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# **“ONE BOURBON, ONE SCOTCH, ONE BEER”: EACH “SPIRIT” SHOULD HAVE AN EQUAL, BUT LIMITED, OPPORTUNITY TO ADVERTISE ON TELEVISION**

*Anthony D. DellaCroce\*\**

*We have a situation in the United States where we're spending \$15 billion on the war on drugs and yet we allow billions of dollars to be freely spent to promote the drug that kills more youth than any other drug. It's time to take a long, hard look at what's going on.<sup>1</sup>*

## **INTRODUCTION**

A resident of Corpus Christi, Texas returns home late from work one evening and turns on the television to discover a curious new commercial that instantly grabs her attention. Two dogs who have just graduated from obedience school are shown on the screen: one has merely earned her diploma, but the other carries a pouch containing a bottle of Seagram's "whisky"<sup>2</sup> and, thus, is labeled class valedictorian.<sup>3</sup> "Strange," she thinks to herself, "I

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\* GEORGE THOROGOOD, *One Bourbon, One Scotch, One Beer*, on THE BADDEST OF GEORGE THOROGOOD AND THE DESTROYERS (EMI Records 1992).

\*\* Brooklyn Law School Class of 1998. The author wishes to extend a special note of thanks to both his family, for their continual support, and friends, who fostered an interest in this topic. A special thanks to Tiffany Mele.

<sup>1</sup> Press Advisory from Representative Joseph Kennedy, *Send a Message to the Alcohol Industry: Stop Marketing Your Booze to Kids* (on file with *Journal of Law and Policy*) [hereinafter Press Advisory (May 16, 1996)].

<sup>2</sup> Seagram, based in Canada, spells its Crown Royal product "whisky." Generally, distilled blends produced in the United States and Ireland are spelled "whiskey." See NEW SHORTER OXFORD ENGLISH DICTIONARY 3672 (4th ed. 1993).

<sup>3</sup> Julian Beltrame, *A Hard Sell: Seagram's Returns Ads to Television: Canadian Liquor Giant Challenges Voluntary U.S. Ban on Ads*, OTTAWA

don't remember ever seeing an ad for hard liquor on television before. What's going on here?"

"What's going on here" is that, in June 1996, Seagram began test advertising its Crown Royal Canadian Whisky on a local television station in Corpus Christi, Texas<sup>4</sup> and, more recently, has extended advertising into other regions of the nation.<sup>5</sup> While these advertisements do not violate any federal legislation,<sup>6</sup> they do bring an abrupt end to the distilled spirits industry's self-imposed, forty-eight-year ban on "hard liquor"<sup>7</sup> advertisements from television.<sup>8</sup>

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CITIZEN, June 27, 1996, at F2; Paul Farhi, *There's the Bottle, Here's the Battle: Seagram TV Ads Stir Criticism, Legislation*, WASH. POST, June 14, 1996, at D1.

<sup>4</sup> Beltrame, *supra* note 3, at F2. "Since early June, residents of Corpus Christi have been guinea pigs in a daring market strategy on the NBC affiliate [KRIS-TV] that could rewrite the rule book on alcohol advertising." Beltrame, *supra* note 3, at F2.

<sup>5</sup> As of October 1996, Seagram advertisements have reached the East Coast on television stations in Long Island, Westchester and Fairfield Counties and 14 counties in New Jersey. Drew Fetherston, *Whiskey Rebellion: Seagram's TV Ads, the First for Hard Liquor, Come to LI*, NEWSDAY, Oct. 30, 1996, at A3. On the East Coast, instead of airing the original advertisement depicting the graduating canines, Seagram has devised a commercial in which a duck and a peacock appear on the screen. *Id.* A voice then likens Chivas Regal scotch to the peacock and an image of the bottle appears. *Id.*

<sup>6</sup> See Farhi, *supra* note 3, at D1.

<sup>7</sup> The author uses the colloquial phrase "hard liquor" as a synonym for "distilled liquor." The process of "distillation" is defined as:

1. The action of trickling or falling down drop by drop. 2. The action or process of vaporizing (some constituent of) a substance by heat, condensing it by cold in a special vessel, and re-collecting the liquid, esp. to free it of dissolved impurities or to separate it from a liquid with a different boiling point; the extraction of a volatile constituent by this means; the separation of volatile from nonvolatile constituents by heating in a closed vessel.

NEW SHORTER OXFORD ENGLISH DICTIONARY, *supra* note 2, at 706.

<sup>8</sup> See, e.g., Debra Goldman, *A Spirit's New Medium*, ADWEEK, July 8, 1996, at 17 (reporting that, as a result of Seagram's advertisement, "it only took 30 seconds for [the 48-year-old ban] to fall off the wagon").

In response to Seagram's commercials, the liquor industry officially voted to end its voluntary ban on November 8, 1996.<sup>9</sup> Other liquor companies are, therefore, likely to follow suit and air their own television commercials.<sup>10</sup> Fearing the potentially negative results of such advertising, Representative Joseph Kennedy II of Massachusetts introduced an omnibus bill that would limit the television advertising of *all* alcoholic beverages.<sup>11</sup>

Part I of this Note argues that the television provision of the spirit industry's self-regulating code was outdated, its repeal is justified and that any advertising privileges enjoyed by the beer and wine industries should be extended to producers of distilled liquors. Part II analyzes the way in which the Supreme Court has recently interpreted the First Amendment as applied to commercial speech. More importantly, it argues that Representative Kennedy's bill, should it be voted into law, is constitutional. Specifically, Section A discusses why alcohol advertisements represent a constitutional form of speech protected under the First Amendment. Section B contends that, although the federal government is not provided broad police powers to care for the health and safety of the American people, the government does have a legitimate interest in regulating alcohol advertisements. Section C argues that Representative Kennedy's regulatory bill directly advances the government

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<sup>9</sup> The ban fell only six months after Seagram's violation of it via commercials. Stuart Elliott, *Liquor Industry Ends Its Ad Ban in Broadcasting*, N.Y. TIMES, Nov. 8, 1996, at A1. Among the companies that voted to abolish the ban were Seagram, the Brown-Forman Corporation (producer of Jack Daniel's), Allied Domecq (producer of Beefeater gin) and Grand Metropolitan P.L.C. (producer of Smirnoff vodka). *Id.*

<sup>10</sup> See Yumiko Ono, *Creep or Splash?: Seagram Memo Plots Ad Move*, WALL ST. J., June 18, 1996, at B1. In an internal memorandum prior to the lifting of the ban, Seagram speculated that "competitors might respond with their own ad campaigns to a move such as Crown Royal adding \$5 million in TV ad spending to its current \$3 million print budget. In one scenario, Seagram envisioned total industry ad spending rising 126% over 1994 levels, to \$335 million." *Id.*

<sup>11</sup> See H.R. 3479, 104th Cong., 2d Sess. (1996); *Liquor Advertising Flap Reveals Crack in Industry Armor: Joseph E. Seagram & Sons Inc.'s Televised Ads for Crown Royal Canadian Whiskey*, ALCOHOLISM & DRUG ABUSE WK., June 24, 1996, at 4.

interests enumerated in Section B. Finally, Section D demonstrates that Representative Kennedy's bill is not needlessly excessive. The means implemented by the bill are necessary to meet the government's interest. This Note, therefore, concludes that all alcohol advertisements on television—either for beer, wine or hard liquor—may be regulated in accordance with the terms of Representative Kennedy's bill.

## I. THE DISTILLED SPIRITS COUNCIL AND THE CODE OF GOOD PRACTICE

In 1948, after the end of Prohibition,<sup>12</sup> the Distilled Spirits Council of the United States enacted the Code of Good Practice,<sup>13</sup> thus enabling the liquor industry to regulate its own practices.<sup>14</sup>

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<sup>12</sup> The Eighteenth Amendment prohibited "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes." U.S. CONST. amend. XVIII (repealed 1933). However, the hardships and pressures wrought by the Great Depression led, in large part, to the repeal of this amendment via the Twenty-first Amendment. See BILL SEVERN, *THE END OF THE ROARING TWENTIES: PROHIBITION AND REPEAL* 163 (1969). The Twenty-first Amendment provides:

- Section 1. The eighteenth article of amendment to the Constitution of the United States [Prohibition] is hereby repealed.
- Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. CONST. amend. XXI, §§ 1-2.

<sup>13</sup> Code of Good Practice for Distilled Spirits Advertising and Marketing (Distilled Spirits Council of the United States, Inc. 1995) [hereinafter Code of Good Practice]. The provision establishing the television restriction dated to 1948. Farhi, *supra* note 3, at D1. "[L]iquor makers agreed to the ban in 1948, in part to appease still potent prohibition sentiment in the U.S." Beltrame, *supra* note 3, at F2.

<sup>14</sup> Code of Good Practice, *supra* note 13, Preamble. The code states: The members of DISCUS [Distilled Spirits Council of the United States] adopt this Code of Good Practice as guidelines to ensure responsible, tasteful, and dignified advertising and marketing of distilled spirits to adult consumers who choose to drink and to avoid

Specifically, in regard to television, the Code of Good Practice stated:

Distilled spirits should not be advertised by means of free access broadcasts media (i.e., national broadcasts network, local broadcasts network, and public TV, and radio) or by means of non-free access broadcast media (i.e., cable and satellite TV). . . . Members should not provide any compensation for advertising "plugs" on free or non-free access broadcast media.<sup>15</sup>

The television restriction soon became outdated and its abandonment is justified for three reasons. First, the repeal is warranted because current American society is notably different than it was in the 1940s.<sup>16</sup> In the early 1940s, only what are now considered to be the three major television networks were broadcasting television signals.<sup>17</sup> By 1946, eight-thousand households nationwide had purchased televisions.<sup>18</sup> As the post World War II period progressed, however, more families purchased televisions.<sup>19</sup> Despite this increase in the sale of televisions, the average household still owned only one television set.<sup>20</sup>

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advertising to individuals below the legal purchase age.

Code of Good Practice, *supra* note 13, Preamble.

<sup>15</sup> Code of Good Practice, *supra* note 13, Advertising §§ B, D (noting that section B did not apply to wine coolers, "a beverage containing not more than 7% alcohol by volume," produced by liquor companies).

<sup>16</sup> See Elaine Underwood, *Seagram's Shapiro Makes a Case for Bringing Spirit Ads Back to TV*, BRANDWEEK, June 17, 1996, at 8 (interviewing Arthur Shapiro, Executive Vice-President of Marketing and Strategy for Seagram America, on how networks and the television "medium" have recently changed).

<sup>17</sup> ABC, CBS, and NBC are the three major television networks that originated from parent radio stations. DAVID POLTRACK, TELEVISION MARKETING: NETWORK, LOCAL, AND CABLE 67 (1983). CBS-TV descended directly from CBS-Radio. *Id.* RCA divided its NBC-TV into the red and the blue networks—the red evolved into what we now know as NBC and the blue became ABC. *Id.*

<sup>18</sup> 2 MARY BETH NORTON ET AL., A PEOPLE AND A NATION: A HISTORY OF THE UNITED STATES 943 (4th ed. 1994).

<sup>19</sup> *Id.* "The number of households with TVs climbed . . . to 4 million in 1950, 46 million in 1960 (a 920 percent increase), and 61 million in 1970." *Id.*

<sup>20</sup> See Underwood, *supra* note 16, at 8.

The relatively small number of televisions present in the homes of consumers following World War II did not prevent television and its commercials from playing a large role in growing suburbia.<sup>21</sup> “[T]elelevision advertising was a valuable service to consumers: if keeping up with or emulating the Joneses was a new version of the American Dream, television advertising provided visual evidence of what the Joneses were buying.”<sup>22</sup> Truth notwithstanding, according to television advertisements of the time, the “Joneses” were not purchasing hard alcohol.<sup>23</sup> Hard liquor companies adhered to the voluntary ban and simply did not advertise.<sup>24</sup> The companies were not blind to the fact that families frequently huddled together around the sole television of their home, eager to watch one of the three newborn networks.<sup>25</sup> Hard liquor

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<sup>21</sup> Television shows and commercials provided viewers a window that allowed them to see examples of the “sumptuous life.” NORTON ET AL., *supra* note 18, at 943. The increasing popularity of television led to a decline in the popularity of radio and the reading of newspapers and other publications. *See* NORTON ET AL., *supra* note 18, at 943.

<sup>22</sup> NORTON ET AL., *supra* note 18, at 943. Television commercials permitted viewers to see the brands of “automobile[s], cigarette[s] or electric appliance[s]” their neighbors were purchasing. NORTON ET AL., *supra* note 18, at 943.

<sup>23</sup> Early television commercials did not paint a complete picture of all the items Americans were purchasing. Although liquor producers did not advertise on radio and television following World War II, their products were, nonetheless, purchased and consumed. *See, e.g.,* Anthony Faiola, *Liquor Industry Says It's Ready for Prime Time*, MORNING NEWS TRIB., Nov., 8, 1996, at A1 (reporting that it is only now, after the ban has been lifted, that distilled spirits producers are preparing to advertise their products on television).

<sup>24</sup> *See, e.g.,* Beltrame, *supra* note 3, at F2 (reporting that, for the past 48 years, the self-imposed ban was followed).

<sup>25</sup> *See* Underwood, *supra* note 16, at 8. Television programs of the period were oriented toward such family viewing. In the late 1940s, *The Goldbergs*, which actually began as a radio show, was popular among television viewers. This series emulated how “[t]elelevision reinforced the family-oriented privatization of American social life . . . [as] the Goldberg family, offered the TV audience a warm humanism that dignified . . . their trying encounters with urban, workday life.” 2 AMERICAN SOCIAL HISTORY PROJECT, WHO BUILT AMERICA?: WORKING PEOPLE & THE NATION'S ECONOMY, POLITICS, CULTURE & SOCIETY 530 (1992). As the 1950s progressed, *The Goldbergs* faded but family oriented comedies and action shows became very popular. For example, programs such as *I Love Lucy*, *Dragnet*, *Father Knows Best* and *Leave It to Beaver* enjoyed

companies did not want to expose themselves to negative social repercussions by attempting to advertise in a manner intrusive upon "family time."<sup>26</sup>

Today, however, the average home owns 2.3 television sets<sup>27</sup> and, between regular public broadcasting and cable, a seemingly endless number of channels exists.<sup>28</sup> No longer are viewers forced to watch what other individuals in the home would like to see. Armed with remote controls and myriad channels to select, viewers are no longer forced to watch a commercial—let alone a commercial for an alcoholic beverage. The television media has progressed markedly and liquor companies should be permitted to "catch up."<sup>29</sup>

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large audiences. NORTON ET AL., *supra* note 18, at 943.

<sup>26</sup> See Underwood, *supra* note 16, at 8.

<sup>27</sup> Underwood, *supra* note 16, at 8 (quoting Arthur Shapiro as saying that "[t]he world has changed. The average home has some 2.3 TV sets. There are scores of channels available").

<sup>28</sup> See POLTRACK, *supra* note 17, at 2-3.

By 1981, some 4500 cable systems were in operation, and another 6000 were in various stages of development. In all, there were 22 million subscriber homes, 11 million of which were receiving some pay service. It is estimated that 60 percent of all U.S. television homes will be cable television subscribers and 45 percent will be purchasing some pay service by 1990.

POLTRACK, *supra* note 17, at 2-3. By 1994, cable had expanded to the extent that 90% of American households could receive cable service if residents so desired. *U.S. TV Households by Cable and VCR*, MEDIASOURCE, May 17, 1994, available in 1994 WL 3513188. Of those who purchased cable service in 1994, 34% of subscribers received 54 or more channels, 61% of subscribers received 30 to 53 channels and only five percent of subscribers received 29 or fewer channels. *Number of Channels Available to Cable Subscribers*, MEDIASOURCE, May 17, 1994, available in 1994 WL 3513138.

<sup>29</sup> Underwood, *supra* note 16, at 8 (interviewing Arthur Shapiro). Television has become an overwhelming force in today's society. In fact, one author has stated that "[t]elevision has become the most influential mass medium in the United States. Its images permeate public and private spaces. Television sets are found in almost every home . . . ." Patrick M. Fahey, Comment, *Advocacy Group Boycotting of Network Television Advertisers and Its Effects on Programming Content*, 140 U. PA. L. REV. 647, 648 (1991). Thus, television "reflect[s] and shape[s] the dominant values and norms in society . . . ." *Id.*



Second, the Code of Good Practice's television restriction was justly stricken because of the unfair marketing advantage it provided to beer and wine companies.<sup>30</sup> Seagram was not the first hard liquor producer to address this "edge" by advertising on television.<sup>31</sup> In a less publicized campaign prior to the airing of the Seagram commercials, Allied Domecq's Presidente Brandy ran limited advertisements on Telemundo's Spanish-language network.<sup>32</sup> The reported success of Allied Domecq's limited campaign<sup>33</sup> demonstrated that television advertisements increase alcohol sales and that future commercials could potentially alleviate

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<sup>30</sup> One commentator believes that liquor producers can overcome declining liquor sales by advertising on television because that "is where tomorrow's customers are." Michael Krantz, *Seagram's on the Box Breaking a 48-Year-Old Pact: The Liquor Company Advertises on TV. Congress May Not Buy It*, TIME, June 24, 1996, at 49. Sales of cases of spirits decreased from "190 million in 1980 to 135 million in 1995—a drop of 29%." *Id.* (citing statistics of M. Shanken Communications). Conversely, sales of beer and wine increased during the same period. *Id.* While advertising alone does not explain this disparity, it undoubtedly gave wine and beer producers an unfair "edge" because television is undoubtedly a powerful medium for advertisers. In a memorandum, Seagram noted how Canon, Playtex and Habitrol were able to "build sales, take shares away from competitors and increase brand-name awareness" by recently implementing television advertising campaigns. Ono, *supra* note 10, at B1. Commercials wield such power because, "[a]s media outlets have expanded, so have the number of commercial messages reaching the average consumer. . . . From 1965 to 1990, the number of commercials shown on network television increased threefold, from approximately 1,800 to almost 5,400 per year. Moreover, this number increases 20% annually." Fahey, *supra* note 29, at 647.

<sup>31</sup> See Ono, *supra* note 10, at B1 (referring to an internal Seagram memorandum which argued that at least one other alcohol producer, Allied Domecq, was "creeping" toward full television advertising).

<sup>32</sup> Ono, *supra* note 10, at B1. "Allied Domecq, based in London, had made spot buys in local [American] markets." Ono, *supra* note 10, at B1. "Spot" advertising entails purchasing advertising time from individual local stations, rather than the major networks. Should a national advertiser purchase airtime in such a manner, it is labeled "national spot" advertising. See CHARLES J. DIRKSEN ET AL., ADVERTISING: PRINCIPLES AND MANAGEMENT CASES 424 (6th ed. 1983); OTTO KLEPPNER, ADVERTISING PROCEDURE 158 (9th ed. 1986).

<sup>33</sup> Allied Domecq reportedly spent between \$1.5 and \$3 million on an advertisement campaign that, according to Seagram, "increased growth [of sales] impressively." Ono, *supra* note 10, at B1.

the current decline in overall hard liquor purchases.<sup>34</sup> Thus, spirits producers should have the same opportunity as their competitors in the beer and wine industries to advertise on television.

Finally, television advertisements for liquor should be permitted due to the rationale that "alcohol is alcohol."<sup>35</sup> The advertising privileges provided to beer and wine producers are justly extended to liquor companies to promote the concept of equality.<sup>36</sup> In a press release, Arthur Shapiro, a Seagram executive, stated: "False perceptions about distilled spirits versus beer and wine have resulted in inequitable social and political treatment. The reality is that alcohol is alcohol, whether it is in the form of beer, wine or spirits."<sup>37</sup> Hard liquor is commonly perceived as somewhat more dangerous than beer and wine because it contains a more concentrated amount of alcohol.<sup>38</sup> During a cable network advertising campaign, Seagram pointed out, however, that "the most common servings of beer (12 ounces), wine (5 ounces), and liquor (1¼

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<sup>34</sup> See Krantz, *supra* note 30, at 49. Additionally, one author noted the recent decline in consumption of hard alcohol reporting that, in the mid-1960s, purchases of hard liquor constituted approximately half of all alcohol sales. However, by 1983 it represented only approximately one-third of alcohol purchases. See Steve Younger, Comment, *Alcoholic Beverage Advertising on the Airwaves: Alternatives to a Ban or Counteradvertising*, 34 UCLA L. REV. 1139, 1145 n.26 (1987) (citing that, in addition to the effects of the television advertising ban, current "health trends" in America may also play a role in shrinking liquor sales).

<sup>35</sup> See Krantz, *supra* note 30, at 49 (suggesting that Seagram seeks a level advertising field based upon the theory that "alcohol is alcohol").

<sup>36</sup> The "utopia" of a true laissez-faire economy has never existed. PAUL A. SAMUELSON, *ECONOMICS* 884 (9th ed. 1973). Despite government involvement in the economy, however, companies promoting hard liquor products should not be discriminated against, but should be afforded the same opportunity as other alcohol producers to advertise. See News Release from Seagram, *Seagram Responds to Changes in the Media and Marketplace with Broadcast Advertising* (June 10, 1996) [hereinafter Seagram News Release].

<sup>37</sup> Seagram News Release, *supra* note 36.

<sup>38</sup> One author on the subject has recommended that his readers "[d]rink wine or beer in preference to hard liquor," reasoning that "[i]n both, the ethanol is in a milder solution. . . . The less diluted alcohol is, the greater an irritant it can be." LEONARD GROSS, *HOW MUCH IS TOO MUCH?: THE EFFECTS OF SOCIAL DRINKING* 149 (1983).

ounces) are equal in alcohol content."<sup>39</sup> While consumers are free to alter these serving sizes,<sup>40</sup> it is unjust to disallow hard liquor producers from running advertisements while beer and wine producers are allowed to erroneously imply in their own advertisements that their products are less dangerous than liquor because they contain less alcohol.<sup>41</sup>

This Note has thus far examined policy reasons supporting the extension of advertising practices, previously enjoyed only by beer and wine producers, to spirits producers. The hard alcohol television ban had grown outdated and it was justifiably lifted due to the expansion of the television medium, the unfair marketing advantage it provided to beer and wine producers and because beer, wine and liquor are all fundamentally related in that they are all alcoholic beverages.

## II. KENNEDY AND THE PROPOSED COMPREHENSIVE ALCOHOL ABUSE PREVENTION ACT OF 1996

In response to the popularity and lure that current beer advertisement campaigns have with children<sup>42</sup> and the likelihood

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<sup>39</sup> DON CAHALAN, UNDERSTANDING AMERICA'S DRINKING PROBLEM: HOW TO COMBAT THE HAZARDS OF ALCOHOL 98 (1987) (referring to a campaign launched by Seagram against television networks, claiming that networks would not air Seagram commercials aimed to prevent drunk driving). "Beers average 4.5% alcohol, wines about 12%, and straight spirits approximately 40%. Therefore, 12 ounces of beer, one glass, or 4 to 5 ounces, of wine, and a shot, or 1.5 ounces, of spirits all contain approximately 0.6 ounces of alcohol." THOMAS BABOR, THE ENCYCLOPEDIA OF PSYCHOACTIVE DRUGS: ALCOHOL: CUSTOMS AND RITUALS 20 (1986).

<sup>40</sup> CAHALAN, *supra* note 39, at 98.

<sup>41</sup> See Krantz, *supra* note 30, at 49. Beer and wine producers have craftily utilized and played upon the mistaken belief that their products contain less alcohol than spirits as a means to increase their own sales. Krantz, *supra* note 30, at 49. These beer commercials undoubtedly have an impact upon consumers. It has been noted, for example, that "[d]ue to lower alcohol content, beer and wine consumption is more socially acceptable" than the consumption of distilled spirits. *Should Liquor Advertising Be Permitted*, BUS. LINE, Jan. 6, 1997, at 2.

<sup>42</sup> Representative Kennedy, while discussing the issue of beer advertisement campaigns, stated: "These are some of the slickest, best produced ads on television, but they may be suckering young people into using a product with

that hard liquor producers will begin to advertise on television,<sup>43</sup> Representative Joseph Kennedy has introduced the Comprehensive Alcohol Abuse Prevention Act of 1996, a bill which would significantly limit the advertisement of all alcohol products on television.<sup>44</sup> Specifically, the bill would, among other proposals<sup>45</sup>

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very harmful consequences." Press Advisory (May 16, 1996), *supra* note 1.

<sup>43</sup> Krantz, *supra* note 30, at 49 (quoting Representative Kennedy on the potential "flood of hard-liquor ads" that could soon hit television). Since the recent repeal of the voluntary ban, there exists even less reason for alcohol producers not to "try their hands" at television advertising and some have already started experimenting. Hiram Walker and Sons, for example, recently announced that it "will spend \$20 million on a television campaign for a new product based on Kahlúa coffee liqueur. That may be the largest budget devoted to a single brand since liquor advertising began appearing on television last year." *Hiram Walker Plans Kahlúa Commercials*, N.Y. TIMES, Mar. 6, 1997, at D7.

<sup>44</sup> See H.R. 3479, 104th Cong., 2d Sess. § 403 (1996); Press Advisory (May 16, 1996), *supra* note 1.

<sup>45</sup> Due to the focus of this Note, only the sections of Representative Kennedy's omnibus bill pertaining to television advertising will be analyzed. Other sections of the bill, such as those addressing drinking on college campuses and instituting a program to award monies to colleges that have effective alcohol and drug abuse prevention programs, are beyond the scope of this Note. Regarding alcohol consumption on college campuses, the bill would enact, among other prohibitions:

- (E) a prohibition on the distribution of any promotional material that encourages the consumption of alcoholic beverages on campus;
- (F) a prohibition of the distribution of free alcoholic beverages for promotional purposes on the campus;
- (G) a prohibition on sponsorship or public support of any on-campus athletic, musical, cultural, or social program, event, or competition by any alcoholic beverage company or by any such group of companies.

H.R. 3479, 104th Cong., 2d Sess. § 102(a)(1).

Regarding awards to colleges that institute programs to combat alcohol abuse, Representative Kennedy's bill sets forth:

- (a) AWARDS.—For the purpose of providing models of alcohol and drug abuse prevention and education (including treatment-referral) programs in higher education and to focus national attention on exemplary school and drug abuse prevention efforts, the Secretary of Education shall, on an annual basis, make 10 National Recognition Awards to institutions of higher education that have developed and implemented effective alcohol and drug abuse prevention and education

outlaw<sup>46</sup> alcohol advertisements between 7 A.M. and 10 P.M. which extend beyond the confines of a simple image of the beverage accompanied by factual audio information.<sup>47</sup> Additionally, the bill would require the Secretary of Health and Human Services to establish a panel<sup>48</sup> for the study of the effects of alcohol advertising and to report annually<sup>49</sup> to Congress regarding its

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programs.

*Id.* § 104(a).

<sup>46</sup> The bill states that the "criminal penalty" imposed upon "any person who violates the restrictions . . . shall be guilty of a misdemeanor and shall on conviction thereof be subject to a fine of not more than \$10,000." *Id.* § 403(f)(1).

<sup>47</sup> *Id.* § 403(c). The bill prohibits:

- (b) PRINT ADVERTISING.—In publications with an under the age of 21 readership of 15 percent or more than 2 million, whichever is less, alcohol advertising shall be restricted to text only advertising in black and white print.
- (c) BROADCAST ADVERTISING.—Any advertising of an alcoholic beverage in a television broadcast shall during the hours between 7 A.M. and 10 P.M. be limited to only a picture of the beverage with factual, objective audion information about the beverage.

*Id.* § 403(b)-(c).

<sup>48</sup> The panel would "review alcohol advertising in all media, including broadcast and cable television, other electronic means, and print and outdoor advertising and review promotional activities undertaken to promote the sale of alcoholic beverages." *Id.* § 502(b).

<sup>49</sup> The content of the report would include:

- (1) an identification of—
  - (A) the media used by alcohol advertising to reach children,
  - (B) the total expenditures for alcoholic beverage advertising in each media and in promotions,
  - (C) the extent to which media program audiences are under the age of 21,
  - (D) an identification of the types and themes of alcohol advertising in all media (especially in broadcast) and other electronic means,
  - (E) any graphics, slogans, children's characters, and techniques that are used and that appeal to youth, and
  - (F) the extent to which other promotional efforts used to market alcoholic beverages which appear in clothing, sporting events, contests, and concerts appeal to individuals under the age of 21;

subsequent findings.<sup>50</sup> Although unlikely to be voted into law,<sup>51</sup> this potential legislation should be found constitutional by the federal courts if enacted.

The First Amendment ensures that "Congress shall make no law . . . abridging the freedom of speech."<sup>52</sup> The U.S. Supreme Court has interpreted this amendment to mean that freedom of speech is guaranteed not only for private citizens, but also for corporate

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- (2) a determination of the extent to which young people are exposed to alcohol advertising and promotions of alcoholic beverages;
  - (3) an evaluation of the relationship between alcohol advertising practices and underage drinking, drunk driving, and related public health problems.

*Id.* § 502(c).

<sup>50</sup> "The Secretary of Health and Human Services shall report annually to the Congress on alcohol advertising, its profile and its effects." *Id.* § 502(a).

<sup>51</sup> The probability that Representative Kennedy's bill will pass into law is less than one percent. The likelihood that it passes in the House is approximately one percent, while the likelihood that it passes the Senate is about zero percent. *Carries Out a Comprehensive Program Dealing with Alcohol and Alcohol Abuse*, BILLCAST 3479, 104th Cong., 2d Sess., available in LEXIS, Legis Library, Blarch File. Additionally, Representative Kennedy previously acknowledged that his bill is unlikely to become law as currently drafted—advancing identical regulations for both beer and liquor. See Christopher Stern, *Seagram Bellies Up to Broadcasting: (Liquor Company Breaks Voluntary Ban on Television Advertising)*, BROADCASTING & CABLE, June 17, 1996, at 11. However, Representative Kennedy's statement and the above statistics were produced before the repeal of the spirits advertising ban. Although the statistics have not changed as of April 8, 1997, they may be subject to change as the heated debate over the Distilled Spirits Council of the United States' ("DISCUS") decision to repeal the ban continues to grow. Opinions may have already begun to shift. As of late November 1996, 26 lawmakers, from both the Democratic and Republican parties, had written to the Federal Communications Commission in an attempt to prompt an investigation into the effects of alcohol advertisements on television. See Bruce Ingersoll, *FTC Opens Investigation of TV Alcohol Advertising: Seagram, Stroh Targeted; Placement of Ads To Be Examined*, WALL ST. J., Nov. 27, 1996, at A3.

<sup>52</sup> U.S. CONST. amend. I. In full, the First Amendment provides that: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

*Id.*

entities operating in the business market.<sup>53</sup> In other words, "commercial speech"<sup>54</sup> is protected under the First Amendment.<sup>55</sup>

Although commercial speech is protected, it is not immune to regulation.<sup>56</sup> The Supreme Court, in *Virginia State Board of Pharmacy v. Citizens Consumer Council, Inc.*,<sup>57</sup> simultaneous to finding that commercial speech is guarded by the First Amendment, also stated that "a different degree of protection [from "regular," private speech] is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired."<sup>58</sup> Therefore, despite First Amendment protection, limitations to commercial speech may, under certain circumstances, be found constitutional.

To be constitutional, however, limitations on commercial speech must pass a four-part test established by the Supreme Court in *Central Hudson Gas & Electric Corporation v. Public Service*

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<sup>53</sup> *Virginia State Bd. of Pharmacy v. Citizens Consumer Council, Inc.*, 425 U.S. 748, 759, 762 (1976). In this case, involving a suit brought by consumers of prescription drugs against Virginia, the U.S. Supreme Court found unconstitutional a law prohibiting pharmacists from advertising various prices of drugs because "the Court has never denied protection on the ground that the speech in issue was 'commercial speech.'" *Id.* at 759.

<sup>54</sup> Defining "commercial speech" remains a challenge to date, prompting one author to state that despite the abundance of articles touching upon the subject, "no one has yet managed to figure out what is meant by the term 'commercial speech.'" Charles Gardner Geyh, *The Regulation of Speech Incident to the Sale or Promotion of Goods and Services: A Multifactor Approach*, 52 U. PITT. L. REV. 1, 1-2 (1990). It is often difficult to distinguish between speech attempting to promote sales or business and speech representing other aims. *See id.* Therefore, even the Supreme Court has wavered regarding its operative definition of commercial speech. *See* Peter J. Tarsney, Note, *Regulation of Environmental Marketing: Reassessing the Supreme Court's Protection of Commercial Speech*, 69 NOTRE DAME L. REV. 533, 551-54. The Supreme Court now generally applies the *Virginia* standard: "[T]hat which does no more than propose a commercial transaction" constitutes commercial speech. *Id.* The Court applies this standard in a case by case fashion, however, leaving room for common sense. *Id.*

<sup>55</sup> *Virginia*, 425 U.S. at 758-60.

<sup>56</sup> *See, e.g.,* Younger, *supra* note 34, at 1158. ("In 1970, Congress passed the Public Health Cigarette Smoking Act of 1969, which prohibited cigarette advertising on radio and television.").

<sup>57</sup> 425 U.S. 748 (1976).

<sup>58</sup> *Id.* at 771 n.24.

*Commission of New York*.<sup>59</sup> The Supreme Court examines whether: (1) the speech is “protected by the First Amendment”—to be protected it must both “concern lawful activity and not be misleading;”<sup>60</sup> (2) the government has asserted a “substantial” interest;<sup>61</sup> (3) “the regulation directly advances the governmental interest asserted;”<sup>62</sup> and (4) the regulation is “more extensive than is necessary to serve that interest.”<sup>63</sup>

The television advertising provisions of Representative Kennedy’s bill, as this Note will next observe, “pass” each prong of the *Central Hudson* test and, therefore, represent a constitutional limitation on commercial speech.

*A. Advertisements for Alcohol are Protected Under the First Amendment*

To pass the first prong of the *Central Hudson* test, the speech at issue must be protected under the First Amendment in that it regards lawful activity and is not misleading.<sup>64</sup> The form of speech Representative Kennedy’s bill seeks to regulate, television alcohol advertising, meets these requirements and is therefore protected under the First Amendment.

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<sup>59</sup> 447 U.S. 557 (1980) (setting forth the four-prong test now used to determine the constitutionality of regulations on commercial speech and, subsequently, using the test to find that New York State legislation prohibiting electrical utilities from participating in promotional advertising violated the First Amendment). *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York* was the first time “[t]he Court articulated a standard for commercial speech protection” since the decision of *Virginia*, four years earlier, in which the Supreme Court determined that commercial speech enjoyed First Amendment protection. Daniel L. Zelenko, Note, *Do You Need a Lawyer? You May Have to Wait 30 Days: The Supreme Court Went Too Far in Florida v. Went For It, Inc.*, 45 AM. U. L. REV. 1215, 1219 (1996).

<sup>60</sup> *Central Hudson*, 447 U.S. at 566.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 564.



Alcohol advertisements promote a lawful activity,<sup>65</sup> thereby satisfying the first requirement of the first prong of the *Central Hudson* test.<sup>66</sup> Since the repeal of Prohibition well over sixty years ago, the production and sale of intoxicating liquors have been lawful in this country.<sup>67</sup> The legality of these activities is witnessed by both the high consumption rate of legally produced alcoholic beverages<sup>68</sup> and the broadcasting of approximately "\$700 million worth of alcohol advertising now on television, for beer and wine" alone.<sup>69</sup> This considerable abundance of alcohol advertisements is aired despite tight federal regulation<sup>70</sup> by the Bureau of Alcohol, Tobacco and Firearms ("BATF"),<sup>71</sup> the Federal Trade Commission ("FTC"),<sup>72</sup> and the Federal Communications

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<sup>65</sup> See U.S. CONST. amend. XXI (repealing the Eighteenth Amendment).

<sup>66</sup> See *Central Hudson*, 447 U.S. at 564.

<sup>67</sup> See U.S. CONST. amend. XXI.

<sup>68</sup> Although there currently exists a declining trend in the amount of alcohol Americans, as a whole are consuming, the per-capita rate of alcohol consumption in 1994 was "2.21 gallons of ethanol, or the pure alcohol content of any drink." Marilyn Chase, *Americans Seem to Drink a Lot or Hardly at All*, WALL ST. J., Dec. 30, 1996, at B1 (arguing that as Americans continue to drink less alcohol, it is predominantly a small percentage of drinkers who ingest a high percentage of the alcohol consumed). For an example of the declining trend in alcohol consumption, see *ABC Figures Say Mountaineers Prefer Drinking Beer to Wine*, CHARLESTON GAZETTE, Feb. 26, 1996, at 6A.

<sup>69</sup> Stuart Elliott, *Alcohol Marketers Take Steps Toward Radio, TV Advertising*, J. REC., May 9, 1996, at 7. It is estimated that beer producers spend in excess of \$600 million per year for television and radio advertisements. An additional \$90 million is spent by these same companies for print advertisements. See *Report: Subpoenas on Alcohol Ads*, NEWSDAY, Nov. 28, 1996, at A84. In contrast, before the repeal of the liquor advertisement ban, liquor companies spent approximately \$230 million per year for print advertisements. *Id.*

<sup>70</sup> See Younger, *supra* note 34, at 1149-55. The federal government provides for joint "jurisdiction over alcohol advertisements on the airwaves" to the Bureau of Alcohol, Tobacco and Firearms ("BATF"), the Federal Trade Commission ("FTC") and the Federal Communications Commission ("FCC"). Younger, *supra* note 34, at 1149-55.

<sup>71</sup> The BATF has prohibited alcohol advertisements from utilizing "'false,' 'misleading,' 'obscene,' or 'indecent' statements" through punitive measures such as the revocation of licenses and criminal penalties. Younger, *supra* note 34, at 1150.

<sup>72</sup> The FTC began in 1914 as a means for the federal government to combat

Commission ("FCC").<sup>73</sup> Thus, Federal repeal of Prohibition and subsequent regulation of the advertising agenda of alcohol producing companies both evidence the legality of the underlying activities—the production and sale of alcoholic beverages.

Additionally, alcohol advertisements are protected by the First Amendment because the commercials that make it to the airwaves meet the second requirement of the first prong of the *Central Hudson* test, due to the fact that they are not misleading. This is so because, in addition to scrutiny from the FTC,<sup>74</sup> the networks have

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"restraints against trade." Jef I. Richards & Richard D. Zakia, *Pictures: An Advertiser's Expressway Through FTC Regulation*, 16 GA. L. REV. 77, 83 (1981). However, the FTC's scope evolved such that it is now capable of regulating alcohol advertisements adjudged "deceptive" or "unfair." Younger, *supra* note 34, at 1151-52; see Richards & Zaika, *supra*, at 83-86; *infra* note 74 (providing a discussion of the terms "deceptive" and "unfair").

<sup>73</sup> The FCC was instituted in 1934 to protect the "public interest" by regulating advertisements broadcast over radio. Dean K. Charchiglia, *Changing Channels in Broadcast Regulation: Leaving Television Advertising to Containment by Market Forces*, 34 CASE W. RES. L. REV. 465, 471-73 (1983-84). The FCC's jurisdiction has subsequently been expanded by the Supreme Court, enabling the agency to regulate advertisements broadcast over television. See *id.* at 472-73. Its power to regulate alcohol advertisements is evidenced by the fact that "it is the agency that required mandatory counteradvertising for cigarettes. This order led to the congressional ban of cigarette commercials on radio and television." Younger, *supra* note 34, at 1155-56.

<sup>74</sup> See *supra* note 72 (discussing FTC regulations). The FTC prohibits "deceptive" or "unfair" alcohol advertisements from being aired on television. Younger, *supra* note 34, at 1151-52. "Deceptive speech" is defined as "any speech having the tendency or capacity to deceive a significant portion of the audience." Younger, *supra* note 34, at 1151. Four types of deceptive speech have been set forth: "misrepresentation of fact; susceptibility to misreading; statistically valid evidence out of context; and puffing." Richards & Zakia, *supra* note 72, at 88-90 (defining "puffing" as "'mere exaggeration' of the product's qualities"). Additionally, when determining if speech is deceptive, the Supreme Court will presume broad "consumer gullibility." Richards & Zakia, *supra* note 72, at 86-88.

"Unfair speech" is defined as advertising "that causes unavoidable substantial harm to consumers even though it is not necessarily deceptive." Younger, *supra* note 34, at 1152. Language is deemed unfair if it either: constitutes conduct "violating public policy as it has been defined by statute, common law, industry practice, or otherwise" or if it causes "unjustified consumer injury." Richards & Zakia, *supra* note 72, at 91. To constitute

devised procedures by which they screen potential alcohol advertisements to eliminate those deemed "misleading."<sup>75</sup>

Alcohol advertisements therefore constitute a form of speech protected by the First Amendment. These advertisements both promote the lawful activities of producing and selling alcoholic beverages and represent those beverages in a non-misleading fashion. Thus, the Comprehensive Alcohol Abuse Prevention Act passes the first prong of the *Central Hudson* test.

### *B. The Government Has Asserted a Substantial Interest*

To constitute a legitimate regulation upon commercial speech, the legislation must purport a "substantial" government interest, as required by the second prong of the *Central Hudson* test.<sup>76</sup> Representative Kennedy's bill passes this prong of the test because it purports a legitimate and "substantial" government interest.<sup>77</sup>

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"unjustified consumer injury," "first, the injury must be substantial, not trivial or speculative; second, the injury must not be outweighed by offsetting consumer or competitive benefits that the practice also produces; and third, the injury must be one which consumers could not reasonably have avoided." Richards & Zakia, *supra* note 72, at 91.

Limiting alcohol advertisements under the above mentioned guidelines permits the federal government to eliminate misleading commercials from television.

<sup>75</sup> See Younger, *supra* note 34, at 1148 (citing testimony given at the congressional media hearings). The networks each have their own commercial clearance departments that screen all commercials submitted by producers to be potentially aired on their stations. POLTRACK, *supra* note 17, at 366. These departments

review commercials first in storyboard form, then in final production form. . . . Of the 50,000 commercials submitted to a network's commercial clearance department, only about one-third make it to air. Not all others are rejected. Some advertisers submit several variations of a commercial for approval, but follow through on only one of those accepted.

POLTRACK, *supra* note 17, at 367.

<sup>76</sup> *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980).

<sup>77</sup> Upon commencing this section of this Note, it is important to mention that Congress does not share in the broad police powers generally enjoyed by the

The Court has long recognized that a "[l]egislature's interest in the health, safety, and welfare of its citizens constitutes a 'substantial'

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states; i.e., police power is not among the specifically delegated federal powers. See John J. Delaney, *Developmental Agreements: The Road From Prohibition to "Let's Make A Deal!"*, 25 URB. LAW. 49, 87 (1993) (stating that the federal government is "defined" by the powers delegated to it by the U.S. Constitution); Sharon N. Humble, Comment, *The Federal Government's Machiavellian Impediment of the States' Collection of Property Taxes Through the FDIC's Regulation of Failed Financial Institutions: Does the End Justify the Liens?*, 25 ST. MARY'S L.J. 493, 499-502 (1993) (setting forth that police powers are "left" to the states to make laws ensuring "public health, morality, security, order, and justice" and that Congress may not interfere with state execution of these powers); see also U.S. CONST. art. I, § 8. This absence does not mean, however, that the health and safety concerns to be set forth in this section do not constitute a legitimate "substantial interest" on the part of the federal government when commercial speech is at issue. In a similar case involving commercial speech and the *Central Hudson* test, for example, the Supreme Court found a "substantial" federal interest in protecting the welfare of children from exposure to mailed contraceptive advertisements. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983). The Supreme Court concluded that legislation prohibiting mass mailings of advertisements for contraceptives was justified by the substantial interest the government has in protecting the role of parents to guide their children's upbringing. See *id.* (citing *H.L. v. Matheson*, 450 U.S. 398, 410 (1981)). Despite this substantial government interest, the legislation at issue in *Bolger* was found unconstitutional because it was too broadly constructed to meet its ends. *Id.* at 73-74. However, based upon the logic of the *Bolger* decision, substantial government interest may be found in the health and safety concerns underlying the current alcohol bill.

The Comprehensive Alcohol Abuse Prevention Act would presumably limit the access of alcohol advertisements to children, thereby permitting parents further control in educating their children about alcohol and drinking. See Press Advisory (May 16, 1996), *supra* note 1. Additionally, it should be noted that the regulation of alcohol advertisements further constitutes a federal concern because interstate transmissions fall within the ability of Congress to regulate interstate commerce. See *Dumont Labs., Inc. v. Carroll*, 184 F.2d 153, 154 (3d Cir. 1950) (finding a Pennsylvania regulation invalid but holding that television broadcasting constitutes interstate commerce on the logic that such broadcasts reach viewers outside the state of the signal's origin), *cert. denied*, 340 U.S. 929 (1951); see also U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause). "There is no doubt but that television broadcasting is in interstate commerce. This is inherent in its very nature." *Dumont*, 184 F.2d at 154.

government interest.”<sup>78</sup> Representative Kennedy bases the rationale of the proposed legislation on the health, safety and welfare of a large number of receptive and vulnerable American citizens: our society’s children.<sup>79</sup>

Kennedy’s concern is not unfounded. The legislation is proposed at a time when consumption of alcohol by this nation’s children is on the rise.<sup>80</sup> Despite the recommendations of the

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<sup>78</sup> *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 341 (1986). In this case, the U.S. Supreme Court determined that a state regulation restricting advertising for gambling casinos aimed at Puerto Rico’s residents was constitutionally founded upon state police interests in the health and safety of its citizens. *See id.*

<sup>79</sup> It is difficult, if not impossible to rationalize the reasons why adolescents drink. However, peer pressure, “mass media and popular culture” undoubtedly impact upon teens developing personalities. STEVE OLSON & DEAN R. GERSTEIN, *ALCOHOL IN AMERICA: TAKING ACTION TO PREVENT ABUSE* 71 (1985).

<sup>80</sup> Sally G. Beatty & Yumiko Ono, *Liquor Industry Is Divided Over Use of TV Ads*, WALL ST. J., June 12, 1996, at B1. “A University of Michigan study last year found that 29.8% of 12th-graders had five or more drinks in a row in the prior two weeks, compared with 28.2% the previous year.” *Id.*

According to a study performed by the Institute of Social Research of the University of Michigan at Ann Arbor:

- 1) Daily alcohol use for 10th-graders increased by more than 6 percent between 1993 and 1995.
- 2) Daily alcohol use for 12th-graders increased by a full 40 percent between 1993 and 1995.
- 3) Today, America’s school-age children continue to use alcoholic beverages at a rate approximately 1½ times greater than they use tobacco.

*Rockdale Area Voices Readers’ Letters—Tell Us What You Think: Alcohol, A Smoking Gun*, ATLANTA J. & CONST., May 2, 1996, at 3.

Currently, Americans start drinking at the average age of 13. H.R. 3479, 104th Cong., 2d Sess. § 602(4) (1996). According to one study, the typical binge drinker is a 16-year-old boy who was 12-years-old when he first experimented with alcohol. *Id.* at §602 (5). Although “boys drink more than girls . . . there is a downward trend in the age which children [of both sexes] try alcohol—27% of students who were seniors in 1975 reported first using alcohol in the eighth grade or earlier compared to 37% of 1993 seniors.” Kathleen Kelleher, *A Sobering Subject for Parents of Teens*, L.A. TIMES, July 11, 1996, at E1 (citing the “Monitoring the Future Study” of the Johnson Institute).

American Medical Association,<sup>81</sup> alcohol producers continue to use advertisements that appeal to the young.<sup>82</sup> President Clinton exclaimed that he was disappointed, "when a major company announced it would break the ban and put liquor ads on TV, exposing our children to liquor before they know how to handle it or can legally do so . . . ."<sup>83</sup> While undoubtedly speaking of

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<sup>81</sup> "The AMA [American Medical Association] recommends . . . that producers and distributors of alcoholic beverages discontinue advertising directed toward youth, such as promotions on high school and college campuses." AMERICAN MEDICAL ASSOCIATION, OFFICE OF ALCOHOL AND OTHER SUBSTANCES, AMA POLICIES REGARDING ALCOHOL ADVERTISING AND PROMOTION § H-30.984 (1996) (on file with *Journal of Law and Policy*).

<sup>82</sup> For example, both "Spuds MacKenzie" and the "Swedish Bikini Team" have successfully been utilized in relatively recent advertising campaigns. See Krantz, *supra* note 30, at 49. More recently, the "Budweiser Frogs" campaign was launched. As a result, "73% of [9- to 11-year-olds] recognized the slogan of the Budweiser Frogs. That recognition rate was second only to the slogan of Bugs Bunny, recognized by 80%. It exceeded the recognition of the slogans of Tony the Tiger, Smokey the Bear and the Mighty Morphin' Power Rangers." Press Advisory (May 16, 1996), *supra* note 1 (citing a survey conducted by the Center for Alcohol Advertising).

<sup>83</sup> Hilary Stout, *Clinton Assails Ads for Liquor on TV Stations*, WALL ST. J., June 17, 1996, at B7. Additionally, as Mike McCurry, a spokesman for President Clinton, stated: "The president feels the . . . voluntary ban on advertising by hard liquor manufacturers is a good thing and has helped protect children." *Clinton Urges Distillers to Keep Ads Off TV: Seagram, Which Has Ties to the President, Recently Began Airing Hard-Liquor Ads in Texas*, ORLANDO SENT., June 15, 1996, at A14.

President Clinton's opinion is not offered in this Note to suggest that he has endorsed Representative Kennedy's bill—for, as of yet, he has not. Krantz, *supra* note 30, at 49. Nor is his opinion offered to suggest that, should Clinton endorse the bill in the future, the bill would then automatically pass the *Central Hudson* test and be constitutional. Such an assertion would be incorrect because it has previously been determined that a bill which is both passed by Congress and supported by the executive branch is not removed from the hands of the judiciary such that its constitutionality may not be reviewed. *INS v. Chada*, 462 U.S. 919, 941-42 (1983) (holding a portion of the Immigration and Nationality Act unconstitutional because it permitted one House of the legislature to allow an illegal alien to remain in the United States without consulting either the other House or the president). Instead, President Clinton's opinion is offered to demonstrate that the executive branch of the federal government recognizes the impact alcohol advertisements have upon children.

Seagram in a political move during an election year, Clinton's comments further strengthen the assertion that alcohol commercials affect children,<sup>84</sup> demonstrating that Kennedy has a sufficient federal concern on which to base his proposed bill.

Additionally, eliminating alcohol advertisements that target children represents a substantial state interest<sup>85</sup> because of the number of adverse effects on the body caused by extended periods of drinking alcohol.<sup>86</sup> Specifically, years of excessive alcohol consumption may injure the stomach's lining,<sup>87</sup> lead to pancreatitis,<sup>88</sup> induce liver disease<sup>89</sup> and possibly affect the body's

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<sup>84</sup> Stout, *supra* note 83, at B7.

<sup>85</sup> Police powers have been interpreted broadly by the Supreme Court such that, "[a] state or city may prohibit acts or things reasonably thought to bring evil or harm to its people." *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949).

<sup>86</sup> Alcoholism may lead to numerous diseases afflicting the "liver, heart and nervous system" even among drinkers who otherwise practice good nutrition. Ivan Diamond, Ph.D., *Alcoholic Myopathy and Cardiomyopathy*, 320 NEW ENG. J. MED. 458, 458 (Feb. 16, 1989) (arguing that "excessive ethanol consumption is itself probably responsible for most of the medical disorders associated with alcohol abuse, and that malnutrition potentiates the adverse effects of ethanol").

Combatting such alcohol-induced diseases costs a high sum. "In terms of health care costs, alcohol figures prominently in our nation's annual medical bills. Medical costs of \$12.8 billion annually for alcohol-related problems represent 12% of all adults' health expenditures." JEAN KINNEY, M.S.W. & GWEN LEATON, *UNDERSTANDING ALCOHOL* 23 (1982). "An estimated 25 percent of all hospitalized persons have alcohol-related problems." H.R. 3479, 104th Cong., 2d Sess. § 602(8) (1996).

<sup>87</sup> "Chronic use of alcohol, as does any alcohol use, stimulates the stomach lining's secretion of hydrochloric acid and irritates the gut's lining. It also inhibits the muscular contractions called peristalsis that pass food along the intestines." KINNEY & LEATON, *supra* note 86, at 73.

<sup>88</sup> KINNEY & LEATON, *supra* note 86, at 74. "The symptoms of acute pancreatitis include nausea, vomiting, occasional diarrhea, and severe upper abdominal pain radiating straight through to the back." KINNEY & LEATON, *supra* note 86, at 74.

<sup>89</sup> It is in the liver that alcohol is metabolized. KINNEY & LEATON, *supra* note 86, at 74. However, this lengthy process may "distract" the liver from performing some of its other vital functions such as producing blood components and regulating sugar levels in the blood. Extensive alcohol abuse can lead to cirrhosis—"the destruction of liver cells and replacement by nonfunctioning scar tissue." See KINNEY & LEATON, *supra* note 86, at 74-75.

cardiovascular system.<sup>90</sup> Because of such potentially destructive effects upon the consumer's person, the government has an increased interest in preventing children from starting to drink too early in life, before they are capable of making educated decisions regarding alcohol.<sup>91</sup> Representative Kennedy's basis for new legislation is therefore due not only to the popularity of alcohol advertisements with children and the increasing rate at which children are consuming alcohol, but also to the potential physical damage associated with years of alcohol abuse.

*C. The Regulation Directly Advances the Asserted Government Interest*

To be a constitutional restraint upon commercial speech, the legislation must "directly advance" the stated goals of the government.<sup>92</sup> Kennedy's bill, therefore, is constitutional because

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<sup>90</sup> Drinking alcohol may lead to, among other potential cardiovascular problems, irregular heart patterns. See KINNEY & LEATON, *supra* note 86, at 81.

<sup>91</sup> Opponents of Kennedy's bill may suggest that even though children are exposed to alcohol commercials and are familiar with producers' logos, such advertisements will not affect the lifestyles and choices of those children. See, e.g., Matthew L. Miller, Note, *The First Amendment and Legislative Bans of Liquor and Cigarette Advertisements*, 85 COLUM. L. REV. 632, 638 (1985) (arguing, without specifically mentioning children, that "[a]lthough the proposition that advertising increases consumption may sound uncontroversial, many economists maintain that advertising merely . . . [affects] an already existing market, and does not affect the total demand"). However, it has also been previously argued that children are more likely to be swayed by television commercials—they are more influenced by "celebrity endorsements" and are more "likely to say they will buy the [advertised] product than adults." Marc L. Sherman, Note, *We Can Share the Women, We Can Share the Wine: The Regulation of Alcohol Advertising on Television*, 58 S. CAL. L. REV. 1107, 1127 (1985) (discussing an argument set forth in M. JACOBSON ET AL., *THE BOOZE MERCHANTS* 50 (1983)). Additionally, the bill itself states that a 1990 study demonstrated a relationship between the exposure of 10- to 13-year-olds to alcohol advertisements and "expectations that the individual [will] drink as an adult." H.R. 3479, 104th Cong., 2d Sess. § 602(15) (citing a study conducted by the American Automobile Association Foundation for Traffic Safety).

<sup>92</sup> *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980).



it "directly advances" the stated government purpose in accordance with the two primary Supreme Court opinions<sup>93</sup> affecting the application of the third prong of the *Central Hudson* test.<sup>94</sup> First, in *Edenfield v. Fane*,<sup>95</sup> the Supreme Court held that a government does not meet its burden of proof "by mere speculation or conjecture."<sup>96</sup> Instead, the government must possess knowledge that the harm it purports does, in fact, exist and that the limitation on commercial speech it seeks will actually prevent such injury.<sup>97</sup> The "harms recited" by the proposed Comprehensive Alcohol Abuse Prevention Act are real and genuine concerns.<sup>98</sup> These reported concerns stand in stark contrast to the conjecture that the Supreme Court refuses to accept as a legislative basis for limiting freedom of speech.<sup>99</sup> Additionally, the legislation includes provisions that would be beneficial to children.<sup>100</sup> Specifically, alcohol advertisements would be reduced during daytime hours when, presumably, children watch the most television.<sup>101</sup>

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<sup>93</sup> See *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Edenfield v. Fane*, 507 U.S. 761 (1993).

<sup>94</sup> See *Central Hudson*, 447 U.S. at 566; see also *supra* note 59 and accompanying text (setting forth the *Central Hudson* test).

<sup>95</sup> 507 U.S. 761 (1993).

<sup>96</sup> *Id.* (holding that a state law which prohibited certified public accountants from soliciting business in person violated the First Amendment).

<sup>97</sup> *Id.* at 770-71.

<sup>98</sup> *Supra* Part II.B (discussing the harms addressed by the Comprehensive Alcohol Abuse Prevention Act).

<sup>99</sup> See, e.g., *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995). In *Rubin*, the Supreme Court found a ban on bottle labels that display beverage alcohol content unconstitutional on First Amendment grounds. See *id.* Referring to the government's argument that such labels would lead to alcohol content wars, the Supreme Court stated that such "anecdotal evidence and educated guesses . . . cannot overcome the irrationality of the regulatory scheme and the weight of the record." *Id.* at 1593.

<sup>100</sup> See generally Press Advisory (May 16, 1996), *supra* note 1 (limiting alcohol advertisements on television during daytime hours and in children's magazines).

<sup>101</sup> As a whole, Americans watch a tremendous amount of television. Children are no exception. Upon graduating high school, the average person is likely to have passed more time watching television than time spent in school. See OLSON & GERSTEIN, *supra* note 79, at 84.

Furthermore, Congress would have the benefit of consistent reports explaining how trends in the advertisement of alcohol have affected children.<sup>102</sup>

Second, in *Cincinnati v. Discovery Network*,<sup>103</sup> the U.S. Supreme Court required a "reasonable fit" between the desired outcome and the means implemented by the governmental body.<sup>104</sup> Such "reasonable fit" exists between the specified means and ends of Kennedy's bill because the bill specifically aims to reduce the exposure of children to alcohol advertisements<sup>105</sup> while

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Despite current federal regulations and the contention of beer producers that they do not aim their advertisements at children, beer "commercials regularly wash over underage viewers." Sally Goll Beatty, *Are Beer Ads on "Beavis and Butt-Head" Aimed at Kids?*, WALL ST. J., Jan. 6, 1997, at B1. For example, a recently conducted "Competitive Media Reporting" study demonstrated that during a 7 P.M. to 8 P.M. airing of *Melrose Place*, on September 2, 1996, Entertainment Television ("E!") showed a commercial for Foster's beer while 41% of its viewing audience was under the age of 21. *Id.* Similarly, during a 7 P.M. showing of *Singled Out*, also on September 2, 1996, Music Television ("MTV") aired a Molson beer advertisement while 52% of its viewers were under the legal drinking age. *Id.* However, the largest percentage of underage viewers reportedly exposed to a beer advertisement occurred during Black Entertainment Television's ("BET") 8 P.M. to 10 P.M. airing of *Unreal*, on September 5, 1996. During this airing, viewers saw a commercial promoting Miller beer—65% of those viewers were under the age of 21. *Id.*

<sup>102</sup> H.R. 3479, 104th Cong., 2d Sess. § 502 (c) (1996). See *supra* notes 48-50 and accompanying text (reporting how the bill would create a panel to study the themes of alcohol advertisements and the extent to which they reach children).

<sup>103</sup> 507 U.S. 410 (1993).

<sup>104</sup> For example, in *Cincinnati v. Discovery Network*, the U.S. Supreme Court held unconstitutional a city ordinance mandating the removal of news racks, in part, because the reason cited by the city (e.g., the prevention of the "distribution of any commercial handbills on public property") was a pretext and the city had "not 'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition." *Id.* at 417.

<sup>105</sup> See H.R. 3479, 104th Cong., 2d Sess. "Any advertising of an alcoholic beverage in a television broadcast shall during the hours between 7 A.M. and 10 P.M. be limited to only a picture of the beverage with factual, objective audio information about the beverage." *Id.* § 403(c). Additionally, "no alcoholic beverage may be advertised or promoted on any audio tape, audio disc, videotape, video arcade game, computer game or film," except if created and viewed only by persons employed in the alcohol industry. *Id.* § 403(a)(1)-(2).

continuing to provide alcohol producers with access to other avenues of advertisement as a way to reach consumers of legitimate drinking age.<sup>106</sup> Upon passage of the bill, alcohol producers could still rely on billboard, radio, and, to a limited extent, magazine advertisements.<sup>107</sup> Therefore, Kennedy's proposed legislation directly promotes the stated ends.

Additionally, the constitutional "fit" between the ends and means of the Alcohol Abuse Prevention Act is further demonstrated by examination of the Supreme Court's decision in *Posadas De Puerto Rico Associates v. Tourism Company of Puerto Rico*.<sup>108</sup> Although gambling has been legalized in Puerto Rico,<sup>109</sup> the Supreme Court in *Posadas* upheld a regulatory scheme preventing casinos from utilizing advertising techniques that would target Puerto Rican citizens.<sup>110</sup> Citing the lack of a legal obstacle prohibiting the Puerto Rican legislature from simply banning the activity of gambling altogether,<sup>111</sup> the Supreme Court concluded that it would "be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising."<sup>112</sup>

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<sup>106</sup> See Press Advisory from Representative Joseph Kennedy, *Send a Message to the Alcohol Industry: Stop Marketing Your Booze to Kids* (May 14, 1996) (on file with *Journal of Law and Policy*) [hereinafter Press Advisory (May 14, 1996)].

<sup>107</sup> Press Advisory (May 16, 1996), *supra* note 1. "No alcohol advertising in magazines/publications that young people read (15% or more than 2 million kids) unless it is limited to text only advertising in black and white print." Press Advisory (May 16, 1996), *supra* note 1.

<sup>108</sup> 478 U.S. 328 (1986).

<sup>109</sup> "In 1948, the Puerto Rico Legislature legalized certain forms of casino gambling." *Id.* at 331.

<sup>110</sup> The U.S. Supreme Court was able to find the legislation constitutional because Puerto Rico's legislature cited health and safety concerns of its citizens as the basis of the legislation. *Id.* at 341.

<sup>111</sup> *Id.* at 345.

<sup>112</sup> *Id.* at 346.

Although the Supreme Court refused to accept the *Posadas* rationale in *44 Liquormart, Inc. v. Rhode Island*,<sup>113</sup> it did not directly overrule the decision, leaving open the possibility that it will be readdressed by the Court in the future. Should it be considered, *Posadas* is relevant to the present discussion because, like gambling in Puerto Rico, the use of alcohol is a legal but harmful activity.<sup>114</sup> Although currently legal, it is not beyond the scope of the federal government's power to completely ban the production and consumption of alcohol.<sup>115</sup> Under the *Posadas* rationale, because the government has the power to curtail the consumption of alcohol it may, in lieu of such drastic action, restrict the advertisements of alcohol producers.<sup>116</sup> In other words, "it is precisely because the government could have enacted a wholesale prohibition . . . that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising."<sup>117</sup> Therefore, restricting alcohol advertisements on television is a legitimate option open to implementation by the government.

Kennedy's bill directly aims to promote a legitimate government end via reasonably calculated and "fitting" means. The bill, as such, coincides with and passes the third prong of the *Central Hudson* test.

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<sup>113</sup> 116 S. Ct. 1495, 1512 (1996).

<sup>114</sup> Consumption of alcohol is legal under the Twenty-first Amendment. See U.S. CONST. amend. XXI, § 2. It is, however, hazardous. Even those drinkers who would not be labeled "heavy drinkers" are apt to experience "the medical problems, the violence and crime problems, the employment problems, and even the marital problems that involve alcohol." OLSON & GERSTEIN, *supra* note 79, at 24 (quoting Mark Moore, Harvard University).

<sup>115</sup> The Eighteenth Amendment, although it has been repealed, unambiguously demonstrates the ability of the federal government to prohibit the use and sale of alcohol. See U.S. CONST. amend. XVIII (repealed 1933).

<sup>116</sup> See *Posadas*, 478 U.S. at 345-46 (stating that inherently implicit to "the greater power to completely ban" an activity is the "lesser power" to restrict advertising promoting that activity).

<sup>117</sup> *Id.* at 346.

*D. The Regulation Is Not More Extensive Than Necessary*

Finally, Kennedy's bill constitutes a legitimate regulation of commercial speech because it meets the final prong of the *Central Hudson* test—it is not more restrictive than necessary to meet the government's interest.<sup>118</sup> Interpreting this fourth prong, the U.S. Supreme Court, in *Board of Trustees of the State University of New York v. Fox*,<sup>119</sup> has determined that the “not more extensive than necessary” test utilized here is a higher test than the Court's “rational basis” standard.<sup>120</sup> However, it still does not require the state to demonstrate that the limitation it chooses is “the least severe that will achieve the desired end.”<sup>121</sup> In the same case, the Court continued its analysis by explaining that, so long as it is “narrowly tailored to achieve the desired objective,” the specific type of regulation to implement is left to the discretion of legislatures.<sup>122</sup> While Representative Kennedy's proposal would curtail First Amendment protections,<sup>123</sup> it does so constitutionally because it is fashioned in such a way as not to be overly broad. It limits advertisements that threaten the health and safety of children, but leaves intact advertising schemes which may impact upon those of legal drinking age.<sup>124</sup>

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<sup>118</sup> 447 U.S. 557, 564 (1980).

<sup>119</sup> 492 U.S. 469 (1989).

<sup>120</sup> *Id.* at 480. By comparison, the lesser scrutiny of the rational basis test allows for legislation that advances legitimate goals of government as long as the means utilized by the laws are loosely related to the stated goals. *See id.*

<sup>121</sup> *Id.* The U.S. Supreme Court in *Fox* held that a regulation prohibiting corporations from holding product demonstration meetings on campus, such as Tupperware parties, was properly focused to advance the state's goal of promoting education. *See id.* at 475-76.

<sup>122</sup> *Id.* at 480.

<sup>123</sup> *See generally* Press Advisory (May 16, 1996), *supra* note 1 (restricting the manner in which alcohol producers could advertise between 7 A.M. and 10 P.M.).

<sup>124</sup> Commercials designed to reach adult audiences and either aired after 10 P.M. or placed in magazines with predominantly adult audiences would still be permitted. *See* Press Advisory (May 14, 1996), *supra* note 106.

Finally, in applying the fourth part of the *Central Hudson* test, special attention must be given to *44 Liquormart, Inc. v. Rhode Island*.<sup>125</sup> The U.S. Supreme Court held invalid state statutes prohibiting the advertising of liquor prices, citing that "special care" is to be taken in cases involving "bans."<sup>126</sup> The Supreme Court noted that "when a state entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands."<sup>127</sup>

At first glance, it may appear that the decision in *44 Liquormart* directly opposes legislation, such as Kennedy's, which restricts a form of commercial speech. However, Kennedy's legislation may still pass the fourth part of the *Central Hudson* test for two reasons. First, Kennedy's legislation restricting alcohol advertising is not a "complete ban,"<sup>128</sup> as discussed in *44 Liquormart*.<sup>129</sup> Despite the legislation, alcohol producers would still have broad access to television advertisements, as they now possess, from 10 P.M. to 7 A.M., would have limited access to advertising from 7 A.M. to 10 P.M., and would retain access to other forms of advertising.<sup>130</sup> Therefore, while Kennedy's legislation influences the fashion of

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<sup>125</sup> 116 S. Ct. 1495 (1996) (holding that Rhode Island's law, which completely banned alcohol advertisements from including price advertising, was unconstitutional).

<sup>126</sup> *Id.* at 1507.

<sup>127</sup> *Id.*

<sup>128</sup> See Press Advisory (May 16, 1996), *supra* note 1. "A major focus of this legislation deals with *restricting*," not thoroughly banning advertisements aimed at children. Press Advisory (May 16, 1996), *supra* note 1 (emphasis added).

<sup>129</sup> See *44 Liquormart*, 116 S. Ct. at 1501. The Rhode Island statute forbade vendors in that state and "out-of-state manufacturers, wholesalers, and shippers" from "'advertising in any manner whatsoever' the price of any alcoholic beverage offered for sale" in Rhode Island. *Id.* (quoting R.I. GEN. LAWS § 3-8-7 (1987)).

<sup>130</sup> See Press Advisory (May 16, 1996), *supra* note 1. "No alcohol advertising on TV during the hours of 7am to 10pm unless it is a picture of the product only with a voice-over." Press Advisory (May 16, 1996), *supra* note 1.

legitimate alcohol advertisements and the times they may be aired, it is not a complete ban.<sup>131</sup>

Second, as noted above, the Court stated that when legislation prevents the free flow of "commercial messages for reasons unrelated to the preservation of fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands."<sup>132</sup> According to this language, there may be "far less reason" to retreat from the rigid standard, but it is still possible. Given the overwhelming health and safety concerns for children that Kennedy reports, the bill may still pass constitutional muster. According to Kennedy, alcohol abuse is:

[T]he number one killer of young people between the ages of 15 and 24 years old. . . . And alcohol use by college students is a factor in 40% of academic problems, 28% of dropouts, 80% of acts of vandalism, 90% of reported rapes on campus, and 95% of violent crime on campus.<sup>133</sup>

Such statistics provide a basis for accepting the objective of the legislature and concluding that the proposed legislation is not more extensive than necessary.

## CONCLUSION

Let us return, for a moment, to the question of our Texas resident: "What is going on here?" It is clear that Seagram and other spirits producers should have the same privileges of television advertising presently shared by wine and beer companies. Strong policy arguments ranging from changing societal norms to fair marketing practices support this contention. However, hard liquor advertisements on television could help induce sizeable repercussions for all alcohol producers. The television provisions of Representative Kennedy's Comprehensive Alcohol Abuse

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<sup>131</sup> This distinction and its importance was directly observed by the Supreme Court in *44 Liquormart*: "[C]omplete speech bans, unlike content-neutral restrictions on the time, place, or manner of expression . . . are particularly dangerous because they all but foreclose alternative means of disseminating certain information." *44 Liquormart*, 116 S. Ct. at 1507.

<sup>132</sup> *Id.*

<sup>133</sup> Press Advisory (May 16, 1996), *supra* note 1.

Prevention Act successfully satisfy the *Central Hudson* test and, therefore, represent a constitutional regulation upon commercial free speech. Should these provisions become law, the bill may limit the advertising practices of *all* alcohol producers. Thus, all alcohol companies would have equal opportunity to advertising, but that opportunity may be limited in the future as regulated by Kennedy's bill. Therefore, by "taking an inch" for themselves, hard liquor giants may cost the entire alcohol industry the proverbial yard in television advertising. But, then again, maybe leveling the playing field was all Seagram had hoped to achieve in the first place.<sup>134</sup>

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<sup>134</sup> See Sally Goll Beatty, *Seagram Flouts Ban on TV Ads Pitching Liquor*, WALL ST. J., June 11, 1996, at B1.



