton diapers may be better for the environment because of the greenhouse gases from cotton fertilizers, carbon dioxide emissions from laundry services (570 kg carbon footprint for cloth diapers versus 550 kg carbon footprint for disposable diaper production), and water use and pollution from growing cotton and from cleaning cloth diapers. Kendyl Salcito, *Why Cloth Diapers Might Not Be the Greener Choice, After All*, WASH. POST: OPINIONS (May 8, 2015), https://www.washingtonpost.com/opinions/why-cloth-diapers-might-not-be-the-greener-choice-after-all/2015/05/08/32b2d8dc-f43a-11e4-bcc4-e8141e5eb0c9_story.html.

95. Alex Molnar, *School Commercialism Hurts All Children, Ethnic Minority Group Children Most of All*, 72 J. NEGRO EDUC. 371, 375–76 (2003).

96. Natasha Ushomirsky & David Williams, *Funding Gaps 2015: Too Many States Still Spend Less on Educating Student Who Need the Most*, EDUC. TRUST, Mar. 2015, at 8.

97. *Id.* at 3. Parents in poorer communities are also less likely to be able to compensate for lost funds. Julianne Hing, *Parent Fundraising Deepens Inequality in the New Public School Economy*, COLORLINES (June 27, 2012, 9:19 AM), <http://www.colorlines.com/articles/parent-fundraising-deepens-inequality-new-public-school-economy> [https://perma.cc/WXM6-QW8W].

98. USHOMIRSKY & WILLIAMS, *supra* note 96, at 8.

99. *Id.* at 3.

100. BRIAN WILCOX ET AL., AM. PSYCHOLOGICAL ASS'N, REPORT OF THE APA TASK FORCE ON ADVERTISING TO CHILDREN: PSYCHOLOGICAL IMPLICATIONS OF COMMERCIALISM

4. *Provides a Captive Audience.* Because states mandate attendance, children are captive audiences to commercialism in schools.¹⁰¹ Students spend an average of 6.64 hours, more than 25% of their day, in school.¹⁰² Programs such as Channel One survived judicial scrutiny because parents can opt out their children from watching the news and commercials,¹⁰³ but students cannot voluntarily choose not to look at such forms of commercial activities such as locker advertisements or SEMs that are required reading by their teachers.¹⁰⁴

5. *Implies Endorsements by School Authorities.* Commercialism in school may be seen as an endorsement by school authorities.¹⁰⁵ Authority figures have credibility, and people tend to not question authority figures.¹⁰⁶ Educators are authority figures in the classroom based on their social position and knowledge.¹⁰⁷ Thus, a free sample of deodorant given by the school nurse or gym teacher as part of education about puberty might well have a stronger impact on students' attitudes about that brand, about deodorants in general, or about the issue of perspiration and body odor than would the same sample handed out at a mall.¹⁰⁸

6. *Generates Less Revenues than Expected.* Although commercial activities in schools can be lucrative for a select few,

IN SCHOOLS 60 (2004); *see also* MICHAEL MORGAN, UNPLUG, CHANNEL ONE IN THE PUBLIC SCHOOLS: WIDENING THE GAPS 7 (1993) (reporting from a study conducted that "schools with the greatest concentration of low-income students are more than twice as likely . . . as the schools with the wealthiest students to have Channel One" and that "the greater the percentage of African-American students in a school, the more likely it is that a school has Channel One").

101. MOLNAR, *supra* note 1, at 9; SCHOR, *supra* note 14, at 85; *see also* NAT'L CTR. FOR EDUC. STATISTICS, https://nces.ed.gov/programs/digest/d15/tables/dt15_234.10.asp [<https://perma.cc/Q6H8-SL28>] (showing in Table 234.10 ages of compulsory attendance by state).

102. NAT'L CTR. FOR EDUC. STATISTICS, https://nces.ed.gov/surveys/sass/tables/sass0708_035_s1s.asp [<https://perma.cc/V39E-UTEE>].

103. Dawson v. E. Side Union High Sch. Dist., 34 Cal. Rptr. 2d 108, 125 (1994).

104. *See, e.g.*, Norman Draper, *Schools Open Lockers to Advertising*, STAR TRIB. (Oct. 18, 2010, 9:47 PM), <http://www.startribune.com/schools-open-lockers-to-advertising/105226404/> [<https://perma.cc/G8NE-EF2B>] (reporting on a school's decision to advertise on lockers); *Captive Kids: Part One*, *supra* note 63 ("Some [schools] are looking for more varied or real-world or high-interest materials to enhance their lessons and better capture the attention of kids who are used to the powerful images of television and other media.").

105. WILCOX ET AL., *supra* note 100, at 56.

106. JOHN O'SHAUGHNESSY & NICHOLAS J. O'SHAUGHNESSY, PERSUASION IN ADVERTISING 146 (2004).

107. Chris Murray & Frank Thompson, *The Representation of Authority: An Adolescent Viewpoint*, 8 J. ADOLESCENTS 217, 227 (1985).

108. WILCOX ET AL., *supra* note 100, at 56.

most schools do not generate the types of revenues expected.¹⁰⁹ A study conducted for the 2003-2004 school year showed that, of the schools that expected revenues from food and beverage commercial activities, over 67% received no income, 26% received \$10,000 or less, and less than 7% received more than \$10,000.¹¹⁰ Another study conducted for the 2010-2011 school year yielded similar results.¹¹¹ Although one school district generated income of over \$500,000 in two years, the amount was only 0.02% of its budget.¹¹² Another school district raised almost \$200,000 in a school year, which represented 0.03% of its budget.¹¹³ Those are the high earners, though—other schools surveyed raised significantly less money.¹¹⁴

III. AND THE FIRST AMENDMENT

Because of the negatives of commercialism in schools, it should be restricted.¹¹⁵ However, any restriction may be challenged in courts as violating the First Amendment rights of the corporations.¹¹⁶ In analyzing First Amendment cases, courts should apply a three-step analysis.¹¹⁷ First, the court should determine if the speech is protected.¹¹⁸ Then, if it is, the court should look at the type of forum where the speech is conducted to determine what First Amendment protections should apply.¹¹⁹ Finally, the court should determine if restricting the speech in that

109. ALEX MOLNAR ET AL., COMMERCIALISM IN EDUC. RES. UNIT, A NATIONAL SURVEY OF THE TYPES AND EXTENT OF THE MARKETING OF FOODS OF MINIMAL NUTRITIONAL VALUE IN SCHOOLS 43 (2006); PUBLIC CITIZEN, SCHOOL COMMERCIALISM: HIGH COSTS, LOW REVENUES 13 (2012).

110. ALEX MOLNAR ET AL., *supra* note 109, at 43.

111. PUBLIC CITIZEN, *supra* note 109, at 13.

112. *Id.* at 13–14.

113. *Id.* at 15.

114. *Id.* at 14–15.

115. See Part II.B (describing the arguments against commercialism in schools).

116. See, e.g., Joseph Blocher, *School Naming Rights and the First Amendment's Perfect Storm*, 96 GEO. L.J. 1, 20 (2007) (discussing school naming rights and stating that “First Amendment-based challenges are all but inevitable”); Kathy Brittain McKee & Eric Haley, *Regulating Channel One Within Public Schools: Precedents and Parameters*, 16 COMMS. & L., June 1994, at 38 (1994) (stating that challenges to Channel One pits “the designated functions for curricula versus the First Amendment communication rights of external businesses”).

117. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). *Cornelius* specifically dealt with the solicitation for charitable funds on federal government property. *Id.* at 790–93. The analysis could be used in all First Amendment cases, though, because it thoroughly looks at speech using both the type of speech and the forum in which the speech is presented.

118. *Id.* at 797.

119. *Id.*

type of forum is a violation of the First Amendment.¹²⁰ This section walks through the same type of analysis to show that commercialism in schools does not have full protection under the First Amendment and, therefore, should be regulated.¹²¹

A. *Is the Speech Protected?*

To determine if a speech is protected under the First Amendment, courts should first look at the content of the speech.¹²² Practices such as pouring-rights contracts, SEMs, and other corporate partnerships are considered commercial speech,¹²³ and, over the years, the amount of protection commercial speech has been given under the First Amendment has increasingly grown from no protection¹²⁴ to limited protection.¹²⁵

1. *What Type of Speech is at Issue?* Protected speech includes both noncommercial and commercial speech.¹²⁶ Noncommercial speech is given the greatest amount of First Amendment protection.¹²⁷ On the other hand, commercial speech is given limited protection, as discussed later in this section.¹²⁸

In considering whether a speech is commercial, courts consider three factors: whether “(1) the speech is an advertisement; (2) the speech refers to a specific product or service; and (3) the speaker has an economic motivation for the speech.”¹²⁹

120. *Id.*

121. *See infra* Part III.C (discussing the results of the First Amendment analysis).

122. *Cornelius*, 473 U.S. at 797.

123. *See, e.g.*, David S. Almeling, Note, *The Problems of Pouring-Rights Contracts*, 53 DUKE L.J. 1111, 1114 (2003) (discussing the legal ramifications of pouring-rights contracts); Blocher, *supra* note 116, at 7 (discussing the potential First Amendment issues with selling school naming rights); Adriane Kayoko Peralta, *Corporate-School Partnerships and Neoliberal Influences on Students as Future Participants in the Labor Market*, 2015 B.Y.U. EDUC. & L.J. 297, 307 (2015) (discussing how corporate sponsorships are considered commercial speech). The Supreme Court defined commercial speech as “expression related solely to the economic interests of the speaker and its audience.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980) (citing *Va. Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976), *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363–64 (1977), and *Friedman v. Rogers*, 440 U.S. 1, 11 (1979)).

124. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

125. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571–72 (2011).

126. *Clear Channel Outdoor, Inc. v. Los Angeles*, 234 F.Supp. 2d 1127, 1132 (C.D. Ca. 2002) (“While commercial speech is afforded First Amendment protection, noncommercial speech is higher up on the hierarchy of protected speech, and as such, a regulation cannot afford noncommercial speech less protection than commercial speech.”).

127. *Id.* at 1132.

128. *Id.*; *see infra* Part III.A.2 (discussing the level of First Amendment protections afforded commercial speech).

129. *U.S. v. Bell*, 414 F.3d 474, 479 (3d Cir. 2005) (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983); *In re Orthopedic Bone Screw Prod. Liab. Litig.*, 193 F.3d 781, 793–94 (3d Cir. 1999)).

However, problems arise when applying these factors to commercial activities in schools because corporate sponsorships and partnerships can also have an educational element, and, therefore, can be considered as both noncommercial and commercial.¹³⁰

Speech that has both noncommercial and commercial elements that are “inextricably intertwined”¹³¹ is considered mixed-motive commercial speech.¹³² Courts have typically not given mixed-motive commercial speech full First Amendment protection based solely on its noncommercial content.¹³³ Therefore, the same type of analysis is applied to mixed-motive commercial speech as other types of commercial speech.¹³⁴

2. *What Level of First Amendment Protections are Given to Commercial Speech?* In the 1940s, the Supreme Court held that commercial speech was afforded the least amount of First Amendment protection.¹³⁵ In *Valentine v. Chrestensen*, F.J. Chrestensen attempted to circumvent a prohibition on distributing commercial advertising on public streets by placing a protest on the backside of a handbill that advertised his business.¹³⁶ The Supreme Court held that “the Constitution

130. See *supra* Part II.A (describing the types of commercial activities in schools).

131. *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989).

132. See, e.g., *RTM Media, L.L.C. v. Houston*, 518 F.Supp. 2d 866, 872 (S.D. Tex. 2007) (describing billboards that contain commercial and noncommercial messages as “mixed messages”).

133. See, e.g., *Fox*, 492 U.S. at 474–75 (“Including [educational] elements no more convert[s] . . . presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech.”); *Valentine v. Chrestensen*, 316 U.S. 52, 55 (1942) (“[E]very merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law’s command.”); cf. *Riley v. Nat’l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (“[W]e do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech.”) The Court distinguished *Fox* from *Riley* because, in *Riley*, the State required commercial information to be included with noncommercial information when soliciting for charitable contributions. *Fox*, 492 U.S. at 474. *Murdock v. Pa.*, 319 U.S. 105, 111 (1943) (“They may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes.’ But the mere fact that the religious literature is ‘sold’ by itinerant preachers rather than ‘donated’ does not transform evangelism into a commercial enterprise.”) *Murdock* is an example of when a protected noncommercial speech—religious speech—does not lose its full First Amendment protection even though it is intertwined with commercial speech.

134. *Fox*, 492 U.S. at 475.

135. *Valentine*, 316 U.S. at 54–55.

136. *Id.* at 53.

imposes no . . . restraint on government as respects purely commercial advertising.”¹³⁷

A year later, the Court expanded commercial speech protection, recognizing that commercial speech has some, if limited, protection based on the intent of the speech.¹³⁸ In *Murdock v. Pennsylvania*, the Court found that Jehovah’s Witnesses did not violate a ban on handbill advertising even though the pamphlets they distributed contained advertisements for books.¹³⁹ The Court focused on the intent of the distribution, stating, “[the government] may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes.”¹⁴⁰

The Court further expanded the protection of commercial speech to those that contained “factual material of clear ‘public interest.’”¹⁴¹ In *Bigelow v. Virginia*, the Court found that an advertisement for abortions was protected under the First Amendment because it also announced that abortions were no longer illegal in New York, which may be of interest to the general public.¹⁴²

In 1980, the Court developed a test for when commercial speech was protected under the First Amendment that balances public interest against governmental interests.¹⁴³ In *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, Central Hudson challenged a regulation that banned electric companies from advertising that promoted the use of electricity,¹⁴⁴ stating that the ban would also prohibit advertising about more efficient products and services that would help conserve energy.¹⁴⁵ To determine if the regulation violated the First Amendment, the Court first looked at the public’s interest that the speech concerns a lawful activity

137. *Id.* at 54. Although the Court addresses “purely commercial advertising,” it also later states that including a noncommercial element—in other words, making it a mixed-motive speech—to circumvent a restriction on commercial advertising does not automatically wrap it under the First Amendment’s blanket of protection. *Id.* at 54–55.

138. *Murdock*, 319 U.S. at 111.

139. *Id.*

140. *Id.*

141. *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975).

142. *Id.*

143. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561–63 (1980).

144. *Id.* at 558.

145. *Id.* at 570.

and that it is accurate and not misleading.¹⁴⁶ The Court then looked at whether the government had a substantial interest in regulating the speech.¹⁴⁷ Because the government had a substantial interest, the Court then applied “intermediate scrutiny,”¹⁴⁸ looking at whether the regulation would directly advance the interest and if that interest could be advanced by less restrictive means.¹⁴⁹

Ultimately, the Court determined that the challenged regulation in *Central Hudson* was over-extensive and the interest could be advanced by less restrictive means.¹⁵⁰

In 1989, the Court further modified the *Central Hudson* test in *Board of Trustees of State University of New York v. Fox*, broadening the final analysis of when the regulation is over-extensive to give more deference to government.¹⁵¹ The Court in *Fox* rejected the “least-restrictive-means standard,”¹⁵² instead requiring “reasonable fit.”¹⁵³ The fourth requirement of the *Central Hudson* test thus became “a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is ‘in proportion to the interest served,’ that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.”¹⁵⁴

The *Central Hudson* test is still used today to determine if commercial speech is protected under the First Amendment.¹⁵⁵ However, it is unclear whether the test should be applied as originally conceived, requiring intermediate scrutiny,¹⁵⁶ or if *Fox*’s reasonable fit standard should be used.¹⁵⁷ In either case, it is clear that commercial speech is afforded at least some First Amendment protection.¹⁵⁸

146. *Id.* at 563.

147. *Id.* at 563–64.

148. *Id.* at 573 (Blackmun, J., concurring) (characterizing the level of scrutiny used by the majority).

149. *Id.* at 564 (majority opinion).

150. *Id.* at 571.

151. *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 476–78, 480 (1989).

152. *Id.* at 477, 480–81.

153. *Id.* at 480.

154. *Id.* (citation omitted).

155. *See, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557–58, 572 (2011) (applying the *Central Hudson* test in pharmaceutical advertisements).

156. *See id.* at 557 (stating that the standard of review for speech that relates to marketing requires “heightened judicial scrutiny”).

157. *Id.* at 572 (later applying the reasonable fit test of narrow tailoring as set out by *Fox*).

158. *Id.* at 571–72.

3. *What Level of Protection Should Apply to Commercialism in Schools?* Because commercial activities in schools are mixed-motive speech, containing both non-commercial and commercial elements,¹⁵⁹ the *Central Hudson* test should be applied to determine if the speech is protected under the First Amendment.¹⁶⁰ The first question of the *Central Hudson* test can be broken into two parts: (1) is the activity lawful; and (2) is it misleading?¹⁶¹ Because very few restrictions are currently in place, the rest of the test should be used to determine if the federal government can promulgate stricter regulations on commercialism in schools.¹⁶²

Is it Lawful? Currently, the federal government does little to restrict commercialism in schools on a national level.¹⁶³ Instead, states are responsible for regulating education.¹⁶⁴ However, states have not fully addressed commercialism in schools,¹⁶⁵ and some states have delegated this responsibility to the local level.¹⁶⁶

Although the federal government has shown interest in the growing problem of commercialism in schools,¹⁶⁷ very little regulation is in place to restrict it.¹⁶⁸ Currently, federal regulations specifically addressing commercialism in schools relate to student privacy and outside food sales in schools.¹⁶⁹

Student privacy was first addressed in the Protection of Pupil Rights Act (PPRA) which states: “All instructional materials, including teacher’s manuals, films, tapes, or other supplementary material which will be used in connection with any survey,

159. See *infra* Parts III.A.3.a and III.A.3.b.

160. See *infra* Parts III.A.3.c, III.A.3.d, and III.A.3.e.

161. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 563 (1980).

162. *Id.* at 563–64; cf. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 534–35, 555–56, 561 (2001) (applying the remaining *Central Hudson* test steps to a tobacco regulation prohibiting tobacco advertising within 1,000 feet of elementary and secondary schools).

163. MOLNAR ET AL., *supra* note 26, at 7.

164. See *id.* at 4.

165. *Id.*

166. *Id.* at 6.

167. See generally U.S. GOV’T ACCOUNTABILITY OFF., GAO-04-810, COMMERCIAL ACTIVITIES IN SCHOOLS: USE OF STUDENT DATA IS LIMITED AND ADDITIONAL DISSEMINATION OF GUIDANCE COULD HELP DISTRICTS DEVELOP POLICIES (2004) [hereinafter GAO-04-810] (reviewing states’ policies regarding commercial activities in schools, particularly the collection of student data for commercial market research); GAO/HEHS-00-156, *supra* note 55 (looking in depth at the types of commercial activities in schools and the existing restrictions in place).

168. GAO/HEHS-00-156, *supra* note 55, at 3 (2000) (stating that, federally, “only general laws and regulations that apply to all businesses or that govern school finance usually cover school-based commercial activities.”).

169. Protection of Pupil Rights Act, 20 U.S.C. § 1232h (2012); see National School Lunch Program, 7 C.F.R. §§ 210.1, 210.11 (2016).

analysis, or evaluation as part of any applicable program shall be available for inspection by the parents or guardians of the children.”¹⁷⁰ However, PPRA was only aimed at prohibiting students from undergoing psychological evaluations or participating in behavioral experiments without parental consent.¹⁷¹ Schools could still collect the information, but they must first notify parents and provide them an opportunity to opt out.¹⁷² PPRA was later amended by the No Child Left Behind Act of 2001 (NCLB), which, on its face, looks as if it narrows the information schools could collect on students.¹⁷³ However, it also seems to open the door for marketing in schools by allowing parents to inspect “survey[s] created by . . . third part[ies]” and allowing schools to consult with parents regarding the “[t]he collection, disclosure, or use of personal information collected from students for the purpose of marketing or for selling that information.”¹⁷⁴

More recently, the Department of Agriculture addressed marketing of foods in schools through the Local School Wellness Policy under the Healthy Hunger-Free Kids Act of 2010.¹⁷⁵ In 2014, the Department of Agriculture proposed to promote nutrition “to influence lifelong eating behaviors in a positive manner” which “include[d] the marketing and advertising of nutritious foods and beverages to students.”¹⁷⁶ The promulgated regulation allows marketing during school hours as long as the food meets certain nutritional standards,¹⁷⁷ which can include foods and beverages such as potato chips, chicken nuggets, and diet soda.¹⁷⁸ It also does not

170. 20 U.S.C. § 1232h(a) (2012).

171. 120 CONG. REC. S14,581 (daily ed. May 14, 1974) (statement of Sen. James Buckley, who originally tried to get the protection under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232h).

172. MOLNAR ET AL., *supra* note 26, at 7–8.

173. 20 U.S.C. §§ 1232h(e)–(f) (2012) (requiring schools to develop policies to notify parents when students will be asked to disclose personal information).

174. 20 U.S.C. §§ 1232h(e)(1)(A)(i), 1232h(e)(1)(E) (2012). For an in-depth discussion on student privacy rights, which also touches on the collection of student information for commercial purposes, see Lynn M. Daggett, *Student Privacy and the Protection of Pupil Rights Act as Amended by No Child Left Behind*, 12 U.C. DAVIS J. JUV. L. & POL’Y 51 (2008).

175. Local School Wellness Policy, 7 C.F.R. § 210.13 (2016).

176. Local School Wellness Policy Implementation Under the Health Hunger-Free Kids Act of 2010, 79 Fed. Reg. 10,693, 10,695 (Feb. 26, 2014) (codified at 7 C.F.R. § 210).

177. 7 C.F.R. § 210.11(c).

178. *Smart Food Planner*, ALL. FOR A HEALTHIER GENERATION, <https://foodplanner.healthiergeneration.org/products/> [<https://perma.cc/D6SU-PPVS>]. The U.S. Department of Agriculture published an online pamphlet to help “anyone that oversees the sale of foods/beverages to students on the school campus during the school day.” *A Guide to Smart Snacks in Schools*, U.S. DEPT OF AGRIC. (last published May 11, 2017), <http://www.fns.usda.gov/tn/guide-smart-snacks-schools> [<https://perma.cc/K7X6-ZS2F>]. The pamphlet refers readers to visit the Alliance for a Healthier Generation’s Smart Food

restrict what can be advertised on school property outside of school hours.¹⁷⁹

Although the federal government does regulate some aspects of education, the responsibility has long been held as primarily the domain of the states.¹⁸⁰ Almost all the states have some regulation in place with respect to commercialism in schools,¹⁸¹ but most have not fully addressed the problem nor are the regulations completely effective.¹⁸² States have restricted certain commercial activities, allowed the activities, or passed the responsibility to the local level to determine what restrictions, if any, are needed.¹⁸³

California, for example, restricts certain commercial activities in schools.¹⁸⁴ However, similar to most states that restrict commercial activities, it only addresses specific forms of advertising and provides broad exemptions that could allow corporations to bypass the regulations.¹⁸⁵ California requires that all instructional material be adopted in accordance with the standards set out by the California Board of Education, which provides guidance on when images or words that can be construed as advertising may be displayed.¹⁸⁶ California also prohibits local school districts from entering into or renewing contracts for foods that do not meet the nutritional standards and for electronic

Planner website for foods that are compliant with the “Smart Snacks Standard.” U.S. DEP’T OF AGRIC., A GUIDE TO SMART SNACKS IN SCHOOL 4–5, 11 (2016). The Alliance works with the food and beverage industry to help “shift[] the purchasing behaviors of participating school districts to buy Alliance compliant products.” *Industry, ALL. FOR A HEALTHIER GENERATION*, https://www.healthiergeneration.org/take_action/ [https://perma.cc/VQ4Q-LSSB].

179. MOLNAR ET AL., *supra* note 26, at 7.

180. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (“There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. Providing public schools ranks at the very apex of the function of a State.” (internal citation omitted)); *Pierce v. Soc’y of the Sisters*, 268 U.S. 510, 534 (1925) (“No question is raised concerning the power of the state reasonably to regulate all schools . . .”).

181. GAO-04-810, *supra* note 167, at 9.

182. MOLNAR ET AL., *supra* note 26, at 4, 6.

183. GAO-04-810, *supra* note 167, at 10–11, 14.

184. *Id.* at 18; MOLNAR ET AL., *supra* note 26, at 5.

185. MOLNAR ET AL., *supra* note 26, at 5. A study conducted in 2009 indicated that even when states implement restrictions, “school commercialism may remain rampant.” *Id.* at 6. The study found that in New York, a state that restricts commercial activities in schools, 75% of the 307 districts surveyed still had at least one form of commercial activity present. *Id.* *See generally* Brian O. Brent & Stephen Lunden, *Much Ado about Very Little: The Benefits and Costs of School-Based Commercial Activities*, 8 LEADERSHIP & POL’Y SCHS. 307 (2009) (comparing New York, a state that regulates commercial activities in schools, with Pennsylvania, a state that does not).

186. CAL. CODE REGS. tit. 5 § 9518 (2016); CAL. DEP’T OF EDUC., STANDARDS FOR EVALUATING INSTRUCTIONAL MATERIALS FOR SOCIAL CONTENT 13 (2013).

media that also contains advertisements, such as Channel One.¹⁸⁷ However, local school districts may still enter into food or beverage contracts as long as they create a policy to ensure that the funds raised benefit the schools and that the parents are given the opportunity to comment before any contracts are signed.¹⁸⁸ School districts also may enter into electronic media contracts if they publicly enter into the contract at a public hearing, show that they could not afford the necessary equipment otherwise, and provide notice to parents with the opportunity for parents to request their students be excluded from the program.¹⁸⁹

Some states, on the other hand, have policies allowing commercial activities in schools.¹⁹⁰ One of the most common allowable activities is advertising on school buses.¹⁹¹ As of 2016, at least ten states allow advertising on school buses.¹⁹² Other activities allowed by state statute, with little to no restrictions, include giving local school districts the ability to sell or lease naming rights¹⁹³ and use SEMs that contain advertising.¹⁹⁴

Some states give blanket authority for local school districts to adopt any commercial advertising policies they see fit.¹⁹⁵ The Florida Educational Code, for example, states:

The district school board may adopt policies governing *public gifts and donations to schools*; input from the community concerning instruction resources; *advertising in schools*; participation in community affairs, including coordination

187. CAL. EDUC. CODE §§ 35182.5(c)(1), 35182.5(c)(3) (2017); *see supra* Part II.A.4 (explaining that Channel One provides news updates with commercials for classroom viewing).

188. CAL. EDUC. CODE §§ 35182.5(c)(1)(A)–(B) (2017).

189. CAL. EDUC. CODE §§ 35182.5(c)(3)(A)–(E) (2017).

190. GAO/HEHS-00-156, *supra* note 55, at 10–13.

191. *Id.*

192. The Campaign for a Commercial-Free Childhood (CCFC) lists “Arizona, Arkansas, Colorado, Massachusetts, Nevada, New Jersey, New Mexico, Tennessee, Texas, and Utah” as states that allow commercial advertising on school buses. *2016 School Bus Action Center*, CAMPAIGN FOR A COMMERCIAL-FREE CHILDHOOD, <http://www.commercialfreechildhood.org/action/2016-school-bus-action-center> [https://perma.cc/3SNJ-J9XS]. However, Minnesota also has a statute that allows the practice so the CCFC list may not be comprehensive. MINN. STAT. § 123B.93 (2016).

193. *See, e.g.*, MINN. STAT. § 123B.025 (2016) (“A school district may enter into a contract to: (1) lease the naming rights for school facilities, including school buildings, ice arenas, and stadiums; (2) sell advertising on or in the facilities listed in clause (1); and (3) otherwise enter into an agreement with a sponsoring agent.”).

194. *See, e.g.*, N.C. GEN. STAT. § 115C-98 (“Local boards of education shall have sole authority to select and procure supplementary instructional materials, whether or not the materials contain commercial advertising, to determine if the materials are related to and within the limits of the prescribed curriculum, and to determine when the materials may be presented to students during the school day. Supplementary materials and contracts for supplementary materials are not subject to approval by the State Board of Education.”).

195. GAO/HEHS-00-156, *supra* note 55, at 10–14.

with local governments and planning authorities; protocols for interagency agreements; *business community partnerships*; community use of school facilities; *public solicitations in schools, including the distribution and posting of promotional materials and literature*; visitors to the school campus; school advisory councils; and parent volunteers and chaperones.¹⁹⁶

Many states believe that controlling commercial activities in schools at the local level is appropriate because each district knows its own particular needs.¹⁹⁷ However, because many school districts need additional funding, they have little incentive to restrict commercial activities in their schools.¹⁹⁸

Attempts by all levels of government to regulate commercialism in schools have proven neither comprehensive nor effective.¹⁹⁹ Thus, commercial speech in schools is currently not unlawful.

Is it Misleading? Although commercialism in school is not unlawful, it could be considered misleading.²⁰⁰ As discussed above, not only can SEMs be biased or inaccurate, and therefore misleading, even seemingly innocuous acts like selling or leasing naming rights may be misleading because they can be interpreted as implied endorsements by the schools and their teachers.²⁰¹ The Court has held that if the commercial speech is misleading, the rest of the *Central Hudson* test need not be applied and the government may regulate it.²⁰² However, even if the commercial speech is not misleading or is only potentially misleading, the government may still regulate it, but it may not completely prohibit it.²⁰³

196. FLA. STAT. ANN. § 1001.43(5) (West 2016) (emphasis added).

197. MOLNAR ET AL., *supra* note 26, at 6. The Supreme Court also recognizes the need for control at the local level. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982) (“We are therefore in full agreement with petitioners that local school boards must be permitted ‘to establish and apply their curriculum in such a way as to transmit community values,’ and that ‘there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.’” (quoting Brief for Petitioner at 10, Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982) (No. 80-2043))).

198. See *supra* text accompanying notes 77–78 (discussing the financial needs of schools) and Part II.B.3 (discussing the funding gap for school districts in higher poverty neighborhoods and those with higher numbers of minorities).

199. See *supra* text accompanying notes 180–198 (discussing the various ways federal and state governments have tried to regulate commercial activities in schools).

200. *Captive Kids: Part One*, *supra* note 63.

201. See *supra* Parts II.B.2 (discussing the inaccuracies in SEMs) and II.B.5 (discussing the problem with implicit endorsement by school authorities).

202. In re R. M. J., 455 U.S. 191, 203 (1982).

203. *Id.*

Does the Government Have a Substantial Interest in Regulating Commercialism in Schools? Both state and federal governments have an interest in regulating issues that concern children, especially commercial speech.²⁰⁴ Courts have long held that states have a compelling interest in the education of children,²⁰⁵ and the federal government has acknowledged that it has a substantial interest in regulating children's education.²⁰⁶

Some of the first challenges to states' interests in regulating education arose when states began implementing compulsory attendance.²⁰⁷ In 1925, an Oregon law mandating attendance was challenged.²⁰⁸ The law was ultimately held unconstitutional because it mandated attendance at a public school, thereby restricting parental rights to choose between public and private schools. However, the Court noted that states have the power "to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, [and] that certain studies plainly essential to good citizenship must be taught . . ."²⁰⁹ In 1972, the Court again held a compulsory attendance law unconstitutional because it infringed on religious freedom, but it noted that states "hav[e] a high[] responsibility for education of its citizens" because "education prepares individuals to be self-reliant and self-sufficient participants in society."²¹⁰

The federal government has also shown it has an interest in children's exposure to commercial marketing. In 1990, Congress enacted the Children's Television Act (CTA) because "special safeguards are appropriate to protect children from

204. *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 475 (1989) ("[T]he governmental interests asserted in support of [restricting commercial speech in schools] are substantial: promoting an educational rather than commercial atmosphere on campuses . . . [and] preventing commercial exploitation of students . . .").

205. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) ("[A]s Thomas Jefferson pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system."); *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 534 (1925) ("No question is raised concerning the power of the state reasonably to regulate all schools, . . . and that nothing be taught which is manifestly inimical to the public welfare.").

206. Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000 (codified at 47 U.S.C. §§ 303a-303b, 394).

207. *See, e.g., Yoder*, 406 U.S. at 207 (discussing the conflict between compulsory attendance and religious rights); *Pierce*, 268 U.S. at 514 (discussing how compulsory attendance at public schools infringes on parental rights to choose between public and private schools).

208. *Pierce*, 268 U.S. at 530-31.

209. *Id.* at 534.

210. *Yoder*, 406 U.S. at 213, 221.

over-commercialization on television.”²¹¹ In proposing the bill, Congress noted that “[y]oung children are neither wary nor skeptical of commercial claims and appeals and therefore tend to place indiscriminate trust in television advertising.”²¹² In addition, it looked at the constitutionality of regulating television advertising to children and concluded that limiting the amount of children’s advertising did not violate the First Amendment.²¹³

Although Congress has taken no action against children’s advertising since the CTA, it continues to recognize that marketing to children is a growing concern and has requested several reports over the years regarding advertising that targets children, particularly advertising on school property.²¹⁴ The reports have been requested from various agencies, including the General Accounting Office (GAO), the FTC, and the FCC.²¹⁵

In 2000, the GAO published the results of a survey conducted at Congress’s request.²¹⁶ The purpose of the survey was: “to (1) identify the laws, regulations, and policies that regulate commercial activities in schools and (2) describe the nature and extent of these activities.”²¹⁷ The report concluded that there were many types of commercial activities in schools because the

211. H.R. Con. Res. 1677, 101st Cong. (1990) (enacted). Although agreeing with the reasoning behind the bill, President Bush withheld his signature, stating that “[t]he First Amendment . . . does not contemplate that government will dictate the quality or quantity of what Americans should hear” Statement on the Children’s Television Act of 1990, 2 PUB. PAPERS 1,425 (Oct. 17, 1990).

212. H.R. REP. NO. 101-385, at 6 (1989), *reprinted in* 1990 U.S.C.C.A.N. 1605, 1610–11.

213. To read Congress’s own *Central Hudson* analysis, see *id.* at 9–10. Congress noted:

Recognition that children are a unique and special concern of the state transcends the particular nature of the medium. State action aimed at protecting children repeatedly has survived First Amendment attack whether the regulation concerned written work, cinematography or radio and television. Government has a right to “adopt more stringent controls on communicative materials available to youths than on those available to adults.” This results from the fact that “a child * * * is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.”

Id. at 8–9 (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 212 (1975); *Ginsburg v. New York*, 390 U.S. 629, 649–50 (1968) (Stewart, J., concurring) (alteration in original) (internal citations omitted)).

214. See, e.g., In the Matter of Commercial Proposals for Distributing Radio or Television Programs For Reception on Board School Buses, 24 FCC Rcd. 11682 (2009) (discussing sponsored radio programs on public school buses); FED. TRADE COMM’N, *MARKETING FOOD TO CHILDREN AND ADOLESCENTS: A REVIEW OF INDUSTRY EXPENDITURES, ACTIVITIES, AND SELF-REGULATION* (2008) (discussing food advertising to children); GAO-04-810, *supra* note 167 (providing results of a follow-up study on commercialism in schools); GAO/HEHS-00-156, *supra* note 55 (providing results of a study on commercialism in schools).

215. See text accompanying notes 216–29 (discussing the various reports provided by the different agencies).

216. GAO/HEHS-00-156, *supra* note 55.

217. *Id.* at 3.

decisions were made at the local level.²¹⁸ In addition, some activities were “highly controversial . . . , such as market research . . . ” and that “[n]ew technologies, particularly those involving the Internet, . . . raise concerns about student privacy.”²¹⁹

In 2004, the GAO published a follow up report at Congress’s request to determine what states have done since the initial report in 2000.²²⁰ The report concluded that states either only addressed specific commercial activities by allowing or prohibiting them, or they gave local level governments the authority to regulate commercial activities. Neither significantly changed the results from the original study.²²¹

In 2008, the FTC published a study of food and beverage marketing to children at Congress’s request.²²² The study was in response to the growing concern over childhood obesity.²²³ The FTC found that “[t]he food and beverage companies surveyed . . . spent more than \$1.6 billion marketing their products to children and adolescents in 2006.”²²⁴ These marketing activities included in-school advertising.²²⁵

In 2009, the FCC published a report at Congress’s request on radio and television broadcasting on school buses.²²⁶ The purpose of the report was to “ensur[e] the health, safety and well-being of school children in the United States.”²²⁷ Although the FCC noted that the broadcasting could include commercials and even acknowledged that children may interpret the commercials as the school’s implicit endorsement, among other possible implications,²²⁸ it declined to take a stand against the practice,

218. *Id.* at 34.

219. *Id.* at 34–35.

220. GAO-04-810, *supra* note 167, at 2. Congress was also concerned about student privacy and what was being done to protect student data. *Id.*

221. *Id.* at 14.

222. S. REP. NO. 109-88, at 108 (2005); FED. TRADE COMM’N, *supra* note 214.

223. FED. TRADE COMM’N, *supra* note 214, at ES-1.

224. *Id.* at ES-11, 81.

225. *Id.* at 52–53.

226. Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, 123 Stat. 524, 525 (2009); LAKE, *supra* note 214. The Explanatory Statement section in the Omnibus Appropriations Act refers back to a statement that directs the FCC to provide a report “on commercial proposals for broadcasting radio or television programs for reception on board specially-equipped school buses operated by, or under contract with, local public educational agencies.” 155 CONG. REC. 4419, at 4830 (2009) (explanatory statement submitted by Rep. Obey, Chairman, H. Comm. on Appropriations).

227. In the Matter of Commercial Proposals for Distributing Radio or Television Programs For Reception on Board School Buses, 24 FCC Rcd. 11682, 11683 (2009)

228. *Id.* at 16–22.

recommending instead that the decision should “reside at the local level.”²²⁹

Does Regulating Commercialism in Schools Advance the Government’s Substantial Interest? Clearly, the government has a substantial interest in protecting children from advertising.²³⁰ However, neither Congress nor the states have done much to advance these interests.²³¹ Regulating commercialism in schools would advance the expressed interests of both the state and federal governments.²³²

The federal and state governments have an interest in “prepar[ing] citizens [so that they can] participate effectively and intelligently in our open political system”²³³ Commercialism in schools, however, “teaches students to be consumers instead of citizens.”²³⁴ In *School Commercialism: From Democratic Ideal to Market Commodity*, Alex Molnar compares the views of John Dewey, an educator and philosopher, with the views of Edward Bernays, a pioneer in public relations.²³⁵ Dewey felt that “[s]chools were . . . laboratories of democracy in which students learned democratic habits of cooperation and public service by living them in the classroom” and encouraged teaching “rational thought and problem-solving practice through which individuals could develop to their greatest capacity and contribute most effectively to democratic civic culture.”²³⁶ On the other hand, Bernays once wrote: “The conscious and intelligent manipulation of the organized habits and opinions of the masses is an important element in democratic society.”²³⁷ Molnar laments that “[a]ll evidence . . . suggests that it is the spirit[] of . . . Edward Bernays

229. *Id.* at 24.

230. *See supra* Part III.A.3 (discussing the various interests both the federal and state governments have in restricting commercialism in schools).

231. *See supra* Part III.A.3 (discussing various restrictions the government has placed on commercialism in schools).

232. *See supra* Part III.A.3 (discussing the various interests both the federal and state governments have in restricting commercialism in schools).

233. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972); *see also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 278 (1988) (Brennan, J., dissenting) (“Public education serves vital national interests in preparing the Nation’s youth for life in our increasingly complex society and for the duties of citizenship in our democratic Republic.”); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.”).

234. Adriane Kayoko Peralta, *Corporate-School Partnerships and Neoliberal Influences on Students as Future Participants in the Labor Market*, 2015 BYU EDUC. & L.J. 297, 315 (2015).

235. MOLNAR, *supra* note 1, at 73, 75.

236. *Id.* at 80.

237. *Id.* at 75–76 (quoting EDWARD L. BERNAYS, PROPAGANDA 9 (1928)).

that [is] more likely to be at home in America's schools and classrooms this century than that of Dewey."²³⁸

Commercialism in schools also adds to the over-commercialism Congress was concerned about when it passed the CTA.²³⁹ The FTC estimated that school-aged children under the age of twelve watched approximately 18,750 paid advertisements on television in 2004.²⁴⁰ This does not include extracurricular activities such as web browsing, advergaming (online games built around a brand), mobile advertising, and social media, which are harder to quantify and are being increasingly used in place of television.²⁴¹

Can Commercialism in Schools be Controlled Through Less Restrictive Means or is it Narrowly Tailored? Currently, the government is applying the least restrictive means.²⁴² What little restrictions that are in place are not comprehensive and vary by state and district.²⁴³ Many allow certain types of advertising on school property instead of restricting it.²⁴⁴ Should the government choose to enact regulations restricting commercialism in schools, they would need to directly advance the interest and be reasonable, in proportion to the interest served, and narrowly tailored to survive the fourth prong of the *Central Hudson* test, either as originally conceived or as expanded by *Fox*.²⁴⁵

B. What Type of Forum Restrictions Should Apply?

Once the court determines if the speech is protected under the First Amendment, it should then look at the type of forum to determine what types of restrictions should apply.²⁴⁶ There are three main types of forums: (1) nonpublic, (2) public, and (3) designated public.²⁴⁷

238. *Id.* at 87.

239. H.R. Con. Res. 1677, 101st Cong. (1990) (enacted).

240. DEBRA J. HOLT ET AL., FED. TRADE COMM'N, CHILDREN'S EXPOSURE TO TV ADVERTISING IN 1977 AND 2004: INFORMATION FOR THE OBESITY DEBATE 49 (2007).

241. COMMON SENSE MEDIA, ADVERTISING TO CHILDREN AND TEENS: CURRENT PRACTICES 9–13 (2014).

242. *See supra* Part III.A.3 (discussing various restrictions the government has placed on commercialism in schools).

243. GAO/HEHS-00-156, *supra* note 55, at 10–15; *see also supra* text accompanying notes 190–198 (discussing the types of commercial activities in schools allowed by different states).

244. *Id.*

245. *See supra* notes 156–157 and accompanying text (discussing the fourth prong under the original *Central Hudson* test and the modification of *Fox*).

246. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985).

247. *Id.* at 802.

1. *Nonpublic Forums.* Nonpublic forums are those that are not open to public discourse, even when “members of the public are permitted freely to visit a place owned or operated by the Government.”²⁴⁸ In nonpublic forums, the government may reasonably restrict speech to those that are viewpoint-neutral and “compatible with the intended purpose of the property.”²⁴⁹ Places that have been held to be nonpublic forums include airport terminals, post office sidewalks, and military bases.²⁵⁰

2. *Traditional Public Forums.* Traditional public forums are places that “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”²⁵¹ Such places include “streets and parks.”²⁵² The purpose of traditional public forums is to allow for the “the free exchange of ideas.”²⁵³ Therefore, the government may regulate speech in traditional public forums, but its ability to do so is limited.²⁵⁴ In order to regulate speech, the government must narrowly tailor the regulation to achieve a compelling state interest and may only restrict content-based, not viewpoint-based, speech.²⁵⁵

3. *Designated Forums.* Designated public forums are nontraditional forums that the government has opened for public assembly, despite no obligation to do so.²⁵⁶ The designation may be a specific place, or it may be a specific activity—a subset of designated forums called limited-access forums.²⁵⁷ The government must

248. Greer v. Spock, 424 U.S. 828, 836 (1976).

249. Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 46, 49 (1983).

250. Int’l Soc’y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992) (holding that airport terminals were nonpublic forums and that the Port Authority of New York and New Jersey’s ban on solicitation was not a violation of the First Amendment); United States v. Kokinda, 497 U.S. 720, 728–30 (1990) (holding that the sidewalk to access a post office is a nonpublic forum and not traditionally a gathering place to exchange ideas); Greer, 424 U.S. at 838, 838 n.10 (holding that a military base could restrict speech because “it is . . . the business of a military installation like Fort Dix to train soldiers, not to provide a public forum.”).

251. See Hague v. Comm. for Indust. Org., 307 U.S. 496, 515 (1939).

252. *Id.* This is typically true; however, streets and sidewalks around nonpublic forums may also be considered nonpublic. *Kokinda*, 497 U.S. at 728 (holding that the sidewalk to access a post office is a nonpublic forum and not traditionally a gathering place to exchange ideas).

253. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985).

254. *Hague*, 307 U.S. at 515–16.

255. Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45, 48–49 (1983).

256. *Id.* at 45–46.

257. *Id.* at 45–46, 46 n.7 (“A public forum may be created for a *limited* purpose such as use by certain groups or for the discussion of certain subjects.”) (internal citations omitted)

intentionally open the forum to the public,²⁵⁸ but it is not required to keep it open.²⁵⁹

The Court first recognized the limited-access forum in *Widmar v. Vincent*.²⁶⁰ In *Widmar*, a university revoked access for the use of its facilities to student religious organizations.²⁶¹ The Court held that the university's policy of allowing student organizations to regularly meet on its premises created a public forum and, consequently, any restriction of the limited-access forum was held to the same strict standard of a traditional public forum.²⁶²

However, in a similar case almost fifteen years later, the Court applied a less stringent standard of review for limited-access public forums.²⁶³ In *Rosenberger v. Rector and Visitors of University of Virginia*, the university denied funding for a Christian newspaper due to its religious content, even though it provided funding for other newspapers.²⁶⁴ Although the outcome was the same as in *Widmar*,²⁶⁵ the Court cited the reasonableness standard for nonpublic forums.²⁶⁶

The different applications in *Widmar* and *Rosenberger* led to some confusion as to whether courts should apply strict scrutiny

(emphasis added).

258. *Cornelius*, 473 U.S. at 802 (“The government does not create a public forum by inaction or by permitting limited discourse . . .”).

259. *Perry Educ. Ass'n*, 460 U.S. at 46.

260. *Widmar v. Vincent*, 454 U.S. 263 (1981).

261. *Id.* at 265.

262. *Id.* at 267–68. Ultimately, the Court found the restriction to be unconstitutional because it was content-based. Compare *Perry Educ. Ass'n*, 460 U.S. at 45, 48–49 with *Widmar*, 454 U.S. at 277 (1981). Justice Stevens noted this discrepancy in his concurrence in judgment, stating,

I do not subscribe to the view that a public university has no greater interest in the content of student activities than the police chief has in the content of a soapbox oration on Capitol Hill. A university legitimately may regard some subjects as more relevant to its educational mission than others. But the university, like the police officer, may not allow its agreement or disagreement with the viewpoint of a particular speaker to determine whether access to a forum will be granted.

Widmar, 454 U.S. at 280 (Stevens, J., concurring in judgment).

263. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

264. *Id.* at 825–27.

265. The Court in both *Widmar* and *Rosenberger* found the restriction to be a violation of the First Amendment. *Rosenberger*, 515 U.S. at 837; *Widmar*, 454 U.S. at 277. Whereas the Court in *Widmar* found it to be unconstitutional because it was a content-based restriction, the Court in *Rosenberger* correctly noted that it was unconstitutional because it was viewpoint-based. *Rosenberger*, 515 U.S. at 845–46.

266. *Rosenberger*, 515 U.S. at 829 (“Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not ‘reasonable in light of the purpose served by the forum . . .’”) (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) and referencing *Perry Educ. Ass'n*, 460 U.S. at 46 (1983)).

or a reasonableness standard, and, to further compound the confusion, many courts used “designated forum” and “limited-access forum” interchangeably.²⁶⁷ The Court later clarified that designated forums and limited-access forums are separate and a different standard applies to each.²⁶⁸ In *Good News Club v. Milford Central School*, the Court stated, “If the forum is a traditional or [designated] open public forum, the State’s restrictions on speech are subject to stricter scrutiny than are restrictions in a limited [-access] public forum.”²⁶⁹ However, courts and parties alike still find it confusing.²⁷⁰

4. *What Type of Forum Applies to Public Schools?* Courts typically hold public schools to be limited-access forums when they open their premises to activities unrelated or tangentially related to education.²⁷¹ Therefore, regulations of speech are held to a less stringent standard under the First Amendment.²⁷²

In addition, courts have acknowledged that speech may be regulated in schools due to the nature of their function.²⁷³

267. In trying to disentangle the types of forums and standards, one court noted: The forum nomenclature is not without confusion. Court decisions also speak of “limited public” fora; most recently this phrase has been used interchangeably with “nonpublic” fora, which means both are subject to a lower level of scrutiny. But “limited public forum” has also been used to describe a subcategory of “designated public forum,” meaning that it would be subject to the strict scrutiny test.

Christian Legal Soc’y v. Walker, 453 F.3d 853, 865–66 n.2 (7th Cir. 2006).

268. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001).

269. *Id.*

270. *Christian Legal Society* was decided in 2006, five years after the Supreme Court’s clarification in 2001. *Christian Legal Soc’y*, 453 F.3d at 865 n.2 (7th Cir. 2006) (“[W]hile the parties appeared to agree at oral argument that we are probably dealing with a ‘limited public forum,’ we will not hold them to that agreement because they were plainly arguing for different levels of scrutiny and the ‘forum’ terminology has not always been clear.”).

271. See, e.g., *Nurre v. Whitehead*, 559 U.S. 1025, 1025–27 (2010), *cert. denied*, (Alito, J., dissenting) (“[T]he school had created a ‘limited public forum’ when it allowed the members of the wind ensemble to choose the piece that they wished to play.”); *Agama v. City of Allegan*, 826 F.3d 326, 336 (6th Cir. 2016) (Merritt, J., concurring in part) (finding that the rental of a room at a public high school to citizens created a limited forum).

272. See *supra* Part III.B.A (discussing the level of protection afforded to designated forums).

273. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (“Educators are entitled to exercise greater control over [certain types of speech] to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.”); *id.* at 278 (1988) (Brennan, J., dissenting) (“[Certain forms of speech] undoubtedly sometimes interferes with the effectiveness of the school’s pedagogical functions.”). See also *Morse v. Frederick*, 551 U.S. 393, 403–05 (2007) (discussing *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969), *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), and *Kuhlmeier*, 484 U.S. 260, each of which held that schools could restrict student speech due to the nature of their function).

However, the restrictions must not violate any constitutional rights.²⁷⁴ Restrictions must also consider the age of the children in question because “the susceptibility of school children to prestige suggestion and social influence within the school environment varies inversely with the age, grade level, and consequent degree of sophistication of the child.”²⁷⁵

C. *Can the Government Restrict Commercialism in Schools?*

It is obvious that the government can restrict commercialism in schools based on the type of speech and the type of forum—commercial speech in itself may be restricted as long as it is reasonable, in proportion to the interest served, and narrowly tailored.²⁷⁶ Also, restricting commercial speech in schools is not a violation of the First Amendment so long as it meets the same standards, and may be even stricter than restrictions on commercial speech in general given the nature of the school setting²⁷⁷ and that students could be considered captive audiences due to mandatory attendance.²⁷⁸

274. *Tinker*, 393 U.S. at 507 (“[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”).

275. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 290 n.69 (1963) (Brennan, J., concurring) (citing A.S. Patel & J.E. Gordon, *Some Personal and Situational Determinants of Yielding to Influence*, 61 J. ABNORMAL & SOC. PSYCHOL. 411, 417 (1960)).

276. *See supra* Part III.A (discussing the First Amendment protections afforded to commercial speech).

277. *See supra* Part III.B.4 (discussing the First Amendment protections afforded to commercial speech in schools).

278. *See supra* Part II.B.4 (discussing captive audience). Courts have historically acknowledged a captive audience doctrine in which audiences have the First Amendment right to not hear a message if they have no means of avoiding it. *See, e.g.*, *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) (“The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners . . .”); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring) (“While [a speaker] clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it.”); *Vance v. Judas Priest*, Nos. 86-5844, 86-3939, 1990 WL 130920, at *28 (D. Nev. Aug. 24, 1990) (“*Kovacs* and *Lehman* imply that individuals have a First Amendment right to be free from unwanted speech.”) (citing *Kovacs*, 336 U.S. at 87 and *Lehman*, 418 U.S. at 307). Although Channel One survived captive audience challenges because parents could opt out their children from watching the programming, the captive audience doctrine may apply to instances when students cannot avoid the commercial messages. *See supra* note 52 and accompanying text (discussing courts’ responses to challenges of Channel One in classrooms).

IV. A CALL TO ARMS

As technology advances, so does advertising.²⁷⁹ Corporations fight for consumers' attention in every available space.²⁸⁰ In their war to win over new customers, they have taken aim at children and have infiltrated the public schools, a place that should be a safe haven from the constant barrage of marketing.²⁸¹ It is time to fight back by restricting the types and amount of commercialism allowed in schools.²⁸² Commercial speech can be restricted in a school setting so long as it is not too restrictive and is reasonable.²⁸³ One possible solution is to require by law that an independent third party vet all commercial activities.²⁸⁴ Those activities that get approved should be entered into a pool that schools can look to when they need resources.²⁸⁵ This should be a national program to eliminate the disjointed and fragmented framework that currently exists from state to state,²⁸⁶ with the federal government taking lead.²⁸⁷ It is time that the states and the nation join forces to protect our children from this "immoral war on childhood."²⁸⁸

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279. Josh Herr, *The Future of Advertising: Everything, Everywhere, All the Time*, FISCAL. TIMES (June 7, 2015), <http://www.thefiscaltimes.com/2015/06/07/Future-Advertising-Everything-Everywhere-All-Time> [https://perma.cc/F2NF-ZQY7].

280. Louise Story, *Anywhere the Eye Can See, It's Likely to See an Ad*, N.Y. TIMES (Jan. 15, 2007), <http://www.nytimes.com/2007/01/15/business/media/15everywhere.html>.

281. BROOME, *supra* note 16, at 29–30 ("Schools exist primarily for the education of children, and not in the slightest degree for the purpose of selling the commodities or services of particular concerns, or for the circulation of propaganda in support of the theories, courses of action, or convictions of groups or organizations."); MOLNAR, *supra* note 1, at 8, 16.

282. See *supra* Part II.A (discussing the types of commercial activities in schools).

283. See *supra* Part III (discussing whether restricting commercialism in schools would violate the First Amendment).

284. Jason Vaughn, *Big Business and the Blackboard: A Winning Combination for the Classroom?*, 26 J.L. & EDUC. 35, 42 (1997).

285. *Id.* at 42. California currently has a similar program to vet SEMs for classroom use. See CAL. EDUC. CODE § 60048 (West, Westlaw through 2016 Reg. Sess.); *Social Content Review*, CAL. DEP'T OF EDUC. <http://www.cde.ca.gov/ci/cr/cf/lc.asp> [https://perma.cc/W5QH-MQX8]; see also *supra* text accompanying note 186 (discussing California's vetting program for SEMs).

286. See MOLNAR ET AL., *supra* note 26, at 4, 29.

287. Vaughn, *supra* note 284, at 42.

288. MOLNAR, *supra* note 1, at 86.