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# COMMENTS

## BIG BROTHER'S WAR ON TELEVISION ADVERTISING: HOW EXTENSIVE IS THE REGULATORY AUTHORITY OF THE FEDERAL TRADE COMMISSION?

*by Cindy Morgan Ohlenforst*

Although originally designed to protect fair competition, the Federal Trade Commission (FTC) has gradually become a formidable consumer protection agency;<sup>1</sup> it has long had the authority to proscribe unfair or deceptive trade practices,<sup>2</sup> and in recent years has often used that authority to regulate national advertising.<sup>3</sup> Recent FTC orders have mandated changes in the advertising for Listerine,<sup>4</sup> Wonder Bread,<sup>5</sup> and Beneficial.<sup>6</sup> In each of these cases the FTC challenged a specific advertising approach on the grounds that it was unfair or deceptive. The FTC need not, however, limit its authority to a specific advertising campaign;<sup>7</sup> indeed, the

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1. Kinter & Smith, *The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency*, 26 MERCER L. REV. 651 (1975). This discussion summarizes the expansion and development of FTC power.

2. Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(1) (1976) [hereinafter cited as FTCA]; see notes 30-33 *infra* and accompanying text.

3. Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 675 (1977). This FTC regulation has sometimes taken the form of broad orders affecting several manufacturers. See, e.g., *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965), in which the court upheld an FTC order stating that it is a deceptive practice to convey falsely to television viewers that they are seeing an actual test when, in fact, undisclosed mockups are being used. Other FTC action has consisted of narrow, particularized orders affecting only a single advertising campaign. See, e.g., *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 99 S. Ct. 86, 58 L. Ed. 2d 113 (1978), in which the court upheld an FTC order directing petitioners to cease and desist advertising that there is no scientific evidence that egg consumption increases the risk of heart and circulatory disease.

4. *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977). The court upheld an FTC order requiring Listerine advertisements to disclose that Listerine does not cure colds. See note 108 *infra*.

5. *ITT Continental Baking Co. v. FTC*, 532 F.2d 207 (2d Cir. 1976); see note 108 *infra*.

6. *Beneficial Corp. v. FTC*, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

7. FTCA § 18(a)(1)(B), 15 U.S.C. § 57a(a)(1)(B) (1976); see text accompanying note 36 *infra*.

FTC is currently proposing broad rules that would severely restrict advertising on children's television programs.<sup>8</sup> Although the FTC's goal of protecting children is laudable, its proposed rules may exceed its statutory authority<sup>9</sup> and face constitutional challenges as well.<sup>10</sup>

### I. THE BACKGROUND OF THE PROPOSED RULES

One of the most active proponents of the proposed advertising restrictions is Action for Children's Television (ACT), a nonprofit consumer organization formed to encourage better television programming for children.<sup>11</sup> ACT originally suggested that each station be required to provide children's programming as part of its public service requirement and that children's programs have no commercials.<sup>12</sup> ACT presented these proposals to the Federal Communications Commission (FCC) in 1970. The FCC subsequently issued a public notice calling for comment on these restrictions,<sup>13</sup> and ultimately received more than 100,000 comments on the proposals.<sup>14</sup> During the time of these proceedings the National Association of Broadcasters (NAB), faced with the prospect of mandatory outside regulation, voluntarily strengthened its self-regulatory code.<sup>15</sup> The changes included reducing from sixteen to twelve minutes per hour the time that could be devoted to nonprogram material during children's programming, and requiring that no advertisement encourage children to eat immoderate amounts of sweets.<sup>16</sup> Because of this industry progress toward self-regulation, the FCC finally decided, in 1974, that government rulemaking was unnecessary at that time.<sup>17</sup> After its unsuccessful challenge of the FCC's refusal to adopt specific rules,<sup>18</sup> ACT petitioned the FTC.

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8. 43 Fed. Reg. 17,967 (1978) (to be codified in 16 C.F.R. § 461).

9. FTCA § 18(e)(3), 15 U.S.C. § 57a(e)(3) (1976) incorporates the Administrative Procedure Act into the Federal Trade Commission Act. According to the Administrative Procedure Act, 5 U.S.C. § 706(2)(C) (1976), an agency rule may be set aside if it exceeds statutory authority or limitations.

10. 5 U.S.C. § 706(2)(B) (1976) states that an agency rule may be set aside if it is contrary to constitutional right or authority.

11. ACT is an organization of Massachusetts parents formed in 1968 whose activities expanded to encompass national problems pertaining to children's television. See generally Thain, *Suffer the Hucksters to Come Unto the Little Children? Possible Restrictions of Television Advertising to Children Under Section 5 of the Federal Trade Commission Act*, 56 B.U.L. REV. 651 (1976).

12. *Action for Children's Television v. FCC*, 564 F.2d 458, 461-62 (D.C. Cir. 1977).

13. *Action for Children's Television (ACT) for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programming and the Establishment of a Weekly 14 Hour Quota of Children's Television Programs*, 28 F.C.C.2d 368 (1971).

14. 564 F.2d at 463.

15. The possibility of congressional action may have helped prompt the self-regulation. *Id.* at 463 n.9.

16. *Id.* at 464. But see Note, *The Limits of Broadcast Self-Regulation Under the First Amendment*, 27 STAN. L. REV. 1527, 1544-48 (1975). See also Thain, *supra* note 11, at 654.

17. 564 F.2d at 464. For a discussion of the relationship between agency pressure and industry self-regulation, see *Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976).

18. 564 F.2d at 479.

In April 1977 the FTC received ACT's request for the promulgation of a trade regulation rule<sup>19</sup> proscribing the advertising of candy products on television before 9:05 p.m., or on programs where children make up at least half the audience, or where the dominant appeal of the advertising is to children.<sup>20</sup> The FTC decided to commence its current rulemaking process based on this petition from ACT and also on a petition filed the same month by the Center for Science in the Public Interest (CSPI).<sup>21</sup> CSPI requested a complete prohibition on advertising of sugared snack foods, as well as disclosure within advertisements of the amount of added sugar in other products and the dental health risks of sugar consumption.<sup>22</sup>

In response to these petitions, the FTC promulgated a Staff Report on Televised Advertising to Children. This report proposes several possible limitations on television advertising.<sup>23</sup> The FTC issued a Notice of Proposed Rulemaking<sup>24</sup> in April 1978, stating that the rulemaking proceedings would consider these restrictions on television advertisements directed to children.<sup>25</sup> Accordingly, the FTC presently seeks comments on a rule that would include the following provisions:

- (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.<sup>26</sup>

The Commission also seeks comments on alternative proposals, including requirements for affirmative disclosure.<sup>27</sup>

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19. A trade regulation rule is essentially a form of administrative legislation. *See generally* Hobbs, *Legal Issues in FTC Trade Regulation Rules*, 1977 FOOD DRUG COSMETIC L.J. 414.

20. 43 Fed. Reg. 17,968 (1978).

21. *Id.* at 17,968 n.2. The FTC received a third petition for rulemaking filed jointly by Consumers Union of America and Committee on Children's Television Inc. This petition, which was filed on Feb. 16, 1978, also requests specific rules on children's advertising. *Id.*

22. *Id.* at 17,968.

23. *Id.* at 17,969. Copies of this report may be obtained by writing Distribution and Duplication Branch, Federal Trade Commission Building, Room 128, 6th Street and Pennsylvania Avenue, N.W., Washington D.C. 20580.

24. The FTC is required to "publish a notice of proposed rulemaking stating with particularity the reason for the proposed rule." FTCA § 18(b)(1), 15 U.S.C. § 57a(b)(1) (1976).

25. 43 Fed. Reg. at 17,967, 17,968. The FTC staff report defines "young children" as those under age eight, and defines "older children" as those between ages eight and twelve. The FTC seeks comments on the appropriateness of these classifications. *Id.* at 17,969.

26. *Id.*

27. The FTC may order an advertiser to affirmatively disclose certain information in its advertisements. For a list of such orders, see Reich, *Consumer Protection and the First Amendment: A Dilemma for the FTC?*, 61 MINN. L. REV. 705, 711 n.31 (1977).

Although the rulemaking procedure is only in its initial stages,<sup>28</sup> and there are still numerous issues of fact and law that must be decided before the Commission can formulate a precise rule, threshold questions concerning the FTC's statutory authority and constitutional limitations<sup>29</sup> need to be considered.

## II. THE STATUTORY AUTHORITY FOR THE PROPOSED RULES

Section 5 of the Federal Trade Commission Act declares "unfair or deceptive acts in or affecting commerce" illegal, and empowers the FTC to issue cease and desist orders.<sup>30</sup> Most FTC regulation of national advertising has been pursuant to its section 5 authority,<sup>31</sup> although the FTC may also rely on section 12, which specifically provides that the dissemination of false advertisements is an unfair or deceptive trade practice and therefore unlawful.<sup>32</sup> Section 5 allows the FTC to challenge a practice either on the ground that it is deceptive or on the ground that it is unfair. The FTC historically has relied primarily on its authority to regulate deceptive advertising, but in recent years it has also begun to rely on its authority to challenge unfair advertising.<sup>33</sup>

FTC action often results in specific orders directed to a particular advertiser, such as cease and desist orders<sup>34</sup> or orders for corrective advertising,<sup>35</sup> but the FTC's authority is not limited to such orders. The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975 authorizes the FTC to prescribe "rules which define with specificity acts or practices which are unfair or deceptive."<sup>36</sup> Thus, the FTC may rule in advance that certain practices constitute deceptive or unfair trade practices. This rulemaking authority enables the FTC to proscribe a pattern of conduct, and one critic argues that through its rulemaking the FTC is "parlaying its essentially negative definitional authority to define and proscribe unfair and deceptive practices into an affirmative power to prescribe a particularized, mandatory, and often far-reaching code of fair

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28. The first legislative hearing was scheduled for Nov. 6, 1978, in San Francisco. The hearing was scheduled to continue on Nov. 20, 1978, in Washington, D.C. 43 Fed. Reg. at 17,967. The hearings were rescheduled, however, for Jan. 15 and Feb. 15, 1979. Then, in December, Kellogg Co. requested a further delay, suggesting a May 1, 1979, starting date. ADA News, Dec. 25, 1978, at 3, col. 1. Hearings finally began in Mar. 1979.

29. The FTC Notice of Proposed Rulemaking recognized the existence of possible first amendment limitations on FTC regulation of advertising, and the FTC seeks information on this issue. 43 Fed. Reg. at 17,970.

30. 15 U.S.C. § 45(a)(1) (1976).

31. See Pitofsky, *supra* note 3, at 669.

32. 15 U.S.C. § 52 (1976).

33. See Pitofsky, *supra* note 3, at 675-87.

34. See, e.g., *ITT Continental Baking Co. v. FTC*, 532 F.2d 207 (2d Cir. 1976); text accompanying note 108 *infra*.

35. See, e.g., *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), discussed at note 4 *supra*.

36. FTCA § 18(a)(1)(B), 15 U.S.C. § 57a(a)(1)(B) (1976). This legislation actually confirmed the FTC's rulemaking authority; the FTC had used substantive rulemaking to enforce FTCA § 5 since 1962. Kinter & Smith, *supra* note 1, at 673-74.

conduct for an entire industry.”<sup>37</sup> Even if this claim is true, the FTC’s statutory authority is limited to deceptive and unfair trade practices. The currently proposed rules concerning advertising on children’s television therefore lie within the FTC’s authority only if the FTC finds that the advertisements are deceptive or unfair.

### A. *Deceptive Advertising*

Courts have traditionally allowed the FTC broad discretion in defining “deceptive” and in making a fact finding that a particular advertisement is deceptive.<sup>38</sup> For the purposes of FTC action, an act is deceptive if it has the capacity or tendency to deceive an average or ordinary person, even though that person may have been ignorant, unthinking, or credulous.<sup>39</sup> This definition allows the FTC to regulate advertising without bearing the burden of proving that consumers were actually deceived, or that the advertisements were patently false, since courts have stressed that the Commission need show only capacity to deceive rather than actual deception.<sup>40</sup>

In *Beneficial Corp. v. FTC*,<sup>41</sup> for example, the FTC determined that a finance company’s advertisements for “Instant Tax Refunds” were deceptive because they did not indicate that potential clients were required to meet the company’s standard credit tests before receiving their “instant refunds.” There was no affirmative untruthful statement, merely the creation of a misleading impression. In sustaining the FTC’s finding that the advertisement was nevertheless deceptive, the court noted that advertising may be “misleading even absent evidence of . . . actual effect on customers.”<sup>42</sup> The court also stated that whether a particular advertisement has a tendency to mislead is a finding of fact rather than a conclusion of law.<sup>43</sup>

One reason the courts allow the FTC extensive discretion is the generally accepted policy that “courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority.”<sup>44</sup> This policy also mandates that an FTC fact finding that advertisements are deceptive be upheld by a reviewing court “unless arbitrary or

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37. Hobbs, *supra* note 19, at 421.

38. See *FTC v. Colgate-Palmolive Co.*, 389 U.S. 374 (1965). See also *Giant Food Inc. v. FTC*, 322 F.2d 977 (D.C. Cir. 1963); *Zenith Radio Corp. v. FTC*, 143 F.2d 29 (7th Cir. 1944) (holding that the FTC may “decide for itself” whether advertisements are deceptive).

39. *Aronberg v. FTC*, 132 F.2d 165, 167 (7th Cir. 1942). See also *FTC v. Standard Educ. Soc’y*, 302 U.S. 112 (1937).

40. *Charles of the Ritz Distribs. Corp. v. FTC*, 143 F.2d 676, 680 (2d Cir. 1944). The extent of the FTC’s discretion is indicated in *Gelb v. FTC*, 144 F.2d 580 (2d Cir. 1944), in which the court approved the FTC finding that hair dye advertisements for “permanent” dye were deceptive insofar as someone might not realize that the dye would last only until the hair grew out. See generally Gellhorn, *Proof of Consumer Deception Before the Federal Trade Commission*, 17 U. KAN. L. REV. 559, 563-67 (1969).

41. 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

42. *Id.* at 617.

43. *Id.* See also *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965).

44. *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 372 (1973). The situation in that case may be distinguished from the FTC’s current rulemaking procedure on the ground that the agency in *Mourning* was dealing more with administrative decisions than with first amendment rights. But see note 88 *infra*.

clearly wrong."<sup>45</sup> The FTC has expanded this interpretation of its authority by determining that an advertisement that might not deceive an average consumer could still deceive a particularly vulnerable group, such as children.<sup>46</sup>

The FTC's proposed rules deal with both advertisements for certain products and advertisements on children's television programs.<sup>47</sup> In order to base these broad rules on its authority to regulate deceptive advertising, the FTC must prove that advertisements of these products, or children's advertising in general, is inherently deceptive. This approach is weak for several reasons. First, it is arguable that a ban on the advertising of sugared foods is, on its face, aimed not at deception but at certain products and is, therefore, outside the statutory authority of the FTC.<sup>48</sup> Secondly, a ban on all advertising directed to or seen by children would presumably include even a simple statement that a program was sponsored by a given manufacturer. An advertiser's claim that "this program was sponsored by the Brand X Food Corporation" could not be characterized as deceptive, even under the broad definition of deceptive used by the FTC.<sup>49</sup> Thirdly, unless the FTC can prove that all advertisements directed at children are per se deceptive, those advertisers who do present accurate, truthful advertising should be able to rebut FTC charges of deception. In essence, the proposed FTC rules deny advertisers the right to air nondeceptive advertisements. Finally, the FTC would face practical problems in delineating the allegedly deceptive advertising. What percentage sugar content in a product renders the advertising for that product deceptive? What age audience renders such advertising deceptive? What percentage of adults in the audience rescues the advertising from being labeled deceptive?<sup>50</sup>

The above difficulties mean that the FTC, notwithstanding its broad discretionary power in defining deceptive advertising,<sup>51</sup> faces a formidable

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45. *Kalwajtys v. FTC*, 237 F.2d 654 (7th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957). See also *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

46. See *Stupell Originals, Inc.*, 67 F.T.C. 173 (1965); Pitofsky, *supra* note 3, at 675-76. See also Statement of Basis and Purpose of Trade Regulation Rule, 29 Fed. Reg. 8324, 8326 (1964) (cigarette advertising).

47. See text accompanying note 26 *supra*.

48. See text accompanying note 30 *supra*.

49. The FTC's proposed rules apply to "televised advertising," a phrase not specifically defined. See text accompanying note 26 *supra*. Unless the FTC interprets "televised advertising" as excluding announcements of sponsorship and statements of fact that include only the name and price of the product advertised, judicial approval of an FTC conclusion that all televised advertising is deceptive seems unlikely.

50. The FTC would face difficulty in justifying a finding that the deceptive nature of advertising is dependent upon the fact that a certain, set percentage of the audience is within a certain, set age bracket. In reviewing a remedy chosen by the Commission, the court must ask if the remedy has a "reasonable relation" to the unlawful practices found to exist. See *FTC v. National Lead Co.*, 352 U.S. 419, 429 (1957). Thus, the Commission must show that its age brackets and percentages of child viewers are reasonably related to whatever advertising practices it proves to be deceptive or unfair. See also note 25 *supra*. Moreover, restrictions must be narrowly tailored to eliminate the deception. *Beneficial Corp. v. FTC*, 542 F. 2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977). See also text accompanying notes 92-96 *infra*.

51. One critic has argued that there are virtually no limits on the power of the FTC.

task in finding that all advertising either on children's programs or of sugared products is inherently deceptive. Without such a finding, a ban would exceed the FTC's statutory authority,<sup>52</sup> at least when the advertising is found not to be unfair.

### B. *Unfair Advertising*

Rather than face the problems of proof and challenges to its statutory authority that would accompany a finding that all advertising of certain products is per se deceptive when directed to children, the FTC could choose to rely on its authority to regulate unfair advertising.<sup>53</sup> Although the FTC's authority to deal with unfair trade practices was granted at the same time as its authority to deal with deceptive trade practices,<sup>54</sup> the definition of "unfair" is still unclear as it is only within the past fifteen years that the FTC has begun to rely on this power.<sup>55</sup>

The FTC has delineated three criteria by which it judges advertising to be 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).<sup>56</sup>

According to FTC analysis, advertising in these categories may be unfair even if it is not actually deceptive. This interpretation allows the FTC

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For an interesting justification and rationalization of the FTC's power, see Reich, *supra* note 27. Reich, the Director of the Office of Policy Planning and Evaluation of the Federal Trade Commission, argues that "the FTC has acquired *de facto* expertise in protecting the flow of truthful commercial speech by virtue of its statutory responsibility to protect consumers, and accordingly there is no need for a reviewing court's neutrality or constitutional expertise." *Id.* at 739.

52. See note 9 *supra*; cf. Thain, *supra* note 11, at 662 (suggests that prohibitions on certain types of advertising are more properly within the authority of the FCC than the FTC).

53. One proponent of the FTC rule concedes that "[b]ecause there is no inherent limit on the reach of implied deception, it could encompass virtually any advertising." Moreover, a rule based on the implicit representations in children's television advertising might be unacceptable since it would set a "potential precedent for attacking numerous other advertisements." The proponent therefore concludes that it would be easier and more prudent for the FTC to base its rule on the "unfairness" theory: "The unfairness approach allows the FTC gradually to extend the scope of 'unfair conduct' as society's standards evolve, while avoiding many problems associated with scientific measurements of audience reaction to, and perception of, advertisements." Thain, *supra* note 11, at 657-58.

54. See note 30 *supra* and accompanying text.

55. See *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 223 (1973); *ITT Continental Baking Co. v. FTC*, 532 F.2d 207 (2d Cir. 1976). But see *FTC v. Gratz*, 253 U.S. 421 (1920), in which the Court adopted a narrow definition of "unfair." The FTC's present broad approach was foreshadowed in *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304 (1934) (holding that a practice not previously declared unlawful could be found unfair). The *Keppel* case is especially relevant as it deals with a sales approach designed to increase children's candy purchases.

56. Statement of Basis and Purpose of Trade Regulation Rule, 29 Fed. Reg. 8324, 8355 (1964) (ban of cigarette advertising).



enormous discretion in determining which advertising may be regulated,<sup>57</sup> especially since its jurisdiction may be based on policy decisions.

The FTC's authority to develop standards of fairness was strengthened by the Supreme Court's decision in *FTC v. Sperry & Hutchinson*.<sup>58</sup> In that case the Supreme Court considered for the first time whether a practice might be unfair absent any deception of consumers or unfairness to competitors. The Court's opinion upheld the FTC's determination that advertising may be unfair in such a situation, and stated that the FTC, like a court of equity, may consider public values when it uses its section 5 authority,<sup>59</sup> thus confirming the FTC's interpretation of its statutory authority to deal with unfair advertising. Unfortunately, the Court did not expressly approve the FTC criteria for determining if advertising is unfair, and further litigation will be necessary to clarify the applicable standards.<sup>60</sup> As the then-Director of the Bureau of Consumer Protection of the FTC stated: "The Supreme Court's broad grant of authority to the FTC to develop new rules in the consumer protection field is too vague to provide any meaningful enforcement guidelines."<sup>61</sup> Other authorities agree that further definition of the terms "unfair" and "immoral" is necessary,<sup>62</sup> especially since the FTC was dealing with a specific adjudicatory decision in *Sperry & Hutchinson*<sup>63</sup> rather than with a general rulemaking procedure.

Despite the confusion in this area, the FTC's discretion in determining what advertisements are unfair is probably broad enough to allow a finding that children's advertising, or the advertising of a particular product, is, as a class, unfair. The FTC has already decided that advertisements aimed at a particularly susceptible group,<sup>64</sup> or those that "address themselves to particularly vulnerable aspects of their audiences . . . might conceivably render even truthful messages unfair."<sup>65</sup> Based on the above judicially ap-

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57. This discretion is of course subject to judicial review. Although the FTCA does not incorporate the "substantial evidence" standard of review enunciated in the Administrative Procedure Act, 5 U.S.C. § 706(2)(E) (1976), it provides that the court may grant appropriate relief if the court finds that the Commission's action is not supported by substantial evidence in the rulemaking record. FTCA § 18(e)(3)(A), 15 U.S.C. § 57a(e)(3)(A) (1976).

58. 405 U.S. 233 (1972).

59. *Id.* at 244.

60. In *Pfizer, Inc.*, 81 F.T.C. 23 (1972), decided shortly after *Sperry & Hutchinson*, the FTC held that it is an unfair practice for an advertiser to make claims unsupported by adequate prior substantiation. (Pfizer had advertised that its "Unburn" sunburn remedy would anesthetize nerve endings in the skin, but had no substantiation for its claim.) The FTC has also held that a failure to disclose information may constitute unfairness. See *Control Data Corp.*, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,980 (1972) (determining that failure to give adequate information about the success of its graduates in obtaining jobs was unfair).

61. Pitofsky, *supra* note 3, at 681.

62. See Nelson, *The Politicization of FTC Rulemaking*, 8 CONN. L. REV. 413 (1976); Schwartz, *Regulating Unfair Practices Under the FTC Act: The Need for a Legal Standard of Unfairness*, 11 AKRON L. REV. 1 (1977).

63. The Court's review was of an FTC cease and desist order directed toward *Sperry & Hutchinson's* practice of unfairly attempting to suppress trading stamp exchanges.

64. See *Pfizer, Inc.*, 81 F.T.C. 23 (1972).

65. *ITT Continental Baking Co.*, 83 F.T.C. 865, 963 (1973), *modified and enforced*, 532 F.2d 207 (2d Cir. 1976); see Thain, *supra* note 11, at 657-62. Thain specifically discusses the precedents for FTC determinations that advertising directed toward children may be unfair.

proved conclusions, the FTC's proposed rules may be justified as within the FTC's statutory authority. If the FTC relies on an "unfairness" finding to regulate the advertising, however, it may face serious objections based on violation of constitutional rights.

### III. THE CONSTITUTIONALITY OF THE PROPOSED RULES

Until recently the Supreme Court held that first amendment protection for free speech does not apply to commercial speech.<sup>66</sup> In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,<sup>67</sup> however, the Court first indicated that commercial speech was not to be automatically denied all first amendment protection.<sup>68</sup> Rather, the Court indicated that a balancing test, weighing the government interest in regulation against "[a]ny First Amendment interest which might be served by advertising an ordinary commercial proposal," would be appropriate.<sup>69</sup> In 1975 the Court announced in *Bigelow v. Virginia*<sup>70</sup> that a state could not prohibit advertising of legal abortions without abridging first amendment protected speech. In that case the Court stressed the necessity for a balancing test: "Regardless of the particular label asserted . . . whether . . . 'commercial' or 'commercial advertising' or 'solicitation'—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation."<sup>71</sup>

Although commercial speech does not merit the same degree of protection as noncommercial speech, in both *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*<sup>72</sup> and *Bates v. State Bar*<sup>73</sup> the Supreme Court reaffirmed the importance of first amendment protection for commercial speech,<sup>74</sup> holding that the free flow of truthful commercial information cannot constitutionally be banned. In light of these decisions<sup>75</sup> at least one court already has commented that the FTC's broad interpretation of its section 5 remedial power cannot survive the demise of the commer-

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66. See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), in which the Court held that the first amendment did not protect "purely commercial advertising." See also *Breard v. City of Alexandria*, 341 U.S. 622 (1951); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). In *Breard* and *Murdock* the Court indicated the significant reach of *Valentine*, and further clarified the standard used in that case.

67. 413 U.S. 376 (1973).

68. *Pittsburgh Press* was the first decision applicable to commercial speech in general. It was preceded by the landmark decision of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), in which the Court recognized a conditional first amendment defense available to newspapers against defamation actions by public officials.

69. 413 U.S. at 389.

70. 421 U.S. 809 (1975).

71. *Id.* at 826.

72. 425 U.S. 748 (1976).

73. 433 U.S. 350 (1977).

74. See also *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977), in which the Court held unconstitutional a prohibition on the advertising and display of contraceptives.

75. For an overview of the new first amendment, commercial speech cases, see Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205 (1976). The author also sets forth possible standards for distinguishing commercial speech from noncommercial speech for first amendment purposes.

cial speech exception to the first amendment.<sup>76</sup>

### A. *The Conflict between the FTC and the First Amendment*

*Deceptive Advertising.* The broad power and discretion of the FTC developed during a period in which commercial speech was not considered to be protected by the first amendment.<sup>77</sup> Accordingly, the first amendment was not considered a limitation on the FTC's power to deal with commercial advertising. The opinion of the Supreme Court in *Jacob Siegel Co. v. FTC*<sup>78</sup> is representative of the deference accorded the FTC during that time; the Court held that judicial review of FTC remedies is limited because the "Commission has wide discretion in its choice of a remedy."<sup>79</sup>

The emergence of first amendment protection for commercial speech, however, raises significant problems with continuing the policy of allowing the FTC to "decide for itself"<sup>80</sup> what constitutes deception.<sup>81</sup> The Court stressed in *Bates* that, "[a]dvertising that is false, deceptive, or misleading of course is subject to restraint,"<sup>82</sup> a point it had already emphasized in *Virginia State Board of Pharmacy*.<sup>83</sup> According to the FTC, this approach to deceptive advertising means that a case-by-case balancing of governmental interest versus the constitutional right at stake, as required in *Bigelow*,<sup>84</sup> is unnecessary where the commercial speech is deceptive.<sup>85</sup> Consequently, according to the FTC's reasoning, once an FTC finding is made that advertising is deceptive, that advertising is no longer protected by the first amendment. One proponent of the FTC position has even argued that a court errs if it assumes that the first amendment requires a court to substitute its own judgment for that of the FTC; rather, the Commission's determinations should be dispositive of the first amendment issue.<sup>86</sup>

If this view of the FTC authority is accepted, it would mean that the FTC, and not the courts, would make the ultimate decision as to the extent of first amendment protection. Although the courts have frequently given federal agencies broad discretion,<sup>87</sup> those whose speech is regulated must

76. *Beneficial Corp. v. FTC*, 542 F.2d 611, 620 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); see text accompanying note 41 *supra*.

77. See Reich, *supra* note 27.

78. 327 U.S. 608 (1946).

79. *Id.* at 611.

80. See note 38 *supra* and accompanying text.

81. See generally Note, *Yes, FTC, There is a Virginia: The Impact of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. on the Federal Trade Commission's Regulation of Misleading Advertising*, 57 B.U.L. REV. 833 (1977).

82. 433 U.S. at 383.

83. 425 U.S. at 770-72.

84. See notes 70-71 *supra* and accompanying text.

85. National Comm'n on Egg Nutrition, 88 F.T.C. 84, 164-66 (1976).

86. Reich, *supra* note 27, at 741.

87. See notes 44 & 45 *supra* and accompanying text. *But cf. Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1039 (1967) (closer judicial scrutiny is more appropriate for fact finding that advertising is deceptive than for other types of fact finding, because a finding of deception is more closely related to a judicial issue of misrepresentation than to an area of agency expertise).

have access to judicial review employing the standard of review accorded constitutional questions.<sup>88</sup>

Another important consideration concerns the definition of "deceptive" used by the FTC. The "capacity to deceive" standard<sup>89</sup> was adopted during a period when commercial speech was not thought to be protected by the first amendment, and, consequently, the standard was never intended to distinguish protected speech from nonprotected speech. The definition is, in fact, so broad that it could easily encompass truthful, accurate statements of fact that are not deceptive<sup>90</sup>—advertisements that should be protected by the first amendment and subject to the balancing test enunciated in *Bigelow*.<sup>91</sup> Therefore, the standard may not withstand constitutional scrutiny; even if the FTC does have the authority to determine the first amendment issues, it may be required to use a narrower standard than its traditional "capacity to deceive" test.

A rule or statute that forbids constitutionally protected as well as unprotected activity is said to be overbroad and can be set aside as unconstitutional.<sup>92</sup> A court can declare a statute unconstitutional on its face on the grounds that some constitutionally protected speech *might* be restricted by the statute, even if the challenging party has not demonstrated that his own constitutional rights have been infringed. The present Supreme Court has shown a reluctance to rely on this facial overbreadth analysis, however. In *Broadrick v. Oklahoma*,<sup>93</sup> for example, the majority upheld an Oklahoma statute that restricted the political activities of Oklahoma civil servants, holding that,

facial overbreadth adjudication is an exception to our traditional rules of practice and . . . its function [is] a limited one at the outset . . . . [P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.<sup>94</sup>

Similarly, in *Bates* the Court specifically declined to apply the overbreadth argument to advertising on the ground that the doctrine is unnecessary in the context of commercial advertising because of commercial advertising's

88. The proper standard for agency review is often a confused issue. Compare note 56 *supra* with note 57 *supra*. In *Beneficial Corp. v. FTC*, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977), the court stressed the importance of the constitutional issue:

We acknowledge, of course, that we are ordinarily obliged to defer broadly to the Commission's exercise of informal discretion . . . . But we are dealing in this case with the government regulation of a form of speech. The first amendment requires, we believe, an examination of the Commission's action that is more searching than in other contexts.

542 F.2d at 618-19 (citations omitted).

89. See notes 39 & 40 *supra* and accompanying text.

90. See, e.g., notes 40 & 42 *supra* and accompanying text.

91. See notes 70 & 71 *supra* and accompanying text.

92. See note 10 *supra*. See generally Note, *The First Amendment Overbreadth Doctrine*,

83 HARV. L. REV. 844 (1970).

93. 413 U.S. 601 (1973).

94. *Id.* at 615.

more durable nature.<sup>95</sup> In *Bates*, and in *Broadrick*, the Court was speaking of facial overbreadth;<sup>96</sup> neither decision means that a party whose own constitutionally protected speech is abridged would be barred from challenging the statute as overbroad in its application. Consequently, an overly broad rule by the FTC would be subject to constitutional attack by advertisers whose nondeceptive advertisements were barred by the rule.

Moreover, despite its reluctance to rely on overbreadth analysis, the Supreme Court's opinion in *Erznoznik v. City of Jacksonville*<sup>97</sup> demonstrates that overbreadth challenges are still valid. In *Erznoznik* the Court considered an ordinance that made it a punishable offense for a drive-in theater to exhibit a film containing nudity where the screen is visible from a public street. Like the FTC's proposed rules, the ordinance was designed primarily to protect minors. The Court held, however, that the restriction was broader than permissible: "[c]learly all nudity cannot be deemed obscene even as to minors."<sup>98</sup> Arguably, all advertising cannot be deemed deceptive even as to minors. Thus, the FTC must show that all advertising directed toward children is inherently deceptive, not only to justify its proposed rules under its statutory authority, but also to rebut charges of constitutional overbreadth.

*Unfair Advertising.* The FTC's power to regulate unfair advertising has been exercised without serious constitutional challenge only because its exercise preceded the Court's new first amendment interpretation of the status of commercial speech.<sup>99</sup> Although the Supreme Court has specifically stated that there is no constitutional protection for untruthful speech,<sup>100</sup> it has carved out no such niche for unfair speech.<sup>101</sup> To exclude unfair speech from first amendment protection, using the FTC's extremely broad

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95. 433 U.S. at 380-81; see *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 n.24 (1976).

96. In *Bates* the Court noted, "[t]he First Amendment overbreadth doctrine, however, represents a departure from the traditional rule that a person may not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the Court." 433 U.S. at 380.

97. 422 U.S. 205 (1975).

98. *Id.* at 213.

99. Compare dates of cases cited at note 55 *supra* (using unfairness standard) with the cases cited at notes 72-73 *supra* (explaining the first amendment protection for commercial speech).

100. See notes 81-86 *supra* and accompanying text. But see *New York Times Co. v. Sullivan*, 376 U.S. 254, 270-72 (1964), in which, in the context of a libel action against a newspaper, the Court emphasized that factual error does not remove the shield of first amendment protection from criticism of public officials' official conduct.

101. In *Virginia State Board of Pharmacy* Mr. Justice Rehnquist interpreted the Court's decision to mean that "[u]nless the State can show that these advertisements are either actually untruthful or misleading, it presumably is not free to restrict [commercial efforts] in any way." 425 U.S. at 782 (Rehnquist, J., dissenting). Even if Mr. Justice Rehnquist's interpretation is correct, however, the definition of "misleading" may be broad enough to allow restrictions. See generally *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 68 (1976), in which the Court reaffirmed the FTC's power to restrain misleading as well as false statements, noting that "regulatory commissions may prohibit businessmen from making statements which, though literally true, are potentially deceptive." (Footnote omitted.)

definition of unfair,<sup>102</sup> might be tantamount to excluding advertising from protection by the first amendment, a position the Court has expressly rejected.<sup>103</sup>

In deciding whether to rely on its authority to regulate deceptive trade practices as opposed to its authority to regulate unfair practices, the FTC faces a dilemma. If it determines that the advertising is deceptive, it must prove that all the advertisements are deceptive, or risk constitutional and statutory challenge on the ground that the rule is overbroad. On the other hand, if the FTC decides to base its rule on a finding that the advertisements are unfair, it must prove that a ban on unfair but nondeceptive advertising does not violate the first amendment. Either approach invites constitutional challenge.<sup>104</sup>

*The Choice of a Proper Remedy.* The FTC has traditionally been allowed to choose whatever remedy will, in its determination, be most appropriate.<sup>105</sup> In some cases the FTC has chosen a cease and desist order directed at a specific advertising campaign. In *ITT Continental Baking Co. v. FTC*<sup>106</sup> for example, the court upheld an FTC order proscribing advertising promotions that implied that Wonder Bread contributed to rapid growth by providing dramatic benefits not provided by other products. In other cases the FTC has required affirmative disclosure<sup>107</sup> or corrective

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102. See notes 56, 64 & 65 *supra* and accompanying text.

103. See notes 72-74 *supra* and accompanying text.

104. This Comment focuses on the advertisers' right to free speech, although the Court has also stressed the viewers' right to hear. In *Virginia State Board of Pharmacy*, for example, the Court noted that "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising." 425 U.S. at 758; see *Bates*, 433 U.S. at 364. See also *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1978). In those cases the restrictions were a complete ban; the concern for consumers' rights to information is less compelling in the case of the FTC's currently proposed rules since they do not constitute a total ban. Manufacturers would still be free to advertise in other media and on television at limited times. Moreover, children's right to hear may be less compelling than that of adults. More stringent controls may be permissible on communicative materials available to youths than those available to adults. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

Ordinarily, the public's interest in the free flow of information will be perceived as being coextensive with the speakers' interest. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978). The Court has not yet been faced with a case involving the electronic media in which the speakers' rights were in conflict with the listeners' rights, so it is difficult to predict which rights the Court would view as paramount. The Court's suggestion that "no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn" (*Virginia State Board of Pharmacy*, 425 U.S. at 764), indicates, however, that the Court is not likely to allow speakers' rights to be curtailed under the guise of protecting the listener.

105. See note 109 *infra* and accompanying text.

106. 532 F.2d 207 (2d Cir. 1976). Two advertising campaigns were at issue. One, the "Wonder Years" campaign, included a film sequence representing a child's growth during the years between ages one and twelve. The other, the "How Big" commercials, asked children how big they hoped to be. Both campaigns suggested that Wonder Bread helped build strong bodies and contribute to rapid growth.

107. *E.g.*, *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977) (order that advertisements that refer to the relationship between eggs and heart disease include a statement that many medical experts believe increased consumption of cholesterol, including that in eggs, may increase the risk of heart disease), *cert. denied*, 99 S. Ct. 86, 58 L. Ed. 2d 113 (1978); *J.B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967) (ordering manu-

advertising, as in *Warner-Lambert Co. v. FTC*,<sup>108</sup> in which the FTC required the manufacturers of Listerine to state that their product does not cure colds, contrary to Listerine's previous advertising.

Before the recognition of first amendment protection for commercial speech, the FTC was allowed almost unbridled discretion in selecting the remedy to be used, in accord with the Supreme Court's statement that an agency's decision as to which remedial provision is used should be upheld as long as it is reasonably related to its objectives.<sup>109</sup> With the new first amendment interpretation concerning commercial speech, however, must come new caution in choosing remedies, and courts have emphasized that the FTC, "like any other governmental agency, must start from the premise that any prior restraint is suspect, and that a remedy, even for deceptive advertising, can go no further than is necessary for the elimination of the deception."<sup>110</sup> Given such limitations, if the FTC elects to ban all children's advertising, or the advertising of an entire class of products, it must face the heavy burden of proving those bans constitutional.<sup>111</sup>

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facturer of Geritol to disclose that Geritol alleviates the symptoms of tiredness only in the small percentage of cases caused by anemia); *Ward Laboratories, Inc. v. FTC*, 276 F.2d 952 (2d Cir.) (order that sellers of baldness treatment disclose that most baldness is caused by factors unaffected by their product), *cert. denied*, 364 U.S. 827 (1960).

108. 562 F.2d 749 (D.C. Cir. 1977); *cf.* *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 471 (an order requiring corrective advertising is well within the arsenal of relief provisions that the Commission may draw upon), *aff'd*, 481 F.2d 246 (6th Cir. 1972), *cert. denied*, 414 U.S. 1112 (1973). *See, e.g.*, *Ocean Spray Cranberries, Inc.*, 80 F.T.C. 975 (1972) (requiring that 25% of one year's advertising budget be spent on corrective advertising).

109. *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1945). In *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 371-72 (1973), the Court concluded: "That some other remedial provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority." *See also* *FTC v. Mandel Bros.*, 359 U.S. 385 (1959); *FTC v. National Lead Co.*, 352 U.S. 419 (1957); *FTC v. Cement Institute*, 333 U.S. 683 (1948). Where a restriction impinges on constitutional rights, courts require existence of a "rational" relationship between the rule and its goal. *See generally* *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977).

110. *Beneficial Corp. v. FTC*, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977). The court stressed that "[i]n failing to consider fully the feasibility of requiring merely that advertising copy be rewritten in lieu of total excision of the offending language, the Commission would appear to have exceeded its remedial authority . . ." 542 F.2d at 619. *See also* *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 99 S. Ct. 86, 58 L. Ed. 2d 113 (1978); *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977); *ITT Continental Baking Co. v. FTC*, 532 F.2d 207, 222 (2d Cir. 1976) (holding that a ban on "virtually any sort of televised representation of the value of food products," irrespective of whether the representation was misleading, was too broad).

111. *Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976), presents several analogous issues. In a 98-page opinion the court considered the "family viewing" hour policy which was designed to reduce violence and adult material during prime-time television hours. The court noted specifically, "The desirability or undesirability of the family viewing policy is not the issue. Rather the question is who should have the right to decide what shall and shall not be broadcast and how and on what basis should these decisions be made." *Id.* at 1072. The court stated that enforcement of the family viewing hour, by the FCC or by the National Association of Broadcasters, would be an unconstitutional infringement of not only the first amendment rights of the producers and writers, but also the "paramount" rights of the viewers and listeners. *Id.* at 1143-44. "If the First Amendment has any meaning at all, it is that broadcasters, not FCC officials or judges, have the authority to make programming decisions." *Id.* at 1154. The court did note, how-

An advertising restriction closely analogous to the type of ban proposed for television advertising on children's programs is the congressional ban on televised advertising of cigarettes.<sup>112</sup> That ban was unsuccessfully challenged on constitutional grounds in *Capital Broadcasting v. Mitchell*,<sup>113</sup> but the rationale used, and perhaps even the outcome, might have been different if the case had been decided after the Supreme Court extended first amendment protection to commercial speech. In *Capital Broadcasting* the district court based its decision, later affirmed by the Supreme Court, on the fact that product advertising was only "tangentially regarded as having some limited indicia"<sup>114</sup> of first amendment protection, a view the Supreme Court no longer holds.<sup>115</sup> Another important distinction is that the cigarette advertising ban was the result of congressional action, not an agency decision. Finally, at least one member of the Supreme Court has since indicated that bans on the advertising of an entire class of products are no longer constitutionally permissible.<sup>116</sup>

Ironically, as one FTC investigation considers the possibility of banning children's advertising of sugared products because of the dental risks involved, another FTC investigation is "examining the possibility of a direct challenge to the states for restrictions [on dental care] that go further than necessary to protect the public health."<sup>117</sup> For the Commission to insist that state legislatures tailor their regulations of commercial interests as narrowly as possible while pursuing overly broad remedies itself in the same area, seems patently inconsistent.

#### B. *A Resolution of the Conflict between the FTC and the First Amendment?*

Despite the extension of first amendment protection to commercial speech, the Supreme Court has made it clear that commercial speech does not merit the same degree of first amendment protection as noncommercial speech.<sup>118</sup> The Court stressed this point in one of its most recent decisions, *Ohralik v. Ohio State Bar Association*:<sup>119</sup> "To require a parity of

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ever, that "[d]ifferent considerations *might* apply . . . to the regulation of commercials by the NAB." *Id.* at 1155 n.141 (emphasis original). See also *National Ass'n of Independent Television Producers & Distribs. v. FCC*, 516 F.2d 526 (2d Cir. 1975); *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971) (upholding prime-time access rule for network television broadcasting).

112. Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §§ 1331-1340 (1976).

113. 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom.* *Capital Broadcasting Co. v. Acting Att'y Gen.*, 405 U.S. 1000 (1972); *cf.* *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968) (Cigarette Labeling Act of 1965 upheld), *cert. denied*, 396 U.S. 842 (1969).

114. 333 F. Supp. at 585.

115. See notes 66-76 *supra* and accompanying text.

116. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 790 (1976) (Rehnquist, J., dissenting).

117. Corby, *FTC May Force Legalized Denturism on Public*, DENTAL ECON., Nov. 1978, at 47 (quoting Harrison J. Sheppard, assistant regional director of the FTC's San Francisco office).

118. See *Bates v. State Bar*, 433 U.S. 350 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

119. 436 U.S. 447 (1978).



constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech."<sup>120</sup> The FTC may, therefore, be able to promulgate broad restrictions on advertising in spite of its first amendment protection. This conclusion is further supported by the Court's assertion that commercial speech is to be afforded only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression."<sup>121</sup>

Although regulation of constitutionally protected speech may be permitted to serve important government interests,<sup>122</sup> the Supreme Court has emphasized that such regulation must be content-neutral<sup>123</sup> restrictions on time, place, and manner. In *Police Department v. Mosley*,<sup>124</sup> for example, the Court invalidated a city ordinance that prohibited picketing on a public way within a certain distance from schools during certain times of day. The ordinance, although purportedly a time, place, and manner restriction, exempted peaceful labor picketing. The Court's opinion stressed:

The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its *subject matter*. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited . . . [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.<sup>125</sup>

In *Virginia State Board of Pharmacy* the Court again emphasized that time, place, and manner restrictions are permissible only if (1) "they are justified without reference to the content" of the speech, (2) they serve a "significant governmental interest," and (3) they leave open "ample alternative channels for communication of the information."<sup>126</sup> Although the FTC could ban all advertising during children's television<sup>127</sup> (a restriction on the time of advertising),<sup>128</sup> it could face valid constitutional challenges

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120. *Id.* at 456.

121. *Id.*

122. *See, e.g., Adderley v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 536 (1965).

123. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), is the only case in which the Court permitted content-based regulation of free speech. In *Lehman* the Court upheld a city's decision to refuse to accept political advertising although the city did accept other paid advertising for display in the city-operated transit system. The case is distinguishable from other cases dealing with government action, however, because the Court treated the city's decision as that of a private speaker rather than a governmental one. Thus, the city was not required to prove that its regulation was content-neutral.

124. 408 U.S. 92 (1972).

125. *Id.* at 95-96 (emphasis added).

126. 425 U.S. at 771. *See also Bates*, 433 U.S. at 384.

127. This is one of the FTC proposals. *See* text accompanying note 26 *supra*.

128. The advertisers could argue, however, that such television advertising is their most effective form of advertising, and that a ban on these advertisements does not leave open ample alternative channels for communication. *See Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), in which the Court held that an ordinance prohibiting the

to a ban on the advertising of certain products (sugared foods, for example) because such a ban is obviously dependent on the content of the advertisement.<sup>129</sup> Advertisers would be permitted to present some commercials during the regulated times, but not commercials dealing with sugared products. The FTC's determination of which commercials could be aired would depend entirely on the *subject matter* of the advertisement.

The Court's statement in *Virginia State Board of Pharmacy* that "[w]hatever may be the proper bounds of time, place, and manner restrictions on commercial speech," they were plainly exceeded in that case,<sup>130</sup> implies that the standards for commercial speech regulation may be more lenient than for noncommercial speech. This interpretation is weakened, however, by the Court's reference to several of its previous decisions on such restrictions,<sup>131</sup> a reference that indicates that the Court will use the standards it has already established in those cases.

Proponents of FTC restrictions on advertising during children's television programs may also find support in court decisions indicating that great weight is to be given three factors involved in these proposals: the advertisements are conveyed via the electronic media; they are directed toward children; and the restrictions, in some of the suggested forms, deal with health. The Supreme Court has long recognized that "[a]lthough broadcasting is clearly a medium affected by a First Amendment interest . . . differences in the characteristics of [the] new media justify differences in the First Amendment standards applied to them."<sup>132</sup> Further, in *Bates v. State Bar*, in the context of an advertising-regulation case, the Court again stressed that "the special problems of advertising on the electronic broadcast media will warrant special consideration."<sup>133</sup> The Court may, therefore, allow more restrictions over television and radio than in other areas. One justification for relaxed judicial scrutiny of governmental regulation of the broadcast media was enunciated in *Banzhaf v. FCC*,<sup>134</sup> in which the District of Columbia Court of Appeals noted that whereas written media requires an affirmative act of reading, "[b]roadcast messages, in

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posting of real estate "for sale" signs violated the first amendment. The Court determined that "serious questions exist as to whether the ordinance 'leave[s] open ample alternative channels for communication'. . . . Although in theory sellers remain free to employ a number of different alternatives, . . . [those options] may be less effective media for communicating the message. . . . The alternatives, then, are far from satisfactory." *Id.* at 93.

129. To the extent that a ban is aimed at the advertising of certain products rather than deception, it may also exceed the FTC's statutory authority. See note 30 *supra* and accompanying text.

130. 425 U.S. at 770.

131. *Id.* The Court refers to several cases on time, place, and manner restrictions, including *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), and *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

132. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969). "For example, the ability of new technology to produce sounds more raucous than those of the human voice justifies restrictions on the sound level, and on the hours and places of use." *Id.* at 387. See also *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).

133. 433 U.S. 350, 384 (1977).

134. 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

contrast, are 'in the air' . . . . [A]n ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act."<sup>135</sup>

In July 1978, in its most recent ruling on profanity, the Supreme Court wrote, "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."<sup>136</sup> The Court stressed two reasons for this limitation: "First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans," and "[s]econd, broadcasting is uniquely accessible to children, even those too young to read."<sup>137</sup> Both courts and the FTC have traditionally recognized the difference in comprehension between adults and children.<sup>138</sup> In the Statement of Basis and Purpose for the rule to ban all cigarette advertising from the electronic media,<sup>139</sup> for example, the FTC concluded that because children are "especially vulnerable and susceptible," a marketing practice directed towards them that "interferes substantially and unjustifiably with their freedom of buying choice" is an unfair or deceptive trade practice even if it is not especially pernicious to adults.<sup>140</sup> In that statement the FTC stressed not only the electronic media's pervasive influence and the special susceptibility of children, but also the concern for the health<sup>141</sup> of children who buy the products advertised. The FTC stressed in that situation, as it would certainly stress in supporting the currently proposed rules, that the restrictions were especially necessary because of the attractiveness and availability of the product to children, and the inherent dangers to the child's health.<sup>142</sup>

#### IV. CONCLUSION

Despite the legitimate concern with the effect of television advertising on

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135. 405 F.2d at 1100.

136. *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978). The fact that the issue was profanity is an important distinguishing factor. The *Pacifica* Court noted that obscene materials have been denied first amendment protection because their content is offensive to contemporary standards. See *Roth v. United States*, 354 U.S. 476 (1957).

137. 438 U.S. at 748-49.

138. The "attractive nuisance" doctrine in torts is one example of the courts' long standing policy of affording children special protection. See, e.g., *Sioux City & Pac. R.R. v. Stout*, 84 U.S. (17 Wall.) 657 (1874). In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court considered the special needs of children in the context of constitutional protection. In upholding a statute that prohibited the sale of obscene magazines to minors, the Court noted that "[t]he world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules." *Id.* at 638 n.6 (quoting Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 939 (1963)). See also note 104 *supra*.

139. 29 Fed. Reg. 8325 (1964). See also note 112 *supra* and accompanying text.

140. 29 Fed. Reg. at 8358.

141. The Wheeler-Lea Amendment, ch. 49, 52 Stat. 111 (1938) to the FTCA included several provisions that are specifically concerned with false advertising of food and drugs. See FTCA §§ 12-17, 15 U.S.C. §§ 52-57 (1976).

142. In *Banzhaf v. FTC*, 405 F.2d 1082, 1097 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969), the court stated that "[t]he public health has in effect become a kind of basic law, both justifying new extensions of old powers and evoking the legitimate concern of government wherever its regulatory power otherwise extends."

children, the FTC may face great difficulty in formulating a rule that exceeds neither statutory nor constitutional limitations. There are two conflicting trends affecting judicial review of FTC action. Traditionally, courts have allowed the FTC to regulate advertising within its sphere of authority with very little judicial restraint. The Supreme Court's recent recognition of first amendment protection for commercial speech, however, means not only that the agency must concern itself with first amendment considerations, but also that the courts must review agency action in light of the first amendment. Thus, while the statutory limitation could be overcome by a broad construction of the FTC's authority to proscribe "unfair" advertisements, the constitutional issue is less easily resolved.

The FTC's proposed rules to curtail advertising on children's television programs, especially of sugared products, are meritorious in many respects. They deal with safeguards for the health of children, and restrictions on the electronic media—areas with which the courts have evidenced great concern and in which federal agencies have been allowed great discretion. Nevertheless, the Supreme Court's recognition of the first amendment protection of commercial speech must impose new limits on the broad discretion and power of the FTC.

