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Built for Boyhood?: A Proposal for Reducing the Amount of Gender Bias in the Advertising of Children's Toys on Television

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Built for Boyhood?: A Proposal for Reducing the Amount of Gender Bias in the Advertising of Children's Toys on Television

Nareissa L. Smith*

ABSTRACT

While the last half-century has seen a dramatic increase in the number of US women in the workforce, women remain underrepresented in STEM (Science, Technology, Engineering, and Mathematics) fields.

For years, researchers and social commentators have tried to explain the persistence of this gender gap. Some have even argued that genetic differences explain women's inability to excel in the hard sciences. This Article asserts that the impact of socialization on children's educational and occupational choices has been greatly underestimated. Specifically, the toys that are marketed to boys teach spatial skills that prepare boys for STEM careers. Conversely, the toys that are advertised to girls focus on relationships, housework, beauty, and fashion. Girls denied the opportunity to develop scientific ability eventually lose interest in STEM careers. Thus, it is critical that girls be encouraged to play with a variety of toys at an early age. However, television advertisements all but tell girls that science is not for them.

Congress has the power to address this issue. Children are exposed to toys primarily through television advertising. Broadcast airwaves affect interstate commerce, thereby making advertising a form of commerce. Therefore, Congress can—and should—use its powers under the Commerce Clause to regulate gender bias in the

* Assistant Professor, North Carolina Central University School of Law. There are many people the author would like to thank for the existence of this Article. First, the author would like to thank my family, particularly her daughter and her nephews, as they were the inspiration for this Article. Second, the author would like to thank the participants who listened to and commented on this paper at the American Association of Law Schools Annual Meeting, the Southeastern Association of Law Schools (SEALS), and the Southeast/Southwest People of Color Conference.

advertising of children’s toys on television. Moreover, Congress can take this action without violating the strictures outlined by the US Supreme Court in Central Hudson Gas and Electric v. Public Service Commission.

TABLE OF CONTENTS

- I. INTRODUCTION 994
- II. HOW TELEVISION INFLUENCES CHILDREN 999
 - A. *Gender Bias and Play* 1000
 - B. *Children, Play, and Television Advertisements* 1004
 - 1. The Significance of Television in Children’s Lives 1004
 - a. *Television and Children* 1004
 - b. *Children and Commercials*..... 1005
 - 2. How Television Commercials “Genderize” Toys 1006
 - a. *Toys and Scientific Ability* 1006
 - b. *Toys on Television*..... 1008
 - c. *The Take-Away*..... 1010
 - 3. Children, Toys, and Career Selection..... 1011
 - C. *Rebuttals* 1013
 - D. *Summary*..... 1016
- III. REVIEW OF EXISTING LAW 1016
 - A. *Legal Authority and Responsibility* 1017
 - 1. Congressional Authority and Acts 1017
 - 2. The Federal Communications Commission..... 1018
 - 3. The Federal Trade Commission 1020
 - 4. Industry Self-Regulation 1021
 - B. *Why the Current Legal and Regulatory Framework is Insufficient to Address Gender Bias in Children’s Advertising* 1022
 - 1. Congress, the FCC, and the FTC 1022
 - 2. Industry Self-Regulation 1024
 - C. *Summary*..... 1025
- IV. THE PROPOSED LAW 1025
 - A. *Congress’ Authority to Enact Legislation Concerning Children’s Advertising*..... 1026
 - B. *The Proposed Law* 1027
 - C. *Examination of the Proposal* 1028
 - 1. Advantages 1028
 - 2. Criticisms..... 1029
- V. FIRST AMENDMENT ISSUES 1030
 - A. *Commercial Speech Law* 1031

1. Analyzing Commercial Speech and Its Place In Modern Advertising.....	1031
2. Considering the Proposal as a Content-Based Regulation on Speech	1032
3. Applying the Appropriate Test.....	1035
<i>a. The Central Hudson Test</i>	1036
i. The Government has a Substantial Interest in Regulating the Speech.....	1037
ii. The Proposed Regulation Directly Advances the Government's Substantial Interest	1040
iii. The Regulation is the Least Restrictive Means of Achieving the Government's Interest.....	1042
<i>b. Strict Scrutiny</i>	1044
i. Compelling State Interest.....	1045
ii. Narrow Tailoring.....	1045
VI. CONCLUSION	1046

"It does appear that on many, many different human attributes—height, weight, propensity for criminality, overall IQ, mathematical ability, scientific ability—there is relatively clear evidence that whatever the difference in means—which can be debated—there is a difference in the standard deviation, and variability of a male and female population. . . . [T]here is reasonably strong evidence of taste differences between little girls and little boys that are not easy to attribute to socialization."

- Lawrence Summers, Former President of Harvard University, 2005¹

"[M]ath class is tough[!]"

- Teen Talk Barbie, 1992²

"Through the world of toys, girls and boys are given separate dreams to follow. Girls are prepared for a future of looking pretty, keeping house and taking care of babies. Boys are given a pass on that

1. Lawrence H. Summers, President, Harvard Univ., Remarks at the NBER Conference on Diversifying the Science & Engineering Workforce (Jan. 14, 2005), available at http://www.harvard.edu/president/speeches/summers_2005/nber.php.

2. *Mattel Says It Erred; Teen Talk Barbie Turns Silent on Math*, N.Y. TIMES, Oct. 21, 1992 at D4, <http://www.nytimes.com/1992/10/21/business/company-news-mattel-says-it-erred-teen-talk-barbie-turns-silent-on-math.html>.

domain, and instead pointed toward the outside world of challenge, physical development and achievement. . . . Girls and boys both will benefit if we offer them limitless options. They will grow up to be more fully developed people if we give them the freedom to discover who they are, without the stress of tightly patrolled gender borders.”

- Kim Gandy, President, National Organization for Women, 2007³

I. INTRODUCTION

Just over one hundred years ago, the United States Supreme Court declared that women were unfit to work outside the home without special legislative protections.⁴ However, as attitudes slowly shifted during the century, women’s participation in the workforce rose from 33.9 percent in 1950 to 59.5 percent in 2008.⁵ As a result of this increased participation, women now comprise almost half of the American workforce.⁶

While the number of women in the American workforce has increased over the last half-century, the workforce remains starkly segregated along gender lines. In 2007, women comprised roughly 78 percent of teachers, 82 percent of social workers, 92 percent of registered nurses, and 97 percent of secretaries and administrative assistants.⁷ By contrast, women comprised only 40.8 percent of chemists and materials scientists, 24.7 percent of computer

3. Kim Gandy, *Below the Belt Column: NOW’s Naughty List: Stereotyping Toys*, NAT’L ORG. FOR WOMEN, Dec. 21, 2007, available at <http://www.hipmama.com/blog/node/news-naughty-list-stereotyping-toys> (reproducing original column). The Below the Belt Column is a bi-weekly online column produced by National Organization for Women (“NOW”) President Kim Gandy.

4. See, e.g., *Muller v. Oregon*, 208 U.S. 412, 422–23 (1908) (upholding an Oregon law limiting the number of hours that could be worked by women). In support of its decision, the Court stated:

The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her.

Id.

5. See *Changes in Women’s Labor Force Participation in the Twentieth Century*, U.S. BUREAU OF LABOR STATISTICS (Feb. 16, 2000), <http://www.bls.gov/opub/ted/2000/Feb/wk3/art03.htm>.

6. *Quick Stats on Women Workers, 2010*, U.S. DEPT. OF LABOR, WOMEN’S BUREAU, <http://www.dol.gov/wb/factsheets/QS-womenwork2010.htm> (last visited Apr. 11, 2015) (stating that women comprised 46.8% of the total US labor force in 2010 and are projected to account for 46.9% by 2018).

7. U.S. CENSUS BUREAU, TABLE 596, EMPLOYED CIVILIANS BY OCCUPATION, SEX, RACE, AND HISPANIC ORIGIN: 2007 1–3 (2007) (on file with author).

programmers, 24.7 percent of architects, and merely 11.5 percent of civil engineers.⁸ While women have undoubtedly made inroads into some of the fields traditionally dominated by men, such as medicine and law,⁹ women have not yet made the same inroads into the hard sciences.¹⁰

For years, researchers and social commentators have tried to explain the persistence of this gender gap.¹¹ Perhaps the most notorious attempt to explain the disparity came in a 2005 speech by former Harvard President Lawrence Summers.¹² In the speech, Summers opined that perhaps biology explained the difference in mathematical achievement, as he noted: “It does appear that on many, many different human attributes—height, weight, propensity for criminality, overall IQ, mathematical ability, scientific ability—there is relatively clear evidence that whatever the difference in means—which can be debated—there is a difference in the standard deviation, and variability of a male and a female population.”¹³ While he later clarified these remarks,¹⁴ his basic point remained:

8. See *id.* at 3–4.

9. In 2009, women were 31% of all lawyers. See AM. BAR. ASS'N, COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW 1 (Nov. 13, 2009). In 2003, women were 25 percent of all physicians, and that number was projected to reach 33 by 2010. See John Dorschner, *Growing Number of Female Doctors Changing Medical Profession*, THE BG NEWS (Mar. 23, 2003, 12:00 AM), http://www.bgnews.com/growing-number-of-female-doctors-changing-medical-profession/article_6e9e7dd6-9942-5bfc-a0df-ccb549da9f95.html. Interestingly, women tended to center their practices in pediatrics, obstetrics, and gynecology. *Id.*

10. See Eileen Pollack, *Why Are There So Few Women in Science?*, N.Y. TIMES MAG. (Oct. 3, 2013), http://www.nytimes.com/2013/10/06/magazine/why-are-there-still-so-few-women-in-science.html?_r=0. One definition of “hard” sciences states that the term “encompass the physical or natural sciences (such as biology, chemistry, and physics) and mathematics.” Katherine Ehmann et al., *Collaboration in Context: Comparing Article Evolution Among Subject Disciplines in Wikipedia*, 13 FIRST MONDAY J. 10 (Oct. 6, 2008), <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2217/2034>. While the “hard/soft and pure/applied distinctions are socially constructed typologies that carry longstanding ideological baggage and serve as proxies for contestations surrounding the power, legitimacy, and prestige of any particular discipline,” the terms are nevertheless useful for furthering our discussion. See Dan W. Butin, *The Limits of Service-Learning in Higher Education*, 29 REV. HIGHER EDUC. 473, 479 (2006).

11. See, e.g., Sean Cavanagh, *Educators Revisit Girls' Loss of Math, Science Interest*, EDUC. WEEK, May 4, 2005, at 6, <http://www.edweek.org/ew/articles/2005/05/04/34gender.h24.html> (examining several reasons why girls lag behind boys in math and science); see also Nancy Heilbronner, *Jumpstarting Jill: Strategies to Nurture Talented Girls in Your Science Classroom*, 32 GIFTED CHILD TODAY 46, 46–54 (Winter 2009); Debra Viadero, *Researchers Mull STEM Gender Gap*, EDUC. WEEK, June 17, 2009, at 1, http://www.edweek.org/ew/articles/2009/06/17/35gender_ep.h28.html.

12. See Summers, *supra* note 1.

13. *Id.*

14. Letter from Lawrence H. Summers, President, Harvard Univ., to Members of the Harvard Community (Jan. 19, 2005), available at <http://www.harvard.edu/president/speeches/>

socialization should not be considered a significant reason for the disparity between the genders in math and science achievement.

This Article asserts that President Summers—and those that agree with him—greatly underestimated the impact of socialization on children’s educational and occupational choices. For example, a recent survey found that 95 percent of girls believed that science careers were “cool.”¹⁵ However, 66 percent of the respondents said that science careers were “not for them.”¹⁶ The disparity between girls’ interest in and desire to pursue scientific careers strongly implies that at some point, girls are getting the loud and clear message that science careers are “not for them.” It is likely that dolls that declare “[M]ath class is tough[!]" contribute to that message.

While not all toys marketed to girls literally discourage them from participating in math and science, as Teen Talk Barbie did, almost none of them *encourage* girls to do so. Rather, girls are encouraged to play with toys that will develop their nurturing abilities, creative skills, and personal beauty regimen.¹⁷ It is not difficult to draw the connection between being encouraged to play with nurturing toys and later pursuing a career in nursing, social work, or teaching—all fields that require nurturing and are heavily dominated by women.¹⁸ Conversely, it is not difficult to conclude that the messages engendered by those playthings could make girls hesitant to pursue careers that are outside of traditional female norms. Thus, it is critical that girls be encouraged to play with a variety of toys.

At this point, a reader might agree that women are lagging behind men in the hard sciences and might also agree that girls are not being encouraged to pursue careers in math and hard sciences. However, the reader might not understand what role the law has to play in addressing this issue. The answer is this: children are exposed to toys primarily through television advertising.¹⁹ Broadcast airwaves affect interstate commerce, thereby making advertising a form of commerce.²⁰ Therefore, Congress can—and should—use its powers

summers_2005/womensci.php (apologizing and attempting to clarify that Summers did not mean that girls are intellectually inferior to boys.).

15. See Ronald Roach, *Survey: American Girls Aren't Interested in STEM Careers*, DIVERSE ISSUES IN HIGHER EDUC. (Apr. 6, 2006), <http://diverseeducation.com/article/5698/>.

16. See *id.*

17. See discussion *infra* Part II.

18. U.S. BUREAU OF LABOR STATISTICS, *supra* note 5.

19. See Bradley S. Greenberg & Sara F. Rosean, *Television and Young People: Violence, Sex, Booze, and Greed*, 2005 MICH. ST. L. REV. 857, 874 (2005) (discussing the contents of advertising for children).

20. Communications Act of 1934, 47 U.S.C. § 151 (2012) (noting that the FCC, which regulates television, was created “[f]or the purpose of regulating interstate and foreign commerce in communication . . .”).

under the Commerce Clause to regulate gender bias in the advertising of children's toys on television.²¹

The Commerce Clause is merely the first portion of the analysis, however. While advertising is a vehicle for promoting commerce, it is also a form of protected speech.²² Thus, any regulation of children's toy advertising must comply with the test outlined by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.²³ This Article proposes that Congress can craft a law addressing this issue that will satisfy the *Central Hudson* test.

The topic of gender bias in children's toy advertising is new to the legal literature. The vast majority of articles that discuss bias in advertising focus on racial stereotypes.²⁴ Some articles have examined gender bias in commercial communications;²⁵ however, most of the discussion regarding gender and the media has been about pornography or violence against women.²⁶ To date, no writing has

21. See U.S. CONST. amend. 1, § 8, cl. 3 (stating that Congress shall have the power to regulate commerce).

22. See 447 U.S. 557, 561 (1980) ("The First Amendment . . . protects commercial speech.").

23. See *id.* at 566 ("In commercial speech cases . . . a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. . . . Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.").

24. See, e.g., Leonard M. Baynes, *White Out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, 45 ARIZ. L. REV. 293, 308–11 (2003) (noting that advertisers frequently discriminate in ad purchasing decisions); Desirée A. Kennedy, *Marketing Goods, Marketing Images: The Impact of Advertising on Race*, 32 ARIZ. ST. L. J. 615, 620 (2000) ("Advertising plays an important role in weaving cultural messages about race into the consciousness of consumers."); Ross D. Petty et al., *Regulating Target Marketing and Other Race-Based Advertising Practices*, 8 MICH. J. RACE & L. 335, 349–52 (2003) (discussing, inter alia, how harmful products such as cigarettes and alcohol are frequently marketed to non-whites); Patricia M. Worthy, *Diversity and Minority Stereotyping in the Television Media: The Unsettled First Amendment Issue*, 18 HASTINGS COMM & ENT L.J. 509, 513–15 (1996) (discussing the impact that television has on creating and reinforcing racial stereotypes).

25. See, e.g., Elizabeth Lambdin, Note, *A New Disease Born Every Minute: The Marketing of Pathology and the Exploitation of Gender-Based Insecurities and Sexuality to Sell Drugs*, 13 CARDOZO J.L. & GENDER 145, 149–59 (2006) (describing how gender stereotypes and insecurities—men's baldness, women's weight problems—are unfairly used in the marketing of drugs to address these "issues").

26. See, e.g., Cheryl B. Preston, *Significant Bits and Pieces: Learning from Fashion Magazines about Violence Against Women*, 9 UCLA WOMEN'S L.J. 1, 13–30 (1998) (discussing, inter alia, how women are frequently objectified in various ways by advertisements); Cheryl B. Preston, *Consuming Sexism: Pornography Suppression in the Larger Context of Commercial Images*, 31 GA. L. REV. 771, 821–31 (1997) (discussing the similarities in pornography and commercial advertisements). Professor Preston is also the author of two additional articles on the topic. See generally Cheryl B. Preston, *Subordinated Stills: An Empirical Study of Sexist Print Advertising and Its Implications for Law*, 15 TEX. J. WOMEN & L. 229, 229–30 (2006);

explored the ways in which gender bias in toy advertising might affect children's perceptions of gender roles, and later, children's occupational choices.

Similarly, many of the articles discussing advertising aimed at children focus on legal restrictions on the advertising of harmful materials—such as alcohol and tobacco—to children.²⁷ Some articles also discuss limiting children's exposure to violence.²⁸ The vast majority of articles discuss the problem of advertising junk food to children.²⁹ These discussions, while enlightening and informative, do not address the problem of gender bias directed at children. This Article aims to fill that gap in the literature.

This Article will proceed in four parts. Part II will prove that television commercials influence children's toy selection, which in turn influences children's skill development and future career choices. Part III reviews the existing laws and regulations governing advertising to children. Part III will also argue that the current rules fail to address the issue of gender bias and that, in the absence of effective laws, a new law is needed to address the problem. Part IV demonstrates that

Cheryl B. Preston, *Baby Spice: Lost Between Feminine and Feminist*, 9 AM. U. J. GENDER SOC. POL'Y & L. 541, 541–42 (2001).

27. See, e.g., Kenneth B. Baren, *If a Picture Is Worth a Thousand Words, Then Advertising is Worth a Thousand Deaths*, 30 S. ILL. U. L.J. 469, 476–82 (2006) (explaining how alcohol and tobacco advertising is aimed at youth); Greenberg & Rosean, *supra* note 19, at 869–74 (specifically discussing children's exposure to both alcohol and tobacco advertising); see also, e.g., Clay Calvert, *Excising Media Images to Solve Societal Ills: Communication, Media Effects, Social Science, and the Regulation of Tobacco Advertising*, 27 SW. U. L. REV. 401, 401–05 (discussing the First Amendment difficulties in regulating tobacco advertising, and periodically discussing children); Jamie Peal Kave, Note, *The Limits of Police Power: State Action to Prevent Youth Cigarette Use after Lorrillard v. Reilly*, 53 CASE W. RES. L. REV. 203, 203–05 (2002) (generally discussing state regulations intended to prevent children from viewing tobacco advertising); David S. Modzeleski, *Lorrillard Tobacco v. Reilly: Are We Protecting the Integrity of the First Amendment and the Commercial Free Speech Doctrine at the Risk of Harming our Youth?*, 51 CATH. U. L. REV. 987, 1020–21 (2002) (proposing alternative methods to prevent children from being targeted by tobacco products).

28. See, e.g., John Alan Cohan, *Broadcasting Industry Ethics, the First Amendment and Televised Violence*, 9 UCLA ENT. L. REV. 1, 1–4 (2001) (discussing the effects of televised violence on children and adults); Jenean M. Klein, *Is Use of the V-Chip in Public Schools an Exercise of Government-Sponsored Censorship?*, 9 MEDIA L. & POL'Y 11 (2001); Jonathan M. Proman, Note, *Liability of Media Companies for the Violent Content of Their Products Marketed to Children*, 78 ST. JOHN'S L. REV. 427, 427–28 (2004) (discussing liability for marketing violent content, such as video games, directly to children).

29. See, e.g., John M.A. DiPippi, *Regulating Food Advertisements: Some First Amendment Issues*, 28 U. ARK. LITTLE ROCK L. REV. 413, 423 (2006) (discussing the limitation of fast food advertisements during children's programs); Samantha Graff, *First Amendment Implications of Restricting Food and Beverage Marketing in Schools*, 615 ANNALS AM. ACAD. POL. & SOC. SCI. 158, 168–71 (2008) (discussing the difficulties that may come in regulating advertising to children on school campuses); Randolph Kline et al., *Beyond Advertising Controls: Influencing Junk-Food Marketing and Consumption with Policy Innovations Developed in Tobacco Control*, 39 LOY. L.A. L. REV. 603, 608–11 (2006) (discussing the need for regulation on this point).

Congress has the authority to address this issue under its Commerce Clause authority and proposes such a law. Finally, Part V proposes that it is possible for Congress to take action in this area without violating the First Amendment.

At the outset, it must be stated that it is unlikely that curbing the gender bias in television advertising aimed at children will immediately result in a generation filled with potential Madame Curies. However, if reducing the gender bias in televised toy marketing might increase the dismal number of women entering the hard sciences by even a fraction, the effort will have been well worth it.

II. HOW TELEVISION INFLUENCES CHILDREN

When a child plays with a toy, it is anything but “child’s play.” Play occupies a “central role” in children’s lives and is a “key facilitator for learning and development.”³⁰ While there is no one settled definition of play,³¹ one view suggests “[p]lay is the process through which children learn.”³² Whatever the definition, play contributes to a child’s cognitive development in a number of ways. Play can increase a child’s attention span, enhance her creativity, and promote her language development.³³ Play also improves children’s abstract thinking and problem-solving skills.³⁴

Toys and play do more than teach children discrete skills.³⁵ “Toys . . . encourage children to play a variety of roles they may take as adults, with more overtly specified rules for playing out these roles.”³⁶ The activities that children choose while young are significant because these activities can “establish lifestyle habits that last into adulthood.”³⁷

30. Joan Packer Isenberg & Nancy Quisenberry, *Play: Essential for all Children*, 79 CHILDHOOD EDUC. 33 (2002).

31. See Frances Wardle, *Play as Curriculum*, EARLY CHILDHOOD NEWS, http://www.earlychildhoodnews.com/earlychildhood/article_view.aspx?ArticleId=127 (last visited Apr. 11, 2015).

32. Rose B. Jones, *Playing with Your Child*, 80 CHILDHOOD EDUC. 272 (2004) (quoting George S. Morrison, EARLY CHILDHOOD EDUCATION TODAY 198 (1998)).

33. See sources cited *supra* notes 31–32.

34. Ling-Ling Tsao, *How Much Do We Know About the Importance of Play in Child Development?*, 78 CHILDHOOD EDUC. 230, 231 (2002).

35. See Isenberg & Quisenberry, *supra* note 30, at 34.

36. Davita Silfen Glasberg et al., *Games Children Play: An Exercise Illustrating Agents of Socialization*, 26 TEACHING SOC. 130 (1998) (quoting Claire M. Renzetti & Daniel J. Curran, WOMEN, MEN AND SOCIETY 66 (2d. ed. 1992)).

37. Isabelle D. Cherney & Kamala London, *Gender-Linked Differences in the Toys, Television Shows, Computer Games, and Outdoor Activities of 5- to 13-Year-Old Children*, 54 SEX ROLES 717 (2004).

This Part develops the following points. First, it will examine the presence and significance of gender bias on children's play activities. Second, research will demonstrate that television advertisements aimed at children encourage, engender, and exploit that gender bias. Finally, this Part will demonstrate that gender bias in children's play choices leads to gender-based decisions in the educational and career choices children make in later years.

A. Gender Bias and Play

As anyone who has shopped for a child knows, children's toys are "highly gendered."³⁸ Boys are encouraged to play with cars, trucks, wagons, machines, and science toys.³⁹ Girls, by contrast, are encouraged to play with toys such as kitchen sets and dolls that promote domesticity and nurturing behavior.⁴⁰

This gendered play is troubling for at least two reasons. First, the toys that boys encounter encourage a certain freedom of imagination.⁴¹ According to experts, "boys [can] use their toys to build something new or to imagine flying off to outer space, whereas girls [can] pretend to use theirs [] to iron clothes and wash dishes."⁴² While maintaining a home is a worthwhile and noble pursuit, being an engineer, for example, requires a certain amount of imagination to envision new possibilities.⁴³ Preparing girls for traditional roles that do not employ the imagination in the same way would therefore seem to put them at a disadvantage in those careers.

Second, toys that are aimed at boys teach skills radically different from those aimed at girls. Gender divergence in toy selection is particularly problematic because "the tendency for girls to play with one set of toys while boys tend to play with another set, may contribute to the development of sex-typed spatial abilities."⁴⁴ The

38. Judith E. Owen Blakemore & Renee E. Centers, *Characteristics of Boys' and Girls' Toys*, 53 *SEX ROLES* 619 (2005).

39. *See id.*

40. *See id.*

41. *See id.* at 619–20.

42. *Id.* at 620.

43. *See, e.g.,* Alison L. Ahearn, *Words Fail Us: The Pragmatic Need for Rhetoric in Engineering Communication*, 4 *GLOBAL J. OF ENGINEERING EDUC.* 57, 62 (2000) ("[T]he engineer uses engineering science only after imagination and creativity have generated a design and a vision of what might be. Science is portrayed as one tool amongst many deployed by the engineer."); *Problems and Problem Solving*, *HIGHER EDUC. ACAD., ENGINEERING SUBJECT CENTER*, <http://exchange.ac.uk/learning-and-teaching-theory-guide/problems-and-problem-solving.html> (last visited Apr. 11, 2015) (describing the need for engineers to be good problem solvers).

44. Dyanne M. Tracy, *Toys, Spatial Ability, and Science and Mathematics Achievement: Are They Related?*, 17 *SEX ROLES* 115 (1987).

term “spatial ability” refers to “skill in representing, transforming, generating, and recalling symbolic, non-linguistic information.”⁴⁵ There are various types of spatial skills, examples of which include “using maps, solving geometry questions, and recognizing two-dimensional representation of three-dimensional objects.”⁴⁶

Spatial skills are particularly important in math and science. In mathematics, spatial visualization improves geometry students’ outcomes and helps calculus students to visualize solids of revolution—three-dimensional figures that are formed when a two-dimensional curve is rotated about a fixed line.⁴⁷ Spatial skills also contribute to science ability. Researchers have stated, “[t]he need for three-dimensional conceptualization is necessary for the comprehension of wave energy transmission, chemical bonding, fields of force, structure of the atom, x-ray diffraction patterns, DNA, cell division, and countless other concepts and phenomena found in every branch of science.”⁴⁸

Due to the centrality of spatial skills to success in the hard sciences, boys’ playthings give them a clear edge over girls in developing these skills. Research shows that the toys that may best help children learn spatial skills—vehicles, machines, construction toys, blocks and puzzles, and sports equipment—are generally considered “boys’ toys.”⁴⁹ In a recent study by psychologists Blakemore and Centers, researchers asked one group of participants to rate toys on a scale from “strongly feminine” to “strongly masculine” and asked a second group to evaluate the qualities of the toy.⁵⁰ The “strongly feminine” and “feminine” toys included Barbie dolls and accessories, baby dolls, dollhouses, an Easy-Bake oven, cleaning toys

45. *Id.* at 124 (quoting Maria C. Linn & Anne C. Peterson, *Emergence and Characterization of Sex-Differences in Spatial Ability: A Meta-Analysis*, 56 *CHILD DEV.* 1479, 1482 (1985)).

46. H. Bayram Yilmaz, *On the Development and Measurement of Spatial Ability*, 1 *INT’L ELECTRONIC J. ELEMENTARY EDUC.* 83, 84 (2009).

47. Paula K. McCoun, *Gender Differences in Attitudes, Spatial Visualization Ability, and Learning Styles of Remedial Mathematics Students* (Aug. 1993) (unpublished M.S. dissertation, Tex. Tech Univ.) (on file with author); Karen Sue Cockburn, *Effects of Specific Toy Playing Experiences on the Spatial Visualization Skills of Girls Ages 4 & 6* (Aug. 1995) (unpublished Ph.D. dissertation, Wash. State Univ.) (on file with author).

48. Yilmaz, *supra* note 46, at 93 (quoting Francis T. Siemankowski & Franklin C. MacKnight, *Spatial Cognition: A Success Prognosticator in College Science Classes*, 1 *J. C. SCI. TEACHING* 56, 56 (1971)).

49. *See, e.g.*, Tracy, *supra* note 44, at 124 (listing vehicles, machines, and construction toys as “spatial in nature”); *see also* Donna Fisher-Thompson, *Adult Sex Typing of Children’s Toys*, 23 *SEX ROLES* 291, 292–93 (1990) (listing blocks and sports equipment as masculine).

50. *See* Blakemore & Centers, *supra* note 38, at 621–22, 624–25. The complete list of the one hundred toys will not be provided here. This Article does, however, provide a sampling of the relevant toys in each category.

(e.g., brooms, mops), and toy kitchens and play food.⁵¹ “Neutral” toys included board games, crayons, an Etch-A-Sketch, Lego building bricks, and blocks.⁵² “Moderately masculine” toys were a microscope, Lincoln Logs, an airport, and a train set.⁵³ Finally, “strongly masculine” toys included Matchbox cars, an erector set, a Tonka truck, and a tool kit.⁵⁴

The study’s results found that while the masculine and neutral toys taught some scientific skills, the feminine toys taught nothing of the sort.⁵⁵ The study concluded that when a second group of participants were asked if the toy “stimulated cognitive ability, was scientific, and/or educational, the consistent pattern was for neutral and moderately masculine toys to be rated higher than . . . any feminine toys.”⁵⁶ Indeed, the “strongly feminine” toys were described as “focus[ing] on appearance and attractiveness,” being “nurturant,” and “encourage[ing] domestic or household skills.”⁵⁷ Thus, gender-typed toys are not merely a nuisance, but have real ramifications for the skill sets children develop through their play.

Other studies have noted this trend as well. One article noted, “The activities that predict strong visual-spatial skills in children are male sex typed: that is, they are generally considered to be more appropriate for boys in our culture”⁵⁸ Another states, “Most of the time boys play with toy vehicles and blocks, which involve spatial manipulations, while girls play with stuffed animals and dolls, which help the development of social skills.”⁵⁹ Enough studies have noticed this trend to show a clear correlation between play with “boys’ toys” and spatial ability.⁶⁰

More troubling is the fact that the spatial deficit, once present, will persist if there is no intervention. One study examined whether preschool children who played with blocks—a toy that builds spatial

51. *Id.* at 622, tbl.II.

52. *Id.*

53. *Id.*

54. *Id.* at 623.

55. *Id.* at 624, 628–29.

56. *Id.* at 629. Toys that were “strongly masculine” performed poorly also, but this is likely because the set generally included toys of aggression (i.e. weapons), which teach very little. *Id.* at 629, 631.

57. *Id.*

58. Lisa A. Serbin et al., *The Socialization of Sex-Differentiated Skills and Academic Performance: A Mediational Model*, 23 *SEX ROLES* 613, 615 (1990).

59. Yilmaz, *supra* note 46, at 92 (citations omitted).

60. See, e.g., Alison Nash & Giordana Grossi, *Picking Barbie™’s Brain: Inherent Sex Differences in Scientific Ability?*, 2 *J. INTERDISC. FEMINIST THOUGHT* 1, 6 (2007) (citations omitted); Tracy, *supra* note 44, at 124.

skills⁶¹—performed better in math in later years than those who did not play with blocks.⁶² While no significant difference appeared in elementary school, by middle school, there was a significant difference in standardized test performance, and this difference persisted into high school.⁶³ In light of these findings, it is not surprising that another study found a connection between adult respondents' spatial abilities and their "retrospective reports of experience with male-typical toys . . ." ⁶⁴ The study further noted that "[g]ender-linked toy preference . . . appears to contribute to the male advantage on spatial tasks in adulthood."⁶⁵

It has also been shown, however, that if girls play with toys that teach spatial skills at an early age, the gap in achievement can be closed or eliminated.⁶⁶ A recent book indicates that "there is currently plenty of evidence to conclude that spatial skill is trainable . . ." ⁶⁷ One study demonstrated this by giving children exposure to male-typed toys.⁶⁸ After the exposure, the children improved their performance on a math test.⁶⁹ Later researchers concluded the study "shows that one possible way of ameliorating the effects of early sex-differentiated experience is to intervene at a young age by providing practice in those skills that subsequently display sex-related differences."⁷⁰ Thus, providing spatial experiences, such as toys, to girls at an early age could greatly influence girls' ability to perform these tasks as they grow older.

61. See, e.g., JO BOALER, WHAT'S MATH GOT TO DO WITH IT? 177 (2008).

62. Charles H. Wolfgang et al., *Block Play Performance Among Preschoolers as a Predictor of Later School Achievement in Mathematics*, 15 J. RES. IN CHILDHOOD EDUC. 173, 174 (2001).

63. *Id.* at 177–78.

64. Gerianne M. Alexander, *Associations Among Gender-Linked Toy Preferences, Spatial Ability, and Digit Ratio: Evidence from Eye-Tracking Analysis*, 35 ARCHIVES OF SEXUAL BEHAV. 699, 700 (2006) (citations omitted).

65. *Id.*

66. Cockburn, *supra* note 47, at 6–7.

67. Nora S. Newcombe et al., *Maximization of Spatial Competence: More Important than Finding the Cause of Sex Differences*, in BIOLOGY, SOCIETY, AND BEHAVIOR: THE DEVELOPMENT OF SEX DIFFERENCES IN COGNITION 183, 184 (Ann McGillicuddy-De Lisi & Richard De Lisi eds., 2002).

68. Cockburn, *supra* note 47, at 6–7.

69. *Id.*

70. *Id.*

B. Children, Play, and Television Advertisements

1. The Significance of Television in Children's Lives

a. Television and Children

While children encounter socializing influences from books, songs, television, and movies, “[t]elevision, however, is perhaps the form of media most influential in shaping ideas of appropriate sex roles.”⁷¹ Children spend so much time watching television that, during their school years, the typical child “will have spent more time watching television than they have in the classroom.”⁷² Indeed, some children “spend an average of nearly 30 hours a week watching television; some spend more time watching television than anything else except sleeping.”⁷³

While the sheer amount of television watched by American children is shocking, the impact of this exposure is more troubling. “Research indicates a relationship between exposure to [television’s] gendered images and children’s perceptions about gender roles.”⁷⁴ While parents might be expected to be the primary role models for gender in their children’s lives, three observations upend this expectation. First, children learn not only through direct experiences but also through the observation of models.⁷⁵ Research suggests that children respond to filmed models just as they do to real ones.⁷⁶ Second, because children spend such a significant amount of time watching television, “exposure to televised models may be even greater than their exposure to their own parents’ behaviors.”⁷⁷ Thus,

71. Susan D. Witt, *The Influence of Television on Children's Gender Role Socialization*, 76 CHILDHOOD EDUC. 322, 322 (2000) (citation omitted).

72. AM. ACAD. OF CHILD & ADOLESCENT PSYCHOLOGY, FACTS FOR FAMILIES: #54 CHILDREN AND WATCHING TV (2001), available at http://www.aacap.org/App_Themes/AACAP/docs/facts_for_families/54_children_and_watching_tv.pdf.

73. Witt, *supra* note 71, at 322 (citing JUDY ROOT AULETTE, CHANGING FAMILIES (1994); PAUL S. KAPLAN, A CHILD'S ODYSSEY: CHILD AND ADOLESCENT DEVELOPMENT (1991); Daniel R. Andersen et al., *Television Viewing at Home: Age Trends in Visual Attention and Time with TV*, 57 CHILD DEV 1024, 1024–25 (1986)). But see Sandra L. Hofferth & John F. Sandberg, *How American Children Spend Their Time*, 63 J. MARRIAGE & FAM. 295, 800 (2001) (estimating that children spend twelve to thirteen hours a week watching television; additionally, children spend more time in school than watching television).

74. Jennifer J. Pike & Nancy A. Jennings, *The Effects of Commercials on Children's Perceptions of Gender Appropriate Toy Use*, 52 SEX ROLES 83, 84 (2005).

75. See *id.* at 84–85.

76. See *id.* at 84.

77. Lois J. Smith, *A Content Analysis of Gender Differences in Children's Advertising*, 8 J. BROADCASTING & ELECTRONIC MEDIA 323, 324 (1994) (citing Albert Bandura, *The Role of Modeling Processes in Personality Development*, in SOCIAL LEARNING IN CHILDHOOD: READINGS IN THEORY AND APPLICATION 185, (Donna M. Gelfand ed., 1969)).

“models seen on television may have as great an impact on heavy viewers as their observation of parental behavior.”⁷⁸ Finally, because children’s exposure to adult occupations beyond their parents’ is limited, television fills the gap by providing children with information about available occupations.⁷⁹ Thus, the influence of television on the formation of children’s gender attitudes cannot be overstated.

b. Children and Commercials

Children are not merely viewing programs while watching television, however. Many of the programs children watch also contain commercials.⁸⁰ A mere four hours of television can contain one hundred commercials;⁸¹ in a year, then, an American child may view up to forty thousand commercials in a year.⁸²

The quantity of commercials viewed is not the only issue, however. Though one might believe a child would be primarily attracted to the programming rather than the advertisements, research shows that children will sometimes focus on commercials more than the actual program.⁸³ When children’s affinity for commercials is coupled with production values that are targeted specifically to children, it is clear that “[c]ommercials . . . have the potential to be one of the most highly persuasive messages that children see.”⁸⁴

Research shows that commercials often succeed in persuading children. The American Psychological Association reports that fifty percent of children can remember a toy ad one week later, even when the ad is shown only once during a program.⁸⁵ Moreover, when

78. Marilou Moore Johnson, *Effect of Televised Portrayal of Non-Sex-Role-Stereotyped Occupations on Children’s Attitudes, Preferences, and Behavior* 28 (August 1990) (unpublished Ph.D. dissertation, Univ. of Tennessee, Knoxville) (on file with author).

79. *See id.*

80. *See* MEDIA EDUC. FOUNDATION, *ADVERTISING: EXPOSURE & INDUSTRY STATISTICS* (2005), available at <https://www.mediaed.org/Handouts/AdvertisingExposure.pdf>.

81. *Id.*

82. *See id.* (“The average American child may view as many as 40,000 television commercials every year.”). *But see* FED. TRADE COMM’N, *CHILDREN’S EXPOSURE TO TV ADVERTISING IN 1977 AND 2004: INFORMATION FOR THE OBESITY DEBATE* 9 (2007), available at <https://www.ftc.gov/sites/default/files/documents/reports/childrens-exposure-television-advertising-1977-and-2004-information-obesity-debate-bureau-economics/cabebw.pdf> (“[C]hildren in the group ages 6 to 11 saw 26,079 ads per year.”).

83. KIM B. SHEEHAN, *CONTROVERSIES IN CONTEMPORARY ADVERTISING* 163 (2004); *see also* ELLEN SEITER, *SOLD SEPARATELY: CHILDREN AND PARENTS IN CONSUMER CULTURE* 108 (1993).

84. SHEEHAN, *supra* note 83, at 163.

85. BRIAN L. WILCOX ET AL., *AM. PSYCHOLOGICAL ASS’N, REPORT OF THE APA TASK FORCE ON ADVERTISING AND CHILDREN* 9–10 (2004), available at <http://www.apa.org/pi/families/resources/advertising-children.pdf>.

children are asked how they learned about a particular toy, they are most likely to state that they learned about it from a television commercial.⁸⁶ Therefore, television ads clearly influence children's toy preferences and requests.

The persuasive effect of advertisements on children is particularly troubling because children "take cues about appropriate gender behavior from advertising."⁸⁷ The following section will explore the types of gender bias presented in children's toy ads.

2. How Television Commercials "Genderize" Toys

One commentator states that while adults have challenged gender roles in the past fifty years, "[i]n children's television, advertising stereotypes are almost identically as rigid if not actually worse than when the late twentieth century women's movement began."⁸⁸ A 1993 article in *Adweek* stated:

It's hard to watch a morning of kids' commercial television without zoning out. But if you don't, the shock is in the extreme gender divides. Of course, there has always been some form of dolls for girls and some sort of guns for boys. But the surprise, in our enlightened, women-in-the-workforce, sensitive-Dad-era, is that kids' advertising is more polarized than the Balkans. This is sex and violence, in some hard-to-believe time warp. The (mostly pink) spots for girls seem to deal exclusively with baby care and hair. The Sly-and-Arnie-style boys' ads, not unexpectedly, are all about violence and power. . . . Obviously, kids see these spots over and over, so that in the end, when the lines are drawn, the boys will be ready to kill, and the girls will be ready to dye their hair.⁸⁹

Unfortunately, since 1993, gender bias in children's advertising has remained relatively unchanged. This is particularly true for toys that teach spatial ability. The next sections will describe in more detail the toys that teach spatial skills and will also explain how the toys that generate spatial development are primarily advertised to boys.

a. Toys and Scientific Ability

As previously stated in this writing, it has been long known in the social science literature that certain toys help children develop

86. See *id.* at 10.

87. Smith, *supra* note 77, at 325.

88. Kathleen Antrim, *Gender Differences in Children's Toys*, UCI-SANTA ANA TCHR.'S INST. (1999), http://www.cfep.uci.edu/uci-sati/faculty/kathleen_antrim_full.html (last visited Apr. 11, 2015).

89. Barbara Lipper, *Toys for Tots—On Saturday Mornings, Advertisers and Programmers Make Sure that Boys Will Be Boys and Girls Will Be Girls*, *ADWEEK* (Oct. 25, 1993, 12:00 AM), <http://www.adweek.com/news/advertising/toys-tots-saturday-mornings-advertisers-and-programmers-make-sure-boys-will-be-boys>.

mathematical skills.⁹⁰ In 1990, Dr. Dyanne Tracy studied the correlation between gender, science achievement, and the types of toys favored by children.⁹¹

The study observed a group of fifth grade students.⁹² The students were sex-typed to determine if, despite their sex, they identified more with another gender role.⁹³ For instance, a young girl that frequently engages in male-typed behavior is colloquially known as a “tomboy”.⁹⁴ The study also reviewed the scientific achievement of the students involved in the study.⁹⁵

For the study, Dr. Tracy utilized the Tracy Toy and Play Inventory (TTPI).⁹⁶ The TTPI rated sixty-nine toys on their ability to teach spatial skills.⁹⁷ The TTPI divided the toys into six categories: those that taught two-dimensional representations or manipulations (2D), those that required a child to make three-dimensional manipulations (3D), those that required a child to estimate movement to hit a target (EMT), those that required gross-body movements to accomplish a task (GB), those that required proportional arrangements or orientations (P), and those that could be included in an elementary classroom for the purpose of completing science activities (SA).⁹⁸

At the outset of the study, the researchers noted that boys and girls had seemingly equal scientific abilities.⁹⁹ But Dr. Tracy went on to state, “[h]owever, when examining science achievement and the types of toys with which children played, unexpected findings surfaced.”¹⁰⁰

The most important findings for this study involved toys that are “sex-typed”—generally branded for either boys or girls and that seemed to influence scientific achievement.¹⁰¹ The three relevant categories, then, are two-dimensional toys, three-dimensional toys, and proportional arraignment toys.¹⁰² Two-dimensional toys—

90. See *supra* notes 55–60 and accompanying text.

91. See Dyanne M. Tracy, *Toy-Playing Behavior, Sex-Role Orientation, Spatial Ability, and Science Achievement*, 27 J. RES. SCI. TEACHING 637, 637 (1990).

92. See *id.* at 638.

93. See *id.* at 642.

94. See *id.*

95. See *id.* at 644.

96. See *id.* at 639.

97. See *id.*

98. See *id.* at 640–41. The TTPI has been reproduced in full in Appendix A of this writing.

99. See *id.* at 645.

100. *Id.*

101. See *id. passim.*

102. See *id.* at 646–47.

stickers, puzzles, and the like—are generally sex-typed for girls.¹⁰³ Femininely oriented boys that did *not* play with two-dimensional toys had higher scientific achievement than those that did.¹⁰⁴

On the other hand, three-dimensional toys such as Tinker Toys, LEGO blocks, and erector sets are sex-typed for boys.¹⁰⁵ The study reported that “[f]or femininely oriented girls and boys, increased three-dimensional toy-playing behavior may be related to increased science achievement.”¹⁰⁶

Finally, proportional arrangement toys—tea sets, vanities, dollhouses, and the like—were sex-typed for girls.¹⁰⁷ Dr. Tracy found that femininely oriented boys that played with these toys often had “significantly” lower science achievement compared to boys that did not.¹⁰⁸ The girls in the study had lower scientific achievement than the femininely oriented boys that also played with the proportional toys at the same level.¹⁰⁹ Dr. Tracy recommended that these girls incorporate more three-dimensional toys into their play.¹¹⁰

In sum, the study showed that the type of toys with which children play can influence scientific ability. Now, the focus will turn to how these toys are advertised.

b. Toys on Television

Drs. Susan Kahlenberg and Michelle Hein authored a study called “Progression on Nickelodeon?” that examined gender-roles in toy commercials.¹¹¹ The study provided a content analysis of advertisements aired on the Nickelodeon children’s network.¹¹² While the study began with several hypotheses, the two most important for this work are the first two. The authors described them as follows: “H₁: More girls-only will be featured in doll and animal commercials than boys-only or boys-and-girls. H₂: More boys-only will be featured in action figure, game/building, sports, and

103. See *id.* at 640, 645–46.

104. See *id.* at 645–46.

105. See *id.* at 640, 646.

106. *Id.* at 646.

107. See *id.* at 640, 647. Proportional arrangement toys were sex-typed for girls even though vehicles were also included in this category. See *id.* at 641.

108. *Id.* at 647.

109. See *id.* at 647.

110. See *id.*

111. Susan G. Kahlenberg & Michelle M. Hein, *Progression on Nickelodeon? Gender-Role Stereotypes in Toy Commercials*, 62 *SEX ROLES* 830 (2010).

112. See *id.* at 830.

transportation/construction commercials than girls-only or boys-and-girls."¹¹³

The study analyzed toy commercials airing on the Nickelodeon network during a two-week period in October 2004.¹¹⁴ In all, 455 toy commercials were studied.¹¹⁵ The commercials were coded in several ways. First, the commercial was coded based on the type of toy being advertised.¹¹⁶ The categories were as follows: dolls, action figures and accessories, arts and crafts, make-believe, games and building, transportation and construction, sports equipment, and "mixed" or other.¹¹⁷ Significant for the current writing, "Dolls" included toys such as Barbie, while "Games/Building" included board games, video games, Lego bricks, and other building toys.¹¹⁸

The commercials were then coded for their gender orientation.¹¹⁹ This determination was not made based on the toy but rather the gender of the children interacting with the toy in the commercial.¹²⁰ Thus, the researchers counted the number of identifiable girls and boys in the advertisement.¹²¹ The commercials were then coded to determine if they featured only girls, only boys, both boys and girls, or were uncodeable due to the lack of a complete human face or body.¹²²

As previously noted, the researchers predicted that very few commercials would depict boys playing with dolls or girls playing with building and construction toys.¹²³ The excerpt below illustrates the researchers' findings:

H₁ predicted that more dolls and animals would be featured in girls-only than either boys-only or boys-and-girl commercials. A cross tabulation of toys by gender portrayal showed support for H₁, as dolls (58.3%) and animals (82.6%) were overwhelmingly relegated to girls-only commercials. As shown in Table 3,¹²⁴ there were no dolls shown in boys-only commercials, and relatively few featured in boys-and-girls commercials (14.4%). Further, less than one-tenth of the animals were shown in boys-only (8.7%) or boys-and-girls (1.4%) commercials. Of special interest was the extent to which dolls were marketed as *girl* toys, insofar that dolls were more likely to be shown with no discernable gender portrayal (27.3%) than to be shown with boys, whether in boys-only (0.0%) or boys-and-girls (14.4%) commercials.

113. *Id.* at 835. The remaining hypotheses are not relevant to the current work.

114. *See id.* at 836.

115. *See id.* at 838.

116. *See id.* at 837.

117. *See id.*

118. *See id.* at 838.

119. *See id.*

120. *See id.* at 837.

121. *See id.*

122. *See id.*

123. *See id.* at 835.

124. *See id.* at 839. This table is reproduced in full in Appendix B.

H₂ predicted that action figure, game/building, sports, and transportation/construction toys would be featured in boys-only commercials more than in girls-only or boys-and-girls only commercials. As shown in Table 3, H₂ was partially supported, with transportation/construction (87.1%), action figure (72.0%), and sports (63.0%) toys predominately featured in boys-only commercials. In fact, action figure and transportation/construction toy commercials had no girls featured, even when paired with boys. Although games/building toys were strongly featured in boys-only commercials (31.5%), they had slightly more prominence in boys-and-girls commercials (32.9%). *That said, there were relatively few games/building toys featured in girls-only commercials (8.2%), indicating that girls should play and build, but more so in the presence of boys.*¹²⁵

The end analysis, then, is that the toys marketed to girls are primarily dolls and animals. The toys primarily marketed to boys are transportation toys, action figures, sports toys, and games and building toys.

c. The Take-Away

Dr. Tracy's seminal study indicates that toy-playing activity is related to scientific achievement. Specifically, playing with toys that provide three-dimensional play is crucial for children's scientific development.¹²⁶ According to Dr. Tracy, the toys that teach three-dimensional skills best are toys such as Tinker Toys, blocks, LEGO bricks, and the like. Therefore, parents that are interested in their children's scientific achievement would be wise to invest in these toys.

However, television does not assist parents or their daughters in this endeavor. As Drs. Kahlenberg and Hein showed, the toys most likely to be marketed exclusively to girls in commercials are dolls.¹²⁷ Moreover, dolls are not among the toys most likely to teach three-dimensional, or even two-dimensional, skills. Conversely, the Kahlenberg and Hein study did show that building toys—those most likely to build three-dimensional skill according to Dr. Tracy—targeted boys in their ads.¹²⁸ While roughly one-third of the commercials for building toys advertised to both boys and girls, the progress implied by that figure is shattered once one notes that 31.5 percent of the toys in that category were advertised exclusively to boys, while only 8.2 percent of the ads for building toys targeted girls alone.

In sum, certain toys help children develop the spatial ability needed to do well in science. The advertisements for the toys that best

125. *Id.* at 838–39 (emphasis on “girl” in original) (emphasis added to final sentence in second paragraph).

126. *See* Tracy, *supra* note 91, at 646.

127. *See* Kahlenberg & Hein, *supra* note 111, at 838.

128. *See id.*

teach or hone these skills target boys to the near-exclusion of girls. While girls are targeted for advertisements featuring other toys such as dolls, those toys do not help girls develop the necessary skills to do well in science. Thus, television commercials tacitly discourage girls from developing these skills, leaving boys with an advantage in this area.

3. Children, Toys, and Career Selection

The observations above lead to the conclusion that television commercials do not encourage girls to play with “masculine” toys. If the concern were limited to girls not playing with certain toys, there would be little cause for alarm. However, children’s playthings and play patterns also influence their later career choices.¹²⁹ Thus, the introduction of certain playthings is crucial to the development of a child’s career aspirations.

Children are able to sort occupations by gender at a very early age.¹³⁰ As early as age six, “[o]ccupational goals tend to reflect concerns with acting appropriately for one’s gender. At this time, children rule out occupations that are associated with the other gender.”¹³¹ Toys further reinforce gender stereotyping.¹³² Not coincidentally, at the same time that children are learning to type occupations (age six), toys are also beginning to influence a child’s future job preferences.¹³³ As one study stated:

[G]ender specific toys may socialize children into stereotypic vocational choices. Toys may be viewed as offering experimentation with future roles and present an opportunity to rehearse a future occupational opportunity on the child’s level. Therefore, continuous presentation of stereotypic toys may deny a child freedom to explore, discover, and express potential. . . . Toys not only provide for future role rehearsal but they also provide cues as to what occupations are available to adult life. The type of toys given to preschoolers is perhaps a subtle if not an overt way of showing what occupations are

129. See Vanessa Green et al., *The Variability and Flexibility of Gender-Typed Toy Play: A Close Look at Children’s Behavioral Responses to Counterstereotypic Models*, 51 *SEX ROLES* 371, 371 (2004) (“Gender differences in toy play and other behaviors . . . may be precursors to later behaviors, including adult social and occupational roles.”).

130. Stacey Teig & Joshua E. Susskind, *Truck Driver or Nurse? The Impact of Gender Roles and Occupational Status on Children’s Occupational Preferences*, 58 *SEX ROLES* 848, 849 (2008) (noting children begin to “base their occupational preferences primarily on the gender roles of the occupation” between ages six and eight).

131. *Id.*

132. Mary Ann Kacerguis & Gerald R. Adams, *Implications of Sex Typed Child Rearing Practices, Toys, and Mass Media Materials in Restricting Occupational Choices of Women*, 28 *FAM. COORDINATOR* 369, 372 (1979) (citing examples of studies showing the influence of toys on vocational choices).

133. See *id.*; Teig & Susskind, *supra* note 130, at 849.

open and appropriate for females and males. The sexes internalize the different kinds of vocations symbolized by their toys.¹³⁴

However, just as sexist typing can be introduced, counter-messages also seem to be effective.¹³⁵ A 1992 study examined how children's gendered toy choices influenced their career goals.¹³⁶ Consistent with gender typing, girls that were given "feminine" toys and boys that were given "masculine" toys wanted to enter feminine and masculine vocations, respectively.¹³⁷ However, girls given gender-neutral toys wanted to enter traditionally "male" occupations.¹³⁸ Thus, it is vital to remove gender-bias to encourage girls into these non-traditional roles.

This article posits that, while gender roles can be learned using television,¹³⁹ they can be unlearned via television as well. When children are exposed to non-traditional gender roles in television commercials, they are more receptive to broadening their views of what were appropriate toys and actions for girls or boys.¹⁴⁰ A study published in 2005 took actual commercials for neutral and masculine toys that featured boys and engineered a second commercial that superimposed girls' faces over the faces of the boys in the original ad.¹⁴¹ A group of children was then asked to view either the original commercial or the modified version and respond to the following question: "Is this toy . . . for boys, for girls, or for both girls and

134. Kacerguis & Adams, *supra* note 132, at 372-73.

135. See, e.g., Nancy J. Cobb et al., *The Influence of Televised Models on Toy Preference in Children*, 8 SEX ROLES 1075, 1079 (1982) (discussing how using cross-gendered *Sesame Street* muppets affected children's subsequent play); Jean DiLeo et al., *Frequency and Modifiability of Children's Preferences for Sex-Typed Toys, Games, and Occupations*, 9 CHILD STUD. J. 141 (1979) (noting that a child's choice is malleable and the socialization involved in toy preference should be controlled by parents and educators based on individual interests and abilities); Barbara Eisenstock, *Sex-Role Differences in Children's Identification with Counterstereotypical Televised Portrayals*, 10 SEX ROLES 417, 418, 427 (1984) (reviewing literature on how counter-stereotypical portrayals can influence children); Phyllis A. Katz, *Modification of Children's Gender-Stereotyped Behavior: General Issues and Research Considerations*, 14 SEX ROLES 591, 592 (1986) (discussing the importance of a child's developmental level, sex role cognitions and behavior, consistence of gender stereotyped behavior, and the role of the individual); Suzanne Pingree, *The Effects of Nonsexist Television Commercials and Perceptions of Reality on Children's Attitudes About Women*, 2 PSYCHOL. OF WOMEN Q. 262, 262 (1978) (noting children's ability to respond to counter-stereotypical gender models and noting that commercials can affect children's attitudes about women).

136. Claire Etaugh & Marsha B. Liss, *Home, School, and Playroom: Training Grounds for Adult Gender Roles*, 26 SEX ROLES 129, 142 (1992) (explaining how parents shape gender roles by providing their children with gender-typical toys and directing them to engage in gender-typed household chores).

137. See *id.*

138. See *id.*

139. See Smith, *supra* note 77, at 324-25; see also sources cited *supra* note 135.

140. See Pike & Jennings, *supra* note 74, at 86-87.

141. *Id.* at 85-86.

boys?"¹⁴² The study found that children viewing the modified commercials "were more likely to indicate that the toys [were] for both girls and boys" even after "limited" exposure.¹⁴³ The researchers dreamed of the potential effects of long-term exposure, as they noted, "If brief exposure to nontraditional images creates changes in children's beliefs, imagine what prolonged exposure could do for children's beliefs and their behaviors."¹⁴⁴ In light of this data, the logical result is that television can be a powerful tool in not only shaping—but reshaping—children's views of gender-appropriate toy behavior.

C. Rebuttals

Critics may assert several counterarguments to the foregoing assertions. This section responds to six potential arguments. The first major counterargument is that biological differences between men and women are the reason for women's continued struggle to make greater inroads into the hard sciences. Yet, the biology argument has been thoroughly debunked. Psychologist Elizabeth Spelke of Harvard University examined the issue extensively and concluded:

Research on the cognitive abilities of males and females, from birth to maturity, does not support the claim that men have greater intrinsic aptitude for mathematics and science. Male and female infants do not differ in the cognitive abilities at the foundations of mathematical and scientific thinking; they have common abilities to represent and learn about objects, numbers, language, and space. . . . Although older boys and girls show somewhat different cognitive profiles, the differences are complex and subtle (it is not the case, e.g., that women are verbal and men are spatial). These differences tend to be small, and they stem primarily from differing strategy choices. Above all, these differing profiles do not add up to a male or female advantage in learning advanced mathematics. . . . [O]ur considerable gifts for mathematics and science have been bestowed, in equal measure, on males and females.¹⁴⁵

Moreover, as previously mentioned, spatial skills gaps can be closed with appropriate training.¹⁴⁶ The fact that spatial training can close

142. *Id.* at 86.

143. *Id.* at 87.

144. *Id.* It should be noted that boys showed greater readiness to change their view of the toys after viewing the non-traditional commercial. *Id.* This was contrary to the researchers' hypothesis, but consistent with earlier research in the area. *Id.* (citing F.L. Geis et al., *TV Commercials as Achievement Scripts for Women*, 10 *SEX ROLES* 513 (1984); Pingree, *supra* note 135).

145. Elizabeth S. Spelke, *Sex Differences in Intrinsic Aptitude for Mathematics and Science?: A Critical Review*, 60 *AM. PSYCHOLOGIST* 950, 956 (2005).

146. See Matthew J. Sharps et al., *Spatial Cognition and Gender: Instructional and Stimulus Influences on Mental Image Rotation Performance*, 19 *PSYCHOL. WOMEN Q.* 413, 417–18 (1994) (noting that women's spatial abilities can be made equal to men's with training); see also, *supra* notes 61–64 and accompanying text.

the skill gap is powerful evidence that biology is not the sole determinant in this matter.¹⁴⁷ Thus, women do not suffer from an innate and incurable inability to excel at math.

A second counterargument is that girls pick the toys they do because they genuinely like playing with dolls and stuffed animals as opposed to trucks and planes.¹⁴⁸ But this ignores the previously established fact that socialization plays a role. Children generally feel pressure from parents and peers when they challenge established gender roles.¹⁴⁹ Children quickly adapt to this reality and conform their behavior accordingly.¹⁵⁰ Therefore, until the bias is reduced, girls may not be fully free to request the toys that they truly want. In fact, the influence of television is such that a child may not even know what he or she wants.

Third, one might assert that boys and girls play with the same toys in different ways; so making “masculine” toys more available to girls by removing gender-typed stigma will not augment girls’ math and science skills.¹⁵¹ This argument, however, should be easily refuted by the available data. Research shows that when girls are exposed to typically “masculine” toys, they improve their math and science proficiency.¹⁵² Indeed, “early introduction and interaction with science-related toys (e.g., chemistry sets, rock and bug collecting kits, microscopes) influences females’ positive attitudes toward science.”¹⁵³ Thus, it appears that boys and girls play with toys in a similar enough manner to make a difference in skill development. Another reason for

147. See, e.g., Janet S. Hyde et al., *Gender Similarities Characterize Math Performance*, 321 SCIENCE 494, 494–95 (2008), available at <http://www.sciencemag.org/content/321/5888/494.full> (discussing the shrinking gender gap). However, there is some literature indicating that training can close the gender gap, but women improve with training more than men. See, e.g., Meiling Tang, *Gender Differences in Relationship Between Background Experiences and Three Levels of Spatial Ability* (2006) (unpublished Ph.D. dissertation, The Ohio State University), available at https://etd.ohiolink.edu/ap/10?0::NO:10:P10_ACCESSION_NUM:osu1155573195. Nevertheless, the evidence is clear that women’s spatial skills improve with training.

148. See, e.g., Gerianne M. Alexander & Melissa Hines, *Sex Differences in Response to Children’s Toys in Nonhuman Primates*, 23 EVOLUTION & HUMAN BEHAV. 467, 468–69 (2002) (finding that monkeys—who are not subject to human socialization—show gender-based toy preferences).

149. Etaugh & Liss, *supra* note 136, at 130.

150. See *id.* at 145–46.

151. See, e.g., Karen Klugman, *A Bad Hair Day for G.I. Joe*, in *GIRLS BOYS BOOK TOYS: GENDER IN CHILDREN’S LITERATURE AND CULTURE* 179–80 (Beverly Lyon Clark & Margaret R. Higonnet eds., 2000) (noting that parents frequently report that children play with unisex toys and cross-gender toys in different ways, e.g., boys throwing dolls as if they were footballs).

152. Catherine Graczyk Atria, *Factors that Influence Women’s Dispositions Toward Science* (Aug. 2008) (unpublished Ph.D. dissertation, University of Florida), available at <http://search.proquest.com/docview/304640718>.

153. *Id.*

the difference could be that anecdotal parent reports—which are frequently about toddlers¹⁵⁴—do not apply as children grow older and learn the appropriate way to use a toy. (Can one honestly imagine an eleven-year-old girl treating a microscope like a baby? It seems unlikely.) Consequently, the anecdotal evidence does not change the fact that playing with masculine-typed toys produces significant differences in girls' math and science abilities.

Fourth, admittedly, spatial development is a complicated subject.¹⁵⁵ Further, there are a number of explanations for spatial skills variances and many ways of obtaining spatial learning.¹⁵⁶ It is also true that spatial ability is but one factor in mathematical success.¹⁵⁷ However, the research demonstrates clearly enough that “play with ‘boys’ toys’ is related to the development of spatial rather than verbal abilities for children of both sexes, while play with ‘girls’ toys’ is related to higher verbal than visual-spatial skills.”¹⁵⁸ Thus, while toys may only be one part of the spatial skills equation, they are an important part that deserves attention.

Fifth, one could argue that televised gender bias is a problem for parents rather than lawmakers. After all, parents control children's access to television. Nevertheless, parents do not have absolute control over all of the messages children receive. A child might have a caregiver or relative that allows the child to see messages that may be objectionable to the parent. When surveyed, an overwhelming majority of parents—88 percent—believed that girls should be encouraged to play with building blocks and toy trucks.¹⁵⁹ Sixty-four percent of the parents were also willing to buy dolls for their sons.¹⁶⁰ Thus, at least some of the data show that parents value

154. See, e.g., Klugman, *supra* note 151, at 180 (referencing an eighteen-month-old child).

155. See, e.g., Daniel Voyer et al., *Magnitude of Sex Difference in Spatial Abilities: A Meta-Analysis and Consideration of Critical Variables*, 117 PSYCH. BULL. 250, 251 (1995) (noting the lack of a clear definition of spatial skills).

156. See, e.g., M. Beth Casey, *Understanding Individual Differences in Spatial Ability within Females: A Nature/Nurture Interactionist Framework*, 16 DEVELOPMENTAL REV. 241, 242, 257 (1996) (explaining debate on origins of spatial differences between the genders).

157. See Jane L. Pearson & Lucy Rau Ferguson, *Gender Differences in Patterns of Spatial Ability, Environmental Cognition, and Math and English Achievement in Late Adolescence*, 24 ADOLESCENCE 421, 429 (1989) (noting that English achievement is also a predictor for math performance).

158. Lisa A. Serbin & Jane M. Connor, *Sex-Typing of Children's Play Preferences and Patterns of Cognitive Performance*, 134 J. GENETIC PSYCH. 315, 316 (1979).

159. Nancy K. Freeman, *Preschoolers' Perceptions of Gender Appropriate Toys and their Parents' Beliefs about Genderized Behaviors: Miscommunication, Mixed Messages, or Hidden Truths?*, 34 EARLY CHILDHOOD EDUC. J. 357, 362 (2007).

160. *Id.*

gender equity in play and are likely thwarted in their attempts by outside sources, including television.

Finally, critics might assert that television ads are not the only mechanism through which children learn about gender. One could argue that a reduction in televised gender bias cannot be effective without, for instance, more strong female role models in science programs. However, there is no panacea to this deeply entrenched problem. A wide array of solutions is required, and many of them will need to be used in tandem. So, rather than advocating for more role models or less gender stereotyping, we should change the conversation to ways to employ less stereotyping, *and* more role models, *and* more scholarships, *and* more of anything that will help to make a difference on this issue. While one singular solution may not create progress, if a multitude of approaches are tried simultaneously, the effect is more likely to be felt. Thus, a multi-layered approach should be employed rather than a unitary one.

D. Summary

In sum, children need play. However, children do not play in a vacuum. Children are guided by the gender bias that they absorb. This gender bias affects the types of toy a child will choose for play. Furthermore, the toy choices matter, as toy play influences a child's ability to acquire skill sets that might be helpful in pursuing scientific careers. In addition, limited play choices can lead to limited career aspirations, particularly for girls. Thus, gender bias in toy selection has a great impact on a child's future life.

Television is a major source—if not the primary source—of the gender messages that the children receive. Television commercials repeatedly tell boys and girls which toys are “for them” and essentially, yet subtly, limit their access to certain toys. While television may not be the sole cause of gendered toy selection, the research clearly shows that television is a major contributor to the problem. If television is part of the problem, it must become part of the solution as well.

III. REVIEW OF EXISTING LAW

The previous Part demonstrated that existing gender bias in television commercials has an impact on the girls watching the advertisements. This Part briefly summarizes the relevant laws and regulations regarding children's advertising and explains why these laws are insufficient to address the issue of gender bias in television advertising.

A. Legal Authority and Responsibility

Congress and three other entities have the ability to govern children's television programming and advertisements. Congress has even passed legislation in this area.¹⁶¹ Moreover, Congress has delegated some authority over advertising to the Federal Communications Commission (FCC)¹⁶² and the Federal Trade Commission (FTC).¹⁶³ Additionally, the advertising industry has its own self-imposed guidelines.¹⁶⁴ Each of these will be discussed in turn.

1. Congressional Authority and Acts

In the early portion of the twentieth century, radio was the primary means of mass communication in America.¹⁶⁵ Sensing the importance of the medium, Congress used its Commerce Clause authority to pass legislation in 1912 and 1927 to regulate radio transmissions.¹⁶⁶ However, both measures were flawed,¹⁶⁷ and as a result, the Federal Communications Act of 1934 was passed¹⁶⁸ under Congress' Commerce Clause authority.¹⁶⁹ As originally drafted, the Act was designed to regulate "communications by wire or radio."¹⁷⁰ It

161. See 47 U.S.C. §§ 303a–303b, 394 (2012).

162. See 47 U.S.C. § 303(f); FCC, Petition for Children's Television (Act) for Rule-Making[:] Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programming and the Establishment of a Weekly [Fourteen]-Hour Quota of Children's Television Programs, 50 F.C.C.2d 1 (1974).

163. J. Howard Beales III, *Advertising to Kids and the FTC: A Regulatory Retrospective that Advises the Present*, 12 GEO. MASON L. REV. 873, 873 (2004) (citing 15 U.S.C. § 45 (2000)); See e.g., *In re Hasbro, Inc.*, 116 F.T.C. 657, 666 (1993) (consent order); *Lewis Galoob Toys, Inc.*, 114 F.T.C. 187, 214 (1991) (consent order); *Gen. Mills Fun Grp., Inc.*, 93 F.T.C. 749, 3 (1979) (consent order).

164. *About Us-CARU*, CARU, http://www.ascreviews.org/category/caru/about_caru/ (last visited Mar. 26, 2015).

165. See Fatima Fofana, *Creating a Diversity of Voices: Local Expression Through a Low Power Radio Service*, 7 COMMLAW CONCEPTUS 409, 411 (1999) (outlining the introduction and rise in popularity of radio in America).

166. See *id.*; see also The Radio Act of 1912, ch. 287, 36 Stat. 302 (requiring a license to "use or operate any apparatus for radio communication"); The Radio Act of 1927, ch. 169, 44 Stat. 1162 (extending radio regulations to "all forms of interstate and foreign radio transmissions and communications within the United States").

167. See generally Kent R. Middleton, *Radio Privacy Under Section 705(a): An Unconstitutional Oxymoron*, 9 ADMIN. L.J. AM. U. 583 (1995).

168. *Id.* at 588–90; Communications Act of 1934, ch. 652, 48 Stat. 1064 (current version at 47 U.S.C. § 605 (2012)).

169. See *Nat'l Broad. Co. v. U.S.*, 319 U.S. 190, 227 (1943) ("The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce.").

170. 47 U.S.C. § 605 (regulating the unauthorized publication of communications).

covers “the transmission by radio of writing, signs, signals, pictures and sounds of all kinds.”¹⁷¹ And after the advent of television in the 1940s and 1950s, the term “radio and wire” was interpreted to include television as well.¹⁷²

In 1990, Congress again used its Commerce Clause authority to pass the Children’s Television Act (CTA).¹⁷³ In enacting the legislation, Congress noted that “special safeguards are appropriate to protect children from overcommercialization on television” and “television station operators and licensees should follow practices in connection with children’s television programming and advertising that take into consideration the characteristics of this child audience.”¹⁷⁴ The CTA imposed several requirements, but the most relevant for the present writing is its limits on the amount of advertising shown during children’s programs.¹⁷⁵ The CTA required that children’s programs “limit the duration of advertising . . . to not more than 10.5 minutes per hour on weekends and not more than [twelve] minutes per hour on weekdays.”¹⁷⁶ However, Congress has not attempted further regulation of children’s television since the enactment of the CTA.

2. The Federal Communications Commission

The FCC plays an important role in regulating television. The Federal Communications Act of 1934 delegated to the FCC the ability to “[m]ake such regulations . . . that . . . will promote public convenience or interest or will serve public necessity”¹⁷⁷ The FCC has used its investigative authority in the public interest to help craft regulations on various issues.

For instance, in 1974, the Commission issued a report on children’s television.¹⁷⁸ A parents group had asked the Commission to

171. *Allen B. Dumont Labs. v. Carroll*, 184 F.2d 153 (3d Cir. 1950); 74 AM. JUR. 2D TELECOMMUNICATIONS § 131 (2009).

172. *Allen B. Dumont Labs.*, 184 F.2d at 156l; 74 AM. JUR. 2D TELECOMMUNICATIONS § 131 (2009).

173. See 47 U.S.C. §§ 303a–303b, 394 (2012).

174. Children’s Television Act of 1990, Pub. L. No. 101-437, Title I, § 101(4)–(5), 104 Stat. 996 (codified as amended in scattered sections of 47 U.S.C.).

175. Diane Aden Hayes, Note, *The Children’s Hour Revisited: The Children’s Television Act of 1990*, 46 FED. COMM. L.J. 293, 296–98 (1994).

176. See 47 U.S.C. § 303a(b) (2012).

177. 47 U.S.C. § 303(f).

178. FCC, Children’s Television (Act) for Rule-Making[:] Looking Toward the Elimination of Sponsorship and Commercial Content in Children’s Programming and the Establishment of a Weekly [Fourteen]-Hour Quota of Children’s Television Programs, 50 F.C.C.2d 1 (1974).

consider a complete ban on commercials in children's television.¹⁷⁹ While the FCC recognized that quality programming for children was in the public interest, it nevertheless declined to adopt such stringent guidelines, stating:

Banning the sponsorship of programs designed for children could have a very damaging effect on the amount and quality of such programming. Advertising is the basis for the commercial broadcasting system, and revenues from the sale of commercial time provide the financing for program production. Eliminating the economic base and incentive for children's programs would inevitably result in some curtailment of broadcasters' efforts in this area. Moreover, it seems unrealistic, on the one hand, to expect licensees to improve significantly their program service to children and, on the other hand, to withdraw a major source of funding for this task.¹⁸⁰

A federal court subsequently upheld the FCC's decision, holding that the decision was well within the scope of the agency's discretion.¹⁸¹

Furthermore, the FCC has authority under the CTA to regulate "program-length" commercials.¹⁸² The Commission defined a program-length commercial as "a program associated with a product, in which commercials for that product are aired."¹⁸³ In brief, a program-length commercial is one that either intentionally or unintentionally blurs the lines between the children's program and the advertised item, usually a toy.¹⁸⁴ For example, an advertisement for a Strawberry Shortcake doll airing during a *Strawberry Shortcake* television program would run afoul of this provision.¹⁸⁵

The FCC also has jurisdiction to regulate obscenity, profanity, and indecency on broadcast airwaves, but not cable.¹⁸⁶ In *F.C.C. v. Pacifica Foundation*, the Supreme Court affirmed the extent of the FCC's ability to regulate broadcast waves.¹⁸⁷ Nevertheless, thus far, the Court has declined to extend the agency's authority to other media, such as cable and the Internet.¹⁸⁸

179. *See id.*

180. *Action for Children's Television v. F.C.C.*, 564 F.2d 458, 466 (D.C. Cir. 1977) (citing *In re* Petition of Action for Children's Television, 28 F.C.C.2d 368 (1971)).

181. *See id.* at 481–82.

182. Allen K. Rostron, *Return to Hot Wheels: The FCC, Program-Length Commercials, and the Children's Television Act of 1990*, 19 HASTINGS COMM. & ENT. L.J. 57, 58 (1996).

183. *In re* Policies & Rules Concerning Children's Television Programming, 6 F.C.C.R. 5093, 5098 (1991).

184. *See, e.g.*, Rostron, *supra* note 182, at 59–68 (describing how toys such as Hot Wheels and Strawberry Shortcake were advertised during programs focused on those characters).

185. *See id.* at 64–65.

186. *See generally* *Denver Area Educ. Telecomm. Consortium, Inc. v. F.C.C.*, 518 U.S. 727 (1996) (discussing limitation of FCC regulations on cable broadcasting).

187. *See* 438 U.S. 726, 729, 736–39 (1978) (considering FCC authorization to regulate indecent broadcasting that is not quite obscene).

188. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 876–78 (1997) (finding that attempts to limit access to internet material where adult access was also curtailed); *Denver Area Educ. Telecomm.*

Finally, the FCC governs the licensing of broadcasters.¹⁸⁹ The initial purpose of the Federal Communications Act as drafted was to “make available, so far as possible, to all the people of the United States, a rapid, efficient, Nation-wide [sic], and world-wide wire and radio communication service with adequate facilities at reasonable charges. . . .”¹⁹⁰ In 1996, the Act was amended to require the FCC to make these resources available to Americans “without discrimination on the basis of race, color, religion, national origin, or sex.”¹⁹¹

3. The Federal Trade Commission

The FTC also has authority over advertising. The FTC can prohibit advertisements that are unfair or deceptive.¹⁹² An advertisement is deceptive if “there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.”¹⁹³ To determine if an ad is deceptive, the court considers the following factors: “(1) the representation, omission, or practice must be likely to mislead the consumer; (2) the act or practice must be considered from the perspective of the reasonable consumer; and (3) the representation, omission, or practice must be material, that is, likely to affect a consumer’s choice or conduct, thereby leading to injury.”¹⁹⁴ The FTC has used this authority to regulate toy advertisements that imply that toys can fly, walk, or talk without human assistance.¹⁹⁵

In addition, a practice is unfair “if it causes or is likely to cause substantial consumer injury, the injury is not reasonably avoidable by consumers, and the injury is not offset by countervailing benefits to consumers or competition.”¹⁹⁶ The FTC has used this authority to challenge advertisements that encourage children to engage in unsafe activities, such as cooking without adult supervision, or to engage in

Consortium, 518 U.S. at 760, 766 (describing why various provisions intended to prevent children from viewing indecent material were unconstitutional).

189. 47 U.S.C. § 303(1)(i) (2012).

190. 47 U.S.C. § 151 (1934) (current version at 47 U.S.C. § 151 (2012)).

191. 47 U.S.C. § 151.

192. 15 U.S.C. § 45(a) (2012) (granting commission authority to regulate and prevent acts deemed to be unfair or deceptive with effect on commerce).

193. Beales, *supra* note 163, at 873 (quoting Deception Policy Statement, appended to *In re Cliffdale Assocs.*, 103 F.T.C. 110, 176 (1984) (appendix)).

194. *Id.* at 873–74 (citing *In re Cliffdale Assocs.*, 103 F.T.C. at 176–83).

195. *Id.* at 874–75.

196. *Id.* at 874 (citing Unfairness Policy Statement, appended to *In re Int’l Harvester Co.*, 104 F.T.C. 949, 1073 (1984) (appendix)).

activities that will cause financial harm to parents, such as advertising 900 numbers and the like.¹⁹⁷

In the late 1970s, the FTC, like the FCC, was asked to adopt rules regulating advertising during children's programs.¹⁹⁸ But unlike the FCC, the FTC seemed more open to adopting such a proposal.¹⁹⁹ While it eventually rejected the proposal, Congress expressed its displeasure by revoking the FTC's ability to engage in rulemaking for children's programs.²⁰⁰ Though its rulemaking authority has been restored, the agency remains reluctant to engage this topic based on the prior experience.²⁰¹

4. Industry Self-Regulation

The business sector has also tried to encourage responsible advertising to children. The Children's Advertising Review Unit (CARU) was founded in 1974 through an agreement with major advertising and trade organizations and is administered by the Council of Better Business Bureaus.²⁰² CARU "evaluates child-directed advertising and promotional material in all media to advance truthfulness, accuracy and consistency with its *Self-Regulatory Guidelines for Children's Advertising* and relevant laws."²⁰³ To that end, CARU's Core Principles go beyond merely discouraging deceptive or unfair advertisements and include encouraging advertisers to embody social goals as well.²⁰⁴ Specifically, the CARU guidelines encourage advertisers to "avoid social stereotyping and appeals to prejudice . . ." ²⁰⁵

While compliance with CARU guidelines is voluntary, CARU does receive and address complaints from viewers.²⁰⁶ When a complaint is filed and verified, CARU attempts to secure the voluntary cooperation of the offending party to cure the violation.²⁰⁷ If the party

197. See Beales, *supra* note 163, at 876.

198. *Id.* at 878 (regulating, specifically, advertisements to very young children and those involving highly sugared foods).

199. See *id.* at 877.

200. See *id.* at 879–80; FTC Improvements Act of 1980, Pub. L. No. 96-252, §§ 11(a)(1)–(a)(3), 94 Stat. 374 (current version at 15 U.S.C. § 57a(h) (2012)).

201. See Beales, *supra* note 163, at 880.

202. *About Us-CARU*, CARU, http://www.ascreviews.org/category/caru/about_caru/ (last visited Mar. 26, 2015).

203. *Id.*

204. *Id.*

205. CHILDREN'S ADVERTISING REVIEW UNIT (CARU), SELF-REGULATORY PROGRAM FOR CHILDREN'S ADVERTISING 5 (9th ed. 2009), available at <http://www.caru.org/guidelines/guidelines.pdf> [hereinafter CARU, SELF-REGULATORY PROGRAM].

206. *Id.* at 3.

207. See *id.*

does not cooperate, CARU may refer the entity to the FTC.²⁰⁸ Moreover, government entities such as the federal courts and the FTC find CARU guidelines quite useful.²⁰⁹

B. Why the Current Legal and Regulatory Framework is Insufficient to Address Gender Bias in Children's Advertising

1. Congress, the FCC, and the FTC

While the previous section illustrates that several entities have the ability to regulate children's advertising, the laws and regulations adopted by these entities are inadequate to resolve the issue of gender disparities in children's toy advertisements for several reasons. First, while the CTA helps reduce children's advertising exposure, it does not go far enough to manage the content of those advertisements. Though Congress's directive to the FCC to regulate "program length commercials" could be seen as regulating content, it does not address gender bias in advertisements. Thus, in its present form, the CTA is unable to address the issue of gender bias.

Similarly, the FCC has very little authority in this area. While the gendered marketing of toys to children is objectionable for a number of reasons, it is by no means "indecent" as that term is defined by FCC regulations.²¹⁰ Therefore, the FCC's ability to address the issue is limited. Admittedly, Section 151 of the Federal Communications Act requires the FCC to make resources available "without discrimination on the basis of race, color, religion, national origin, or sex."²¹¹ Thus, an argument could be made that, if this language is read broadly, it could encompass a claim of gender stereotyping in advertising. However, it would seem to stretch logic to

208. NATIONAL ADVERTISING REVIEW COUNCIL, THE ADVERTISING INDUSTRY'S PROCESS OF VOLUNTARY SELF-REGULATION 11 (2012), available at <http://www.ascreviews.org/wp-content/uploads/2012/10/NAD-CARU-NARB-Procedures-Updated-10-9-12.pdf>.

209. See, e.g., Ellen J. Fried, *Assessing Effectiveness of Self-Regulation: A Case Study of the Children's Advertising Review Unit*, 39 LOY. L.A. L. REV. 93, 96-97 (2006) ("[W]hile the FTC retains ultimate jurisdiction over all unfair or deceptive practices in advertising, it demurs to CARU on issues related to children's advertising. That essentially leaves CARU as the watchdog over advertising to children."); see also Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711, 743 (1999) (noting that when considering new regulations, "the FTC's legislative proposal closely tracked CARU's Guidelines.")

210. See *Consumer Help Center—TV: Obscene, Indecent and Profane Broadcasts*, FCC, <https://consumercomplaints.fcc.gov/hc/en-us/articles/202731600-Obscene-Indecent-and-Profane-Broadcasts> (last visited Mar. 28, 2015) ("The FCC has defined broadcast indecency as 'language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities.'")

211. 47 U.S.C. § 151 (2012).

read Section 151—which prohibits discrimination in the provision of FCC resources—as an affirmative directive to regulate the content of that advertising. Moreover, there is no evidence that the section has been used in this manner. Thus, this argument is not persuasive.

The FTC is equally impotent on this issue. While an argument could be crafted that a gendered toy advertisement contains a “representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment,”²¹² in context, the argument cannot prevail. The literature does not reveal the FTC using the language to combat any type of advertising bias.²¹³ Thus, the FTC has little leeway to address this issue.

Additionally, two non-legal issues affect the ability of both the FTC and the FCC to address this issue. First, political will would be an obstacle. Prior experience shows that neither agency eagerly regulates children’s programming.²¹⁴ In the 1970s, both organizations were asked to either ban children’s advertising outright or to adopt stricter standards for such advertising.²¹⁵ And in both cases, the agencies were unable to do so.²¹⁶ While one might be reluctant to compare the politics of the 1970s to the politics of today, some commentators believe that the FTC’s willingness to intervene may have decreased even more due to advances in technology that allow parents to exercise more control over the ads children view.²¹⁷ Moreover, even when speech is blatantly racist or sexist, the FCC has recently reaffirmed that it will not punish such speech unless it is indecent.²¹⁸ Thus, neither agency seems interested in addressing gender issues, in advertising or otherwise, at the moment.

212. Beales, *supra* note 163, at 873 (citing *In re Cliffdale Assoc.*, 103 F.T.C. 110, 176 (1984) (appendix)).

213. See, e.g., *id.* at 887–88; see also Valere Byrd Fulwider, *Future Benefits? Tax Policy, Advertising, and the Epidemic of Obesity in Children*, 20 J. CONTEMP. HEALTH L. & POL’Y 217, 226–27 (2003).

214. See Beales, *supra* note 163, at 878–80 (noting that “Kidvid” led to the neutering of the FTC’s rule-making authority regarding children’s advertising); Fulwider, *supra* note 213, at 227.

215. Beales, *supra* note 163, at 878–80; Fulwider, *supra* note 213, at 226–27.

216. Beales, *supra* note 163, at 878–80; Fulwider, *supra* note 213, at 226–27.

217. Beales, *supra* note 163, at 880 (referring to the increase in commercial-free television, DVD and videotape programs, and TiVo-style technology allowing commercial-free viewing).

218. See Clay Clavert, *Imus, Indecency, Violence & Vulgarity: Why the FCC Must Not Expand Its Authority Over Content*, 30 HASTINGS COMM. & ENT. L.J. 1, 4 n.16 (2007) (citing *CBS Can’t Be Fined For Imus’ Comment*, L.A. TIMES (Apr. 18, 2007), <http://articles.latimes.com/2007/apr/18/business/fi-briefs18.6> (quoting former FCC Chair Kevin J. Martin’s refusal to pursue sanctions against Imus for calling a group of African American female

Second, outside influences play a role in both agencies. Congress is certainly not immune from political whims, but the agencies have been accused of being particularly susceptible to lobbying efforts.²¹⁹ Even those with connection to the FTC admit that the failure of the previously proposed children's television regulations was due, at least in part, to "skilled lobbying by politically well-connected industries."²²⁰ More pointedly, one scholar has asserted:

One explanation for the federal government's lack of action [in regulating children's food advertisements] is the powerful lobby for the industry. . . . The industry lobby defeated [the 1970's regulatory proposals] by influencing the vote of the Senate Commerce Committee. . . . Since the late 1970s, both the FTC and the [FCC] have proposed efforts to regulate advertising to children during children's programming, but advertising remains largely unregulated.²²¹

Moreover, the FTC suffered a stern Congressional rebuke for even seriously considering the proposal.²²² Thus, it is unlikely that either agency will undertake such regulation on its own volition without Congressional direction or approval.

2. Industry Self-Regulation

Leaving this issue to industry self-regulation is also an unavailing option. While the CARU system and guidelines are useful, they are merely voluntary.²²³ And while industry self-regulation can be effective, there is always a danger that there will be perverse incentives for either non-compliance or non-enforcement, as increased enforcement may bring unwanted attention from the public sector.²²⁴ For instance, one study observed that the number of cases and complaints referred to CARU had been surprisingly low.²²⁵ However,

basketball players "nappy headed 'hos"—a derogatory term insulting on both racial and gender grounds)).

219. Beales, *supra* note 163, at 880 ("[E]ntire industries sought restriction of, or even outright exemptions from, the agency's authority.").

220. *Id.*

221. Fulwider, *supra* note 213, at 226–27 (footnotes omitted).

222. See Beales, *supra* note 163, at 879 ("The children's advertising proceeding was toxic to the Commission as an institution. Congress allowed the agency's funding to lapse, and the agency was literally shut down for a brief time." (footnote omitted)).

223. See CARU, SELF-REGULATORY PROGRAM, *supra* note 205, at 3 ("When [CARU] finds violations, it seeks changes through the voluntary cooperation of advertisers and Website operators.")

224. See Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711, 717–19 (1999).

225. See *id.* at 738 (describing a study by Gary M. Armstrong that questioned the effectiveness of the CARU guidelines if they only averaged fifteen cases a year). Children's Advertising Review Unit Director Elizabeth Lascoux asserts that more cases are not filed because advertisers have learned to follow the rules, and "[t]hey know that the alternative to

the researchers—and the legal academy—are unsure whether the lower case load means that advertisers are working hard to achieve compliance or whether CARU is providing insufficient enforcement.²²⁶

It is also unclear whether the industry would be willing to eliminate gender-biased advertising on its own accord. While the CARU guidelines suggest creating ads that are sensitive to racial stereotyping, at this point, they are silent on the gender issue.²²⁷ This could be because gender stereotyping is not yet viewed as being as offensive as racial stereotyping.²²⁸ Moreover, gender stereotyping may even help the companies' bottom lines.²²⁹ Indeed, when interviewed, toy makers have said that the decision to sell gender-typed toys is "a sound business decision' based on considerable research."²³⁰ While that statement was made more than twenty years ago, the continued prevalence of the pattern demonstrates that the toy-makers must believe that gender-based advertising is still essential to their bottom lines. If this is the case, the industry certainly cannot be trusted to address this problem on its own.

C. Summary

In summary, while there is an existing legal framework to address advertising directed at children, that framework is inadequate to prevent gender bias in children's advertising. Further, while the industry has attempted self-regulation, the industry has not yet addressed this specific issue. The gap in the law and the legal literature demonstrates that a new law is needed, and the next Part describes the form that the new law should take.

IV. THE PROPOSED LAW

As the foregoing section demonstrated, the current law is inadequate to address the problem of gender-based advertising. This

this kind of self-regulation is government regulation that could be much more intrusive.' But, the low number of cases could also mean that CARU is not doing its job." *See id.* at 740. (footnotes and internal quotation marks omitted).

226. *See id.* at 740.

227. *See* CARU, SELF-REGULATORY PROGRAM, *supra* note 205, at 5. ("Advertisers should avoid social stereotyping and appeals to prejudice, and are encouraged to incorporate minority and other groups in advertisements and to present positive role models whenever possible.").

228. *See* Alexander M. Czopp & Margo J. Monteith, *Confronting Prejudice (Literally): Reactions to Confrontations of Racial and Gender Bias*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 532, 533 (2003).

229. *See* SHEEHAN, *supra* note 83, at 104.

230. Michelle Healy, *Playing Around with Gender Specific Toys*, USA TODAY, Nov. 15, 1989, at 4D, available at 1989 WLNR 1385383 (quoting Jodi Levin of the Toy Manufacturers of America).

Part will focus on how the gap in the law should be remedied. The first section argues that Congress is the appropriate actor to address this issue. The second section proposes the legislation that Congress should enact using its Commerce Clause authority. The final subsection analyzes the benefits of the proposed approach.

A. Congress' Authority to Enact Legislation Concerning Children's Advertising

Congress clearly has the authority to address this issue. As stated in the previous Part, since the early twentieth century, Congress has relied on its authority under the Commerce Clause to regulate radio and television communications.²³¹ Since the Supreme Court has already recognized these regulations as a valid exercise of Congress' commerce power, there does not seem to be much argument on this point.²³²

But the Commerce Clause is implicated for another reason. As stated, the broadcast airwaves affect interstate commerce standing alone. However, when the issue is advertising, the effect on interstate commerce is twofold. It is beyond cavil that advertising is a form of commerce.²³³ The broadcast airwaves themselves are commerce, and in this instance, they are also carrying a commercial message. Thus, there is a dual justification for applying the Commerce Clause in this instance. Therefore, there should be no trouble applying the Commerce Clause to these facts.

Not only is Congress constitutionally able to address this issue, but policy concerns also compel this result. As previously noted, the FCC and the FTC are unwilling to create further advertising regulations at this time.²³⁴ Since Congress can use legislation to direct either agency, the agencies would not need to amass the necessary political capital.²³⁵ Moreover, as discussed, the FTC and

231. See *supra* Part III.A.1 (summarizing regulations passed by Congress for the purpose of controlling radio and television).

232. See *supra* Part III.A.1.

233. See Jess Alderman et al., *Application of Law to the Childhood Obesity Epidemic*, 35 J.L. MED. & ETHICS 90, 97 n.154 (2007) ("Both agencies [FTC & FCC] derive their authority to regulate advertising from the Commerce Clause of the Federal Constitution, which grants the federal government jurisdiction over commerce among states."); Robert M. Bankey Jr., Comment, *Sound Rights: Legal Protections from Audio Intrusions in Light of Directional Sound Technology*, 17 COMM.LAW CONSPECTUS 309, 332 n.181 (2008) ("In the case of directed sound technology, since the technology would invariably carry advertisements, the connection to interstate commerce is more like [United States v.] *Darby*, [312 U.S. 100 (1941)] than [United States v.] *Lopez*, [514 U.S. 549 (1995)]. Therefore, federal regulation of the technology likely would be constitutional.").

234. See *supra* Part III.A.2–3.

235. Federal Trade Commission Act, 15 U.S.C. §§ 41–45 (2012).

FCC both have limited spheres of authority. However, if it so desires, Congress can expand the scope of either agency to embrace the new regulations. Such an expansion would certainly enhance either agency's ability to deal with these issues. For all of the foregoing reasons, Congress should be the entity to address this issue.

B. The Proposed Law

The previous Part concluded that Congress has the power under the Commerce Clause to address gender bias in children's toy advertising. This writing suggests that Congress use this authority to enact the Children's Gender Bias Elimination Act (CGBEA). As proposed, the CGBEA would read as follows:

Section 101 – Any advertisement for a toy on any commercial broadcast licensee that depicts children playing with a toy must depict both boys and girls visibly interacting with or playing with the toy that is the object of the advertisement.

(a) The term “visibly interacting” means that the child must be shown for a time long enough to allow a viewer to see the child's face and determine the child's gender.

(b) The term “commercial broadcast licensee” includes a cable operator.

Section 102 – Any advertisement for a toy on any commercial broadcast licensee that does not depict children playing with a toy, but utilizes a voice-over, must use both male and female voices in the voice-over narration.

Section 103 – In any advertisement for a toy the voice announcer for the advertisement shall not directly state that that the advertised toy is “for girls” or “for boys.”

Section 104 – The Federal Communications Commission shall have the primary responsibility for enforcing this Act, and shall from time to time, if necessary, issue regulations that may be necessary to fulfill the objectives of this section.

Section 101 would prohibit any advertisement that depicts children playing with a toy from using only girls or only boys in the advertisement. This requirement is as simple as it sounds. Furthermore, the language “visibly interacting” in Section 101(a) is given a specific definition to prevent a particular problem. During the survey of children's programming discussed in Part II, the author noted that in a particular ad, a child was shown so briefly that it was impossible to determine whether the child was a boy or a girl, even when the image was frozen.²³⁶ Thus, this requirement is in place to ensure that advertisers will not show a girl for a millisecond and claim to have satisfied the requirements of the statute.

Section 101(b) may require some explanation. The FCC's power to regulate programming is limited to broadcast media; it cannot regulate indecency on cable systems and other non-broadcast

236. See Smith, *supra* note 77, at 227; *supra* Part II.B.2.b.

entities.²³⁷ Congress dealt with this reality in the Children's Television Act by defining a "broadcast licensee" to include a cable provider.²³⁸ Thus, that same approach is utilized here to ensure that the law covers cable channels. Since many popular children's television shows featuring ads appear on basic cable networks—such as Nickelodeon and PBS Sprout—Section 101(b) is necessary to place broadcast and cable advertisements on equal footing.

Section 102 requires advertisers to use both male and female voice-overs in toy advertisements that do not use children. As Part I explained, voice-over advertisements can affect a child's view of a toy.²³⁹ Thus, using male voice-overs in purportedly gender-neutral commercials can essentially turn the "neutral" message into a male-oriented ad. Therefore, this Section is necessary to ensure that advertisers do not circumvent the requirements of Section 101 by using gendered voices.

Section 103 would prohibit advertisements from announcing that the toy is only for girls or only for boys. Both Sections 102 and 103 are necessary because a company could conceivably create an advertisement that does not use any children, but nevertheless proclaims that the toy is for girls. Section 103 would eliminate that possibility.

Section 104 authorizes the FCC to make regulations if necessary. Under current Supreme Court precedent on the non-delegation doctrine, this provision should provide little room for challenge.²⁴⁰

C. Examination of the Proposal

1. Advantages

There are several advantages to the proposed law. First, the statute, if enacted, would help reduce the televised gender-bias problem, which, in turn, could make a difference in the choices and options for the children viewing the ads. A 2005 study examined boys' and girls' responses to a gender-neutral toy after viewing two

237. See, e.g., Matthew Bloom, *Pervasive New Media: Indecency Regulation and the End of the Distinction Between Broadcast Technology and Subscription-Based Media*, 9 YALE J.L. & TECH. 109, 116 (noting that while the FCC is able to regulate broadcast media, it "is powerless to regulate indecency on cable television").

238. Pub. L. No. 101-437, § 102(a), 104 Stat. 996 (1990) (codified at 47 U.S.C. § 303a (2012)).

239. See *supra* Part II.B.2.b.; see also Pike & Jennings, *supra* note 74, at 84.

240. Richard D. Cudahy, *The Nondelegation Doctrine: Rumors of its Resurrection Prove Unfounded*, 16 ST. JOHN'S J. LEGAL COMMENT. 1, 2 (2002) (noting that the Court has only twice invalidated statutes on nondelegation grounds).

commercials—one using only boys and one using only girls.²⁴¹ The researchers found that children who viewed the girls-only commercial were far more likely to respond that the toy was for both girls and boys.²⁴² Thus, while the mere act of putting children of both genders in a toy commercial may not seem significant, the research shows that children are heavily influenced by what they view. Thus, if even a small amount of this bias can be removed, children, especially girls, will be more likely to engage in non-gendered play.²⁴³ Such non-gendered play could lead to a non-traditional academic path, and eventually, a non-traditional career.

Second, advertisers retain a great deal of flexibility under the proposal. Nothing in the law states that a girl must be the “main focus” of an ad or that a boy must be shown playing with a doll for a particular amount of time. It merely requires both boys and girls to be used in the ads. Moreover, advertisers retain the option to create ads that feature the toy, but do not use children in any manner. Therefore, this is a viable approach to the issue.

2. Criticisms

Admittedly, some criticisms could be leveled at the proposed law. First, it could be argued that companies have the right to advertise their product in any manner they wish. Companies are in business to sell products, after all. However, the right to advertise one’s products and services is not unlimited; false, deceptive, or unfair advertising is not allowed.²⁴⁴ Furthermore, even if gender-based advertising is not false, deceptive, or unfair, it has a harmful and lasting impact on children.²⁴⁵ For that reason alone, the advertisers’ desire to advertise in an unfettered manner should give way to a girls’ right to full personhood.

Second, critics may argue that the proposal does not go far enough because an outright ban on children’s advertising would be preferable to the proposed legislation. Indeed, while it may seem preferable, Part III demonstrates the political will for such an action does not seem available.²⁴⁶ Moreover, a less drastic measure will be

241. See Pike & Jennings, *supra* note 74, at 85–86.

242. See *id.* at 89.

243. See *id.* at 88 (“[T]he nontraditional depictions of girls playing with stereotypical boys’ toys may have encouraged some children to broaden their gender schema of what is gender appropriate toy use.”).

244. See *supra* Part III.A.4.

245. See Pike & Jennings, *supra* note 74, at 84–85. “The repeated exposure of these images contributes to the development of children’s conceptions of gender and their expected roles of men and women.” *Id.* at 85.

246. See *supra* Part III.

more likely to survive a First Amendment challenge.²⁴⁷ Thus, a moderate approach is likely the best first step to take. However, should this moderate proposal not generate positive results, proponents will have a stronger argument for pushing more stringent regulations and guidelines.

V. FIRST AMENDMENT ISSUES

The First Amendment states “Congress shall make no law . . . abridging the freedom of speech”²⁴⁸ While this seems fairly explicit, the Supreme Court has created several categories of speech under the First Amendment.²⁴⁹ Some of the categories—political speech for example—are highly valued; therefore, any infringements on such speech must meet strict scrutiny.²⁵⁰ Other categories, such as obscenity, are deemed to have little value and, therefore, merit little to no protection under the First Amendment.²⁵¹ Still others merit protection, but in a less aggressive manner than more valuable speech.²⁵² Commercial speech is one of the less-protected categories.²⁵³

Since the activity regulated here is commercial speech, for the proposal to be viable, it must not violate the First Amendment. Section A reviews the law in this area and explains why the proposal does not violate the First Amendment’s limited protections for commercial speech. Subsection B then considers other First Amendment issues.

247. See generally *infra* notes 249–54.

248. U.S. CONST. amend. I.

249. See generally *infra* notes 250–53 and accompanying text.

250. See Jennifer M. Smith, *Morse Code, Da Vinci Code, Tax Code and . . . Churches: An Historical and Constitutional Analysis of Why Section 501(C)(3) Does Not Apply to Churches*, 23 J.L. & POL. 41, 72 (2007) (“[P]olitical speech . . . is “high value” speech and should therefore be accorded the highest protections of strict scrutiny . . .”).

251. See Eric C. Chaffee, *Sailing Toward Safe Harbor Hours: The Constitutionality of Regulating Television Violence*, 39 U. MICH. J.L. REFORM 1, 15–16 (2005) (“The types of speech that receive the least First Amendment protection are obscenity, advocacy of imminent lawless behavior, fighting words, defamation, and fraudulent misrepresentation.” (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992) (other citations omitted))); Kevin Frances O’Neill, *A First Amendment Compass: Navigating the Speech Clause with a Five-Step Analytical Framework*, 29 SW. U. L. REV. 223, 230–32 (2000) (“The unprotected categories are (1) advocacy of imminent lawless action, (2) obscenity, (3) child pornography, and (4) fighting words.”).

252. See O’Neill, *supra* note 251, at 231 (“The less-than-fully-protected categories are: (1) defamatory statements, (2) commercial speech, and (3) lewd, profane, or indecent expression.”).

253. See *id.*; see also Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 68 (2007) (noting that the protection the Supreme Court grants to commercial speech can be considered “First Amendment Lite”).

A. Commercial Speech Law

1. Analyzing Commercial Speech and Its Place In Modern Advertising

Due to the categorical nature of First Amendment analysis, the discussion must begin with the definition of commercial speech.²⁵⁴ The Court has stated that speech that does “no more than propose a commercial transaction” is commercial speech.²⁵⁵ While the concept may appear simple, scholars have noted that the Court’s approach is inconsistent.²⁵⁶ Nevertheless, there are at least two types of commercial speech—“(1) speech concerning commercial products or services or (2) speech advocating the sale of commercial products or services.”²⁵⁷

Applying the foregoing to the present issue, it may seem beyond cavil that a commercial for a toy is clearly commercial speech; after all, the advertisement implies that the toy is available for sale, and thus proposes the sale of the toy.²⁵⁸ Yet, this may not be the end of the inquiry. Many modern advertisements go beyond an offer to sell a product at a particular price.²⁵⁹ They are instead artistic “minidramas” that are used to create an image that the consumer can

254. See, e.g., *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 65 (1983) (“Because the degree of protection afforded by the First Amendment depends on whether the activity sought to be regulated constitutes commercial or noncommercial speech, we must first determine the proper classification of the mailings at issue here.”).

255. *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973).

256. James Sweet, *Opting-Out of Commercial Telemarketing: The Constitutionality of the National Do-Not-Call Registry*, 70 TENN. L. REV. 921, 938 (2003); see also Redish, *supra* note 253, at 74 (noting that the Supreme Court’s approach to commercial speech is “not always consistent”).

257. See Redish, *supra* note 253, at 74.

258. See, e.g., Kathleen J. Lester, Note, *Cowboys, Camels, and Commercial Speech: Is the Tobacco Industry’s Commodification of Childhood Protected by the First Amendment?*, 24 N. KY. L. REV. 615, 666 (1997) (noting that advertisements are the “epitome of commercial speech”); Louis J. Virelli III, Comment, *Permissible Burden or Constitutional Violation? A First Amendment Analysis of Congress’ Proposed Removal of Tax Deductibility from Tobacco Advertisements*, 2 U. PA. J. CONST. L. 529, 552 (2000) (“[A]dvertisements have remained the paradigmatic example of commercial discourse under the First Amendment.”); Tung Yin, *How the Americans with Disabilities Act’s Prohibition on Pre-Employment-Offer Disability-Related Questions Violates the First Amendment*, 17 LAB. LAW. 107, 114 (2001) (“A prototypical example of commercial speech is an advertisement in which the advertiser proposes to sell a service or a product at a certain price.”).

259. Matthew Savare, Comment, *Where Madison Avenue Meets Hollywood and Vine: The Business, Legal, and Creative Ramifications of Product Placements*, 11 UCLA ENT. L. REV. 331, 374 (2004) (“There are many commercials today that do not propose a transaction at all, and it seems inconceivable that any agency would run an advertisement that simply implores customers to purchase their products.”).

associate with the product.²⁶⁰ If the advertisement does more than propose a commercial transaction, or if it has both commercial and non-commercial elements, there is a strong argument that the advertisement should be given a higher level of protection under the First Amendment.²⁶¹ In a similar vein, many toy commercials attempt to create a fantasy world or make a toy seem “fun.”²⁶² Also, few, if any, of the ads mention a price point.²⁶³ Thus, there may be non-commercial aspects to the ads that may merit higher protection.

Despite the aforementioned, the type of speech discussed in this Article is most likely commercial speech. Not only are advertisements the quintessence of commercial speech, but in enacting the CTA, Congress looked to the *Central Hudson* test to guide its analysis of the statute.²⁶⁴ Thus, in this area, Congress is presuming the speech is of a commercial nature.²⁶⁵ While Congress’ position may not be dispositive, under current case law, the Court would be hard-pressed to reach an alternate conclusion.²⁶⁶

2. Considering the Proposal as a Content-Based Regulation on Speech

The distinction between content-based and content-neutral speech regulations is essential to the Court’s First Amendment

260. See, e.g., Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 639–40 (1990). The authors describe a Diet Pepsi commercial from the 1980s featuring actor Michael J. Fox. In the commercial, Fox must find a Diet Pepsi to impress a young woman. The authors note that even if we assume the commercial was intended to propose a commercial transaction, the commercial is actually a “very short film” that attempts to associate Pepsi products with “youth, vitality, [and] chic cinematic style.” *Id.* at 640.

261. See, e.g., *Riley v. Nat’l Fed’n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796 (1988) (“But even assuming, without deciding, that such speech in the abstract is indeed merely ‘commercial,’ we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech. . . . Thus, where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. . . . Therefore, we apply our test for fully protected expression.”).

262. See Beales, *supra* note 163, at 874–75.

263. See, e.g., Kozinski & Banner, *supra* note 260, at 639.

264. H.R. REP. NO. 101-385, at 8–10 (1989).

265. Children’s Television Act of 1990, Pub. L. No. 101-437, Title I, 104 Stat. 996 (codified in scattered sections of 47 U.S.C.).

266. In many of the cases that have been deemed “mixed content” or “mixed speech,” the additional component that merited the higher scrutiny was completely non-commercial. Thus, while the Diet Pepsi example cited by Judge Kozinski is instructive, the Court has not yet ruled on that hypothetical. See, e.g., *Riley*, 487 U.S. at 796 (explaining that commercial speech does not “retain its commercial character when it is extricably intertwined with otherwise fully protected speech” and therefore no argument regarding the art aspect of the advertisements were made); *Kasky v. Nike, Inc.*, 45 P.3d 243, 259–62 (2002) (noting Nike advertisements were related to material facts about business and commerce—no arguments regarding artistic merit made).

jurisprudence.²⁶⁷ In fact, “[t]he content distinction is the modern Supreme Court’s closest approach to articulating a unified First Amendment doctrine.”²⁶⁸ While the distinction is important, the Court has noted that “[d]eciding whether a particular regulation is content-based or content-neutral is not always a simple task.”²⁶⁹ Nevertheless, it can generally be said that “[a] content-based regulation is aimed at the ‘communicative impact’ of speech, while a content-neutral regulation is aimed at the ‘noncommunicative’ impact.”²⁷⁰ More specifically, the “principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.”²⁷¹

The statute proposed here is most likely a content-based regulation for several reasons. First, many of the Court’s precedents suggest that a law is content-based when only a particular form of speech is impacted by the regulation.²⁷² For example, in *City of Cincinnati v. Discovery Network, Inc.*, Cincinnati enacted a regulation prohibiting the distribution of commercial handbills.²⁷³ The regulation resulted in the removal of newsracks containing the commercial materials.²⁷⁴ The city argued that its regulation was content-neutral because its safety and esthetic justifications for the ordinance were unrelated to the content of the speech.²⁷⁵ The Court disagreed, noting “the very basis for the regulation is the difference in content between ordinary newspapers and commercial speech.”²⁷⁶ The Court further noted, “[u]nder the city’s newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus, by any commonsense

267. Wilson R. Huhn, *Assessing the Constitutionality of Laws that are Both Content-Based and Content Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 803–04 (2004) (“Once it has been found that a law infringes upon freedom of expression, standard First Amendment doctrine requires the courts to determine whether the law is ‘content-based’ or ‘content neutral.’”).

268. DANIEL A. FARBER, *THE FIRST AMENDMENT* 21 (1998).

269. *Turner Broad. Sys., Inc. v. FCC.*, 512 U.S. 622, 642 (1994); see also Ofer Raban, *Content-Based, Secondary Effects, and Expressive Conduct: What in the World Do They Mean (and What Do They Mean to the United States Supreme Court)?*, 30 SETON HALL L. REV. 551, 554 (2000) (“What distinguishes content-based laws from content-neutral laws is not entirely clear.”).

270. Raban, *supra* note 269, at 554.

271. *Turner Broad.*, 522 U.S. at 642 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (alteration in original).

272. See *Rostron*, *supra* note 182, at 77–85.

273. 507 U.S. 410, 413 (1993).

274. See *id.*

275. See *id.* at 429.

276. *Id.* at 429.

understanding of the term, the ban in this case is ‘content based.’”²⁷⁷ Therefore, if *Discovery Network* is the lodestar, it must follow that, where commercial speech is singled out for differential treatment from non-commercial speech, the regulation is content-based. As such, since the regulation here applies only to commercial speech—and further still, only commercial speech directed at children—it is, in that sense, content-based.

Second, the proposal here goes beyond the scope of a traditional content-neutral regulation. A content-neutral regulation in this area would likely focus on the non-communicative aspects of the ads, such as the decibel volume of the ads or when they can be aired.²⁷⁸ The proposal herein would go beyond such ancillary matters, however, and would actually create a change in the content of the advertisements. After all, current advertising campaigns that feature only boys would need to be altered to include girls. The content—and perhaps the character—of the advertisement would necessarily be different. Such a regulation is a far cry from simply regulating the volume of the commercials or when such commercials might be aired. Thus, the disparity between the proposed regulation and a typical content-neutral regulation also suggests the regulation is content-based.

Third, another hallmark of content-based regulations, particularly those that are viewpoint-based, is the “disagreement with the underlying ideology or perspective that the speech expresses.”²⁷⁹ The reform suggested here is possibly viewpoint-based because it disfavors the current paradigm of children’s advertising due to its gendered narrative. Thus, the regulation expresses disagreement with the gendered perspective of the advertisements. Were this argument accepted, it would further support a finding that the proposal is content-based.

The foregoing arguments are difficult to overcome. Perhaps the best rebuttal would be that the objective of the advertisement—to encourage purchase—has not been changed. It could be posited that since the ad’s true goal is not altered, the content has not been altered. However, the Court has stated that “[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech.”²⁸⁰ The toy companies could argue that adding a girl to

277. *Id.*

278. *See, e.g.*, Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189–90 (1983) (“Laws that prohibit noisy speeches near a hospital, ban billboards in residential communities, impose license fees for parades and demonstrations, or forbid the distribution of leaflets in public places are examples of content neutral regulations.”).

279. *Ridley v. Massachusetts Bay Transp. Auth.*, 390 F.3d 65, 82 (1st Cir. 2004) (citations omitted).

280. *Ridley v. Nat’l Fed’n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795 (1988).

the commercial due to legal requirements, when they would not have necessarily done so in the absence of such a law, is a form of compelled speech.²⁸¹ Finally, while the best rebuttal is that the government would not be prohibiting the speech altogether nor altering its core purpose, the toy companies could argue that the proposed changes could diminish the ability to achieve that objective.²⁸² For all of these reasons, the proposal could be considered content-based.

3. Applying the Appropriate Test

The previous section on content neutrality is critical. In general, the content-based regulation of commercial speech is governed by the *Central Hudson* test.²⁸³ Confusion remains, however, as to whether *Central Hudson* is *always* the appropriate test.²⁸⁴ Much of this confusion arises due to the Court's decision in *R.A.V. v. City of St. Paul*.²⁸⁵ In *R.A.V.*, the Court considered whether a hate-speech ordinance that targeted racially hostile speech violated the First Amendment.²⁸⁶ The Court ruled in the affirmative because the regulation expressed a view of the content of the speech.²⁸⁷ The Court stated: "The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed."²⁸⁸ Aware of the sea of change in First Amendment doctrine he had announced, Justice Scalia explained that even his new ruling was not without its exceptions.²⁸⁹ He explained:

When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. . . . [To illustrate,] a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment

281. See *Riley*, 487 U.S. at 797.

282. *Id.* at 791–92.

283. See generally Cecil C. Kuhne, III, *Testing the Outer Limits of Commercial Speech: Its First Amendment Implications*, 23 REV. LITIG. 607, 614 (2004) (noting that content-based restrictions are granted intermediate scrutiny); James Weinstein, *Fools, Knaves, and the Protection of Commercial Speech: A Response to Professor Redish*, 41 LOY. L.A. L. REV. 133, 133 n.3 (2007) ("*Central Hudson* remains the standard for assessing the validity of content-based distinctions on commercial speech.").

284. Kerri L. Keller, Note, *Lorillard Tobacco Co. v. Reilly: The Supreme Court Sends First Amendment Guarantees Up in Smoke by Applying the Commercial Speech Doctrine to Content-Based Regulations*, 36 AKRON L. REV. 133, 166 (2002) (noting that "doubt exists as to whether *Central Hudson* is always the appropriate test").

285. See 505 U.S. 377 (1992).

286. See *id.* at 379–81.

287. *Id.* at 391.

288. *Id.* at 386.

289. *Id.* at 388–89.

protection) is in its view greater there. But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion.²⁹⁰

The decision in *R.A.V.* is notable because many post-*R.A.V.* cases have considered whether *R.A.V.* mutated the previous understanding of commercial speech such that content-based distinctions within commercial speech should now merit strict scrutiny.²⁹¹ At this point, the Supreme Court has not clearly provided an answer to this question.²⁹² Due to current confusion, as well as the likely content-based nature of this proposal, the proposal will be analyzed using both the intermediate scrutiny test employed in *Central Hudson* and strict scrutiny.²⁹³

a. *The Central Hudson Test*

To strike the appropriate balance between the protected nature of the speech and the interest in promoting accurate commercial speech to the public, the Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* announced a test to evaluate whether the speech should be protected.²⁹⁴ The Court stated:

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For

290. *Id.* (internal citations and quotation marks omitted).

291. *See, e.g.*, MD II Entm't, Inc. v. City of Dall., 28 F.3d 492, 495 (5th Cir. 1994) ("More recent cases, however, have questioned the continued validity of *Central Hudson* as it applied to content-based restrictions on commercial speech."); Hornell Brewing Co. v. Brady, 819 F. Supp. 1227, 1228 n.1 (E.D.N.Y. 1993) (plaintiffs argued that *R.A.V.* required application of strict scrutiny to content-based commercial speech regulation); Citizens United for Free Speech II v. Long Beach Twp. Bd. of Comm'rs, 802 F. Supp. 1223, 1230 (D.N.J. 1992); Holding v. Mun. of Anchorage, 63 P.3d 248, 253 n.27 (Alaska 2003) ("We recognize that some debate exists over the proper level of scrutiny for content-based restrictions on commercial speech.").

292. *See Holding*, 63 P.3d at 253 n.27 ("The Supreme Court has not directly addressed this issue . . .").

293. Scholars have noted that the *Central Hudson* test—particularly its third and fourth prongs—bears a superficial resemblance to traditional strict scrutiny. *See, e.g.*, Jennifer Brown, Note, *Government Regulation Gets the Finger from a Feisty Frog: Bad Frog Brewery Inc. v. New York State Liquor Authority*, 20 LOY. L.A. ENT. L. REV. 633, 655 (2000) ("The difference between 'substantial' and 'compelling' is one of degree rather than substance."). Indeed, some of the Court's cases seemed to use the third and fourth prongs in this manner. *See* Thomas D. Blue, Jr., *Over the Edge: The Fourth Circuit's Commercial Speech Analysis in Penn Advertising and Anheuser-Busch*, 74 N.C. L. REV. 2086, 2102 (1996) (noting that some cases "feigned" fidelity to a stricter application). Nevertheless, later cases have clarified that there is a difference—however slight—in the two tests. *See, e.g.*, Donald W. Garner & Richard J. Whitney, *Protecting Children from Joe Camel and His Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation*, 46 EMORY L.J. 479, 429 n.67 (1997) (noting that after the Court's reinterpretation of *Central Hudson's* fourth prong in *Board of Trustees of S.U.N.Y. v. Fox*, 492 U.S. 469 (1989), the difference between *Central Hudson* and strict scrutiny tests is more amplified). For these reasons, while the strict scrutiny and *Central Hudson* tests may seem similar, each test will be analyzed separately.

294. 447 U.S. 557, 566 (1980).

commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.²⁹⁵

Advertising toys to children is certainly legal, as long as it is neither false nor deceptive, as those terms are commonly understood.²⁹⁶ Thus, this type of commercial speech is covered under the First Amendment. In light of this, the discussion that follows will examine each of the three remaining *Central Hudson* factors to explain why the proposed legislation does not run afoul of the First Amendment.

i. The Government has a Substantial Interest in Regulating the Speech

Of the three remaining prongs, this prong is the most easily met. The government can assert a powerful interest in regulating the speech for several reasons. First, the FCC has recognized the importance of regulating advertising directed at children.²⁹⁷ While declining to limit all advertising directed at children, the Commission nevertheless recognized that children, as a unique group, are owed a special duty of protection from advertising.²⁹⁸ The FCC report stated:

Broadcasters have a special responsibility to children. Many of the parties testified and we agree, that particular care should be taken to insure that they are not exposed to an excessive amount of advertising. It is a matter of common understanding that, because of their youth and inexperience, children are far more trusting of and vulnerable to commercial "pitches" than adults. . . . Since children watch television long before they can read, television provides advertisers access to a younger and more impressionable . . . group than can be reached through any other medium. For these reasons, special safeguards may be required to insure that the advertising privilege is not abused.²⁹⁹

While this pronouncement was made in the 1970s in passing the CTA, Congress reaffirmed the importance of the interest to be served in regulating advertising to children.³⁰⁰ Between the FTC's

295. *Id.*

296. *See generally* FCC, Petition for Children's Television (Act) for Rule-Making[.] Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programming and the Establishment of a Weekly [Fourteen]-Hour Quota of Children's Television Programs, 50 F.C.C.2d 1 (1974).

297. *Id.*

298. *Id.* at 5.

299. *Id.* at 9 (citations omitted).

300. *See* 47 U.S.C. § 303a (2012) (discussing the standards for children's television programming).

1974 Report and the CTA, *Central Hudson* was decided.³⁰¹ Thus, Congress used the *Central Hudson* test as a guide in its statements regarding the constitutionality of the enactment.³⁰² In its report on the Children's Television Act of 1989, the Committee on Energy and Commerce stated that it had a substantial interest in protecting children from over-commercialization and noted that the interest in question "was acknowledged by the industry itself . . . in the FCC's 1974 Policy Statement."³⁰³ Congress also reiterated: "It is difficult to think of an interest more substantial than the promotion of the welfare of children who watch so much television and rely upon it for so much of the information they receive."³⁰⁴ Thus, there is considerable support for the conclusion that protecting children from advertising is a substantial interest.

In addition to the concerns about over-commercialization, two further reasons support finding a substantial interest in regulating gender bias. First, there is an interest in self-determination and self-definition for children. Congress and the FCC have recognized that children are "impressionable," and advertising can shape their self-concepts.³⁰⁵ This concern is particularly pronounced when gender-biased toy advertising is displayed to children.³⁰⁶ As discussed earlier in this Article, gender bias can insidiously influence a child's later academic and career choices.³⁰⁷ To be certain, many things encountered in childhood can have a pernicious influence, and the effects of this influence may persist into youth and young adulthood. However, many other areas that have been the focus of attempts to protect children, such as alcohol, drugs, violence, and smoking, are different. While all of these habits are potentially harmful, none go to the core of a child's personhood. A cigarette advertisement does not tell a girl that she is less important. It does not tell a girl what she can or cannot do. It does not impose limitations based on an immutable characteristic. In short, it does not tell a girl her place and how to stay within its confines. Gender-biased advertising, on the other hand, accomplishes that goal quite handily. While adult women may be able to avoid, process, or reject those messages, young girls are

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

302. *Id.* at 566; *see also* § 303a.

303. H.R. REP. No. 101-385, at 9 (1989) (citing Children's Television (Act) Report and Policy Statement, 50 F.C.C.2d 1, 9 (1974)).

304. S. REP. No. 101-227, at 17 (1989) (stating the rationale is that a child does not possess the full capacity for individual choice, which is the presupposition of the First Amendment guarantee).

305. WILCOX ET AL., *supra* note 85, at 8-9.

306. Smith, *supra* note 77, at 334-35.

307. *See Serbin et al.*, *supra* note 58, at 617-22.

unable to do so, therefore the government has a strong interest in curbing this type of advertising.³⁰⁸

Second, there is a practical reason for finding a government interest in regulating this subject. Currently, the United States has a crisis in the math and science fields.³⁰⁹ In 2005, the American Association of State Colleges and Universities (AASCU) reported a sharp decrease in the numbers of American students studying math and science.³¹⁰ The news is especially troubling because even as the number of students decreases, the need for persons in those professions is expected to grow.³¹¹ Moreover, our nation lags behind others in producing new scientists.³¹² For example, in 2002, 60,600 bachelor's degrees in engineering were awarded in the United States.³¹³ This pales in comparison to the 590,800 engineering degrees awarded in Asian nations and the 98,400 degrees awarded in Japan alone.³¹⁴ But the gender gap impacts this issue as well. The AASCU report mentioned the difficulties faced by female students entering the sciences and specifically recommended that “[a]ll students, but particularly underrepresented minorities and women, need encouragement to pursue science activities from an early age”³¹⁵ As our nation falls behind in the math and science fields, we cannot afford to lose a single available person. That is, we need “all hands on deck,” both male and female. While limiting gender-biased toy advertisements will not cure this problem overnight, the government certainly seems to have an interest in trying to combat this serious decline. Promoting gender equity could be one method of addressing it.

In short, the government could assert several interests, and any of these could be considered substantial for the reasons explained above. There are few principled arguments that the government

308. See, e.g., Petty et al., *supra* note 24, at 363 (arguing that public policy and Supreme Court precedents such as *Brown* and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), indicate a disfavor for stereotyping); Worthy, *supra* note 24, at 561–62 (arguing that protecting non-white children is not merely substantial, but compelling).

309. Am. Ass'n of State Colls. and Univs. (“AASCU”), *Strengthening the Science and Mathematics Pipeline for a Better America*, 2 POLICY MATTERS 1, 1–2 (2005), available at <http://www.aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/STEM%20Pipeline.pdf> [hereinafter AASCU].

310. *Id.*

311. *See id.*

312. DIV. SCI. RES. STATS., NAT'L SCI. FOUND., *ASIA'S RISING SCIENCE AND TECHNOLOGY STRENGTH* vii, 9 (2007), available at <http://www.nsf.gov/statistics/nsf07319/pdf/nsf07319.pdf>.

313. *Id.* at 3.

314. *Id.* at 5.

315. AASCU, *supra* note 309, at 3.

should not be concerned about these issues. Thus, the first prong of *Central Hudson* is likely to be met.

ii. The Proposed Regulation Directly Advances the Government's Substantial Interest

Central Hudson's third prong requires that the regulation materially advance the asserted governmental interest.³¹⁶ In elucidating this requirement, the Supreme Court has stated:

This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. Consequently, the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.³¹⁷

The proposed law likely satisfies this prong, despite being a more substantial hurdle than the prior prong.

The strongest argument in support of a direct relationship is that, as drafted, the proposed law would directly address the issue of gender-biased advertising. The argument proceeds in this fashion—the toys marketed to girls do not promote math and science skills; without such toys, girls lose interest in math and science, as they feel the subjects are not for them; without math and science skills or interest, girls will avoid the fields; without entering the fields, the girls cannot obtain degrees and later employment in the fields. Once again, changing toy advertising will not cure this problem overnight. However, if part of the genesis of the problem is gender-biased toy advertising, a proposal that directly addresses a genesis of the problem—even if it is not the sole genesis—should show a sufficient connection.

Despite this argument, at least two criticisms could be advanced with some vigor. First, those opposed to the proposal could state that the connection is not sufficiently direct because the gender gap in sciences is caused by a multitude of factors. Second, opponents could argue that the connection between eliminating gender bias from toy ads and the resulting entry of girls into those fields is too tenuous a connection.

The first issue is most easily addressed. While a number of factors cause a girl to develop academic interests, television, as previously explained above, is a primary—if not *the* primary—source in helping children to develop their construction of what it means to

316. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).

317. Greater New Orleans Broad. Ass'n. v. United States, 527 U.S. 173, 188 (1999) (citations omitted) (internal quotation marks omitted).

be a boy or a girl.³¹⁸ So, while gender-biased toy advertising is not the sole culprit, it is also highly likely that one change in toy advertising could cause many other things to fall into place. Admittedly, it is also possible that the change will occur and nothing will happen. Given the weight of data on this topic, however, that seems unlikely. No study has found that television advertisements have no impact on children—the only issue is the degree to which they are so affected.³¹⁹ Consequently, any proposal targeted at excising the insidious gender bias seems to be directly tailored to the issue.

The second issue is also easily addressed. In *Lorillard Tobacco Co. v. Reilly*,³²⁰ a more recent case on advertising to children, the Court addressed the issue of relationship between ends and means. At issue in *Lorillard* was legislation Massachusetts passed to prevent the advertising of cigars and cigarettes to children.³²¹ To satisfy the third prong of *Central Hudson*, the State argued that there was an identifiable problem with underage cigar and cigarette smoking and that limiting advertising of those products was necessary to combat the problem.³²² Though the tobacco companies asserted that there was “no causal link” between advertising and tobacco use, the Court rejected this position due to the evidence provided by the government conclusively proving the link between advertising and youth tobacco usage.³²³

A similar result should follow in the toy advertising context. Part II provided merely a sampling of the available data on this subject. Even from that sampling, it should be clear a connection between limiting gender bias and girls’ comfort entering roles in the hard sciences exists. Just as in *Lorillard*, every child who sees an ad for tobacco will not smoke and every child who avoids such advertisements cannot be guaranteed a smoke-free life. Indeed, the Court in *Lorillard* did not appear to require that advertising be the only influence. If it had, the Court would have required that the State negate the influence of peer pressure and the parental smoking habits in its decision. The Court did not indicate that a causal connection of some sort need be shown, even if advertising is not the sole cause.³²⁴ Thus, just as in *Lorillard*, there is enough evidence to show that there is a causal connection between gender-biased advertising and girls’

318. See *supra* Part II.B.1.

319. See *supra* Part II.B.1.

320. 533 U.S. 525 (2001).

321. See *id.* at 532–33.

322. See *id.* at 533, 556–57.

323. See *id.* at 557, 560–61.

324. *Id.*

later success in math and science. Thus, this likely counterargument should not defeat the third prong.

iii. The Regulation is the Least Restrictive Means of Achieving the Government's Interest

The final prong requires an examination of the means chosen to combat the problem.³²⁵ The Court has struggled to define this prong in recent years. Since *Central Hudson*, the Court has refined the understanding of the prong several times. In *Board of Trustees of the State University of New York v. Fox*,³²⁶ the Court stated that the standard in *Central Hudson* did not require use of the least-restrictive alternative.³²⁷ To further confuse matters, the Court seemed to back away from this statement in two later cases.³²⁸ Nevertheless, in more recent decisions, the Court seems to have settled on the approach outlined in *Fox*.³²⁹ In *Greater New Orleans Broadcasting Ass'n v. United States*,³³⁰ the Court clarified its position as follows:

The fourth part of the test complements the direct-advancement inquiry of the third, asking whether the speech restriction is not more extensive than necessary to serve the interests that support it. The Government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest—"a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." On the whole, then, the challenged regulation should indicate that its proponent "carefully calculated" the costs and benefits associated with the burden on speech imposed by its prohibition."³³¹

The proposed law should be sufficient to meet the Court's current standard, as it is a reasonable and proportionate fit between the problem to be addressed and the restriction on speech. To understand the appeal of the proposal advanced herein, it is helpful to compare it to other prospective approaches. At one end of the spectrum, advertising to children is completely unfettered. The other end of the spectrum would impose a ban on all advertising to children. The middle of the spectrum would be advertising with some ancillary

325. *Id.* at 556.

326. 492 U.S. 469 (1989).

327. *See id.* at 477-78.

328. *See* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) ("It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance."); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995) (requiring proof of "the availability of alternatives that would prove less intrusive to the First Amendment's protections for commercial speech").

329. *See, e.g., Lorillard Tobacco*, 533 U.S. at 566 (2001).

330. 527 U.S. 173 (1999).

331. *Id.* at 188 (quoting *Board of Trustees of S.U.N.Y. v. Fox*, 492 U.S. 469, 480 (1989); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 417 (1993)).

limits imposed. The proposal here is not at either end of the spectrum, but seeks to find a midpoint between the two extremes.

The most restrictive approach would tell advertisers how to advertise the toys, i.e., any advertisement of a toy that teaches a scientific skill must include a girl; girls and boys must be shown as “equals” in any commercial; the color pink may not be used in advertising domestic toys; and so forth. The proposal here is modest by comparison to any of these requirements. Under the proposal, advertisers have two choices: they can include both boys and girls in their ads, or they can create ads that focus on the toy and show no children.³³² Thus, advertisers retain a significant level of freedom.

The soundness of this approach is underscored by revisiting the Court’s rationale in *Lorillard*. After finding that the State met its burden on the *Central Hudson*’s third prong, the *Lorillard* Court found that the State did not meet the final part of the test.³³³ The Court reviewed the evidence and determined that if the anti-tobacco advertising legislation were permitted to stand, “[i]n some geographical areas, these regulations would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers.”³³⁴ Thus, the Court found the State failed *Central Hudson* on this prong.³³⁵

The proposal advanced here is materially different than the one in *Lorillard* for at least two reasons. First, nothing in the proposal would keep adults—parents, family members, and others who may want to purchase toys for children—from obtaining truthful information about the toys available for sale. Second, unlike in *Lorillard*, the proposal here is far from imposing a complete ban. It merely requires a shift in advertising tactics. This is a minimal step to take.

In sum, the proposal offered here should be sufficient to pass muster under *Central Hudson*. There is a significant government interest, and the proposal is directly related to achieving that interest. Finally, the proposal has the required fit between the objective and the restriction on speech. Therefore, the proposed law should pass constitutional muster.

332. It is surprisingly easy to craft commercials that include toys without including children. During the author’s study, of the forty-six commercials viewed, fourteen featured toys but did not include children. The advertisers were able to show the toy and its abilities without showing a child interacting with a toy. At times, a hand would enter the frame to move the toy, but the gender of the hand’s owner could not be discerned. Thus, gender-free marketing strategies are already in place. See *supra* Part II.

333. *Lorillard Tobacco*, 533 U.S. at 561.

334. *Id.* at 562.

335. *Id.* at 561.

b. Strict Scrutiny

As previously stated, this proposal may merit strict scrutiny.³³⁶ However, additional analysis is required due to the current confusion in commercial speech law. If a court holds that the speech—or aspects of the speech—is not commercial in nature, strict scrutiny would apply. Moreover, the proposal here may be analogous to Justice Scalia's statement in *R.A.V.*—that strict scrutiny may be appropriate where content-based regulations of commercial speech do not consist entirely of the reasons why commercial speech is proscribed. For example, when a state prohibits “only that commercial advertising that depicts men in a demeaning fashion.”³³⁷ Here, of course, commercial speech is restricted for the benefit of children, especially girls. Consequently, the analysis here is incomplete without a discussion of strict scrutiny.

If the measure is content-based and does not fit within the exceptions listed in *R.A.V.*,³³⁸ strict scrutiny will apply.³³⁹ Strict scrutiny requires that the regulation be narrowly tailored to serve a

336. See *supra* Part V.A.3.

337. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (internal citations and quotation marks omitted).

338. See generally *id.* at 379–96 (majority opinion). If the proposal is a content-based regulation, it is possible that the standards in *R.A.V.* will apply. However, it could also be argued that the regulation proffered here fits within Justice Scalia's first exception because “the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable.” *Id.* at 388. Justice Scalia's statement that “a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion” may seem to be the end of the discussion because it sounds analogous to this fact pattern on a superficial level. *Id.* at 389. However, this is not merely an issue of presenting women or girls “in a demeaning fashion”; it is about protecting children. This proposal regulates advertising based on one of the primary reasons why it is proscribable—with respect to children. In evaluating this proposal—especially since it does not prevent adults from learning any information—the differences in children's response to advertising must be remembered.

Children are far more impressionable than adults. In *Lorillard*, the Court recognized that “children smoke fewer brands of cigarettes than adults, and those choices directly track the most heavily advertised brands, unlike adult brands which are more dispersed and related to pricing.” 533 U.S. at 558. Those statistics proved that the children were far more influenced by the advertising they viewed than were their adult counterparts. Congress and the FCC have also mentioned concerns about the ability of commercial advertising to influence children. See generally *In re* Petition of Action for Children's Television Act, 50 F.C.C. 2d 1 (1974); H.R. REP. No. 101-385 (1989). Here, girls (and boys) are being influenced. The reason to regulate the speech is not to create a gender equal world, nor to attempt to castigate the male gender or uplift the male gender. It merely attempts to prevent children from being influenced in a particular manner. Thus, while gender is implicated, it is not the *sine qua non* of the regulation. The issue here is that children are not old enough to interpret—and independently accept or reject—the gender cues that they are given in toy ads. Until they are, it seems the government has the need and ability to step in and limit their exposure.

339. *R.A.V.*, 505 U.S. at 395; cf. *Turner Broad. Sys. Inc. v. F.C.C.*, 512 U.S. 622, 661–62 (1994) (applying intermediate scrutiny when the restriction is content neutral and the burden on speech is incidental).

compelling state interest.³⁴⁰ Both of those conditions are satisfied here.

i. Compelling State Interest

First, the state interest can be considered compelling. While the Court has long required those engaging in content-based regulations of speech to demonstrate a “compelling interest” to support the differential treatment, the Court has “frequently adopted an astonishingly causal approach to identifying compelling interests.”³⁴¹ Due to minimal guidance, the opinions of the Court must serve as the guide. The Court has mentioned children as a compelling state interest in some of its First Amendment cases. For instance, in *Sable Communications of California, Inc. v. F.C.C.*,³⁴² the Court found that it had previously recognized a “compelling interest in protecting the physical and psychological well-being of minors.”³⁴³ While this statement was made in the context of indecent speech, it would not be difficult to apply within the advertising context. Gendered toys cause girls to reconsider what positions are “appropriate” for them. This conception of “appropriate” behavior can also apply to children’s perception of appropriate roles and occupations in adulthood.³⁴⁴ When a belief developed during childhood can affect a girl’s self-concept in a way that influences choice of friends, activities, interests, and future aspirations, the psychological impact is patent.³⁴⁵ Thus, for this reason—as well as the reasons set forth during the *Central Hudson* discussion—the Court should be able to find a compelling interest.

ii. Narrow Tailoring

Second, the proposal as drafted can be considered narrowly tailored. To determine whether a regulation is narrowly tailored, the proponent of the legislation “must demonstrate that it

340. *Boos v. Barry*, 485 U.S. 312, 321–22 (1988) (internal citations omitted) (discussing the need for a regulation to serve a compelling state interest and that it can be narrowly drawn in order to survive the most exacting scrutiny).

341. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1321 (2007) (citing Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 932–37 (1988) (“Unfortunately, while decisions of the Supreme Court and opinions of various members of the Court have frequently described or treated governmental interests as compelling, few have explained why . . . Thus, with few exceptions, the Court has failed to explain the basis for finding and deferring to compelling governmental interests.”)).

342. 492 U.S. 115 (1989).

343. *Id.* at 126.

344. See *Etaugh & Liss*, *supra* note 136, at 139–45.

345. *Id.* at 145–46.

does not ‘unnecessarily circumscrib[e] protected expression.’”³⁴⁶ This requirement is sometimes phrased as requiring the “least restrictive alternative.”³⁴⁷ The proposal herein meets these requirements.

First, the current proposal infringes upon speech as little as is necessary. It does not prevent adults—or children—from learning any valuable information about the toys that are available. Finally, including children of both genders is a minimal intrusion on the rights of advertisers. Under this proposal, advertisers remain free to advertise any toy they wish in any manner as long as both males and females are included. As such, the infringement on speech is likely minimal.

Second, the proposal is aimed precisely only at the problematic aspects of the speech at issue. The literature states that children are more likely to believe that a toy is for both boys and girls if both boys and girls are shown playing with the toy.³⁴⁸ The current proposal directly addressed this issue in a minimal way by requiring females to be either visually or audibly present in these ads. Because it is carefully designed to achieve its stated purpose, the proposal is narrowly tailored.

VI. CONCLUSION

Every child is precious. Every child deserves a chance to fully explore and exploit his or her talents. Currently, television ads aimed at children deny children—especially girls—that opportunity. The law can and should address this problem. This issue is of supreme importance to every child in America who has been told, implicitly or explicitly, that their talents are limited. As a nation, we need the talents of each and every individual—male or female. If necessary, we should create new laws to promote a new vision.

346. Republican Party of Minn. v. White, 536 U.S. 765, 775 (2002) (quoting *Brown v. Hartlage*, 465 U.S. 45, 54 (1982)).

347. Fallon, *supra* note 341, at 1326 (citing *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004); *U.S. v. Playboy Entm’t Group Inc.*, 529 U.S. 803, 815 (2000); *Sable Commc’ns*, 492 U.S. at 126).

348. See *supra* notes 141–43 & accompanying text.

APPENDIX A

Table 1. Toys and their Category Definitions for the Tracy Toy and Play Inventory³⁴⁹

Toys	Category Definition
Stickers Magnetic Alphabet Board Chalkboard Jigsaw Puzzles Spirograph	These toys require the user to make <u>TWO-DIMENSIONAL (2D)</u> representations or manipulations of reality either with or without directions. Jigsaw Puzzles and Magnetic Alphabet Boards are examples of Two-Dimensional toys.
Tinker Toys Erector Sets Wooden/Plastic Blocks Rubix Cube Airplane Models Model Cars Ship Models Lego Blocks [sic] Playdoh	These toys require the use to make <u>THREE-DIMENSIONAL (3D)</u> manipulations of the pieces either with or without directions. Model Building and Lego Blocks [sic] are examples of Three-Dimensional toys.
Ping Pong Equipment Soccer Equipment Yard Darts/Well [sic] Darts Basketball Equipment Boomerang Video Games Baseball/Softball Equipment Football Equipment Tetherball Equipment Marbles Tennis Equipment Miniature Golfing Equipment Bowling Equipment Kickball Equipment Pool (billiards) Croquet Equipment Horseshoes Set Volleyball Equipment Baton Frisbee Badminton Equipment	These toys require the user to manipulate, or <u>ESTIMATE</u> the <u>MOVEMENT</u> of, an object so that it hits another <u>TARGET</u> object (EMT) associated with the activity. The target may be still or moving. There may be gross- and fine-body movements associated with these toys. Video Games and Croquet Equipment are examples of estimated-movement-with-a-target toys.

349. See Dyanne M. Tracy, *Toy-Playing Behavior, Sex-Role Orientation, Spatial Ability, and Science Achievement*, 27 J. RES. SCI. TEACHING 637, 640-41 (1990). All capitalizations appear in the original.

<p>Ice Skates/Roller Skates Skateboard Big Wheel Bicycle/Tricycle Jump Rope Pogo Stick Wagon Swing Skis Canoe Tester-totter [sic] Stilts Row Boat</p>	<p>These toys require the user to make <u>GROSS-BODY (GB)</u> movements in order to accomplish the task for which the toy was intended. No concern for a “target” (other than a self-imposed bodily destination) is inherent in the related activity. These toys usually become an extension of the users’ own bodies. Ice Skates/Roller Skates and a Sled are examples of gross-body-movement toys.</p>
<p>Toy Tea Sets Toy Cars/Tracks Dress-up Vanity Toy Farm Set Toy City Set Toy Zoo Set Electric Racercars [sic] Toy Cash Register Toy Picnic Set Electric Train Toy Garage Toy House Cleaning Set Dollhouse Medical Kit Toy Kitchen Items</p>	<p>These toys are played with and placed in <u>PROPORTIONAL (P)</u> arrangements or orientations along with other objects of the same scale. Electric Train Sets and Toy Zoo Sets are examples of proportional-arrangement [sic] toys.</p>
<p>Telescope Microscope Chemistry Set Rockets Electrical Kit</p>	<p>These toys are realistic enough to be included in an elementary classroom for the purpose of completing <u>SCIENCE ACTIVITIES (SA)</u>. Microscopes and Electric Kits are examples of science activity toys.</p>

APPENDIX B

Table 2. Toys and Gender Portrayals in Toy Commercials³⁵⁰

Gender Portrayal											
Toys	Cannot code		Girls only		Boys only		Boys & Girls		Total		
	R%	C%	R%	C%	R%	C%	R%	C%	R%	C%	
Dolls	27.3	42.2	58.3	51.9	.0	.0	14.4	23.5	100	30.5	
Action Figures	28.0	15.6	.0	.0	72.0	29.0	.0	.0	100	11.0	
Arts & Crafts	.0	.0	.0	.0	.0	.0	100.0	21.2	100	4.0	
Make believe	.0	.0	40.0	6.4	40.0	8.1	20.0	5.9	100	5.5	
Animals	7.2	5.6	82.6	36.5	8.7	4.8	1.4	1.2	100	15.2	
Games/Build	27.4	22.2	8.2	3.8	31.5	18.5	32.9	28.2	100	16.0	
Transportation/Construction	12.9	4.4	.0	.0	87.1	21.8	.0	.0	100	6.8	
Sports	.0	.0	7.4	1.3	63.0	13.7	29.6	9.4	100	5.9	
Mixed/other	39.1	10.0	0	0	21.7	4.0	39.1	10.6	100	5.1	
TOTAL	19.8	100	34.3	100	27.3	100	18.7	100	100	100	
R% Row percentages; C% Column percentages; Gender Portrayal x Toys ($\chi^2 = 414.638, df=24, p=.000, N=455$).											

350. Susan G. Kahlenberg & Michelle M. Hein, *Progression on Nickelodeon? Gender-Role Stereotypes in Toy Commercials*, 62 *SEX ROLES* 830, 839 (2010).

