Counter-Advertising in the Broadcast Media: Brining the Administrative Process to Bear upon a Theoretical Imperative

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COUNTER-ADVERTISING IN THE BROADCAST MEDIA: BRINGING THE ADMINISTRATIVE PROCESS TO BEAR UPON A THEORETICAL IMPERATIVE

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As part of its campaign against unfair advertising, the Federal Trade Commission (FTC) in January 1972 submitted to the Federal Communications Commission (FCC) a comprehensive proposal advocating application through administrative rulemaking of the FCC's fairness doctrine to a wide spectrum of broadcast advertisements.¹ The FCC and the courts previously had invoked the fairness doctrine as the basis for implementing counter-advertising to correct false or misleading statements in broadcast advertising. Taking the position, however, that counter-advertising should be severely restricted, the FCC has determined applicability of the fairness doctrine on a case-by-case basis.

A consideration of the FTC proposal, which has evoked vigorous criticism,² provides a focal point for discussion and evaluation of the place of counter-advertising in the broadcast media. Initially, attention must be directed to the need for adopting new means of protecting the public interest in full and accurate disclosure in advertising claims. Beyond the economic and legal theory justifying its implementation, the suggestion for increased counter-advertising raises important questions concerning the effective employment of the administrative process to foster the beckoning objectives of counter-advertising while minimizing its adverse impacts, particularly that upon the broadcast industry. Admittedly, politics enter into the matter; politics are at the center of all major American social and economic questions.³ It is submitted, nevertheless, that politics, any more than business, need not be a dirty word, and that an understanding by public administrators,⁴ as well as

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³ See notes 206-23 infra & accompanying text.
⁴ Professor Davis has described the role of the administrative agency as follows: “The administrative process is a governmental tool. It is no more conservative or liberal than the elevator in the Senate Office Building. It is used to promote pro-business policies, anti-business policies, and policies having little or nothing to do with business.” K. Davis, ADMINISTRATIVE LAW 14 (1965).
by businessmen, of their relation with and obligation to the public interest can only result in increased benefits for all.

THE POSITIVE IMPACT OF COUNTER-ADVERTISING UPON THE ECONOMIC SYSTEM AND WITHIN THE BUSINESS COMMUNITY

The explicit goal of counter-advertising and other proposals to regulate advertising is to provide full and accurate information to the public. The theoretical foundation for the private, free enterprise system includes an axiomatic assumption that all purchasers of products will have full information about the economy generally and any product specifically. Although, accepting the fact of human limitations, it is immediately apparent that this objective of perfect knowledge can be attained only to an imperfect extent; enjoyment of the benefits of a competitive economy requires persistent aspiration to the goal of an informed public.

The FTC counter-advertising proposal attempts to achieve this goal by forcing advertisers to disclose all relevant information in advertising claims concerning their products. Suggesting that application of the fairness doctrine to certain advertisements would be consistent with the public service obligations of both agencies, the proposal seeks to have the FCC require that broadcasters afford an opportunity for reply to certain types of advertising. Under the proposal, the fairness doctrine would be triggered whenever controversial issues of current national importance are raised either explicitly by advertising asserting claims of product performance or characteristics or implicitly by advertising stressing broad recurrent themes affecting the purchase decision.

6. The necessity for and process of adapting economic theory to reality has been described as follows:
   Perfect competition is a perfect procedure with respect to efficiency. Of course, the requisite conditions are highly specialized ones and they are seldom if ever fully satisfied in the real world. Moreover, market failures are often serious, and compensating adjustments must be made by the allocation branch . . . Monopolistic restrictions, lack of information . . . and the like must be recognized and corrected . . . . The ideal conception may then be used to appraise existing arrangements and as a framework for identifying the changes that should be undertaken.
7. Cited by the FTC as an example of "[a]dvertising asserting claims of product performance or characteristics that explicitly raise controversial issues of current public importance" were advertisements stating that the products contribute to the solution of environmental problems. FTC Proposal, in ANTITRUST L. & ECON. REV., Fall 1971, at 53.
8. Food commercials which may be viewed as encouraging poor nutritional habits were suggested as examples of "[a]dvertising stressing broad recurrent themes, affecting
vulnerable would be advertising claims resting on controversial scientific premises, as well as advertising which is silent about negative aspects of a product. With respect to the problem of allocating broadcast time, the FTC has suggested that paid counter-advertisements should have the same open access enjoyed by paid commercial advertisements. It was further proposed that five minutes of prime time each week be set aside without charge to permit discussion of issues not addressed in paid counter-advertisements.

These proposals for advertising regulation suggest the use of legal and administrative means for moving toward the theoretical ideal of a private, free enterprise system with its benefits for all segments of society. An underlying premise of counter-advertising is that the economic system must reward honest advertisers and deter all others. "Honest" advertisers may be defined as those who either attempt in good faith to disclose in their advertisements all relevant data concerning their products or avoid advertising which conveys controversial implications or questionable factual assertions. The specific aim of counter-advertising should be to encourage the former type of honest advertiser and to accept the latter as essentially neutral, being neither harmful nor helpful to the purchaser. The balance of advertisers are

the purchase decision in a manner that implicitly raises controversial issues of current national importance." Id. at 53-54.

9. The FTC proposal embraces "[a]dvertising claims that rest upon scientific premises which are currently subject to controversy within the scientific community." A cited illustration was a drug advertised as effective in curing or preventing an ailment. Although this claim may be based upon substantial scientific proof, that proof may be disputed by other members of the scientific community. The difference of opinion should be aired in order that the public may make its purchasing decision in full knowledge of the difference of opinion. Id. at 54-55.

10. Cited as examples of "[a]dvertising that is silent about negative aspects of the advertised product" were advertisements of small cars emphasizing low cost and economy but omitting safety comparisons with larger cars. Id. at 55-56.

11. Cf. Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971). It is anticipated that such time periods will expand as counter-advertising is recognized as compatible with the essential aspects of the existing broadcast structure. If, on the other hand, the proposal is unsuccessful, the time might decrease. This Article assumes that a further expansion of counter-advertising time and the rules defining it will occur but does not concede that the amount would be set at 20 percent of advertising time. See Loevinger, supra note 2, at 8. Exaggerations of the time proposed for counter-advertising and other distortions of the FTC proposal have existed since its inception. See Wall Street Journal, Mar. 1, 1972, at 1, col. 1.


13. The theory is that the private, free enterprise system will benefit all, not just business. See A. Smith, THE WEALTH OF NATIONS. Thus, Adam Smith's classic work was not entitled "The Wealth of Businessmen."
"nondisclosing" advertisers, who, while utilizing facts in their advertisements, either omit relevant facts or make questionable assertions. In other instances, their advertisements present implications of a factual or controversial nature without the actual assertion of facts. Nondisclosing advertisers are not labelled dishonest herein, although some undoubtedly are. Instead, many advertisers of this type are recognized as either in philosophical disagreement with the counter-advertising principle of a fully informed public or unaware of the importance of such a principle to the economic system and to the reputation of business.

Regardless of whether the importance of full disclosure is ever understood by the advertising industry, subjecting nondisclosing advertisers to counter-advertising will generate several positive results in the economic system. Most immediately, purchasers will receive more relevant data with which to make more rational purchasing decisions. As a consequence, products which are most efficient in satisfying consumer wants will prevail in the marketplace. Significantly, market adjustments will be achieved not by governmentally controlled decisions but rather through private responses. Moreover, by utilizing legal coercion to encourage self-regulation by advertisers, the objectives of counter-advertising can be realized at minimal cost to the broadcast industry. It is to be expected that, after initial applications of counter-advertising in heavy doses, nondisclosing advertisers will act to avoid being subject to the adverse marketing impact and additional costs presumably resulting from presentation of their products in an unfavorable light. Moreover, supporting the expectation that the objectives of counter-advertising can be achieved in the short term is the FTC's recently

14. The counter-advertising proposal is not intended as a remedy for dishonest advertising. Other sanctions, such as preliminary injunctions, are more appropriate in dealing with such practices. See notes 150-51 infra & accompanying text.

15. Coercion inheres in any legal system. "A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation." J. Rawls, supra note 6, at 235.

16. See notes 166-86 infra & accompanying text.

17. See notes 176, 204-05 infra & accompanying text.

18. But cf. Comment, And Now a Word Against Our Sponsor: Extending the FCC's Fairness Doctrine to Advertising, 60 Calif. L. Rev. 1416, 1446 n.172 (1972), in which it is concluded that cigarette advertising was, at most, stunted by the decision in Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969). The amount expended for such advertising fell from over $216 million in 1967 to over $195 million in 1970, the last year before the ban (15 U.S.C. § 1335 (1970)) on such advertisements went into effect. 60 Calif. L. Rev. at 1446 n.172. The 1970 expenditures, however, exceeded the 1966 amount by over $1 million. Id.
gained authority to seek preliminary injunctive relief against unfair advertising.\textsuperscript{19} By employing its powers, the FTC can discourage unfair advertising of any type and thus diminish the necessity of invoking counter-advertising as a remedy.

Beyond the positive impact counter-advertising would have in terms of efficiency of the economic system, adoption of the FTC proposal would provide the framework for greater candor by business and an opportunity to improve its current poor public reputation. Although some leaders in the business community have attributed the low esteem in which business is held by many Americans to the sincere but misguided efforts of public interest groups,\textsuperscript{20} the President of the United States Chamber of Commerce has praised Ralph Nader for attempting to restore basic ideals in the business community.\textsuperscript{21} Whatever the merits of the attempts by consumer groups to increase public awareness, it is little wonder that cynicism is directed at a business community which has opposed the mass of modern social legislation designed to regulate its activities, even though "these very laws created an environment in which business has thrived and enjoyed unprecedented prosperity and vitality."\textsuperscript{22} Business has helped create its image problem by misaligned itself on the wrong side of too many issues; rather than endeavoring to correct deficiencies resulting from a complex set of multiple interrelationships, business has fought the overwhelming majority of efforts at reform.\textsuperscript{23}

These public relations difficulties have been exacerbated by the reliance of the business community upon advertising as a means of improving its image. Such efforts are often counterproductive, since the general public disdain for and distrust of advertising naturally passes to the advertisers.\textsuperscript{24} Dean Prosser’s description of “puffing” illuminates


\textsuperscript{20} See Loevinger, supra note 2, at 1 passim.

\textsuperscript{21} Wall Street Journal, Sept. 19, 1973, at 19, col. 3. Other leaders subsequently disputed this view.

\textsuperscript{22} Barmash, Business “Is Own Worst Enemy to Public,” May Chairman Says, N.Y. Times, Jan. 8, 1974, at 45, col. 5. See also Barmash, Retailer’s Critical Speech Stirs Big Mail Response, N.Y. Times, Feb. 19, 1974, at 45, col. 3.

\textsuperscript{23} Barmash, Business “Is Own Worst Enemy to Public,” May Chairman Says, N.Y. Times, Jan. 8, 1974, at 45, col. 5.

\textsuperscript{24} Cigarette advertising provides one example from the spectrum of commercial advertising. Smoking cigarettes may not cause lung cancer, heart disease, and other disorders; nonetheless, a massive body of reputable scientific opinion has long supported the conclusion that it does. For many years the industry avoided any mention of the health danger in its advertising, and the media which accepted the advertising pro-
The problem: "The 'puffing' rule amounts to a seller's privilege to lie his head off, so long as he says nothing specific, on the theory that no reasonable man would believe him, or that no reasonable man would be influenced by such talk." Thus, while the puffing seller may avoid tort liability, he should not expect that his practices will engender warm public approbation.

The attention focused upon the credibility of broadcast advertisers is heightened by the importance of the electronic media as a means of disseminating information to the public. Although there are some alternative sources of information concerning products, several factors negate the value of these sources and emphasize that of broadcast advertising. Public opinion surveys demonstrate that television offers the most believable of all advertising forums and that such advertising attracts the most consumer attention. Furthermore, while television has a high appeal to upper socio-economic groups, it has an especially great impact upon those at the lower end of the socio-economic spectrum, since such individuals generally cannot be reached through the printed media.

As a result, television can be the most beneficial source of information aiding rational purchasing decisions, or, by retarding rational decisionmaking, it can be highly pernicious. Adding to the pernicious possibilities is the unavailability to most consumers of information countering the misleading aspects of what they regard as the most credible source of product information. For consumers acting alone, the cost of analyzing every product to determine unfavorable aspects and of disseminating such information would be prohibitive. In contrast, counter-advertising would provide a means by which consumers could pool their resources and present information concerning products in

26. See Loevinger, supra note 2, at 13-14.
28. Id.
29. Id.
the most effective manner. Furthermore, as advertisers discover the desirability of avoiding counter-advertising attacks and embark upon a course of full disclosure, or at least one of avoiding obfuscation by nondisclosure, the need for, and cost of, responsive measures would soon diminish.

America is gripped by a malaise, at the heart of which is the loss of credibility of its institutions. Indeed, the need for candor is the central point of the Watergate dilemma. In times such as these, however, the cries for honesty in government should not be permitted to drown out the equally justified pleas for honesty in business. The government alone has not caused an amazing number of people to regard the energy crisis as a conspiracy between the oil companies and the government; the conduct of the oil companies and the remainder of the business community has had a major impact upon public opinion. The business community can gain the confidence of the American public only by seeking ways to avoid repetitions of such histories. The most effective means of achieving a good reputation is to tell the full, unqualified truth. Support by businessmen of counter-advertising would be a step in the right direction.

**The Fairness Doctrine: Theoretical Basis for Counter-Advertising**

Elucidating the public interest criteria of the Federal Communications Act, the fairness doctrine provides the basis for the authority of the FCC to ensure that the public is not misled by one-sided broadcast advertising. Although the doctrine has a complex history, may be inconsistent in actual application, and lacks a resolved definition, it is an inherent and unavoidable part of broadcast regulation. Indeed, it

31. See Loevinger, supra note 2, at 29 n.39. Justice Loevinger argues that "any believer in democracy" must reject counter-advertising because it would increase governmental power. Merely preventing such an increase is not even remotely the lesson of Watergate. Rather, governmental power must be contained by the rule of law, preferably through full disclosure. As this Article will demonstrate, the counter-advertising proposal would protect by a rule of law the interests of weaker parties, that is, uninformed consumers, from stronger ones, that is, nondisclosing advertisers.

32. See Newsweek, Dec. 10, 1973, at 40 (in public opinion survey, business and Congress each received a rating for candor under 30 percent; that for the executive branch was less than 20 percent).


36. The Supreme Court has observed:

In 1959 the Congress amended the statutory requirement of § 315 that
now seems clear that the only alternative to application of the fairness doctrine to advertising would be its total repeal by the FCC. While undoubtedly pleasing to broadcasters, such an action would be of questionable legality.  

It is the scope of application of the fairness doctrine to broadcast advertising which is at the heart of the FTC proposal. This determination can, of course, be made through administrative adjudication and judicial decision. Nevertheless, administrative rulemaking which recognizes the nature of the public interest in all its complexities and balances the needs of the broadcast industry and the viewer would appear a far more attractive means of resolving the extent to which advertisers are subject to the fairness doctrine. Before examining the rationale for administrative authority and its reasonable limits, however, it is necessary to survey the history of the fairness doctrine and its application to advertising.

Development of the Fairness Doctrine through the Cigarette Controversy

Several early cases concerning control of program content under the public interest criterion illustrate the development of the fairness doctrine.

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37. In light of the 1959 amendments to section 315 of the Communications Act, 47 U.S.C. § 315 (1970) (see notes 36 supra & 47 infra), an attempted administrative repeal of the fairness doctrine would flout the enunciated legislative policy. Congress could repeal the relevant language of section 315, but such action is extremely unlikely.


39. Admittedly, FCC regulations would require elaboration in adjudicatory proceedings, as well as subsequent revision. Nevertheless, a comprehensive program would require minimal elaboration and revision as contrasted with a policy which must develop on a case-by-case basis.
trine, as well as its application to advertising. Although developing unsteadily, the principle of balanced presentations has remained a continuing thread throughout the history of broadcasting. More than 20 years before the clear genesis of the fairness doctrine in the FCC's 1949 Report on Editorializing by Broadcast Licensees, the Federal Radio Commission (FRC) asserted the importance of balanced program content in *Great Lakes Broadcasting Co.* Shortly thereafter the Court of Appeals for the District of Columbia Circuit upheld a ruling of the FRC in which the Commission, focusing upon a licensee's false advertising practices in its use of its station solely as an adjunct to its other business activities, found such purely commercial use improper. The same court also affirmed the FRC's refusal of a license to a church which proposed to use a radio station for the exclusive purpose of promoting its denomination; it was held that a licensee, to serve the public interest, must present diverse views and not merely those reflecting its ideas. Although not bearing directly on the current controversy concerning application of the fairness doctrine to advertising, these early decisions demonstrate an historic concern with advertising as well as balance in program presentations.

Between 1943 and 1949 the FCC directed most of its resources to solving the problems of licensee involvement in political campaigns. During this period, nevertheless, the Commission faced squarely for the first time the question whether members of the public should be afforded the opportunity to challenge broadcast advertisements. In *Sam Morris* residents of localities which prohibited the sale of alcoholic beverages protested the advertising of such products on a station serving their area. Framing its decision in terms of the public interest, the FCC clearly indicated that such advertisements were open to chal-

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42. KFKB Broadcasting Ass'n v. FRC, 47 F.2d 670 (D.C. Cir. 1931).

43. Trinity Methodist Church, South v. FRC, 62 F.2d 850 (D.C. Cir. 1932), cert. denied, 288 U.S. 599 (1933).

44. This effort culminated in the Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

45. 11 F.C.C. 197 (1946).
lenge because the matter was one of controversy and public importance.\textsuperscript{46}

While not fully inert, the fairness doctrine had limited application for almost two decades after the 1949 statement on editorials. Indeed, the most significant occurrence in this interval was the implicit congressional approval of the doctrine in the 1959 amendment to section 315 of the Communications Act.\textsuperscript{47} The development of the fairness doctrine in the area of broadcast advertising lay dormant until the FCC decision in WCBS-TV, Applicability of the Fairness Doctrine to Cigarette Advertising.\textsuperscript{48} The FCC ruled that the doctrine attached to cigarette advertisements, expressly limiting its holding to that product, however. The Court of Appeals for the District of Columbia Circuit, although affirming the FCC decision when the case came before it as Banzhaf v. FCC,\textsuperscript{49} placed severe restraints upon the application of the doctrine to advertising. Observing that the public interest standard applies primarily to program content, the court reasoned that it could not uphold the Commission's ruling "merely on the ground that [the decision] may reasonably be thought to serve the public interest."\textsuperscript{50} Instead it was deemed necessary to explore fully the reasons for applying the fairness doctrine to cigarette advertising.

The Commission's position had been based upon the theory that the

\textsuperscript{46} Id. at 199. The Commission indicated that it would consider a continuation of present policy at the next license renewal. The matter never achieved visibility again, perhaps because of the strong stand by the National Association of Broadcasters against liquor advertising. See Broadcast of Programs Advertising Alcoholic Beverages, 5 P & F Radio Reg. 593 (1949).

\textsuperscript{47} Section 315, as amended, provides, in pertinent part:

\begin{itemize}
  \item Appearance by a legally qualified candidate on any—(1) bona fide news-cast, (2) bona fide news interview, (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or (4) on the spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters . . . from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.
\end{itemize}


\textsuperscript{49} 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969). The court rejected the appellant's request for equal, rather than fair reply, time.

\textsuperscript{50} Id. at 1096.
public interest must comprehend protection of the public health.\textsuperscript{51} Noting that this rationale has “become a kind of basic law, both justifying new extensions of old powers and invoking the legitimate concern of government wherever its regulatory power otherwise extends,”\textsuperscript{52} the court observed that some public health issues are “murky” and that the FCC has no special expertise to determine which issues affect the public health.\textsuperscript{53} Nevertheless, the court rejected the objections to enforcement of the FCC ruling because of the unique health hazards associated with cigarettes.\textsuperscript{54} It was emphasized that the mere reporting of such hazards would not be an effective challenge to assertions made in the extensive broadcast advertisements of cigarettes.\textsuperscript{55}

Having found that the public interest criterion permits regulation, the court turned to the first amendment questions\textsuperscript{56} raised by application of the fairness doctrine to broadcast advertising. First, it was observed that the decision of the FCC would not ban the discussion of smoking and that cigarette commercials would still be permitted.\textsuperscript{57} Second, the court concluded that the speech content of cigarette advertisements “barely” qualifies as constitutionally protected speech,\textsuperscript{58} despite a possible chilling effect.\textsuperscript{59} Furthermore, the court noted with approval the observation by the FCC that a full discussion about controversial questions of public importance contributes to the public debate.

\begin{itemize}
\item \textsuperscript{51} See WSBC, Inc., 2 F.C.C. 455 (1936); Oak Leaves Broadcasting, 2 F.C.C. 298 (1936).
\item \textsuperscript{52} 405 F.2d at 1097.
\item \textsuperscript{53} Id.
\item \textsuperscript{54} The court noted that the grave dangers of cigarette smoking are inherent in the normal use of the product and threaten the lives of a substantial portion of the population. Moreover, the dangers had been established by a “compelling cumulation of statistical evidence,” the Commission having relied upon the conclusions of the Surgeon General’s advisory committee. Id. at 1097-98.
\item \textsuperscript{55} The court observed: “[A]s a public health measure addressed to a unique danger authenticated by official and congressional action, the cigarette ruling is not invalid on account of its unusual particularity. It is in fact the product singled out for treatment which justifies the action taken.” Id. at 1099.
\item \textsuperscript{57} 405 F.2d at 1099, 1100.
\item \textsuperscript{58} Id. at 1101. The court noted that promotional advertising generally is not within the ambit of first amendment protection since such advertising does not affect the political process, contribute to the exchange of ideas, or provide information on matters of public importance. Rather, since it provides a form of individual expression only for the advertiser, the promotion of product sales is a form of merchandising subject to limitation for public purposes, like other business practices. Id. at 1101-02.
\item \textsuperscript{59} Id. Presumably, being forced to accept free anti-smoking advertisements would deter licensee acceptance of advertisements promoting cigarettes.
\end{itemize}
Recognizing that the free speech argument of the cigarette and network interests would ensure for the wealthy the loudest and most extensive voice in the marketplace of ideas, the court reasoned that to accept the argument of those interests would provide them a distinct advantage in guiding the debate without regard to the truth or the innate popular appeal of the argument. Consequently, in language foreshadowing that used by the Supreme Court in *Red Lion Broadcasting Co. v. FCC*, the court of appeals found that the FCC ruling actually furthered free speech.

**Application of the Fairness Doctrine to Controversial Issues Raised by Commercial Advertising**

Although the narrowly circumscribed *Banzhaf* decision left many important questions unanswered, it provided the basis for the decision in *Friends of the Earth v. FCC* applying the fairness doctrine to automobile and gasoline advertising. The FCC had rejected the request for counter-advertising, but the Court of Appeals for the District of Columbia Circuit held that “when there is undisputable evidence as there is here, that the hazards to health implicit in air pollution are enlarged and aggravated by such products, then the parallel of cigarette advertising is exact.” Noting that the *Banzhaf* ruling had not had a detrimental effect on the electronic media, the court rejected the unsupported position of the FCC that mandatory reply to commercials involving controversial issues of public importance would disrupt the broadcasting system.

61. The court observed:

[N]ot 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. And the provision of information is no small part of what the First Amendment is about. A political system which assigns vital decisions to individual free choice assumes a well-informed citizenry. We do not think the principle of free speech stands as a barrier to required broadcasting of facts and information vital to an informed decision to smoke or not to smoke.

405 F.2d at 1103.
62. 449 F.2d 1164 (D.C. Cir. 1971).
64. 449 F.2d at 1169.
65. *Id.* at 1168.
The public controversy concerning pollution remains in 1974 and, indeed, has been intensified by the energy crisis; the FCC, nevertheless, has retained the position it asserted in *Friends of the Earth* that programming on the pollution issue is subject to the program balance requirements of the fairness doctrine but advertising implicitly raising that issue is not. An examination of the FCC position illuminates many of the tenuous and fallacious arguments currently being urged against adoption of the FTC counter-advertising proposal.

The FCC argued in *Friends of the Earth* that, because balancing the benefits and detriments of polluting products involves more complex issues than the cigarette controversy, the rationale for requiring reply spot advertisements to counteract cigarette advertising should be inapplicable to the pollution issue. Although there is merit to the argument that complex issues should not be discussed in the psychologically appealing format of spot advertising, the conclusion of the Commission against permitting such spot counter-advertisements is untenable so long as spot advertisements urging consumption of products emitting pollutants remain permissible. Moreover, just as the news and editorial coverage of the cigarette health hazard faced oblivion in the onslaught of massive cigarette advertising, the interaction of news and other coverage of the pollution problem will be of limited effect as long as polluters advertise massively and those seeking to end pollution cannot. Thus, an argument can be made against all spot announcements concerning controversial issues but not against permitting reply to those presenting only one side of an issue.

Counter-advertising is needed to inform the public of the dangers inherent in polluting products and would not, as the FCC implied in *Friends of the Earth*, discourage technological innovation aimed at improving the quality of life. The issue which must be resolved is not the use or non-use of polluting products; instead, the focus of the controversy is upon advertising which conceals the fact that some of the fruit of the technological revolution, if not altogether poisonous, may be so tainted as to threaten the quality of life. Granting the propriety

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66. 24 F.C.C.2d at 750.
67. Id. at 746.
69. A total ban of controversial spot advertisements probably would be financially disastrous to the broadcast industry. Moreover, such an action would fail to aid in providing consumers the information with which to make rational purchasing choices.
70. 24 F.C.C.2d at 746.
71. 449 F.2d at 1169.
of promoting the use of technological developments, the target of the
FTC proposal is promotion which obfuscates or fails altogether to pre-
sent information concerning deleterious effects of products. Such in-
adquate advertising inhibits the public’s access to essential consider-
ations and thereby violates the public interest criterion of the Communi-
cations Act. 72

Rather than supporting counter-advertising, the FCC suggested in
Friends of the Earth that advertising is peripheral to solving the pollu-
tion problem. 73 It is submitted, however, that the policy decision of re-
quiring counter-advertising, or of prohibiting advertising rather than
banning a product, applies equally to cigarettes and pollutants. The
presentation of complete information promotes the freedom of con-
sumers to use products which harm only the user or which fulfill a
substantial need of society or a large segment of it. Since cigarettes af-
ford many people pleasure or fulfill a psychological need, consumers
must be permitted to balance the benefits against the potential harm of
cigarette smoking and thus reach their own conclusions. The balancing
process requires advertisers to present the needed information rather
than avoid the issue. Although most common polluting products harm
persons other than the user, many fulfill great societal needs and indi-
vidual desires. Consequently society and individuals need complete in-
formation to determine permissible total use and appropriate individual
use of such products. The recognition that some utilization of pollut-
ing products is essential to American civilization does not support un-
bridled advertising which urges the overuse 74 and misuse of products
to achieve a “full rich life” and which ignores the undesirable conse-
quences. 75 By requiring disclosure of controversial and undesirable ef-
fects, a system of counter-advertising would balance satisfactorily the
interests of society and the business community. 76

The asserted peripheral effect of advertising was not the foundation
of the FCC ruling in Friends of the Earth; rather, that basis was the
Commission’s fear that requiring counter-advertising responses would

72. Id. at 1169-71.
73. 24 F.C.C.2d at 746.
74. If a product is generally desired or actually needed by large numbers of people,
consumers will purchase a sufficient amount of the product to fulfill that desire or
need in the absence of advertising exaggerating the product’s benefits.
75. 449 F.2d at 1169.
76. Admittedly, neither counter-advertising nor the total FTC effort to regulate
advertising will solve every advertising problem. Nevertheless, counter-advertising
should remedy many of the deficiencies in current advertising practices.
undermine the present system of broadcasting. The Commission's argument that counter-advertising would place an unreasonable financial burden on the broadcast industry, however, was tacitly rejected in Red Lion Broadcasting Co. v. FCC, where the Supreme Court stated that if broadcasters sought to avoid any increased costs resulting from application of the fairness doctrine by curtailing programming coverage of a particular controversy, the FCC should be prepared, nevertheless, to require coverage. It is submitted, moreover, that the entire financial argument lacks merit; not a scintilla of evidence suggests that the networks would collapse under the burden of anti-pollution advertisements.

The FCC again refused to apply the fairness doctrine to advertisements concerning pollution in Alan F. Neckritz, despite warnings from the dissent that stronger rules may be forced upon the Commission by the courts. Complainants argued that advertisements for Chevron with F-310 suggested that the gasoline contributed significantly to cleaner air. The majority of the Commission, finding that the advertisement was merely competitive and did not raise the issue of air pollution despite its allusion to cleaning the air, stated: "The Chevron advertisements do not claim there is no danger in air pollution . . . but assert, instead, that use of the sponsor's product helps to solve the problem." It was also observed that the fairness doctrine was not intended

77. 24 F.C.C.2d at 748-49.
78. Id. In assessing the financial impact of counter-advertising, it is instructive to note that application of the fairness doctrine to cigarette advertising clearly did not drive such advertising from the air. See Comment, And Now a Word Against Our Sponsor: Extending the FCC's Fairness Doctrine to Advertising, 60 CALIF. L. REV. 1416, 1446 n.172 (1972), discussed in note 18 supra. Moreover, an inquiry might be made into the value of saving a system of broadcasting if it is dependent upon advertising which conceals, glosses, or distorts information which is vital to the health of some individuals and perhaps to the survival of mankind. See generally Economic Aspects, supra note 27 (discussing alternatives to the present system).
80. Id. at 393-94.
81. 29 F.C.C.2d 807 (1971).
82. Id. at 816.
83. Various versions of the advertisement presented a late model Chevrolet with a large balloon attached which turned black with exhaust, a car engulfed in a bag of black smoke, and exhaust ignited with a blow torch to indicate unburned gasoline in the exhaust. These advertisements asserted that the depicted conditions were remedied by the use of six tankfuls of the gasoline and concluded that "F-310 turns dirty exhaust into good clean mileage." Id. at 807-08.
84. Id. at 812.
to apply to advertisements which refer to, but do not discuss, controversial issues.

What the FCC appears to have ignored is that the advertiser used the issue of air pollution as a means of improving public opinion of its product.\textsuperscript{85} Various federal and state governmental actions regarding the advertisements attest to their controversial character.\textsuperscript{86} This and many other advertisements claiming pollution abatement raise the controversial issue whether the advertised product actually makes a significant contribution to the public policy of ending pollution. Nevertheless, while conceding that a blatantly controversial assertion concerning ecology would invoke the fairness doctrine,\textsuperscript{87} the FCC attempted to restrict the application of the doctrine in advertising to the "unique" cigarette.\textsuperscript{88} The FCC must recognize that such a position is too restrictive to be supported and that the public interest criterion of the Communications Act requires that it deal with the problems of controversy and deceit in broadcast advertising.

In an advertising controversy concerning labor relations, the Court of Appeals for the District of Columbia Circuit in \textit{Retail Store Employees' Union v. FCC}\textsuperscript{89} instructed the FCC to refine its analysis\textsuperscript{90} of the applicability of the fairness doctrine. The court stated that strikes and union boycotts are clearly controversial issues of substantial public importance within the community,\textsuperscript{91} noting that Congress had enacted labor legislation dealing with the broad problem of economic warfare between labor and management as well as the specific problems engendered by union strikes and boycotts.\textsuperscript{92} Although the court found that there might be circumstances in which a licensee would have to

\textsuperscript{85} See \textit{id.} at 817 (dissenting opinion).
\textsuperscript{86} At the time of the FCC decision in \textit{Alan F. Neckritz}, the FTC had issued a complaint against the advertisement. In addition, the California Air Resources Board and the Hawaiian State Consumer Protection Committee had found the advertisement to be misleading. \textit{id.}
\textsuperscript{87} 29 F.C.C.2d at 812.
\textsuperscript{88} \textit{id.} at 811.
\textsuperscript{89} 436 F.2d 248 (D.C. Cir. 1971). The controversy arose out of a strike by the appellant union against an Ashtabula, Ohio, department store within the broadcast area of radio station WREO. Without mentioning the strike, WREO carried advertisements for the store while also carrying a substantial number of union advertisements supporting the strike. In April 1966, the station refused further advertisements from the union concerning the strike, proposing instead a roundtable discussion of the issue. Neither party accepted the proposal. \textit{id.} at 250-51.
\textsuperscript{90} 14 F.C.C.2d 423 (1968).
\textsuperscript{91} 436 F.2d at 258.
\textsuperscript{92} \textit{id.} at 259.
grant reply time to a union to answer labor-related assertions in a retail store's advertising, it did not suggest the factors the FCC should consider in determining when the fairness doctrine is triggered. Nevertheless, the suggestion is plain that the FCC position will receive intensive judicial scrutiny.

Implementation of the FTC counter-advertising proposal clearly would overrule administratively the FCC decisions in *Alan F. Neckritz* and *Retail Store Employees' Union*. Because the gasoline advertisement in *Alan F. Neckritz* affected the purchase decision in a manner which implicitly raised controversial issues of current national importance and made controversial scientific claims, it clearly would have invoked counter-advertising under the second and third criteria of the FTC proposal. Similarly, the FCC decision in *Retail Store Employees' Union* is inconsistent with the second element of the proposal, since the advertising implicitly raised controversial labor relations issues.

Continuing the administrative and judicial effort to define controversial advertising, the Court of Appeals for the District of Columbia Circuit in *Green v. FCC* affirmed the FCC ruling that the fairness doctrine was inapplicable to military recruiting advertisements on the ground that the advertising raised no controversial issue of public importance. Reasoning that the only issue raised was voluntary recruitment, the court rejected the argument that the draft, the Vietnam war, the morality of war, and the desirability of military service were implicit issues in the advertisement. The *Green* decision thus can be reconciled with *Banzhaf* and *Friends of the Earth* upon the basis that the former did not deal, implicitly or explicitly, with a controversial subject, whereas *Banzhaf* clearly concerned a controversial subject and *Friends of the Earth* contained inherent elements of controversy. That attempted distinction, however, remains vulnerable. Are not the

93. See note 8 supra & accompanying text.
94. See note 9 supra & accompanying text.
95. See note 8 supra & accompanying text.
96. 447 F.2d 323 (D.C. Cir. 1971).
98. 447 F.2d at 329-31.
99. Id. at 330.
100. The *Banzhaf* decision focused upon the existence of a controversy rather than upon the implication of one. Nevertheless, the advertisements at issue in that case either raised the health issue only by implication or were silent about that consideration. Because the cigarette smoking issue also includes scientific controversy, cigarette advertising also falls within the third category of the FTC proposal. See note 9 supra. Most advertising embraced by the proposal meets more than one of the criteria.
draft and the desirability of military service implicitly involved in advertising for voluntary recruitment? The answer appears less clear than the FCC and the court of appeals were willing to admit.\textsuperscript{101}

Because the \textit{Green} court narrowly construed the \textit{Banzhaf} rule, it seems clear that it would not have ordered spot reply advertisements even if the military recruitment advertisements were deemed to be controversial. In \textit{Banzhaf} it was held that discussion of cigarette smoking on news or educational programs was an insufficient means of challenging the claims made in extensive commercial spot advertising.\textsuperscript{102} The court in \textit{Green} indicated, however, that the mere fact that one side of an issue is discussed in advertisements does not mean that a necessary balance must be struck through reply advertisements presenting an opposing point of view.\textsuperscript{103}

The decision in \textit{Green} also overlooks a serious candor problem in the military recruitment advertising. Extremely laudatory of the military, the advertisements failed to present the arduous, dangerous aspect of military service. Indeed, a striking parallel exists between the "you'll get more out of life" advertisements for cigarettes and the military recruitment effort. Advertising which distorts the reality of war or military service in peacetime creates the same problems as other types of distorting advertisements. Undoubtedly, nearly everyone knows the reality of military service; indeed, this widespread knowledge appears to be the basis of the court's findings.\textsuperscript{104} Nevertheless, advertisements omitting material facts are improper, whatever the subject matter. In short, the court erred in finding that an advertisement omitting vital data represented a suitable access to ideas and experience.\textsuperscript{105}

The clear purpose of advertising frequently is to overcome rational

\textsuperscript{101} An examination of the debate on ending the draft suggests the interrelationship of voluntary recruitment and the draft. Evidencing the connection among all forms of fulfilling manpower requirements, a major issue is whether an end to the draft will seriously reduce draft-induced enlistments labelled "voluntary." Such voluntary enlistments are an important alternative to the draft, but the court in \textit{Green} did not discuss this interrelationship, instead reasoning simplistically that "one who voluntarily enlists, which is the object of recruitment announcements, is not a draftee." 447 F.2d at 330. Those whose enlistments had been induced by the draft might doubt the statement, despite its literal truth. Such enlistments were motivated in part by a desire to gain the benefits suggested by the advertisement while avoiding the disadvantages that might flow from the draft. Indeed, the court's statement might be regarded as substantially incorrect.

\textsuperscript{102} 405 F.2d at 1098.

\textsuperscript{103} 447 F.2d at 333.

\textsuperscript{104} Id. at 331.

decisionmaking, "no matter how fully the seeming subject matter is covered in the licensee's programming or is patently apparent to the public," and thus to induce the results sought by the advertisement. On issues of controversy, the public interest criterion requires that the consumer be permitted to make a rational decision. This being so, it follows that the public interest should also require remedial presentation of factual data which is detrimental and material, without regard to the controversial nature of the matter involved in the underlying issue. Addressing the problem of silence in advertising, the fourth criterion of the FTC counter-advertising proposal would provide the opportunity for reply to the advertisements in Green unless the public interest in maintaining the military were found to outweigh the harm of the omission.

The foregoing review of opinions concerning the application of the fairness doctrine to advertising indicates that the FCC and the courts can resolve marginal factual problems realistically and thereby move toward the goal of more specific, inclusive standards. Nevertheless, it is submitted that a preferable means of clarifying the limits of the fairness doctrine and the public interest criteria would be to implement the comprehensive FTC counter-advertising proposal. An analysis of the controversies to which the fairness doctrine has been applied indicates

107. See note 10 supra & accompanying text.
108. 447 F.2d at 329.
109. Without administrative clarification, continued litigation is almost certain. Since the fairness doctrine is legislatively sanctioned (see notes 36-37 & 47 supra), the FCC must enforce it or the judiciary will. The courts are unlikely to overrule Banzhaf and Friends of the Earth; furthermore, congressional repeal of the doctrine appears equally improbable. Thus, a comprehensive definition of the doctrine by the FCC is desirable to further justice and administrative and judicial efficiency.

A clarification of the fairness doctrine also will assist pleading and proof in subsequent litigation. Presently, after a complainant establishes a prima facie case, the burden of proof shifts to the respondent. Office of Communications of United Church of Christ v. FCC, 425 F.2d 543, 549 (D.C. Cir. 1969). In Hale v. FCC, 425 F.2d 556 (D.C. Cir. 1970), the court stated that to establish a violation of the fairness doctrine, complainants must show that specific programs have dealt with controversial issues partially, and, if so, that other programs on the station have not balanced the coverage by presenting opposing viewpoints. Acknowledging that the doctrine looks to the general balance of a station's programming, the court stated, as follows, that proof of a violation must be based on specific facts:

Where complaint is made to the Commission, the Commissioner expects a complainant to submit specific information indicating (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the
that the first and second categories of the proposal are generally within, and the third and fourth categories are easily derived from, the doctrine as presently enunciated. Only rarely will advertisements for a product fall within either of the first two categories without involving the third or fourth as well. Retail Store Employees' Union and Green exemplify the rare advertisement which fits within only one category under the proposal. Promoting cigarettes as part of the good life, the Banzhaf advertisements implicitly raised a continuing health controversy, involved a scientific dispute, and failed to disclose a negative aspect, thereby coming within categories two, three, and four. Arguably, the advertisements in Friends of the Earth and Alan F. Neckritz involved both implicit and scientific controversies.

It is perhaps unfortunate that everyday products involve inherent policy problems. In an interacting society which is both a biological and social ecosphere, however, the actions of every person, including his use of products, affect other citizens and the public interest. Consequently, the connection between products and controversial issues is clear and unavoidable.

**Counter-Advertising and the First Amendment**

Any discussion of the economic and social justification for counter-advertising requires a consideration of whether application of the fairness doctrine to advertising is consistent with first amendment guarantees. Decisions of the Supreme Court in Red Lion Broadcasting Co. v.

basis for the claim that the station has presented only one side of the question; and (5) whether the station had afforded, or has plans to afford, an opportunity for the presentation of contrasting viewpoints.

*Red Lion* at 558-59. While perhaps reasonable, the standard suggested in *Hale* is difficult to meet, requires an examination of previous programming in considerable detail, and will deter many parties from initiating litigation. See Collins, *Positing a Right of Access: Evaluations and Subsequent Developments*, 15 Wm. & Mary L. Rev. 339, 349-50 (1973). Only determined individuals desiring meaningful dialogue, rather than loud militants seeking diatribe, will be able to meet the *Hale* standard.

110. See note 7 *supra* & accompanying text. See also Retail Store Employees' Union v. FCC, 436 F.2d 248, 258 (D.C. Cir. 1971); Alan F. Neckritz, 29 F.C.C.2d 907 (1971) (dictum).

111. See note 8 *supra* & accompanying text. See also Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971); Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

112. See note 9 *supra* & accompanying text.

113. See note 10 *supra* & accompanying text.
COUNTER-ADVERTISING

FCC\textsuperscript{114} and Pittsburgh Press Co. v. Commission on Human Relations\textsuperscript{116} together rebut any constitutional arguments against the FTC proposal. Product advertising is the prime example of commercial speech, which was specifically held in Pittsburgh Press to be outside the ambit of first amendment protections.\textsuperscript{116} There is thus no constitutional impediment to applying the fairness doctrine, held constitutional in Red Lion, to require broadcast licensees to ensure the equitable coverage of controversial subjects explicitly or implicitly raised in commercial advertisements.\textsuperscript{217}

Columbia Broadcasting System v. Democratic National Committee,\textsuperscript{118} involving noncommercial advertising, is of no assistance to opponents of the FTC proposal. Rather than basing their challenge on the fairness doctrine, the plaintiffs in that case argued that an absolute refusal to sell time for political advertisements\textsuperscript{119} violated the right of access created by the Communications Act and the first amendment.\textsuperscript{120} The Supreme Court rejected this argument on the basis of the legislative history of the Communications Act,\textsuperscript{121} an absence of state action,\textsuperscript{122} and the lack of a first amendment right of access.\textsuperscript{123} Moreover, limiting its decision to the facts of the case, the Court specifically left open the possibility for legislation or a Commission rule either forbidding an absolute refusal by a licensee to accept political advertisements or requiring that any such advertisement be accepted.\textsuperscript{124}

Presented in a portion of Chief Justice Burger's opinion in Democratic National Committee which received the support of less than a majority of the Court, the argument that the first amendment requires "editorial independence" could provide a basis for invalidating an ad-


\textsuperscript{116} For protection to arise under the first amendment, the material at issue must have idea content. 413 U.S. at 385.

\textsuperscript{117} See Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969).

\textsuperscript{118} 93 S. Ct. 2080 (1973).

\textsuperscript{119} Id. at 2084-86.

\textsuperscript{120} Id. at 2084.

\textsuperscript{121} Id. at 2087-91.

\textsuperscript{122} Id. at 2092-96.

\textsuperscript{123} Id. at 2099-2101.

\textsuperscript{124} Id. at 2094.
vertising reply regulation.\textsuperscript{125} For invalidation to occur under this theory, the intrusion of the regulation must be so great that effective editorial control is shifted from the licensee to the regulator.\textsuperscript{126} The threat to the validity of counter-advertising on this basis appears minimal for two reasons. In the subsequent decision in \textit{Pittsburgh Press}, no other justice joined or advanced the Chief Justice's position concerning editorial independence.\textsuperscript{127} Furthermore, the history of the fairness doctrine demonstrates that the FCC has given the licensee broad discretion to exercise its public trusteeship in good faith and that the Commission acts only when the licensee breaches that trust.\textsuperscript{128} Continuing this longstanding policy, any final set of FCC counter-advertising rules should both encourage maximum compliance and provide continued monitoring to assure that the standards do not work an abusive or arbitrary hardship upon the licensee.\textsuperscript{129}

As noted previously, the Court in \textit{Democratic National Committee} left unresolved the validity of a statutory or administratively created right of access for ideas. In \textit{Tornillo v. Miami Herald Publishing Co.},\textsuperscript{130} however, the Florida Supreme Court, following the rationale of the decision in \textit{Red Lion Broadcasting Co.} to its logical conclusion, upheld an ineptly drafted state statute requiring access for reply to political attacks.\textsuperscript{131} The court's enlightened concept of access was based upon the theory that the first amendment accords greater value to the right to

\begin{enumerate}
\item[125.] The argument was advanced in Part III of the opinion. \textit{Id.} at 2092-96. Only Justices Rehnquist and Stewart joined the Chief Justice on this point.
\item[126.] \textit{Id.} at 2095-96.
\item[128.] Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).
\item[129.] \textit{See} note 186 infra & accompanying text.
\item[130.] 287 So. 2d 78 (Fla. 1973), rev'd, 42 U.S.L.W. 5098 (U. S. June 25, 1974). A special concurrence by Justice Roberts of the Florida court distinguished \textit{Democratic National Committee}. \textit{Id.} at 87-89.
\item[131.] The statute provides:
If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in \$ 775.082 or \$ 775.083.
\end{enumerate}

\textit{FLA. STAT. ANN.} \$ 104.38 (1973). The statute is vulnerable to attack for vagueness and overbreadth.
receive ideas than to the right of the broadcaster or publisher to editorial independence. It is thus clear that the rationale of Red Lion Broadcasting Co. ultimately supports the consistency between the first amendment and a counter-advertising regulation. Enforcement of the fairness doctrine to its fullest functional extent is a necessary and valuable ingredient in a broadcasting system which values and protects free speech. Moreover, the FTC proposal, by providing an excellent format for presenting the public with information, would assist in the realization of the goals of rational decisionmaking and a reputable business community.

PRACTICAL DIFFICULTIES OF IMPLEMENTING A COUNTER-ADVERTISING PROPOSAL

A fair evaluation of the counter-advertising proposal must take account of the practical problems arising from its implementation. An assessment that the proposal will present significant difficulties suggests the need to explore positive solutions. Thus, having established the theoretical justification for counter-advertising, it is now necessary to examine in some detail the insuperable obstacles which opponents have asserted would be inherent in application of the FTC proposal. These practical difficulties include the economic impact of counter-advertising upon the electronic media, its influence on the nature of advertising, and the involvement of politics in advertising questions. The administrative character of the FTC proposal avoids the practical problems which might arise under either a judicially enforced program or a legislatively enacted counter-advertising format. Moreover, even conceding that practical difficulties exist in implementing the proposal, most of these problems can be adequately resolved by a proper utilization of the administrative process.

The Nature of the Administrative Process

Endowed with flexibility, a properly functioning administrative process provides the most appropriate governmental avenue for implementing a counter-advertising program. Through a process of experimentation, an administrative agency can respond to new problems rapidly. This is partially due to the fact that an agency, particularly one with rulemaking authority, is not as inhibited by stare decisis as the

132. 287 So. 2d at 87.
133. E.g., Loevinger, supra note 2, at 8-21.
courts in reversing prior decisions\textsuperscript{135} and also because it can act more quickly than the Congress in formulating innovative and complex programs.\textsuperscript{136} As long as it acts in furtherance of its statutory purpose, an administrative agency can, when necessary, freely change its policies or procedures.\textsuperscript{137}

Because of these important considerations, it is manifest that the administrative process should be used as the means of implementing the FTC's counter-advertising proposal. The FCC could, for example, require only the most economically viable stations to run counter-advertisements until it determines the economic impact of the proposal.\textsuperscript{138}

In addition, the percentage of time initially established as the upper limit for counter-advertising need not be as great as that which may eventually result, and the grant of reply time could at first be limited to only certain of the four categories outlined in the FTC proposal. A gradual implementation of the concept would protect against abuses and permit timely termination should serious problems arise.

Although there are other alternative means of achieving the objectives of counter-advertising, none appear as promising as the administrative process. For example, while helpful, voluntary private regulation has been generally unsuccessful in the past because of its limited effectiveness.\textsuperscript{139} A judicially created tort or legislatively enacted criminal statute would lack flexibility, and the latter would be overly punitive.

Another salutary characteristic of the administrative process is the ability to supplement abstract regulations with hypothetical examples.\textsuperscript{140} The inclusion of examples is designed to increase public certainty and

\begin{itemize}
\item \textsuperscript{135} Id. \S 17.09.
\item \textsuperscript{136} Id. \S\S 1.05, 1.39-40.
\item \textsuperscript{137} Cf. id. \S\S 17.01-09.
\item \textsuperscript{138} Perhaps network affiliates in the top 50 markets would constitute a group for the initial application. This was the standard utilized in implementing the FCC's prime time access rule, 47 C.F.R. \S 73.658(k) (4) (1973).
\item \textsuperscript{139} The newly created National Advertising Review Board appears to be doing more than any previous effort. Hopefully, the Board would supplement counter-advertising rules, make suggestions on their clarification and modification, and otherwise aid in the effort to provide more informative advertisements. However, the fact that the Board has no legal authority calls into question its long-range effectiveness. Cf. J. Rawls, A Theory of Justice (1972), in which it is argued: "It is reasonable to assume that even in a well-ordered society the coercive powers of government are to some degree necessary for the stability of social cooperation." Id. at 240.
\item \textsuperscript{140} Professor Davis has observed: "An agency which uses three tools for making law—adjudication, rules in the form of generalizations, and rules in the form of hypotheticals—is much better equipped to serve the public interest than an agency which limits itself to the first two of the three tools." K. Davis, Discretionary Justice 61 (Illini Books ed. 1973).
\end{itemize}
to decrease the possibility of arbitrariness on the part of the agency or a reviewing court.\textsuperscript{144} In a fashion, the FCC has provided examples in its statements on the fairness doctrine and local service,\textsuperscript{142} even some involving advertising situations.\textsuperscript{143} In the future, the Commission could use some of the absurd complaints and diatribe it has received to illustrate situations which do not warrant counter-advertising.\textsuperscript{144} The use of such examples would assist the FCC in performing its regulatory function and the broadcasting industry and advertisers in understanding the duties imposed upon them by counter-advertising regulations.

Although the FTC and the FCC were created by Congress to perform different functions, the agencies in some instances have overlapping duties and often deal with different facets of the same social or political problem. With respect to advertising, for example, the FTC controls the message, and the FCC regulates the broadcasting media.\textsuperscript{145} The suggestion that the FTC alone should bear responsibility for advertising abuses fails to appreciate the interrelationship of the two agencies. The FTC has the duty and power to regulate advertising and thereby forbid unfair and deceptive practices.\textsuperscript{146} On the other hand, the Communications Act gives the FCC the responsibility for regulating broadcasting in the public interest,\textsuperscript{147} a power which unquestionably reaches advertising. Unfair advertising cannot be reconciled with that standard, even if such advertising is a major source of a licensee's profits.

Recognizing the connection between unfair advertising and the public interest criteria, the FCC has held that subliminal advertisements "clearly are intended to be deceptive" and are inconsistent with the obligation of a licensee.\textsuperscript{148} Equally improper would be advertisements

\begin{enumerate}
\item[141.] Id. at 58-61.
\item[142.] Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1971); Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598 (1964).
\item[144.] One example is the assertion that dog food advertisements raise the issue of the effects of dog-carried pests upon humans. This assertion illustrates a situation which does not raise an implicit, controversial issue. See Loevinger, supra note 2, at 12-13. The FCC files contain many more examples, some of which will provide even better guidance concerning the limits of counter-advertising.
\item[145.] Liaison between FCC and FTC Relating to False and Misleading Radio and TV Advertising, 22 F.C.C. 1572 (1957) [hereinafter cited as Liaison Statement].
\end{enumerate}
urging the use of aspirins to treat cancer or promoting the sale of narcotics. Both the FTC and FCC must take responsibility for regulating such advertising by defining their respective areas of authority and, when necessary, working together to solve common problems.

An important functional distinction between the FTC and FCC may be used to explain the role of each agency in regulating advertising. The FCC has the affirmative duty to promote the effective use of broadcasting in the public interest. The FTC, on the other hand, has the responsibility of preventing abuse in advertising. Therefore, the FCC's mandate is to promote good, while that of the FTC is to prevent evil. In advertising issues, some developments are sufficiently harmful to require FTC action; the sanguine character of others suggests the desirability of FCC promotion. A great range of developments and situations, however, neither warrant absolute prohibition nor require approbation. In such situations, the FTC sanctions of cease and desist orders and preliminary injunctions are reasonably believed to be excessive. The agency could invoke these sanctions when other measures are unavailable but would be well advised to avoid them. Nevertheless, some administrative action is desirable in dealing with that type of advertising falling within the outer limits of "good" and "evil."

Advertising which provides just enough information about a product to be misleading exemplifies one such intermediate situation, as do commercials which implicitly raise scientific or other controversial issues. To further the public interest, both the proponents and opponents of the assertions made in such advertisements should be able to present their views so that the issues may be resolved in a civil and democratic

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The authority of the FTC to seek preliminary injunctions should supplement the Commission's other efforts to regulate advertising. Properly used, this authority will arrest blatant violations of section five of the Federal Trade Commission Act, 15 U.S.C. § 45 (1970). The FTC can employ lesser sanctions against less clear violations or in situations in which the product has both favorable and unfavorable aspects. For example, in many situations where an injunction is not an appropriate remedy, the advertiser should be given the opportunity to provide additional information concerning
manner. In this regard, the requirement that advertising present all relevant and controversial aspects of a product provides a more appropriate resolution than barring advertisements or even the product itself. Although these two remedies exist, the creation of an administrative framework which will encourage honest advertising in the first instance will be the best means of assuring that the public will have the information needed to make informed decisions concerning products.

In addition to the nature of the statutory mandates of the FCC and FTC, the development of the law of standing supports the desirability of promulgation by the FCC of counter-advertising regulations. The cases now permit members of the public who are injured in fact to appeal from an agency decision when the interest affected is arguably within the scope of protection of the relevant statute. Unquestionably, consumers are injured in fact by false or incomplete advertising which causes them to purchase products they otherwise would not buy. Given this injury and the fact that administrative agencies are inadequately funded, consumers perform a much needed function by becoming private attorneys general who vindicate the public interest. The role of the consumer varies considerably, however, in actions begun by the FTC and the FCC. The nature of FTC remedies and the FTC control of initiating actions largely preclude consumer involvement in the matters at issue before that agency. Conversely, the Communications Act requirement that licenses be granted in the public in-

its product. As Justice Brandeis observed: "If there be time to expose through discussion the falsehood and fallacies, the remedy to be applied is more speech, not enforced silence." Whitney v. California, 274 U.S. 357, 377 (1927) (concurring opinion).


154. See Loevinger, supra note 2, at 7. At one point, the author suggests that the FTC should seek additional funds which would enable that agency to enforce counter-advertising itself. Id. In apparent contradiction, he later criticizes the FTC for seeking additional funds by circumventing the Office of Management and Budget and going directly to Congress. Id. at 19. The Supreme Court has provided general support for the FTC's effort to obtain extra funds from Congress, noting: "The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in statute ... and to perform other specified duties as a legislative or judicial aid ... Its duties are performed without executive leave and ... must be free from executive control." Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935).

interest has resulted in an FCC format which encourages public participation in that agency's licensing and rulemaking proceedings.\textsuperscript{157}

The FTC and the FCC have a long-standing policy of cooperating to solve problems concerning broadcast advertising.\textsuperscript{158} Coordination of the two agencies' efforts is only logical in light of the massive advertising expertise of the FTC and the knowledge and experience the FCC has acquired in regulating broadcasting. Obviously, the FCC should employ its expertise to rectify deceptive and incomplete broadcast advertising. Any regulatory problems growing out of the overlapping jurisdictions of the FTC and FCC should be resolved by inter-agency cooperation and not by competition for congressional appropriations.

FTC and FCC cooperation will do much to allay the charge that counter-advertising discriminates against the broadcast media. Admittedly, the administrative imposition of a burden upon the electronic media and not upon all mass media would be a form of discrimination. The Supreme Court has consistently held, however, that such discrimination in the application of first amendment protections may be justified on the basis of differences between the broadcast and print media.\textsuperscript{159} Specifically, judicial approval of application of the fairness doctrine to broadcast advertising will continue absent congressional repeal, regardless of the announcement of administrative rules establishing a counter-advertising format. Administrative attention has, however, also focused on deficiencies in the other communications media. Designed to correct many genres of advertising abuses, the FTC's efforts to require substantiation of advertising assertions\textsuperscript{160} and to develop a viable system of corrective advertising\textsuperscript{161} would affect all media.

Those advocating the correction of advertising abuses harbor no desire to discriminate against radio and television. Nevertheless, since groups with limited resources must select targets with care, the electronic medium has been chosen as one of several primary areas for re-

\textsuperscript{157} The Communications Act permits an interested party to file a petition urging the Commission to deny the renewal of an existing license. 47 U.S.C. § 309(d)(1) (1970). The Act also allows any person, upon a showing of interest, to intervene in an action. Id. § 309(e).
\textsuperscript{158} Liaison Statement, \textit{supra} note 145.
\textsuperscript{159} E.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).
form because of its special characteristics. Many believe that the peculiarly persuasive impact and qualities of television render advertising abuse in that medium particularly harmful.\(^{162}\) Moreover, the Communications Act and its offspring, the fairness doctrine, provide an existing remedy for correcting that abuse.\(^{163}\) The goal of counter-advertising is to promote the availability of the information required for rational consumer decisions and not to "get" television.\(^{164}\) In due course more difficult problem areas in mass communications will receive attention until that goal is realized. The FTC's new authority to seek preliminary injunctions undoubtedly will aid that quest while minimizing any possible discrimination against the broadcast media.\(^{165}\)

Economic Impact of Counter-Advertising upon the Electronic Media

In addition to the alleged discrimination against the electronic media, opponents of counter-advertising argue that restrictions on advertising would undermine the economic structure of the broadcasting industry. Accordingly, this economic impact must be defined and minimized by the administrative framework selected to implement the FTC proposal. Unfortunately, the FCC, while doing little to determine the financial effect of counter-advertising, has asserted that the application of the fairness doctrine to advertising would severely harm the economic base of the industry.\(^{166}\) Neither the Commission nor its supporters have advanced any persuasive data to substantiate these assertions.

Utilizing complete data from its licensees, the FCC could attempt to predict the financial effect of counter-advertising by constructing an economic model of the broadcasting industry.\(^{167}\) Although the Commission does not presently have such data in a complete or usable form, and probably will not obtain it until after the counter-advertising issue

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163. See notes 34-113 supra & accompanying text.
164. See notes 206-23 infra & accompanying text.
165. Preliminary injunctions may be sought to correct abuses in all media. See note 151 supra.
167. See Economic Aspects, supra note 27, at 24. The Brookings Institution study attempts to create a model which can be used to evaluate present policies. Although some tentative extrapolation from the data is possible, the study does not provide the kind of information necessary for examining the impact of counter-advertising.
is resolved, efforts should now be begun to obtain the information.\textsuperscript{168} An economic model would not only be essential in evaluating the initial effect of counter-advertising on the broadcast industry but would also be helpful in monitoring the impact of continued regulation.

The unsupported assertion that counter-advertising will destroy broadcasting or gravely erode its quality fails to appreciate the nature of the administrative process. One of the salutary characteristics of this process is its ability to consider the economic impact of proposed procedures prior to their implementation and to monitor that impact after regulations have been promulgated and while they are being enforced. Initially, as previously suggested, the FCC could apply the fairness doctrine only to the more profitable licensees and impose lesser obligations upon those with lesser resources. Such an approach would be consistent with the standard enunciated by the Court of Appeals for the District of Columbia Circuit in \emph{Citizens Communications Center v. FCC}\textsuperscript{169} to be used in assessing license renewals, that court stating: "Along with elimination of excessive and loud advertising and delivery of quality programs, one test of superior service should certainly be whether and to what extent the incumbent has reinvested the profit on his license to the service of the viewing and listening public."\textsuperscript{170} Surely one way for a licensee to achieve the goals of eliminating "excessive and loud advertising" and of reinvesting profit to serve the public would be to forego initially some profit from advertising by providing free time to counter the dubious advertisements that remain.\textsuperscript{171}

Pessimistic about the chances for success of an administrative implementation of a counter-advertising program and ignoring the results of applying the fairness doctrine to cigarette advertising, opponents conclude that counter-advertising could generate significant financial losses in the broadcast industry.\textsuperscript{172} As already demonstrated, the obvious ad-


\textsuperscript{169} 447 F.2d 1201 (D.C. Cir. 1971). The court rejected the attempt of the FCC to insulate incumbent licensees from comparative hearings with competing applicants.

\textsuperscript{170} Id. at 1213 n.15.

\textsuperscript{171} Manifestly, stations realizing little or no profit cannot serve the public by eliminating advertising which they need to survive or by reinvesting profits that either do not exist or are required to attract the capital necessary to operate a station. Such capital, however, does not include the premiums paid to acquire the right to an FCC license; nor does it include the limited real value of intangibles such as good will, the Communications Act demonstrating that no property right exists in such acquired rights, 47 U.S.C. § 301 (1970). Although hoping for continuity, licensees invest such funds with the full knowledge that policies of the FCC may change.

\textsuperscript{172} See Loevinger, \emph{supra} note 2, at 9. Assuming that a blanket 20 percent of all
Administrative response to an economically threatening situation is a variable application of new procedures dependent upon the profit margins of licensees.173 Designed to assure reasonable minimum profits, a variable application would avoid the losses which opponents fear. It is by no means clear, moreover, that a comprehensive counter-advertising program would result in a diminution of broadcast advertising revenue. The application of the fairness doctrine to cigarette advertising had a minimal impact on revenues from such advertising.174 Furthermore, the experience with cigarette advertisements demonstrates that counter-advertising requires neither an exactly equal amount nor quality of reply time but only that basic equality required for fairness.175 Such a time limitation, coupled with the fact that some programming time can be set aside for the discussion of advertising issues, further reduces the possibility of losses to licensees. In addition, counter-advertisements, since they have a substantial public service aspect, could be presented during the time presently allotted to some public service advertising having only marginal value.

Although an administrative implementation of a counter-advertising program would attempt to avoid losses to the broadcasting industry, such losses could also be reduced by making adjustments in the advertising market. A counter-advertising program might be especially attractive to honest advertisers who calculate that advertising their products in the framework of full and relevant disclosure would increase their sales. On the other hand, the program would be viewed with disfavor by nondisclosing advertisers who would cease to advertise altogether because of a fear that a well-informed public would not buy their products or who would avoid using nondisclosure advertising tactics to prevent the disclosure of damaging information in counter-advertisements. The likelihood that advertisers who could not withstand full disadvertising time would be required for counter-advertising, Justice Loevinger concludes that television would lose $68 million, $18 million greater than its current pre-tax profits. 173 While often considered monolithic, the profitability of broadcasting varies considerably. Television fares notably better than radio and is itself variable. Id. at 10-11.

Vital factors affecting profitability include market size, network affiliation, and whether a station is VHF or UHF. Depending on market size, the most profitable stations are those owned by the networks and the VHF stations. The UHF stations are the least profitable. Economic Aspects, supra note 27, at 16-18. 174. See note 18 supra.

175. See Comment, And Now a Word Against Our Sponsor: Extending the FCC's Fairness Doctrine to Advertising, 60 Calif. L. Rev. 1416, 1439-40 (1972), which discusses the unsuccessful effort to achieve a one to five ratio of counter-advertising and cigarette commercials. See also Westinghouse Broadcasting Co., 16 F.C.C.2d 1034 (1969) and National Broadcasting Co., 16 F.C.C.2d 884 (1969).
closure would refrain from advertising does not necessarily mean that licensees will suffer a loss of advertising revenues. Licensees will not experience financial setbacks if honest advertisers expand their efforts to capture more of the market from those who would not or could not advertise honestly. With the time available for advertisements declining, a constant or increasing demand for broadcast advertisements would result in an increase in the cost of advertising time. Consequently, the advertising market would absorb much of the financial burden which counter-advertising would place upon licensees.

Any consideration of the economic impact of counter-advertising must include the possibility that part of the cost of reply time could be borne by those desiring to refute the claims made in particular advertisements. Since its 1949 statement, the FCC has used the fairness doctrine as the basis for affording responsible spokesmen the opportunity to respond to controversial views presented by a licensee. The continued application of this procedure would not only ensure the respectability of a counter-advertising program and the absence of nonsense and diatribe but would also provide a probable source of broadcasting income. For example, although charitable undertakings are chronically short of money, responsible groups such as the American Heart Association should be able to pay something to licensees for broadcasting their views.

An analysis of television advertising indicates:

From the standpoint of the individual advertiser ... his demand for television advertising ... is highly elastic .... At the same time, in television—more than in any other medium—the value of advertising to the advertiser is sensitive to the total amount and proportion of advertising in the medium. This is true because an increase in the fraction of broadcast time devoted to advertising reduces both viewships and the attention viewers pay to a given commercial.

ECONOMIC ASPECTS, supra note 27, at 34. While extrapolation from this analysis of the nature of television advertising is uncertain, several results are possible, including the loss of revenue to broadcasting caused by counter-advertising. Given a reduction in total advertising under such a program, honest advertisers would be willing to pay more because they would attract more viewers and attention. The monopolistic character of television advertising sales reinforces that possibility. Id. at 36-37. Already higher than in other media, attention to television advertisements might increase under a counter-advertising program because of greater availability of useful information and the stimulation of conflicting claims between advertisers and counter-advertisers. Again, such a program would increase both the public benefit and the willingness of advertisers to pay the greater costs, since broadcasters would utilize their monopolistic power for their own benefit.

Beyond payments by counter-advertisers, comparative advertising presents an avenue by which the goals of counter-advertising may be achieved without a detrimental economic impact on the electronic media. The final FCC regulations should include comparative advertisements within any counter-advertising quota. For example, the FCC could classify as counter-advertisements statements by automobile insurance companies concerning the poor crashworthiness of automobiles and indicating a willingness of their agents to identify particular makes of automobiles which are superior or inferior. While the same approach can be applied to comparative advertising among the various members of a single industry, the FCC should critically examine such advertising to ensure that it fulfills the counter-advertising goal of full disclosure.

Comparative advertising by the members of a particular industry presents special regulatory problems. Because radio and television advertisements cannot be retained and collated, consumers might have difficulty in evaluating a series of advertisements which emphasize various important aspects of a product. In addition, even competitors are likely to ignore some of a product's negative characteristics. As a means of dealing with these problems, the FCC could promulgate regulations exempting from counter-advertising those industries which as a whole present fully disclosing comparative advertisements. The specifics of


The following episode indicates, however, that the aversion of the broadcast industry to counter-advertising may not be motivated entirely by economic considerations. Believing that the major television networks are not presenting an accurate account of the activities of the oil industry, the Mobil Oil Corporation has sought to buy time on the networks to explain its position. The company also offered to pay for reply advertisements to remove any arguments the networks might raise with respect to the fairness doctrine. All networks refused the advertisements on the basis of a policy against accepting advertising concerning controversial subjects, apparently without regard to the economics of such refusals. An unidentified network executive, however, admitted that the policy against controversy was violated in some oil company advertisements because of difficulties in dealing with a "good customer." Although a network vice-president recognized that the energy crisis presents a number of thorny questions concerning the public interest, the question of the networks' fairness doctrines obligations remains unresolved. Brown, Networks Reject Mobil Equal Ad Plan, N.Y. Times, Mar. 16, 1974, at 1, col. 2.

179. With no reason to camouflage the detrimental aspects of a product, producers who deal with a totally distinct aspect possibly would focus upon the universally ignored detriment and provide the public all pertinent information. Nevertheless, the danger of self-motivated silence remains a problem. For example, because of the desire of manufacturers to sell large automobiles, a substantial possibility exists that advertisements of such products will ignore the adverse effect of automatic transmissions and air conditioners upon gas mileage.
such an exemption would depend upon the circumstances in individual industries. Using administrative regulations as a starting point, a valuable comparative advertising program would eventually grow out of subsequent decisions, discussion, and rulemaking. If successful, such a regulatory system would not only result in counter-advertising "paying its own way" but would also assist in achieving the goals of a fully informed public and an improved reputation for the business community.

An administrative policy designed to maintain the economic viability of the broadcasting industry also would minimize any detrimental effect on journalistic and program quality. Factors other than the impact of counter-advertising are involved, however, in an evaluation of journalistic and program quality. Red Lion Broadcasting Co. v. FCC demonstrates that the FCC has the authority to compel the coverage of a controversy and thereby assure the quality of broadcasting journalism. Moreover, with respect to the issue of program quality in license renewal proceedings, it was held in Citizens Communications Center v. FCC that the Commission must consider the nature and extent of a licensee's reinvestment of resources, especially in cases involving highly profitable stations.

A licensee realizing a return of 67 or 39 percent of its tangible investment can maintain program quality just as well as one making a 134 or 78 percent return. The only alternative is a comparative hearing in which the licensee, facing an applicant perhaps better able to serve the public interest, will risk the loss of its license. While broadcasters have valid reason to expect a high return on their investments, the profitability of an extremely significant portion of the television industry is disproportionately high when compared to the industry-wide average of approximately eight percent. These unusually high profit margins could decline without serious detriment to the stations. Moreover, although a high percentage of advertising revenue goes to producers, per-

180. Among a variety of questions, the FCC would have to determine the consequences of one company choosing not to advertise comparatively or of an industry-wide failure to present one possibly important issue. Those determinations would require the agency to consider the size of the industry, the importance of the company to the industry, the value of the ignored issue, the degree to which the advertisements develop other issues, and any other possibly decisive factors.


182. 447 F.2d 1201, 1213 n.35 (D.C. Cir. 1971).

183. Economic Aspects, supra note 27, at 17. These were the 1970 profit figures for network-owned and VHF stations respectively.

184. Id. at 16.
formers, and others associated with highly successful programs;\textsuperscript{185} these individuals probably would accept lower remuneration to avoid "bankrupting" broadcasters or advertisers.

Many of the arguments concerning the economic impact of counter-advertising are speculative and no more definitive than the assertion that implementation of the FTC proposal would result in a substantial decline in television advertising time. Such arguments demonstrate, nevertheless, that the proper course for implementing counter-advertising is the administrative ideal of innovation and experimentation with appropriate adjustments based on experience. Rather than the destruction of radio and television, the aim of the FTC and most advocates of counter-advertising is the improvement of advertising quality. Safeguards, including a well-balanced and articulated rule structure based upon and checked by an economic model of the broadcasting industry, can and should be developed to deal with the potential hazards of counter-advertising.\textsuperscript{186} If this is done, the administrative implementation of a counter-advertising program can maintain program quality while assuring the financial security of the broadcasting industry.

\textbf{Improving the Quality of Advertising}

While seeking to contain and minimize the economic disruption of broadcasting, proponents of a rational counter-advertising mechanism admittedly desire to change present advertising practices. Aimed at achieving full disclosure in the context of a viable broadcasting system supported by advertising, the FTC proposal undoubtedly will have a major effect on the factual assertions in advertisements.\textsuperscript{187} Thus, an examination of the character and magnitude of expected changes in advertising is necessary in evaluating the merits of counter-advertising.

In \textit{Red Lion Broadcasting Co. v. FCC}\textsuperscript{188} the Supreme Court provided the legal foundation for the regulation of advertising by the FCC. Responding to the hypothetical assertion by broadcasting interests that application of the fairness doctrine might drive controversy from the air, the Court observed that if necessary the FCC could require the broad-

\textsuperscript{185} \textit{Id.} at 41.

\textsuperscript{186} Unfortunately, the FCC appears disinterested in attempting to solve the problems of providing a broadcasting service which is oriented toward the public interest. Indeed, the agency seems more interested in establishing the impossibility of such a service. A redirected disposition of the FCC would permit the utilization of the agency's considerable resources in framing a realistic solution.

\textsuperscript{187} \textit{See} Loevinger, \textit{supra} note 2, at 14-16.

\textsuperscript{188} 395 U.S. 367 (1969).
casting of controversy. Furthermore, since advertising lacks the first amendment protection enjoyed by political speech, the Commission arguably could forbid nonfactual representations in broadcast advertisements. While legally sound, the flaw in this reasoning is that advertisers, unlike FCC licensees, are neither under an obligation to serve the public interest nor subject to sanctions for a failure to perform such a duty. It is the advertisers, and not FCC licensees, who prepare advertisements and thus determine the content of commercial messages. The maximum deterrent which the FCC could direct toward broadcast advertising would be the requirement that the advertiser either disclose relevant data fully or risk triggering the fairness doctrine.

The recognition of these practical limitations in forcing advertisers to serve the public interest leads to a reconsideration of the objectives of counter-advertising. The goal of full disclosure is an ideal which may never be achieved, and an administrative counter-advertising program should take this fact into account. The more important objective, nevertheless, and one which should not be compromised, is that of protecting consumers from the harm which may result from misleading and partially disclosing advertisements. Giving priority to the latter goal, although thereby perhaps reducing the quantum of information available to consumers, would be preferable for several reasons. Most importantly, such an approach would ensure that consumers are protected from the harm of misleading partial disclosures. Under a system in which advertisers could not with impunity fail to mention the undesirable and perhaps hazardous effects of their products, partially disclosing advertising would diminish, and any such advertisements which remained would be deemed suspect by consumers. Eventually, the very lack of information would provide consumers an incentive to seek information both to aid in making wise purchases and to rebut the possible inference that factual advertising was avoided because it would be unfavorable. While these effects should result in a net improvement in the overall quality of advertising, it must be conceded that a requirement that an advertiser disclose the bad as well as the good points about its product will make more difficult the entry of new products into the market.

189. Id. at 392-93.
190. See note 116 supra & accompanying text.
191. See Loevinger, supra note 2, at 17-18, where the problem of new product entry is presented as a reason against the implementation of counter-advertising. Cf. Economic Aspects, supra note 27, at 37-39, which presents an argument that existing advertising structures limit new entry.
In addition to the major effect upon factual advertising claims, counter-advertising would also change the nature of nonfactual assertions made in advertisements. A mere urging of use or mention of name is one of two major types of nonfactual advertising. Consumers will regard such assertions as self-praise or an invitation to use a product without any special claim concerning its virtues. Image advertising is the second type of nonfactual advertising. As with the simple assertion that a product is good, viewers should perceive image advertising as no more than self-praise; such a perception in itself is not overly harmful. Although in most cases viewers and listeners will regard such advertising as noninformative, image advertising has the potential of creating the attitude that the use of a product is essential or appropriate to the “good life.” Because of this potential, it will be necessary to apply the second criterion of the FTC counter-advertising proposal to determine the implications of such advertisements.193

The cigarette advertisements in Banzhaf v. FCC194 may be used to illustrate both types of nonfactual advertising. The assertion “Smoke Brand X because it is good” mentions the product’s name and gives the public the impression that some benefits will result from smoking this particular brand of cigarettes. Because of the issues raised by such a nonfactual assertion, this and similar advertisements clearly touch upon the realm of the fairness doctrine. Generally, it would appear that the scope of permissible nonfactual advertising should be directly related to the degree to which controversial issues are implicit in such advertising, especially where those issues concern the ultimate use of a product.

Although attentive to implicit controversial issues, the FCC has attempted to focus its advertising regulation upon explicit controversy; the FTC proposal also has that focus. Consequently, unless it is similar to the type of advertising in Banzhaf, an advertisement which urges nothing more than consumption or asserts that a product is “good” usually will not and should not be subject to the fairness doctrine. Advertisements fall within the Banzhaf standards when disinterested third parties determine that they affect an important interest in a significantly adverse manner which is not commonly known. In most cases this determination will be a governmental one, such as that made by the courts and the FCC with respect to cigarette advertising. The American Heart

192. Such an assertion is mere puffing. See note 25 supra & accompanying text. On the other hand, an allegation that a product is the best asserts a fact, since the allegation lends itself to substantiation.
193. See note 8 supra & accompanying text.
Association, however, would be a proper party to bring the public's attention the fact that a popular and highly regarded product contains an ingredient which may adversely affect the health of millions of consumers.\footnote{One such case is milk, a product that is widely promoted by image advertising. While its adverse effects have been suspected for a long time and are now rather certain, milk retains a substantially unchallenged position because the industry has great political power. Theoretically, milk is precisely the type of product about which the public interest standard and the fairness doctrine should require information; nevertheless, the public is virtually uninformed about those adverse effects. \textit{See generally} California Milk Producers Advisory Bd., No. — (F.T.C., filed April 22, 1974).}

From the foregoing discussion it should be clear that an advertisement urging enlistment in the army would not be subject to the fairness doctrine simply because it omits discussion of a hazard which is common knowledge.\footnote{\textit{See} Green v. FCC, 447 F.2d 323 (D.C. Cir. 1971). \textit{But see} note 105 \textit{supra} \& accompanying text questioning this result.} This difference in result emphasizes that there are innumerable variations of nonfactual advertising, each implicitly raising issues of greater or lesser importance. It would thus seem appropriate to consider image advertisements on a case-by-case basis and by balancing the factors considered in the \textit{Banzhaf} decision: the importance of the adverse effect, the intensity of that effect, the knowledge of the public concerning that effect, and the reliability of the source which asserts the adverse effect.\footnote{\textit{Compare} Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), \textit{cert. denied}, 396 U.S. 842 (1969), \textit{with} Green v. FCC, 447 F.2d 323 (D.C. Cir. 1971).}

The FCC can weigh the same factors in analyzing factual assertions in advertisements. An evaluation of factual claims should include an examination of the relative merits of the facts provided, a consideration of the possible application of the counter-advertising rules, and suggestions of ways to achieve conformity with those rules. Such an analysis may be illustrated by considering examples of advertisements for a hypothetical soft drink and toothpaste:

\begin{verbatim}
Drink Burpo!
Burpo tastes good.
Burpo makes you feel good.
Burpo has vitamin C.
Burpo has lots of vitamin C.
Burpo with vitamin C is good for you.

Glop toothpaste gives you 14 brushes to the ounce.
Glop toothpaste is the most economical toothpaste.
\end{verbatim}
Glop toothpaste gives more brushes to the ounce than any other toothpaste.
Glop toothpaste gives five more brushes to the ounce than any other toothpaste.\textsuperscript{199}

It has been argued that advertisements with the most factual content are the most likely to trigger counter-advertising.\textsuperscript{200} The error in this contention lies in its failure to acknowledge the substantive difference between advertisements making general factual assertions and those presenting specific allegations. The former would invoke reply because of their tendency toward incompleteness, but the latter would do so only if the veracity or completeness of the particular statement was challenged. Thus, the hypothetical toothpaste advertisement is unlikely to trigger counter-advertising because it provides information which is useful to a potential purchaser and is specifically verifiable. The first assertion can be easily tested, and the other three can be verified when the product is compared with others. The advertisement would avoid the first three criteria of the counter-advertising proposal if all the assertions are true and the fourth if the product has no undisclosed detrimental characteristics.\textsuperscript{201}

The Burpo advertisement, on the other hand, probably would trigger reply advertising because it provides only one general fact and considerable opinion. Such an excess of opinion could easily be remedied by the advertiser. Rather than "lots of" vitamin C, the advertisement could state what percentage of the average daily requirement as determined by the United States government is contained in an eight ounce serving. Moreover, while not legally required, the advertisement could compare the vitamin content of the drink with that of orange juice.\textsuperscript{202} The

\textsuperscript{199} E. Kitch & H. Perlman, Legal Regulation of the Competitive Process 97 (1972).
\textsuperscript{200} Loevinger, supra note 2, at 15.
\textsuperscript{201} See notes 7-10 supra & accompanying text. Glop might be particularly abrasive or Burpo might have a large amount of sugar. The failure to disclose such negative aspects in the advertisements may raise issues of public concern, especially if the advertisements are directed specifically toward naive audiences and children. Special rules probably would be required for advertisements focused toward children. Since the FCC is considering this problem apart from the question of applying the fairness doctrine to advertising, it is not considered in detail here. Although requiring full disclosure is one way to deal with advertisements for children, the preferable course of action is a complete ban on advertising aimed at children of products that might harm them. The parent rather than the child should decide whether Burpo is to be consumed despite its high sugar content.
same approach would eliminate the “it’s good for you” opinion. The advertisement could state, for example, that the drink is good for a person because it provides a certain percentage of the average daily requirement of vitamin C.203

Either directly or indirectly, a counter-advertising program would force the advertiser to disclose more than the mere fact that Burpo has vitamin C.204 Advertisers who claim vitamin C content but fail to specify the amount would generate suspicion in an advertising atmosphere where most advertisements present such statistics. In such a milieu it is expected that purchasers would penalize the nondisclosing advertiser by not purchasing its product.205 In addition, a counter-advertising program could remedy the nondisclosure directly by forcing disclosure of the vitamin C amount or prohibiting any assertions concerning the product’s vitamin content.

The FTC counter-advertising proposal does not create a structure which is a certain guide in every situation. Nevertheless, the proposal presents a clear, abstract statement of a legal principle which was easily applied to these hypothetical advertisements. Built upon that foundation, two things will occur in time. The abstract principle itself will be refined as a result of administrative inquiry, scholarly comment, and case decisions. Moreover, the abstraction will become more certain in application after it has been used to correct the deficiencies in particular advertisements. Eventually, businessmen will know what is permitted and not permitted. Accordingly, they will improve the quality of their advertisements in order to avoid counter-advertising, other legal sanctions, and, most importantly, the loss of sales.

The Politics of Advertising

Because of the nature of American concepts of government, it is only natural that the political process play a substantial role in implementing the counter-advertising proposal. In the early nineteenth century,
De Tocqueville observed the unusual attraction of Americans to using the judiciary to solve social and political problems. Although that tendency has remained strong, the failure of the judiciary as a vehicle for reform was a major impetus for the creation of the modern administrative structure and agencies such as the FCC and FTC. From the beginning, the purpose of the “fourth branch of government” was to serve as the forum for the resolution of complex social and political problems. While some people regard as wrong the American attitude toward judicial and administrative involvement in political issues, that attitude exists, is sanctioned by history, and will remain a potent force and important aspect of American society.

Opponents of counter-advertising argue that judicial and administrative involvement in advertising will do little to improve the public’s impression of business or quiet the “vigorous attacks . . . mounted against advertising.” Those opponents do not cavil with the validity of the public’s attitude but assert that the attacks increase as the quality of advertising improves. They fail to consider the possibility that such improvement flows from increased governmental regulation resulting from organized consumer pressure.

209. Id.
210. Loervinger, supra note 2, at 2.
211. The recent application of the fairness doctrine to cigarette advertising, followed by the total ban of such advertising, may be compared to a consumer effort to publicize the dangers of cigarette smoking more than two decades ago. The manufacturer of Old Gold cigarettes advertised that its product had been found to be the least irritating of the six leading brands in terms of tar and nicotine content in an “impartial test by Reader’s Digest.” Indeed, the magazine had conducted a test, but the conclusion it reached, as quoted by the court in P. Lorillard Co. v. FTC, 186 F.2d 52 (4th Cir. 1950), was that “no single brand is so superior to its competitors as to justify its selection on the ground that it is less harmful.” The court, noting that the assertions contained in the Old Gold advertisements were but a small part of the whole truth, upheld a finding of the FTC that such advertisements were misleading. Obviously underestimating the abilities of the advertising copy writer, the magazine article had observed: “The laboratory’s general conclusion will be sad news for the advertising copy writers, but good news for the smoker, who need no longer worry as to which cigarette can most effectively nail down his coffin. For one nail is just as good as another.” Id. at 57.

Recently, Senator Frank B. Moss and the American Public Health Association presented a petition to the Federal Consumer Product Safety Commission. Hopefully,
The middle years of the last decade witnessed a coalescing of factors which bear heavily upon the thesis that the effort to promote fairness in advertising is political. First, a remarkable man named Banzhaf was able to convince the FCC that the fairness doctrine should be applied to cigarette advertising.\(^{212}\) Shortly thereafter, the civil rights movement discovered that the doctrine could be used as a means of combating racism in broadcasting.\(^{213}\) First analyzing the fairness doctrine as a first amendment imperative,\(^{214}\) Dean Jerome Barron then developed his theory of a right of access to the media, a theory which has provided a compelling basis for using the doctrine as a broad instrument of social reform.\(^{215}\) Moreover, Ralph Nader and others launched the contemporary consumer movement which questioned the safety of products and the basic ethics of the corporate community. Finally, the reaction to the Vietnam war created a new, multi-faceted movement supported by a mass of intelligent and articulate people who believe that reform should be effected within the framework of existing institutions.\(^{216}\) Naturally allied with the consumer group, the new reformers view the fairness doctrine as the means for improving the quality of broadcasting.

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\(^{214}\) Barron, In Defense of "Fairness": A First Amendment Rationale for Broadcasting's "Fairness" Doctrine, 37 U. Colo. L. Rev. 31 (1964).


\(^{216}\) The McCarthy, Kennedy, and McGovern campaigns provide the best examples of mass movements seeking to reform society. Among other examples, former Secretary of Health, Education and Welfare John Gardner organized Common Cause and former Attorney General Ramsey Clark and former Associate Justice Arthur Goldberg are deeply involved in public interest work. These men and others rely heavily upon large numbers of committed people throughout the country.
Although many have advocated fundamental changes of various aspects of American society, reformers have nonetheless sought to maintain a media without governmental domination. In an effort to provide access to the people and a greater dissemination of ideas, the attempt has been made to use a governmental application of legal rules as a countervailing force to the private interests which control the broadcasting industry. That effort may be quixotic, futile, or wrong, but the underlying motives decidedly are not totalitarian. Moreover, the influence of licensees, full disclosure by competing advertisers, and the nature of the democratic process should prevent the control of a counter-advertising program by totalitarian forces.

The licensees themselves provide an assurance against the seizure of the reply right by small militant factions or groups with entrenched governmental power. Under the fairness doctrine, licensees have the duty to act in good faith to assure fair discussion of controversial issues of public importance. Since licensees control the choice of respondents and thus will determine initially who may present counter-advertisements, it is unlikely that they will select irresponsible spokesmen. The major burden of response to cigarette advertising, for example, fell upon the American Cancer Society and the American Heart Association. While some people undoubtedly would have liked to argue that consumption of marijuana is no more hazardous than that of tobacco and thus proper, the licensee would have been under no obligation to accept such an advertisement and probably would not have done so. Because the fairness doctrine mandates fairness in covering an issue and not complete access for every view, it is difficult to conceive reversal by the FCC or a court of a licensee's decision not to broadcast an arguably irresponsible advertisement.

Presented by either the advertiser or competitors, full disclosure stands as another check against counter-advertising abuses. Presumably, disclosing advertisers will offer products that consumers consider superior and will have unhampered access to broadcasting time. Honest advertisers with superior products will benefit because they can advertise and present complete facts. On the other hand, economic detriment will be suffered by honest advertisers with inferior products who must either refrain from advertising or disclose their products' short-

219. Id.
comings and by nondisclosing advertisers whose obfuscative efforts will be negated by informative counter-advertisements.

The access of advertisers, the advertising industry, and the broadcasting industry to the democratic process should also provide a measure of protection against abuse. In the adoption of a counter-advertising program, all three can argue for reasonable standards designed to promote dialogue rather than diatribe. Their effort should begin with the initial rulemaking proceedings, continue with a critique of the shortcomings in the adopted rules, and end with litigation to reverse erroneous decisions by the licensee or the FCC. Because these groups are articulate, intelligent, well funded, and have a reasonable access to the media, they can readily and ably protect their interests within the context of democratic procedures. Moreover, American history demonstrates that vocal militant groups ultimately are unsuccessful, and there is no reason to believe that the result will be different with counter-advertising.

The significant fact about the American political scene which opponents of counter-advertising fail to acknowledge is that the new reform movement is largely composed of intelligent and rational individuals and that only a small portion of its support emanates from the "lunatic fringe." Indeed, members not only of the wealthier and poorer segments of society but also of the vast middle and upper-middle classes have become intensely concerned with the quality of life in this

220. Substantially all cigarette advertising vanished from its pages when the New York Times required that cigarette advertisements disclose the tar and nicotine content. Upon fulfilling that standard, some cigarette advertising subsequently returned.
221. Consider this comment about the Declaration of Independence:

Our democracy then, in Jefferson's familiar but neglected phrase, rests on a "decent respect to the opinions of mankind."

The Declaration of Independence was motivated by, among other things, American feelings of anger and outrage against King George III and the members of his government. Yet it did not attack the king as an idiot or lunatic. Nor did it scream curses or identify the king with unsavory or unmentionable physical or sexual acts. It did not even accuse George III or his government of corruption and incompetence, which it might very well have done. The declaration simply declared some rights and some grievances in measured, even legalistic language. If the Declaration of Independence had been a volcano of expletives, it would have had little effect in its day and would have been buried with other sub-literature long before our time. Much of our daily problem of communication arises from our unwillingness to show a similar decency and self-restraint.

D. BOORSTIN, DEMOCRACY AND ITS DISCONTENTS: REFLECTIONS ON EVERYDAY AMERICA 7 (1971). The history of such contemporary organizations as the Black Panthers and Students for a Democratic Society demonstrates that if radical, intemperate groups gain a forum, they will harm themselves more than those they attack.
COUNTER-ADVERTISING

country. Paradoxically, establishment organizations seeking to improve society raise questions that are uncomfortable for entrenched economic interests. For instance, the American Heart Association has questioned the healthfulness of what is now deemed to be "normal" amounts of whole milk, eggs, and animal protein in adult diets. Moreover, the American Cancer Society has attacked the use of tobacco, while the American Tuberculosis Association has turned its attention to other respiratory ailments and protests against air pollution. Middle class citizens of Santa Barbara, California oppose further off-shore drilling for oil in their locality and impliedly in most other areas. In moves that would have shocked a socialist ten years ago, automobile insurance companies support no-fault insurance to the chagrin of trial attorneys, question the crashworthiness of automobiles to the discomfort of the automobile industry, and literally shout about the problem of drunken driving to the possible displeasure of the liquor industry.222

Entrenched economic interests could tolerate such criticisms if they were voiced by groups which are virtually powerless. American business has little reason to fear food cultists inspired by oriental religions, advocates of marijuana or narcotics consumption urging them as sources of enlightenment, wandering beachcombers irritated about the spoilage of their refuge by the effluents of modern industry, or even a respected group such as the Amish holding unusual ideas about modern conveniences and contemporary society. Those impotent factions would not have moved the FTC to propose counter-advertising regulations to the FCC. The FTC and FCC listen, however, when the people involved are dedicated scientists, respected philanthropists, hard-working business people, articulate and able attorneys, and others similarly situated. From the perspective of the affected industries, the resultant political change presages economic danger because the ability of establishment organizations to effect reform is much greater than that of small, vociferous, militant groups. Thus, the opposition to a counter-advertising program stems from a belief in the absolute necessity of checking those people who know how to make the system responsive and from an absence of a full understanding of the potential benefits of such a program for honest businessmen.223

222. It must be noted that the liquor industry has been an outspoken opponent of liquor abuse.

223. Even though one may disagree with his conclusion about political motivation, most of Justice Loewinger's observations concerning the governmental bureaucracy are correct. Although the leadership of the FTC in 1972 was devoted to realistic change, a desire to enhance its power, prestige, and influence perhaps may motivate the FTC
CONCLUSION

The nature of the administrative process provides the essential mechanism for overcoming the practical difficulties in implementing a counter-advertising program. Guided by the basic administrative qualities of flexibility and experimentation, the FTC and FCC can create, develop, and refine a scheme which can avoid the detrimental political and economic effects which opponents fear will result from the implementation of the FTC proposal. Continued licensee participation in communications regulation and resort to the democratic process throughout the development of the program can channel political involvement toward furtherance of the public interest. Although the alleged economic impact of counter-advertising would be insubstantial, the administrative process can determine and minimize that impact by initially requiring only the most profitable stations to run counter-advertisements.

Undoubtedly, a counter-advertising program will affect the nature of the advertisements presented by the mass media. Advertisers either will become honest and disclosing or have their partial disclosures rebutted and clarified by replies; in either instance, the result will provide the public more accurate and complete information for making rational purchasing decisions, a primary goal of the private, free enterprise system.

The fairness doctrine provides a firm theoretical basis for an administrative counter-advertising program. The decided cases demonstrate that the principle is generally applicable to advertising and that the first amendment provides no specific constitutional bar to a further extension of the doctrine to the entire field of advertising. Although the FCC and the courts have limited the application of the doctrine to the facts of particular cases, the necessity now exists for comprehensive regulation to guide the actions of advertisers and the broadcasting industry. Administrative development of a counter-advertising program can provide that certainty and thereby further the vital objectives of informed consumer decisions and an improved reputation for business.

in counter-advertising. See Loevinger, supra note 2, at 18-21. Individuals representing the public before the FTC and the FCC, nevertheless, understand how to deal with these institutions and how to respond to their detracting attributes. Always able to draw applications which the FCC will find acceptable, the Washington communications bar has understood those institutions especially well for a long time. See, e.g., Preison, The Need for Modification of Section 326, 18 Fed. Com. B.J. 15 (1963), where the author, a leader of the communications bar, candidly presents some of the realities of FCC practice and ultimately argues that the FCC should not consider or control program content. Undoubtedly, the communications bar also would be effective in protecting the interests of the broadcasting industry were counter-advertising rules adopted.