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Fairness and Unfairness in Television Product Advertising

In a dramatic shift in policy,¹ the Federal Trade Commission has proposed strict new regulation of children's television advertising. On February 28, 1978, the Commission unanimously approved staff recommendations to initiate a trade regulation rule that would ban all televised advertising directed at preschool-age children, ban televised advertising directed at children aged up to eleven years of sugared foods, posing high dental-health risks, and require that commercials viewed by these older children for other sugared foods be balanced by nutrition and health messages financed by advertisers.² Hearings on these proposals are expected to be lengthy, and the affected industries are mobilizing opposition.³

Whatever the fate of the FTC initiatives, they have brought into sharp focus fundamental questions about the social role of television advertising, the need and authority for governmental regulation, and the limits to such regulation imposed by the first amendment. The FTC has singled out for attention an especially vulnerable and sympathetic class—children. But the powerful messages of television advertising reach virtually all Americans. Decisions about the regulation of children's television advertising will necessarily implicate larger issues of public policy and constitutional rights.

The purpose of television product advertisements⁴ is to induce a

1. The recent history of the Federal Trade Commission's response to children's television advertising practices is set forth in note 168 *infra*.

2. In its notice of rulemaking, the Commission invited comment on whether it should:

(a) Ban all televised advertising for any product which is directed to, or seen by, audiences composed of a significant proportion of children who are too young to understand the selling purpose of or otherwise comprehend or evaluate the advertising;

(b) Ban televised advertising for sugared food products directed to, or seen by, audiences composed of a significant proportion of older children, the consumption of which products poses the most serious dental health risks;

(c) Require televised advertising for sugared food products not included in Paragraph (b), which is directed to, or seen by, audiences composed of a significant proportion of older children, to be balanced by nutritional and/or health disclosures funded by advertisers.

FTC Proposed Trade Regulation Rulemaking and Public Hearing, 43 Fed. Reg. 17967, 17969 (1978). The rulemaking notice indicated that "young children" referred to those below the age of eight and "older children" referred to those aged eight to eleven. *Id.* at 17969 nn. 16 & 17.

3. Schorr, *Some TV Ads That May Mislead Children Face Ban FTC Staff Plans To Recommend*, Wall St. J., Feb. 24, 1978, at 10, col. 3.

4. This Note is primarily concerned with product advertising and thus does not contemplate issues involving conventional political advertising or corporate "image" advertising. To the extent the latter two forms of advertising contribute to political debate, the first amendment affords them broad protection from regulation. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). To the extent that corporate "image" advertising affects commercial transactions, it may be subject to regulation by the Federal Trade Commission. See letter from the Federal Trade Commission to Senator Thomas McIntyre and several other members of Congress (Apr. 30, 1975), reprinted in 5 TRADE REG. REP. (CCH) ¶ 50,231 (1975); address by then-

purchase. But, in thirty seconds of sight and sound, each commercial conveys countless messages extending far beyond the product to the mores, values, and aspirations of our society. Their aggregate impact upon viewer attitudes is difficult to ascertain, but accumulating evidence suggests that the impact may be substantial. Some advertisements may color citizens' perceptions of important, controversial issues. Some may perpetuate and reinforce psychologically destructive cultural stereotypes. Some may mislead, affirmatively or tacitly, on vital purchasing decisions. Advertising accounts for a significant portion of television broadcasting time, and television occupies an increasingly significant portion of Americans' lives. For a nation committed to "uninhibited, robust, and wide-open" political debate,⁵ to cultural pluralism, and to the health and welfare of its people, the impact of television product advertising raises troubling questions.

The first section of this Note explores the impact of television product advertising⁶ on viewer attitudes. The next two sections set forth the statutory basis on which the Federal Communications Commission and the Federal Trade Commission could provide for the effective presentation of contrasting points of view on controversial issues implicitly or explicitly raised by television product advertising, could ensure that the implicit messages of such advertisements are delivered fairly and without deception, and could counter the adverse effects of such advertising. The purpose of these sections is not to predict actual regulatory behavior, for in fact the FCC and FTC have shown a reluctance to take any action in these areas. The final section considers the constitutional limits on any governmental response to television advertising in light of the Supreme Court's traditional differentiation between broadcasting and the print media and of the Court's recent abandonment of the doctrine that commercial speech enjoys no first amendment protection.

I. THE MESSAGES OF TELEVISION ADVERTISING

In the span of three decades, television has emerged as a dominant cultural institution in the United States. The parade of statistics, though familiar, still astonishes. Ninety-seven per cent of all American households have a television set and forty-three per cent

FTC Chairman Lewis A. Engman to the Antitrust Section of the State Bar of Michigan (Feb. 15, 1974), reprinted in 5 TRADE REG. REP. (CCH) ¶ 50,200 (1974); Ludlam, *Abatement of Corporate Image Environmental Advertising*, 4 ECOLOGY L.Q. 247 (1974). The Federal Communication Commission's "fairness doctrine" covers both forms of advertising if they expressly address controversial issues. See text at note 71 *infra*.

5. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

6. See note 4 *supra* for a discussion of the scope of this term.

have two or more.⁷ The average set is on more than six hours each day, with usage increasing to nearly eight hours if a preschool-age child is in the home. Today's eighteen-year-old has spent approximately 22,000 hours in front of a television—more time than in any other activity except sleeping—and has watched approximately 350,000 commercials along with other programming.⁸ In 1976, advertisers spent 6.6 billion dollars on television advertising,⁹ which occupies a significant portion of all broadcast time.¹⁰

The impact of television, and in particular of television product advertising, on American society is much more difficult to measure than is the pervasiveness of television viewing.¹¹ It has proved easier to design and implement communications strategies than to gauge their actual effects upon viewer desires, attitudes, and prejudices. Social scientists have struggled to keep pace with rapidly evolving media technologies and techniques, but they have found that the more they learn, the more they need to learn.¹² The bulk of advertising research, moreover, is confined to analysis of the sales efficacy of particular advertising campaigns and provides little information about the actual impact of television advertising.¹³ Given the com-

7. Ricklefs, *The Television Era: Three Families Show How Generation of T.V. Has Altered Lifestyles*, Wall St. J., Oct. 12, 1976, at 1, col. 1.

8. On the average, a student graduating from high school has spent 11,000 hours in the classroom, which is only approximately half of the time he has spent watching television. Lublin, *The Television Era: From Bugs to Batman, Children's TV Shows Produce Adult Anxiety*, Wall St. J., Oct. 19, 1976, at 1, col. 1.

9. See Lancaster, *The Television Era: How TV Commercials Use Ploys and Anxiety To Try To Win Viewers*, Wall St. J., Nov. 1, 1976, at 1, col. 1 (figures are 1976 projections). The Television Bureau of Advertising has announced a 1980 sales goal of nine billion dollars. *Advertising Age*, Jan. 31, 1977, at 8.

10. Many broadcast outlets subscribe to the Television Code of the National Association of Broadcasters. This code limits the broadcast of "non-program material" by network-affiliated stations to 16 minutes per hour. The limit is 9 1/2 minutes per hour for children's programs aired in "prime time" or on a weekend day; it is 12 minutes for children's programs broadcast on weekdays outside prime time. NATIONAL ASSN. OF BROADCASTERS, *THE TELEVISION CODE 16-17* (19th ed. 1976). "Non-program" material may be of a nonadvertising nature.

11. See *Banzhaf v. FCC*, 405 F.2d 1082, 1100-01 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969); Kottman, *Truth and the Image of Advertising*, J. MARKETING, Oct. 1969, at 64.

12. See, e.g., Sheikh, Prasad & Rao, *Children's TV Commercials: A Review of Research*, J. COM., Autumn, 1974, at 126.

13. See, e.g., J. KLAPPER, *THE EFFECTS OF MASS COMMUNICATION* x-xi (1960). In making public pronouncements, the advertising and broadcasting firms that have sponsored such research face an awkward dilemma: to attract clients, they must claim vast persuasive powers; to mollify critics, they must disclaim any profound impact. See Foxall, *Advertising and the Critics: Who Is Misleading Whom?*, 48 ADVERTISING Q. 5 (1976). Advertisers must believe that television advertising effectively promotes their products. Thirty seconds of prime-time advertising sold for an average of \$50,000 to \$55,000 in the fall of 1977. See N.Y. Times, Jan. 8, 1978, National Economic Survey, at 57. But, when confronted with the criticism that massive advertising of over-the-counter drugs may contribute to a "drug mentality" among younger viewers, the National Broadcasting Company published studies purporting to demonstrate that "teenagers who are exposed to more TV drug advertising are less likely to use illicit drugs." BROADCASTING, June 7, 1976, at 31 (quoting William S. Rubens, an NBC vice president) (emphasis original).

plexity of the communication process, one must not mistake ubiquity for influence.¹⁴

Despite the need for caution in assessing this impact, authorities agree that the mass media are adept at reinforcing or channeling preexistent beliefs of the audience but relatively ineffective in converting the audience to new ones.¹⁵ The conclusion does not follow, however, that television advertising has a negligible impact upon viewers' values and perceptions.¹⁶ First, in a changing society the conservative reinforcement of traditional myths, stereotypes, and prejudices does have an impact. The least common denominator of social consensus, embraced by advertisers in order to maximize appeal and minimize offense, is not value-neutral simply because it is broadly tolerated.¹⁷

Second, studies indicate that the mass media, though having only limited ability to alter viewer perceptions radically, may successfully bring about small, incremental changes in attitude.¹⁸ These minor changes are most likely to occur when the viewer entertains two conflicting opinions or attitudes—in that circumstance, the media may effectively guide the choice between them.¹⁹ Because the public is frequently ambivalent about many complex social questions, con-

14. See Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 769 (1972); Lazarsfeld & Merton, *Mass Communication, Popular Taste and Original Social Action*, in MASS COMMUNICATIONS 492, 494 (W. Schramm ed. 1960).

15. See, e.g., J. KLAPPER, *supra* note 13, at 15-17; P. SANDMAN, D. RUBIN & D. SACHSMAN, *MEDIA* 15 (2d ed. 1976) [hereinafter cited as P. SANDMAN].

16. See Jaffe, *supra* note 14, at 769-70.

17. See *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642, 661 (D.C. Cir. 1971), *revd. on other grounds sub nom. Columbia Broadcasting Sys., Inc. v. Democratic Natl. Comm.*, 412 U.S. 94 (1973); J. KLAPPER, *supra* note 13, at 38; H. SCHILLER, *MASS COMMUNICATIONS AND AMERICAN EMPIRE* 149 (1969); Lazarsfeld & Merton, *supra* note 14, at 503-04. "In America, where commercial control [of media] sanctions only the sanctioned, rebels are particularly unlikely to receive much aid from mass media. The essential danger of mass media in America lies in their ability to inflate existing consent to the point of a dull unanimity, and so to achieve social and economic stasis." Klapper, *Mass Media and the Engineering of Consent*, 17 AM. SCHOLAR 419, 428 (1948).

Recent evolution of Coca-Cola advertising provides an intriguing example of the interplay of television advertising and political and cultural attitudes. According to *Advertising Age*, the company's policy is to tailor its advertising campaign to "the mood of the country." In 1974, to complement its long-running "It's the real thing" campaign, Coke introduced its "Look up, America" theme "to accentuate the positive, to provide some relief from Watergate problems and the 'down' side of life." The company then discarded both themes in favor of "Coke for better times," which was accompanied by faster, march-tempo music described as reminiscent of "When the Saints Go Marching In." *Advertising Age*, April 26, 1976, at 1. Whether Coca-Cola's advertising was effective in distracting the nation from the trauma of Watergate is debatable, but it is significant that the company intended both to sell a product and to brighten the national self-image. Cf. D. POTTER, *PEOPLE OF PLENTY* 188 (1954) (advertising is intended not only to sell the product, but also to shape human standards).

18. J. KLAPPER, *supra* note 13, at 17-18.

19. See *id.* at 44-45.

stant exposure through television to a particular idea or attitude may significantly shape some viewer perceptions.

Finally and most critically, it appears doubtful that people's resistance to attitudinal conversion extends beyond the explicit commercial message of an advertisement to its implicit cultural messages, which Margaret Mead has called "the ad behind the ad."²⁰ These supplementary, incidental messages may circumvent the conscious defenses of the viewer and more readily influence his attitude.²¹ An advertisement might not convince viewers to buy a particular brand of cigars, but it might reassure them that a woman's primary role is sexual ornamentation.²² A snack food advertisement need not induce a purchase to suggest to the viewer that processed snack foods are nutritious.²³ Although generally ancillary to advertising's commercial purpose,²⁴ these messages touch upon every aspect of American life. Their role in shaping attitudes and opinions regarding three issues—the environment, sexism, and nutrition—may be representative.

The cultural environment modifies people's perceptions of their physical environment.²⁵ Perception of environmental concerns as "problems," in turn, is a prerequisite to attention and action.²⁶ Where advertising promotes products that harm the environment or endorses values that contribute to environmentally destructive practices, it may have an impact upon public attitudes on important

20. Mead, *Some Cultural Approaches to Communications Problems*, in MASS COMMUNICATIONS 329, 340 (W. Schramm ed. 1960).

21. *Id.* at 339-40. See Adorno, *How To Look at Television*, 8 Q. FILM, RADIO, & T.V. 213, 221 (1954); Gussow, *Counternutritional Messages of TV Ads Aimed at Children*, 4 J. NUTRITION EDUC. 48, 50 (1972); Reed, *The Psychological Impact of TV Advertising and the Need for FTC Regulation*, 13 AM. BUS. L.J. 171, 179 (1975).

22. For example, in one Muriel cigar television commercial (outline on file at *Michigan Law Review*), workmen are shown doing their jobs. Suddenly, lights illuminate the rear of the scene. A blonde woman in a cutaway, string-skirted gown dances across the stage and hands cigars to the men. She then sings:

Turn off the bright lights and turn off the gloom. Great-tasting Muriel will light up the room. Light up a Muriel and light up your life. Let in the sunshine wherever you are. Reach for a Muriel, it's one great cigar. Light up a Muriel and light up your life.

23. In one television advertisement, the announcer stated:
 "Like new Hostess Twinkies that golden sponge cake * * * with creamy filling * * * now gives your children more than good taste. It gives them important nutrition, too. Because now Hostess Twinkies are fortified with body-building vitamins and iron to grow on. . . . Now there are snack cakes with more than good taste. New vitamin-fortified Hostess snack cakes. . . . Thank Hostess for the good taste kids love, and good nutrition they need."

ITT Continental Baking Co., 83 F.T.C. 865, 982, *modified*, 83 F.T.C. 1105 (1973), *enforcement order as modified granted*, 532 F.2d 207 (2d Cir. 1976) (quoting snack cake advertisement).

24. See note 50 *infra*.

25. W. BURCH, H. CHEEK & L. TAYLOR, SOCIAL BEHAVIOR, NATIONAL RESOURCES, AND THE ENVIRONMENT 201 (1972).

26. Murch, *Who Cares About the Environment?*, in ENVIRONMENTAL CONCERN 11-12 (MSS Information Corp. 1974).

environmental issues.²⁷ First, consumers' purchasing decisions affect the health of ecosystems.²⁸ Moreover, as noted above, product advertisements may affect attitudes without successfully inducing purchase.²⁹ Thus, a viewer might decide not to buy a snowmobile but learn from advertising that snowmobiling is an enjoyable, socially approved recreation.³⁰ The broadcast of advertisements for soft drinks in disposable containers when a bill banning no-return bottles is pending in a state legislature, for home trash compactors when recycling is being urged as a means of solid waste management, or for automobiles when a bond issue for public transportation or bikeways is before the voters may influence the viewer both as a consumer and as a citizen. More generally, the "consumption ethic" promoted by television advertising³¹ may simply overwhelm the "land ethic" of respect for the natural environment.³² Where advertising panders an illusion of abundance, where it manifests resources only as consumer goods, where it glorifies technology as a panacea for shortages worldly and spiritual, advertising intervenes in environmental controversy.³³ The endorsement of energy-intensive, high-mobility, throwaway lifestyles in suburban settings is a significant social statement with major ramifications for land use, air pollution, and energy conservation.

The stereotyping of women in television product advertising has received extensive documentation.³⁴ A summary of several indepen-

27. Empirical evidence of the impact of product advertising on environmental attitudes is negligible. See text at notes 11-13 *supra*. One limited study of the impact of an advertising campaign claiming antipollution benefits of a brand of gasoline reached inconclusive results. Sandman, *Madison Avenue v. the Environmentalists*, 5 J. ENVTL. EDUC. 45, 49 (1973).

28. See generally P. EHRLICH & A. EHRLICH, POPULATION, RESOURCES, AND ENVIRONMENT 196 (2d ed. 1972); A. FRITCHE, THE CONTRASUMERS (1974); P. SWATEK, THE USER'S GUIDE TO THE PROTECTION OF THE ENVIRONMENT (1970).

29. See text at notes 20-21 *supra*.

30. See, e.g., WMTW Television (Poland Spring, Maine), Snowmobile Advertiser Texts (copy for several snowmobile advertisements) (on file at *Michigan Law Review* office). In one advertisement, snowmobiles are shown roaring across snow-covered slopes as a voice sings: Hey Blue . . . Big Blue . . . it's a real mobile with a real good feel . . . it's a Sno Jet, you bet . . . Big Blue . . . gotta get goin' while the snow is snowin' . . . we'll be riding high . . . we're goin' to pass them by. We'll take 'em on a hill like they're standing still . . . Big Blue. Star Jet, SST, Whisper Jet . . . they're the Big Blue Sno Jet snowmobiles for 73. And with features like the multiplex 2 slide suspension and positrack for fantastic hill climbing. You don't have to look any further for a snowmobile. (Music) Hey Blue . . . ridin' Blue . . . gonna have some fun with a son of a gun . . . gonna move on out make the other ones run. Be it black or green or yellow . . . it's mean . . . Big Blue. Hey Blue . . . Big Blue . . . It's a real mobile with a real good feel . . . it's a Sno Jet . . . you bet. Big Blue.

31. See note 50 *infra*.

32. See A. LEOPOLD, A SAND COUNTY ALMANAC WITH ESSAYS ON CONSERVATION ROUND RIVER 236 (1966).

33. See also Gussow, *Consuming in the Year 2000*, 76 Tchrs. C. Rec. (Colum. U.) 665 (1975); White, *The Historical Roots of Our Ecological Crisis*, in THE SUBVERSIVE SCIENCE 34 (P. Shepard & D. McKinley eds. 1969).

34. See, e.g., Busby, *Sex-Role Research on the Mass Media*, J. COM., Autumn, 1975, at 107; Courtney & Whipple, *Women in TV Commercials*, J. COM. Spring, 1974, at 110; Hennessee &

dent surveys contrasts the portrayal of men and women in television advertising:

The world for women in the ads is a domestic one, where women are housewives who worry about cleanliness and food preparation and serve their husbands and children. Seldom is a woman shown combining out-of-home employment with management of her home and personal life.

The picture of men is quite different. Men are portrayed as the voices of authority. They are ten times more likely to be used as the voice-over. . . . Men are shown in a wide range of occupations and roles in both their out-of-home working and leisure lives. Inside the home, they are more often portrayed as beneficiaries of women's work than as contributors to household duties.³⁵

More concisely and more bluntly, two commentators have concluded that women in television advertising "play two stock roles—the housewife-mother or the sex object. In both, they are viewed solely in their relation to men."³⁶ Although it is difficult to ascertain the precise impact that conservative role models in television advertising have in perpetuating these stereotypes,³⁷ surely such stereotyping does have psychological, social, and political effects. Women who have their own careers and interests may feel guilt and depression,³⁸ and women generally may refrain from entering professions and from engaging in other assertive behavior. The policy decisions of persons in positions of power may reflect the stereotyping, and portrayals of women content with very circumscribed domestic roles may suggest little need for remedial equal-rights legislation. Finally, men may be encouraged to treat women as sexual and domestic adjuncts and may feel obligated to act dominantly and aggressively. In sum, television advertising endorses and helps effectuate a potentially destructive view of social relations.³⁹

Nicholson, *NOW Says: TV Commercials Insult Women*, N.Y. Times, May 28, 1972, § 6 (Magazine), at 12; Silverstein & Silverstein, *The Portrayal of Women in Television Advertising*, 27 FED. COM. B.J. 71 (1974); Note, *Ring Around the Collar—Chain Around Her Neck: A Proposal To Monitor Sex Role Stereotyping in Television Advertising*, 28 HASTINGS L.J. 149, 149-51 (1976).

35. Courtney & Whipple, *supra* note 34, at 116-17. The surveys found that 75% of all television advertisements using women are for kitchen and bathroom products. Seventy-eight percent of the women are portrayed in a home or family setting, compared to 5% of the men. Of the voice-overs (announcers' voices), 87-89% are male. *Id.* at 111, 113, 115.

36. Hennessee & Nicholson, *supra* note 34, at 12. *See, e.g.*, the advertisement discussed in note 22 *supra*.

37. People tend to emulate models portrayed on television. Busby, *supra* note 34, at 107, 125-26; Siegel, *Communicating with the Next Generation*, J. COM., Autumn, 1975, at 14, 23. *See* Note, *supra* note 34, at 152-53.

38. *See generally* P. CHESLER, *WOMEN AND MADNESS* (1972).

39. *See generally* S. DE BEAUVOIR, *THE SECOND SEX* (1953); M. FASTEAU, *THE MALE MACHINE* (1974); B. FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

Nutrition is a third area affected by television advertising. The twentieth century has witnessed a radical change in the American diet. Foods rich in fat and sugar have replaced the complex carbohydrates—fruit, vegetables, and grains—as staples. Because fats and sugars are low in vitamins and minerals, over-consumption and malnutrition simultaneously pose serious health problems.⁴⁰ Nutritionists and consumer organizations have increasingly focused their concern about this problem on the role of food industry advertising, which amounted to twenty-eight per cent of all television advertisement spending in 1975.⁴¹

Numerous studies have shown that much television advertising promotes heavily processed foods rich in fats and sugars⁴² and affects the nutritional concepts of viewers,⁴³ especially children.⁴⁴ As

40. See STAFF OF THE SELECT COMMITTEE ON NUTRITION AND HUMAN NEEDS, UNITED STATES SENATE, DIETARY GOALS FOR THE UNITED STATES 1 (1977) [hereinafter cited as DIETARY GOALS]. Fats and sugars now account for at least 60% of caloric intake, an increase of 20% since the early 1900s. *Id.* at 9. Although dietary quality and income level roughly correlate, high income does not insure good nutrition. A 1965 report found that 9% of all households with greater than \$10,000 income had poor diets. AGRICULTURAL RESEARCH SERVICE, U.S. DEPT. OF AGRICULTURE, DIETARY LEVELS OF HOUSEHOLDS IN THE UNITED STATES 5 (1965), cited in Federal Trade Commission, Staff Statement of Fact, Law, and Policy in Support of the Proposed Rule and in Support of Affirmative Disclosures in Food Advertising, 39 Fed. Reg. 39,852, 39,853 (1974) [hereinafter cited as FTC Staff Statement].

41. DIETARY GOALS, *supra* note 40, at 59. In 1975, food advertisers spent \$1.15 billion for television time. *Id.*

42. See, e.g., *id.* at 59; Choate, *The Sugar-Coated Children's Hour*, 214 THE NATION 146 (1972); Goodman, *A Limit on Ads for Kids*, Wash. Post, Sept. 15, 1976, § A, at 21, col. 5; Gussow, *supra* note 21, at 50; Lublin, *supra* note 8, at 37, col. 2.

A 1975 study of four Chicago television stations found that 70% of weekday advertising promoted foods high in fat, saturated fat, cholesterol, sugar, or salt. On weekends the figure reached 85%. Only 3% of weekday and 1.7 % of weekend food advertising were devoted to fruits and vegetables. No advertising promoted fresh vegetables. DIETARY GOALS, *supra* note 40, at 59-63. In a one-week test period, one survey found that over 80% of all advertising on children's programs was for ingestibles. Gussow, *supra* note 21, at 49. Ninety percent of these ads highlighted the products' sugared, sweetened, or fried ("crisped") properties. Choate, *supra* at 146.

43. See, e.g., the advertisement noted in note 23 *supra*.

44. See, e.g., D. YANKELOVICH, INC., EFFECTS OF NUTRITION LABELING ON FOOD PURCHASING (1970) (cited in FTC Staff Statement, *supra* note 40, at 39,857 n.80); Advertising Age, Dec. 20, 1976, at 43; Wash. Star, Nov. 20, 1976, § C, at 1; Atkin, Children's Nutrition Learning from Television Food Advertising (unpaginated manuscript of article to appear in *Journal of Nutrition Research* during 1977).

In the absence of authoritative information to the contrary, consumers believe that heavily advertised name-brand foods are good products and universally high in nutrition. D. YANKELOVICH, INC., *supra* (as cited in FTC Staff Statement, *supra* note 40, at 39,857). Children who watch a great deal of Saturday morning television are more likely than others to believe that sweets are "good for you," and they are more likely to consume the foods advertised. Moreover, this effect generalizes to unadvertised brands of the same product categories: dry cereals, candy bars, snacks, desserts, and soft drinks. Atkin, *supra*.

Nutritionist Joan Gussow notes that "it is an article of faith among nutritionists that the reason we have so much trouble altering people's diets for the better is because eating habits, once established, are hard to change. Yet, somehow, between 1928 and 1968, people had learned to eat thousands of new food items." Gussow, *supra* note 21, at 48. Dr. Gussow places much of the responsibility on advertising. *Id.* at 52.

food prices rise, ill-informed purchases increase the financial burden on the consumer, especially the low-income consumer.⁴⁵ Television food advertising, potentially an effective tool for nutrition and education,⁴⁶ instead educates viewers to eat nutritionally deficient foods.

The impact of television product advertising in these three areas of public concern suggests the scope and pervasiveness of its societal impact.⁴⁷ As the authority of traditional institutions such as church and family has declined, the mass media have played an increasing role in transmitting cultural norms and creating consensus.⁴⁸ However, as historian David Potter observed, television advertising, unlike more traditional institutions, lacks social responsibility: "[It] has

45. See FTC Staff Statement, *supra* note 40, at 39,854; WHITE HOUSE CONFERENCE ON FOOD, NUTRITION, AND HEALTH, FINAL REPORT 59 (1970) [hereinafter cited as FINAL REPORT].

To the extent that these purchases are financed through federal programs, there exists a government subsidy of unnutritious food manufacturing. See K. CLARKSON, FOOD STAMPS AND NUTRITION I, 56, 62, 76-77 (1975).

46. Since World War II, food advertising has represented the largest expenditure for public dietary education in the United States. DIETARY GOALS, *supra* note 40, at 59. The Panel on Popular Education and How To Reach Disadvantaged Groups, of the White House Conference on Food, Nutrition, and Health, noted the extraordinary influence of television and suggested that "the gaps in our public knowledge about nutrition, along with actual misinformation carried by some media, are contributing seriously to the problem of hunger and malnutrition in the United States." FINAL REPORT, *supra* note 45, at 179-80. The Panel's recommendations are set forth in note 194 *infra*.

47. Empirical evidence of this impact, though persuasive, is not conclusive. As the Supreme Court has recognized, however, countless regulations of commercial activity are predicated upon the "unprovable assumptions" that constitute social consensus. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61-62 (1973). Cf. *Ethyl Corp. v. EPA*, 541 F.2d 1, 6 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976) ("Man's ability to alter his environment has developed far more rapidly than his ability to foresee with certainty the effects of his alterations. . . . [W]atchdog agencies . . . must deal with predictions and uncertainty, with developing evidence, and, sometimes, with little or no evidence at all."); *Reserve Mining Co. v. EPA*, 514 F.2d 492, 520 (8th Cir. 1975) ("the level of probability does not readily convert into a prediction of consequences The best that can be said is that the existence of this asbestos contaminant in air and water . . . creates some health risk. Such a contaminant should be removed").

Psychologist John Condry, noting the comparison between unforeseen ecological and social effects, has suggested:

Since the pace of change is likely to remain quite high, our survival as a society is in large measure dependent upon our ability to forecast the effects of technological and related social change, and to reverse a dangerous trend once the dangers become apparent. We shall have to be more responsive to the way a variety of forces in society interact, and more willing to slow the pace of change until we are relatively sure that society can survive the shock of a given innovation.

J. Condry, *Childhood, Technology, and Society* 7 (mimeograph copy of comments before the FTC Hearings on Television and Children, Nov. 8, 1971, on file at the *Michigan Law Review*).

48. See Wirth, *Consensus and Mass Communication*, in MASS COMMUNICATIONS 561, 574-75 (W. Schramm ed. 1960); J. Condry, *supra* note 47, at 3-6.

Historian Daniel Boorstin has concluded that television advertising has supplanted local and regional songs and stories as the new folk culture of modern America. D. BOORSTIN, *DEMOCRACY AND ITS DISCONTENTS* 38-42 (1971). Empirical evidence tends to support this theory. A majority of mothers surveyed in the Los Angeles area reported that their children were singing television advertising jingles by age two; by age three, over 90% had joined the chorus. Almost 90% of all three-year-olds personally interviewed could identify Fred Flintstone from a photograph. Siegel, *supra* note 37, at 22.

in its dynamics no motivation to seek the improvement of the individual or to impart qualities of social usefulness."⁴⁹ Instead, this advertising reflects a distorted image of reality that affirms only those values coincident with its commercial purpose.⁵⁰

At a time of increasing demands that business be accountable to the larger society for its actions, the question arises whether the self-interested voice of television advertising should be permitted to continue largely unrestrained and unrebuted. If some governmental response is appropriate, it must be based upon a concern for the public health and welfare and for the presentation of free, pluralistic discourse. The statutory authority for and the constitutional limits to such a response require careful examination.

49. D. POTTER, *supra* note 17, at 177.

50. Potter identified advertising, along with churches, schools, and businesses, as "an institution of social control," that is, an institution that "guide[s] the life of the individual by conceiving of him in a distinctive way and encouraging him to conform as far as possible to the concept." D. POTTER, *supra* note 17, at 176. Potter did not object to the existence or influence of these institutions, as he recognized that they inhere in human culture. But Potter was troubled by the "lack of institutional responsibility" he thought unique to advertising:

[T]hough it wields an immense social influence, comparable to the influence of religion and learning, it has no social goals and no social responsibility for what it does with its influence, so long as it refrains from palpable violations of truth and decency. . . . Occasional deceptions, breaches of taste, and deviations from sound ethical conduct are in a sense superficial and are not necessarily intrinsic. . . . What is basic is that advertising, as such . . . ultimately regards man as a consumer and defines its own mission as one of stimulating him to consume or to desire to consume.

Id. at 177. See also Mead, *supra* note 20, at 339-43.

A recent exchange of letters in *Advertising Age* illustrates the principle of nonresponsibility. In one letter, an executive noted a print advertisement for an automobile theft alarm. The advertisement featured a smiling woman with beckoning eyes and in a low-cut dress. The copy read "Don't say no to a Pro! . . . A pro that is used to working on the street!" Letter from Robert B. Martin, *Advertising Age*, Dec. 6, 1976, at 48 (quoting advertisement). The advertising executive responsible for the ad stated in a subsequent letter: "If the client likes the ad, if it reaches the target audience and induces them to buy, if awareness of the product increases, hiking sales, have we not fulfilled our role? I think we have." Letter from T.L. Thorne, *Advertising Age*, Dec. 20, 1976, at 44.

In some cases, however, these underlying messages are not totally unrelated to the commercial purposes of advertising. For example, reinforcing stereotyped sex roles for women may be essential to the sales of some cosmetics or household products, and consumer attitudes towards environmental degradation are probably closely linked to the sales strategies for particular types of automobiles and recreational vehicles.

The most common message of product advertising, then, is materialism. To induce consumption, the advertisement must persuade viewers that the acquisition of material goods will satisfy their wants. Thus, in the fictive world of the television commercial, people's lives are defined by the goods they consume and by the approval of others. In surveying hundreds of television commercial scripts reviewed by the Federal Trade Commission, then-Commissioner Mary Gardiner Jones found that they espoused two controlling principles: materialism—the satisfaction of inner needs by the acquisition or use of things—and external motivation—personal satisfaction derived from without rather than developed within, such as emulating neighbors. Jones, *The Cultural and Social Impact of Advertising on American Society*, 1970 L. & SOC. ORD. 379, 381-84. See also D. RIESMAN, *THE LONELY CROWD* 97 (1950); H. SKORNIA, *TELEVISION AND SOCIETY* 158 (1965).

II. THE FAIRNESS DOCTRINE

Congress has empowered the Federal Communications Commission to regulate broadcasting "as public convenience, interest, or necessity requires."⁵¹ In the discharge of this broad mandate, the FCC has required that licensees devote a reasonable portion of broadcast time to provide fair coverage of opposing views on controversial issues. Where one side of a controversial public issue is raised, the broadcaster is under a fairness obligation to provide opportunities for the presentation of contrasting views.⁵² If necessary, the licensee must provide the reply programming at its own expense.⁵³ These principles comprise the fairness doctrine. It is under this doctrine that those discontented with the cultural and political content of television advertising have typically brought their grievances.

Given television's historical dependence upon advertising for financial support,⁵⁴ the proposed application of the fairness doctrine to advertising appears to threaten the industry far more profoundly than does its application to regular programming. Unlike a conventional fairness ruling, which interferes slightly with the broadcaster's editorial discretion, application of the fairness doctrine to advertising reaches the hand of the public into the broadcaster's pocket-book.⁵⁵

In this context, the 1967 decision of the FCC—an agency generally sensitive to the concerns of licensees⁵⁶—requiring broadcasters

51. Communications Act of 1934, § 303, 47 U.S.C. § 303 (1970 & Supp. V 1975).

52. *In re* Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *In re* The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Fairness Report, 48 F.C.C.2d 1 (1974) [hereinafter cited as Fairness Report], *petition for reconsideration denied*, 58 F.C.C.2d 691 (1976) [hereinafter cited as Fairness Report Rehearing]; *In re* Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598 (1964); Houser, *The Fairness Doctrine—An Historical Perspective*, 47 NOTRE DAME LAW. 550 (1972); Comment, *The FCC's Fairness Doctrine in Operation*, 20 BUFFALO L. REV. 663 (1971).

53. See *Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963).

54. In the early days of radio, government and private enterprise moved somewhat awkwardly by trial and error to resolve the novel problem of devising an effective and appropriate means of financing a national broadcasting system. By the advent of television that problem had been resolved. From the outset, advertising has been an indispensable element of television. H. SCHILLER, *supra* note 17, at 26.

Until the 1950s quiz show scandals, advertisers themselves prepared most programming. Today, networks finance the production of programming by selling time to advertisers; to remain on the air programming must not only attract and retain a sizeable audience, but also put the audience in a mood receptive to the advertiser's appeal. See P. SANDMAN, *supra* note 15, at 7-8, 135, 139.

55. There is vigorous debate over the potential economic impact upon the industry of application of the fairness doctrine to product advertising. See note 95 *infra* and accompanying text. No one denies, however, that the requirement of reply time to advertisements deemed controversial would to some degree reduce broadcasters' revenues by lessening the value of air time to advertisers and by replacing some advertisements with unpaid reply broadcasts.

56. Comment, *A Proposed Statutory Right To Respond to Environmental Advertisements*:

to air antismoking messages to counter conventional cigarette advertisements⁵⁷ seems an act of extraordinary courage or naivete, or both. Whatever the explanation for this decision, the Commission soon realized the potential ramifications of recognizing that television advertisements for arguably hazardous products could give rise to fairness obligations and thus attempted to limit its ruling to the "unique situation" of cigarette advertising.⁵⁸

The "crazy quilt" of FCC decisions that followed as the Commission struggled to find some logical limitation to the principle underlying its cigarette decision has been amply chronicled elsewhere.⁵⁹ In brief, the Commission refused to apply the fairness doctrine to any pure product advertisement, whether it promoted large automobiles

Access to the Airways After CBS v. Democratic National Committee, 69 Nw. U.L. REV. 234, 245-46 (1974) (suggesting that the FCC may be a "captured agency").

57. Television Station WCBS-TV, 8 F.C.C.2d 381 (1967), *stay and rehearing denied sub nom.* Applicability of the Fairness Doctrine to Cigarette Advertising, 9 F.C.C.2d 921 (1967), *aff'd. sub. nom.* Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). The Commission's decision responded to a letter from John F. Banzhaf, III, which complained that WCBS-TV was presenting only one side of a controversial issue of public importance by broadcasting

cigarette advertisements which by their portrayals of youthful or virile-looking or sophisticated persons enjoying cigarettes in interesting and exciting situations deliberately seek to create the impression and present the point of view that smoking is socially acceptable and desirable, manly, and a necessary part of a rich, full life.

405 F.2d at 1086. In a brief letter to WCBS-TV, the Commission stated:

The advertisements in question clearly promote the use of a particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that, however enjoyable, such smoking may be a hazard to the smoker's health.

8 F.C.C.2d at 382.

As early as 1946, the Commission had acknowledged that product advertising could raise controversial issues deserving reply under fairness principles. See *In re Sam Morris*, 11 F.C.C. 197 (1946) (dictum). In addition, see *In re Broadcast Licensees Advised Concerning Stations' Responsibilities Under the Fairness Doctrine as to Controversial Issue Programming*, 40 F.C.C. 571, 572 (1963). Until Banzhaf's complaint, however, the principle had not been fully applied to product advertising.

58. Cigarette Advertising, 9 F.C.C.2d 921, 943 (denial of stay and rehearing of 8 F.C.C. 381 (1967)), discussed in note 57 *supra*. This attempt to limit the applicability of the fairness doctrine was made in response to numerous petitions for reconsideration of the Commission's decision. In denying the petitions, the Commission dismissed the contention that its ruling logically could not be restricted to cigarette advertising. Petitioners argued that because "very little in society is uncontroversial," the Commission's theory would also apply to advertising for other products, including "automobiles, food with high cholesterol count, alcoholic beverages, flouride in toothpaste, pesticide residue in food, aspirin, detergents, candy, gum, soft drinks, girdles, and even common table salt." The Commission, declaring itself unimpressed by this "parade of horrors," defended its ruling by stressing the widespread governmental and private findings of the serious health hazard posed by cigarettes. Claiming no knowledge of any other advertised product warranting response under the fairness doctrine, the Commission stated that "instances of extension of the ruling to other products upon consideration of future complaints would be rare, if indeed they ever occurred." 9 F.C.C.2d at 942-43.

Congress subsequently prohibited the advertising of cigarettes on television or radio. Public Health Cigarette Smoking Act of 1969, § 6, 15 U.S.C. § 1335 (1976).

59. See Simmons, *Commercial Advertising and the Fairness Doctrine—The New F.C.C. Policy in Perspective*, 75 COLUM. L. REV. 1083, 1089-100 (1975).

and leaded gasolines that contribute to air pollution,⁶⁰ water-polluting phosphate detergents,⁶¹ or trash compactors that inhibit resource recycling.⁶² In every case, the Commission either distinguished the cigarette ruling on its facts or ignored it entirely.⁶³ The Commission's attempt to limit its ruling in the cigarette case was temporarily thwarted, however, by the Court of Appeals for the District of Columbia Circuit in *Friends of the Earth v. FCC*.⁶⁴ In reviewing the FCC's dismissal of the complaint in the automobile and gasoline advertising case, the court found the circumstances indistinguishable from those of cigarette advertising and ordered the Commission to impose the fairness doctrine's reply requirements upon broadcasters of advertisements for large automobiles and leaded gasoline.⁶⁵ Faced with the option of either implementing the far-reaching principle implicit in the cigarette ruling or repudiating it altogether, the Commission chose the latter.

On July 12, 1974, the Commission released its long-awaited Fair-

60. *Friends of the Earth*, 24 F.C.C.2d 743 (1970), *rev'd.*, 449 F.2d 1164 (D.C. Cir. 1971).

61. William H. Rogers, Jr., 30 F.C.C.2d 640 (1971).

62. John S. MacInnis, 32 F.C.C.2d 837 (1971).

63. For example, in *Friends of the Earth*, 24 F.C.C.2d 743 (1970), discussed in note 60 *supra* and accompanying text, the Commission reiterated its assertion that cigarettes are a "unique product" for purposes of the fairness doctrine. The Commission distinguished cigarettes from other products by stating that "the Government is not urging people to stop now—without any delay—buying or using gasoline-engine automobiles, detergents, or electricity. The benefits and detriments here are of a more complex nature, and do not permit the simplistic approach taken to cigarettes." Second, the Commission concluded that no one would propose a ban on all broadcast advertising of automobiles, as Congress had done in the case of cigarettes. Finally, the Commission proposed that remedial action be directed at the environmentally offensive products themselves, suggesting that the national experience with liquor prohibition had shown this direct approach impracticable for cigarettes, but not for automobiles. 24 F.C.C.2d at 746-47.

64. 449 F.2d 1164 (D.C. Cir. 1971).

65. The court, in an opinion by Judge McGowan, rejected the Commission's attempt to distinguish cigarettes as a unique threat to human health:

The distinction is not apparent to us, any more than we suppose it is to the asthmatic in New York City for whom increasing air pollution is a mortal danger. Neither are we impressed by the Commission's assertion that, because no governmental agency has yet urged the complete abandonment of the use of automobiles, the commercials in question do not touch upon a controversial issue of public importance. Matters of degree arise in environmental control, as in other areas of legal regulation. . . . Commercials which continue to insinuate that the human personality finds greater fulfillment in the large car with the quick getaway do, it seems to us, ventilate a point of view which not only has become controversial but involves an issue of public importance. When there is undisputed evidence, as there is here, that the hazards to health implicit in air pollution are enlarged and aggravated by such products, then the parallel with cigarette advertising is exact and the relevance of *Banzhaf* inescapable.

449 F.2d at 1169. The court further commented:

It is obvious that the Commission is faced with great difficulties in tracing a coherent pattern for the accommodation of product advertising to the fairness doctrine. . . . Pending, however, a reformulation of its position, we are unable to see how the Commission can plausibly differentiate the case before us from *Banzhaf* insofar as the applicability of the fairness doctrine is concerned.

449 F.2d at 1170.

ness Report,⁶⁶ the first major reconsideration and reformulation of the fairness doctrine since its inception. The Commission first reiterated the first amendment justification for the doctrine but acknowledged the danger of "undue governmental interference in the processes of broadcast journalism, and the concomitant diminution of the broadcaster's and the public's legitimate First Amendment interests."⁶⁷ Turning to the application of the fairness doctrine to advertising, the Commission noted its traditional respect for the central role of advertising in the broadcast industry⁶⁸ and emphasized that it "must proceed with caution so as to ensure that the policies and standards which are formulated in this area will serve the genuine purposes of the doctrine without undermining the economic base of the system."⁶⁹

Proceeding with its self-admonished caution, the Commission announced that the fairness doctrine would apply only to those paid announcements that are "overtly editorial."⁷⁰ Thus, a fairness obligation arises when an advertisement "presents a meaningful statement which obviously addresses, and advocates a point of view on, a controversial issue of public importance," but not "[i]f the ad bears only a tenuous relationship to [public] debate, or one drawn by unnecessary inference."⁷¹ The licensee need only make a "common sense judgment" on this difficult question and will be overruled only if that judgment is unreasonable or in bad faith.⁷² Conventional product advertising, moreover, was declared wholly beyond the

66. Fairness Report, *supra* note 52.

67. *Id.* at 6.

68. The FCC stated that the Federal Radio Commission (FRC), the predecessor to the FCC, had "placed advertising in its proper context and perspective" in 1929. *Id.* at 22. Although broadcasters were licensed to serve public interests, the FRC asserted that advertising constituted an "exception" to this rule "because advertising furnishes the economic support for the service and thus makes it possible." 3 F.R.C. ANN. REP. 32 (1929), cited in Fairness Report, *supra* note 52, at 22. Although the FCC did not attempt similarly to remove advertising wholly from the operation of its congressionally mandated "public interest" standard, these deferential remarks indicated its policy preferences.

69. Fairness Report, *supra* note 52, at 22.

70. *Id.*

71. *Id.* at 22-23. An example of an editorial advertisement, the Commission noted, would be an advertisement urging a constitutional amendment concerning abortion.

72. *Id.* at 23-24. The broad discretion afforded the broadcaster and the strict wording of the standard would seem to relieve the broadcaster of fairness response duties in all but the most extreme cases. To trigger the fairness doctrine, the advertisement must do more than merely address a controversial issue in a general way; it must advocate a "point of view" and must do so "obviously." *Id.* at 23. In deciding if the advocacy is "obvious," the licensee need only exercise "common sense." *Id.* Thus, advocacy that might be "obvious" to the psychologist or public relations expert but not to one exercising only "common sense" does not trigger fairness obligations.

The line between product advertising and editorial or "image" advertising is not always distinct. *See, e.g.,* Center for Auto Safety, 32 F.C.C.2d 926 (1972). Under this test, it seems likely that most corporate advertising intended to influence public opinion and political decisionmaking may escape any fairness response.

reach of the fairness doctrine.⁷³ Stating that the purpose of the doctrine is "to facilitate 'the development of an *informed* public opinion,'" ⁷⁴ the Commission concluded that "standard product commercials, such as the cigarette ads, make no meaningful contribution toward informing the public on any side of any issue."⁷⁵ Indeed, since product commercials are not informative in this sense, presentation of opposing views under the fairness doctrine would, according to the Report, "provide the public with only one side of a public controversy."⁷⁶

The Commission's discussion of the very difficult problem of applying the fairness doctrine to product advertising is unsatisfying in several respects. The Commission's concern over the first amendment rights of broadcasters is misplaced.⁷⁷ In upholding the doctrine as applied to regular programming against challenge under the first amendment, the Supreme Court has declared that, because broadcast licensees are but trustees of the public airwaves, "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."⁷⁸ Still, there may be legitimate concern where application of the doctrine interferes with editorial policy by "chilling" broadcast coverage of controversial subjects because of the threat of fairness obligations.⁷⁹

73. Fairness Report, *supra* note 52, at 24-26.

74. Fairness Report, *supra* note 52, at 24 (emphasis original) (quoting *In re Editorializing by Broadcast Licensees*, *supra* note 52, at 1249).

75. Fairness Report, *supra* note 52, at 24. The report quoted the assertion in *Banzhaf* that cigarette commercials are "at best a negligible 'part of any exposition of ideas.'" *Id.* at 25 (quoting *Banzhaf*, 405 F.2d 1082, 1102 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969), quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

76. Fairness Report, *supra* note 52, at 25. The Commission rejected a Federal Trade Commission proposal that the public be provided broadcast time to respond to certain product advertisements. *Id.* at 26-28. See note 152 *infra*.

77. This first amendment concern is discussed in the text at note 67 *supra*. In addition, see Fairness Report Rehearing, *supra* note 52, at 708 (dissenting statement of Commissioner Robinson); Simmons, *supra* note 59, at 1108-10.

The status of product advertising as constitutionally protected speech is discussed in Part IV *infra*.

78. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

The Supreme Court has recognized the first amendment value in avoiding "the risk of an enlargement of government control over the content of broadcast discussion of public issues." *Columbia Broadcasting Sys., Inc. v. Democratic Natl. Comm.*, 412 U.S. 94, 126 (1973). Although it rejected on this ground a proposed "right of access" scheme to be monitored by the FCC, the Court did reaffirm the constitutional propriety of the FCC's administration of fairness doctrine requirements. See 412 U.S. at 126-27.

79. This concern was dismissed as "speculative" in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 393 (1969). Moreover, the FCC has reported "no credible evidence" of any such chilling effect on broadcasters' editorial policies. Fairness Report, *supra* note 52, at 8.

The potential "chilling effect" of a state statute establishing a "fairness doctrine" for newspapers led the Supreme Court to strike down the statute as an unconstitutional interference with the editorial discretion of the print media. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). The Court in *Miami Herald* virtually ignored the similarities between the statute involved in that case and the FCC's fairness doctrine as applied to broadcasters and

Although this concern might normally caution against imposing fairness obligations, different interests are present in the context of product advertising. It might well be that broadcasters have no first amendment interest in product commercials.⁸⁰ They sell time to paying customers, subject only to occasional subjective judgments regarding "good taste."⁸¹ The broadcaster provides the medium for advertising, not the message.

Under this analysis, the first amendment interest at stake, if any, is the advertiser's.⁸² The Supreme Court has recently noted that commercial speech "may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely."⁸³ If an advertisement for a controversial product such as cigarettes triggered a fairness reply, the advertiser would not likely cease advertising.⁸⁴ However, if the advertisement were controversial not because of the product itself, but because of other, unrelated content such as sexual stereotyping, the advertiser would have somewhat less incentive to protect the controversial message. To the extent that such advertisements are "chilled" merely by the prospect of rebuttal under the fairness doctrine, the advertiser's position evokes little sympathy: the first amendment does not protect the speaker from free and open debate. The more realistic concern is not that advertising will be chilled but rather that the network will decline to run the offending advertisement, or at least strongly request that it be withdrawn or modified in order to avoid fairness doctrine obligations.⁸⁵

found constitutionally valid in *Red Lion*. It is beyond the scope of this Note to discuss the constitutionality of the FCC's fairness doctrine, but it is likely that the Court will continue to distinguish between the first amendment rights of the print media and of broadcasters. See generally Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976).

80. See *Capitol Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 584 (D.D.C. 1971), *affd. mem. sub nom. Capitol Broadcasting Co. v. Kleindienst*, 405 U.S. 1000 (1972) (cigarette advertising).

81. See NATIONAL ASSN. OF BROADCASTERS, *supra* note 10, at 12. Of course, those broadcasters who do not subscribe to the NAB Code are not subject to any of its requirements.

82. See, e.g., Reply Comments of America Petroleum Inst. at 10, Fairness Report, *supra* note 52. The Fairness Report did not discuss the first amendment interests of the advertiser.

83. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 n.24 (1976).

84. During the period when cigarette advertising was subject to the FCC's fairness doctrine, cigarette advertising time on television did not decline significantly. See Comment, *And Now a Word Against Our Sponsor: Extending the FCC's Fairness Doctrine to Advertising*, 60 CALIF. L. REV. 1416, 1446 (1972). Advertisers might, of course, counteract the fairness doctrine by shifting some of their advertising expenditures to media not subject to fairness obligations, thereby reducing broadcasters' revenues.

85. Because of its economic reliance on advertising, the television network is far less likely to resist an advertisement for a controversial product, the controversial nature of which the advertiser of course cannot avoid, than to resist controversial advertising content, which the advertiser can avoid.

This result might, loosely speaking, be considered a "chill."⁸⁶ But a chill is constitutionally impermissible only if the speech withheld is protected by the first amendment. It would have been inconsistent for the FCC to allow potential "chilling effects" to preclude application of the fairness doctrine to product commercials, for at the time of the Fairness Report the Commission apparently did not believe that product advertising warranted constitutional protection.⁸⁷ The Supreme Court's recent decisions extending some constitutional protection to commercial speech,⁸⁸ which have emphasized the public's interest in receiving product information,⁸⁹ might raise concern about possible chilling of advertiser's speech. However, as this Note concludes in Part IV, the noninformational content of television advertising does not have first amendment protection. Application of the fairness doctrine to product advertising seems not to threaten first amendment interests; rather, by encouraging full discussion of controversial issues, it would appear to advance the public's first amendment right to be informed.⁹⁰

The fundamental error of the Fairness Report, however, is that it

86. The expression "chilling effect" arose in recognition of the need to protect individuals from statutes threatening criminal sanctions or loss of employment for vaguely defined restrictions of expression or association. *See, e.g.,* *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967); *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965); *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 74 n.11 (1961) (Warren, C.J., dissenting). The FCC has applied the term to the potential financial disincentive to broadcasters to cover subjects triggering fairness doctrine obligations. *See* Fairness Report, *supra* note 52, at 7. The application of the concept to advertisers' difficulties in their relations with networks and the resulting impact on their marketing strategy, *see* Reply Comments of American Petroleum Inst., *supra* note 82, seems attenuated.

87. *See* note 75 *supra* and accompanying text.

88. *See* *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975). *See generally* Part IV *infra*.

89. *See, e.g.,* *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 96 (1977).

90. *See* *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). To the extent that, contrary to the FCC's position, the controversial advertising message does enjoy constitutional protection the chilling of advertisers' speech again becomes cause for concern. This Note suggests that, except for information about the product, television product advertising is not so protected. *See* Part IV *infra*.

Several citizens' organizations have challenged the validity of the Commission's distinctive treatment of product advertising by asserting that the first amendment not only permits but compels applying the fairness doctrine to product advertising. *See* Brief for Petitioner Council on Economic Priorities and Intervenor United Farm Workers at 3-28, *National Citizens Comm. for Broadcasting v. FCC*, 555 F.2d 938 (D.C. Cir. 1977) [hereinafter cited as UFW Brief]. The brief argues that, in *Columbia Broadcasting Sys., Inc. v. Democratic Natl. Comm.*, 412 U.S. 94 (1973), the Supreme Court constitutionalized the fairness doctrine by leaving it the sole guardian of viewers' first amendment rights, and that the Court's opinion in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), prohibits absolute distinction of commercial from political speech. UFW Brief, *supra* at 15-23. While the District of Columbia Circuit cited *Columbia Broadcasting Sys., Inc. v. Democratic Natl. Comm.*, the court did not consider the fairness doctrine. 555 F.2d at 953. *Cf. Note, The Fairness Doctrine and Access to Reply to Product Commercials*, 51 *IND. L.J.* 756, 766-82 (1976) (discusses the first amendment and commercial speech). *But cf.* Part IV *infra*.

equates lack of discourse with lack of impact.⁹¹ The FCC contended that because product commercials make no meaningful contribution to public debate, the airing of opposing views is purposeless; if commercials do not truly "inform," their broadcast can create no counteracting duty to inform.⁹² Yet the Commission's recognition that television commercial "speech" is unworthy of first amendment protection⁹³ hardly compels the conclusion that the implicit messages of product advertising should never give rise to fairness obligations. On the contrary, speech that does not rise to the level of the first amendment may nonetheless call for a reasoned response—and perhaps more urgently requires such a response.⁹⁴ The FCC's distinction serves to protect the subtle, implicit, nonrational message. The appeal that plays upon biases and emotions rather than intellect is rewarded with immunity from rebuttal.

It may be that in actuality the Commission was most concerned about the economic ramifications for broadcasting should standard commercials require opportunities for reply, but preferred to rely primarily on arguments relating to the public interest rather than to the financial self-interest of the industry. Certainly the hotly contested economic issue is a serious one.⁹⁵ However, when confronted with evidence that questioned the potential economic impact of applying the fairness doctrine to product commercials, the Commission disclaimed reliance on economic considerations in the adoption of its new fairness policy.⁹⁶ If economic considerations were not determinative of the Commission's decision, then that decision apparently

91. See Note, *supra* note 34, at 159-60.

92. See Fairness Report, *supra* note 52, at 24-25.

93. The Fairness Report quoted language from *Banzhaf* that treated television commercial "speech" as unworthy of first amendment protection. *Id.* at 24-25 (quoting *Banzhaf v. FCC*, 405 F.2d 1082, 1102 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969)). The current status of product advertising as constitutionally protected speech is discussed in Part IV *infra*.

94. This principle was included in the *Banzhaf* decision, which approved the imposition of fairness doctrine requirements upon broadcasters of television advertisements. The Commission's position thus inverted the logic of *Banzhaf*.

95. See the various positions taken in Petition for Reconsideration and Rehearing on Behalf of Council of Economic Priorities, Project on Corporate Responsibility, and Intervenor United Farm Workers at 2-5, Fairness Report, *supra* note 52; Reply Comments of National Broadcasting Co. at 11-17 & Attachments A & B, Fairness Report, *supra*; Comments of Columbia Broadcasting Sys., Inc. (Oct. 12, 1971) at 13-23, Fairness Report, *supra*; Loewinger, *The Politics of Advertising*, 15 WM. & MARY L. REV. 1, 8-10 (1973); Simmons, *supra* note 59, at 1110-13; Comment, *supra* note 84, at 1444-49; Note, *supra* note 90, at 776-78.

96. Responding to petitions for reconsideration of the Fairness Report, *supra* note 52, the Commission stated:

The Commission was given [by petitioners] inconclusive statistics and told that it should have held a hearing on the economics of broadcasting before concluding that extension of the doctrine to product advertising would be detrimental to commercial broadcasting. The extensive proceedings in this docket provided more than ample opportunity for that question to be raised. Clearly, however, the economic impact on the broadcasting industry was only one of many factors contributing to our choice of policy, and that factor alone is not of such critical importance as to cause a change of policy.

Fairness Report Rehearing, *supra* note 52, at 698-99.

turned on the unpersuasive constitutional arguments previously discussed and thus appears arbitrary⁹⁷ and contrary to the best interests of the viewing public.

If, as seems more likely, fear of economic consequences was more influential than the FCC cared to admit,⁹⁸ then any ambiguity about the financial impact of application of the fairness doctrine to product advertising should be resolved by thorough study. Even if application of the doctrine is found to pose a substantial threat to the current system of privately financed broadcasting, broadcasting's first responsibility must be to the public. Where the financial structure of broadcasting would limit the paramount first amendment "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences,"⁹⁹ the industry must adapt itself to the first amendment, not vice versa.¹⁰⁰

Consistent with the policy announced in the Fairness Report, the FCC has routinely disposed of fairness claims arising from product advertising.¹⁰¹ Several of these complaints dealt with the environment or sexism, two of the issues previously suggested as illustrative of the role of advertising in society.¹⁰² A brief examination of two such claims will demonstrate the shortcomings of the new fairness policy.

97. Several citizens' organizations have charged that the Fairness Report's distinctive treatment of product advertising is arbitrary, capricious, and an abuse of discretion in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1976). See UFW Brief, *supra* note 90, at 51-60. But see Public Interest Research Group v. FCC, 522 F.2d 1060, 1066 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976).

98. Many supporters as well as critics of the FCC's exclusion of product advertising from fairness doctrine coverage have assumed that the economic factor was "critical." See, e.g., Simmons, *supra* note 50, at 1107; Note, *supra* note 90, at 764.

99. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1968).

100. One commentator has suggested that the Commission thought it more appropriate to leave to Congress the regulation of the sale and advertising of products that are dangerous to health or otherwise detrimental to the public interest. See Note, *supra* note 90, at 764. This argument ignores the possibility that product advertising makes important, albeit implicit, statements concerning controversial issues such as environmental degradation, sexism, or nutrition regardless of the actual public danger caused by the particular advertised product.

101. See Council on Children, Media, and Merchandising v. ABC, 59 F.C.C.2d 448 (1976) (advertisements directed at children); *In re Storer Broadcasting Co.*, 58 F.C.C.2d 468, 474 (1976) (sex-stereotyped advertisements; license application); *In re Complaint by Natl. Health Federation*, 58 F.C.C.2d 314 (1976) (flouride representations in toothpaste advertisements); *In re Columbia Broadcasting Sys., Inc.*, 56 F.C.C.2d 313, 315-16 (1975) (automobile and gasoline advertisements; license application); *In re Application of National Broadcasting Co.*, 52 F.C.C.2d 273, 287 (1975) (sex-stereotyped advertisements); *In re Application of American Broadcasting Co.*, 52 F.C.C.2d 98, 116 (1975) (sex-stereotyped advertisements); *In re Complaint of the Sierra Club*, 51 F.C.C.2d 569 (1975) (automobile and gasoline advertisements); *In re Complaint of the Sierra Club*, 48 F.C.C.2d 617 (1974) (snowmobile advertisements); Peter C. Herbst, 48 F.C.C.2d 614 (1974), *petition for reconsideration denied*, 49 F.C.C.2d 411 (1974), *affd. sub nom.* Public Interest Research Group v. FCC, 522 F.2d 1060 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976) (snowmobile advertisements).

102. See text at notes 25-39 *supra*.

One of the fastest growing and most controversial recreational pastimes in the United States is snowmobiling. While enthusiasts praise the mobility these vehicles have brought to residents of wintry northern regions, critics complain of hazards to riders, excessive noise, injurious trespassing on private land, and ecological disruption.¹⁰³ In the winter of 1973, as the Maine legislature was studying proposals for regulating snowmobiles, four snowmobile manufacturers conducted intensive, prime-time advertising campaigns on local television stations.¹⁰⁴ Although the advertisements made no mention of the pending legislative proposals, protest letters written to one of the stations alleged that the commercials stated a controversial viewpoint by associating snowmobile use with "the good life" and by encouraging disregard of safety, environmental concerns, and private property rights. When the station failed to respond promptly the protesters took their case to the FCC and elaborated on many of their contentions.¹⁰⁵ At this point, the station answered that the advertisements raised no fairness question because they did not advocate the "misuse" of snowmobiles.¹⁰⁶ The complainants responded that whether the issue was characterized as "misuse," "abuse," or "proper use," the advertisers had involved themselves in a public controversy that triggered fairness obligations.¹⁰⁷

In rejecting the complaint, the FCC conceded that "hazardous operation, adverse environmental effects and interference with private property rights by snowmobiles may constitute controversial issues," but declared that the snowmobile advertisements were not, by the standard set forth in the Fairness Report, devoted "in an obvious and meaningful way to the discussion" of these issues.¹⁰⁸ The Commission thus simply reiterated its unrealistic distinction between advertising content and impact. Although complainants offered no empirical evidence of the effect of the advertising on the views of Maine residents, a heavy ad campaign presenting snowmobiles in a favorable light almost certainly played a part in shaping public attitudes.¹⁰⁹ By ignoring this role, the FCC shirked its responsibility to ensure a fair presentation by broadcasters of opposing viewpoints.¹¹⁰

103. See Comment, *Snowmobiles—A Legislative Program*, 1972 WIS. L. REV. 477, 477-79.

104. An advertisement from the campaign is reprinted in note 30 *supra*. Excerpts from other advertisements are reproduced in *Public Interest Research Group v. FCC*, 522 F.2d 1060, 1062, n.2 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976).

105. 522 F.2d at 1062.

106. 522 F.2d at 1063.

107. 522 F.2d at 1063 (quoting protesters' complaint).

108. Peter C. Herbst, 48 F.C.C.2d 614, 615-16 (1974), *petition for reconsideration denied*, 49 F.C.C.2d 411 (1974), *affd. sub nom. Public Interest Research Group v. FCC*, 522 F.2d 1060 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976).

109. See text at notes 15-23 *supra*.

110. It should be noted that the television station had offered to air a single half-hour discussion program on the pending snowmobile legislation. The complainants took the posi-

An examination of sexism in product advertising illustrates the general proposition that advertisements for noncontroversial products may themselves be controversial if the appeal conveys a particular position on an issue of public importance. In 1975, the National Organization for Women (NOW) petitioned the FCC to deny the license renewal applications of a television station in New York City¹¹¹ and another in Washington, D.C.¹¹² NOW charged, *inter alia*, that in routinely depicting women in both programming and advertising as subservient, incompetent, and frequently ridiculous, the stations had violated the fairness doctrine by presenting a "one-dimensional" view on the controversial issue of women's role in society.¹¹³ Because the controversy arose in the setting of license renewal proceedings, the FCC considered petitioners' fairness doctrine allegations as only one aspect of the licensees' overall performance.¹¹⁴ Even in this context, however, the Commission gave NOW's fairness claim very short shrift. Citing the Fairness Report, it concluded that petitioners' descriptions of the women's roles portrayed in the entertainment programs and product advertising were "too insubstantial or ambiguous for us to determine that the mere playing of the role transmits any clear or singular message demonstrably linked to a controversial issue of public importance."¹¹⁵ In light of research indicating that televised cultural stereotypes do influence viewer perceptions,¹¹⁶ the FCC's flat refusal to consider the fairness implications of sexually stereotyped product advertising, though consistent with the policy announced in the Fairness Report, seems difficult to justify.

Given the considerable legal and financial resources that have been and are being expended to persuade or compel the Commission to include product advertising within the purview of the fairness doctrine, one must determine how much would be gained by applying the doctrine to product advertising. This determination can best

tion that one program "could not offset months of repeated and continuous ads," 522 F.2d at 1063.

111. *In re* Application of American Broadcasting Co. (ABC), 52 F.C.C.2d 98 (1975).

112. *In re* Application of National Broadcasting Co. (NBC), 52 F.C.C.2d 273 (1975).

113. 52 F.C.C.2d 273, 282-85; 52 F.C.C.2d 98, 109-11. Documentation for this allegation consisted of monitoring and survey projects conducted by NOW. 52 F.C.C.2d at 282-85; 52 F.C.C.2d at 109-11. To demonstrate the existence of a substantial public controversy concerning women's societal role, NOW cited numerous popular and scholarly articles, government reports, and public opinion polls. ABC, 52 F.C.C.2d at 109. Neither licensee contested this point. 52 F.C.C.2d at 286; 52 F.C.C.2d at 115.

114. NOW also alleged that the stations had failed to provide programming that met the needs of women in their communities and had engaged in discriminatory employment practices. NBC, 52 F.C.C.2d at 286.

115. NBC, 52 F.C.C.2d at 287. Comparable discussion of NOW's fairness allegations regarding the ABC-owned station appears at 52 F.C.C.2d at 116.

116. See Note, *supra* note 34, at 152-53; note 37 *supra*.

be made by examining the operation of the doctrine as currently applied by the Commission. Clearly the doctrine has not led the broadcast media to offer viewers a spectrum of political and social views. The Commission has historically deferred to the judgment of the licensee in determining whether a controversial issue has been raised.¹¹⁷ If a controversial issue is found, the licensee again enjoys broad discretion in choosing the format, content of, and spokesperson for the responding broadcasts.¹¹⁸ Although the Commission disapproves of "imbalance" in the presentation of contrasting viewpoints, it has declined to establish a minimum ratio to guarantee meaningful reply time.¹¹⁹ Furthermore, in reviewing licensee decisions the Commission has been extremely reluctant to find that a broadcaster exercised its discretion unreasonably or in bad faith.¹²⁰ In exercising such broad discretion at every stage of the fairness process¹²¹—to judge what is controversial, who should reply, and how and when—licensees will generally make judgments reflecting the cultural biases of their managers and owners, who are typically affluent, white, male, and business-oriented.¹²² Consequently, the inclusion of product advertising within fairness doctrine coverage, as the doctrine is presently applied, is unlikely to increase significantly the presentation of contrasting viewpoints on controversial issues.¹²³

If, on the other hand, the fairness doctrine were applied to afford meaningful reply time to all controversial presentations, whether in advertising or programming, it might seriously threaten the financial welfare of the broadcast industry.¹²⁴ Nearly every commercial on the

117. Fairness Report, *supra* note 52, at 11. *See, e.g., In re Storer Broadcasting Co.*, 60 F.C.C.2d 1097 (1976); *In re Media Access Project*, 60 F.C.C.2d 218 (1976).

118. Fairness Report, *supra* note 52, at 16. *See, e.g., Public Media Center v. KATY*, 59 F.C.C.2d 494, 517 (1976). In addition, see Comment, *supra* note 56, at 234, 243 n.43.

119. Fairness Report, *supra* note 52, at 17. *But cf. Public Media Center*, 59 F.C.C.2d 494 (1976) (FCC ruling that 8 of 13 licensees failed to afford adequate reply time to political advertising). For a discussion of the problems of balance, see Comment, *supra* note 84, at 1436-44.

120. During 1973-1974, the FCC processed 4,280 formal fairness complaints and ruled against the licensee in only 19 (.4%). Fairness Report Rehearing, *supra* note 52, at 709 (Commissioner Robinson, dissenting).

121. *See generally* Note, *supra* note 90, at 758 n.7.

122. *See* P. SANDMAN, *supra* note 15, at 101.

123. The classification of a product advertisement as controversial, which gives rise to the presentation of views attacking the advertiser's produce, jeopardizes the licensee's financial interest because the advertiser may refuse to purchase further broadcast time. "Accordingly, there would be an incentive for the broadcasters *not* to classify an advertisement as raising fairness obligations." Comment, *supra* note 56, at 244-45.

124. Those who suggest that extension of the fairness doctrine to product advertising might not cut too deeply into broadcasting revenues apparently assume that only limited types of product advertising would trigger fairness obligations. *See, e.g., Comment, supra* note 84, at 1446-47. It has been argued in this regard that some controversial paid commercials might be effectively balanced by other paid commercials, which would fulfill at least part of the licensee's fairness responsibility without any financial burden. For example, phosphate detergent ads might be countered by ads for nonphosphate detergents, and ads for big cars might be

air might be considered offensive or at least controversial by some substantial minority of Americans.¹²⁵ If these groups were to benefit fully from the fairness doctrine, the financial burden imposed on broadcasters would undoubtedly be great.¹²⁶

Even within the context of current broadcasting economics, however, the Commission could, by appropriate line drawing, apply the fairness doctrine in a manner that recognizes the political and cultural impact of product advertising. Whether an advertisement addresses a controversial issue could be determined by objective evidence of actual or potential impact on viewer attitudes rather than by a mechanical examination of the script. To screen out marginal claims of controversy, fairness obligations arising from advertising could be triggered, for example, by findings in an approved public opinion survey or by the pendency of legislative or administrative action specifically pertinent to the subject matter of the ad.¹²⁷

Despite its past vicissitudes, the fairness doctrine continues to serve the public interest and should not be abandoned.¹²⁸ So long as

balanced by ads for small cars. See UFW Brief, *supra* note 90, at 4 n.1. This argument is unpersuasive because advertising, even when directly comparative, does not rebut. See Lazarfeld & Merton, *supra* note 14, at 476-77. Comparative advertising, however, typically seeks to increase the advertiser's share of sales in a single product category—*e.g.*, soft drinks, cigarettes, or a particular class of automobile. This advertising obviously will not challenge attributes of the product class itself. On the other hand, advertising for competing product categories, *e.g.*, cigars versus cigarettes, rarely discusses the merits of the product category with which the advertised product competes.

125. Two sources of legitimate controversy in all product advertising are the ethic of consumption, see text at notes 31-33 *supra*, and capitalism. See generally BROADCASTING, April 26, 1976, at 39.

If only television advertisements dealing with a few specific issues were deemed to be controversial, reply broadcasting time could be restricted to allowing general responses to all advertising raising those issues. Interview with Peter M. Sandman, Associate Professor, The University of Michigan School of Natural Resources, in Ann Arbor, Michigan (Feb. 1, 1977) [hereinafter cited as Interview]. However, every advertisement implicates a host of issues, many of which are controversial to substantial factions of the public. New controversies, moreover, erupt continually.

126. One communications scholar has suggested that the gravest threat to broadcasting posed by fairness doctrine reply time would be the enhancement of viewers' awareness, which would deny advertisers a passive audience receptive to subrational commercial appeals. Interview, *supra* note 125.

127. Cf. Note, *supra* note 90, at 775, suggesting several criteria for determining whether a product was controversial, including whether it was related to the subject of an upcoming referendum, to an election issue in a campaign office, to the subject of pending legislation, or to the subject of heated debate in the service area of a broadcasting station. The use of such criteria would serve to remove some of the discretion currently given licensees to determine whether a controversial issue has been raised, a necessary step if the fairness doctrine is to ensure the presentation of contrasting views. However, the increased governmental infringement upon editorial discretion may upset the balance between governmental control and editorial discretion noted as being desirable in *Columbia Broadcasting Sys., Inc. v. Democratic Natl. Comm.*, 412 U.S. 94 (1973), discussed in note 78 *supra*.

128. The fairness doctrine may be linked to the public's first amendment right of access to information. See Note, *Constitutional Ramifications of a Repeal of the Fairness Doctrine*, 64 GEO. L.J. 1293 (1976).

The doctrine provides political leverage to groups whose power to influence broad-

access to the airwaves is limited by technology,¹²⁹ oligopoly,¹³⁰ or advertising's imperative to accommodate mass tastes,¹³¹ the fairness doctrine will remain essential to ensuring some public exposure to contrasting viewpoints on issues of public importance. However, as presently applied the fairness doctrine falls far short of its lofty purposes, and the FCC is unlikely to extend even this limited version of the doctrine to product advertising, the economic basis of the industry. Thus, it is useful to consider other policy tools that might counter the impact of the implicit messages accompanying product advertisements.

III. THE FEDERAL TRADE COMMISSION AND DECEPTIVE OR UNFAIR ADVERTISING

Under the authority granted by Congress in section 5 of the Federal Trade Commission Act¹³² the FTC shares jurisdiction over television advertising with the FCC. While the FCC is concerned with ensuring that broadcasting serves the "public interest" in the broadest sense,¹³³ Congress created the Federal Trade Commission for the specific purpose of protecting the integrity of commerce from practices deemed predatory or contrary to public policy.¹³⁴ Initially

casters is otherwise meager. Much of this leverage will arise because a station may attempt to accommodate complainants' concerns rather than incur the expense and adverse publicity of contesting a fairness complaint. Interview, *supra* note 125.

129. Although cable television (CATV) has been heralded as a solution to the problems of limited access to television, its prospects are uncertain. *See, e.g.*, R. LE DUC, *CABLE TELEVISION AND THE FCC* (1973); R. SMITH, *THE WIRED NATION* (1972); Branscomb, *The Cable Fable: Will It Come True?*, J. Com., Winter, 1975, at 44; Comanor & Mitchell, *The Costs of Planning: The FCC and Cable Television*, 15 J. L. & ECON. 177 (1972).

130. In April 1972, the Department of Justice filed suits against the three major networks charging restraint and monopoly of prime-time programming through control of prime-time access. The National Broadcasting Co. has settled; the other suits are pending. *BROADCASTING*, Nov. 22, 1976, at 21. In response to a petition by Westinghouse Broadcasting Co., the FCC has announced a major inquiry into charges that networks dominate broadcasting at the expense of affiliate and "other programming sources." *BROADCASTING*, Jan. 17, 1977, at 19. Barring sudden, radical changes in government policies, however, network domination of the broadcast industry is likely to continue.

131. *See* note 17 *supra* and accompanying text.

132. Federal Trade Commission Act § 5(a)(1), 15 U.S.C. § 45(a)(1) (1976), grants the FTC authority to regulate "unfair or deceptive acts or practices in or affecting commerce."

133. Mindful of the statutory warning against censorship contained in the Communications Act of 1934, § 326, 47 U.S.C. § 326 (1970), and of Justice Brandeis' belief that the best remedy for fallacious speech is more speech, *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (concurring opinion), the FCC initiated the fairness doctrine so that voices other than those favored by broadcasters could be heard.

134. This distinction has arisen in the context of FTC jurisdiction over corporate "image" advertising. Noting limitations imposed by both the FTC Act and the first amendment, the Commission has ruled that its jurisdiction over deceptive image advertising is restricted to those of which "the dominant appeal or likely effect" is commercial, *i.e.*, concerning "the sale of goods or services or the elicitation of other commercial dealings." FTC Letter, *supra* note 6, at 55, 424. *See generally* Ludlam, *supra* note 6.

restricted to relationships among competitors, FTC authority now extends to protection of the consumer as well.¹³⁵ Although the FTC's concern for consumers generally centers around the consumer's role in commercial transactions, the agency has exercised its jurisdiction over "unfair" trade practices that threatened injury even where the potential victims were not actual or prospective consumers.¹³⁶ Unlike the FCC, whose remedies are generally limited to prescribing more speech, the FTC has available a variety of options to remedy unfair or deceptive practices. Upon determining that an advertising practice is unfair or deceptive within the meaning of section 5, the FTC may order disclosure¹³⁷ or correction¹³⁸ by the advertiser or may proscribe the practice by order¹³⁹ or rule.¹⁴⁰

The FTC has both the experience and the authority necessary to confront the problems raised by the power and impact¹⁴¹ of television advertising. Even though lawyers, and hence most governmental agencies, tend to read an advertisement as if it were a contract by focusing on the literal meaning of its terms,¹⁴² the FTC has, at least on occasion, proved itself capable of responding to the reality behind and beyond the words. For example, in 1964 the Commission, by requiring a health warning in all cigarette advertisements, recognized that social responsibility to the consumer must accompany the exercise of the extraordinary power of advertising. Intensive mass media advertising, the Commission asserted,

is a form of power in the market place—power over the buying choice of consumers. It is lawful power. But just as the possession of lawfully-acquired market or monopoly power in the antitrust sense may nevertheless place a firm under a special duty of fair dealing toward its competitors, an advertiser's possession of great power vis-a-vis consumers may place him under a special duty of fair dealing toward them. . . . The duty exists even if no individual advertisement, viewed in isolation, is deceptive under conventional principles.¹⁴³

The FTC's response to cigarette advertising thus recognized not merely the strict meaning of words, but also their actual influence

135. See *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1019-21 (1967) [hereinafter cited as *Developments*].

136. See note 168 *infra*.

137. See note 174 *infra*.

138. See note 177 *infra* and accompanying text.

139. Federal Trade Commission Act, § 5(b), 15 U.S.C. § 45b (1976).

140. Federal Trade Commission Act, § 18, 15 U.S.C. § 57a (1976).

141. See text at notes 7-9 & 16-47 *supra*.

142. See J. HOWARD & J. HULBERT, *ADVERTISING AND THE PUBLIC INTEREST* 49-50 (1973) (staff report to the FTC).

143. FTC, *Statement of Basis and Purpose of Trade Regulation Rule, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking*, 29 Fed. Reg. 8324, 8357 (1964) (footnote omitted) [hereinafter cited as *Cigarette Statement*].

and impact.¹⁴⁴

Viewed in this light, the FTC's contribution to the FCC's 1971 inquiry into the fairness issues raised by television advertising¹⁴⁵ is both intriguing and disappointing. In contrast to the FCC's content-oriented approach to advertising,¹⁴⁶ the FTC emphasized the power and influence of television advertising¹⁴⁷ and recognized that product advertisements "often raise issues, directly or implicitly, that relate to some of the nation's most serious social problems—drug abuse, pollution, nutrition and highway safety."¹⁴⁸ Asserting that its own regulatory tools were inadequate to respond fully to these problems,¹⁴⁹ the FTC proposed that interested groups be given free "counter-advertising" time to discuss controversial issues implicitly raised and negative product attributes left unmentioned by television product advertisements.¹⁵⁰ This proposal drew vigorous criticism

144. The FTC finds its authority to regulate the implicit messages that affect consumers in § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976). The FTC views that section as a mandate "to create a new body of law—a law of unfair competition adapted to the diverse and changing needs of the complex and evolving modern American economy." Cigarette Statement, *supra* note 143, at 8349 (footnote omitted).

An FTC staff report on advertising notes that, despite the difficulty of transition from traditional legal analysis, the FTC is "attempting to shift to more behaviorally oriented evaluative criteria." J. HOWARD & J. HULBERT, *supra* note 142, at 50.

145. See *In re* The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Notice of Inquiry, 30 F.C.C.2d 26, 29-33 (1971). The inquiry resulted in issuance of the Fairness Report, *supra* note 52, discussed in text at notes 66-100 *supra*.

146. See text at notes 71-76 & 91-94 *supra*.

147. See Statement of the FTC Before the FCC, *In re* The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Part III: Access to the Broadcast Media as a Result of Carriage of Product Commercials 2-7 (1972) [hereinafter cited as FTC Statement]. The FTC pointed out that television advertising is dominated by a relatively small number of corporations. *Id.* at 4. The FTC also noted:

Advertising today is largely a one-way street. Its usual technique is to provide only one carefully selected and presented aspect out of a multitude of relevant product characteristics. Advertising may well be the only important form of public discussion where there presently exists no concomitant public debate. At times, this may produce deception and distortion where the self-interest of sellers in disclosure does not coincide with the consumer's interest in information.

All of these elements of the modern-day advertising mechanism combine to endow broadcast advertising with an enormous power to affect consumer welfare.

Id. at 6-7.

148. *Id.* at 5.

149. *Id.* at 11. The Commission noted that, in proceeding through typically prolonged and costly administrative litigation, the Commission must make difficult choices among cases in allocating its limited resources. Moreover, litigation "may be a relatively unsatisfactory mechanism for determination of the truth or accuracy of certain kinds of advertising claims" and for dealing with truthful but controversial advertisements. *Id.* at 7-8. Requiring substantiation of advertising claims, the Commission continued, is effective only for claims "objectively verifiable" and is constrained by limited agency resources. *Id.* at 8-9. Finally, the FTC stated that disclosure requirements cannot furnish the consumer with all needed product information and cannot take the place of an advocate's criticism or supplementary presentation. *Id.* at 9-11.

150. See *id.* at 11-19; Thain, *Advertising Regulation: The Contemporary FTC Approach*, 1 FORDHAM URB. L.J. 349, 390-92 (1973).

The FTC recommended that a right of access to broadcasting be afforded for response

from advertisers and broadcasters¹⁵¹ and finally was rejected by the FCC, which accorded it only cursory discussion in the Fairness Report.¹⁵²

to four categories of product commercials. First, such a right would arise to counter "[a]dvertising asserting claims of product performance or characteristics that explicitly raise controversial issues of current public importance." FTC Statement, *supra* note 153, at 13. The FTC included in this category both corporate image advertising, *see* notes 6 & 72 *supra*, and product claims of, for example, environmental or nutritional benefits. FTC Statement, *supra* note 147, at 13. Second, the right to respond would reach "[a]dvertising stressing broad recurrent themes, affecting the purchase decision in a manner that implicitly raises controversial issues of current public importance." *Id.* at 14. The FTC elaborated as follows:

Advertising for some product categories implicitly raises issues of current importance and controversy, such as food ads which may be viewed as encouraging poor nutritional habits, or detergent ads which may be viewed as contributing to water pollution. Similarly, some central themes associated by advertising with various product categories convey general viewpoints and contribute to general attitudes which some persons or groups may consider to be contributing factors to social and economic problems of our times. For example, ads that encourage reliance upon drugs for the resolution of personal problems may be considered by some groups to be a contributing cause of the problem of drug misuse.

Id. at 14-15 (footnotes omitted).

The third category of advertising that the FTC felt should give rise to a right to respond would be "[a]dvertising claims that rest upon or rely upon scientific premises which are currently subject to controversy within the scientific community." *Id.* at 15. The FTC acknowledged its authority to prohibit as deceptive the presentation or implication of a controversial claim as established fact, but the Commission suggested that counter-advertising would be preferable because the public would hear both sides of the debate. *Id.* at 16-17. Finally, the right to respond would reach "[a]dvertising that is silent about negative aspects of the advertised product." *Id.* at 17. As an example, the FTC suggested that

in response to advertising for small automobiles, emphasizing the factor of low cost and economy, the public could be informed of the views of some people that such cars are considerably less safe than larger cars. On the other hand, ads for big cars, emphasizing the factors of safety and comfort, could be answered by counter-ads concerning the greater pollution arguably generated by such cars. In response to advertising for some foods, emphasizing various nutritional values and benefits, the public might be informed of the views of some people that consumption of some other food may be a superior source of the same nutritional values and benefits.

Id. at 18.

151. *See, e.g.*, Response of the American Association of Advertising Agencies to Statement of the Federal Trade Commission, The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act (1972); Reply Comments of the National Association of Broadcasters [NAB] to the Statement of the Federal Trade Commission, The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Part III: Access to the Broadcast Media as a Result of Carriage of Product Commercials (1972). The NAB asserted that, "through its proposals, the FTC, the agency charged with the duty to police advertising, is sidestepping its own statutory responsibilities and attempting to foist on the FCC and the public obligations which neither is equipped to assume." *Id.* at 4. The NAB went on to state that "[t]he public interest is ill-served by an administrative agency which fails to make every effort to discharge its statutory duties, no matter how overwhelming or onerous they may seem." *Id.* at 10.

152. *See* Fairness Report, *supra* note 52, at 26-28. As to the first two categories of advertising that the FTC felt should give rise to a right to respond, *see* note 150 *supra*, the FCC simply referred to its prior conclusion that product commercials cannot meaningfully address public issues. *See* text at notes 74-76 *supra*. Generally, the FCC complained that the FTC's categories "seem to include virtually all existing advertising. . . . We believe that the adoption of the FTC proposal—wholly apart from a predictable adverse economic effect on broadcasting—might seriously divert the attention and resources of broadcasters from the traditional purposes of the fairness doctrine." The FCC concluded: "We do not believe that the fairness doctrine provides an appropriate vehicle for the correction of false and misleading advertising." Fairness Report, *supra* note 52, at 26-27.

The FTC "counter-advertising" proposal is intriguing because it represented both an innovative, if unpolished, attempt to grapple with the social and political impacts of television product advertising and an unusually candid call for help from one federal agency to another. The proposal was disappointing, however, because the FTC itself already possessed ample authority to respond creatively to the serious and complex problems in this field.

Traditionally the FTC has concerned itself only with deceptive advertising—a concept broad enough to reach many of the objectionable features of television commercials. Advertising that is literally truthful may be unlawfully deceptive in the "general impression" it conveys to the "populace" about a product.¹⁵³ Moreover, unlawful misrepresentation is not confined to the particulars of the product itself, but may also concern such "extrinsic" factors as the country of its origin or the scope of the manufacturer's business.¹⁵⁴

Frequently the impressions conveyed by product advertisements are at least partially the result of subtle psychological techniques. Television commercials are not deceptive merely because they use psychological appeals¹⁵⁵ to convey a favorable product image. Rather, they are deceptive because the images they convey are often

153. *Charles of the Ritz Distrib. Corp. v. FTC*, 143 F.2d 676, 679 (2d Cir. 1944). The FTC need only determine that an advertisement has the capacity to deceive, not that actual deception has occurred. 143 F.2d at 679. Thus, the FTC employs the standard not of the reasonable person, but rather of "the ignorant, the unthinking and the credulous." *Aronberg v. FTC*, 132 F.2d 165, 167 (7th Cir. 1942).

154. See, e.g., *FTC v. Royal Milling Co.*, 288 U.S. 212 (1933) (firm calling itself a "milling company" did not grind flour); *Mohawk Ref. Corp. v. FTC*, 263 F.2d 818 (3d Cir.), cert. denied, 361 U.S. 814 (1959) (re-refined oil not so labeled); *Manco Watch Strap Co., Inc.*, 60 F.T.C. 495 (1962) (product's foreign origin not disclosed). See generally Note, "Extrinsic Misrepresentations" in Advertising Under Section 5(a) of the Federal Trade Commission Act, 114 U. PA. L. REV. 725 (1966).

False implications about facts such as the environmental impact of an automobile or the nutritional value of a food item often interfere with rational consumer product selection in much the same manner as does false information about a product's origin or the scope of a manufacturer's business. See Note, *The Regulation of Corporate Image Advertising*, 59 MINN. L. REV. 189, 210 (1972). In many cases, misinformation about impact or nutrition would bear much more directly on consumer decisions, given the current concern for the environment and nutrition.

155. Demand is inevitably both economic and psychological. See J. HOWARD & J. HULBERT, *supra* note 142, at 82-83. Psychological "self-concept" appeals are, of course, inherent in certain product categories, such as cosmetics and clothes. *Id.* at 54. Numerous studies have demonstrated that the informational content of advertising bears little or no relation to changes in the viewers' attitudes or behavior. See, e.g., Haskins, *Factual Recall as a Measure of Advertising Effectiveness*, J. ADVERTISING RESEARCH, March 1964, at 2. As psychologist Roger Brown has put it, "[w]e should not expect a symbol-using animal to live by meat and drink alone." R. BROWN, *SOCIAL PSYCHOLOGY* 568 (1965).

Given that demand is both economic and psychological, suggestions that the psychological component be purged from advertising and that the consumer be permitted to make a purely "rational" choice, see, e.g., Reed, *supra* note 21, at 180-82; Note, *Psychological Advertising: A New Area of FTC Regulation*, 1972 WIS. L. REV. 1097, 1108-11, are misdirected.

false, in that they are contradicted by undisclosed facts. Such psychological appeals should, if not factually substantiated,¹⁵⁶ at least not be at odds with provable reality.

Advertising need not be a comprehensive consumer's guide that sets forth every merit and demerit of a product potentially relevant to the purchasing decision. However, the law of deceptive advertising does forbid misrepresentation of facts, even "extrinsic" facts, capable of affecting a significant number of purchasers' decisions.¹⁵⁷ This principle, in conjunction with the "general impression" test discussed earlier,¹⁵⁸ offers an appropriate standard for disclosure: information directly contrary to a factual impression conveyed by an advertisement must be presented when it is likely to affect the consumption decisions of a substantial number of persons. Obviously, that standard requires informed and thoughtful line drawing, which can best be developed on a gradual, case-by-case basis.¹⁵⁹ Properly applied, the FTC authority to regulate deceptive advertising could

156. An FTC staff report has proposed that substantiation requirements be applied to implicit psychological claims as well as to factual claims. See J. HOWARD & J. HULBERT, *supra* note 142, at 54. The practical difficulties of this approach appear obvious: it may be interpreted as a back-door attempt to eliminate psychological appeals altogether, which is an impossibility.

157. Whether tacit or explicit, a misrepresentation is unlawful if material—that is, if it is capable of affecting the purchasing decisions of a substantial number of consumers. See Cigarette Statement, *supra* note 143, at 8352; *Developments, supra* note 135, at 1056-63.

158. See note 153 *supra*.

159. The FTC made this point when it required cigarette advertising to disclose the health hazards of smoking:

[T]he principle requiring disclosure of a product's hazards in labeling and advertising should not be applied mechanically or uncritically, or pushed to an absurd extreme. It can be applied only on the basis of the specific and concrete facts and circumstances pertaining to the product involved. . . . It is a question of judgment. . . .

Cigarette Statement, *supra* note 143, at 8363. At that time, the FTC argued that cigarettes were distinguishable from other hazardous products promoted by mass media advertising. *Id.* at 8361-63.

More recently, the Commission has rejected a petition for rulemaking based on impression-disclosure theory. Senator James Abourezk (D.-S.D.), noting that "advertisers frequently exploit a general consumer preference to purchase from a small or family-owned company" by the use of misleading brand names or appeals, requested that the FTC require disclosure of the advertiser's parent corporation. Letter from Senator Abourezk (co-signed by five other senators) to Mr. Calvin J. Collier, FTC Chairman (April 5, 1976) (on file at the *Michigan Law Review*). Senator Abourezk cited as examples Pepperidge Farm baked goods (Campbell Soup Co.), Sara Lee baked goods (Consolidated Foods Corp.), and Celeste Pizza, advertised as "Mama's' Old Family Recipe" (Quaker Oats). News Release of Sen. James Abourezk (Apr. 5, 1976) (on file at the *Michigan Law Review*). Abourezk also asserted that such disclosure would help counteract specious product differentiation by a single manufacturer—for example, detergent manufacturers that create an illusion of meaningful competition. *Id.* In denying the petition, the FTC stated that it lacked evidence either that current practice misleads a significant number of persons to their detriment or that a consumer preference for small manufacturers exists. The acquisition of such evidence, according to the Commission, would require the expenditure of significant resources. Furthermore, it stated that mere disclosure of corporate affiliation would not better inform the consumer about the product. Letter from the Federal Trade Commission (Charles A. Tobin, Secretary) to Senator James Abourezk (June 15, 1976) (on file at *Michigan Law Review*).

go a long way toward alleviating much of the objectionable impact of television commercials.

The deceptiveness doctrine is not the only standard available to FTC regulation of television advertising, since the Commission also has authority to prohibit commercial practices that are "unfair." In recent years attention within and without the Commission has focused increasingly upon the question whether an advertisement that is not strictly "deceptive" may nonetheless be considered "unfair." The Supreme Court's opinion in *FTC v. Sperry & Hutchinson Co.*,¹⁶⁰ though arising in the general context of antitrust principles rather than advertising,¹⁶¹ gave an expansive reading to the Commission's authority to regulate "unfair" commercial practices. Noting the "sweep and flexibility" of the FTC's mandate,¹⁶² the Court stated that

the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.¹⁶³

Continuing in a footnote, the Court cited, with apparent approval,¹⁶⁴ criteria adopted by the Commission for determining whether a practice that is not deceptive is nonetheless unfair:

(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 otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).¹⁶⁵

Notwithstanding the expansive reading given to the scope of the FTC unfairness authority in *Sperry & Hutchinson*, the encouragement of commentators,¹⁶⁶ and the public statements of its staff,¹⁶⁷ the Commission has made only limited efforts to give substance to

160. 405 U.S. 233 (1972).

161. The Court's discussion in *Sperry & Hutchinson* demonstrates that its reasoning applies to the full breadth of FTC authority. Neither *FTC v. R.F. Keppel & Bros., Inc.*, 291 U.S. 304 (1934), relied upon by the Court in *Sperry & Hutchinson*, 405 U.S. at 242-43, nor the FTC's unfairness criteria, quoted in text at note 165 *supra*, involved antitrust considerations.

162. 405 U.S. at 241.

163. 405 U.S. at 244.

164. See Note, *supra* note 155, at 1108-11.

165. 405 U.S. at 244-45 (citing Cigarette Statement, *supra* note 157, at 8355).

166. See, e.g., Note, *supra* note 155, at 1106-11.

167. In 1971, Gerald J. Thain, then-Assistant Director for Food and Drug Advertising of the FTC's Bureau of Consumer Protection, anticipating the favorable decision in *Sperry & Hutchinson*, discussed "the Unfairness Doctrine" as an emerging theory of FTC regulation of

its unfairness authority in the advertising field.¹⁶⁸ Just as psychologi-

advertising. Thain, *Consumer Protection: Advertising—The FTC Response*, 26 FOOD, DRUG, COSM. L.J. 609, 616-23 (1971). He stated that the Unfairness Doctrine . . . is potentially of great value in dealing with exploitive or inequitable practices that do not fall within established categories of unfair or deceptive activity. In my view, it is exceedingly important that the Commission develop such tools, for it is becoming increasingly apparent that traditional approaches are not adequate to deal with the problems created by modern mass media advertising. . . . The consumer, unwary of the new advertising techniques, is placed in a vulnerable and easily exploitable position. . . . Since television occupies a central place in most households, the viewer is continuously engulfed with messages which educate, messages which set standards, and messages which instill drives. Attitudes and life styles are most certainly influenced by the medium. Thus, the importance of understanding the new television advertising, as well as new advertising in general, cannot be overemphasized.

Id. at 621-22. Two years later, his initial optimism tempered by experience, Mr. Thain reported that "[d]ealing with advertising other than that which is simply misinformative . . . has been . . . difficult. However, the Commission of the 1970's will, in my judgment, be compelled to focus increasingly on these problems." Thain, *supra* note 150, at 393.

More recently, Richard B. Herzog, Assistant Director of the FTC's Division of National Advertising, Bureau of Consumer Protection, has suggested that the FTC has the authority to proceed against advertising that can be shown to encourage abuse of alcohol. Statement of Richard B. Herzog Before the Subcommittee on Alcoholism and Narcotics, Senate Committee on Labor and Public Welfare (March 11, 1976) (on file at *Michigan Law Review*). Noting that § 5 prohibitions of unfairness and deceptiveness reach "implied representations" even if not intended by the advertiser, Mr. Herzog stated that "an ad would be particularly suspect if it suggested—frankly or, perhaps, symbolically—that alcoholic beverages are a means of coping with social or emotional difficulties, including loneliness, frustration, or tension, or if it portrayed behavior or personality characteristics distinctively present in alcohol abusers." *Id.* at 5. However, Mr. Herzog cautioned that the lack of conclusive evidence of the actual impact of such advertising is a "basic constraint" on governmental response. *Id.* at 11.

168. The Commission has proceeded under its § 5 authority against television advertising practices that may result in physical injury to children. See *Uncle Ben's, Inc.*, 3 TRADE REG. REP. (CCH) ¶ 21,246 (1976) (commercial showing child placing her face close to pot of boiling rice); *General Foods Corp.*, 3 TRADE REG. REP. (CCH) ¶ 20,928 (1975) (commercial suggesting that wild plants are edible). Cf. *Philip Morris, Inc.*, 3 TRADE REG. REP. (CCH) ¶ 20,153 (1972) (distribution of sample razor blades in home-delivered newspapers). Absent a threat of physical injury, however, the Commission has exercised little initiative in the area of nondeceptive unfair advertising.

Presumably the easiest cases for use of the unfairness theory involve advertising directed at children. Since children are an especially vulnerable audience, too young and inexperienced to respond discriminatingly to commercial appeals, extraordinary legal protections have traditionally been extended to them. See FTC Staff Statement on the Application of the Federal Trade Commission Act to Television Advertising of Child-Directed Premiums, Proposed Industry Guide, 39 Fed. Reg. 25505, 25505-10 (1974). Moreover, the landmark case establishing the FTC's power to proceed against "unfair" practices not otherwise unlawful, *FTC v. R.F. Keppel & Bros.*, 291 U.S. 304 (1934), concerned a lottery-type scheme promoting the sale of candy to children, who were deemed by the Court to be "unable to protect themselves." 291 U.S. at 313. Until very recently, however, the Commission had declined to find any inherent deception or unfairness in television food advertising directed at children. Letter from the FTC to Action for Children's Television, 5 TRADE REG. REP. (CCH) ¶ 50,229 (1975). See also *ITT Continental Baking Co.*, 83 F.T.C. 865 (1973), *modified*, 83 F.T.C. 1105 (1973), *enforcement of order as modified granted*, 532 F.2d 207 (2d Cir. 1976), discussed in note 194 *infra*. It abandoned its proposal to prohibit television food advertising directed at children that uses premiums or sweepstakes. Wall St. J., Mar. 15, 1977, at 2, col. 4. In 1976, however, the FTC approved a consent order prohibiting children-oriented vitamin advertisements that featured Spider-Man, a popular television and comic book hero. See *Hudson Pharmaceutical Corp.*, 3 TRADE REG. REP. (CCH) ¶ 21,191 (1976). Although the complaint leading to the consent order alleged both deceptiveness and unfairness, the advertisements were not deceptive in the traditional sense.

Finally, on February 28, 1978, the Commission initiated rulemaking proceedings to

cal appeals in television product advertising are not "deceptive" merely because they are psychological,¹⁶⁹ neither are they necessarily "unfair." However, at the very least, advertising appeals should be considered unfair under the "substantial injury to consumers" test where their cumulative effect can be shown to be harmful to viewers' mental health.¹⁷⁰ Furthermore, as the Court in *Sperry & Hutchinson* suggested, the public policies expressed in statutory and common law present an additional basis for a finding of unfairness.¹⁷¹ Consequently, television commercials should also be considered "unfair" when they exploit and cultivate desires and prejudices that contradict societal principles manifested in American law.¹⁷²

consider strict generic regulation of children's television advertising. See note 2 *supra*. In support of its proposals, the staff report reasoned:

The remedy described in paragraph (a) follows from the conclusion that televised advertising directed to children too young to understand the selling purpose of, or otherwise comprehend or evaluate, commercials is inherently unfair and deceptive. The remedy described in paragraph (b) reflects the conclusion that the most cariogenic sugared products should not be advertised to children on television. The remedy described in (c) reflects the view that those products of lesser cariogenicity should be advertised to children only if balanced by nutritional and/or health disclosures addressed to that group.

4 TRADE REG. REP. (CCH) ¶ 38,046 (1978).

The FTC has never found an advertisement directed at adults to be unfair unless it was also deceptive. Although some cases of deceptive advertising involve messages that seem offensive or unfair regardless of their truthfulness, the Commission has relied essentially on the deceptiveness theory. See, e.g., *Savitch v. FTC*, 218 F.2d 817 (2d Cir. 1955); *J.B. Williams Co.* [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,671 (1971).

169. See note 155 *supra* and accompanying text.

170. See 405 U.S. at 244 n.5, quoted in text at note 165 *supra* ("substantial injury to consumers"). The FTC has already proceeded against advertising appeals endangering the physical health of viewers. See note 168 *supra*.

171. 405 U.S. at 244, quoted in text at note 163 *supra*.

On at least one occasion, the FTC staff has, apparently without considering whether its concerns were consistent with public values, attempted to proscribe advertisements that were alleged to exploit consumer concerns unfairly. In *ITT Continental Baking Co.*, 83 F.T.C. 865, *modified and aff'd.*, 532 F.2d 207 (2d Cir. 1976), the FTC's complaint alleged that respondent's advertisements were "unfair" because they tended "to exploit the emotional concerns" of parents for the healthy growth of their children by misrepresenting the nutritional value of Wonder Bread and tended "to exploit the guilt feelings [of mothers] regarding the nutritional effect of snack cakes on children's diets" by misrepresenting the nutritional value of Hostess snack cakes. 83 F.T.C. at 872, 874. The FTC, reasoning that these unfairness allegations relied on the falseness of the advertising claims, declined to consider their unfairness as a separate issue. 83 F.T.C. at 962-64.

172. This standard would require precisely the kind of judgment the Supreme Court endorsed in *Sperry & Hutchinson*, 405 U.S. 233 (1972), discussed in the text at notes 161-65 *supra*. Application of the standard in the illustrative subject areas of environment, sexism, and nutrition is discussed in the text at notes 178-204 *supra*.

This standard is similar to the kind of judgment suggested by Margaret Mead when she called for the development of "an ethic of communications" that would insist that "the audience be seen as composed of individuals who could not be manipulated but could only be appealed to in terms of their systematic cultural strengths." Mead, *supra* note 20, at 343. Dr. Mead gave an example in the nutrition field: "It would . . . be regarded as ethical to try to persuade the American people to drink orange juice as a pleasant and nutritional drink by establishing a style of breakfast, a visual preference for oranges, and a moral investment in good nutrition, but not by frightening individual mothers into serving orange juice for fear that they would lose their children's love, or their standing in the community." *Id.* at 343.

This standard would require careful and delicate judgments on the part of the FTC and would not permit regulation of commercial appeals simply because bureaucrats—or even the great majority of society—deemed them distasteful or improper. Absent convincing scientific proof of harm to viewers, only a forceful expression in law of societal values would suffice to invoke the FTC's jurisdiction. The Commission's task in determining fairness would not be to divine the prevailing mood of the nation, but to apply the nation's own carefully weighed and reasoned judgments of fairness expressed in its statutes and judicial decisions. The values to be discerned do not involve norms or preferences—hedonism versus puritanism, cooperation versus self-reliance, heterosexuality versus homosexuality—but involve fundamental societal principles articulated in law. Thus, although a racist advertisement might be tolerated by a majority of the population, the fundamental principles of American law declare that appeal unfair. Should the Commission attempt to project its own values upon the public rather than limit its activity to those areas in which societal values have been clearly articulated, Congress and the courts could correct it.

Once the Commission determines that a particular advertisement or a series of advertisements are deceptive or unfair, it must fashion an appropriate remedy. As the Commission has recognized,¹⁷³ much of the unfairness, deceptiveness, and controversial nature of product advertising lies in its relentless one-sidedness, its failure to reveal information needed by consumers in making purchasing decisions. Consequently, a useful remedy in deception cases has been to require disclosure of material facts.¹⁷⁴ Some unfair advertising appeals may be so patently offensive or harmful that a cease and desist order directed toward the noxious commercial is proper.¹⁷⁵

Often no single advertisement is responsible for the unfair impact, which results rather from the reinforcement of a similar pernicious message or theme by numerous advertisements.¹⁷⁶ In such

173. See text at note 150 *supra*.

174. Where an advertisement materially misleads by silence, the Commission may require disclosure of material facts. See FTC Statement of Basis and Purpose, Trade Regulation Rule, Care Labeling of Textile Wearing Apparel, 36 Fed. Reg. 23,883, 23,889 (1971); Cigarette Statement, *supra* note 143, at 8351. It is clear that disclosure of material information in a thirty- or sixty-second television commercial is not always practical.

175. The Supreme Court upheld this approach to unfairness advertising in *FTC v. R.F. Keppel & Bros., Inc.*, 291 U.S. 304 (1934), discussed in note 168 *supra*. In addition, see the physical injury cases cited in note 168 *supra*.

176. See Cigarette Statement, *supra* note 143, at 8357; Silverstein & Silverstein, *supra* note 34, at 73; Note, *supra* note 34, at 177-78. The FTC has stated that

[i]n the conventional false and misleading advertising case it is not unusual to consider the challenged advertisement apart from the respondent's—and the industry's—total advertising. This is a satisfactory procedure where the source of public injury or consumer exploitation lies essentially within the four corners of the advertisement, in the claims made or facts left undisclosed. It is less satisfactory where the cumulative effect of massive and long-continued advertising throughout an entire industry, in contrast to the effect of a

cases the FTC has the authority to require corrective advertising at the advertiser's expense to remedy the lingering effects of unfair or misleading practices.¹⁷⁷ Where advertising has created a deceptive impression, the corrective advertisements can supply the supplementary information necessary for informed consumer choice. Where advertising has had an unfair impact, the corrective advertisements can offer complementary, balancing messages to mitigate or cure the unfairness.

Thus far the discussion of the deceptiveness and unfairness principles and the remedies available to the Commission has been very general. Their application in three illustrative areas of current concern—the environment, sexism, and nutrition—should help clarify them as well as demonstrate the role the FTC can play in regulation of the content and impact of television commercials.

Consumers' purchasing decisions, as noted previously,¹⁷⁸ affect the environment. Conversely, the environment—or, more precisely, consumers' perceptions of it—affects their purchasing decisions. Opinion surveys continue to find a high level of public concern over environmental and energy problems.¹⁷⁹ The frequency of advertisements extolling the environmental beneficence¹⁸⁰ and energy efficiency of various products indicates that this concern is reflected in consumer purchase decisions. Where advertisers have sought expressly to exploit this concern, the FTC has held them to a strict standard of truthfulness.¹⁸¹ Many advertisements, however, either attempt more subtly to associate environmental values with a partic-

single advertisement or particular advertisements, is itself a source of substantial and unjustifiable injury to the consuming public.

Cigarette Statement, *supra* note 143, at 8357.

177. See Warner-Lambert Co., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,066, at 20,934-35 (1975), *aff'd. as modified*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 1575 (1978); Firestone Tire & Rubber Co., 81 F.T.C. 398, 464-74 (1972), *aff'd.*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973); ITT Continental Baking Co., 83 F.T.C. 865, 971-72, *modified*, 83 F.T.C. 1105 (1973), *enforcement of modified order granted*, 532 F.2d 207 (2d Cir. 1976). See generally Cornfeld, *A New Approach to an Old Remedy: Corrective Advertising and the Federal Trade Commission*, 61 IOWA L. REV. 693 (1976); Comment, *Corrective Advertising—The New Response to Consumer Deception*, 72 COLUM. L. REV. 415 (1972).

178. See note 28 *supra*.

179. See, e.g., OPINION RESEARCH CORP., PUBLIC ATTITUDES TOWARD ENVIRONMENTAL TRADEOFFS (1975). This study reported that 60% of those surveyed expressed a willingness to pay higher prices in order to protect the environment and that a 48% plurality preferred higher automobile prices to eliminating pollution-control devices.

180. See D. RUBIN & D. SACHS, MASS MEDIA AND THE ENVIRONMENT 114-49 (1973); Sandman, *supra* note 27.

181. See Standard Oil of Cal., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,789 (1974). In ruling that advertisements claiming extraordinary antipollution qualities for a brand of gasoline were deceptive, the FTC stated:

The challenged . . . advertisements are examples of the type of advertising which focuses on serious anxieties of consumers resulting from heated public discussion of issues such as environmental protection; individual and public health; job, home, and auto safety; economic woes such as shortages and inflation; etc. . . . In our opinion, it is incumbent upon advertisers who seek to advance their own interests in even partial reliance

ular product notwithstanding the product's actual adverse environmental impact or are simply silent about the environmental impact of the product being promoted. Snowmobile advertisements, for example, typically picture carefree enjoyment of the product in pristine wilderness settings without making reference to the destructive effects of snowmobiling on wilderness ecosystems.¹⁸² Similarly, automobile commercials often present the product against a backdrop of idyllic nature—coastal vistas, small farms, grassy fields, and the like; the role of the automobile in urban congestion and air pollution is understandably ignored.¹⁸³ In these circumstances—where advertising creates impressions material to consumer choice and clearly rebuttable by reference to appropriate facts—disclosure principles¹⁸⁴ should require that these facts be presented to the viewers.

Disclosure principles do *not* require that advertisers “tell all” about their products and business. Rather, they only require a fair presentation of facts concerning a particular issue raised by the advertisement. Automobile commercials with heavy doses of pastoral imagery clearly imply that automobiles are clean, pristine machines. If that impression influences consumer purchase decisions, disclosure of corrective information is warranted. These corrective advertisements, however, would not have to disclose other facts that might influence consumer choice but that are unrelated to issues raised by the commercial, such as a problem with a trunk latch reported by some owners, a labor dispute involving the manufacturer, or the manufacturer's investments in foreign countries in which human rights are allegedly denied. If an advertisement cannot be said to open the door to these subjects by its own explicit or implicit repre-

on such serious consumer concerns to exercise an extra measure of caution in order to be certain that their representations to consumers will not deceive or mislead.

Id. at 20,656.

182. See *Public Interest Research Group v. FCC*, 522 F.2d 1060, 1062 (1st Cir. 1975). See also Comment, *supra* note 103, at 477.

183. *Cf. Friends of the Earth v. FCC*, 449 F.2d 1164, 1169 (D.C. Cir. 1971) (FCC required to extend to certain gasoline and automobile commercials the fairness doctrine as applied to cigarette commercials).

184. See text at notes 156-59 *supra*. As the Court of Appeals for the District of Columbia Circuit has stated, “[w]here a controversial issue with potentially grave consequences is left to each individual to decide for himself, the need for an abundant and ready supply of relevant information is too obvious to need belaboring.” *Banzhaf v. FCC*, 405 F.2d 1082, 1089 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

Application of disclosure principles in the environmental area would further the congressional policy declared in the Environmental Education Act § 1(a), 20 U.S.C. § 1531(a) (1970):

The Congress of the United States finds that the deterioration of the quality of the Nation's environment and of its ecological balance poses a serious threat to the strength and vitality of the people of the Nation and is in part due to poor understanding of the Nation's environment and of the need for ecological balance; that presently there do not exist adequate resources for educating and informing citizens in these areas, and that concerted efforts in educating citizens about environmental quality and ecological balance are therefore necessary.

sentations, no disclosure obligation would arise. If, on the other hand, the advertisement boasts of "a trouble-free trunk" or "the corporation with a conscience," it might trigger disclosure obligations.¹⁸⁵ Nor does this standard for disclosure reach the larger social issues in a consumer society that are only tangentially raised by a particular product advertisement. Implicit endorsements of conspicuous consumption, frivolous technology, and novelty for its own sake are not factual representations, but social judgments. Consequently, no contrary "facts" exist to be disclosed.

While commercials that make implicit or explicit deceptive statements about the environmental impact of particular products should be subject to disclosure requirements, whether appeals that simply foster antienvironmental attitudes can be deemed "unfair" within the meaning of section 5 raises a more difficult question. Although the nation's policy in favor of environmental quality is manifest,¹⁸⁶ the details of that policy are the subject of vigorous debate. The FTC's authority to protect the consumer from unfair and harmful commercial appeals does not permit it to choose among political viewpoints. A finding of unfairness should rest only upon a demonstration of a controlling national value or of palpable harm of the kind suggested in *Sperry & Hutchinson*.¹⁸⁷

185. Another example is provided by an advertisement for canned tuna. Claims of good flavor, nutrition, or convenience do not implicate the question of porpoise mortality associated with the commercial tuna industry. Representations that hook-and-line fishing is used to catch individual tuna, however, would require disclosure of actual netting techniques and their danger to porpoises if porpoise mortality were shown to affect the purchasing choices of a substantial number of consumers.

186. See The National Environmental Policy Act of 1969, § 101, 42 U.S.C. § 4331(a) (1970):

The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

In addition, see Environmental Education Act, § 1(a), 20 U.S.C. § 1531(a) (1970), quoted in note 184 *supra*; Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 (Supp. V 1975); Clean Air Act of 1970, 42 U.S.C. § 1857 (1970).

187. See text at notes 165 & 170-71 *supra*. It may be that the nation is fast approaching the formulation of a controlling value favoring energy conservation. See, e.g., Energy Policy and Conservation Act, 42 U.S.C. §§ 6201-6422 (Supp. V 1975); N.Y. Times, April 19, 1977, at 24, col. 1 (text of one of President Carter's energy addresses). If such a value develops and is manifested in law, the FTC could require corrective advertising or restrict commercial appeals encouraging wasteful energy practices because of unfairness to consumers.

It may be argued persuasively that the pervasive presentation of only one perspective—the business perspective—of the environmental issue, or of any issue, is itself an unfair practice because it is antidemocratic. Interview, *supra* note 125. However, general arbitration

The principle of deceptiveness is particularly suited for application to commercials promoting controversial products, such as snow-mobiles, that frequently do not disclose the information necessary for rational consumer decisionmaking with respect to the subject of the controversy. Consequently, under this analysis the FTC has authority to remedy a substantial amount of the objectionable impact of advertisements for controversial products. It is more difficult to establish a basis for the Commission's authority to regulate the impact of advertisements that present only one side of an important issue in a context other than the promotion of a controversial product.¹⁸⁸ FTC action in such cases would be limited to the exercise of its authority under the unfairness doctrine. Advertisements employing sex-role stereotyping provide an illustration of the potential application of this doctrine.

Emerging national values and accumulating evidence of harm converge to suggest that, under the *Sperry & Hutchinson* test, pervasive sex-role stereotyping in television advertising is unfair to viewers. Numerous statutes and court decisions evince a national policy against this stereotyping where it results in invidious discrimination against women.¹⁸⁹ Moreover, pervasive media stereotyping reduces freedom of choice for both sexes and may adversely affect the mental health of viewers.¹⁹⁰ Although women and men alike may disagree on the propriety of special benefits and protections to be afforded women, the principles of equal opportunity and freedom of choice seem so clearly approved in American law that the FTC may take effective action against sex-role stereotyping without having to choose among several seriously competing political viewpoints.

Remedial action to counter sex-role stereotyping in television commercials might take one or both of two forms. The first would require advertisers to promote freedom of choice in sex roles through their regular product advertising, such as by representing more women in professional roles and more men performing household chores. The second alternative, corrective advertising, would explicitly promote freedom of choice in sex roles through advertisements similar to the "anti-cigarette" messages used to discourage smoking.¹⁹¹ Given that the problem of stereotyping arises not from any

of demands for television access to reply to the social and political bias of advertising exceeds the essentially commercial jurisdiction of the FTC. The solution of this broader problem rests with the Federal Communications Commission and with Congress.

188. An advertisement promoting a controversial product may pose the same difficulty if the controversial nature of the product is unrelated to the important issue presented in an unfair manner. An example is an advertisement employing sex-role stereotyping in the promotion of an automobile.

189. See the statutes and cases cited and discussed in Note, *supra* note 34, at 171-75.

190. See text at notes 36-39 *supra*.

191. Because responsibility for sex-role stereotyping in television commercials is widely shared, financing the corrective advertising poses practical problems. Perhaps the most equita-

particular advertising theme or practice but from the similar content of many advertisements,¹⁹² these counter-advertisements might be the better remedy. Despite the FTC's apparent authority and the remedies available, the Commission has taken no action with respect to sex-role stereotyping in product commercials.

Food advertising on television presents the strongest case for vigorous Commission action under both disclosure and unfairness principles. It is also an area in which the Commission has already been relatively active, thus far with unimpressive results. The Commission staff has negotiated consent orders proscribing false or deceptive nutritional claims.¹⁹³ When hearing contested staff complaints, however, the Commission has been reluctant to find misrepresentation by implication or innuendo.¹⁹⁴ Although the Commission has pro-

ble solution would be to assess television advertisers collectively for the cost of corrective messages, excepting those advertisers who could demonstrate to the FTC's satisfaction that their advertising generally does not represent stereotyped sex roles.

192. See note 176 *supra*.

193. See, e.g., Carnation Co., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,566 (1974) (representation of a chocolate drink as the nutritional equivalent of milk); Amstar Corp., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,356 (1973) (claim that sugar is a unique source of energy, strength, and stamina); Ocean Spray Cranberries, Inc., [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 19,981 (1972) (claim that cranberry juice is more nutritious than alternative breakfast juices). All three consent orders required disclosures or corrective advertising.

194. Coca-Cola Co., 83 F.T.C. 746 (1973), involved a classic case of nutritional counter-education by television advertising. See text at notes 42-46 *supra*. The complaint alleged, *inter alia*, that advertising for Hi-C fruit drinks misrepresented the product as (1) "The Sensible Drink," nutritionally and economically, as a source of vitamin C," (2) "made with fresh fruit and [having] a high fruit content comparable to fresh fruits and fruit juices," (3) "unqualifiedly good for children," and (4) "particularly high in vitamin C content even as compared to . . . citrus fruit juices." 83 F.T.C. at 751.

In affirming the initial decision of the administrative law judge dismissing the complaint, the FTC found that "the advertising representations made in behalf of Hi-C are not reasonably likely to have communicated the comparisons and claims of equivalence to citrus juices . . . so critical to the allegations advanced by complaint counsel" 83 F.T.C. at 818. The FTC also ruled that the express claims that the product was "made from fresh fruit" and "made with real fruit" did not suggest

that Hi-C is made with fresh fruit, in the specific sense that unprocessed fruit was used in the manufacturing process. . . . [C]onsumers would not be reasonably likely to take this meaning from these words. The claims are true in the sense that the fruit components of the product are made from fresh fruit rather than from artificial or synthetic ingredients, and consumers are likely to so interpret the representation, based upon their understanding of canned unrefrigerated fruit drinks.

83 F.T.C. at 812 (footnotes omitted). Commissioner Jones dissented:

The Hi-C commercials are, in my view, a classic example of a message conveyed by words, ambiance and picturization using suggestion, ambiguous comparison and subtle innuendo

The Commission's opinion ignores or perhaps reverses the standard model of the consumer as "the ignorant, the unthinking and the credulous consumer" which the Commission has been commended to use in determining whether a particular act or practice is unfair or deceptive. (*Aronberg v. FTC*, 132 F.2d 165, 167 (7th Cir. 1942)) Instead, without any record evidence to support it the Commission implicitly adopts a new consumer model . . . portraying the consumer as discriminating, sophisticated and highly knowledgeable as well as skeptical and unbelieving. This consumer knows that fruit drinks are not the same as citrus juices *despite what Hi-C's ads said*.

posed a trade regulation rule setting forth disclosure standards for food advertising, that rule would require nutritional information only to substantiate *express* nutritional claims.¹⁹⁵ Only with its recent proposals concerning children's television advertising has the Commission begun to recognize the potentially unfair and misleading effects of food commercials.¹⁹⁶

Even though it has utilized affirmative disclosure as an appropriate remedy for silence that misleads, the Commission once stated with regard to broadcast food advertising that "it would be unrealistic to impose upon the advertiser the heavy burden of nutrition education."¹⁹⁷ Unfortunately for the consumer, the food industry is already conducting a massive campaign of "nutrition education" designed solely to induce the purchase of its highly processed, rela-

83 F.T.C. at 802-06 (emphasis original).

ITT Continental Baking Co., Inc., 83 F.T.C. 865, *modified*, 83 F.T.C. 1105 (1973), *enforcement of order as modified granted*, 532 F.2d 207 (2d Cir. 1976), concerned major television, radio, and print advertising campaigns for Wonder Bread and Hostess snack cakes. The campaigns were aimed primarily at children aged one through twelve and their mothers. 83 F.T.C. at 950. The Wonder Bread television advertisements stressed the product's significant contribution to rapid growth and typically contained time-sequence photography depicting a child rapidly growing taller and larger. The announcer stated that a child would "never need Wonder Bread more than right now, because the time to grow bigger and stronger is during the Wonder Years—ages one through twelve—the years when your child grows to ninety percent of his adult height. . . . How can you help? By serving nutritious Wonder Enriched Bread. Wonder helps build strong bodies twelve ways. Each delicious slice of Wonder Bread supplies protein . . . minerals . . . carbohydrates . . . vitamins. . . ." 83 F.T.C. at 867. The Hostess advertisements stated that vitamin-enriched Hostess snack cakes provide "good nutrition" and implied that the cakes represent a "major nutritional advance." 83 F.T.C. at 872-73.

The FTC staff complaint alleged, *inter alia*, that the Wonder Bread advertisements were deceptive because the product is "not an outstanding source of nutrients," will not provide a child "with all the nutrients, in recommended quantities, that are essential to healthy growth and development," and is not "an extraordinary food for producing dramatic growth in children." 83 F.T.C. at 870-72. The Hostess advertisements were said to be deceptive because vitamin-enrichment was not a major nutritional advance because the snack cakes, made primarily of sugar, provided significant quantities of only three of ten essential vitamins. 83 F.T.C. at 873-74.

The FTC dismissed all allegations but one: it held that the Wonder Bread advertisements falsely represented the product as having extraordinary growth-inducing qualities. 83 F.T.C. at 962. It found it "impossible to imply from these [Wonder Bread] commercials the very specific representations" further alleged, 83 F.T.C. at 958, and found corrective advertising unwarranted. 83 F.T.C. at 972. The Hostess advertisements were not deceptive, the FTC concluded, because vitamin-enriched snack cakes represented a genuine "major nutritional advance" relative to nonenriched snack cakes, because the "good nutrition" claim was implicitly qualified to mean only vitamin enrichment, and because "housewives are well aware, as a matter of common knowledge and experience, that snack cakes, whether home-made or commercially manufactured, do contain large amounts of sugar." 83 F.T.C. at 964-66. Commissioner Jones dissented with regard to several of these conclusions. 83 F.T.C. at 943-47.

195. See Proposed Trade Regulation Rule, 39 Fed. Reg. 39,842 (1974). *But see* the FTC staff proposal contained in FTC Staff Statement of Fact, Law, and Policy in Support of the Proposed Rule and in Support of Affirmative Disclosures in Food Advertising, 39 Fed. Reg. 39,852 (1974) [hereinafter cited as Disclosure Statement], discussed in note 200 *infra*.

196. See notes 2 & 168 *supra*.

197. ITT Continental Baking Co., 83 FTC 865, 965, *modified*, 83 F.T.C. 1105 (1973), *enforcement of order as modified granted*, 532 F.2d 207 (2d Cir. 1976).

tively unnutritious products.¹⁹⁸ The law of deceptive advertising requires that material facts be disclosed where silence misleads.¹⁹⁹ Nothing could be more material to the purchase of food products than their nutritional qualities. For generations, people have assumed that food feeds—that it has nutritional value sufficient to meet human needs. Where that assumption no longer holds, advertisers have a responsibility to disclose the facts.²⁰⁰

Moreover, the significance of television advertising in shaping viewers' perceptions of food values²⁰¹ creates a further responsibility to educate viewers about good nutrition. That so powerful an educational tool should be used to encourage unhealthy eating habits in a malnourished nation²⁰² is the most offensive and harmful form of unfairness.²⁰³ As part of the price of access to television, food advertisers should be assessed the cost of corrective nutritional messages, both informational and motivational.²⁰⁴

198. See text at notes 40-45 *supra*.

199. See note 174 *supra*.

200. Former FDA Commissioner Alexander M. Schmidt has pointed out that "[t]he increasing number of processed and formulated foods makes it difficult for consumers to identify the nutritional qualities of the products they purchase." Address (*The Role of the FDA in Food Safety*) of Commissioner Schmidt to the American Association for the Advancement of Science Symposium on Food Safety and the Organic Food Myth (San Francisco, California, Feb. 25, 1974), quoted in 39 Fed. Reg. 39,854 (1974). See generally J. TURNER, *THE CHEMICAL FEAST* (1970). An FDA study found that 40% of shoppers nationwide believed that the government currently insures that processed foods are nutritious and "good for you." PUBLIC HEALTH SERVICE, FOOD AND DRUG ADMINISTRATION, U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE, *FDA CONSUMER KNOWLEDGE SURVEY, REPORT I, 1973-74*, at 39 (HEW (FDA) Pub. No. 76-2058, 1976).

The FTC staff has proposed certain affirmative disclosure requirements for all food advertising, regardless of express claims. See Disclosure Statement, *supra* note 195. Because this proposal was not endorsed by the FTC, the Director of the Bureau of Consumer Protection, or the Assistant Director for National Advertising, its prospects for adoption appear remote. The staff set forth four reasons why standards of deceptiveness should apply "with particular strictness" to food advertising: (1) that advertising's major impact on consumers' health; (2) its regressive economic impact on the poor; (3) its frequent direction at "especially vulnerable audiences—children, the poor, the elderly"; and (4) the "special duty of fair dealing towards consumers" arising from the "power" and "tremendous influence" of the food industry's "massive and forceful advertising." *Id.* at 39,856 (citing Cigarette Statement, *supra* note 143, at 9357, quoted in text at note 143 *supra*).

201. See note 44 *supra*.

202. See note 38 *supra*.

203. The nation's commitment to the proper nourishment of its people is reflected in numerous congressional enactments. See, e.g., 7 U.S.C. § 2011 (1976) (food stamp program); 42 U.S.C. § 3045 (Supp. V 1975) (nutrition programs for the elderly).

204. The Panel on Popular Education and How To Reach Disadvantaged Groups of the White House Conference on Food Nutrition and Health stated in its formal recommendations that

[i]t is impossible for the American people to obtain proper nutrition education without the planned availability of the mass media of public information—radio and television.

Nutrition education . . . cannot be cast in a beggar's role with radio and television stations for air time which is the people's property to begin with.

Any nutrition program must have the assurance that it will have at least as much exposure to the people through their mass media as is received by any selling effort in

It is perhaps unrealistic to expect the Federal Trade Commission to respond to the problem of the social impact of television product advertising more aggressively or innovatively than has the Federal Communications Commission.²⁰⁵ The purpose of this Note is not to predict bureaucratic behavior, but to set forth the legal basis for meaningful action. In light of several recent Supreme Court decisions redefining the scope of constitutional protection accorded commercial speech,²⁰⁶ any proposal for the regulation of television advertising, whether proscriptive or prescriptive, must be evaluated against first amendment standards. It is to that concern that this Note now turns.

IV. THE FIRST AMENDMENT AND TELEVISION ADVERTISING

The first amendment represents a commitment to free and open discussion of competing ideas—a commitment based upon the convictions that the freedom to say what one pleases is sacrosanct, that truth will emerge fortified from the cacophony, and that regulation of speech invites tyranny.²⁰⁷ Traditionally, a distinction has been drawn between “commercial” and “noncommercial” speech for pur-

behalf of major cigarette brands, automobiles, or airlines or other major consumer product selling efforts.

Final Report, *supra* note 45, at 182-83. The Panel recommended that radio and television licensees be required to set aside 10% of broadcast time for “public service communications programs of the Federal Government.” *Id.* at 183. The Panel evidently envisioned a mandatory nutrition education program under the “public interest” standard of the Federal Communications Act of 1934, § 303, 47 U.S.C. § 303 (1970), the cost of which would be borne by the licensees rather than by food advertisers. In a similar vein, the staff of the U.S. Senate Select Committee on Nutrition and Human Needs has generally recommended “extensive use of television to educate the public in the potential benefits of following certain dietary goals.” DIETARY GOALS, *supra* note 40, at 84.

A recent study suggests that the mass media have considerable potential for achieving changes in health-related behavior. An educational campaign in a California town using television and radio spot advertisements, “mini-dramas,” and other media resulted in a substantial reduction in egg consumption and cigarette smoking as compared to a control community. Maccoby & Farquhar, *Communication for Health: Unselling Heart Disease*, J. COM., Summer 1975, at 114, 119-20, 122-23.

205. See generally E. COX, R. FELLMETH & J. SCHULZ, THE NADER REPORT ON THE FEDERAL TRADE COMMISSION (1969). Nevertheless, the FTC’s discussions suggest the potential for bold action in the national advertising field, even where substantial economic interests are at stake. See Cigarette Statement, *supra* note 143. Moreover, during his confirmation hearings, Michael Pertschuk expressed concern about the social impacts of advertising, particularly advertising that “revels in waste” of energy and other resources and food advertising that may be “in part responsible for conditioning a nation of sugar junkies.” N.Y. Times, March 31, 1977, at § D, at 9, col. 2. The FTC’s recent initiatives concerning children’s television advertising may signal a new, more activist approach. See notes 2 & 168 *supra*. See also Brown, *TV Edgy over Reformers and the F.C.C. and F.T.C.*, N.Y. Times, March 22, 1978, § A, at 1, col. 5.

206. See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Carey v. Population Services Intl.*, 431 U.S. 678 (1977); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

207. See *Buckley v. Valeo*, 424 U.S. 1 (1975), and cases cited therein.

poses of first amendment analysis.²⁰⁸ Although recent pronouncements of the Supreme Court continue to recognize some distinction, they preclude the mechanical exclusion of advertising from first amendment protection merely by a resort to labeling.²⁰⁹ Moreover, a central premise of this Note has been that product advertising plays a significant role in shaping cultural and political perceptions, which suggests that it may be precisely the kind of speech most deserving of first amendment protection. However, careful analysis of the rationales of the recent decisions extending the constitutional protection to "commercial speech" indicates that the regulatory approaches proposed by this Note are constitutionally permissible.

In 1942, in a ruling later described by one of the participating Justices as "casual, almost offhand,"²¹⁰ the Supreme Court held that first amendment protections do not extend to "purely commercial advertising."²¹¹ The Court has forcefully repudiated this absolute view in a rash of decisions in the past three years. In *Bigelow v. Virginia*,²¹² the Court struck down a Virginia statute barring advertisement of abortion services, declaring that the "relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."²¹³ The opinion stressed that the advertisements at issue "contained factual matter of clear 'public interest.'"²¹⁴ Next, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,²¹⁵ the Court, although acknowledging that certain commercial advertisements may have special public interest aspects that leave them open to governmental regulation, overturned the state's prohibition of price advertising of prescription drugs on the additional ground that the "free flow of commercial information" is itself in the public interest and constitutionally protected.²¹⁶

208. See *Breard v. City of Alexandria*, 341 U.S. 622 (1951); *Valentine v. Christensen*, 316 U.S. 52 (1942).

209. One commentator recently proposed that all "profit-oriented" speech be deemed beyond the first amendment's purview because such speech does not involve the individual vision or values that lie at the heart of the freedom of expression. Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976).

210. *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

211. *Valentine v. Christensen*, 316 U.S. 52, 54 (1942).

212. 421 U.S. 809 (1975).

213. 421 U.S. at 822. Indeed, the Court noted that the services offered were constitutionally protected. 421 U.S. at 822 (citing *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973)).

214. 421 U.S. at 822.

215. 425 U.S. 748 (1976).

216. 425 U.S. at 764-65, 770. The Court stated that [a]dvertising, 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

In the three most recent commercial speech cases, the Court has reiterated the public's interest in the free flow of commercial messages. In *Linmark Associates, Inc. v. Township of Willingboro*,²¹⁷ a unanimous Court held real estate "for sale" signs constitutionally indistinguishable from the advertisements in *Bigelow* and *Virginia Pharmacy* and thus struck down a municipal ordinance banning the signs' display. The majority opinion in *Carey v. Population Services International*,²¹⁸ relying upon both the "free flow of commercial information" rationale of *Virginia Pharmacy* and the special considerations that arise when commercial information relates to "activity with which, at least in some respects, the State cannot interfere,"²¹⁹ held unconstitutional a statutory ban on advertisements for contraceptive products. Finally, a five-member majority in *Bates v. State Bar of Arizona*,²²⁰ held that blanket suppression of advertising by attorneys violates the first amendment.

In concluding that commercial speech enjoys constitutional protection, the Court has explicitly recognized that such speech is not "wholly undifferentiable from other forms"²²¹ and that the differences "suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired."²²² Although the Court has suggested a few standards appropriate to commercial speech,²²³ it has not yet been required to delineate the precise boundaries of the "degree of protection" to be accorded product advertising. Nonetheless, the principles expressed by the Court provide at least a tentative basis for evaluat-

aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. [Citations omitted.] And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

425 U.S. at 765.

217. 431 U.S. 85 (1977).

218. 431 U.S. 678 (1977).

219. 425 U.S. at 760. Cf. *Bigelow v. Virginia*, 421 U.S. 809 (1975) (first amendment protection of a message is not necessarily negated because the message has commercial aspects).

220. 433 U.S. 350 (1977).

221. *Virginia Pharmacy*, 425 U.S. at 771 n.24.

222. 425 U.S. at 771 n.24. See *Bates*, 433 U.S. at 381; *Carey*, 431 U.S. at 716-17 (Stevens, J., concurring); *Linmark*, 431 U.S. at 96.

223. *Virginia Pharmacy*, 425 U.S. at 771 n.24. The Court stated that the attribute of commercial speech—that is, that it may be more readily verifiable by the speaker and less likely to be chilled than noncommercial speech—

may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. . . . They may also make it appropriate to require that a commercial message appear in such a form or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive. . . . They may also make inapplicable the prohibition against prior restraints.

425 U.S. at 771 n.24.

ing the constitutionality of the regulatory approach to television product advertising suggested by this Note.

Although the issue has not been directly before it, the Court has stated that the protection accorded commercial speech presents no obstacle to regulating false, misleading, or deceptive advertising to ensure "that the stream of commercial information flow[s] cleanly as well as freely."²²⁴ Such restrictions are consistent with, if not mandated by, the Court's rationale for extending first amendment protection to commercial speech. At the heart of the recent decisions lies the right of the citizen to receive truthful and reliable information,²²⁵ a right protected by regulations prohibiting false, misleading, and deceptive advertising.²²⁶ In addition, the economic motivation of commercial speech makes it "durable" enough not to be inhibited by strict proscription of inaccuracy.²²⁷

Regulation of "unfair," as distinct from "deceptive," appeals has been so little exercised that courts have yet to consider its constitutional limits. The principles enunciated in the recent commercial speech decisions suggest that the kinds of advertisements identified as "unfair" by this Note carry no greater first amendment protection than do deceptive advertisements. As indicated in section III, unfairness principles give the Commission authority to regulate that portion of a product commercial that conveys implicit messages clearly harmful in light of fundamental public values.²²⁸

The Supreme Court has extended constitutional protection to commercial speech in order to protect the public's right to accurate product information. But advertisements that are arguably unfair are rarely informative.²²⁹ Often they are designed to becloud the rational faculties of the viewer in order to induce purchase not of a product, but of an image.²³⁰ The implicit association of profligate energy use

224. *Virginia Pharmacy*, 425 U.S. at 771-72. See *Bates*, 433 U.S. at 383-84; *Carey*, 431 U.S. at 701; 431 U.S. at 716 (Stevens, J., concurring); *Linmark*, 431 U.S. at 98.

225. See *Bates*, 433 U.S. at 383. Cf. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 432-34 (1971) (advertising informs consumers of what is offered for sale and provides information which permits a rational choice among competing products).

226. Differences may exist with respect to what constitutes misleading or deceptive advertising. For example, in *Bates*, the Supreme Court was divided on whether the particular advertisement in question was deceptive and whether price advertising by attorneys is inherently deceptive. Compare the majority opinion, 433 U.S. at 372-75, 381-83, with 433 U.S. at 386-88 (Burger, C.J., dissenting), and 433 U.S. at 391-95 (Powell, J., dissenting).

227. *Virginia Pharmacy*, 425 U.S. at 772 n.24. Extrinsic factors material to consumer decisions have traditionally been covered by the law of deceptive advertising, see text at note 154 *supra*, and recent decisions of the Supreme Court give no reason to believe that such misrepresentations are now protected.

228. See text at notes 153-77 *supra*.

229. For example, the verbal content of the cigar advertisement described in note 213 *supra* consists entirely of a musical jingle and the word "Muriel" flashed briefly on the screen.

230. See *Developments, supra* note 135, at 1010. Historian David Potter pointed out that

with high social status, for example, conveys nothing about the quality of the product. In other instances unfair advertising content is not only irrelevant to the product, but also to the advertising appeal. The casual but consistent stereotyping of women in advertisements may often be wholly incidental to the advertiser's purpose. Application of the unfairness doctrine thus leaves the protected information content of the commercial speech untouched; by restricting advertising's antirational or irrelevant content, the doctrine serves to highlight information.²³¹

Properly considered, the regulation of unfairness assesses impact, not content—it does not restrict dissemination of commercial information, but encourages it. It seeks to prevent the offensive and detrimental impact that may be a consequence of the noninformational content of television product advertising. The Supreme Court has stated, however, that the possible offensiveness or detrimental impact of a particular commercial message does not justify its suppression. In *Carey* the Court refused to uphold a statutory ban on the advertisement of contraceptive products despite the argument that such advertisements would be offensive and embarrassing to those exposed to them.²³² And in *Linmark* the Court stated that “[a]fter *Virginia Pharmacy* it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is ‘detrimental.’”²³³ It is important to note, however, that these recent

“advertising tends to minimize information and maximize appeal, with the result that producers tend less to differentiate their products physically, in terms of quality, or economically, in terms of price, than to differentiate them psychologically in terms of slogan, package, or prestige.” Thus, Potter concluded, “advertising tends less to provide the consumer with what he wants than to make him like what he gets.” D. POTTER, *supra* note 26, at 187-88.

A recent advertisement for *Good Housekeeping* in *Advertising Age* nicely illustrates the manipulative, rather than informative, function of modern advertising. Directed at advertisers themselves, the advertisement quoted from Emerson: “Build a better mousetrap and the world will beat a path to your door.” The ad copy noted that, in today's skeptical world, a superior product is insufficient persuasion; a credible advertising medium is essential. “So if you've got the mousetrap—we've got the cheese.” *Advertising Age*, Oct. 25, 1976, at 27. The advertisement indicated no sense of irony in having transformed Emerson's consumer from a mousetrap purchaser into a mouse being trapped by the product.

231. *Cf.* Redish, *supra* note 225, at 446.

232. The Court stated that “[a]t least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.” 431 U.S. at 701 (citing *Cohen v. California*, 403 U.S. 15 (1971)). *Cf. Virginia Pharmacy*, 425 U.S. at 765 (1976) (asserting that much advertising is “tasteless and excessive” and probably offends many).

In his concurring opinion in *Carey*, Justice Stevens emphasized that the Court's opinion did not “deprive the State of all power to regulate . . . advertising in order to minimize its offensiveness.” 431 U.S. at 717. In addition, see Justice Powell's concurring opinion, 431 U.S. at 711-12.

233. 431 U.S. at 92 n.6. The Court was not required to decide whether commercial speech could be banned when the likelihood of detrimental impact had been substantiated because the Court held that the defendant municipality failed to establish that the proscription of “for sale” signs would “reduce public awareness of realty sales and thereby decrease public concern over selling.” 431 U.S. at 95-96.

Supreme Court cases concerned restrictions designed to prevent advertising impact attributable precisely to the protected informational content of the advertisements. The Township of Willingboro sought to ban "for sale" signs because it feared the result of public knowledge of the seller's offer to sell. If the contraceptive advertisements in *Carey* were offensive and embarrassing to some persons, the nature of the advertised product was the cause. The advertising messages that would be regulated by the unfairness doctrine, in contrast, are entirely incidental to the protected commercial information.²³⁴ Regulation of unfair advertising responds not to the fact of the commercial appeal, but to its manner. With regard to the commercial information protected by the Constitution, regulation of incidental messages implicit in the advertisement is no more than a "time, place, or manner" restriction of the kind expressly reaffirmed in *Linmark*.

Judicial recognition of the unique qualities of television broadcasting also suggests that special regulatory measures will survive constitutional scrutiny. Citing only *Capital Broadcasting Co. v. Mitchell*,²³⁵ the Court expressly reserved judgment in *Virginia Pharmacy* on the constitutionality of advertising regulation involving "the special problems of the electronic broadcast media."²³⁶ At first glance that citation is puzzling, because *Capital Broadcasting* upheld not merely the regulation of broadcast advertising, but an outright statutory ban on broadcast advertising of a particular product, cigarettes.²³⁷ Since the Court struck down similar suppressions of particular commercial information in *Virginia Pharmacy* and its

Although evidence exists of the impact on viewers of unfair appeals, *see* text at notes 11-47 *supra*, that evidence may not sufficiently prove adverse impact. Nonetheless, regulation of unfair appeals would not be constitutionally prohibited because, unlike the situation in *Linmark*, the restriction would not be a total ban and, more important, the regulated portion of the message—the portion having the detrimental impact—would contain no commercial information. Thus, the adverse impact could be avoided without affecting the protected commercial content of the speech.

234. This is not to say that the messages contained in such appeals can never be protected by the first amendment. This Note asserts that these appeals are *not* constitutionally protected when *implicitly* made in the context of a product commercial. On the other hand, messages *expressly* discussed in this context are afforded complete first amendment protection. Of course, if the message were expressly conveyed in the broadcast media and concerned an issue of public controversy, fairness doctrine obligations would arise. *See* note 249 *infra*.

235. 333 F. Supp. 582 (D.D.C. 1971), *affid. mem. sub nom.* Capital Broadcasting Co. v. Acting Atty. Gen., 405 U.S. 1000 (1972), *cited in* *Virginia Pharmacy*, 425 U.S. at 773.

236. 425 U.S. at 773. In addition, *see* *Bates*, 433 U.S. at 384 ("the special problems of advertising on the electronic broadcast media will warrant special consideration"); *Carey*, 431 U.S. at 712 n.6 (Powell, J., concurring) ("carefully tailored restrictions may be especially appropriate when advertising is accomplished by means of the electronic media"); *Bigelow*, 421 U.S. at 825 n.10 ("[we] need [not] comment on the First Amendment ramifications of legislative prohibitions of certain kinds of advertising in the electronic media").

237. The statutory ban reviewed in *Capital Broadcasting* is contained in the Public Health Cigarette Smoking Act of 1969, § 6, 15 U.S.C. § 1335 (1976).

other commercial speech decisions, *Capital Broadcasting's* apparent continuing authority must lie in its distinctive treatment of the broadcast media.²³⁸ In distinguishing broadcasting from the print media, Judge Gasch, writing for a majority of the three-judge district court in *Capital Broadcasting*, relied principally upon *Banzhaf v. FCC*,²³⁹ which had upheld application of the fairness doctrine to cigarette commercials prior to their expulsion from the airwaves. In his discussion of what he called "the significant differences between the electronic media and print,"²⁴⁰ Judge Gasch quoted an observation of the *Banzhaf* Court:

Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcasting messages, in contrast, are "in the air." In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than that of the written word.²⁴¹

This passage recognizes the pervasive impact of the broadcast media—the characteristic that is responsible for the unfairness of television advertising and that makes its regulation necessary. This power is clearly one of the "special problems" posed by broadcasting in the context of the first amendment.²⁴²

Although both *Banzhaf* and *Capital Broadcasting* recognized the impact of television advertising, they concluded that product advertising enjoyed little, if any, constitutional protection.²⁴³ Even though

238. The *Capital Broadcasting* opinion also relied on the theory that the petitioner-broadcasters in the case lost ability to collect revenues but had not lost the right to speak. This theory is less significant as an explanation of the citation of the case in *Virginia Pharmacy* because the pharmacies sustained no economic benefit in the form of fees from not posting drug prices.

239. 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

240. 333 F. Supp. at 586.

241. 333 F. Supp. at 586 (quoting 405 F.2d at 1100-01) (omitting fourth sentence of original quotation).

242. The more traditional rationale for the different first amendment protection accorded the broadcast media has been the doctrine of "scarcity" and the consequent public "ownership" of the airwaves. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). In his dissent in *Capital Broadcasting*, Judge Wright apparently rejected the notion that the power of broadcasting justifies less stringent first amendment protection. He argued that the greater government regulation of broadcasting "is constitutionally justified only because it serves to apportion access to the media fairly." 333 F. Supp. at 590.

243. The *Capital Broadcasting* and *Banzhaf* courts considered not only the power of broadcast advertising, but also its legitimacy as "speech" in the constitutional scheme of freedom of expression. Although *Banzhaf* found that cigarette advertising implicitly raised controversial issues and thus deserved fairness doctrine reply, it also held that such advertising did not deserve first amendment protection. Because the advertisements "present[ed] no information or arguments . . . which might contribute to public debate," the court held that they were

this conclusion cannot survive the recent Supreme Court pronouncements, the two decisions are still particularly important for their confirmation of the critical distinction—entirely missed in the FCC's Fairness Report²⁴⁴—between a message's impact and its value in reasoned social discourse. Except for the little product information it provides and the express social statement it virtually never makes, television product advertising operates outside the realm of rational discourse.²⁴⁵ Its influence through innuendo and stereotype avoids the defenses of conscious resistance or rebuttal.²⁴⁶ Although the product information and any express social statement contained in it are protected by the first amendment, the predominating nonrational content is constitutionally regulable.²⁴⁷

"at best a negligible 'part of the exposition of ideas, and [were] of . . . slight social value as a step to truth.'" 405 F.2d at 1102 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)); the *Chaplinsky* "exposition of ideas" test of first amendment value in speech was reaffirmed in *Virginia Pharmacy*, 425 U.S. at 762). The advertisements were therefore "outside the pale of First Amendment concern." 405 F.2d at 1101.

The *Capital Broadcasting* court agreed with this reasoning, indicating that fairness doctrine obligations simply reflect "the rather limited extent to which product advertising is tangentially regarded as having some limited indicia of [first amendment] protection." 333 F. Supp. at 585.

244. See text at notes 74-76, 91-94 *supra*. Cf. Ervin, *Advertising: Stepchild of the First Amendment*, *Advertising Age*, April 19, 1976, at 122, col. 1; Simmons, *supra* note 59, at 1109.

245. Gerald J. Thain, then-Assistant Director for Food and Drug Advertising of the FTC's Bureau of Consumer Protection, has explained that [t]elevision advertising can combine visual, verbal, and emotional stimuli to provide what is essentially a nonrational experience for the viewer. A "mood" may be induced, by color, music, and camera techniques, which is capable of overcoming rational considerations, such as the price of a standardized product. Mood advertising may associate a product with strongly-held social values such as affluence or sophistication, or it may imply benefits leading toward the satisfaction of basic emotional needs, such as attractiveness to the opposite sex, freedom from fear, and acceptance. In neither situation is there any rational connection between the product and the inference being made, and in neither case does the advertisement provide sufficient information on the product's real attributes, such as quality and price—information conducive to a rational purchase.

Thain, *supra* note 167, at 622. See also P. SANDMAN, *supra* note 15, at 11; Krugman, *The Impact of Television Advertising: Learning Without Involvement*, 29 *PUB. OPINION Q.* 349, 354 (1965).

246. See note 21 *supra*.

247. The *Virginia Pharmacy* Court stated that the standard governing the application of the first amendment is whether particular speech is so removed from any "exposition of ideas," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), and from "'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,'" *Roth v. United States*, 354 U.S. 476, 484 (1957), that it lacks all protection.

425 U.S. at 762. Applying the standard to commercial speech as a class, the Court held that it deserved some protection. The application of the standard to the noninformational content of television product advertising, however, suggests a contrary result. See *Banzhaf*, 405 F.2d at 1102, discussed in note 243 *supra*; note 245 *supra*.

The rationale for the regulation of the nonrational content of television commercial advertising is essentially the same rationale that has dictated the regulation of "subliminal" advertising, in which a message is flashed on a screen so briefly that it is consciously unnoticed but subconsciously communicated. The FCC has emphasized that this practice will not be tolerated. See 5 *TRADE REG. REP. (CCH)* ¶ 50,198 (1974). The Commission suggested that such messages are intended to be "deceptive" and noted that the NAB Television Code prohibits use of "[a]ny technique whereby an attempt is made to convey information to the viewer by

It is true that a great deal of protected communication contains nonrational elements.²⁴⁸ The crowd-pleasing speech, the spot advertisement for a political candidate, and the ordinary motion picture all appeal to the intuitive, emotional, and subconscious faculties of their audiences. But, in each of these examples, the nonrational messages conveyed are primary and direct: the speaker usually intends to convey them and the listener is usually aware of their presence, which allows him to guard against them. Indeed, except in the case of the political advertisement, the listener has actively solicited the communication for the specific purpose of enjoying its influences, rational or otherwise. In contrast, the unfair messages of television product advertising are, for both speaker and listener, purely ancillary to the primary message of promoting the sale of the product.²⁴⁹ The advertiser does not expressly state the unfair messages and may not even be aware of them; the audience did not solicit them and has no defense against them.²⁵⁰ They are not commercial speech—they are not speech.

An advertiser may expressly discuss an issue of public controversy in the course of a commercial message, and there would then be little doubt of its protected status.²⁵¹ The advertiser could argue that snowmobiling is safer and more energy efficient than other recreation, that women find their deepest fulfillment in housework, or that sugar is an invaluable nutrient. But the viewer could then consciously weigh the merits of these explicit arguments with a critical eye. The viewer, indeed, would also have the benefit of opposing views presented under the fairness doctrine, even as presently ad-

transmitting messages below the threshold of normal awareness." *Id.* at 55,370. Subliminal advertising raises no first amendment issue not because the subliminal message is not influential, but because it operates extra-rationally—that is, the inability of the recipient to perceive consciously a subliminal message renders it dangerous. See Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191, 1202 (1965). The unfair appeals and social models of television product advertising, as the *Banzhaf* and *Capital Broadcasting* courts understood, are no more deserving of constitutional protection.

248. See Note, *supra* note 247, at 1202.

249. In some instances, of course, the advertiser may be well aware of the nonrational appeal of the commercial and feel that it is essential for successful marketing. For example, in order to maintain a market for dishwasher detergent that leaves glassware "spotless," an advertiser may feel compelled to use the product commercial to reinforce the view that women find deep fulfillment in housework, the mastery of which includes avoiding water-spotted glassware. Although messages ancillary to the informational content of noncommercial speech are tolerated for fear of otherwise chilling speech that contributes to public debate, tighter regulation can operate in the context of commercial speech with little likelihood of stifling the protected commercial message. See *Virginia Pharmacy*, 425 U.S. at 771 n.24. Moreover, the noncommercial message of advertising forfeits constitutional protection only when the advertiser chooses to keep it implicit.

250. See note 19 *supra*.

251. Cf. *Virginia Pharmacy*, 425 U.S. at 764-65 ("Obviously, not all commercial messages contain the same or even a very great public interest element. There are few to which such an element could not be added").

ministered.²⁵²

The conclusion that the deceptive and unfair appeals of television product advertising are constitutionally regulable does not ensure that the particular regulatory remedy²⁵³ selected will be constitutionally permissible. The remedies suggested in this Note, however, do not appear to exceed constitutional bounds. The FTC's remedy of disclosure for deceptive advertising is consistent with the extension of constitutional protection to commercial speech. Although the constitutionality of a remedy requiring disclosure was not passed upon by the Court, language in both *Virginia Pharmacy* and *Linmark* suggests that different constitutional considerations apply to that remedy than to an absolute ban on advertising.²⁵⁴ Disclosure requirements, of course, vindicate the public's right to commercial information by curing deception through the remedy of additional information. Although the burden of disclosure might ordinarily raise a first amendment question,²⁵⁵ the burden is not imposed absent material deception, the regulation of which is expressly approved in the Court's recent opinions.²⁵⁶

This Note has suggested that, rather than proscribing unfair advertising appeals, the better remedy for unfair advertising is usually corrective advertising designed to vitiate the unfairness through rebuttal and counter-persuasion.²⁵⁷ Corrective advertising is also a more appropriate remedy than mere disclosure in some instances of deceptive or misleading advertising.²⁵⁸ The constitutional issues presented by corrective advertising in the context of deceptiveness are similar to those raised by the disclosure remedy: each requires the airing of statements regarding commercial information about the advertised product. Moreover, the remedy of corrective advertising in deceptive television product advertising has been upheld against constitutional challenge in a recent decision of the Court of Appeals

252. See text at note 71 *supra*. The advertiser might still be held accountable to the FTC for the truth of factually verifiable claims for the product. See, e.g., National Commn. on Egg Nutrition, 3 TRADE REG. REP. (CCH) ¶ 21,184 (1976), *order enforced in part*, 570 F.2d 157 (7th Cir. 1977).

253. The application of the FCC's fairness doctrine to product advertising presents no constitutional problems that have not already been resolved with respect to other forms of protected speech. See text at notes 78-79 *supra*.

254. In *Virginia Pharmacy*, the Court indicated that the distinctive attributes of commercial speech "may . . . make it appropriate to require that a commercial message appear in such a form, or include such *additional information*, warnings, and disclaimers, as are necessary to prevent its being deceptive." 425 U.S. at 771 n.24 (emphasis added). This language was noted in *Linmark*, 431 U.S. at 90, where the Court stated that such requirements raise very different constitutional considerations than would total bans on particular types of advertisements.

255. See text at notes 262-65 *infra*.

256. See text at notes 224-26 *supra*.

257. See text at notes 192 & 204 *supra*.

258. See text at notes 182-84 *supra*.

for the District of Columbia Circuit, *Warner-Lambert Co. v. FTC*.²⁵⁹ Citing *Virginia Pharmacy* for the proposition that "the First Amendment presents 'no obstacle' to government regulation of false or misleading advertising,"²⁶⁰ the court in *Warner-Lambert* rejected the contention that first amendment protection of commercial speech precludes the remedy of corrective advertising in deceptive advertising cases.²⁶¹

The use of corrective advertising to counter unfairness raises more difficult constitutional questions, for in this context the corrective advertisements, rather than merely correcting earlier impressions conveyed about the characteristics of a particular product, would present a counterview on a social issue implicitly raised in the advertiser's commercials. The Court of Appeals for the District of Columbia Circuit recently addressed concerns similar to those raised by requiring corrective advertising that goes beyond a statement of product characteristics to a declaration of opinion. In *United States v. National Society of Professional Engineers*,²⁶² the court reversed that portion of the district court's order that required the defendant to state to its members that it "does not consider competitive bidding to be unethical."²⁶³ In modifying the decree, the court reasoned that the first amendment requires that an affirmative speech remedy "not be more intrusive than necessary to achieve fulfillment of the governmental interest."²⁶⁴ The court's primary concern was that the lower court's decree forced "an association of individuals to express as its own opinion judicially dictated ideas."²⁶⁵ A corrective remedy to unfair advertising, in contrast, need only present countervailing ideas which would not be represented as the views of the offending advertiser. With careful attention to the exigencies of particular cases, the FTC could readily fashion unfairness remedies "no more intrusive than necessary"—that is, broad enough to avoid dictating precise content yet strict enough to achieve the desired results.²⁶⁶

259. 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 1575 (1978).

260. 562 F.2d at 758.

261. The Supreme Court has suggested in another context that affirmative and general speech requirements may be constitutionally preferred to abridgements. See *Buckley v. Valeo*, 424 U.S. 1, 49 n.55 (1976).

262. 555 F.2d 978 (D.C. Cir. 1977), *cert. granted*, 434 U.S. 815 (1977).

263. 555 F.2d at 984.

264. 555 F.2d at 984. See *Warner-Lambert Co.*, 562 F.2d at 758: "Petitioner is correct that this triggers a special responsibility on the Commission to order corrective advertising only if the restriction inherent in its order is no greater than necessary to serve the interest involved." Cf. *Beneficial Corp. v. FTC*, 542 F.2d 611, 618-20 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977) (prior restraints on specific content of commercial speech must be carefully examined).

265. 555 F.2d at 984. The court's deference to the Society as "an association of individuals" may hint that, even where some affirmative remedy is warranted, the courts may be more reluctant to prescribe speech by persons or groups than by corporations.

266. *Banzhaf* cautioned against strict prescriptions of speech, even where an affirmative remedy is appropriate. 405 F.2d at 1103. The court stated:

Critics of governmental regulation of broadcasting fear most the specter of governmental "propaganda" dominating the airwaves.²⁶⁷ None of the proposals discussed in this Note begin to approach pervasive governmental control of broadcasting. Americans have a justified fear of anyone deciding for them what they "ought" to see and hear.²⁶⁸ Television broadcasting, as presently structured, forces an uncomfortable policy choice between delegating this decision wholly to corporate advertisers and permitting representative government to intervene on behalf of a perceived public interest. Whether called "education," "acculturation," or "advertising," propaganda is constantly broadcast to television viewers.²⁶⁹ The question is whether it is to be accountable to the public.

The Supreme Court has properly renounced the absolute exclusion of commercial speech from constitutional protection. It has carefully refrained, however, from extending such protection to commercial advertising in all forms and under all circumstances. Where television product advertising communicates only by image and innuendo, it cannot claim the protection of the first amendment.

V. CONCLUSION

The constant challenge of an evolving technological society is to prevent rapid innovation from outstripping the understanding and control of the people and their representatives. As one commentator has noted, "we will either direct our technology or it will be used to direct us. In communications the second course has been evident for some time."²⁷⁰ In a pluralistic, democratic society, the issues presented by pervasive television advertising conveying latent cultural messages are troubling. Although the problems suggest a need for innovative governmental response, that response has not been forth-

Finally, not only does the cigarette ruling not repress any information, it serves affirmatively to provide information. We do not doubt that official prescription in detail or in quantity of what the press must say can be as offensive to the principle of a free press as official prohibition. But the cigarette ruling does not dictate specific content and, in view of its special context, it is not a precedent for converting broadcasting into a mouthpiece for government propaganda.

267. See 405 F.2d at 1103.

268. See Jones, *supra* note 50, at 392.

269. Communications scholars have long recognized the correspondence between state propaganda and private-sector advertising. See, e.g., Bauer, *The Obstinate Audience: The Influence Process from the Point of View of Social Communication*, 19 AM. PSYCHOLOGIST 319, 319 (1964); Lazarsfeld & Morton, *supra* note 20, at 339. Klapper has stated:

Propaganda, in short, appears wherever there are two unidentical minds and a means of communication. These are the simple necessary and sufficient conditions for an attempt to engineer consent. The current fear of propaganda is perhaps not ill-founded, but it is inexactly expressed. For what the guardians of the free mind really fear is not the engineering of consent, but rather that the engineering will be so successful as to bar the conditions for opposing engineering. The goal perilous is not consent, but unanimity.

Klapper, 17 AM. SCHOLAR 419, *supra* note 17, at 420.

270. H. SCHILLER, *supra* note 17, at 150.

coming. Apparently out of concern for the economic base of broadcasting, the Federal Communications Commission has effectively excised product advertising from its mandate to regulate communications in the "public interest." The Federal Trade Commission, meanwhile, has been largely unwilling to confront the unfairness and deception of subtly implied claims and psychological appeals. Yet the first amendment, far from prohibiting innovative reform, stands for the fundamental value that reform would serve—the integrity of public discourse.