THREE RULES AND A CONSTITUTION: CONSUMER

Since at least the publication of Nader's Raiders expose[2] and the American Bar Association's critique,[3] the 1960s has been regarded as decade of trivial pursuits for the Federal Trade Commission. The Commission's reputation for chasing small-time con-artists, challenging inconsequential business practices, turning a blind eye to politically connected corporations, and doing it all with a lethargy that exemplified popular notions of bureaucratic inertia, earned it the ridicule of consumer activists and the disdain of the regulatory bar.[4] That the reality is more complicated than the commentators' accounts should come as no surprise to any student of the agency. Other contributors to this volume describe a number of Commission initiatives from the period that evolved into durable and controversial policies. What might surprise most observers is that the decade of the Commission's supposed timidity produced one of the most consequential rulemakings the agency ever conducted. Indeed a credible argument can be made that in six months in 1964, a rule the Commission proposed and promulgated (but never enforced) was the most important in the history of the agency. The effects of the proceeding were immediate, and they still reverberate today, not only in prosecutions and regulations of the Commission, but also in acts of Congress and decisions of the Supreme Court.

The 1964 proceeding produced a rule (the "Cigarette Rule")[5] requiring health warnings on cigarette advertisements and packages. In the rationale for the rule, the Commission articulated a definition of unfair acts and practices that would tempt the agency to test the statutory and constitutional limits of its powers to regulate advertising. Fifteen years later, a

[2] EDWARD COX, ROBERT FELLMETH, & JOHN SCHULZ, THE NADER REPORT ON THE FEDERAL TRADE COMMISSION 72 (Barron Press 1969).

[3] American Bar Association, Report of the ABA Commission to Study the Federal Trade Commission, Antitrust and Trade Reg. Rep. No. 427 (BNA) (Special Supplement, Sept. 16, 1969).

[4] *See, e.g.*, MICHAEL PERTSCHUK, REVOLT AGAINST REGULATION 69-76 (University of California Press 1982).

[5] Unfair or Deceptive Advertising and Liability of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324 (July 2, 1964).

chastened Commission revamped the definition in the course of another rulemaking – the Children's Advertising Rulemaking (or "KidVid")[6] – when the 1964 formulation proved inadequate to steer the agency within its legal boundaries. The Rule would provoke the first wave of the rising tide of federal legislation that occupies the field of tobacco marketing regulation today.

This article discusses how the legal legacy of the Cigarette Rule grew over the subsequent decades, how the Children's Advertising Rulemaking drew upon and added to that legacy, and how the Do Not Call Rule of 2003[7] benefited from the lessons of both. The similarities among the episodes are striking. Each effort was a cause celebre. Each provoked a Congressional response redefining the authority of the agency. Each threatened to transform entire industries. The differences are well known. Their intended remedies were polar opposites; the first one would have mandated messages where virtually none existed, while the other two were designed to staunch steady streams of speech that were flowing too freely for the officials at the agency. And the proceedings could not have concluded more differently. Although the Cigarette Rule itself never took effect, a variation of the Rule became federal legislation – a qualified Congressional endorsement of the Commission's initiative. The Children's Advertising proceeding ended in an abandonment of the effort and a Congressional ban against reinstating it – a rare rebuke for a regulatory agency. The Do Not Call Rule was promulgated expeditiously and is enforced actively – with an enthusiastic endorsement from Congress. Most importantly for this discussion, the three rulemakings have changed the powers of the Commission in ways that the agency could not have accomplished on its own. The

[6] Children's Advertising, 43 Fed. Reg. 17,967 (Apr. 27, 1978).

[7] Do Not Call Rule of 2003, 68 Fed. Reg. 4580 (Jan. 29, 2003).

information that producers provided to consumers. With the new learning about the role of advertising in the marketplace guiding the Commission's competition policy, it was inevitable that the same insights would influence consumer protection.

The inevitable came to pass in the Children's Advertising Rulemaking. Staff regarded the new ideas about advertising as inapplicable to the commercials that it proposed to curtail when it launched the Rulemaking in 1978. According to the staff proposal, children -- unsophisticated, impressionable, and gullible -- still satisfied the precepts of the manipulative model of advertising. The conclusion followed easily that the Commission could ban commercials for kids without offending the premises underlying the pro-competitive view of advertising. This argument was designed to preserve more than consistency between competition and consumer protection policy; the staff was also preparing to defend the constitutionality of the rule. Just two years earlier in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[15] the Supreme Court had decided to extend First Amendment protection to commercial speech – relying on the Commission's economic studies of advertising to do justify its decision.[16] Courts of appeals had started to use that decision to curtail Commission orders that restricted more speech than necessary to cure deception.[17]

Neither the policies of the competition mission nor the warnings from the courts were enough to dissuade the Commission from launching KidVid. But both guided the Commission through its revision of unfairness policy in 1980 and the disposition of the Rulemaking in 1981. The agency abandoned its effort to control advertising to children because it could not conclude

[15] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

[16] *Id.* at 754 n.11, 765 n.20 (citing Commission staff report on a study predicting that the effect of the free flow of information from advertising consumer drug prices would be substantial).

[17] *See* Standard Oil Co. v. FTC, 577 F.2d 653 (9th Cir. 1978); Nat'l Comm'n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977).

that a ban would advance the stated purpose of the Rule or that a ban could target the allegedly offensive messages without suppressing many more messages of value to the marketplace. In other words, the agency compared the restraint's costs to its benefits and found a serious deficit. The staff recommendation did not declare the proposed ban anticompetitive or unconstitutional, but those conclusions were implicit in an analysis similar to that which the agency undertakes in applying the rule of reason in an antitrust case or the commercial speech doctrine under the First Amendment. Every consumer protection rule or enforcement action that restricts speech now has to satisfy a comparable competitive and constitutional review. Relatively few are tested in court, because the analysis performed in the closing of the Children's Advertising Rule is now second nature to the Commission. Do Not Call is one that has been tested, and it has passed.

I. The Cigarette Rule

The Cigarette Rule set in motion two separate legal developments, both of seminal importance but neither intended by the Commission. As soon as it was promulgated, the Rule precipitated the first specific cigarette legislation in the modern era. Congress, undoubtedly prompted by the Commission, enacted the Federal Cigarette Labeling and Advertising Act ("FCLAA"). FCLAA followed the concept of the Cigarette Rule by mandating disclosures on labeling and advertising, but at least as significant was the effect of the law on all putative regulators of cigarette marketing. FCLAA and its successors guaranteed that no authority other than Congress, at either the state or federal level, would be allowed to engage in substantive lawmaking in the area of smoking and health.

Eight years later, the rulemaking Congress had blocked before it could control cigarette marketing blossoed

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of Basis and Purpose for the Cigarette Rule and held that the Commission had broader power than the specific proscriptions of existing competition or consumer protection laws.[18] This broad mandate would later invite the Commission to launch its Children's Advertising proceeding, which nearly cost the agency its ability to regulate advertising under any definition of unfairness.

A. The Commission's Response to the 1964 Report of the Surgeon General

On January 11, 1964, the United States Surgeon General released the report of the Advisory Committee on Smoking and Health. The conclusion of the report was clear: Smoking causes lung cancer in men. Commissioner Philip Elman assigned his aide, Richard Posner, to draft a proposed rule to advise people of the findings.[19] Seven days later, the Federal Trade Commission issued a *Notice of Proposed Trade Regulation Rule*[20] and, in July 1964, promulgated a Final Rule requiring cigarette manufacturers to "disclose, clearly and prominently, in all advertising and on every pack, box, carton or other container … that cigarette smoking is dangerous to health and may cause death from cancer and other diseases."[21]

B. Congress Reacts

The Commission had not been proceeding in a vacuum. Tobacco spokesmen questioned the agency's authority to regulate and threatened litigation to stop the Rule, states began to consider labeling restrictions

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responded with legislation to postpone promulgation of the rule[23] and then requested that the agency postpone enforcement of the rule for six months.[24] The Commission complied, and Congress convened hearings to consider various remedial measures. Choosing from among a variety of alternatives (including possible FDA regulation of tobacco), Congress decided to mandate the warnings itself via FCLAA. As the Supreme Court describes it, Congress created a "comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health"[25] and required that all cigarette packs contain the warning, "Caution: Cigarette Smoking May Be Hazardous to Your Health."[26]

While Congress expressly preserved the Commission's authority under Section 5 of the FTC Act[27] to regulate and proscribe "unfair or deceptive acts or practices in the advertising of cigarettes,"[28] FCLAA affirmatively prohibited the Commission (and everyone else) from imposing any additional requirements for cigarette labeling.[29] Additionally, Congress declared that "[n]o statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of" FCLAA.[30] Thus, in response to the Commission's attempt to regulate cigarette labeling and advertising, Congress modified the outcome of the FTC proceeding, legislated it, and reserved for itself

[23] *See* Eileen Shanahan, *Court Fight Seen on Tobacco Rule*, N.Y. TIMES, Jun. 26, 1964, at 37.

[24] *See* Associated Press, *House Panel Asks Delay of Warning On Cigarette Packs*, N.Y. TIMES, Aug. 20, 1964, at 41; Food and Drug Adm'n v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 145 (2000); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 513-14 (1992).

[25] *Brown & Williamson*, 529 U.S. at 148 (quoting Pub. L. No. 89-92 § 2, 79 Stat. 282 1965.).

[26] Federal Cigarette Labeling and Advertising Act, Pub. L. 89-92, § 4, 79 Stat. 283 1965.

[27] 15 U.S.C. § 45 (2004).

[28] Codified 15 U.S.C. § 1336 (2001).

[29] Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 5(a), 79 Stat. 283 1965.

[30] *Id.* at § 5(b).

"exclusive control" over the subject.[31] This would not be the last time Congress would intervene and amend FTC regulatory activity in

labeling) to the FTC,[38] an authority exercised regularly by the Bureau of Consumer Protection,[39] and its contingent in the Division of Advertising Practices, headed for many years by a

the design of smokeless tobacco regulation, gave the Commission carefully constrained authority (with a minor supporting role for the Department of Justice), and trusted no one else to join the action.

D. The Legacy of the Cigarette Rule

The Food and Drug Administration discovered the lasting effect of the Cigarette Rule when it asserted in 1996 that it had jurisdiction to regulate tobacco products.[45] Ms. Wilkenfeld had left the FTC and its limited jurisdiction over tobacco to join the FDA, which exercised extensive controls over the marketing of drugs and medical devices. Declaring cigarettes to be a device, the FDA promulgated trade regulation rules affecting nearly every aspect of their promotion labeling and sale.[46] Tobacco manufacturers, retailers, and advertisers filed suit immediately challenging the FDA's jurisdiction and seeking an injunction against enforcement of the rule. The case eventually reached the Supreme Court, which held that the FDA did indeed lack jurisdiction, in large part because of the Cigarette Rule and Congress's reaction to it.[47]

over cigarettes – was the enactment of FCLAA.[49] According to the Court, by enacting FCLAA, Congress had clearly intended to preclude "*any* administrative agency from exercising significant policymaking authority on the subject of sthor4f st07(aking authoritaking a 7mubject012n2.sthn201

tobacco marketing, it did arm the Commission with a powerful weapon to wield against other industries. That weapon was given (or rather returned) by the Supreme Court to the Commission just at the time when it seemed that all the agency's constituencies were urging it to realize its full regulatory potential. The consumer movement was capitalizing on the success of Ralph Nader's campaign for automobile safety regulations.[54] Congress was passing a steady succession of laws regulating the economy.[55] The new Nixon administration heeded the calls of Nader's Raiders and the American Bar Association and appointed a series of strong Chairmen with a mandate to reactivate and revitalize the Commission. [56] First Casper Weinberger, then Miles Kirkpatrick (Chairman of the ABA Committee), then Lew Engman, reorganized the agency and began to pursue path-breaking causes in both competition and consumer protection.[57] The proscription of "unfair" practices in Section 5 was a potentially powerful weapon to use in those cases, but it needed ratification to realize that potential.

The Commission was eagerly anticipating (indeed it had sought) the endorsement of the courts of the Cigarette Rule's definition of unfairness. That endorsement came, not in a consumer protection case, but in the Commission's battle with Sperry & Hutchinson ("S&H")

laws – competition could be unfair independent of the proscriptions of those statutes.[58] The Court agreed, holding that unfairness depended on the criteria laid out in the Statement of Basis and Purpose to the Cigarette Rule:

> (1) "Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law … or other established concept of unfairness;"
>
> (2) "whether it is immoral, unethical, oppressive, or unscrupulous;" and
>
> (3) "whether it causes substantial injury to consumers (or competitors or other businessmen)."[59]

While the *S&H* decision gave the Commission the substantive power to consider public values outside the law, "like a court of equity,"[60] a legislative grant handed the Commission the procedural device to wield this power in numerous rulemaking attempts in the 1970s. That grant was the Magnuson-Moss and Federal Trade Commission Improvement Act ("MMFTCIA") which articulated detailed procedural authority to promulgate industry-wide rules.[61] The Commission had not quit promulgating rules after the Cigarette Rule. Generally modest efforts did not reshape marketing practices; few had provoked retaliation. But by 1975, another industry had made good on the tobacco companies' threat to challenge the authority of the Commission to promulgate trade regulation rules. This time the product was gasoline and the rule was the requirement to post octane ratings on gas pumps.[62] The Commission survived the challenge, but doubt remained about its powers. The MMFTCIA removed those doubts in 1975, and

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[58] *Sperry & Hutchinson Co.*, 405 U.S. at 245.

[59] *Id.* at 244 (citing Unfair or Deceptive Advertising and Liability of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. at 8355).

[60] *Id.*

[61] 15 U.S.C. § 2301 *et seq.* (2004).

[62] National Petroleum Refiners v. FTC, 482 F.2d 672 (D.C. Cir. 1973).

precipitated what has been acknowledged by the Chairman who presided over its climax as a rulemaking "frenzy."[63]

The Commission proposed rules that would have: imposed disclosures on over-the-counter medicines; required inspections, disclosures and warranties on used cars; established definitions (like "natural") for foods; regulated mobile home warranties; and banned certain credit practices, just to name a few. A list of major rulemakings in the 1970s reveals a wide array of proceedings that left the Commission with a bulging docket in the late 1970s.

Major 1970s Rulemakings		
	Initial Proposal	**Final Disposition[64]**
Octane Labeling	1969	Issued 1971
Care Labeling	1969	Issued 1971
Use of negative-option plans	1970	Issued 1973
Cooling-off period for door-to-door sales	1970	Issued 1972
Holder-in-due course I	1971	Issued 1975

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Mail order merchandise	1971	Issued 1975
Franchises and business ventures	1971	Issued 1978
Advertising Premiums to Children[65]	1974	Terminated 1977
Vocational schools	1974	Terminated 1988[66]
Credit practices	1975	Issued 1984
Mobile homes	1975	Terminated 1986
Food advertising	1975	Terminated 1982
Hearing aids	1975	Terminated 1985
Prescription drugs	1975	Terminated 1978
Cellular plastics	1975	Terminated 1980
Health spas	1975	Terminated 1985
Protein supplements	1975	Terminated 1984
Funeral rule	1975	Issued 1982
OTC drugs	1975	Terminated 1981
Holder-in-due course II	1975	Terminated 1988
Used cars	1976	Issued 1981
Care labeling	1976	Issued 1983
Ophthalmic practices I	1976	Issued 1978
Antacid advertising	1976	Terminated 1984
Thermal insulation	1977	Issued 1979
Children's advertising (KidVid)	1978	Terminated 1981
Standards and certification	1978	Terminated 1985
Ophthalmic practices II	1980	Vacated 1990

The agency proposed over two dozen industry-wide rules from 1971 through 1980 (ten years that spanned two political administrations), with the great majority being the waves of the

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environmentalist on their Boards.[67] Whether the nature or the number was more impressive is hard to say:

> In the mid-seventies, there were gestating with the womb of the FTC alone as many as thirty to forty major investigations, studies, cases, and rule-making proceedings, each as potentially as significant – and as threatening to some segments of business – as the truth-in-lending bill or the fair packaging and labeling bill, business *causes celebres* of a decade earlier.[68]

Few of these ever made their way into the Federal Register, but the activity underway by 1977 was already enough to foment serious resistance. The Funeral Rule, the Used Car Rule, and the challenges to doctors' and lawyers' advertising restraints, among others, had mobilized opposition to the Commission from very powerful constituents in Congressional districts across the land.[69] There is no question, however, that one rule in particular ignited the controversy that changed the course of unfairness and the Commission's consumer protection mission.

II. Discovering the Limits of Unfairness With Children

A. The Children's Advertising Rulemaking Bursts the Regulatory Bubble

As Chairman Muris described it, "The pinnacle of unfocused unfairness theories in rulemakings concerned children's advertising." [70] More than any other initiative, this was the proceeding that would brand the Commission as an undisciplined regulator, and the most indelible brand was applied by a typically friendly observer. The *Washington Post* called it a "preposterous intervention that would turn the agency into a great national nanny."[71] Well described elsewhere in this volume, the Commission proposed a rule that would ban all

[67] TIMOTHY J. MURIS & J. HOWARD BEALES, THE LIMIT

advertising to young children, ban advertising of the most heavily sugared products to older children, and require advertising or Public Service Announcements promoting good health to provide balance against commercials for other sugared foods.

The legal premise for the proposal was a 346-page staff report that concluded children were unable to discern the persuasive intent of advertising, that the sugared products advertised were not desirable, that the advertising caused children to eat more of the undesirable products, and that few if any of the justifications for advertising could be applied to children.[72] It followed that the advertising was itself unfair and deceptive and that its elimination from the airwaves could curb the incidence of dental caries in children. The Commission had impressive authority on its side; one of the advocates of the Rule was the Commissioner of the FDA, who had urged the FTC to protect kids from the commercials that lured them to caries-causing products. Citing a report from the Life Science Research Office of the Federation of American Societies for Experimental Biology that had attributed dental caries to then-current levels of sugar consumption, the Commissioner wrote:

> In view of the large amounts of advertising -- particularly television advertising -- that are directed to children urging them to consume a seemingly endless variety

and dental caries. The proceeding could not resolve the fundamental question whether a ban would reduce the injury to consumers that the rule was intended to address. There remained, at

left only a theory of deception to justify any proposed Rule. Nonetheless, the staff recommendation to terminate the proceeding was a significant development in its own right. It marked a sharp contrast to the Staff Report that launched the rulemaking, and it was a harbinger of the kind of analysis that awaited the many proposed rules that were fermenting within the Bureau of Consumer Protection.

A comparison of the 1978 Staff Report with the 1981 Final Report reveals remarkable developments in the approach to advertising. The 1978 Report had concluded that none of the classical economic justifications (such as providing information), indeed none at all, justified advertising to children.[80] The 1981 Report recited the Commission's longstanding recognition of the value of truthful advertising, including advertising to children,[81] and found evidence that children can learn from commercial communications.[82] The 1978 Report called advertising to kids "unconscionable,"[83] a conclusion nowhere to be found in the 1981 Report. In 1978, advertising was blamed for fomenting child-parent conflict,[84] another finding absent from the

to draw a line,[86] and the Commission agreed. The 1978 Report found advertising for sugared products to be false, misleading, and deceptive because it appealed to children too young to understand they were being solicited, it influenced their attitudes about the advertised products, and it failed to disclose the harm of eating the advertised products.[87] In 1981, the staff agreed that some children were too young to understand, but the staff coul

not only helped change consumer protection at the Commission; they helped change constitutional doctrine at the Supreme Court.

Although the 1978 Staff Report acknowledged in passing and dismissed as irrelevant the "classical justifications" for advertising, the staff devoted a great deal of analysis to explain why a recent Supreme Court decision that had extended First-Amendment protection to commercial speech would not impede the rule. Before 1976, the Commission had seldom confronted constitutional limits to its power to restrict advertising. For decades, the Supreme Court had denied free-speech protections to pu

and again citing economic work done in connection with the Commission staff's investigation of drug advertising, the Court observed that it "is entirely possible that advertising will serve to reduce, not advance, the cost of legal services to consumers."[99] Arizona could not ban advertising by lawyers, just as Virginia could not ban advertising by pharmacists, in large part because the new competition policy at the Commission had also become a policy vindicated by the First Amendment.

It did not take long for the implications of this decision to affect the advertising prosecutors at the Commission. In *National Commission on Egg Nutrition v. Federal Trade Commission*,[100] the FTC had issued an order directing the egg trade association to cease advertising that deceptively characterized the science concerning cholesterol, heart disease, and egg consumption. The order required future advertisements by the National Commission on Egg Nutrition to contain a disclaimer that medical experts believe egg consumption may increase the risk of dietary cholesterol and heart disease. The Court of Appeals for the Seventh Circuit overturned that requirement as a violation of the First Amendment. In language that would foreshadow FTC rulemaking and Congress's reaction in the years that followed, the court wrote, "The First Amendment does not permit a remedy broader than that which is necessary to prevent deception." [101] The Ninth Circuit pared back another order of the Commission because of similar concerns,

conformance with commercial speech protections.[103] Parties representing advertisers in the KidVid proceeding challenged the staff to explain how it could propose a ban in the face of these precedents. The staff did not answer the challenge directly, since it had decided to terminate the rulemaking, but staff clearly responded by acknowledging that it could not fashion an effective ban in the first place. That acknowledgement would have been more than adequate to find any ban unconstitutional.

The absence of any analysis of whether children's advertising was unconscionable also has a simple explanation. The FTC Improvements Act of 1980 ("FTCIA")[104] revoked the Commission's authority to promulgate any rule invoking a theory of unfairness to govern advertising and terminated other proceedings. The Commission had seen this coming and had tried to avert it by narrowing its expansive definition of unfair acts and practices – the definition articulated in the Cigarette Rule and approved in *S&H*. In 1980, the FTC issued its Unfairness Pa7gc[rabted 8(e)-nt,rro2rabted1.c3 -2..0.02879 Tw079Jrabted 80,rro2r-2.3

themselves could not reasonably have avoided."

Because of the 1980 FTCIA, KidVid escaped the application of this new unfairness analysis. But there is little doubt that without KidVid, the Commission would not have found it necessary to announce a policy that so significantly limited the agency's discretion and committed it to an economically based approach to unfairness. So the rule that represented the pinnacle of undisciplined unfairness left us with an unfairness doctrine that would govern the agency for the next twenty-five years.

Interestingly, the FTC's Unfairness Policy Statement's three prongs bear more than a passing resemblance to the analysis the Supreme Court requires for extending protection to commercial speech under the First Amendment. Compare the Unfairness Policy's[105] three elements to the three prongs of *Central Hudson Gas & Electric Corporation v. Public Service Commission*:[106]

- Unfairness Policy Statement – declared that unfairness would not be invoked to prohibit a practice unless it caused an injury (1) that must be substantial; (2) not outweighed by countervailing benefits to consumers or competition that the prohibition would displace; and (3) not reasonably avoidable absent the prohibition; and

- *Central Hudson* -- decided in the same year the FTC's Unfairness Statement was released -- (1) the asserted governmental interest must be substantial; (2) the e c1 0 advss

economist, much of Professor Muris's work was as suitable for economic journals as law reviews. (One of those publications was a book containing extensive legal and economic criticism of rulemaking at the agency, with whole chapters devoted to certain rules.)[108] More importantly for the Bureau, two of his top appointees reviewing staff recommendations, Howard Beales and Fred McChesney, counted Ph.D.s in economics among their credentials. Another Ph.D., Robert Rogowsky, would succeed them. This team led the effort to apply economic analysis and the new definition of unfairness to the remnants of its 1970s rulemaking, resulting in the cancellation or abandonment of most of those efforts. Abandoned were the rules proposing to regulate over-the-counter drug advertising, food advertising, health spas, hearing aids, and mobile homes.[109]

- In response to complaints about malfunctioning hearing aids, the

rule.

The decision in *International Harvester*[110] secured the Unfairness Statement as legal Commission precedent. The precedent became binding on the Commission in Congress's codification of the FTC's 1980 unfairness policy in 1994. In the process, Congress abolished public policy as an element of unfairness, even though the FTC had largely abandoned it from its unfairness test in 1980.

Without the Unfairness Policy Statement, would the Commission have chosen a similar vehicle to revamp its deception and substantiation policies? We cannot say. But it is beyond doubt that the Statement designed to quell the unrest created by KidVid provided a model for all three pillars of consumer protection law. Indeed, the circumstances leading up to the adoption of the Deception Policy Statement involved some of the same constituencies as the debate over unfairness. Miller and Muris came to the Commission convinced that the agency's problems stemmed from the vague and flexible limits of its authority. The Commission had made considerable progress clarifying that authority with respect to unfairness but the law on deception offered great temptation for the Commission staff to find products it deemed undesirable, like those ensnared in KidVid, and declare any advertising for them deceptive for failing to disclose their undesirable features. In a memo to the Commission in 1982,[111] Muris described numerous cases and proposals that had invoked the FTC Act's sanction against deceptive acts and practices to justify dubious challenges:

- A 1979 Staff report recommending that subjective claims get "closer legal scrutiny."

[110] *In re* International Harvester Co., 104 F.T.C. 949 (1984).

[111] Memorandum from Timothy J. Muris, Commissioner, FTC to Federal Trade Commission (March 25, 1982) (on file with author).

- A Deputy Bureau Director suggesting the Commission pursue a commercial showing a happily married couple on the grounds that the advertiser could not prove its product would generate marital bliss.

- A consent agreement prohibiting an auto manufacturer from advertising Road & Track Magazine's reviews of cars unless the manufacturer could back them up.

- A lawsuit against challenging claims th

agency's own competition policy.

III. The Telemarketing Sales Rule (the "TSR")

A. National Do-Not-Call ("DNC") Registry

In 2003, the FTC created the National Do-Not-Call ("DNC") Registry, the result of rulemaking pursuant to the 1995 Telemarketing Act. Its most important features include an opt-out provision, allowing individuals the opportunity to select not to receive telephone calls from solicitors. Conversely, the TSR provides an exemption for telemarketers who have the express permission of the individual call recipient. In addition, telemarketers may call individuals with whom they have an "established business relationship." Solicitations from charitable organizations are only subject to an opt-in company specific do-not-call restriction.

The DNC Rule spurred immediate controversy. Not since the KidVid era had the Commission pursued rulemaking and restrictions on commercial speech with the reach of what had failed two decades earlier; this time, however, the Commission acted pursuant to a Congressional mandate. In response to its proposal for a national DNC registry, the Commission received more than 64,000 comments.[113] While consumers, consumer groups, and state law enforcement agencies generally favored the DNC list, business and industry objected to the proposed restrictions on free speech in an open economy.[114] Proponents of the Rule weighed the cost against the benefits, claiming that the value of consumers' privacy outweighed the costs to businesses of a cessation in telemarketing. That is, those in favor argued that the DNC Rule provides a mechanism by which consumers may avoid unwanted interruptions on their time and in their homes. Opponents relied on another cost-benefit test, claiming that the cost of

[113] Do Not Call Rule of 2003, 68 Fed. Reg. at 4582.

[114] *See id*. at 4582-83.

suppressing speech generating enormous value to consumers in goods and services subsequently purchased outweighed the benefits to consumers of a quiet telephone. Thus, the battle lines were drawn for the court challenge. After an initial skirmish over whether Congress had authorized the Commission to issue the rule, the issue became not whether the Commission held the authority to enact the Rule but whether it had the power to enact a rule that distinguished between types of speech based on the caller. What began as a clear mandate from Congress to restrict telemarketing sales calls found its way into the courts.

B. Mainstream Marketing Services v. FTC

Seizing on the distinction made by the FTC between commercial telemarketing and calls from charitable organizations, the District Court in the case of *Mainstream Marketing Services v. Federal Trade Commission*[115] found that the DNC list was a sufficiently significant governmental intrusion on commercial speech to warrant First Amendment analysis under *Central Hudson* t5gi99 Tw 11.2iTj/TT2 1 Tf0 Tc634.770.0013hri Amen0.0o-6

the Commission recognized that all unwanted calls are invasive of privacy, yet failed to block unwanted calls on behalf of charitable organizations, the court found that the DNC list failed to advance the government's purported substantial interest – protecting consumers from the invasion of their privacy at home via the telephone.

Network,[120] and the distinction in *Discovery Network* bore no relationship to the city's interests. In addition, the DNC's commercial/non-commercial distinction was based on findings that commercial telephone solicitation was significantly more problematic than charitable or political fundraising calls.[121]

Furthermore, the court held that the registry was narrowly tailored because it did not over-regulate speech. The DNC list was merely a mechanism for allowing consumers to affirmatively avail themselves of a choice to block unwanted commercial solicitations. Additionally, consumers retained the choice to opt-out from specific charitable organizations via a company specific do-not-call list.

In October 2004, the Supreme Court denied the petition for writ of certiorari, leaving the Tenth Circuit's decision intact.[122]

C. Legacy of the DNC Rule at the FTC

Mainstream Marketing serves as evidence that every FTC consumer protection rule that restricts speech now has to satisfy both a competitive, cost-benefit analysis and a constitutional, First Amendment review. For the DNC Rule, the economic analysis is based on conflicting interpretations of the same costs and benefits. Consumers and their advocates view as benefits permissive speech restrictions to advance individual privacy rights. However, industry views these same restrictions as unwieldy limitations on free speech that are costly to the consumers themselves.

A First Amendment review of the Rule underscores one of the legacies of the KidVid rulemaking. Although the DNC Rule restricted commercial speech that would normally be

protected, the FTC structured the rule so that it would satisfy *Central Hudson's* three-part test, and thereby withstand an inevitable constitutional test. The Tenth Circuit held that the first prong of *Central Hudson* was met because the FTC had a substantial governmental interest in protecting the privacy of individuals in their homes and protecting consumers against the risk of fraud and abusive solicitation. [123] The DNC Rule also met the second prong of *Central Hudson* because the court held that the registry advanced the government's interests in combating the danger of abusive telemarketing and preventing the invasion of consumer privacy. Finally, the Rule met the third prong of *Central Hudson* because it restricted only core commercial speech (commercial sales calls) and therefore did not "burden[] an excessive amount of speech."[124]

1. Could Do Not Spam be in our Future?

In December 2003, Congress passed the: Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN-SPAM Act"). Among its provisions, the Act calls for the FTC to consider a Do-Not-Email Registry, akin to the DNC list. The Commission's examination of the prospect does not bode well for a sequel. As noted by Chairman Muris, a Do-Not-Email list would face significant impediments that DNC overcame. First, unlike

marketing.

> Because email technology allows spammers to shift the costs almost entirely to third parties, there is no incentive for the spammers to reduce the volume. … Because there is virtually no marginal cost to increasing the number of messages, fraud artists and pornographers, who generally have little to gain from reputation, profit from extremely low response rates by sending untold millions of messages. If spammers had to pay the actual costs of spam, normal market forces would eliminate much of the spam problem.[127]

group the rule was intended to protect.

The fortunes of these three rules can be explained by the lessons that a wiser Commissioner Pertschuk ("I was a cost-benefit draft resister."[128]) recommended after his term as Chairman:

1. Is the rule consonant with market incentives to the maximum extent feasible?
2. Will the remedy work?
3. Will the chosen remedy minimize the cost burdens of compliance, consistent with achieving the objective?
4. Will the benefits flowing from the rule to consumers or to competition substantially exceed the costs?
5. Will the rule or remedy adversely affect competition?
6. Does the regulation preserve freedom of individual choice to the maximum extent consistent with consumer welfare?
7. "States' rights" may be a tarnished symbol, but the federal regulator needs to ask, "To what extent is this problem appropriate for federal intervention and amenable to a centrally administered national standard?"[129]

Do Not Call and the Cigarette rule would pass these tests. KidVid obviously failed them. The Supreme Court now requires them. If future Commissioners heed the call from the father of KidVid, the Commission may be able to regard that experience as a short-run detour into ridicule that put the Commission on the road to respectability, and on the winning side of constitutional challenges.

[128] PERTSCHUK, *supra* note 3 at 139. Miller and Muris quickly learned that Pertschuk did not practice as he preached, for example when he waged a losing battle against the reforms of deception policy and other elements of the Miller agenda.

[129] *Id.* at 141-152.