



[Mark Bittman](#) on food and all things related.

**Tags:**

[advertising](#), [First Amendment](#), [junk food](#)

The First Amendment to the Constitution, which tops our Bill of Rights, guarantees — theoretically, at least — things we all care about. So much is here: freedom of religion, of the press, of speech, the right to assemble and more. Yet it’s stealthily and incredibly being invoked to safeguard the nearly unimpeded “right” of a handful of powerful corporations to market junk food to children.

It’s been [reported](#) that kids see an average of 5,500 food ads on television every year (sounds low, when you think about it), nearly all peddling junk. (They may also see Apple commercials, but not of the fruit kind.) Worse are the online “advergames” that distract kids with entertainment while immersing them in a product-driven environment. (For example: [create your own Froot Loops adventure!](#))

And beyond worse: collecting private data, presumably in order to target children with personalized junk food promotions, as in [this](#) Capri Sun advergame, which asks for permission to use your webcam to film you — without first verifying your age.

Remember: [17 percent](#) of kids in the United States are obese (many more are nearly so), and though there is an argument that during the boom-and-bust periods of capitalism’s development our [genetic code has encouraged us to consume as many calories as possible](#), nowhere in our DNA is it written that we need to eat Big Macs, drink soda or eat Twizzlers (much as I personally like the last of these). These cravings become habits as they are taught, encouraged and reinforced by the marketing arm of Big Food, and the federal government appears powerless to change this. Here’s where the First Amendment comes in.

I’ve written before about the government’s pathetic attempt to nudge industry toward at least improving the nutritional profile of junk food advertising targeted at kids in the form of [voluntary guidelines](#) proposed by an interagency working group of the Federal Trade Commission, Centers for Disease Control and Prevention, Food and Drug Administration and Department of Agriculture.

They suggested draft nutrition standards, and although the recommendations were absolutely nonbinding, the food and media industries erupted in opposition, forming an absurdly named lobbying group, the [Sensible Food Policy Coalition](#) (“Keep the government out of your kitchen!”), and seemingly [managed to quash the release of a final report](#) with actual recommendations.

Viacom, a member of the coalition, retained — that means paid — the renowned constitutional law scholar Kathleen M. Sullivan, who [wrote](#) that “Government action undertaken with the purpose and predictable effect of curbing truthful speech is *de facto* regulation and triggers the same First Amendment concerns raised by overt regulation.” On the flip side, [an open letter](#) signed by more than three dozen prominent legal scholars (who were not paid) countered that the guidelines “pose no threat to any rights guaranteed by the First Amendment.”

It's easy to get lost in the Constitution and forget that we're talking about children being bombarded by propaganda so clever and sophisticated that it amounts to brainwashing, for products that can and do make them sick. Which brings me to this: an article published in the journal Health Affairs called "Government Can Regulate Food Advertising To Children Because Cognitive Research Shows That It Is Inherently Misleading." (Journals are not known for tabloid-like headlines, but this does get the point across.)

The authors, Samantha Graff, Dale Kunkel and Seth E. Mermin, note that advertising was only granted First Amendment protection in the 1970s, when a series of decisions established that commercial speech deserves a measure of protection because it provides valuable information to the consumer, like the price and characteristics of a product.

"When the court extended the First Amendment to commercial speech," Graff told me, "it focused on how consumers benefit from unfettered access to information about products in the marketplace. But this notion has been twisted to advance the 'rights' of corporations to express their 'viewpoints' in the public debate — not only about their favored political candidates, but also about the wares they are hawking."

There is a legal test for judging whether commercial speech qualifies for protection under the First Amendment. Called [the Central Hudson test](#), it says that such speech must be truthful and not "actually or inherently misleading." Since, as the authors point out, children under 12 cannot fully recognize and interpret bias in advertising, they're not equipped to make rational decisions about it. (Never mind that this is true of many adults also; that's a different story.) Based on relevant court decisions and scientific evidence, they contend, *all* advertising directed at children under 12 meets the legal definition of "inherently misleading," and therefore can be regulated by government.

They conclude that while regulating junk food advertising to kids may face all sorts of political opposition, like this [bill](#) to end "attack ads" against junk food, the First Amendment shouldn't stand in the way of tailored restrictions.

But although this kind of regulation may be constitutional, we're unlikely to see it any time soon, especially in [an era of corporate "personhood."](#) It's bad enough that kids are inundated with junk food ads on TV and online, but they're also seeing them in the schools they attend every day, and on the buses that take them there and back.

Nine states currently allow [advertising on school buses](#), and 11 more, plus the District of Columbia, are considering it this year; nowhere is there language that prohibits food or beverage ads. [Maine is the only state](#) with a law prohibiting junk food marketing in schools, but according to a recent report, 85 percent of that state's schools visited were noncompliant, and most were wholly unaware of the law.

The U.S.D.A.'s much-improved school meals guidelines recently received kudos (even [from me](#)). But how in the name of the founding fathers can we justify feeding kids healthy food, while at the same time — and in the same place — encouraging them to eat junk?

Clearly, public schools need all the revenue they can get, but if the only way to sufficiently fund the schools is by undermining the nutrition of the kids who attend them, we'd better bring in more junk food ads, because we're going to have to pay for something else our kids will need:

Health care.

3.
  - Barry Reitman
  - Blooming Grove, NY

### [Flag](#)

I recall that Bob Keeshan (Captain Kangaroo) turned down significant dollar amounts, refusing to ever do kids product commercials. He understood the inherent deceitfulness of using the relationship kids have with a fictional character -- particularly one they look up to. I don't know if Fred Rogers, being on public television, was contractually precluded from accepting such offers, but probably would have turned them down for reasons of principal, as well. Today's hero's are more often than not cartoons, and their corporate owners have no such scruples.

- [March 28, 2012 at 8:16 a.m.](#)
- [Reply](#)
- [Recommend42](#)
- - [Share this on Facebook](#)
  - [Share this on Twitter](#)