

Legislative History: The Regulation of Tobacco and Food Companies to Address Public Health

by Brandon Kelley

It can be difficult to pinpoint when an issue becomes a public health problem because decades can go by before a trend is discovered. Some trends are noticed sooner than others, and some are addressed quicker than others. For example, tobacco use has caused a well-known public health crisis and consequently has been subjected to many regulations in an attempt to reverse the epidemic. In contrast, obesity is a relatively new public health crisis, and there have been arguments that unhealthy, or “junk,” foods should be regulated more strictly like tobacco. It is critical to study legislative history because previous laws or court cases compound and influence future legislation. As such, food corporations have already faced remarkably similar regulations as tobacco companies, except the regulations have been less strict. The lax regulations of food companies could explain why tobacco usage has been in decline, but obesity rates have continued to rise.

Federal regulation in the interest of consumer public health began as early as 1906 from the introduction of the Pure Food and Drug Act. The act was meant to protect consumer health and mandated several stipulations to prevent misleading marketing and adulterated or dangerous ingredients.¹ In 1911 the *United States v. Johnson* case ruled that the 1906 act addressed misleading ingredients but did not forbid misleading health claims.² However, the Sherley Amendments of 1912 added a provision that prohibited any misleading or fraudulent curative claims.³ Since 1912, legislative efforts continued to slowly evolve with a focus on consumer and public health safety.

Tobacco has been known to cause health problems since at least the early twentieth century. According to a 1919 Minnesota Cigarette Law and Comments Bulletin, smoking cigarettes was known to damage the organs.⁴ However, it was the epidemiological studies conducted by Ernst Wynder during the 1940s and 50s that finally linked cases of increased lung cancer to tobacco usage. As a result, the US Surgeon General officially concluded the correlation in 1964.⁵ In 1970, the government passed the Public Health Cigarette Smoking Act of 1969. It declared that the public

¹ Pure Food Act, 59th Cong., § 1, Ch. 3915. (1906).

² *United States v. Johnson*, 221 U.S. 488 (1911).

³ Pure Food Act Amended, 62nd Cong., § 2 Ch. 352 (1912).

⁴ James Sorenson, “Cigarette Law and Comments,” 1919, www.industrydocuments.ucsf.edu.

⁵ Centers for Disease Control and Prevention [hereafter CDC], “Achievements in Public Health, 1900-1999: Tobacco Use—United States, 1900-1999,” *Morbidity and Mortality Weekly Report*, last reviewed May 2, 2001.

must “be adequately informed” that smoking may be hazardous to health by mandating the statement: “*Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health,*” and banning radio or television advertisements of tobacco.⁶ The Public Health Cigarette Smoking Act of 1969 represented the first of many attempts by the government to minimize the public health crisis caused by tobacco usage and created a federal obligation that the public needs to be made aware of the dangers associated with tobacco.

Similarly, obesity was correlated with higher mortality as early as 1912 in a report by the Association of Life Insurance Medical Directors.⁷ Furthermore, obesity was correlated to diseases such as diabetes and shorter life span as early as 1933, as explained in a Horlick’s Malted Milk diet book.⁸ Most links between obesity and disease appear to be made from life insurance agencies until at least 1980 when the United States Department of Agriculture [USDA] released a pamphlet that discussed obesity and ideal weight.⁹ The Centers for Disease Control and Prevention [CDC] began to track obesity in 1999 with data collected by the continuous National Health and Nutrition Examination Survey [NHANES].¹⁰ Precursors to the NHANES existed as early as 1959, known as National Health Examination Survey 1, and included height/weight data, but this information was not utilized to track obesity.¹¹ Since the NHANES did not purposefully track obesity percentiles until 1999, it was seemingly not a major concern in the 20th century.

Interestingly, the CDC does have self-reported obesity data from a different and uniquely measured survey, the Behavioral Risk Factor Surveillance System. The Behavioral Risk Factor Surveillance System data show that obesity percentiles have been increasing since at least 1985 in state populations.¹² Unfortunately, it appears as if long-term statistical data on obesity rates, although existing in one form or another across various surveys, are fragmented and incomplete until at least 1999 when the CDC created the continuous NHANES to monitor obesity percentiles. As the obesity prevalence has increased since 1999, the American Medical Association officially classified obesity as a disease in 2013.¹³ The disease classification served as the

⁶ To Extend Public Health Protection with Respect to Cigarette Smoking and for Other Purposes, Public Law 91-222, 79 Stat. 282.15. 1970.

⁷ Association of Life Insurance Medical Directors, *Medico-Actuarial Mortality Investigation, The Actuarial Society of America*, vol. 1, (New York, NY, 1912), PDF.

⁸ Herman Bundesen, *A Safe Reducing Diet*, (Horlick’s Malted Milk Corp, Racine, 1933), PDF, 3, www.whatamericaate.org.

⁹ U.S Department of Agriculture, “Nutrition and Your Health,” *Dietary Guidelines for Americans*, 1980.

¹⁰ CDC, “National Health and Nutrition Examination Survey,” last reviewed April 30, 2020.

¹¹ CDC, “National Health.”

¹² CDC, “Obesity Trends Among U.S. Adults Between 1985 and 2010,” (2016).

¹³ American Medical Association House of Delegates, “Recognition of Obesity as a Disease,” Resolution No. 420, A-13 (2013).

acknowledgment that obesity represents a public health concern, but it has only continued to increase in adults from 34.9% in 2012 to 42.4% in 2018.¹⁴

Despite how long it takes for something to become a public health issue, the actions taken to slow or reverse the crisis are critical. After tobacco was linked to diseases, Congress initiated steps to reduce exposure to tobacco, especially for children. In 1965, the first survey created to assess tobacco usage revealed at least 42% of adults were smokers; by 2017, the prevalence of tobacco usage had declined to 19%. The reduction of tobacco usage is partially due to the aggressive anti-tobacco campaign and regulations on advertising. In contrast, for “junk” food items, there have been few advertising regulations because commercial advertising is difficult to regulate. A Supreme Court ruling *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc* declared truthful commercial advertising cannot be excluded from the freedom of speech since the economy depends on free-flowing information between seller and consumer.¹⁵ Samantha Graff, a lawyer in Public Health Law & Policy, states that the Virginia court case further suggests that the American public is capable of rational decision-making concerning their health and whether or not to purchase “junk” food. She contends that it would, therefore, be unlawful to ban “unhealthy” food advertisements.¹⁶

However, the rational decision-making ability of consumers is compromised if the marketing was misleading or deceptive. One marketing campaign of tobacco companies in the 1970s saw the introduction of “low-tar” or “light” cigarettes. The cigarettes were advertised as being less unhealthy due to lower tar yields, but when consumed, they still provided harmful levels of tar, nicotine, and other common carcinogens.¹⁷ Some consumers believed the “light” cigarettes marketing and switched to those under the belief the cigarettes were less unhealthy. Instead, evidence suggested that as a result of the “light” cigarettes, consumers actually received *more* tar and nicotine due to factors such as longer draws and more frequent smoking.¹⁸ As of 2018, the Food Drug Administration has barred tobacco companies from marketing their products as “light, mild, or low” unless evidence suggests the product is less harmful.¹⁹

The “low/light” branded tobacco marketing tactics vaguely mirrors the fat-free mania in food items. During the 1970s, fat and cholesterol were identified as a

¹⁴ CDC, “Prevalence of Obesity and Severe Obesity Among Adults: United States, 2017–2018,” National Center for Health Statistics, Last reviewed February 27, 2020.

¹⁵ *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc*, 425, US 748, (1976).

¹⁶ Jennifer Harris and Samantha Graff, “Protecting Young People from Junk Food Advertising: Implications of Psychological Research for First Amendment Law,” (2012), <https://doi.org/10.2105/AJPH.2011.300328>.

¹⁷ National Cancer Institute, “Dictionary of Cancer Terms,” *National Institute of Health*.

¹⁸ Center for Disease Control, “Low-Yield Cigarettes,” (2019).

¹⁹ Center for Tobacco Products, “Advertising and Promotion,” *U.S. Food and Drug Administration*, (2020).

contributor to heart disease, and many manufactures began producing low-fat and fat-free food items. In foods, fat contributes to satiation and taste; removal of fat reduces the flavor, but the addition of sugar compensates for that loss of flavor.²⁰ Sugary carbohydrate-rich snacks with no fat are often unfulfilling and can lead to overeating. A suspected contributor to the obesity epidemic was the overconsumption of fat-free but high-sugar snacks.²¹ Admittedly, it could be an understandable and logical initial conclusion that dietary fats would increase cholesterol levels, a fat-based molecule in the body. However, it is suspected that sugar companies played a role in research that placed emphasis on dietary fat demonization while excluding the role of sugar. In 1965, the Sugar Research Foundation performed industry-supported research that discovered sugar (sucrose) contributed to cardiovascular disease by increasing serum cholesterol and serum triglyceride levels, in addition to discovering that a reduction of cholesterol and saturated fat intake could improve serum cholesterol levels.²² Due to specific omissions in the final report, arguments over result validity, and potential result manipulation, the final review concluded that the only dietary intervention needed to help reduce cardiovascular disease was the reduction of cholesterol and saturated fat consumption.²³ In 1977, the McGovern Committee officially announced that Americans should eat less fat and cholesterol in order to prevent chronic diseases.²⁴ Although the report also suggested reducing sugar and processed food intake, during the 1980s, manufactures were producing fat-free products that had higher sugar content, a trend that still occurs today.²⁵ So, if tobacco companies are no longer able to market their products as “light” due to unchanged negative health risks and more frequent consumption, then regulations on “light, free, or reduced” branded food products should be investigated. Foods that are advertised as healthy alternatives due to their “light/free/reduced” branding may contain higher sugar, sodium, or other ingredients that pose health risks. Similar to the “low tar” cigarettes, consumers may be overconsuming these healthy alternative foods, leading to an overabundance of sugar, sodium, or calorie consumption.

Another parallel between tobacco and food industry marketing involves child-targeted advertising. The Federal Trade Commission [FTC] acknowledges the concern between “junk” food advertisements and children, and have explained the steps they

²⁰ David McClements, “Reduced-Fat Foods: The Complex Science of Developing Diet-Based Strategies for Tackling Overweight and Obesity,” *Advances in Nutrition*, (2015), doi: 10.3945/an.114.006999.

²¹ Nestle, Marion, “Interview: Marion Nestle,” Interviewed by PBS Frontline, (2008).

²² Cristine Kearns, et al, “Sugar Industry and Coronary Heart Disease Research: A Historical Analysis of Internal Industry Documents,” *JAMA Internal Medicine*, 2016, doi: 10.1001/jamainternmed.2016.5394.

²³ Cristine Kearns, et al, “Sugar Industry.”

²⁴ Dietary Goals for the United States, Select Committee on Nutrition and Human Needs, United States Senate, 95th Cong. 1st Session, February 1977, US Dietary goals.

²⁵ P K Nguyen, et al, “A Systematic Comparison of Sugar Content in Low-Fat vs Regular Versions of Food,” *Nutrition & diabetes*, 2016, doi: 10.1038/nutd.2015.43.

are taking to combat obesity, in addition to their rationale for not regulating the advertisements.²⁶ In a document based upon a speech by Howard Beales, Director of the Bureau of Consumer Protection, the FTC cites the Supreme Court as stating that regulation of free speech, or commercial advertising, should be a last resort and not the first option to be considered.²⁷ The FTC compared the discussion of regulating food advertisements towards children with a logistically complicated and difficult attempt by the FTC to reduce dental caries via regulation of child-targeted advertisements during the 1970s.²⁸ In addition, if the FTC were to pursue regulation, there are logistical hurdles that need to be met in order for the regulation to pass, such as: legally defining “junk” food, determining time slot advertisements, and other criteria such as determining whether the food advertisement itself is linked to obesity or the sedentary time in front of the television.²⁹ The FTC’s official position is that the food industry should be encouraged to change their practices to encourage healthier diets and lifestyles, and declared that banning certain food advertisements “is neither a workable nor an efficacious solution to the health problem of childhood obesity.”³⁰

Conversely, banning cartoon characters in marketing *was* seen as an efficacious solution, at least against tobacco use. In 1997, the FTC officially filed a complaint that R.J. Reynolds Tobacco Company’s ‘Joe Camel’ character brand was a violation in advertising towards children, citing that due to the character, children under the age of 18 became a larger percentage of people who smoked Camel cigarettes than the percentage of adults.³¹ The Joe Camel campaign represented an effective marketing strategy – with the character becoming as well-known as Mickey Mouse – purposefully hooking children onto cigarettes and placing them at risk to become lifelong smokers.³² The complaint suggested that: 1) due to themes and techniques of using the character, the company should have known that it would have a massive appeal to children; 2) many children and youth do not comprehend the risks associated with tobacco.³³ Ultimately, the FTC dropped the complaint because of the Master Settlement Agreement of 1998 between four of the largest tobacco companies and most of the states and territories. The agreement prohibited the use of cartoon characters in tobacco products and advertising, in addition to mandating that tobacco companies help

²⁶ Federal Trade Commission [hereafter FTC], “Food Marketing to Children and Adolescents,” *Federal Trade Commission*, (2019).

²⁷ Howard Beales, “Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present,” *Federal Trade Commission*, 2004, 21.

²⁸ Beales, 6.

²⁹ Beales, 19.

³⁰ Beales, 23.

³¹ FTC. “Joe Camel Advertising Campaign Violates Federal Law,” *Federal Trade Commission*, (1997).

³² FTC, “Joe Camel.”

³³ FTC, “Joe Camel.”

finance public education to reduce underage smoking and inform the public on the dangers of tobacco use.³⁴

The marketing tactic of food companies using cartoon characters saw a different regulatory outcome. In 2011, a Fox News article covered an Associated Press story that the government planned on banning cartoon characters or mascots on food items such as cereal boxes. The original proposal would set maximum limits for different nutrients in food items. If the limit was exceeded, the food item could not be advertised towards youth between ages 2-17, including television, in-store, and internet advertisements, in addition to ridding of cartoon characters such as those on cereal boxes.³⁵ However, food industry interest groups lobbied against the legislation, stating they are too broad and would “limit marketing of almost all of the nation's favorite foods.”³⁶ As a result, the mandates originally put forth were re-evaluated, and ultimately agreed-upon industry guidelines concerning food advertisements towards children were encouraged. One organization that sets industry guidelines is the Children’s Food and Beverage Advertising Initiative, a coalition of at least 13 of the largest food companies, or an estimated 2/3 of advertising expenditures. The companies in the coalition pledge to adhere to annually updated voluntary standards.³⁷ In 2011, the Children’s Food and Beverage Advertising Initiative saw new guidelines such as setting limits for quantities of fats, sugars, or sodium on food marketed towards children, in addition to continued use of cartoons or licensed characters on healthier food options.³⁸ David Vladeck, the director of the FTC’s consumer protection, suggested that the use of cartoon characters represented an inextricable link to the food’s “brand identity” and should remain untouched.³⁹ So for tobacco, cartoon-based advertising became restricted due to its efficiency. In contrast, for food companies, the use of cartoon-based advertising is suggested as an effective marketing strategy towards healthier options.

Excluding a prohibition-style ban on “junk” food and tobacco, there does not appear to be many regulatory actions left apart from marketing and availability that would reduce the consumption of those products. Nonetheless, one of the remaining options includes implementing taxes. The CDC says that applying taxes have been one of the most effective ways to reduce smoking prevalence, stating in 1999 that a 10% increase in tobacco price reduced demand for cigarettes by 4%,⁴⁰ in 2017, a 20% increase in tobacco price reduced demand by 7.4% for people over 30 years old, or by 14.8% for

³⁴ Robert Pitofsky, “Complaint Dismissal,” *R.J. REYNOLDS TOBACCO COMPANY – ODC*, 1999.

³⁵ Associated Press, “Gov’t to Urge Food Companies To Limit Ads For Kids,” (2011), Dfw.cbslocal.com.

³⁶ Fox News, “Cartoon Characters on Cereal Boxes Get Reprieve,” (2016).

³⁷ William Kovacic, “Marketing Food to Children and Adolescents,” *Federal Trade Commission*, (2018), 62.

³⁸ Elaine Kolish, “The Children’s Food & Beverage Advertising Initiative,” *Council of Better Business Bureaus*, (2012), 5, 9.

³⁹ Fox News, “Cartoon Characters on Cereal Boxes Get Reprieve,” (2011).

⁴⁰ CDC, “Achievements in Public Health, 1900-1999: Tobacco Use—United States, 1900-1999,” (1999).

people between 13-29 years old.⁴¹ The idea of sugar taxes has been around for some time, and a quick internet search will reveal dozens of blogs and articles that argue against implementing a sugar tax. The CDC links to a County Health Rankings organization website that discusses the validity of sugar or “unhealthy” snack taxes. The website states that evidence suggests taxing food items would decrease the amount consumed, but it would have to be a larger tax than most areas currently impose.⁴² Taxes on sugary beverages is often less than 4%, and it has been suggested that a tax of 20% would be the lowest threshold that would begin to reduce calorie consumption.⁴³ For example, Berkeley, California implemented a tax equivalent to 12 cents per can and saw a 21% decrease in sugary beverages and a 63% increase in water purchases, suggesting a tax on soda consequently encourages people to drink more water.⁴⁴

Despite the many arguments against a sugar or “unhealthy” food tax, a critical point is determining what should be taxed. If the government considered ingredients that can be linked to health problems when overconsumed, taxes could apply to saturated fats, cholesterol, sodium, or the nutritionally-ambiguous term “sugar.” For a sugar tax, perhaps it would apply to sucrose (table sugar) and maybe high fructose corn syrup, but naturally-occurring sugar in food items such as milk and fruits need to be considered as well. If the government taxes sugar or even added sugar, companies can switch to controversial non-caloric artificial sweeteners or increase the use of non-digestible sugar alcohols. It appears that placing a tax on so-called “unhealthy” foods is more complicated than taxing tobacco because certain ingredients that can be unhealthy in large quantities appear across many different types of food. So, if an “unhealthy” ingredient were to be taxed, many logistical questions would need to be answered such as: *what ingredients will be taxed?; will it be above a certain threshold of quantities only?; will there need to be any legal definitions regarding “unhealthy” foods?* Dealing with the logistics will be a regulatory challenge different from that of tobacco regulation and explains why the government finds it easier to rely on self-imposed voluntary guidelines of food companies, as opposed to law-driven regulations.

Although there are several similarities in regulations between food and tobacco companies, the regulatory outcomes may also vary because of the different dangers of the products. Tobacco use has been linked to many different diseases, even if used in moderation, in addition to having detrimental effects due to second-hand smoke exposure.⁴⁵ Whereas food often contains multiple ingredients, none of which are necessarily unhealthy by themselves in moderate consumption but could pose health

⁴¹ CDC, “Tobacco Control Interventions,” (2017).

⁴² County Health Rankings, 2017, “Sugar Sweetened Beverage Taxes.”

⁴³ County Health Rankings, “Sugar Sweetened.”

⁴⁴ County Health Rankings, “Sugar Sweetened.”

⁴⁵ Center for Disease Control, 2014, *The Health Consequences of Smoking: 50 Years of Progress*, A Report of the Surgeon General, (2014), 95-97, 425.

problems if overconsumed. Therefore, it may be understandable that regulations on food companies have been seemingly lackluster when compared to regulations of tobacco companies. However, considering that the regulatory pressure on tobacco companies has seen the frequency of smokers decrease over the decades, yet the regulation of food products has been less strict with obesity rates continuing to rise, it seems to suggest a reasonable solution still needs to be found.

Analyzing the legislative history of the public health crises may lead to new ideas to try and curb the obesity epidemic. For example: should consumers be adequately warned on the dangers of overeating, similar to the dangers of smoking?; should “fat-free” and similar labels be restricted, due to the risk that, like “light” cigarettes, it may be encouraging more frequent consumption under a misplaced idea of health?; should cartoon characters be banned from anything other than fruits, vegetables, and legumes? Understanding the regulatory, legislative history can also save time and money, such as the FDA acknowledging that trying to ban “junk” food advertisements would be logistically difficult and instead encouraged other alternatives. This history can also be used to find and apply the tactics that have worked, such as implementing taxes with the desire to discourage the purchase of a particular product. Unfortunately, the biggest drawback of using regulatory history is the difficulty in applying legislation to a completely different field, showing why food companies have not been regulated as strictly as tobacco companies.