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Erica Swecker

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JOE CAMEL: WILL "OLD JOE" SURVIVE?

Justice Brandeis once wrote: "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."¹

Cigarette advertisements featuring a "sunglass-sporting, phallic-nosed,"² camel named Joe, surrounded by his "cool, jazz-playing, pool-hustling, poker-playing, cigarette-smoking"³ crowd of camel-friends, have been accused of enticing children to smoke. In 1991, the nation's top two health officials, Secretary of Health and Human Services Louis W. Sullivan and Surgeon General Antonia C. Novello, battled with tobacco companies over the use of cartoon characters to advertise cigarettes.⁴ Since then, twenty-seven state attorneys general have petitioned the Federal Trade Commission (FTC) to sue R.J. Reynolds (RJR) to ban Joe Camel advertisements.⁵ While she was Surgeon General, Jocelyn Elders attacked cigarette advertising "that she said . . . appealed directly to young people, especially RJR Nabisco's popular 'Joe Camel' character."⁶

Public interest advocates want Joe Camel banned because they claim the advertisements target children and adolescents in

1. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

2. *Tobacco War Is Puff Away: Traders Think Smokers' Loyalty to High-Priced Brand Cigarettes, Past Profits Are Fading Fast*, ARIZ. REPUBLIC, Apr. 16, 1993, at A15 [hereinafter *Tobacco War*].

3. Daniel Mendel-Black, *Leader of the (Cigarette) Pack, Me and That Camel Ad: The Seduction of America's Youth*, WASH. POST, Dec. 15, 1991, at C5.

4. Paul Farhi, *Kool's Penguin Draws Health Officials' Heat: Surgeon General, HHS Claim Ad Campaign Is Aimed at Minors*, WASH. POST, Oct. 23, 1991, at C1. Novello said, "The use of themes in tobacco advertising that appeal to young people is disgraceful." *Id.* Sullivan stated, "Cartoon figures can't hide the truth: Smoking is the No. 1 preventable cause of death in America." *Id.*

5. Paul Farhi, *Push To Ban Joe Camel May Run Out of Breath*, WASH. POST, Dec. 4, 1993, at C1.

6. John Schwartz, *Report Cites Teenagers' Tobacco Use: Rise in Smoking Noted by Surgeon General*, WASH. POST, Feb. 25, 1994, at A1, A18.

an effort to sell cigarettes.⁷ Tobacco companies refute this accusation, arguing that Joe Camel is aimed at smokers of legal age in an effort to maintain brand loyalty or encourage brand switching.⁸ Initially, the FTC had been reluctant to enter this controversy because of the constitutional questions involved. In addition, the FTC has been struggling with Congress to define its role and authority to regulate advertising and protect consumers. A decision regarding a ban of Joe Camel advertisements came at a critical time in this debate. Despite pressure to institute a ban, on May 31, 1994, the FTC, by a three-to-two vote, decided not to take any action against Joe Camel.⁹ Accordingly, the FTC does not pose a current threat to Mr. Camel. Nevertheless, with the increasing pressure on the cigarette industry, a renewed assault on Joe Camel by Congress, the courts, other administrative agencies, or future FTC commissioners is likely.

The Joe Camel advertisements qualify as commercial speech under the First Amendment.¹⁰ In the 1993-94 Term, the Supreme Court decided three commercial speech cases in an effort to clarify the commercial-speech doctrine.¹¹ This Note examines these three cases and their effect on the commercial speech doctrine. Analyzing these cases and the Court's approach when children are involved, this Note attempts to determine the standard the Court should use to decide whether a ban on Joe Camel advertisements would violate the First Amendment. Next, this Note discusses the FTC's authority to regulate commercial speech and the First Amendment issues implicated by such regulation. This Note will comment on the FTC's decision not to ban Joe Camel advertisements in light of these First Amendment concerns. Finally, this Note will address the future alternatives available to opponents of Joe Camel and the likelihood that banning Joe Camel would be successful.

7. *U.S. Urged To Escalate Tobacco War*, WASH. POST, Jan. 12, 1994, at A17.

8. Susan Cohen, *Smooth Sell*, WASH. POST MAG., Feb. 20, 1994, at 8, 12.

9. *Camel Ad Gets a Reprieve from the FTC*, L.A. TIMES, June 8, 1994, at D3.

10. See *infra* notes 271-74 and accompanying text.

11. See *infra* notes 163-211 and accompanying text.

THE EFFECTS OF CIGARETTE ADVERTISING

From the 1950s to the late 1980s, the "Marlboro Man" made Marlboro cigarettes the most successfully marketed cigarette in the United States.¹² In 1988, however, RJR launched a \$75 million-a-year advertising campaign to sell its Camel cigarettes.¹³ The advertisements featured "smooth" cartoon character Joe Camel.¹⁴

Joe Camel has been a highly effective advertising campaign. Before "Old Joe," Marlboro held nearly thirty percent of the \$44 billion American cigarette market, but, today, Marlboro's overall market share has dropped to twenty-two percent.¹⁵ Camel, formerly a bottom-rank brand, is now one of the country's top selling brands.¹⁶

Camel's market share has increased, but overall cigarette sales have decreased.¹⁷ In the United States, the number of smokers has declined steadily by one million each year.¹⁸ This decrease is predominantly due to education about the negative health effects of smoking.¹⁹ In addition to this decline, some surveys show that from 1988 to 1990, no real growth in teenage smoking occurred,²⁰ and, in 1993, only nineteen percent of high

12. *Tobacco War*, *supra* note 2, at A15.

13. *Id.*

14. Mendel-Black, *supra* note 3, at C5.

15. *Tobacco War*, *supra* note 2, at A15. Marlboro, however, remains the most popular cigarette among teens. See *Teens Drawn In by Cigarette Ads, Study Finds*, CHI. TRIB., Aug. 19, 1994, § 1, at 5 (accounting for 60% of teen sales in 1993) [hereinafter *Teens Drawn In*].

16. *Teens Drawn In*, *supra* note 15, at 5 (reporting an increase to almost 14% in Camel's market share).

17. Joseph R. DiFranza et al., *RJR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children*, 266 JAMA 3149 (1991).

18. *Id.*

19. Gary Lee, *On Both Sides of the Leaf: U.S. Condemns Tobacco, Subsidizes Sales*, WASH. POST, June 4, 1992, at A27. In 1991, the federal government spent \$80 million dollars in its campaign against tobacco use. *Id.* A recent study conducted by the University of California at San Francisco found that television commercials depicting tobacco companies as greedy and uncaring increased threefold the number of smokers who quit or cut back, while a similar study in Minnesota concluded that "long-term community-wide education campaigns that include intensive anti-smoking programs can lower 'the risk of being a smoker' among teens by 40 percent." Don Oldenburg, *Tobacco's Last Gasp?: Toward a Smoke-Free Society*, WASH. POST, Feb. 23, 1993, at C5.

20. Compare NATIONAL INSTITUTE ON DRUG ABUSE, NATIONAL HOUSEHOLD SURVEY

school seniors smoked daily compared to twenty-seven percent in 1975.²¹ More recent surveys, however, show a small increase—seventeen percent to nineteen percent—in smoking among high-school-aged children since 1992.²² An increase of this size does not correlate with the significant increase in the amount of money the tobacco industry has spent on advertising allegedly targeted at young people. The amount of money spent on advertising and promotion increased from \$2.5 billion in 1985²³ to \$4.6 billion in 1994.²⁴

JOE CAMEL: DOES HE ENTICE CHILDREN TO SMOKE?

With the decrease in the number of adult smokers in the United States, many opponents of Joe Camel argue that the only way for cigarette companies to remain profitable is to entice young people to try cigarettes in the hope that they will continue smoking throughout adulthood.²⁵ Evidence to support this theory focuses on the increase in young smokers choosing Camel cigarettes since Joe Camel was introduced into the marketplace. In 1992, Camel was the cigarette chosen by thirty-three percent of America's underage smokers, up from 0.5 percent three years earlier.²⁶ Its market share among eighteen to twenty-four year-olds has almost doubled since the campaign started in 1988.²⁷

ON DRUG ABUSE: MAIN FINDINGS 1990 with NATIONAL INSTITUTE ON DRUG ABUSE, NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: MAIN FINDINGS 1988. The surveys also showed a decline in the number of twelve and thirteen year-olds who had smoked within one month of the survey to two percent in 1990. *Id.*

21. Cohen, *supra* note 8, at 10.

22. *Id.* at 23; see also Jeremy Wallace, *Institute of Medicine Battles Teenage Smoking*, DET. FREE PRESS, Sept. 14, 1994, at 5A (discussing a recent report by the National Academy of Sciences citing recent studies that show that smoking among youths has remained at a constant level and may have increased slightly).

23. Cohen, *supra* note 8, at 11.

24. *Teens Drawn In*, *supra* note 15, at 5.

25. Henry A. Waxman, *Tobacco Marketing: Profiteering from Children*, 266 JAMA 3185 (1991). "To maintain sales, the tobacco industry must rely on more than 1,000 children each day becoming addicted to tobacco." Jay Siwek, M.D., *The Silent Epidemic*, WASH. POST, June 23, 1992, (Health), at 15.

26. John Rosemond, *Banning Joe Won't Lessen Tobacco's Lure*, PHOENIX GAZETTE, Apr. 9, 1992, at E1.

27. 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.

In 1991, the Journal of the American Medical Association (JAMA) published a series of studies suggesting that cigarette advertisements using cartoon characters have a greater appeal to children and adolescents than to adults. One study showed that children between the ages of three and six identify Joe Camel as readily as Mickey Mouse.²⁸ Another study found that seventy percent of adolescents between the ages of twelve and seventeen identified Camel and Marlboro as the most heavily advertised brands.²⁹ The study also found that the younger the individual, the more likely that the teenager would identify Camel as the most heavily advertised cigarette brand.³⁰ The third study found that high school students were more likely to recognize Joe Camel and link his image to cigarettes than were a group of adults.³¹

These studies provide much of the evidence used to assert that cigarette advertisements featuring Joe Camel target adolescents. The effect of cigarette advertising, however, is difficult to assess due to the possible factors contributing to smoking behavior, the methodological problems in the existing studies, and the strong disagreement among researchers about the validity of the studies.³² RJR has also attacked the authority of the JAMA studies. Specifically, the company alleges that one author, Dr. Joseph R. DiFranza, altered the questions and lumped together data to produce the most damaging results.³³ RJR uncovered a

28. 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).

29. John P. Pierce et al., *Does Tobacco Advertising Target Young People To Start Smoking?*, 266 JAMA 3154 (1991). The purpose of the study was to "evaluate whether tobacco advertising encourages teenagers younger than 18 years to start smoking." *Id.* The study compared 1990 California telephone survey data with data from a 1986 telephone survey. *Id.*

30. *Id.*

31. DiFranza et al., *supra* note 17, at 3150-51 (determining if children see, remember, and are influenced by cigarette advertising).

32. Lawrence O. Gostin & Allan M. Brandt, *Criteria for Evaluating a Ban on the Advertisement of Cigarettes: Balancing Public Health Benefits with Constitutional Burdens*, 269 JAMA 904 (1993). "Existing studies do not adequately account for the full range of possible variables that can affect smoking . . ." *Id.* at 906.

33. Maria Mallory, *That's One Angry Camel*, BUS. WK., Mar. 7, 1994, at 94. RJR's attorneys uncovered this evidence in documents subpoenaed for discovery purposes. *Id.* DiFranza dismissed the allegations as another tactic by the tobacco companies to mislead the public. *Id.* at 95; see also Cohen, *supra* note 8, at 12 (reporting that

letter to DiFranza's co-researchers in which DiFranza wrote that "responses to some questions appeared to show the Camel advertisements appeal more to people in their twenties than in their early teens."³⁴ Although Dr. DiFranza denies these allegations,³⁵ a significant number of studies cast doubt on his findings.³⁶ For example, in February of 1994, an RJR-commissioned Roper poll found that "90 percent of kids aged 10 to 17 recognized such ad icons as the Energizer Bunny and the Keebler elves" but only "73 percent recognized Joe [Camel]."³⁷ "Just 3 percent of the kids who knew Joe said they liked cigarettes or that smoking was O.K. A majority said smoking was 'gross' or bad for their health."³⁸

With no incontrovertible evidence that Joe Camel advertisements cause children to smoke, RJR has aggressively challenged efforts to ban Joe Camel. The cigarette maker has also taken steps to demonstrate that it is not attempting to lure children to smoke. For example, RJR recently hired a well-known actor to star in public-service advertisements to discourage underage smoking.³⁹ Moreover, the company maintains its strong in-house ad-review panel to ensure that all advertisements featuring Joe Camel, and marketing ventures using Joe Camel, do not suggest that RJR is pushing cigarettes on children.⁴⁰ Although these efforts are just beginning, they bolster RJR's contention that it is not targeting children with its advertising campaign but instead is encouraging brand switching among adult smokers. Nonetheless, without conclusive evidence that Joe Camel

DiFranza denied manipulating his data and stood behind other findings from the study).

34. Mallory, *supra* note 33, at 95.

35. Cohen, *supra* note 8, at 12.

36. See generally *id.* (noting a study by John Pierce, a researcher at the University of California at San Diego, who found that, in 1988, smoking among sixteen- to eighteen-year-old Californians "reached an all-time low . . . but then suddenly reversed, increasing by 0.7 percent annually in the first years of the Joe Camel campaign"). Compare a survey for Advertising Age in 1992 which put Camel's share of the underage smoking market at eight percent or in fifth place among young people. See *id.*

37. See Mallory, *supra* note 33, at 95.

38. *Id.*

39. *Id.*

40. *Id.*

advertisements are not aimed at children and do not cause them to smoke cigarettes, this debate will continue.

HOW THE GOVERNMENT BANNED CIGARETTE ADVERTISEMENTS

Banning Joe Camel cigarette advertisements would not constitute the first instance of cigarette advertisement regulation. Most notably, television and radio advertisements for cigarettes have not existed since Congress passed The Public Health Cigarette Smoking Act of 1969.⁴¹ However, the events leading to passage of this law were somewhat unusual.

In a 1964 report, the Surgeon General warned that cigarettes were "a health hazard of sufficient importance . . . to warrant appropriate remedial action,"⁴² and the government responded almost immediately. The FTC proposed that cigarette advertisements carry a printed warning, and Congress enacted a law requiring cigarette packages to carry the warning "Caution: Cigarette Smoking May Be Hazardous to Your Health."⁴³ In exchange for this warning, Congress gave the tobacco industry a three year reprieve from FTC, Federal Communications Commission (FCC), state, and local regulation.⁴⁴

Three years later, when the ban on federal regulation of the tobacco industry was about to expire, the FCC instituted a policy requiring broadcasters to air one anti-smoking commercial for every four cigarette commercials.⁴⁵ By 1969, the tobacco compa-

41. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 6, 84 Stat. 87, 89 (codified as amended at 15 U.S.C. § 1335 (1988)) (banning cigarette advertisements on all "medium of electronic communication[s]" beginning January 1, 1971).

42. David D. Vestal, *The Tobacco Advertising Debate: A First Amendment Perspective*, in ADVERTISING AND COMMERCIAL SPEECH 127, 128 (Theodore R. Kupferman ed., 1990).

43. Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 4, 79 Stat. 282, 283 (1965) (current version at 15 U.S.C. § 1333(a) (1988)).

44. Sylvia A. Law, *Addiction, Autonomy, and Advertising*, 77 IOWA L. REV. 909, 914 (1992) (quoting the 1964 report).

45. *Id.* This policy was formed in response to the actions of an anti-smoking activist, John Banzhaf, who appealed to the FCC to ban cigarette advertising in the electronic media. *Id.* The Court of Appeals for the District of Columbia upheld this policy. *See Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968) (upholding, under the fairness doctrine, the FCC requirement that broadcasters air anti-smoking advertisements), *cert. denied*, 396 U.S. 842 (1969).

nies readily agreed to a ban of all cigarette advertising on television and radio because of the negative effects anti-smoking advertisements had on cigarette sales.⁴⁶ Congress obliged and passed a law to that effect.⁴⁷

Over the next fourteen years, Congress strengthened the warning labels on cigarette packages⁴⁸ and forced tobacco companies to include the labels on all cigarette advertisements.⁴⁹ Other than federal warning guidelines, however, "no state or federal law restricts advertisement of cigarettes in the print media."⁵⁰ In fact, Congress has preempted all state regulation of cigarette advertising.⁵¹

In recent years, public sentiment has favored restrictions on cigarette smoking.⁵² Recent legislation prohibits smoking on almost all domestic airline flights,⁵³ and hundreds of retail operations and shopping centers around the country, including Sears and Arby's,⁵⁴ have voluntarily banned smoking. The Environmental Protection Agency in 1993 labeled passive-smoking "as serious a carcinogenic risk as asbestos and radon,"⁵⁵ and ninety-six percent of recently surveyed office and plant manag-

46. Vestal, *supra* note 42, at 129 n.12.

47. Public Health Cigarette Smoking Act § 6, 84 Stat. at 89 (codified as amended at 15 U.S.C. § 1335 (1988)). Broadcasters challenged this ban but were dismissed by memorandum opinion in *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom.* *Capital Broadcasting Co. v. Kleindienst*, 405 U.S. 1000 (1972). Because the broadcasters who filed suit had not lost any right to speech but had only "lost an ability to collect revenue from others for broadcasting their commercial messages," the Court did not rule on the issue of First Amendment protection for a ban on cigarette advertising. *Id.* at 584.

48. *See, e.g.*, The Comprehensive Smoking Education Act of 1984, Pub. L. No. 98-474, § 4(a), 98 Stat. 2000, 2201-02 (codified as amended at 15 U.S.C. § 1333(a) (1988)).

49. *Id.*

50. Law, *supra* note 44, at 915.

51. 15 U.S.C. § 1334(b) (1988) (stating that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes").

52. Vestal, *supra* note 42, at 128.

53. Department of Transportation and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-164, § 335, 103 Stat. 1069, 1098-99 (codified as amended at 49 U.S.C. § 1374(d)(2)(A) (Supp. 1992)).

54. Kirstin D. Grimsley, *More Malls, Stores Curb Smoking*, WASH. POST, Jan. 26, 1994, at A1.

55. *See Oldenburg, supra* note 19, at C5 (quoting the EPA report).

ers said they expect smoke-free workplaces by the year 2002.⁵⁶ Smoking also has been prohibited in the White House, four major league baseball parks, and Colonial Williamsburg and was banned at the 1992 Summer Olympics.⁵⁷

Capitol Hill and the White House have responded to this change in public sentiment. President Clinton previously intimated that he would propose a federal tax on cigarettes to fund health-care reforms,⁵⁸ and bills to regulate cigarette advertising have gained substantial support and expanded in number.⁵⁹ "Members of Congress are . . . uncomfortable supporting tobacco interests anymore."⁶⁰ This increasing support for efforts to restrict cigarette smoking and advertising suggests that a ban on Joe Camel advertisements would be challenged not in Congress but in the courts on constitutional grounds.

ARE CONSTITUTIONAL GUARANTEES MORE EASILY OVERCOME WHEN CHILDREN ARE INVOLVED?

The primary reason for banning Joe Camel advertisements is the deleterious effect they may have on children by encouraging them to smoke cigarettes. In analyzing the constitutionality of such a ban, it is necessary to examine the circumstances in which the United States Supreme Court is willing to limit constitutional guarantees in order to protect children. The Court has recognized a "compelling interest in protecting the physical

56. *Id.*

57. *Id.*

58. See *Kentuckians Burn First Lady in Effigy*, WASH. POST, Aug. 30, 1994, at A2; see also Dana Priest & Michael Weisskopf, *Health Care Reform: The Collapse of a Quest*, WASH. POST, Oct. 11, 1994, at A6; Dana Priest, *Some Hope Seen for Small Health Bill*, WASH. POST, Sept. 14, 1994, at A4.

59. H.R. 2147, 103d Cong., 1st Sess., (1993) (regulating the manufacture, labelling, advertising and promotion of tobacco products); H.R. 1969 and S. 609, 103d Cong., 1st Sess., (1993) (removing the tax deduction for advertisements promoting cigarettes); H.R. 1966, 103d Cong., 1st Sess. (1993) (requiring that cigarette packages and cigarette advertising bear a label stating the addictive quality of nicotine); H.R. 3297, 101st Cong., 1st Sess. (1990) (banning glamorous cigarette advertisements from publications targeted at readers under 21 years of age); H.R. 1493, 101st Cong., 1st Sess. (1989) (restricting the advertising and promotion of tobacco products); H.R. 1272, 100th Cong., 1st Sess. §§ 3(a), 4(2)(D) (1987) (proposing a ban on all cigarette advertising); H.R. 4972, 99th Cong., 2d Sess. §§ 3(a), 5(2)(D), 7 (1986) (same).

60. Cohen, *supra* note 8, at 28 (quoting Congressman Synar).

and psychological well-being of minors.”⁶¹ “[A]lthough children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children’s vulnerability and their needs for ‘concern, . . . sympathy, and . . . paternal attention.’”⁶²

With this overriding concern, the Court has upheld restrictions on the First Amendment rights of children. In *Prince v. Massachusetts*,⁶³ the Court recognized that the “state’s authority over children’s activities is broader than over like actions of adults.”⁶⁴ By sustaining child labor laws that prohibited a nine-year-old girl from selling religious materials on the street,⁶⁵ the Court acknowledged “the interests of society to protect the welfare of children”⁶⁶ and to give them “opportunities for growth into free and independent well-developed men and citizens.”⁶⁷ The Court upheld this statute despite the fact that it “[c]oncededly . . . would be invalid,” if made applicable to adults.⁶⁸

*Ginsberg v. New York*⁶⁹ further illustrates the Court’s concern for a child’s inability to make mature decisions. At issue was a law prohibiting the sale of sexually oriented magazines to minors under the age of seventeen.⁷⁰ Although the First Amendment protected the sale of the magazine to adults,⁷¹ the Court held that the availability of the magazines to children presented a danger against which they should be protected.⁷² “[T]he power of the state to control the conduct of children reaches beyond the scope of its authority over adults and,’ ac-

61. *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989).

62. *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (citing *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971)).

63. 321 U.S. 158 (1944).

64. *Id.* at 168.

65. *Id.*

66. *Id.* at 165.

67. *Id.*

68. *Id.* at 167.

69. 390 U.S. 629 (1968).

70. *Id.* at 631.

71. *Id.* at 634.

72. *Id.* at 641.

cordingly [we] acknowledge a supervening state interest in the regulation of literature sold to children."⁷³

More recently, in *FCC v. Pacifica Foundation*,⁷⁴ a divided Court upheld the power of the FCC to regulate speech over the radio if the speech is "indecent" even though it is not constitutionally obscene.⁷⁵ The holding was narrow, relying on the "unique" aspects of broadcasting such as accessibility to minors.⁷⁶ The radio broadcast at issue involved a monologue in which comedian George Carlin discussed seven "dirty words."⁷⁷ Pacifica broadcast the program in the early afternoon when, the Court assumed, children were likely to be listening.⁷⁸ A majority of the Justices held that the FCC cannot censor material before it is broadcast, but it can review and sanction a broadcast based on its content.⁷⁹ A different majority of the Justices ruled that broadcasting receives limited protection from the First Amendment because it is "a uniquely pervasive presence in the lives of all Americans"⁸⁰ and "is uniquely accessible to children, even those too young to read."⁸¹ However, beyond these grounds, no majority could agree on the constitutional rationale for the holding. Justices Stevens and Rehnquist and Chief Justice Burger suggested that in determining the constitutional protection afforded speech, courts must consider the content and context of the broadcast.⁸² Justices Powell and Blackmun rejected this view and held that society's right to protect children from the "general dissemination of such speech"⁸³ combined with the unique characteristics of the broadcast media permitted

73. *Id.* at 638 n.6 (quoting Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 938-39 (1963)).

74. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

75. *Id.* at 737-38.

76. *Id.* at 749-50.

77. *Id.* at 729.

78. *Id.*

79. *Id.* at 735.

80. *Id.* at 748.

81. *Id.* at 749.

82. *See id.* at 747-48 ("Because content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its context in order to determine whether the Commission's action was constitutionally permissible.").

83. *Id.* at 758.

regulation of the monologue.⁸⁴ Justices Stewart and White dissented on statutory grounds and never reached the constitutional issues.⁸⁵ Justices Brennan and Marshall strongly dissented, finding that no fundamental privacy interest was implicated⁸⁶ and that parental choice determined whether a child should listen to such a broadcast.⁸⁷ Although a narrow holding by a divided Court, *Pacifica* suggests that protection of children is an acceptable rationale for regulating speech and limiting certain First Amendment rights.

The Court has explicitly recognized that a restriction promulgated to protect children must be narrowly tailored so as not to impermissibly infringe upon the rights of adults. In *Butler v. Michigan*,⁸⁸ a unanimous Court struck down a statute that made it an offense to provide materials to the general public that may have a detrimental influence on minors.⁸⁹ The state argued that its compelling interest was to "shield juvenile innocence" and "promote the general welfare."⁹⁰ The Court, however, found the statute to be overbroad and vague because such restrictions "reduce the adult population . . . to reading only what is fit for children."⁹¹ That the purpose of the law was to protect children did not validate the statute.⁹²

In *Sable Communications v. FCC*,⁹³ the Court recognized the compelling interest of protecting minors from exposure to indecent telephone messages.⁹⁴ The Court, however, invalidated the statute because it limited "the content of adult telephone conversations to that which is suitable for children to hear."⁹⁵ In other words, Congress could impose a total ban of "obscene" telephone

84. *Id.* at 759-60 (discussing the intrusive nature of radio).

85. *Id.* at 778-79.

86. *Id.* at 765.

87. *Id.* at 770.

88. 352 U.S. 380 (1957).

89. *Id.* at 383-84.

90. *Id.* at 383.

91. *Id.*

92. *Id.*

93. 492 U.S. 115 (1989).

94. *Id.* at 126.

95. *Id.* at 131.

messages because obscenity is not protected speech,⁹⁶ or Congress could regulate non-obscene, "indecent" dial-a-porn if it narrowly tailored the restriction to protect minors.⁹⁷ A total ban of "indecent" telephone messages, however, is not narrowly tailored because it would act to restrict protected speech among adults.⁹⁸

The government cannot prevent the general public from reading or having access to materials solely on the ground that the materials would be objectionable if read or seen by children.⁹⁹ Such a ban is precisely what proponents of the ban on Joe Camel advocate. They assert that Joe Camel is objectionable if seen by children and want the government to prohibit RJR from employing the figure in its advertisements. Although such a ban may arguably serve the compelling interest of protecting children, it would not be narrowly tailored. Consequently, it would "reduce the adult population . . . to reading only what is fit for children."¹⁰⁰

THE HISTORY OF COMMERCIAL SPEECH

Joe Camel advertisements qualify as commercial speech, and discussing the constitutional validity of a ban on these advertisements requires analysis under the commercial speech doctrine of the First Amendment. In 1942, the Supreme Court took the first step towards defining commercial speech and the extent to which commercial speech could be regulated consistently with the First Amendment.¹⁰¹ In *Valentine v. Chrestensen*,¹⁰² the Supreme Court held that, although speech cannot be unduly burdened, commercial speech does not enjoy a high level of protection.¹⁰³ Although the First Amendment forbids banning all communication by handbill, the Constitution "imposes no such restraint on government as respects purely commercial advertis-

96. *Id.* at 124.

97. *Id.* at 126.

98. *Id.* at 131.

99. *See supra* text accompanying notes 61-98.

100. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

101. *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

102. *Id.*

103. *Id.* at 54.

ing."¹⁰⁴ The Court accorded great deference to the legislature in determining how commercial speech could be proscribed in order to protect the public interest.¹⁰⁵

After *Chrestensen*, the commercial-speech doctrine slowly evolved, inching farther away from unlimited government-regulatory power and toward express, First Amendment protection. In a 1951 case, *Breard v. Alexandria*,¹⁰⁶ the Court acknowledged the competing interests present in commercial speech cases.¹⁰⁷ By weighing a homeowner's right to privacy against a publisher's right to solicit door-to-door, the Court acknowledged that the commercial aspect of speech does not necessarily eliminate constitutional guarantees of freedom.¹⁰⁸

The first hint of disapproval of the *Chrestensen* decision appeared in a concurring opinion by Justice Douglas in 1958.¹⁰⁹ In *Cammarano v. United States*,¹¹⁰ Justice Douglas criticized *Chrestensen* and argued that a "profit motive should make no difference"¹¹¹ to the First Amendment analysis. Justice Douglas' opinion was the Court's first step in attempting to identify the factors that should be considered in an analysis of commercial speech.¹¹²

In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,¹¹³ the Court progressed in defining commercial speech when it identified an advertisement that did "no more than propose a commercial transaction" as the "classic example[] of commercial speech."¹¹⁴ The Court upheld an ordinance prohibiting newspapers from listing employment advertisements in columns according to whether the advertisements sought to hire

104. *Id.*

105. *Id.* at 55.

106. 341 U.S. 622 (1951).

107. *Id.*

108. *Id.*

109. *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (Douglas, J., concurring).

110. 358 U.S. 498 (1959).

111. *Id.* at 514 (Douglas, J., concurring). "Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive." *Id.*

112. *See id.*

113. 413 U.S. 376 (1973).

114. *Id.* at 385.

male or female employees.¹¹⁵ The Court suggested that advertisements for legal activity would receive some First Amendment protection, but commercial speech advertising illegal activity would not.¹¹⁶ "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity."¹¹⁷

Finally, in *Bigelow v. Virginia*,¹¹⁸ the Supreme Court limited the *Chrestensen* holding by abandoning the idea that commercial speech was without First Amendment protection.¹¹⁹ The Court struck down a statute that made the circulation of any publication to encourage or promote abortion illegal, rejecting the contention that the commercial nature of the publication left it unprotected by the First Amendment.¹²⁰ The Court held that restrictions on advertising must serve a legitimate public interest, but it reserved judgment on whether the First Amendment "permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit."¹²¹ By acknowledging the importance of commercial speech in the marketplace of ideas, the Court articulated a willingness to extend First Amendment protection to commercial speech.¹²²

Shortly after the *Bigelow* decision, the Court established the foundation of the commercial speech doctrine. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,¹²³ the Supreme Court held that a statute banning licensed pharmacists from advertising the prices of prescription drugs was an unconstitutional restriction on commercial speech.¹²⁴ The Court reasoned that access to information is crucial to an enlightened

115. *Id.*

116. *Id.* at 389.

117. *Id.*

118. 421 U.S. 809 (1975).

119. *Id.*

120. *Id.* at 825-26.

121. *Id.* at 825.

122. *Id.* at 825-26.

123. 425 U.S. 748 (1976).

124. *Id.*

society, and, within the marketplace of ideas, commercial speech is "indispensable to the proper allocation of resources."¹²⁵ The economic motivation behind commercial speech does not eliminate First Amendment protection, although it does differentiate the speech from other types of speech.¹²⁶ The Court articulated the need to restrict speech that fails to provide truthful or verifiable commercial information, suggesting that false or deceptive commercial speech would not be entitled to any First Amendment protection,¹²⁷ and recognized that the distinguishing factor between commercial speech and other types of speech was content.¹²⁸

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.¹²⁹

Giving little weight to the effect the speech may have on its recipients, the Court, in its seven-to-two decision, found no support for suppressing truthful information about lawful activity.¹³⁰

Virginia Pharmacy was a progressive step in the shaping of the commercial speech doctrine. In subsequent cases, the Court made it clear that commercial speech and noncommercial speech were distinct entities. Without such a differentiation, it was

125. *Id.* at 765.

126. *Id.* at 761.

127. *Id.* at 771. "The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely." *Id.* at 771-72.

128. *Id.* at 761. "Purely factual matter of public interest may claim protection." *Id.* at 762.

129. *Id.* at 765.

130. *Id.* at 773; *see also* *Carey v. Population Servs. Int'l*, 431 U.S. 678, 700 (1987) (agreeing that advertisements for contraception, a lawful activity, could not be suppressed).

feared that First Amendment protection would be levelled and diluted.¹³¹ In *Ohralik v. Ohio State Bar Ass'n*,¹³² the Court recognized that commercial speech occupies a "subordinate position in the scale of First Amendment values," and thus requires "regulation that might be impermissible in the realm of noncommercial expression."¹³³

With the distinction between commercial speech and noncommercial speech established, the Court was obligated to define commercial speech and to identify the level of protection it deserved. *Central Hudson Gas & Electric Corp. v. Public Service Commission*¹³⁴ defined commercial speech as "expression related solely to the economic interests of the speaker and its audience."¹³⁵ The Court recognized the protection afforded commercial speech in earlier cases and explicitly reaffirmed its disdain for the "highly paternalistic" view that government has the unlimited power to suppress or regulate all commercial speech to protect its recipients.¹³⁶ Nonetheless, the decision rested on whether the kind of speech at issue was an area traditionally subject to government regulation.¹³⁷ In other words, the nature of the advertised activity and the government interest in restricting expression related to the activity became significant in determining the protection available to particular commercial expressions.

The Court developed a four-part analysis for commercial speech cases.¹³⁸ To gain any First Amendment protection, the commercial speech must concern lawful activity and not be mis-

131. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

132. *Id.*

133. *Id.* A ban on in-person solicitation by attorneys was upheld primarily because of the undue influence and deceptive tactics that a lawyer could use to elicit business, as well as the invasion of privacy that such advertising promotes. *Id.* at 465. A target of in-person solicitation is "[u]nlike the reader of an advertisement, who can 'effectively avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'" *Id.* at 465 n.25 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

134. 447 U.S. 557 (1980).

135. *Id.* at 561.

136. *Id.* at 562.

137. *Id.* The New York Public Service Commission wanted to prevent electric utilities in New York State from distributing advertisements promoting the use of electricity. *Id.* at 558.

138. *Id.* at 566.

leading.¹³⁹ The speech may then be regulated if the asserted government interest is substantial, the regulation is narrowly drawn to directly advance the asserted government interest, and the regulation is no more extensive than necessary.¹⁴⁰ The *Central Hudson* test set forth a framework for analyzing commercial speech cases, but it also created new ambiguities as courts struggled to define each prong of the test.

The concurrence and dissent in *Central Hudson* identified divergent perspectives regarding commercial speech protection. Justice Blackmun, in concurrence, questioned the origins of the test, asserting that the test was "not consistent with our prior cases and does not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech."¹⁴¹ He envisioned few instances, if any, in which the government could restrict expression because of the effect its message might have on the public.¹⁴² Justice Rehnquist argued, in dissent, that commercial speech deserves much less First Amendment protection than noncommercial speech.¹⁴³ He believed that, by labelling economic regulation as free speech, the Court had revitalized *Lochner* era decisions¹⁴⁴ and would "unduly impair the state legislature's ability to adopt legislation reasonably designed to promote interests that have always been rightly thought to be of great importance to the State."¹⁴⁵ Although the *Central Hudson* test has been used repeatedly to evaluate commercial speech restrictions, for all intents and purposes, these opposing viewpoints have shaped the decisions.¹⁴⁶

Since the *Central Hudson* decision, the Court has continued to

139. *Id.*

140. *Id.*

141. *Id.* at 573 (Blackmun, J., concurring).

142. *Id.* at 575-76.

143. *Id.* at 584 (Rehnquist, J., dissenting).

144. *Id.* at 591. During the era of *Lochner v. New York*, 198 U.S. 45 (1905), "it was common practice for [the] Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies." *Central Hudson*, 447 U.S. at 589 (Rehnquist, J., dissenting).

145. *Id.* at 585.

146. For a more detailed review of the history of commercial speech, see David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359 (1990).

refine the balancing test through its application. In *Metromedia, Inc. v. City of San Diego*,¹⁴⁷ the Court found that an ordinance imposing substantial prohibitions on the erection of billboards directly advanced the substantial government interest in preserving the aesthetic beauty of the city.¹⁴⁸ The legislature's reasoning that billboards adversely affect traffic safety and the appearance of the city was not "manifestly unreasonable."¹⁴⁹ *Board of Trustees v. Fox*¹⁵⁰ further shaped the fourth prong of the *Central Hudson* test by requiring only a "reasonable fit" between the government's interest and the restrictions imposed.¹⁵¹

Changes in the personnel of the Court led to a shift in the focus of the *Central Hudson* test in *Posadas de Puerto Rico Associates v. Tourism Co.*,¹⁵² with Justice Rehnquist leading the narrow majority. The Court's decision in *Posadas* implied that government could more easily regulate commercial speech and that unlimited deference would be given to legislative determinations.¹⁵³ The majority in *Posadas* upheld the constitutionality of a Puerto Rico statute restricting advertising for casino gambling, a legal activity in Puerto Rico.¹⁵⁴ The deference given to the Puerto Rican legislature in applying the *Central Hudson* test suggests the Court's analysis was just a routine exercise. The Court did, however, expressly reject a tenet of *Virginia Pharmacy*.¹⁵⁵ "[B]ecause the government could have enacted a

147. 453 U.S. 490 (1981).

148. *Id.* at 510. Billboards inherently cause "esthetic harm." *Id.*

149. *Id.* at 509.

150. 492 U.S. 469 (1989).

151. *Id.* at 480.

152. 478 U.S. 328 (1986).

153. *Id.* The Court seemed to adopt the standard for legislative value-determinations set forth in *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

The doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.

Id. at 730.

154. *Posadas*, 478 U.S. at 348.

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

wholesale prohibition of the underlying conduct . . . it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising."¹⁵⁶ Three of the four Justices dissenting from the *Posadas* majority, cited the relaxed standards used to uphold the regulation and the unlimited deference accorded the Puerto Rican legislature.¹⁵⁷

The *Posadas* decision left the commercial-speech doctrine in disarray.¹⁵⁸ By suggesting that a total ban on truthful advertising for a legal activity was a constitutionally valid restriction on commercial speech, the Court extended the power of government to regulate commercial speech, making legislative decision making definitive, regardless of First Amendment implications.¹⁵⁹ Such an approach to commercial speech could lead only to censorship of any advertising that the legislature found offensive or unacceptable.¹⁶⁰ This rationale perpetuates consumer ignorance in an effort to control behavior by keeping the public uninformed. The Court had specifically warned against such a slippery slope because it could lead to censorship and the deterioration of the marketplace of ideas.¹⁶¹ "[W]e, [the Court], view as dubious any justification that is based on the benefits of public ignorance."¹⁶²

THREE RECENT COMMERCIAL SPEECH DECISIONS

After *Posadas*, the Court did not attempt to resolve the confusion surrounding the commercial-speech doctrine until the 1993-

156. *Posadas*, 478 U.S. at 346 (emphasis omitted).

157. *Id.* at 351, 355 (Brennan, J., dissenting, joined by Marshall & Blackmun, JJ.); see also *id.* at 359-63 (Stevens, J., dissenting, joined by Marshall & Blackmun, JJ.) (dissenting on grounds that the majority holding sanctioned censorship and prior restraint).

158. For a more detailed discussion of *Posadas*, see *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 172-82 (1986).

159. See Vestal, *supra* note 42, at 135-38 (discussing *Posadas*).

160. *Posadas*, 478 U.S. at 361 (Stevens, J., dissenting, joined by Marshall & Blackmun, JJ.).

161. *Bates v. State Bar of Arizona*, 433 U.S. 350, 374-75 (1977). The preferred solution is to disclose more and not less information and thereby arm the public with enough information to view advertising in its proper perspective. *Id.* at 375.

162. *Id.* at 375.

1994 Term. Two of the three cases recently decided renounce *Posadas* as a fact-specific aberration in commercial-speech cases and reaffirm the Court's commitment to abandoning the slippery slope toward censorship.¹⁶³ Though all three cases are in some ways difficult to reconcile,¹⁶⁴ overall, the Court has established that (1) the government has the burden of justifying its substantial interest and the means used to achieve that end, (2) deferential treatment of legislative judgment will not be accepted as readily as it was in *Posadas*, and (3) commercial speech does have some value in the marketplace of ideas that justifies First Amendment protection.¹⁶⁵

*City of Cincinnati v. Discovery Network*¹⁶⁶

In *City of Cincinnati v. Discovery Network*, a six-to-three opinion authored by Justice Stevens, the Court invalidated an ordinance that banned the Discovery Network from distributing their commercial publications through freestanding news racks located on public property.¹⁶⁷ The prohibited publication was a free magazine that advertised educational, recreational, and social programs available to individuals in Cincinnati.¹⁶⁸ The

163. *Edenfield v. Fane*, 113 S. Ct. 1792 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993). *But see* *United States v. Edge Broadcasting*, 113 S. Ct. 2696 (1993).

164. *See* Floyd Abrams, *A Growing Marketplace of Ideas*, LEGAL TIMES, July 26, 1993, at S28. "In the commercial-speech area, as much as in any other in recent years, Supreme Court opinions often fail to relate to one another at all." *Id.*

165. *Id.*

What our decisions require is a "fit" between the legislature's ends and the means chosen to accomplish those ends—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; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed. . . . [S]ince the State bears the burden of justifying its restriction, it must affirmatively establish the reasonable fit we require.

Discovery Network, 113 S. Ct. at 1510 n.12 (citing *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989)).

166. 113 U.S. 1505 (1993).

167. *Id.*

168. *Id.* at 1508.

Supreme Court relied on the four-part test set forth in *Central Hudson* to determine if the statute violated the First Amendment.¹⁶⁹ The publications involved lawful activity and were in no way misleading or deceptive.¹⁷⁰ The Court found that the city had a substantial interest in providing safe and aesthetically pleasing public streets for its citizens and that the news racks could be considered hazardous and unsightly.¹⁷¹ However, by removing only the 62 "commercial" news racks of the over 1500 "noncommercial" ones throughout Cincinnati, the city failed to establish a "reasonable fit" between the legislature's restriction on commercial speech and the substantial interest asserted.¹⁷² The regulatory scheme banned only those news racks that disseminated commercial speech.¹⁷³ The remaining news racks were just as hazardous and unsightly; the city's only reason for allowing them to remain was because they disseminated noncommercial speech—newspapers.¹⁷⁴

The majority's decision in *Discovery Network* clarified several aspects of the commercial-speech doctrine.¹⁷⁵ By striking down Cincinnati's ban on commercial news racks, the Court reaffirmed the "reasonable fit" standard articulated in *Board of Trustees v. Fox*¹⁷⁶ and affirmed the intermediate level of review set forth in the *Central Hudson* case.¹⁷⁷ Defining "reasonable fit" more precisely, the Court rejected a least-restrictive-means requirement yet qualified that "if there are numerous and obvious less-

169. *Id.* at 1510.

170. *Id.* at 1509.

171. *Id.* at 1510-11.

172. *Id.* at 1510.

173. *Id.*

174. *Id.* at 1511-13.

175. See Steven W. Colford, *Big Win for Commercial Speech: Industry Cheers Supreme Court Ruling in Cincinnati Newsrack Case*, ADVERTISING AGE, Mar. 29, 1993, at 1. For a more detailed discussion, see *Supreme Court Proceedings: Review of Supreme Court's Term*, 62 U.S.L.W. 3045, 3046-47 (1993) [hereinafter *Supreme Court Proceedings*]; Abrams, *supra* note 164, at S28.

176. 492 U.S. 469 (1989); see also Abrams, *supra* note 164, at S28 (discussing the Court's decision to clarify the "reasonable fit" standard).

177. *Discovery Network*, 113 S. Ct. at 1511-13; see also Bernard H. Siegan, *Supreme Court Decisions Reaffirm Need To Provide Commercial Speech Full Constitutional Protection*, LEGAL OPINION LETTER (Wash. Legal Found., Wash., D.C.), Oct. 1, 1993, at 1 (discussing the Court's reliance on the *Central Hudson* test for commercial speech cases).

burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."¹⁷⁸ No rigid definition of commercial speech existed, and this case illustrated "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category."¹⁷⁹ Instead, the Court recommended a careful examination of the speech at issue "to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed."¹⁸⁰ By rejecting the "low value" of commercial speech as justification for the distinction between commercial and noncommercial news racks, the Court reinforced the worth of commercial speech in the marketplace of ideas.¹⁸¹ This case reaffirmed and even strengthened the protections that the First Amendment affords commercial speech.

*Edenfield v. Fane*¹⁸²

Edenfield v. Fane was the second commercial-speech case decided by the Supreme Court in the 1993-1994 Term. The Florida statute at issue prohibited certified public accountants (CPAs) from making "direct, in-person, uninvited solicitations."¹⁸³ The Court had recognized in *Ohralik v. Ohio State Bar Ass'n*¹⁸⁴ that personal commercial solicitation involved some detrimental aspects.¹⁸⁵ The Court, however, recognized in *Edenfield* that "these detriments are not so inherent . . . that solicitation of this sort is removed from the ambit of First Amendment protec-

178. *Discovery Network*, 113 S. Ct. at 1510 n.13.

179. *Id.* at 1511.

180. *Id.* at 1513 (quoting *Bolger v. Youngs Drug Prods.*, 463 U.S. 60, 66 (1983)).

181. *Id.* at 1516.

In the absence of some basis for distinguishing between "newspapers" and "commercial handbills" that is relevant to an interest asserted by the city, we are unwilling to recognize Cincinnati's bare assertion that the "low value" of commercial speech is a sufficient justification for its selective and categorical ban on newsracks dispensing "commercial handbills."

Id.

182. 113 S. Ct. 1792 (1993).

183. *Id.* at 1796 (quoting FLA. ADMIN. CODE § 21A-24.002(c) (1992)).

184. 436 U.S. 447 (1978).

185. *Id.* at 464.

tion.”¹⁸⁶ The Court found that, although the government’s interests in proscribing solicitation by CPAs were substantial, the government had failed to demonstrate that its restriction on solicitation advanced the asserted interest.¹⁸⁷ “[R]egulation may not be sustained if it provides only ineffective or remote support for the government’s purpose.”¹⁸⁸

Writing for the majority, Justice Kennedy emphasized that the burden for justifying a restriction on commercial speech will not be satisfied by “mere speculation or conjecture.”¹⁸⁹ The government “must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”¹⁹⁰ Applying these standards, the Supreme Court struck down Florida’s statute based on the state’s failure to demonstrate that a reasonable fit existed between the government’s interests in preventing fraud, ensuring privacy, and maintaining CPA independence and the ban on in-house solicitation by CPAs.¹⁹¹

Both this decision and *Discovery Network* dismantle the reasoning used in *Posadas* and thus reinforce the theory that *Posadas* should be confined to its facts. The Court would no longer accept Puerto Rico’s asserted means and ends without evidence to link the two. “[M]ere speculation and conjecture” are not enough to achieve a “reasonable fit.”¹⁹² In both *Edenfield* and *Discovery Network*, the Court rejected the contention that, as long as the interests asserted are substantial, the legislature should receive considerable deference in determining a reasonable way to accomplish the interests advanced.¹⁹³ By rejecting this paternalistic philosophy, the Court challenged the holding

186. *Edenfield*, 113 S. Ct. at 1797.

187. *Id.* at 1800.

188. *Id.* (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 564 (1980)).

189. *Id.*

190. *Id.*

191. *Id.* at 1799-1801. For a more detailed discussion, see Felix H. Kent, *Two More Decisions on Commercial Speech*, N.Y. L.J., Aug. 30, 1993, at 3; *Supreme Court Proceedings*, *supra* note 175.

192. *Edenfield*, 113 S. Ct. at 1800.

193. *Id.* at 1792; *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1516 (1993).

in *Posadas* that the government can regulate advertising if it can restrict the underlying activity.¹⁹⁴ Because very few activities are constitutionally protected, the *Posadas* holding suggested that government can regulate almost any advertising.¹⁹⁵ If the Court subscribed to this proposition, it would be necessary to provide great deference to the legislature to determine which advertising should be banned, and, as long as the Court found a substantial interest, the restriction would be upheld.¹⁹⁶ Without such deference to the legislature, it would be difficult to allow government to regulate advertising of any regulable activity. The two positions are irreconcilable.

*United States v. Edge Broadcasting Co.*¹⁹⁷

United States v. Edge Broadcasting Co., because it involved the underlying activity of gambling, appears to be an affirmation of *Posadas*.¹⁹⁸ In *Edge*, the Court upheld a federal ban restricting broadcasters licensed in nonlottery states from broadcasting lottery advertisements over their airwaves.¹⁹⁹ However, the majority declined to decide the case on the basis that gambling is not a constitutionally protected right and the greater power to prohibit gambling altogether includes the lesser power to ban its advertisement.²⁰⁰ Instead, the majority applied the *Central Hudson* test and found a reasonable fit between the imposed restriction and the government's interest in supporting the policy of nonlottery states.²⁰¹

Some legal commentators view *Edge* as a setback to First Amendment protection of commercial speech.²⁰² The Court's

194. Kent, *supra* note 191.

195. See Vestal, *supra* note 42, at 138-39.

196. See Abrams, *supra* note 164.

197. 113 S. Ct. 2696 (1993).

198. *Id.*

199. *Id.*

200. *Id.* at 2703; see also *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986) (finding both reasons as the basis for its holding).

201. *Edge*, 113 S. Ct. at 2703-05.

202. See Abrams, *supra* note 164, at §29; Siegan, *supra* note 177. But see Kent, *supra* note 191, at 28 (suggesting that *Edge* does not "constitute a significant departure from the recent commercial speech protection cases" because it is confined to its facts).

use of reasoning from *Posadas*, after abandoning much of this same rationale in *Edenfield* and *Discovery Network*, is irreconcilable with any progress made in the first two cases. By failing to require specific evidence from the government to meet its "reasonable fit" burden, the Court ignored its recent holding in *Edenfield*.²⁰³ In addition, the Court took a paternalistic approach, which it often has criticized, by restricting the flow of information in an attempt to protect the listeners in the nonlottery state from lottery advertisements.²⁰⁴ Using a deferential analysis of commercial speech, the Court stated that courts may "allow room for legislative judgments."²⁰⁵

The most plausible explanation for the divergent holding and reasoning in *Edge* stems from the Court's bias against gambling.²⁰⁶ The Court views gambling as a vice that historically has been regulated or prohibited; and, therefore, regulation of gambling advertisements is acceptable.²⁰⁷ Such a bias limits the precedential value of the decision. Nonetheless, courts could extend *Edge* to other vices that affect the health and welfare of the public—affecting the First Amendment freedoms of cigarette advertisers, alcohol advertisers, and even condom advertisers.²⁰⁸ The future implications of the 1993-1994 Term's decisions on commercial speech, especially advertising, are uncertain. Justice White, the author of *Edge*, is no longer on the Court, and, with the recent retirement of Justice Blackmun, another protector of advertising has been lost.²⁰⁹ Justices Ginsberg and Breyer's opinions on this subject are not yet

203. *Edge*, 113 S. Ct. at 2704. The Court stated that it had "no doubt that the statutes directly advanced the governmental interest at stake." *Id.*

204. *Id.*

205. *Id.* at 2707. For a more detailed discussion, see Kent, *supra* note 191; Siegan, *supra* note 177.

206. See Abrams, *supra* note 164, at S29.

207. *Id.*

208. Justice Rehnquist has compared advertising gambling to advertising cigarettes. He fears that by protecting pure commercial advertising and eliminating regulations that ban certain advertisements, the Court will open the door to "the active promotion of prescription drugs, liquor, cigarettes, and other products the use of which it has previously been thought desirable to discourage." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 781 (1976) (Rehnquist, J., dissenting).

209. Kent, *supra* note 191, at 3.

known and can only be the subject of conjecture.²¹⁰

Determining the harmful effects of speech is not a prong of the *Central Hudson* test, and such an analysis would only incorporate the idea that government has the right to withhold information from the public as a means of protection. As Justice Stevens stated in his dissenting opinion in *Edge*, the restriction on commercial speech is "the most intrusive, and dangerous form of regulation possible—a ban on truthful information regarding a lawful activity imposed for the purpose of manipulating, through ignorance, the consumer choices of some of its citizens."²¹¹

Overall, these three cases have strengthened First Amendment protection of commercial speech. The Court has refined the *Central Hudson* test and reaffirmed the value of commercial speech. However, the Court has by no means made the analysis routine. As a result, the question remains as to whether government can regulate or even ban advertisements of legal activity. This gray area will not only cause dissension among the lower courts but also was the cause of the FTC's protracted debate on whether to ban Joe Camel, advertising of a harmful but legal activity.

THE FEDERAL TRADE COMMISSION

The FTC is an independent administrative agency created pursuant to the Federal Trade Commission Act of 1914 (FTC Act).²¹² The FTC is comprised of five Commissioners appointed to seven-year terms by the President and confirmed by the Senate.²¹³ The primary responsibility of the FTC is to put into effect several statutes designed to "promote competition and to protect the public from unfair and deceptive acts and practices in the advertising and marketing of goods and services."²¹⁴

Section five of the FTC Act at first gave the FTC only the

210. *Id.*

211. *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2710 (1993).

212. Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (current version at 15 U.S.C. § 41 (1988)).

213. 15 U.S.C. § 41.

214. 16 C.F.R. § 0.1 (1994).

antitrust authority to prohibit all "unfair methods of competition."²¹⁵ In 1938, the Act was amended to increase the FTC's authority in the consumer protection arena by declaring any "unfair or deceptive acts or practices . . . unlawful."²¹⁶ Today, the FTC is organized into two bureaus—the Bureau of Competition and the Bureau of Consumer Protection.²¹⁷ The Bureau of Competition pursues noncriminal antitrust conduct, whereas the consumer protection arm enforces consumer protection laws enacted by Congress, as well as trade regulation rules issued by the FTC.²¹⁸ A third bureau, the Bureau of Economics, provides research, analysis, and evaluation services to the other two Bureaus.²¹⁹

The FTC can act in several different ways to restrain anticompetitive business practices or to keep the marketplace free of unfair, deceptive, or fraudulent practices.²²⁰ The FTC can issue a complaint and litigate the question in an administrative proceeding, or it can seek an injunction in federal court or issue general rules to regulate an entire industry.²²¹ However, the FTC Act's failure to define the scope of the FTC's authority left the Commission with great latitude to interpret its regulatory power particularly with respect to conduct it deemed "unfair."²²²

215. 15 U.S.C. § 45; see also Edward B. Cohen & William I. Rothbard, *Reauthorizing the FTC Back into the Future*, LEGAL TIMES, July 5, 1993, at 29.

216. 15 U.S.C. § 45(a)(1).

217. Neil W. Averitt & Terry Calvani, *The Role of the FTC in American Society*, 39 OKLA. L. REV. 39, 39 n.1 (1986).

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. Cohen & Rothbard, *supra* note 215, at 29. The Supreme Court, in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972), affirmed that the "unfairness" language could be interpreted to give the FTC broad authority in proscribing practices it found unfair. *Id.* at 244. "[T]he Court declared that unfairness authority extended to 'public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.'" *Id.*

Authority of the FTC To Ban Advertisements

The FTC led a relatively noncontroversial existence until 1969. In 1969, two reports were published criticizing the inactivity and lack of initiative of the FTC.²²³ As a result, Congress demanded increased activity, and the FTC responded by initiating new, aggressive projects.²²⁴ Congress did not discourage the agency's new activism and in fact increased the FTC's authority.²²⁵

In the consumer protection arena, the FTC proposed a ban on advertising designed to influence children.²²⁶ Spurred by congressional prodding, the FTC launched the "Kid-Vid" proceeding to disclose whether advertising directed at children was unfair or deceptive on the theory that children were "too young to appreciate the commercial and self-promotional nature of advertising."²²⁷ The proceeding was an effort to find remedies to rectify any adverse effects caused by the advertising.²²⁸

Public outcry and criticism of the proceeding, in addition to general displeasure with the ineffectiveness and overreaching of other FTC initiatives, prompted Congress in 1980 to terminate the Kid-Vid proceeding and several other FTC proceedings as part of a three-year reauthorization.²²⁹ The Federal Trade

223. EDWARD F. COX ET AL., "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION (1969); REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969). "[T]hese criticisms . . . ignited a frenzy of activity and reform at the FTC." Cohen & Rothbard, *supra* note 215, at 29.

224. Senator Gale W. McGee (D-Wis.) advised the chairman of the FTC, "the mistakes you are to make ought to be mistakes in doing and trying rather than playing safe in not doing." *Agriculture—Environmental and Consumer Protection Appropriations for Fiscal Year 1972: Hearings Before the Subcomm. of the Senate Comm. on Appropriations*, 92d Cong., 1st Sess. 2673 (1971); see also Cohen & Rothbard, *supra* note 215 (reasoning that the undefined scope of the FTC's authority and the liberal regulatory era of the 1970s were the primary contributors to the FTC's changing role).

225. See Averitt & Calvani, *supra* note 217, at 42. The agency's total budget more than doubled between 1969 and 1978. *Id.* Statutory authority also increased substantially. See, e.g., Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 57(a)-57(b) (1988) (giving the FTC authority to more actively safeguard consumer interests).

226. See FTC STAFF REPORT ON TELEVISION ADVERTISING TO CHILDREN (Feb. 1978).

227. Averitt & Calvani, *supra* note 217, at 42; see also Cohen & Rothbard, *supra* note 215, at 29 (discussing the origin and goals of the "Kid Vid" proceeding).

228. Cohen & Rothbard, *supra* note 215, at 29.

229. *Id.*; see also Averitt & Calvani, *supra* note 217, at 39 (discussing Congress'

Commission Improvements Act of 1980 eliminated the Commission's authority to regulate unfair advertising through 1982.²³⁰

The Kid-Vid controversy has lived on in the continuing congressional debate about the proper role of the FTC in regulating unfair advertising, and, as a result, Congress has failed to reauthorize the FTC since the early 1980s.²³¹ Since 1982, the FTC has remained operational thanks to the appropriation committees' reluctant earmarking of money for the agency in the absence of an authorization bill.²³² The fundamental disagreement in Congress is whether the FTC has authority to make "industry-wide regulations governing unfair advertising."²³³

Dismantled by Congress and governed by the appropriations committees, the FTC has been thwarted in its efforts to develop a national strategy to protect the consumer.²³⁴ With no federal agency protecting the consumer, states have filled the gap by suing advertisers.²³⁵ However, the tide is changing for the FTC. Congress finally passed an FTC reauthorization bill on August 11, 1994, and President Clinton signed it into law on August 26.²³⁶

Despite the lack of support in Congress, many recognize that, in the past five years, the FTC successfully has created its niche in the regulatory world by focusing on its role as a law enforcement agency and less as an agency enabling a political agen-

changed view of the FTC).

230. 15 U.S.C. § 57(i) (1988). This restriction did not affect the FTC's authority over deceptive or false advertising. *Id.* § 57(a).

231. Cohen & Rothbard, *supra* note 215, at 29.

232. See *Showdown on Capitol Hill*, FTC: WATCH (Wash. Reg. Rptg. Assocs.), No. 390, May 24, 1993 [hereinafter *Showdown*] (discussing the showdown between the House and Senate over adding riders to various appropriations bills to reauthorize the FTC).

233. *Id.* (quoting Apr. 29, 1993, letter from House Commerce Committee Chairman, John Dingell, to Chairman of House Appropriations Subcommittee, Neal Smith, discussing FTC reauthorization).

234. Cohen & Rothbard, *supra* note 215, at 30. "Deregulation, combined with a gridlocked Congress, made the FTC virtually irrelevant as the national cop on the marketing beat." *Id.*

235. *Id.* (discussing the FTC's slow efforts to create boundaries for environmental advertising and the state activism that ensued until such guidelines were set forth).

236. *Reauthorization*, FTC: WATCH (Wash. Reg. Rptg. Assoc.), No. 418, Sept. 12, 1994 [hereinafter *Reauthorization*].

da.²³⁷ The new reauthorization incorporates the FTC's formal definition of the term "unfair."²³⁸ For a practice to be unfair, (1) it must substantially injure the consumer, (2) the consumer must not be able to reasonably avoid the injury, (3) the injury must not be outweighed by offsetting benefits resulting from the practice, and (4) these findings cannot be based solely on the grounds that the practice offends public policy.²³⁹ The FTC also refuses to accept anecdotal evidence as a basis for promulgating industry-wide rules.²⁴⁰

The FTC has made progress in developing guidelines for its regulatory actions to combat unfairness in advertising, and, with the new reauthorization, the guidelines may become even more defined. Up to this point, however, the FTC's evolution and policy statements have paralleled the Supreme Court's efforts to define the constitutional protection afforded commercial speech.

Do the FTC's Regulatory Actions Pass Constitutional Muster?

The three FTC commissioners who voted against issuing the complaint to ban Joe Camel based their vote on the fact that, without more evidence to link Joe Camel to an increase in underage smokers, the FTC could not determine that RJR had violated the law.²⁴¹ In other words, such a ban could not sur-

237. As noted by Averitt and Calvani:

In the past five years, however, the agency has settled upon a new sense of its own mission. We believe this sense of identity will be more stable and lasting because it is founded ultimately on a principled, functional definition of the agency's law enforcement role, rather than on the more transitory imperatives of any one group's values or political agenda.

Averitt & Calvani, *supra* note 217, at 39.

238. See Commission Statement of Pol'y on the Scope of the Consumer Unfairness Jurisdiction, 104 F.T.C. 949, 979 app. (1984).

239. *Reauthorization*, *supra* note 236.

240. See Credit Practices Rule: Statement of Basis and Purpose and Regulatory Analysis, 49 Fed. Reg. 7740, 7742 (1984) (codified at 16 C.F.R. § 144).

241. *Joe Camel: Steiger Disappointed, Yao Disgruntled at Decision Not To Sue*, FTC: WATCH (Wash. Reg. Rptg. Assoc.), No. 415, June 27, 1994. "[I]t was the law that won the day. While noting that a concern about the health of children had 'led us to consider every possible avenue to a lawsuit,' the majority noted that each of those avenues was a road to nowhere when 'factual and legal questions' were raised." *Id.*

vive a legal challenge.²⁴² Although this decision may provide an indication of the fate of future efforts to ban cigarette advertising logos such as Joe Camel, differences exist between the analysis done by the FTC and the analysis done by the Supreme Court with regard to commercial speech.

The difference between the Supreme Court's analysis of commercial speech and the FTC's analysis is that the FTC uses a public policy and anticompetition approach, whereas the Court uses a substantial-state-interest test.²⁴³ Obviously, the FTC considers the First Amendment issues involved. However, the changing state of the commercial-speech doctrine has raised much uncertainty as to whether FTC advertising restrictions would pass constitutional muster.²⁴⁴

Although the approach may be different, the basic analyses share many similarities. As the Court refines the commercial speech doctrine and the FTC defines its policy, the two share common goals—protecting the free marketplace of ideas and retreating from the “slippery slope” of censorship. The Supreme Court has imposed a more stringent burden on the government in justifying a restriction on commercial speech.²⁴⁵ 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.”²⁴⁶ This requirement of the *Central Hudson* test is similar

242. *Id.*

243. C. Lee Peeler & Michelle K. Rusk, *Commercial Speech and the FTC's Consumer Protection Program*, 59 ANTITRUST L.J. 985, 986 (1991) (“[T]he Commission's policy statement on unfairness jurisdiction has made it clear that it will look to public policy, as established by common law or statute, as a means of providing additional evidence of consumer injury”); see also Patricia P. Bailey, *How Advertising Is Regulated in the United States*, 54 ANTITRUST L.J. 531 (1985) (discussing the effect of advertising bans on competition).

244. *Compare* *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986) (upholding a statute restricting advertising for casino gambling) *with* *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993) (declining to follow *Posadas* and find a constitutional right to prohibit advertising of lotteries); *compare* *Edenfield v. Fane*, 113 S. Ct. 1792 (1993) (striking a ban on in-person solicitation by accountants) *with* *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (upholding a ban on in-person solicitation by attorneys).

245. *Edenfield*, 113 S. Ct. at 1792.

246. *Id.* at 1800.

to the statistical data required by the FTC to justify any regulations based on unfairness in advertising.²⁴⁷ Also, by requiring a "reasonable fit" between the restriction and the substantial interest,²⁴⁸ the Court has adopted the standard traditionally used by the FTC in promulgating an order. A regulatory order promulgated by the FTC must bear a "reasonable relationship" to the violation.²⁴⁹

Despite similarities, the Court's changing definition of commercial speech has a direct impact on the FTC's regulatory activity. Although the Court articulated the basic definition of commercial speech in *Central Hudson*,²⁵⁰ it has reflected on and refined this definition in more recent cases. Such constant revision makes the FTC's task of regulating the advertising industry without violating the First Amendment more difficult.

In *Bolger v. Youngs Drug Products*,²⁵¹ the Court established that, although advertising "links a product to a current public debate" or contains "discussion of important public issues," the speech is not necessarily entitled to First Amendment protection.²⁵² More recently in *Board of Trustees v. Fox*,²⁵³ the Court held that the basic test for identifying commercial speech is that the speech "proposes a commercial transaction."²⁵⁴ However, in less straightforward cases, the Court has focused on the economic motivation of the speaker and the audience²⁵⁵ and has examined the speech "carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed."²⁵⁶ These changing definitions have added to the

247. See *supra* notes 134-46 and accompanying text.

248. See *supra* text accompanying notes 150-51, 176.

249. Peeler & Rusk, *supra* note 243, at 988.

250. See *supra* notes 134-37 and accompanying text.

251. 463 U.S. 60 (1983).

252. *Id.* at 64-68 (quoting *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980)).

253. 492 U.S. 469 (1989).

254. *Id.* at 473 (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)).

255. *Central Hudson*, 447 U.S. at 561.

256. *Cincinnati v. Discovery Network*, 113 S. Ct. 1505, 1513 (1993) (quoting *Bolger*, 463 U.S. at 66); see also *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 796 (1988) (taking into consideration whether the commercial and noncommercial speech implicated are inextricably intertwined).

uncertainty of whether an FTC ban of Joe Camel advertisements would pass constitutional muster.

The deference given to regulatory agencies in commercial-speech cases is another area of the law that has substantial impact on the actions and direction taken by the FTC. By not requiring strict-scrutiny review of commercial-speech cases, the Court has given regulatory bodies latitude in promulgating restrictions. *Posadas de Puerto Rico Associates v. Tourism Co.*²⁵⁷ and *Fox*²⁵⁸ suggested that any reasonable restriction would be upheld with little inquiry into the actual relationship between the restriction and the government's interest. However, more recent cases have reexamined the use of such a deferential standard of review.²⁵⁹

Could the FTC Have Banned Joe Camel?

A ban of Joe Camel pits the rights of the FTC to protect the public from harmful advertising against the First Amendment rights of cigarette companies to advertise their products. Health organizations and public interest groups have been pushing the FTC to ban Joe Camel advertisements because they purportedly entice children to smoke.²⁶⁰ RJR claims that Joe Camel is not aimed at hooking new smokers but is an effort to persuade existing smokers to buy their brand and to maintain brand loyalty.²⁶¹

Although many proponents of the ban scoff at the tobacco industry's arguments—attributing them to an egregious desire to make money at the expense of children—no one can say with certainty that Joe Camel encourages children to start smoking.²⁶² The statistics show only that Joe Camel successfully

257. 478 U.S. 328, 344 (1986) (Court had no evidence to support the assertion that a ban on advertising gambling would achieve Puerto Rico's interest in protecting its citizens from increased prostitution and immoral behavior).

258. *Fox*, 492 U.S. at 473 (holding that the third prong of the *Central Hudson* test does not require a least-restrictive-means analysis).

259. See *supra* notes 189-96 and accompanying text.

260. Farhi, *supra* note 5, at C1.

261. *Id.*

262. Rosemond, *supra* note 26, at E1.

entices teenage smokers to choose Camel brand cigarettes.²⁶³ In addition, the influence of parents, friends, and family members who smoke contribute significantly to a child's decision to begin smoking.²⁶⁴ Considering that seventy-five percent of all teenagers who smoke have parents who smoke,²⁶⁵ these children may have a predisposition to smoke. Banning Joe Camel cigarette advertisements could have some effect on the number of people who smoke, but the more probable effect will be to decrease the number of people who smoke Camel brand cigarettes.²⁶⁶

Despite the argument that the FTC's attempt to protect the public from smoking is misplaced, to prove its case, the FTC would have had to claim that the advertisements are unfair because they attempt to entice children to do something that they are not, in many states, legally allowed to do—buy cigarettes.²⁶⁷ The FTC, by its definition of “unfair,” would have had to establish that (1) Joe Camel advertisements substantially injure consumers, (2) consumers are not able to avoid the injury, and (3) the injury outweighs the advertisements' benefits.²⁶⁸ Without more correlative evidence that Joe Camel advertisements cause children to smoke, it would have been difficult, though not impossible, to prove that these advertisements substantially injure consumers. In a hailstorm of criticism, however, the FTC has abandoned past attempts to ban advertising that influences children.²⁶⁹ Although public sentiment probably would have supported a ban of “Old Joe,”²⁷⁰ the FTC commis-

263. *Id.*

264. *Id.*

265. U.S. DEP'T OF HEALTH AND HUMAN SERVS., PUB. NO. 87-8397, SMOKING, TOBACCO AND HEALTH: A FACT BOOK (1989).

266. For example, in Norway, where cigarette advertising has been banned, 36% of 15-year-olds smoke. However, in Hong Kong, where there are very few restrictions on tobacco advertising, only 11% of 15-year-olds smoke. *Cross-National Study by London's INFO-TAM and Children's Research Unit*, WALL ST. J., Dec. 12, 1989, at B1.

267. The FTC has won cases using the “unfairness doctrine” to restrict advertisements for 900-numbers. Auerbach, *supra* note 27, at D9. The FTC successfully argued that it is unfair to target children in these advertisements because the children do not pay for the calls. *Id.*

268. See *supra* notes 239-42 and accompanying text.

269. See *supra* notes 226-31 and accompanying text.

270. See *We Should Look at Health Issues, Not Just Smoking*, ARIZ. REPUBLIC, Mar.

sioners may have been influenced by history in making their decision.

DOES A BAN OF JOE CAMEL VIOLATE THE FIRST AMENDMENT?

Even if the FTC had decided to ban Joe Camel, such a ban may have violated the First Amendment right to free speech. Advertisements inviting consumers to buy cigarettes qualify as commercial speech.²⁷¹ Although the advertisements arguably are misleading because they "glamorize smoking by associating it with adventuresome, athletic, sexual, or creative activity,"²⁷² the Supreme Court defines "inherently misleading" advertising as those messages that encourage fraud, overreaching, or confusion.²⁷³ Cigarette advertising does not promote fraud, overreaching, or confusion and, therefore, is not legally misleading.²⁷⁴

Because smoking is a legal activity, the Constitution does not allow prohibiting cigarette advertising. However, in many states, smoking by children under the age of eighteen is illegal, and some argue that, in these states, advertisements that appeal to children are also illegal. However, it will be necessary for proponents of this argument to present a much stronger link between Joe Camel advertisements and the sale of cigarettes to people under eighteen years old.

The courts would apply the *Central Hudson* test to determine if a regulation banning Joe Camel violates the First Amendment rights of RJR.²⁷⁵ The substantial government interest advanced for banning Joe Camel advertisements is to protect American youth from the harmful effects of smoking. The Court most like-

18, 1992, at A10.

271. See *supra* notes 251-58 and accompanying text (defining commercial speech).

272. See Gostin & Brandt, *supra* note 32, at 906.

273. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 (1978). Public protection from "vexatious conduct" is an important state interest. *Id.*

274. See *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 498 & n.9 (10th Cir. 1983) (finding that advertisements for alcoholic beverages are not inherently misleading), *rev'd on other grounds sub nom. Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984).

275. See *supra* text accompanying notes 138-40.

ly would find this interest to be substantial.²⁷⁶ Clearly, smoking has harmful health consequences, including lung cancer and heart disease,²⁷⁷ and, as noted above, the Court is willing to apply a more lenient standard to state actions when child welfare is at issue.²⁷⁸

The government then must prove that the challenged regulation advances this substantial interest in a direct and material way and that a reasonable fit exists between the restriction and the asserted interest.²⁷⁹ This burden will be difficult to meet. More direct evidence is necessary to link a ban of Joe Camel to a decrease in the number of children who smoke cigarettes.²⁸⁰ Even if the Court strikes a deferential pose, as it has in the past when the underlying activity is considered harmful,²⁸¹ or assumes a paternalistic attitude,²⁸² the government will still have to prove that the ban is reasonable. Again, this will be a hard burden to meet, considering the conflicting evidence that a causal connection exists between Joe Camel advertisements and youths who choose to smoke. However, the Court does not require a least-restrictive-means analysis,²⁸³ and Joe Camel's appeal to young people arguably has some effect on whether they decide to begin smoking.

*United States v. Edge Broadcasting Co.*²⁸⁴ and *Posadas de Puerto Rico Associates v. Tourism Co.*²⁸⁵ both provide precedent that supports banning advertisements for legal activity that is considered harmful. However, other decisions suggest a departure from the idea that because the government can regulate or ban the sale of cigarettes, it is a more acceptable and less intru-

276. Gostin & Brandt, *supra* note 32.

277. U.S. DEP'T OF HEALTH & HUMAN SERVS., PUB. NO. 89-8411, REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS—A REPORT OF THE SURGEON GENERAL 11-12 (1989).

278. See *supra* notes 61-87 and accompanying text.

279. See *supra* text accompanying notes 147-51, 176-78, 248-49.

280. See *supra* text accompanying notes 26-40.

281. See *supra* text accompanying notes 152-62, 191-96.

282. See *supra* text accompanying notes 61-100.

283. See *supra* text accompanying note 178.

284. 113 S. Ct. 2696 (1993); see also text accompanying notes 197-210.

285. 478 U.S. 328 (1986); see also text accompanying notes 152-62.

sive regulation to ban cigarette advertising.²⁸⁶ Nonetheless, the paternalistic bias toward protecting Americans from smoking could be even more popular with the Court than a bias toward protecting Americans from the vice of gambling—especially when children are at issue.

FUTURE ATTEMPTS TO BAN JOE CAMEL

Although the recent vote by the FTC commissioners not to ban Joe Camel increases the likelihood that "Old Joe" may continue to appear in the print media, Joe Camel's opponents will likely continue in their efforts to ban the advertisements. The full effect of the FTC vote is unknown, but already some members of Congress have shown interest in pursuing the issue.²⁸⁷ One possible legislative action that could empower another agency to ban Joe Camel advertisements is passage of The Fairness in Tobacco and Nicotine Regulation Act.²⁸⁸ If enacted, this legislation would transfer regulation of the manufacture, sale, labeling, advertising, and promotion of tobacco products to the Food and Drug Administration (FDA).²⁸⁹ In February 1994, David A. Kessler, commissioner of the FDA, expressed his opinion that cigarettes could be regulated as drugs by the FDA, but he is waiting for direction from Congress before asserting this authority.²⁹⁰ Such a law would shift the authority to regulate

286. See *supra* text accompanying notes 191-96.

287. *FTC Closing Its Camel Cigarettes Investigation Without Action*, FTC: WATCH (Wash. Reg. Rptg. Assocs.), No. 414, June 6, 1994. "Congress is unlikely to let the vote go by without some scrutiny. In fact, the agency had begun providing Rep. Henry Waxman (D-Cal), a prominent cigarette industry foe, with the complete records of its investigation even before its decision to take no action." *Id.*

288. *Showdown*, *supra* note 232; H.R. REP. NO. 2147, 103d Cong., 1st Sess. (1993).

289. According to one Congressman:

[This legislation] would also implement regulations governing advertising and promotion of tobacco products. In a comparable manner [sic] that the FDA regulates other legal drugs. . . . I would like to point out that this no longer has [sic] a First Amendment problem or issue since this is something that we do with all legal products under the FDA.

Showdown, *supra* note 232 (quoting Rep. Mike Synar at a May 17, 1993, press conference).

290. *The Great Dromedary Debate: What We Have Here Is a Failure To Communicate*, FTC: WATCH (Wash. Reg. Rptg. Assocs.), No. 407, Feb. 28, 1994. Reports indicate that cigarette manufacturers have the ability to control the amount of nicotine,

cigarette advertisements from the FTC to the FDA.

State courts may also have the authority to ban Joe Camel. Recently, the California Supreme Court, in a unanimous decision, ruled that a lawsuit challenging Joe Camel advertisements is not preempted by federal law and can be decided by the lower state court.²⁹¹ With an amended complaint, the plaintiffs could sue RJR for violating the state's ban on unfair business practices alleging that "the Old Joe Camel advertising campaign targets minors for the purpose of inducing and increasing their illegal purchases of cigarettes."²⁹² The court held that "Congress left the states free to exercise their police power to protect minors from advertising that encourages them to violate the law."²⁹³

CONCLUSION

The First Amendment protects the intellectual integrity and right to self-determination of the individual. Banning Joe Camel advertisements is a direct assault on these values. Although commercial speech may be of lesser value to the marketplace of ideas, the marketplace assumes the existence of an equal and free flow of information. The receipt of information is determinative, not the communicator's motivation behind the speech. In other words, the speaker and the audience, not Congress, the FTC, or the courts, should decide its value. The public should have the opportunity to make informed choices even about which kind of cigarette to buy. Any negative influences on children should be counteracted not by shielding them from the information but by advertisements that educate them and their parents as to the harmful effects of smoking.

Nonetheless, government seems determined to regulate cigarette advertising, and, when false or misleading speech or speech that advertises an illegal activity is involved, the First

an addictive drug, in cigarettes and have increased the amount of nicotine instead of lessening it. *Id.* By increasing nicotine, the manufacturers "intend" for cigarettes to have the effect of a drug, implicating FDA authority. *Id.*

291. *Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73 (Cal.), cert. denied, 115 S. Ct. 577 (1994).

292. *Id.* at 75.

293. *Id.* at 83.

Amendment is not implicated. However, regulation of advertisements of a legal activity does implicate the First Amendment. Even though the cigarettes advertised may have harmful effects, the speech should not be compromised. A paternalistic attitude by the judicial and legislative branches should not limit First Amendment protection. As Justice Black once said, "[t]he motives behind the state law may have been to do good. But . . . history indicates that urges to do good have led to the burning of books and even to the burning of 'witches.'"²⁹⁴

Erica Swecker

294. *Beauharnais v. Illinois*, 343 U.S. 250, 274 (Black, J., dissenting).