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Up In Smoke: The FTC's Refusal to Apply the "Unfairness Doctrine" to Camel Cigarette Advertising

John Harrington

Indiana University School of Law

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Up In Smoke: The FTC's Refusal to Apply the "Unfairness Doctrine" to Camel Cigarette Advertising

John Harrington*

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* B.A. (political science), B.A. (sociology) Northwestern University, 1990; candidate for J.D. Indiana University School of Law—Bloomington, 1995.

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INTRODUCTION

The "Joe Camel" advertising campaign has been a bonanza for R.J. Reynolds, with the company's cigarettes posting significant gains in market share since the campaign's inception in 1988.¹ However, that success has brought controversy in its wake, particularly given disturbing evidence suggesting that children may be attracted to smoking by the cartoon imagery and the debonair demeanor of Old Joe.² In a much-cited example, one study revealed that six-year-old children were as familiar with Joe Camel as they were with Mickey Mouse.³ As a response to the success of the "smooth character" campaign, legislation was introduced in 1990 to ban the cartoon-like advertising typified by Joe Camel.⁴ Although this legislation failed to pass the subcommittee stage,⁵ the campaign to rein in Old Joe continued, with the focus shifting to the Federal Trade Commission (FTC), which considered administrative action that would eliminate the ads entirely.⁶ In June 1994, by a three-to-two vote of its commissioners, the FTC decided to close its investigation of the Camel campaign.⁷ The majority explained that "[a]lthough it may seem intuitive to some that the Joe Camel advertising campaign would lead more children to smoke or lead

1. Laura Bird, *Joe Smooth for President*, ADWEEK'S MARKETING WK., May 20, 1991, at 20, 20.

2. See, e.g., Joseph R. DiFranza et al., *RJR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children*, 266 JAMA 3149 (1991); Paul M. Fischer et al., *Brand Logo Recognition by Children Aged 3 to 6 Years: Mickey Mouse and Old Joe the Camel*, 266 JAMA 3145 (1991); John P. Pierce et al., *Does Tobacco Advertising Target Young People to Start Smoking?*, 266 JAMA 3154 (1991).

3. Fischer et al., *supra* note 2, at 3145, 3147-48.

4. H.R. 5041, 101st Cong., 2d Sess. (1990).

5. See Rep. Henry Waxman, *Tobacco Marketing: Profiteering From Children*, 266 JAMA 3185, 3185-86 (1991); *House Subcommittee Approves Strong Anti-tobacco Measure*, 48 CQ WKLY REP. 2922, 2922 (Sept. 15, 1990).

6. See Stuart Auerbach, *FTC Staff Takes Aim at 'Joe Camel': Reynolds Denies Ad Campaign Is Aimed at Enticing Teens to Smoke*, WASH. POST, Aug. 12, 1993, at D9; Jube Shiver, *Ban Urged on Camel Symbol in Tobacco Ads*, L.A. TIMES, Aug. 12, 1993, at D1.

7. *FTC Closes Investigation of R.J. Reynolds Tobacco Company*, FTC TODAY, June 8, 1994, available in LEXIS, Trade Library, FTC File No. 932-3162.

children to smoke more, the evidence to support that intuition is not there Because the evidence in the record does not provide reason to believe that the law has been violated, we cannot issue a complaint."⁸ The dissenters countered that "[b]y refusing to bring such a case, the majority has implicitly downplayed strong circumstantial evidence of an effect on minors There is evidence that the cartoon character has appeal to minors and that Camel has increased its market share among minors."⁹

This Note analyzes whether the FTC legally could have undertaken action against the Joe Camel advertising campaign. Part I reviews the history of the FTC's statutory authority to regulate unfair business practices. Part II recounts the efforts of the FTC to apply its power to the regulation of commercial advertising and the congressional response it provoked. Part III examines the current understanding of the FTC's authority and considers an application of those powers against the Camel advertisements. Finally, Part IV explores constitutional limitations that may constrain FTC action in this area. This Note concludes that, under existing regulatory standards and an understanding of the limited constitutional protection afforded advertising for products like cigarettes, a ban on Joe Camel advertising could withstand both statutory and constitutional challenges.

I. HISTORY OF THE FTC'S POWER TO REGULATE UNFAIR BUSINESS PRACTICES

A. *The Original FTC Act*

The statutory basis for the FTC's regulatory power over commercial advertising derives from Section Five of the Federal Trade Commission Act,¹⁰ which provides in relevant part: "Unfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."¹¹ Originally, however, the FTC's grant of authority was limited to "unfair methods of competition,"¹² which reflected the early understanding of the FTC's mission as dealing primarily with antitrust

8. *FTC Statements Regarding R.J. Reynolds Tobacco Company—Camel Cigarettes*, FTC TODAY, June 8, 1994, available in LEXIS, Trade Library, FTC File No. 932-3162.

9. *Id.* (dissenting statement of Commissioner Dennis A. Yao).

10. 15 U.S.C. §§ 41-58 (1988 & Supp. V 1993).

11. 15 U.S.C. § 45(a)(1) (1988).

12. Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, 719 (1914) (current version at 15 U.S.C. § 45(a)(1) (1988)).

regulation.¹³ The vagueness inherent in the term "unfair" vested considerable discretion in the FTC to determine what practices would come within its purview. Congress was well aware of this vagueness when it passed the Act and hoped that under judicial supervision, the FTC would formulate a working definition through application.¹⁴ A House Conference Report summarized the legislative understanding:

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task.¹⁵

Reflecting the limitation in the early statutory language and the common understanding of its main mission,¹⁶ much of the FTC's early unfairness work was focused on practices that were harmful to other competitors within a market, as opposed to practices that affected consumers directly.¹⁷ Efforts by the FTC to expand its regulatory authority beyond competing business concerns were rebuffed by the courts. In *FTC v. Raladam Co.*, the Supreme Court struck down an FTC attempt to prevent a manufacturer from advertising its product as a scientific cure for obesity.¹⁸ The Court saw the problem as one of jurisdiction because the FTC had not found that any of Raladam's competitors had been harmed by the practice.¹⁹ Dismissing the idea that the FTC's jurisdiction extended beyond cases where harm to competitors had been demonstrated, the Court stated: "Unfair trade methods are not *per se* unfair methods of competition The unfair methods must be such as injuriously affect or tend thus to affect the business of (an offending company's) competitors."²⁰

13. See Neil W. Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225, 230 (1981) (citing H.R. REP. NO. 533, 63d Cong., 2d Sess., pt. 1, at 2 (1914)).

14. *Id.* at 226.

15. H.R. CONF. REP. NO. 1142, 63d Cong., 2d Sess. 19 (1914).

16. See *supra* notes 12-13 and accompanying text.

17. This facet of the FTC's work is beyond the scope of this Note. For a general discussion, see Averitt, *supra* note 13.

18. *Raladam*, 283 U.S. 643 (1931). The FTC had issued a "cease & desist" order, authorized by 15 U.S.C. § 45(c). *Id.* at 646.

19. The FTC simply drew the conclusion, without evidence to support it, that the practice was harmful to competitive and public interests. *Id.* at 646.

20. *Id.* at 649; see also *FTC v. Gratz*, 253 U.S. 421, 427 (1920) (holding the FTC could not enjoin merchants from refusing to sell cotton ties unless purchaser also bought bagging because practice involved no "deception, bad faith, fraud, or oppression" on part of seller); *FTC v. Curtis Publishing Co.*, 260 U.S. 568, 582 (1923) (holding the FTC could not prevent publishing company from enforcing exclusivity provisions of agency contracts with distributors because practice had "long been recognized as proper and unobjectionable").

This narrow view of the FTC's jurisdictional mandate faded somewhat in *FTC v. R.F. Keppel & Bro., Inc.*²¹ In *Keppel*, the FTC had sought to bring to a halt a candy manufacturer's practice of including lottery-type inducements within the candy's packaging as violative of public policy because it encouraged gambling by children.²² The jurisdictional issue arose because any of the manufacturer's competitors were free to include the same inducement in their packaging, so the practice was not "unfair" in the sense of placing other manufacturers at a competitive disadvantage.²³ Nonetheless, the Supreme Court sustained the FTC action, ruling that the FTC's jurisdiction was not limited to actions likely to have anticompetitive consequences.²⁴ Eschewing the idea that the concept of unfairness could be constrained within "fixed and unyielding categories,"²⁵ the Court instead looked to whether "the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy."²⁶ The Court has subsequently noted that *Keppel* "sets the standard by which the range of FTC jurisdiction is to be measured today."²⁷

B. Confirmation of a Greater Consumer Protection Role: From *Wheeler-Lea* to *Sperry*

While the courts were allowing the FTC greater latitude in asserting its unfairness jurisdiction, Congress was also taking steps to expand the Commission's jurisdiction. These efforts culminated in the Wheeler-Lea amendment to the Federal Trade Commission Act.²⁸ The amendment gave the FTC authority to regulate "unfair or deceptive acts or practices," and was designed to relieve the FTC of the burden of demonstrating competitive harm in unfairness proceedings,²⁹ as well as to allow the Commission

21. *Keppel*, 291 U.S. 304 (1934).

22. *Id.* at 308.

23. *Id.*

24. *Id.* at 314. The case signaled a trend toward significant judicial deference to the FTC in defining the contours of "unfair" when the FTC's findings are supported by the evidence. *Id.*

25. *Id.* at 310.

26. *Id.* at 313. The case is also noteworthy because of the Court's reference to the idea of special unfairness protection where children are involved. "[H]ere the competitive method is shown to exploit consumers, children, who are unable to protect themselves . . . Such devices have met with condemnation throughout the community." *Id.* *Keppel* serves as well to illustrate the Court's early understanding of the difference between the FTC's power with respect to deceptive, as opposed to unfair, practices: "[W]e may take it that [Keppel's candy-packaging practice] does not involve any fraud or deception." *Id.* at 309; see *infra* notes 31-32.

27. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 242 (1972).

28. Wheeler-Lea Amendment, ch. 49, §3, 52 Stat. 111 (1938).

29. Averitt, *supra* note 13, at 234.

to focus more directly on consumer injury than it had previously done.³⁰ This more expansive view of the FTC's consumer protection role was recognized by the Supreme Court in *FTC v. Sperry & Hutchinson Co.*,³¹ where the Court held that the FTC was empowered to sit "like a court of equity" in determining whether a given practice was unfair.³² The Court further noted that Wheeler-Lea had "charged the FTC with protecting consumers as well as competitors,"³³ thus laying to rest any doubt that the FTC's regulatory power extended beyond merely policing competition among rivals and encompassed actions impacting consumers directly.

II. THE FTC'S EFFORTS TO REGULATE COMMERCIAL ADVERTISING AND THE CONGRESSIONAL RESPONSE

A. Efforts to Develop Standards of Unfairness

When the FTC's jurisdiction was thought to be limited to anti-competitive activity injurious to competition, the concept of direct unfairness to consumers was almost by definition of minimal practical import. However, with the passage of the Wheeler-Lea Amendment and the broadened understanding of the FTC's authority, the bounds of the term "unfair" and the power it granted took on added significance. Although the FTC did not immediately begin a vigorous enforcement of its unfairness mandate,³⁴ by 1964 it had developed three criteria to consider when probing for consumer unfairness: (1) whether the practice injures consumers, (2) whether the practice violates established public policy, and (3) whether the practice is unethical or unscrupulous.³⁵ In *Sperry*, the Supreme Court tacitly approved these criteria,³⁶ and Congress made explicit the power of the FTC to promulgate standards of unfairness with the passage of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, which authorized the FTC to prescribe "interpretive

30. *Id.* at 234 n.63.

31. *Sperry*, 405 U.S. 233 (1972).

32. *Id.* at 244.

33. *Id.*

34. During much of this time, enforcement was focused on "deceptive" practices. See generally *Averitt*, *supra* note 13. While the FTC's power to correct "deceptive" practices is contained in the same phrase that gives rise to its unfairness authority, the powers are not considered coterminous ("unfair or deceptive acts or practices . . . are declared unlawful.") 15 U.S.C. § 45(a)(1) (1988). See Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction, 4 Trade Reg. Rep. (CCH) ¶ 13,203, at 20,907 (June 23, 1988) [hereinafter Policy Statement].

35. Policy Statement, *supra* note 34, at 20,908.

36. *Sperry*, 405 U.S. at 244 n.5.

rules, general statements of policy, and substantive trade regulation rules with respect to unfair or deceptive acts."³⁷

B. Enforcement of the Unfairness Standard in the Advertising Context

The FTC's application of unfairness concepts to commercial advertising began in earnest with the Cigarette Rule,³⁸ which served as the forum by which the FTC articulated the general unfairness standards listed above. There, the FTC concluded that the failure to include health warnings on cigarette advertising was unfair under these criteria.³⁹

Throughout the 1970s, the FTC utilized its broadened mandate to successfully bring a number of actions against advertisers, often on the basis that their advertisements were unfair because they either posed a risk of physical harm to children or enticed children to engage in risky or dangerous activities. In *In re General Foods Corp.*, for example, the FTC won a consent decree from the maker of Post Grape Nuts to take off the air an advertisement showing a known naturalist picking and eating berries, in part on the ground that the ad would "have the tendency or capacity to influence children to engage in behavior which is harmful or involves the risk of harm."⁴⁰ A similar result was reached in *In re Mego International*, where the FTC initiated action against the manufacturer of a Cher doll on the grounds that an ad showing a child using an electric dryer without the parent visible on-screen could cause children to use "electrical personal grooming devices without the close and watchful supervision of an adult."⁴¹ Given the significant grant of definitional discretion delegated to the FTC by the Magnuson-Moss Act, advertisers had little hope of

37. H.R. CONF. REP. NO. 1606, 93d Cong., 2d Sess. 31 (1974). The Act also expanded the FTC's jurisdiction to include matters "affecting commerce." *Id.*

38. 16 C.F.R. § 408 (1965).

39. The Cigarette Rule was also based in large part on a deception theory. 29 Fed. Reg. 8324, 8350-54 (1964).

40. *General Foods Corp.*, 86 F.T.C. 831, 832 (1975).

41. *Mego International*, 92 F.T.C. 186, 187 (1978). *See also* *Philip Morris, Inc.*, 82 F.T.C. 16 (1973) (approving consent decree to cease distributing unsolicited razor blades directly to homes: "[T]he distribution of the razor blades . . . constitutes a hazard to the health and safety of persons . . . particularly young children."); *Uncle Ben's*, 89 F.T.C. 131 (1977) (approving consent decree to cease airing ads showing children in proximity to foods being cooked or trying to cook without adult supervision). For an example of a (futilely) contested FTC unfairness action where the agency's rationale did not rely on particular danger to children, see *Pfizer*, 81 F.T.C. 23 (1972).

prevailing once an action had been initiated, and often found it most advantageous merely to settle.⁴²

III. APPLICATION OF THE FTC'S UNFAIRNESS STANDARD TO JOE CAMEL ADVERTISING

Although the FTC's three-part unfairness test has never been formally codified, courts have utilized the three factors to review FTC unfairness rulings,⁴³ and FTC action against Joe Camel advertising would properly be analyzed under these terms.

A. Consumer Injury

Consumer injury is the most important of the three factors to consider when evaluating a possible unfairness action because a finding of consumer injury can, even absent the presence of the other unfairness criteria, suffice to warrant a finding of unfairness.⁴⁴ To bring about an unfairness determination, an injury must be: (1) substantial, (2) not outweighed by any countervailing benefits to consumers or competition, and (3) one that consumers themselves could not reasonably have avoided.⁴⁵

1. Substantiality of the Injury

To determine whether Joe Camel advertising causes a substantial injury, it is necessary to delineate with some precision exactly what "injury" there is. To be sure, smoking itself causes injury. Estimates are that over four hundred thousand deaths per year can be directly traced to

42. As the FTC asserted its consumer unfairness authority more forcefully, reaction to its approach, which had initially been very favorable (as evidenced by the passage of the Magnuson-Moss Act), began to change for the worse. Concerns about the lack of discernible standards, *see, e.g.,* William Erxleben, *The FTC's Kaleidoscopic Unfairness Statute: Section 5*, 10 GONZ. L. REV. 333 (1975); Caswell Hobbs, *Unfairness at the FTC—The Legacy of S&H*, 47 ANTITRUST L.J. 1023 (1978); Teresa Schwartz, *Regulating Unfair Practices Under the FTC Act: The Need for a Legal Standard*, 11 AKRON L. REV. 1 (1977), coupled with controversial FTC actions in the unfairness area, *see, e.g.,* *Children's Advertising, Notice of Proposed Rulemaking*, 43 FED. REG. 17967 (1978), led to a call for a reining in of the FTC's power. The decline of the "consumerism" movement of the early 1970s has also been cited as a reason for this change. *See* Richard Craswell, *The Identification of Unfair Acts and Practices by the Federal Trade Commission*, 1981 WIS. L. REV. 107, 108. As a result, Congress in 1980 suspended the FTC's authority to initiate any proceedings against commercial advertisers on the ground of unfairness. Pub. L. No. 96-252, 94 Stat. 374 (1980). This prohibition was extended for one year by Pub. L. No. 97-377 (1981), but was not extended thereafter.

43. *See, e.g.,* *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354 (3d Cir. 1988); *American Fin. Serv. v. FTC*, 767 F.2d 957 (D.C. Cir. 1985).

44. Policy Statement, *supra* note 34, at 20,908.

45. *Id.* at 20,908-09.

smoking.⁴⁶ However, to make the inferential step from saying that smoking causes injury to saying that Joe Camel advertising can be banned as unfair because it causes injury requires a somewhat different conclusion. It would have to be shown that advertising causes consumption of cigarettes, thereby causing the injury, and that Joe Camel advertising is somehow different from and more harmful than other types of cigarette advertising.

Whether advertising of cigarettes causes an increase in their consumption has been a subject of significant scientific and marketing literature.⁴⁷ Results of these studies have shown a correlation or relation between advertising and cigarette consumption, but have not conclusively demonstrated that advertising causes an increase in demand for cigarettes.⁴⁸ Certainly, this is consistent with the position of the tobacco industry, which claims that its advertising is aimed solely at affecting brand choice among individuals who already smoke.⁴⁹ However, the FTC need not have conclusive evidence of the causal connection for its finding to be upheld. Courts give significant deference to an FTC factual finding,⁵⁰ and thus would likely uphold an FTC conclusion that there is a causal link between cigarette advertising and consumption.

Another somewhat related basis by which the FTC could conclude that cigarette advertising causes an increase in consumption is the theory

46. *Death Toll From Smoking Is Rising*, N.Y. TIMES, Feb. 1, 1991, at A9, A14.

47. See, e.g., James J. Boddewyn, *There is No Convincing Evidence for a Relationship Between Cigarette Advertising and Consumption*, 84 BRIT. J. ADDICTION 1255 (1989); Jane Chetwynd et al., *The Influence of Advertising on Tobacco Consumption: A Reply to Jackson & Ekelund*, 84 BRIT. J. ADDICTION 1251 (1989); John D. Jackson & Robert B. Ekelund, *The Influence of Advertising on Tobacco Consumption: Some Problems With Chetwynd et al.'s Analysis*, 84 BRIT. J. ADDICTION 1247 (1989).

48. The scientific debate has been marked in part by a somewhat partisan tone:

Both groups [the tobacco industry and smoking control advocates] enthusiastically cite and publicize research papers whose conclusions support their own policy and political interests and attack the methodology or funding of studies which do not please them. Few witnessing these debates are in any position to assess the credibility of the arguments advanced, with the ascendant view at any given time likely to more reflect presentational skill than the substance of the research under discussion.

Simon Chapman, *The Limitations of Econometric Analysis in Cigarette Advertising Studies*, 84 BRIT. J. ADDICTION 1267 (1989). It is therefore relevant that it was a group of anti-smoking researchers that recently observed, "[D]ata on the direct effects of cigarette advertising on demand for cigarettes are inconclusive. Econometric studies show little or no effects of cigarette advertising on overall demand for cigarettes." Michael Klitzner et al., *Cigarette Advertising and Adolescent Experimentation With Smoking*, 86 BRIT. J. ADDICTION 287, 288 (1991).

49. See Fischer et al., *supra* note 2, at 3145.

50. See *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986).

that it targets children and adolescents. This has been a particular focus of the scientific literature,⁵¹ and it would allow the FTC to consider other relevant factors, such as the fact that the cigarette industry is unique in its requirement of finding new smokers. Each year one million smokers quit and almost four hundred thousand die from tobacco-related illnesses.⁵² In the absence of new smokers, the industry would be unable to sustain itself. Further, the decision whether to start smoking is made at a particularly early age: 99 percent of all smokers start before age twenty, and 60 percent start before age fifteen.⁵³ Given these facts, along with the astronomical amount of money spent on cigarette advertising,⁵⁴ it is simply not credible that the sole purpose of cigarette advertising is to convince those already smoking to switch brands, especially given the low elasticity of brand preference relative to advertising in the cigarette category.⁵⁵

The idea of focusing on injury to children would further provide a basis for singling out Joe Camel advertising. Joe Camel has been demonstrated to appeal to children. For example, in a recent study, six-year-old children were shown to be as familiar with the Joe Camel logo (i.e., these children could match a picture showing just Joe Camel, with no reference to brand or product, with a picture of a cigarette) as they were with a Mickey Mouse logo.⁵⁶ Further, Joe Camel recognition rates were significantly higher than those for the Marlboro Man.⁵⁷ In another study, teenagers exposed to Joe Camel advertising were shown to have higher recall and recognition of the ad than adults, and also found the ads more appealing than adults did.⁵⁸

In sum, it has been shown that children see, remember, and respond positively to Joe Camel. Further, Camel brand-share among the under-eighteen market has risen from half a percent before Joe Camel to almost 33 percent now.⁵⁹ Sales to the under-eighteen market have been estimated to account for about one-quarter of all Camel sales.⁶⁰ R.J. Reynolds claims that the ads are targeted to smokers in their early twenties,⁶¹ but docu-

51. See *supra* notes 2 and 47.

52. Kenneth Polin, *Argument for the Ban of Tobacco Advertising: A First Amendment Analysis*, 17 HOFSTRA L. REV. 99, 110 (1988) (citing the Surgeon General's findings).

53. *Id.*

54. *Id.*

55. See Fischer et al., *supra* note 2, at 3148.

56. *Id.* at 3147.

57. *Id.* at 3146.

58. DiFranza et al., *supra* note 2, at 3151.

59. *Id.* at 3151.

60. Auerbach, *supra* note 6, at D9.

61. DiFranza et al., *supra* note 2, at 3149.

ments from a recent case suggest that the industry is aware of the effect its advertising has on children.⁶² The FTC has noted that "unwarranted health and safety risks" are among the types of injuries which may warrant a finding of unfairness.⁶³ If the FTC found that Joe Camel advertising caused consumer injury by causing children to smoke, the deferential nature of judicial review of administrative fact findings suggests this would be upheld.

2. Countervailing Benefits

The FTC has said that it will look at whether a practice is "injurious in its net effects" in making a determination of unfairness.⁶⁴ In other words, if a practice causes injury, it will still not be found to be unfair if the costs of a remedy would exceed the costs brought about by the practice. However, in the case of Joe Camel advertising, it is difficult to discern any tangible countervailing benefit. The Supreme Court has noted that much of the value of commercial speech is found in its informational value.⁶⁵ Yet to characterize Joe Camel as providing any "informational value" is to stretch that term farther than it was perhaps meant to be stretched. Further, by the omission of almost all specific product information (other than that required by law) and the substitution of cartoon imagery, the informational value of Joe Camel has been reduced to an absolute minimum. Indeed, it would not be difficult to characterize these omissions as having a negative informational value, since they obfuscate the factual data that one would expect to play a role in consumer decision making.⁶⁶ Countervailing societal benefits, therefore, do not outweigh the injury caused by Joe Camel.

3. Ability of Consumers to Avoid Injury

The basis of the FTC's focus on the ability of consumers to avoid injury is the belief that the market is "self-correcting . . . we rely on consumer choice—the ability of individual consumers to make their own private purchasing decisions without regulatory intervention—to govern the

62. See *FTC in a Bind Over Cigarette Ads*, CHI. TRIB., Aug. 12, 1993, at N22 (quoting R.J. Reynolds spokesperson).

63. Policy Statement, *supra* note 34, at 20,908.

64. *Id.* at 20,909.

65. "Society may also have a strong interest in the free flow of commercial information . . . Advertising, however tasteless and excessive it sometimes may seem, is nevertheless dissemination of information as to who is producing and selling what product, for what reason, and at what price." *Virginia State Bd. of Pharmacy v. Virginia Citizens Council, Inc.*, 425 U.S. 748, 763-64 (1977).

66. See Polin, *supra* note 52, at 101.

market."⁶⁷ To the extent that Joe Camel advertising entices children or adolescents to begin smoking, this "market correction" concept does not apply. Once a child begins smoking, he is exposing himself to a drug that is more addictive than heroin,⁶⁸ and which causes many deaths each year as well as illnesses ranging from cardiovascular disease to many forms of cancer.⁶⁹ It may be true that adults can rationally make this kind of choice, and we certainly do not want to reduce the adult population to viewing only that which is suitable for children,⁷⁰ but when an advertisement for a product that is illegal for children to use uniquely appears to target children, and indeed, is more effective at promoting that product to children than to adults, it seems logical to expect that many children will be lured in. Once they become smokers, the odds are they will stay smokers.⁷¹

B. Established Public Policy

Although the FTC focuses primarily on consumer injury when making an unfairness evaluation,⁷² it will also look to public policy.⁷³ Occasionally, violation of public policy will serve as evidence that an injury is present, but more often it is used to ascertain whether an FTC finding of injury to consumers is in accord with legislative and judicial determinations in the area.⁷⁴ Public policy analysis thus serves primarily as a supplemental, rather than an independent, criterion of unfairness evaluation.

Insofar as Joe Camel advertising encourages children to smoke, one need look no further than the laws against selling tobacco products to minors to find a public policy supporting an unfairness action.⁷⁵ This is not to say that these laws show evidence of an independent ground for an unfairness action. If the states want to prevent children from seeing Joe Camel ads, they are certainly as capable of trying to prohibit them as is the FTC, at least in the abstract. Rather, it merely suggests that the general and

67. Policy Statement, *supra* note 34, at 20,909.

68. Board of Trustees, Report 6: Tobacco Product Liability, 255 JAMA 1034, 1034 (1986) (quoting former Director of National Institute of Drug Abuse).

69. L.O. Gostin & A.M. Brandt, *Criteria for Evaluating a Ban on the Advertising of Cigarettes*, 269 JAMA 904, 905 (1993).

70. *FCC v. Pacifica Found.*, 438 U.S. 726, 760 (1978) (Powell, J., concurring).

71. Polin, *supra* note 52, at 110.

72. Policy Statement, *supra* note 34, at 20,908.

73. *Id.* at 20,909. "Public Policy" is defined in the Policy Statement as including that which "has been established by statute, common law, industry practice, or otherwise." *Id.*

74. Policy Statement, *supra* note 34, at 20,909 to 20,909-2.

75. *See, e.g.*, CAL. PENAL CODE § 308 pt. 1 title 9, ch. 7 (Deering 1993) (\$500 fine for first violation); OHIO REV. CODE ANN. 29 § 2927.02 (Anderson 1993) (third degree misdemeanor); NY PUB. HEALTH § 1399-aa, -dd (McKinney 1993).

well-established policy against underage smoking is an indication that the FTC can focus on the injury Joe Camel has on children as (illicit) consumers of cigarettes.

C. *Is the Practice Unethical or Unscrupulous?*

Although the element of unethical or unscrupulous conduct was included by the FTC in its Policy Statement, the FTC noted that "[c]onduct that is truly unethical or unscrupulous will almost always injure consumers or violate public policy as well."⁷⁶ For that reason, the FTC will not rely on this element as a basis for a finding of unfairness, but that does not mean that the FTC will need to be blind to the obvious unscrupulousness of advertising cigarettes to children, or the (perhaps) even more egregious action of denying it while doing it.⁷⁷

IV. CONSTITUTIONAL IMPLICATIONS OF AN FTC UNFAIRNESS PROCEEDING AGAINST JOE CAMEL

Assuming that a ban on Joe Camel advertising is within the statutory power of the FTC, the constitutional implications of such an action must be considered. To do this, it will be helpful to trace the development of the Supreme Court's understanding of the unique position of commercial speech within the First Amendment spectrum.

A. *Development of the Commercial Speech Doctrine*

Constitutional protection for commercial speech is of relatively recent origin.⁷⁸ Traditionally, it was held by the Court to be outside the purview

76. Policy Statement, *supra* note 34, at 20,909-03.

77. Shiver, *supra* note 6, at D12 (quoting R.J. Reynolds spokesperson—"If we believed for a minute that the Camel ad induces children to smoke, we wouldn't wait for the FTC or anyone else to act. We would immediately change the campaign.").

78. The Supreme Court has struggled somewhat to develop precise boundaries around what constitutes "commercial speech." As Justice Stevens noted, it is not an unimportant issue, "[b]ecause 'commercial speech' is afforded less constitutional protection than other forms of speech, it is important that the commercial speech concept not be defined too broadly, lest speech deserving of greater constitutional protection be inadvertently suppressed." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 579 (1980) (Stevens, J., concurring) (citation omitted). In *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983), the Court articulated three definitional factors, not all of which were required: (1) the speech is a paid-for advertisement, (2) that refers to a specific product, and (3) that is published in the economic interest of the speaker. *Id.* at 66-67. This Note treats the Joe Camel campaign as falling within the rubric of commercial speech, though it should be noted that other types of speech by tobacco companies related to their products seem to tread close to the line between commercial and non-commercial speech. In *R.J. Reynolds*, 113 F.T.C. 344 (1986), the FTC complained against publication by a tobacco company of

of the First Amendment.⁷⁹ In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, however, the Court extended First Amendment protection to consumer speech, holding that "truthful information about entirely lawful activity" could not be completely suppressed by a state.⁸⁰ Taking note of the "common sense differences" between commercial speech and other forms of expression, the Court extended a lesser degree of protection to commercial speech than core political speech receives.⁸¹ For example, it suggested that protection of commercial speech hinged on its truth and expressed tolerance for labeling requirements and consumer warnings.⁸²

The Court refined its test for evaluating restrictions on commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁸³ The Court in *Central Hudson* articulated a four-part test to evaluate restrictions on commercial speech. First, the speech at issue "must concern lawful activity and not be misleading" to come within the protection of the Constitution at all.⁸⁴ Second, if the speech is protected, the government must assert a substantial interest in restricting it.⁸⁵ Third, the restriction must directly advance the asserted interest.⁸⁶ Fourth, the restriction must be no more restrictive than necessary to advance the interest.⁸⁷

B. *Subsequent Reductions in the Protection Afforded Commercial Speech*

The *Central Hudson* test, though purportedly derived from the *Virginia Pharmacy* analysis, was in fact seen by some as a substantial lessening in the protection afforded commercial speech.⁸⁸ In *Posadas de*

an ad titled *Of Cigarettes and Science* which purported to cast doubt on the uniformity within the scientific community about the dangers of smoking. The company asserted that the ad was not commercial speech, but fully protected comment on an issue of public concern. *Id.* The suit was settled by consent decree. The definitional ambiguities as they relate to product health claims are highlighted in Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 VAND. L. REV. 1433 (1990).

79. See, e.g., *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

80. *Virginia Pharmacy*, 425 U.S. 748, 773 (1976).

81. *Id.* at 771-72 n.24.

82. *Id.*

83. *Central Hudson*, 447 U.S. 557 (1980).

84. *Id.* at 566.

85. *Id.*

86. *Id.*

87. *Id.*

88. Among the doubters was the author of *Virginia Pharmacy* himself. "I believe the test now evolved and applied by the Court is not consistent with our prior cases and does not provide adequate protection for truthful, non-misleading, non-coercive commercial

Puerto Rico Assoc. v. Tourism Co. of Puerto Rico,⁸⁹ the Court dealt yet another blow to the strength of the commercial speech doctrine. *Posadas* involved a ban on advertising for casino gambling construed by the Superior Court of Puerto Rico to apply only to ads directed to residents of Puerto Rico, as opposed to tourists.⁹⁰ Casino gambling was a legal activity in Puerto Rico for both tourists and residents, so the ads clearly came within the first prong of the *Central Hudson* test.⁹¹ The casinos argued that, since the underlying activity was legal, advertising for the activity could not be suppressed completely.⁹² The Court flatly rejected this, stating, "[T]he greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."⁹³ Taken to its logical extreme, this argument would in effect permit the state to ban almost any type of commercial advertising, at least that which does not relate to the exercise of a constitutionally-protected right.⁹⁴

Another significant lessening in the scrutiny of commercial speech regulations occurred in *Board of Trustees v. Fox*.⁹⁵ Relying on the "subordinate position [of commercial speech] in the scale of First Amendment values,"⁹⁶ the Court in *Fox* concluded that the fourth prong of *Central Hudson* did not require a legislature to use the least-restrictive means when restricting commercial speech, but instead required only that a "fit" be established between the end sought and the means used to achieve it.⁹⁷ Since the means analysis had been the main vehicle through which the Court had invalidated restrictions on commercial speech,⁹⁸ the

speech." *Id.* at 573 (Blackmun, J., concurring). In support of the argument that *Central Hudson* represented an outright rejection of the anti-paternalism theme of *Virginia Pharmacy*, see Krista L. Edwards, Comment, *First Amendment Values and the Constitutional Protection of Tobacco Advertising*, 82 NW. U. L. REV. 145, 153 (1987).

89. *Posadas*, 478 U.S. 328 (1986).

90. *Id.* at 336.

91. *Id.* at 340-41.

92. *Id.* at 345.

93. *Id.* at 345-46.

94. The Court distinguished cases involving the exercise of constitutionally-protected rights. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (recognizing a constitutional right to abortion).

95. *Fox*, 492 U.S. 469 (1989).

96. *Id.* at 478.

97. *Id.* at 480.

98. The Court used the fourth prong to invalidate the regulation at issue in *Central Hudson* itself. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 569-70 (1980). It also played a role in the decision in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976) (citing examples of restrictions short of a ban, such as warning labels and disclaimers).

weakening of this part of the *Central Hudson* test represented a significant retreat from vigorous application of the test.

C. *Application of the Central Hudson Test to Joe Camel Advertising*

1. Is the Speech Related to Lawful Activity and Not Deceptive or Misleading?

Cigarette smoking is, of course, a lawful activity. The type of "deception" arguably involved in cigarette advertising—depicting cigarette smoking as associated with healthful, active lifestyles, while failing to discuss the health risks associated with smoking—is not likely to be considered deceptive or misleading, absent overtly false health claims made in a given ad.⁹⁹ Advertising cigarettes to children, on the other hand, would certainly not be related to lawful activity. However, given that the tobacco industry continues to deny that its advertising targets children, it is unlikely that this rationale could be used to deny Joe Camel advertising the protection of the First Amendment, and the first prong of the *Central Hudson* test would be cleared.

2. Is the Government Interest Substantial?

The interest in preventing children from taking up smoking is certainly a substantial interest, given the harmful effects of smoking itself and the greater governmental interest in protecting the welfare of children.¹⁰⁰ Generally, the Supreme Court has recognized that suppressing demand for activities that are detrimental to "the health, safety, and welfare of its citizens" qualifies as a substantial government interest,¹⁰¹ so a court would almost certainly find the interest asserted here substantial.

3. Does the Regulation Directly Advance the Interest?

It is this element of the *Central Hudson* test that would appear to pose some difficulty for a ban on Joe Camel advertising, since studies have yet to establish any direct causal link between advertising and an increase in cigarette consumption, nor has Joe Camel been conclusively shown to have the effect of causing children to smoke. However, the Court in *Posadas* showed significant deference to the legislative judgment that advertising

99. See Gostin & Brandt, *supra* note 69, at 905.

100. See generally *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

101. See, e.g., *Posadas de P.R. Assoc. v. Tourism Co. of P.R.*, 478 U.S. 328, 341-42 (1986).

increased demand for gambling among Puerto Rican residents. "[T]he Puerto Rico Legislature obviously believed . . . that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one."¹⁰² Indeed, the *Posadas* Court opined that the mere fact of litigating against a ban is probative of the belief (of the litigant) that the advertising will increase demand for a product.¹⁰³ The courts allow similar deference to FTC findings of fact, upholding them unless they are not supported by evidence.¹⁰⁴ A court would likely find, therefore, that a ban on Joe Camel would directly advance the interest of preventing children from starting to smoke.

4. Is the Regulation No More Broad Than is Necessary?

The requirement of this prong of the *Central Hudson* test is not, as has been indicated, that the regulation be the least restrictive means of achieving a desired governmental objective, but rather that there be a "fit that is not necessarily perfect, but reasonable," or proportional to the objective.¹⁰⁵ Incremental regulation of cigarette advertising has already been attempted,¹⁰⁶ and while it is conceivable that other means short of a ban could be used, the Court has said "[w]e think it is up to the legislature to decide whether or not such a 'counterspeech' policy would be as effective."¹⁰⁷

It is important to note that a ban on Joe Camel advertising would not prevent R.J. Reynolds from speaking out on issues related to cigarette smoking, nor would it even prevent them from advertising just as heavily for Camel cigarettes as they do now. The only effect would be to remove from the "stream of commercial information"¹⁰⁸ an ad campaign demonstrated to primarily appeal to children and adolescents. While there can be no doubt that this is a selective regulation, the Court in *Posadas* was faced with a situation where only a certain type of advertising for casino

102. *Id.*

103. *Id.*

104. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986).

105. *See Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989).

106. Tobacco Education & Child Protection Act, H.R. 3614, 103d Cong., 1st Sess. §3 (1993) (latest version of earlier Tobacco Control & Health Protection Act); H.R. 5041, 101st Cong., 2d Sess. (1990); H.R. 1493, 101st Cong., 1st Sess. (1989); H.R. 1532, 100th Cong., 1st Sess. (1987); H.R. 1272, 100th Cong., 1st Sess. (1987); Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1335 (1988) (effective Jan. 2, 1971); Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 1333, §§ 4401-08 (1988).

107. *Posadas*, 478 U.S. at 344.

108. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976).

gambling—that aimed at Puerto Rican residents—was banned, while advertising for exactly the same gambling was allowed, as long as it was aimed at tourists. Indeed, if a general ban on cigarette advertising were sought on the theory that it appealed to children, that might serve to weaken the argument that the means sought were proportional to the ends desired, since a significantly greater amount of speech—speech that has not been linked as greatly to children as has Joe Camel—would be banned. Further, this would have the less desirable (and certainly more constitutionally burdensome) effect of inhibiting the dissemination of information about cigarette smoking to adults, including those who may want to receive information about lower-tar and lower-nicotine brands, and to expectant mothers, who may not find out about the harmful effects of tobacco as easily without the advertising.

CONCLUSION

A ban on Joe Camel advertising is within the statutory power of the FTC pursuant to its power to regulate unfair advertising practices. It would also withstand constitutional scrutiny under the *Central Hudson* test for evaluating regulations on commercial speech. Further, given the objective of reducing demand for cigarettes by keeping children from starting to smoke, a selective ban on Joe Camel advertising is preferable constitutionally to a more general ban on cigarette advertising, because it will not prevent the dissemination of advertising and information about cigarettes generally, but will instead focus solely on a particular ad campaign which has been shown to hold greater appeal for children than it does for adults.