THERE'S A FILTER FOR THAT: RETHINKING U.S. COMMERCIAL SPEECH DOCTRINE IN THE DIGITAL AGE

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I. INTRODUCTION

The average American is estimated to be exposed to 4,000 to 10,000 advertisements each day.[1] Much of this exposure may be attributed to the rise of internet platforms providing advertisers the ability to reach hundreds of thousands of users every day. The generation that is growing up in the midst of this advertising boom is known as Gen Z. Members of Gen Z (persons born in 1997 and later) have been dubbed "digital natives," a phrase alluding to their widespread technological fluency from an increasingly young age.[2] Data collected in 2018 proved this nomenclature to be accurate, reporting that ninety-five percent of teens in the United States had access to a smartphone.[3] Yet, perhaps the most shocking typification of a young digital native is experienced when watching a toddler confidently open a smartphone through a swipe or press of the home button. Unfortunately, increased access to the internet for Gen Z has also led to revelations concerning the correlation between increased depression and anxiety with the use of social media platforms like Facebook.[4] Even more concerning is the fact that Facebook has sought to keep information secret about the harms its platforms are causing young users.[5] Since online advertising is such lucrative business model[6] and general online use has been linked with matters of public health,

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[1] Jon Simpson, *Finding Brand Success in the Digital World*, FORBES AGENCY COUNCIL (Aug. 25, 2017), https://www.forbes.com/sites/forbesagencycouncil/2017/08/25/finding-brand-success-in-the-digital-world/?sh=1ba2fd12626e.

[2] *See Digital Native*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/digital-native.

[3] *See* Kim Parker & Ruth Igielnik, *On the Cusp of Adulthood and Facing an Uncertain Future: What We Know About Gen Z so Far*, PEW RSCH. CTR. (May 14, 2020), https://www.pewresearch.org/social-trends/2020/05/14/on-the-cusp-of-adulthood-and-facing-an-uncertain-future-what-we-know-about-gen-z-so-far-2/.

[4] *See* Jean M. Twenge, *Has the smartphone destroyed a generation?*, 320 THE ATLANTIC MONTHLY, Sept. 2017, at 58, 63-64.

[5] *See* Damian Gayle, *Facebook Aware of Instagram's Harmful Effect on Teenage Girls, Leak Reveals*, THE GUARDIAN (Sept. 14, 2021), https://www.theguardian.com/technology/2021/sep/14/facebook-aware-instagram-harmful-effect-teenage-girls-leak-reveals.

[6] *See, e.g.*, Alphabet Inc., Annual Report (Form 10-K) at 6-7 (Dec. 31, 2020) (Google Services generates revenues primarily by delivering both performance advertising and brand advertising); *see also* Facebook, Inc., Quarterly Report (Form 10-Q) at 35 (Apr. 29, 2021) ("Facebook generate substantially all of our revenue from advertising"); *see generally* Megan Graham & Jennifer Elias, *How Google's $150 Billion Advertising Business Works*, CNBC (last updated Oct. 13, 2021), https://www.cnbc.com/2021/05/18/how-does-google-make-money-advertising-business-breakdown-.html ("Google's main business is online advertising. In 2020, Alphabet generated almost $183 billion in revenue. Of that, $147 billion — over 80% — came

it would seem natural for there to be a large amount of regulation concerning online advertising practices to protect children, but this is hardly the case in the United States.[7]

As such, the United States relies predominantly on the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC) to regulate advertisements directed at children. However, both agencies have in recent years been relatively inactive in targeting commercial advertising practices that are directed at children.[8] In fact, scholars have pointed out that there exists a recent trend in the courts to assign commercial speech greater protections, even in matters of public health.[9] Moreover, the application of the *Central Hudson*[10] intermediate scrutiny test for commercial speech looks more like a strict scrutiny test in its recent legal applications.[11] The combination of a gap in regulatory action for online advertising directed at children and an increased protection of commercial speech begs the question of whether there is an alternative approach to the United States' hands-off strategy.

For the United States to stay abreast of the current online climate while adequately protecting children's right to privacy and wellbeing, the U.S. Supreme Court's *Central Hudson* intermediate scrutiny analysis for commercial speech should interpret its "no more extensive than necessary" requirement to be more aligned with Canada's *R. v. Oakes*[12] test's minimal impairment prong. Moreover, to avoid a ruling of unconstitutionality, American legislation and agency rules addressing advertisements directed at children online would need to be narrower than the Quebec Consumer

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from Google's ads business, according to the company's 2020 annual report. Google has been the market leader in online advertising for well over a decade and is expected to command nearly a 29% share of digital ad spending globally in 2021").

[7] *See* Rita-Marie Reid, *Embedded Advertising to Children: A Tactic That Requires a New Regulatory Approach*, 51 AM. BUS. L.J. 721, 743 (2014).

[8] *See id.* at 744.

[9] *See* Micah L. Berman, *Clarifying Standards for Compelled Commercial Speech*, 50 WASH. U. J. L. & POL'Y 53, 54 (2016) [hereinafter Berman, *Clarifying Standards*]; *see also* Samantha Rauer, *When the First Amendment and public health collide: the Court's increasingly strict constitutional scrutiny of health regulations that restrict commercial speech*, 38 AM. J. L. & MED. 690, 702 (2012).

[10] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562-63 (1980) (noting that the Constitution grants "a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.").

[11] *See generally* Rauer, *supra* note 9, at 702 (citing Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 525 (2001); *and* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489-90 (1996)) ("Although the Supreme Court originally conceived of the Central Hudson test as an intermediate standard of review, it essentially appears to apply strict scrutiny to public health regulations.").

[12] *See* R. v. Oakes, [1986] 1 S.C.R. 103, 138–49 (Can.).

Protection Act (Quebec CPA) and more akin to the FTC's 900-Number Rule[13] or the United Kingdom's Age Appropriate Design Code (AADC).[14]

Section II of this comment details the dangers of advertising to children before examining child directed advertising regulations in the United States, the United Kingdom, and Canada. Additionally, this section analyzes the United States' intermediate scrutiny standard for protecting commercial speech before reviewing the origins of the proportionality analysis within Europe and Canada. Section III applies the Quebec CPA within the United States and the United States' Child Online Protection Act in Canada to better display how each legal test differs. Section III also examines lessons learned from the comparative analysis. Finally, Section IV concludes that the U.S. could utilize the reasoning in the *Oakes* test to better protect children's wellbeing from negative advertisements and that the AADC or the FTC's 900-Number Rule could serve as legislative or agency templates for regulating child directed advertising.

II. BACKGROUND

This section will examine the controversy surrounding advertisements directed towards children before analyzing various regulations in the United States, United Kingdom, and Canada that protect children from advertising. Next, the section will review how the United States uses intermediate scrutiny to protect commercial speech. Finally, it will overview the theory and history that guides the proportionality analysis prior to examining how Canada's Supreme Court utilizes proportionality analysis concerning commercial speech.

A. Advertising and the Impact on Children

In the 1970s, there was a large push to limit child directed advertising.[15] The primary factor motivating this policy shift was a fear that advertising could have negative consequences for the wellbeing of children who watched them.[16] Studies that substantiated this fear analyzed how children perceive commercials utilize three stages of cognitive development: the perceptual stage, the analytical stage, and the reflective stage.[17]

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[13] See generally 16 C.F.R. § 308.3(e) (prohibiting pay-per-call services and ads for 900-number services directed to children under 12).

[14] *See also Age Appropriate Design Code*, U.K. INFORMATION COMMISSIONER'S OFFICE 3 (Sept. 2, 2020), https://ico.org.uk/media/for-organisations/guide-to-data-protection/ico-codes-of-practice/age-appropriate-design-a-code-of-practice-for-online-services-2-1.pdf [hereinafter ICO].

[15] *See* Deborah Roedder John, *Consumer Socialization of Children: A Retrospective Look at Twenty-Five Years of Research,* 26 J. CONSUMER RES. 183, 188 (1999); J. Howard Beales, III, *Advertising to Kids and the FTC: A Regulatory Retrospective that Advises the Present*, 12 GEO. MASON L. REV. 873, 878 (2004).

[16] *See* John, *supra* note 15, at 188.

[17] *See id.* at 186–87.

In the perceptual stage (ages three to seven), research suggests that children do not critically view the commercial and accept the viewing as entertaining and truthful.[18] However, research indicates that children by the age of five are capable of distinguishing a commercial from regular programing.[19] Yet, this distinction is often attributed to perceptual cues and length of time that a commercial plays for.[20] Once in the analytical stage (ages seven to eleven), children utilize more abstract reasoning and are capable of employing a "decision strategy" that takes into account environmental cues.[21] It is at this stage that children first begin to understand the informational and persuasive intent of advertisements.[22] Moreover, in this analytical stage children develop the capacity to understand viewpoints from the perspective of others.[23] Consequently, children within this stage begin to grasp the concepts of negotiation and persuasion.[24] At the final reflective stage (ages eleven to sixteen), children's thinking evolves in a manner of degree, not kind, to grasp the social and consumer underpinnings of advertisements.[25]

Research demonstrated that advertisements influence children in a myriad of fashions. For example, advertisements have the capacity to influence knowledge, attitudes, and values in relation to products and brands.[26] Moreover, advertisements may function to socialize children to consumerism by raising a child's awareness of product availability and encouraging the purchase of products.[27] Unintended consequences of advertisements occur as well. For instance, children cultivating unhealthy eating habits may be a consequence of food advertisements.[28] Additionally, poor body image and self-identity in teenagers may result from reinforced stereotypes in advertisements.[29]

Much of the research available on advertising and its impact on children concerns television advertising. Therefore, the issues surrounding advertising in a world where access to the internet is widely available only heightens the concern that advertising will negatively impact the

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[18] *See id.* at 187; BARRIE GUNTER ET AL., ADVERTISING TO CHILDREN ON TV: CONTENT, IMPACT, AND REGULATION 28 (2004) (summarizing previous research suggesting that children ages three to seven find advertising entertaining without analyzing the persuasive intent of the advertisement.).

[19] *See* John, *supra* note 15, at 187.

[20] *See id.*; GUNTER ET AL., *supra* note 18, at 31-33.

[21] John, *supra* note 15, at 184.

[22] *See id.* at 185; GUNTER ET AL., *supra* note 18, at 34. Research in this field, however, does not always agree on what constitutes "understanding advertisements," which impacts at what age researchers claim children acquire said ability, *see id.* at 38.

[23] *See* John, *supra* note 15, at 187.

[24] *See id.* at 187.

[25] *See id.*

[26] *See* GUNTER ET AL., *supra* note 18, at 87.

[27] *See id*. at 38.

[28] *See id.* at 117.

[29] *See id.* at 118.

development and overall wellbeing of children. In the United States, the FTC and Congress set out regulations in an attempt to mitigate these negative consequences but have done so in a limited fashion.

B. United States Regulations for Advertising to Children

Section five of the FTC Act grants the FTC the general power to regulate advertising and prohibits unfair or deceptive practices in commerce.[30] Specifically, the FTC Act designates false advertising as unfair or deceptive.[31] The FTC finds a practice to be deceptive if a representation or omission is likely to mislead the customer and the inclusion or exclusion of the deceptive information is material.[32] Though such legislation applies equally to both advertising directed at children and adults, the FTC would later propose rules that particularly addressed child directed advertising.

In 1978, the FTC issued a notice of proposed rulemaking that would have restricted advertisements aired during children's television programs.[33] The proposed rule suggested banning television advertising directed at children under the age of eight, banning television advertising of sugared food products to children between eight and twelve, and requiring a significant amount of health disclosures in food advertisements.[34] Public and congressional outcry was swift.[35] In response to the proposed rule, Congress allowed the FTC's funding to lapse and shut down the agency for a temporary period.[36] Consequently, the FTC has been reticent to regulate child directed advertising in such an encompassing manner.[37] However, an example of a narrow FTC rule that restricts child directed advertising is the 900-Number Rule.[38] This rule bans child directed advertisements for kids under twelve from containing 900 number call services.[39] For older children, ages twelve to eighteen, the advertisement must display clearly that the child must have

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[30] *See* 15 U.S.C. § 45 (2018).

[31] *See id.* § 52.

[32] *See* FTC Policy Statement on Deception, appended to *In re* Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984).

[33] *See* Children's Advertising, 43 Fed. Reg. 17967 (proposed Apr. 27, 1978) (to be codified at 6 C.F.R. pt. 461).

[34] *See id.* at 17969.

[35] William A. Ramsey, Note, *Rethinking Regulation of Advertising Aimed at Children,* 58 FED. COMM. L.J. 361, 362–63 (2006) ("FTC received harsh political and public response to this proposed rulemaking. The Washington Post called the proposal 'a preposterous intervention that would turn the FTC into a great national nanny.' Congress responded to the FTC's proposal not only by passing legislation limiting the FTC's power to enforce any rule relating to children's advertising, but also by failing to renew the FTC's funding, in effect shutting down the agency temporarily.") (quoting Editorial, *The FTC as National Nanny*, WASH. POST, Mar. 1, 1978, at A22).

[36] *See* Beales, *supra* note 15, at 879.

[37] *See* M. Neil Browne et al., *Advertising to Children and the Commercial Speech Doctrine: Political and Constitutional Limitations*, 7 ECON. FAC. PUBL'N'S 68, 81 (2009).

[38] *See* 16 C.F.R. § 308.3(e) (1993).

[39] *See id.* § 308.3(e)(1).

the parent's permission to call.[40] This narrow regulatory rule is still functioning today.

In 1998, Congress passed the Child Online Protection Act (COPA).[41] Though COPA did not address child directed advertising, it did impose criminal penalties on violators who posted online for "commercial purposes . . . material that is harmful to minors."[42] Material that is "harmful to minors" included "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that . . . the average person, applying contemporary community standards, would find, . . . is designed to pander to, the [minor's] prurient interest."[43] However, a violator may assert the defense that access to the harmful material was restricted by requiring the use of a credit card, a digital certificate of age, or any other technologically feasible means of verifying age.[44] Thus, the primary goal of COPA was to reduce children's access to pornography and protect the vulnerable online from generally harmful material. Nevertheless, COPA would be struck down as unconstitutional under the strict scrutiny standard in 2004.[45] COPA thus displays that any regulation and legislation passed by the FTC, FCC, or Congress would need to pass the U.S. Supreme Court's scrutiny standard if challenged in court.

On the other hand, the Children's Online Privacy Protection Act (COPPA)[46] has not been struck down as unconstitutional. COPPA's primary purpose is to protect children's information by giving parents greater clarity and control over their child's online data.[47] COPPA generally requires that online services directed to children are prohibited from collecting personal data from children under thirteen without parental consent.[48] Moreover, the FTC, who is empowered to enforce COPPA, stipulated that apps and websites are bound by COPPA if they (1) are directed to children under thirteen and collect personal data from children, (2) are general audience apps or websites but have actual knowledge that they collect personal information from children under thirteen, or (3) are website or app operators with actual

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[40] *See id.* § 308.3(f)(1).

[41] *See* Elizabeth R. Purdy, *Child Online Protection Act of 1998*, *in* ENCYCLOPEDIA OF THE FIRST AMENDMENT 266 (John Vile et al. David Hudson, & David Schultz eds., 2009), https://dx.doi.org/10.4135/9781604265774.

[42] Child Online Protection Act of 1998, 47 U.S.C. § 231(a)(1) (1998).

[43] *Id.* § 231(e)(6)(A).

[44] *See id.* § 231(c)(1)(A)-(C).

[45] *See* Ashcroft v. Am. Civ. Liberties Union, 542 U.S. 656, 666-67 (2004) ("Filters are less restrictive than COPA. They impose selective restrictions on speech at the receiving end, not universal restrictions at the source. … Above all, promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished.").

[46] 16 C.F.R. § 312.1 (2013).

[47] *See* Ariel Johnson, *Reconciling the Age Appropriate Design Code with COPPA*, INT'L ASS'N OF PRIV. PRO.'S (Feb. 23, 2021), https://iapp.org/news/a/reconciling-the-age-appropriate-design-code-with-coppa/.

[48] 16 C.F.R. § 312.2.

knowledge they are collecting personal information on behalf of another website from children under thirteen.[49] A child directed website is then one where the operator has actual knowledge that it is collecting personal data from children under the age of thirteen or the characteristics of the website in general suggest it is directed at children.[50] Practically speaking, COPPA means that targeted advertising to children under thirteen would not be permitted on websites that have actual knowledge of child data collection nor without parental consent. COPPA also requires that online services establish procedures to protect collected personal data.[51]

C. United Kingdom Regulations for Child Activities Online

A regulatory scheme in the United Kingdom that attempts to protect children online from online advertising and more is the Age Appropriate Design Code (AADC).[52] The AADC is a Code of Practice that displays how the Information Commissioner's Office (ICO) plans to interpret the General Data Protection Regulation against violators.[53] The AADC stipulates fifteen standards that apply to online platforms, including apps and social media sites, that are (1) directed at children or (2) are likely to be accessed by children.[54] Importantly, children are defined as persons under the age of eighteen.[55] A quick summation of the major premises in the AADC follows.

First, all platforms that are subject to the AADC are required to design their services with the child's best interest in mind without using a child's data in ways known to be detrimental to their wellbeing or against regulatory standards.[56] Naturally, this requires conducting a data protection impact assessment to assess the rights of children accessing the platform and verifying the ages of users unless all the AADC's standards are applied equally to adult and child users.[57] Second, there is a requirement that privacy protection is set to high for children by default unless a compelling reason not to exists.[58] Privacy protection includes no data sharing, geolocation, or profiling of child users without considering the best interest of the child and having a compelling reason.[59] If a child is under the age of thirteen, parental consent is needed before utilizing personal data.[60] Lastly, privacy

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[49] FTC Children's Online Privacy Protection Rule, 16 C.F.R. § 312.3 (2022).

[50] 16 C.F.R. § 312.2.

[51] *Id.* § 312.3(e).

[52] *Introduction to the Age appropriate design code*, U.K. INFORMATION COMMISSIONER'S OFFICE (n.d.), https://ico.org.uk/for-organisations/guide-to-data-protection/ico-codes-of-practice/age-appropriate-design-code/.

[53] ICO, *supra* note 14, at 4.

[54] *Id.* at 17.

[55] *Id.*

[56] *See id.* at 7.

[57] *See id.* at 29.

[58] *See id.* at 7.

[59] *See* ICO, *supra* note 14, at 7.

[60] *See id.* at 106.

information provided to users must (1) be understandable to a child while (2) not collecting more data than what is needed and (3) providing prominent tools for children to exercise their rights of data protection.[61] Though the success of the AADC is yet to be fully seen, YouTube, TikTok, and Instagram have already altered their practices with YouTube blocking ad targeting for all children.[62]

D. Quebec Regulations for Advertising to Children

In Quebec, Canada, the Consumer Protection Act (Quebec CPA) limits advertising "directed at persons under thirteen years of age."[63] This limitation applies to a variety of formats including online advertising directed at children in Quebec.[64] In determining whether an advertisement is directed to children, the Quebec CPA advises an accounting of context, "and in particular of (a) the nature and intended purpose of the goods advertised; (b) the manner of presenting such advertisement; [and] (c) the time and place it is shown."[65] However, there are exceptions for advertisements in magazines or inserts,[66] for advertisements that "announce a program or a show directed at [children under thirteen],"[67] and for advertisements "constituted by a store window, a display, a container, a wrapping or a label or if it appears thereon."[68] The Quebec CPA has then promulgated a list of actions that advertisements must not do if they are to be exempt from the Quebec CPA.[69] Some of the more notable prohibited actions include exaggerating the character of the goods or service, use of an animated cartoon or comic to advertise a good besides a cartoon show or comic book, and employing a well-known celebrity that appears in publications or programs directed at children.[70] Nevertheless, as long as an advertisement is of general appeal and

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[61] *See id*. at 38-40.

[62] *See* Jane Wakefield, *Children's Internet Code: What is it and how will it work?*, TECH. – BBC NEWS (Sept. 1, 2021), https://www.bbc.com/news/technology-58396004.

[63] Consumer Protection Act, C.Q.L.R. 1978, c P-40.1, ss. 248-49 (Can.).

[64] OFF. DE LA PROT. DU CONSOMMATEUR, ADVERTISING DIRECTED AT CHILDREN UNDER 13 YEARS OF AGE: GUIDE TO THE APPLICATION OF SECTIONS 248 AND 249 CONSUMER PROTECTION ACT 3 (2012), https://cdn.opc.gouv.qc.ca/media/documents/consommateur/sujet/publicite-pratique-illegale/EN_Guide_publicite_moins_de_13_ans_vf.pdf.

[65] Consumer Protection Act s. 249(a)-(c).

[66] *See* Regulation respecting the application of the Consumer Protection Act, C.Q.L.R. 1981, c P-40.1, r. 3, s. 88 (a)-(d) (Can.) (outlining the conditions that exempt advertisements).

[67] *Id.* at s. 89 (if the "advertisement is in conformity with the requirements of section 91").

[68] *Id.* at s. 90 (if the "requirements of paragraphs *a* to *g*, *j*, *k*, *o* and *p* of section 91 are met").

[69] *See id.* at s. 91 (outlining the restrictions placed on ads directed at children, for "purposes of applying sections 88, 89 and 90").

[70] *See id.* at s 91.

its content was not designed to appeal to children, it will not be subject to the Quebec CPA.[71]

It should also be noted that Quebec, Canada does not represent the federal regulatory culture in Canada. Nationally speaking, Canada has legislation that prohibits false or misleading advertising in general, but the advertising industry is predominantly self-regulated.[72] Specifically, the Broadcast Code for Advertising to Children outlines measures for legally advertising to children.[73] Unlike the Quebec CPA, this self-regulatory regime does not outright ban advertisements to children, rather it requires compliance with scheduling stipulations, safety requirements, and endorsement procedures.[74] Consequently, the Quebec CPA represents a markedly different tactic in addressing advertisements to children.

Regardless of the regulatory track that is taken by an agency or congressional body, it will eventually need to pass whatever level of scrutiny or test that the court system applies. The following subsection will thus examine both the United States' intermediate scrutiny analysis and Canada's proportionality analysis as applied to commercial speech.

E. Intermediate Scrutiny for Commercial Speech in the U.S.

In the United States, the First Amendment of the Constitution protects freedom of speech.[75] Unlike the Canadian Charter and the European Convention though, the U.S. Bill of Rights does not contain an explicit limitation on when or how to deduce if interference with an enshrined right is proportionate or even permitted.[76] Some scholars have thus posited that the absence of a limitation clause is indicative of a constitutional culture that was suspicious of government power and consequently preferred categorical protections against government intrusions.[77] Moreover, the lack of a

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[71] *See* Consumer Protection Act ss. 248-49; *see also* OFF. DE LA PROT. DU CONSOMMATEUR, *supra* note 64, at 26.

[72] Catherine Bate & Kelly Harris, *Advertising & Marketing in Canada*, LEXOLOGY (May 2, 2019), https://www.lexology.com/library/detail.aspx?g=883c4ac1-215f-40c6-a045-27920b9402fe.

[73] *The Broadcast Code for Advertising to Children*, AD STANDARDS (last updated Aug. 2022), https://adstandards.ca/preclearance/advertising-preclearance/childrens/childrens-code/.

[74] *See id.*

[75] U.S. CONST. amend. I ("Congress shall make no law… abridging the freedom of speech, or of the press…").

[76] *Compare* U.S. CONST. amend. I–X *with* Canadian Charter of Rights and Freedoms, Part I of Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c 11 s. 1 *and* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 sec. 1.

[77] *See* MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE 55 (2013).

limitation clause effectively grants the judiciary large discretion to formulate tests concerning unconstitutionality.[78]

Commercial speech is generally defined as speech that proposes a commercial transaction.[79] The U.S. Supreme Court has held that commercial speech may fall within the First Amendment's protection of free speech.[80] The U.S. Supreme Court in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York* created a four-pronged test to deduce if commercial speech is protected.[81] First, the commercial speech must be lawful and not misleading.[82] Second, the government must have a substantial interest to regulate the speech in question.[83] Third, if there is a substantial governmental interest and the speech is lawful and not misleading, then the court must ascertain whether the regulation directly advances the government's interest.[84] Fourth and finally, the regulation must be no more extensive than is necessary.[85] The final prong does not require the least restrictive means like strict scrutiny,[86] yet the Supreme Court has been critiqued for applying the final prong in a similar fashion.[87]

The *Central Hudson* test was applied in *44 Liquormart, Inc. v. Rhode Island* for a state regulation that banned advertisements containing the price of alcohol except for price tags or signs within a licensed premise that was not visible from the street.[88] The Court only addressed the final two prongs in *Central Hudson* and found that the government failed on both

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[78] *See* TOR-INGE HARBO, THE FUNCTION OF PROPORTIONALITY ANALYSIS IN EUROPEAN LAW 219 (2015).

[79] *See* Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976); Bigelow v. Virginia, 421 U.S. 809, 822 (1975); Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rel.'s, 413 U.S. 376, 385 (1973).

[80] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980).

[81] *Id.* at 566.

[82] *Id.*

[83] *Id.*

[84] *Id*.

[85] *Id*.

[86] *See* Bd. of Tr.'s of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989).

[87] *See* Beales, *supra* note 15, at 887 ("It seems very likely that there will be further evolution of commercial speech/First Amendment principles as they pertain to the broadcast media; moreover, the direction of doctrinal change thus far suggests more protection, rather than less, for commercial speech on radio and television."); Donald L. Beschle, *Clearly Canadian? Hill v. Colorado and Free Speech Balancing in the United States and Canada*, 28 HASTINGS CONST. L.Q. 187, 231 (2001) ("In cases involving commercial speech and hate speech, replacing allegedly clear categorical rules with more open-ended balancing-type analysis has led to stronger protection for the free speech right."); Micah L. Berman, *Commercial Speech Law and Tobacco Marketing: A Comparative Discussion of the United States and Canada*, 39 AM. J.L. & MED. 218, 234 (2013) [hereinafter Berman, *Commercial Speech Law*] ("As mentioned above, the commercial speech doctrine in the United States started out by emphasizing the interests of consumers. Since that time, however, the focus of the courts has gradually shifted from the consumer to the speaker.").

[88] *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 (1996).

accounts.[89] For the third prong, the Court noted that common sense arguments were not sufficient to establish the regulations would materially decrease market-wide consumption of alcohol.[90] As for the final prong, the Court reasoned that the government could have used alternative methods such as taxation or education campaigns.[91] Therefore, the near total ban on commercial speech was found to be unconstitutional.[92]

Another application of the *Central Hudson* test can be found in *Lorillard Tobacco Co. v. Reilly*.[93] In *Lorillard*, a Massachusetts regulation prohibited the advertising of tobacco within 1000 feet of a school, among other things, and the government asserted its interest was the protection of minors from the harms of tobacco.[94] The Supreme Court then engaged in the *Central Hudson* test.[95] The Court presumed that the first prong was met and that the advertisements were lawful and not misleading, and no party contested the second prong i.e., that the government had a substantial interest in protecting the health of minors.[96] For the third prong, the Court stated that the government may "justify speech restrictions by reference to studies" that show the regulations may directly advance the government interest.[97] The government subsequently provided a sufficient amount of evidence after presenting various studies on the issue of protecting children from tobacco-related products.[98] The Court then turned to the final prong of analyzing if the regulation was more extensive than necessary.[99] Of particular concern for the Court was that the restrictions would constitute a near total ban in certain areas for advertising to adults.[100] Consequently, the regulation failed the final prong and was found to be unconstitutional.[101]

Neither one of these two cases involve regulations of speech on the internet, but both still provide insight into how the U.S. Supreme Court has employed the *Central Hudson* test in a strict fashion and elevated commercial speech interests above protecting child welfare online. Of particular note, the U.S. Supreme Court has repeatedly placed an emphasis and a preference for the use of filters by parents to protect children instead of banning certain content from being online and accessible to children.[102] Though the cited

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[89] *Id.* at 505, 507.
[90] *See id.* at 506.
[91] *See id.* at 507.
[92] *See id.* at 516.
[93] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554-55 (2001).
[94] *Id.* at 534-35.
[95] *See id.* at 552-54.
[96] *See id.* at 555.
[97] *Id.* (quoting Florida Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995)).
[98] *See Lorillard Tobacco Co*., 533 U.S. at 561.
[99] *See id.*
[100] *See id.* at 561–62.
[101] *See id.* at 565–66.
[102] *See* Ashcroft v. Am. Civ. Liberties Union, 542 U.S. 656, 669 (2004) ("[Congress] could also take steps to promote their development by industry, and their use by parents. It is

cases involve the use of strict scrutiny because the regulations police speech-content, they still offer the insight that when it comes to internet regulations the Supreme Court finds filters to be a viable alternative to near total bans.

In light of both the *Central Hudson* test and the tendency of the U.S. Supreme Court to offer filters as the best alternative in cases concerning content regulation online, three conclusions arise. First, near total bans will rarely be found to be acceptable under the *Central Hudson* test. Second, the greater the infringement on adult freedoms the greater the possibility that the government action will be unconstitutional. Lastly, the *Central Hudson* test is increasingly employed to protect commercial speech over the wellbeing of the consumer. With these deductions in mind, this comment will now examine the proportionality analysis' history and its use in Canada.

F. The Theory and History of the Proportionality Analysis

The theory supporting proportionality analysis is not a modern invention.[103] Scholars trace proportionality analysis in its modern doctrinal form to Prussian administrative law.[104] Article 10(2) of the 1794 Prussian *Allgemeines Landrecht* states, "[t]he police is [sic] to take the *necessary* measures for the maintenance of public peace, security and order."[105] The concept of limiting government action to what was necessary was then coupled with the Prussian principle *Rechtsstaat* which limited government intervention on individual rights to what was explicitly authorized by the law.[106] Therefore, Prussian proportionality analysis was a two-step process where government intervention of individual rights must have been necessary and explicitly authorized by the law.

Proportionality analysis was then adopted by the European Court of Justice in 1970 and then by the European Court of Human Rights in 1976.[107] Consequently, the adoption of the proportionality analysis in these reputable

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incorrect, for that reason, to say that filters are part of the current regulatory status quo. The need for parental cooperation does not automatically disqualify a proposed less restrictive alternative."); United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 825–26 (2000) (finding that between a blanket speech restriction and technology available to parents to restrict child access to sexually explicit material, the government failed to show that the less restrictive option was not as effective); Reno v. Am. Civ. Liberties Union, 521 U.S. 844, 875 (1997) (finding a statute that criminalized the knowing transmission of obscene material to minors under the age of eighteen as too broad because there was "available *user-based* software . . . that [was] a reasonably effective method by which *parents* can prevent their children from accessing sexually explicit and other material which *parents* may believe is inappropriate for their children.") (emphasis in original).

[103] *See* COHEN-ELIYA & PORAT, *supra* note 77, at 24 n.1 ("Traces of the concept of proportionality can be found in Ancient times: … images of balancing in Egyptian tomb paintings … and … in the Hammurabi Codex and the Old Testament … [and] the Magna Carta").

[104] *Id.* at 24.

[105] *Id.* at 25.

[106] *See id.*

[107] *See id.* at 11.

courts led to many Western European jurisdictions adopting proportionality analysis and eventually contributed to proportionality analysis' spread across the globe.[108] A notable exception to the proportionality analysis trend is the United States which some scholars identify as having either a categorizing analysis or a balancing test.[109]

As alluded to in the Prussian history of proportionality analysis, proportionality analysis is employed in modern times whenever citizens' individual rights are threatened by government action; in other words, proportionality analysis is used by the courts to examine the scope of exceptions to protected individual freedoms enshrined in a country's constitution.[110] Moreover, as Prussian administrative law performed the proportionality analysis in a two-step process, modern European proportionality analysis also involves an overarching two-step procedure.[111] First, the court assesses whether the government has a legitimate ground to infringe on protected freedoms.[112] Second, if the government is found to have a legitimate ground, the intrusion on individual freedoms must be proportionate.[113]

The general framework of a necessary action by the government and only a proportional intrusion on the individual's freedom plays out in Canada as well. However, when applying the proportionality analysis to commercial speech, the Canadian Supreme Court implements a multi-pronged test that analyzes proportionality and necessity in greater depth than the two-step process outlined above.

G. Canada's Commercial Speech Doctrine

The Canadian Charter of Rights and Freedoms (Canadian Charter) enshrines the civil rights and freedoms of all Canadians.[114] The Canadian Charter particularly protects the "freedom of thought, belief, opinion, and expression, including freedom of the press and other media of

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[108] *See* COHEN-ELIYA & PORAT, *supra* note 77, at 11-13. Examples of countries that have adopted a proportionality analysis in Western Europe include Belgium, France, Greece, Italy, Portugal, Spain, Switzerland, and the United Kingdom. *Id.* at 11 n.8. Eastern European countries with proportionality analysis include Albania, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Lithuania, Moldavia, Poland, Romania, Slovakia, and Slovenia. *Id.* at 12 n.10. In Asia, states that have adopted proportionality analysis include Hong Kong, South Korea, and India. *Id.* at 12. In Latin America, Brazil, Columbia, Mexico, and Peru employ a proportionality analysis. *Id.* "Two other bodies of law that have contributed to the global diffusion of proportionality are international law and Canadian constitutional jurisprudence." *Id.*

[109] *See id.* at 15; Beschle, *supra* note 87, at 190–91.

[110] *See* HARBO, *supra* note 78, at 15 ("The proportionality principle is often applied as a means to limit the scope of an exception to the freedom/right.").

[111] *See id.* at 22.

[112] *See id.*

[113] *See id.*

[114] *See* Canadian Charter of Rights and Freedoms, c 11 s. 1.

communication."[115] In conjunction with the Canadian Charter, the province of Quebec also has a Charter of Human Rights and Freedoms (Quebec Charter) that states, "Every person is the possessor of the fundamental freedoms, including . . . freedom of expression."[116] Thus, both the federal Canadian Charter and the provincial Quebec Charter protect freedom of expression which was found to apply to commercial speech like advertising.[117]

However, the Canadian Charter also possesses an explicit limitation to all freedoms protected therein: "The [Canadian Charter] guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[118] The Canadian courts then developed a multi-step test that is applied whenever the government infringes on a right, including commercial speech.[119] The name for the test is the *Oakes* test derived from the case *R. v. Oakes*.[120] The *Oakes* test engages in an initial two-step examination with the second prong containing multiple steps within it.[121] First, the court examines the legislative objective to see if it is sufficiently "pressing and substantial" to limit an individual right.[122] Second, the court analyzes if the means to achieve the objective are proportional.[123] This proportionality prong includes three steps: (1) the means employed must have a rational connection to the objective, (2) the infringement on individual rights must interfere no more than needed on the rights to achieve its objective, and (3) the costs of the intrusion must not outweigh the benefits sought.[124] Though this comment focuses primarily on one case applying the *Oakes* test in the 1980s, the structure of the *Oakes* test remains the same today.[125]

The leading case for employing the *Oakes* test to commercial speech directed at children in Canada is *Irwin Toy Ltd. v. Quebec*.[126] *Irwin Toy Ltd. v. Quebec* involved an advertiser challenging the constitutionality of the Quebec CPA, specifically the near total ban on child directed advertising, claiming it infringed upon freedom of expression guaranteed in the Canadian

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[115] *Id.* at s. 2.
[116] Charter of Human Rights and Freedoms, C.Q.L.R. 1975, c C-12 s. 3 (Can.).
[117] *See* Irwin Toy Ltd. v. Quebec, [1989] 1 S.C.R. 927, 969-71 (Can.).
[118] Canadian Charter of Rights and Freedoms, c 11 s. 1.
[119] *See* R. v. Oakes, [1986] 1 S.C.R. 103, 138-39 (Can.).
[120] *See id.*
[121] *See id*.
[122] *Id.*
[123] *See id.* at 139.
[124] *See id.* at 139; *see also* L. W. SUMNER, THE HATEFUL AND THE OBSCENE: STUDIES IN THE LIMITS OF FREE EXPRESSION 56 (2004) ("The proportionality test subdivides in turn into three parts: (a) *Rational connection*. … (b) *Minimal impairment*. … [and] (c) *Proportional effects*.").
[125] *See* R. v. K.R.J., [2016] 1 S.C.R. 906, 938 (Can.); Alberta v. Hutterian Brethren of Wilson Colony, [2009] 2 S.C.R. 567, 593–94 (Can.); Thomson Newspapers Co. v. Canada, [1998] 1 S.C.R. 877, 903 (Can.).
[126] *See* Irwin Toy Ltd. v. Quebec, [1989] 1 S.C.R. 927, 928-29 (Can.).

Charter and the Quebec Charter.[127] After identifying that commercial speech was protected under freedom of expression and that government restrictions in Quebec were over the content of speech,[128] the Canadian Supreme Court required that the Quebec CPA pass the *Oakes* test in order to be justified.[129] First, the Canadian Supreme Court required that the Quebec CPA possess a pressing and substantial objective. This prong was satisfied because the Canadian Supreme Court found that the Quebec CPA's objective was "the protection of a group [children] which is particularly vulnerable to the techniques of seduction and manipulation abundant in advertising."[130] Second, the Canadian Supreme Court went on to examine the proportionality of the legislative means through a three-step analysis.[131]

Firstly, the Canadian Supreme Court found the advertising ban to be "rationally connected" to its objective of protecting the vulnerable because (1) the ban is clearly directed to protect children and (2) the ban is not total since there are exceptions and advertisements can still be directed at adults.[132] Secondly, the Canadian Supreme Court held that the ban was the "minimal impairment of free expression" because "while evidence exists that other less intrusive options reflecting more modest objectives were available to the government, there is evidence establishing the necessity of a ban to meet the objectives the government had reasonably set."[133] Lastly, the Canadian Supreme Court noted that the impact of the ban did not outweigh the government's objective because advertisers are always free to direct messages to parents.[134] Therefore, with these three steps met the Quebec CPA was held proportional and constitutionally sound.[135]

Three major premises are distilled from this case about proportionality analysis. First, proportionality analysis may be used to offer deference to the legislators' concerns and to remove discretionary judgments on behalf of the judicial branch when competing claims of individual and

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[127] *See id.*

[128] *See id.* at 967–79.

[129] *See id.* at 986.

[130] *Id.* at 989. The Canadian Supreme Court noted that this first prong is an evidentiary inquiry that only requires a reasonableness justification for the legislative action. *Id.* at 990. Specifically, the Canadian Supreme Court relied on a U.S. Federal Trade Commission report which the legislature used as evidence that advertising to children is "*per se* manipulative." *Id.* at 988.

[131] *See Irwin Toy Ltd*., [1989] 1 S.C.R. at 991.

[132] *See id.* at 933.

[133] *Id.* at 934 (in finding the Quebec CPA passed the minimal impairment step, it was noted that "[t]his Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups. There must nevertheless be a sound evidentiary basis for the government's conclusions.").

[134] *See id.* at 934. The Court noted here that impact on advertisers' revenue is not a sufficient reason to hold that the legislation's impact outweighed the objective. *Id.* at 1000.

[135] *See id.* at 1000.

community rights are at issue.[136] Second, the deference within the proportionality analysis lends itself to fostering a constitutional culture where communal rights are not viewed as a threat to individual rights and consumer protection is highly valued.[137] Third, bans of commercial speech for the purpose of protecting minors must contain sufficient exceptions to not function as a total ban on adults' rights, but near total bans are not *per se* invalid.

III. ARGUMENT

The previous section displayed that the form of the *Central Hudson* test is similar to Canada's proportionality analysis, yet the application of these tests has led the courts in different directions. The U.S. Supreme Court has increasingly applied the "no more extensive than necessary" prong of the *Central Hudson* test in a strict scrutiny fashion to protect commercial speech, which results in near total bans of speech being contradictory to the First Amendment.[138] The Canadian Supreme Court, on the other hand, is not as wary about near total bans of commercial speech when done for a legitimate end,[139] and consequently commercial speech analysis is done with greater emphasis on protecting the consumer.

To draw out these differences in more detail and to examine a possible regulatory solution for curtailing advertisements directed to children online in the United States, this section will take the Quebec CPA and put it into the United States legal context as well as place COPA in the Canadian legal context. What will follow is a hypothetical challenge to the Quebec CPA on U.S. First Amendment grounds from a company that advertised a toy directly to children under thirteen and the U.S. Supreme Court consequently applying the *Central Hudson* test to examine if the Quebec CPA is constitutional in preventing such a practice. Then, the inverse will be analyzed by placing COPA in the Canadian context and applying the *Oakes* test. Though COPA in the United States was struck down on strict scrutiny

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[136] *See Irwin Toy Ltd*., [1989] 1 S.C.R. at 990 ("Where legislature mediates between the competing claims of different groups in the community . . . [and] if that if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess.").

[137] *See* COHEN-ELIYA & PORAT, *supra* note 77, at 155.

[138] *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555-56 (2001); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507 (1996).

[139] *See Irwin Toy Ltd*., [1989] 1 S.C.R. at 933.

grounds, Canada applies the *Oakes* test for all alleged infringements of freedom of expression.[140]

A. Applying the U.S. Central Hudson *Test to Quebec CPA*

The *Central Hudson* test asks four questions. First, is the commercial speech lawful and not misleading?[141] Second, is the government interest substantial? [142] Third, does the regulation directly advance the government's interest?[143] Finally, is the regulation no more extensive than necessary?[144]

First, the Supreme Court is likely to find that the practice of advertising a toy on YouTube to children is not a misleading nor an unlawful form of speech since the advertisement is clearly displaying corporate affiliations.

Second, the government's legislative goal of protecting minors from harmful advertising will likely be found as a substantial government interest. This may be deduced from the fact that in *Reno v. ACLU* the Supreme Court noted that "we have repeatedly recognized the governmental interest in protecting children from harmful materials."[145] Therefore, the second prong of the *Central Hudson* test is likely passed as long as the government details how advertising may be harmful to children.

Third, the Supreme Court is likely to hold that a near total ban on child directed advertising directly advances the government's interest. The government here would need to rely on more than common sense arguments that near total bans logically advance the government's interest in protecting child welfare and present actual studies that show such a restriction would be successful.[146] Nevertheless, this prong would likely be met since there are studies that display the need to limit child directed advertising and the dangers associated with advertising to children.[147] This leaves the final prong for the Court's analysis.

Finally, the Court will likely find that the Quebec CPA is not narrowly tailored to the government's interest. Though the final prong does not require the least restrictive means of regulation, precedent displays that

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[140] *See* Berman, *Commercial Speech Law*, *supra* note 87, at 227-28.

[141] *See Cent. Hudson Gas & Elec. Corp*. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Reno v. Am. Civ. Liberties Union* , 521 U.S. 844, 875 (1997).

[146] *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555 (2001); 44 Liquormart, Inc. v. Rhode Island, 517 U.S 484, 505 (1996).

[147] *See* John, *supra* note 15, at 183–84; GUNTER ET AL., *supra* note 18, at 103, 117.

near total bans have been found to almost be *per se* overly broad under the *Central Hudson* test.[148] However, it could be argued that the Quebec CPA is not a near total ban due to the exceptions listed: the exceptions include advertisements in magazines directed at children, advertisements announcing shows for children, and advertisements included on a store window, a display, a container, or a wrapping label.[149] Thus, the government could argue that the Quebec CPA is distinguishable from both *Lorillard Tobacco Co. v. Reilly* and *44 Liquormart, Inc. v. Rhode Island* because both of the regulations in these respective cases essentially denied adults access to advertising whereas the Quebec CPA still permits adults access to advertising.[150] The problem with this distinction is that the Quebec CPA applies to the online setting and thus the U.S. Supreme Court will likely reason that filters used by parents would be less intrusive and still achieve the same goal.[151] Therefore, the Quebec CPA would be deemed unconstitutional in the United States by failing the *Central Hudson* test's final prong.

B. Applying the Canadian Oakes *Test to COPA*

The *Oakes* test asks two overarching questions: (1) was the legislative aim pressing and substantial and (2) was the means proportional to the end.[152] For the latter analysis, there must be (a) a rational connection between the means and the end, (b) the impairment of individual freedom must be minimal, and (c) the costs must not outweigh the benefits.[153]

First, the legislative aim of COPA is likely to be found as substantial. Similar to the Quebec CPA in *Irwin Toy Ltd. v. Quebec* where the Canadian Supreme Court found that protecting those who are easily susceptible to manipulation was a substantial interest,[154] COPA too was passed by legislators intending to protect children from harms arising online. [155] Thus, the first step of the *Oakes* test will likely be met.

As for the proportionality examination, all three subsections will likely be satisfied by COPA. First, COPA is rationally connected to its legislative end since COPA's requirements of age verification to access adult content online clearly restrict the capacity of children gaining access to

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[148] *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 505 (1996).

[149] *See* Regulation respecting the application of the Consumer Protection Act, C.Q.L.R. 1981 c P-40.1 r. 3, ss. 88-9 (Can.).

[150] *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 562 (2001); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507 (1996).

[151] *See* Ashcroft v. Am. Civ. Liberties Union, 542 U.S. 656, 666–67 (2004) ; *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 825–26 (2000); *Reno v. Am. Civ. Liberties* Union, 521 U.S. at 879.

[152] *See R. v. Oakes*, [1986] 1 S.C.R. 103. 138–39 (Can.).

[153] *See id.* at 139.

[154] See Irwin Toy Ltd. v. Quebec, [1989] 1 S.C.R. 927, 987 (Can.).

[155] *See* 47 U.S.C. § 231 (1998). Purdy, *supra* note 41, at 266.

pornography and other similarly harmful material.[156] Second, the Court does not require the least intrusive legislation available but only that the government presents evidence that supports the necessity of the legislation.[157] Therefore, this prong will likely be met since Congress can point to the fact that the FCC has known since the 1970s that advertising to children is dangerous.[158] Finally, the Court is likely to hold that the costs of COPA do not outweigh the benefits. In *Irwin Toy Ltd. v. Quebec*, the Court held that advertisers were still free to advertise to adults even with the restrictions surrounding child directed advertising and that merely a revenue cost was not sufficient to outweigh the substantial legislative aim.[159] Here, the costs would be requiring adult content sites to implement an age verification system which may deter website visitors. This deterrent principle is in fact the impact the legislation aims to achieve for children and those who are adults would still be able to access the content by merely verifying their age. Thus, the Court is likely to find the final prong of the *Oakes* test satisfied. Therefore, COPA would be upheld as constitutional in Canada.

C. Lessons Learned

The above comparative analysis of the *Central Hudson* test and the *Oakes* test highlights that the major difference between these tests is that the Canadian proportionality analysis elevates the wellbeing of the consumer by not interpreting its proportionality prong in a strict fashion. This is not to say that the *Oakes* test is impervious from being interpreted strictly, rather the Canadian Supreme Court has set the precedent that the proportionality prong is not a legal instrument that will be used to subjugate consumer wellbeing for the sake of commercial speech rights.[160] However, the tendency to elevate the wellbeing of the consumer may also be traced back to Canada's constitutional culture where the Canadian Charter possesses an explicit limitation clause for individual rights.[161] Canada's constitutional culture combined with the *Oakes* test enables Canada to possess regulations that aim to protect the wellbeing of children even at the expense of commercial speech.

The increasingly strict nature of the *Central Hudson* test, on the other hand, lends itself to the constitutional culture where individual rights are perceived in absolutes. This categorical perspective is evidenced by the fact that the U.S. Bill of Rights does not have limitation clauses for the

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[156] *See* Child Online Protection Act of 1998, § 231(c)(1).

[157] *See Irwin Toy Ltd*., [1989] 1 S.C.R. at 934.

[158] *See* H.R. REP. NO. 100–675, at 7 (1988) (noting that the FCC had, in its 1974 policy statement, concluded "that children cannot distinguish conceptually between programming and advertising" and are "far more trusting of and vulnerable to commercial 'pitches' than are adults").

[159] *See Irwin Toy Ltd*., [1989] 1 S.C.R. at 1000.

[160] *See* Berman, *Commercial Speech Law*, *supra* note 87, at 234.

[161] *See* COHEN-ELIYA & PORAT, *supra* note 77, at 13.

individual rights enumerated therein.[162] Yet, the similar structure between the *Central Hudson* test and the *Oakes* test provides the U.S. courts with an opportunity to reverse engineer the present constitutional culture. The *Central Hudson* test is an intermediate scrutiny test, which means that courts are not required to interpret it in the vein of strict scrutiny. Rather, as the Canadian Supreme Court noted in *Irwin Toy Ltd. v. Quebec*, minimal impairment could be understood to require the government to present evidence that supports the necessity of the legislation while the court should "not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups."[163] Therefore, the *Central Hudson* test can be implemented in a fashion that proportionately elevates consumer wellbeing and changes the United States' constitutional culture because the structure of the test is similar to Canada's *Oakes* test.

A natural question that arises from this suggestion for *Central Hudson* interpretation is why the Court would be motivated to do so. First, as shown above, American children are being placed in harm's way for the sake of protecting commercial speech rights.[164] Second, online advertising is a global industry that requires a concerted global effort to protect the vulnerable and the United States' current stance puts children from across the globe at risk since online advertisements may originate in various countries. Lastly, there is an international trend in protecting children's rights online and limiting the scope of commercial speech.[165] The United States need not become a legal outlier and a safe haven for overly protected commercial speech. Therefore, interpreting the *Central Hudson* test like the proportionality analysis in the *Oakes* test can help the United States return to the origins of commercial speech doctrine and protect vulnerable consumers.[166]

Nevertheless, some may question the value in examining Canadian legal principles to address a United States constitutional issue. In response, it is important to note what this comment is not advocating. Specifically, this comment is not advocating a wholesale adoption of the Canadian *Oakes* test into the United States legal context to replace the *Central Hudson* test for First Amendment analysis. Rather, the *Oakes* test may serve as a template for reasoning through the *Central Hudson* test because there are enough structural similarities between the two tests. With the *Central Hudson* test being interpreted in a strict fashion, despite being an intermediate scrutiny analysis, the *Oakes* test provides a roadmap on how to stop the strict

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[162] *See* U.S. CONST. amend. I–X; COHEN-ELIYA & PORAT, *supra* note 77, at 13.

[163] *Irwin Toy Ltd*., [1989] 1 S.C.R. at 999.

[164] *See* GUNTER ET AL., *supra* note 18, at 87.

[165] *See* Natasha Singer, *Britain Plans Vast Privacy Protections for Children*, N.Y. TIMES (Jan. 21, 2021), https://www.nytimes.com/2020/01/21/business/britain-children-privacy-protection-kids-online.html.

[166] *See* Berman, *Commercial Speech Law*, *supra* note 87, at 234.

interpretation of the *Central Hudson* test and better elevate consumer wellbeing above the ever-increasing protection of commercial rights. Thus, by examining Canadian legal principles, the United States could return to commercial speech doctrine's original task – protecting the consumer.[167]

Another major takeaway from the above analysis is that even with the numerous exceptions included in the Quebec CPA, it was still too similar to a near total ban and thus unconstitutional under the *Central Hudson* test. Consequently, regulating advertising directed at children will need to be narrower in its scope. An example of a narrow FTC rule that targets advertising directed to children is the 900-Number Rule.[168] This rule bans child directed advertisements for kids under twelve from containing 900 number call services.[169] For older children, ages twelve to eighteen, the advertisement must clearly display that the child must have the parent's permission to call.[170] The 900-Number Rule displays a narrowly tailored regulation that also effectively restricts commercial speech for the purpose of protecting children from being manipulated.

Regulations for online advertisements then could specifically target advergames as the FTC did with the 900-Number Rule. Advergames are videogames specifically created by companies or in collaboration with companies to promote a brand's product.[171] Examples of advergames include Doritos VR Battle, Chex Quest, and Chipotle's Scarecrow.[172] Applying the regulatory scheme of the 900-Number Rule to advergames, the FTC could ban advergames for children under the age of twelve and require the online platform to obtain parental permission before allowing older children to play.[173] This would successfully limit advertisements to the most vulnerable children while also being sufficiently narrow to survive an attack on constitutional grounds.

Additionally, the United Kingdom's AADC could also serve as a template for American legislation combating targeted advertising. First, the AADC applies to online services that are either directed at children, defined

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[167] *See id.* Though commercial speech doctrine undoubtedly has the goal of protecting commercial speech, the fact that the doctrine originated with an intermediate scrutiny analysis lends itself to the inference that there is a co-equal purpose of protecting the wellbeing of consumers. Otherwise, the U.S. Supreme Court should have used a strict scrutiny test to protect commercial speech rights from infringement.

[168] *See* 16 C.F.R. § 308.3.

[169] *See id.* § 308.3(e).

[170] *See id.* § 308.3(f).

[171] *See* Reid, *supra* note 7.

[172] *See* Mitch Swanson, *Advergaming: How Videogame Advertising Helps with Consumer Engagement*, GAMIFY, https://www.gamify.com/gamification-blog/advergaming-how-game-advertising-is-built-for-consumer-engagement.

[173] *See generally* Seth Grossman, *Grand Theft Oreo: The Constitutionality of Advergame Regulation*, 115 YALE L.J. 227, 235 (2005).

as under eighteen, or are likely to be accessed by children.[174] AADC thus expands legal obligations beyond COPPA's two primary applications: online platforms directed at children under thirteen that collect personal data from children and general audience apps or websites that have actual knowledge that they collect personal information from children under thirteen. [175] By incorporating the AADC's definition of children and its broader application to websites likely to be accessed by children, U.S. legislation could encapsulate website operators who rely on the excuse of not having actual knowledge that they collect data from children under thirteen or that their websites are not directed at children to target children with advertising.

Second, the AADC's expanded legal application is coupled with the concept that operators of online platforms can adapt their platform designs to the audience that is using their services; [176] meaning that a website operator must design the platform by creating parental consent requirements for users under thirteen but not for older children who can opt into behavioral advertising on their own. Additionally, the AADC mandates website tools be easily displayed for children to exercise their rights to privacy on their own.[177] In contrast, COPPA's requirement of primarily utilizing parental consent as a tool to protect children displays a focus on empowering parents as gatekeepers but not empowering children or other teenagers.[178] Therefore, legislation could place a greater onus on website operators to implement designs that empower children under the age of eighteen to exercise their privacy rights to not be targeted by behavioral advertising while still being more protective of the most vulnerable children in requiring parental consent. These regulatory suggestions also have the benefit of being sufficiently narrow for the *Central Hudson* test because they do not impair the flow of information that is directed at adults since, unlike the Quebec CPA, advertisements are not outright banned.

IV. CONCLUSION

By comparing the trajectory of the United States' commercial speech doctrine and regulatory approach with Canada and the United Kingdom, it is possible to see how the United States could better address the issue of online advertising directed at children on both an agency and judicial level. In understanding that Canada's proportionality analysis prioritizes the consumer's wellbeing over individual commercial speech rights and shares a structural similarity with the *Central Hudson* test in the United States, it begs the question why the United States should not also interpret the *Central Hudson* test to prioritize the consumer's wellbeing by refraining from strictly

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[174] *See* ICO, *supra* note 14, at 17.
[175] *See* FTC Children's Online Privacy Protection Rule, 16 C.F.R. § 312.3 (2022).
[176] *See* ICO, *supra* note 14, at 97.
[177] *See id.* at 8.
[178] *See* Johnson, *supra* note 47.

interpreting the *Central Hudson* test. As for regulatory action, though the Quebec CPA and COPA were too expansive for the U.S. Supreme Court, rules derived from the 900-Number Rule or the AADC could provide a template for regulating online advertising strategies without being too expansive.