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February 6, 1996

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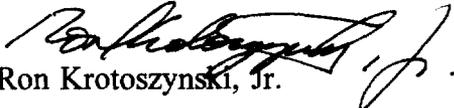
Re: MM Docket No. 93-48

Dear Mr. Caton:

Enclosed for filing please find an academic paper that I would like to submit in the above captioned proceeding.

Please call me at (317) 274-4907 should you have any questions regarding this matter.

Sincerely,


Ron Krotoszynski, Jr.

Enclosure

cc: The Hon. Reed E. Hundt
Jonathan E. Neuchterlein, Esq.

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Into the Woods: Broadcasters, Bureaucrats, and Children's
Television Programming

by

Professor Ronald J. Krotoszynski, Jr.¹

Into the woods and down the dell,
In vain, perhaps, but who can tell?²

In 1961, Federal Communications Commission Chairman Newton Minow decried the "vast wasteland" of commercial television, including the paucity of educational children's programming, and challenged commercial television broadcasters to do a better job.³ Today, some thirty-five years later, we have before us another Chairman, Reed E. Hundt. Like Chairman Minow, Chairman Hundt appears to believe that commercial television broadcasters can and should do more to enlighten and educate their audiences. In particular, Chairman Hundt thinks that the needs of the nation's youngest viewers are going unmet on commercial television stations.

Chairman Hundt contends that broadcasting in the public interest requires that commercial television broadcasters respect

¹ Assistant Professor of Law, Indiana University - Indianapolis. J.D., LL.M., Duke University. I gratefully acknowledge the comments, suggestions, and contributions of former Chairman Newton N. Minow, and Professor Lucas A. Powe, Jr. Thanks also to Nancy M. Olson, S. Elizabeth Wilborn, Randall D. Lehner, Mary N. Newcomer, David V. Snyder, and John C. Hueston for their invaluable assistance. As always, any and all errors and omissions are my own.

² S. Sondheim, "Into the Woods," Cast Recording Lyrics Booklet, at p.14 (1987).

³ See Minow, Abandoned in the Wasteland: Children, Television, and the First Amendment 3-7, 185, 188, 190 (1995); "Minow Observes a 'Vast Wasteland,'" Broadcasting Magazine, May 15, 1961.

the programming needs -- and limitations -- of their youngest viewers.⁴ Specifically, the Chairman argues that to meet the needs of children the government must regulate violent and indecent programming.⁵ He also asserts that the Federal Communications Commission (the "Commission") has a legal and a moral obligation to ensure that commercial television broadcasters air a minimal amount of educational children's programming.⁶ Two of these proposals merit only brief discussion, principally because the legal and policy issues surrounding them are fairly unambiguous.

Chairman Hundt's support for recently enacted legislation mandating the inclusion of the so-called "violence chip," or "V-chip," in all television receivers does not appear to raise serious First Amendment objections. Provided that the Commission does not impose any special burdens or restrictions on the broadcast of programming coded as "violent" -- and there currently no indication exists that either the Commission or Congress harbors any such intentions -- this technology is the functional equivalent of a mute button.⁷

⁴ Hundt, "Television in the Public Interest," supra, at ____.

⁵ Id. at ____.

⁶ Id. at ____.

⁷ Of course, issues of identifying and labelling "violent" programming will remain. But these issues should be little different from those associated with the operation of the Motion Picture Association of America's ratings system, or with the music industry's project of identifying and labelling products that feature "explicit" lyrics. Neither of these practices, by themselves, raises serious First Amendment

Chairman Hundt's observations and suggestions regarding indecent programming also do not require particularly laborious study or evaluation. Simply put, they represent an endorsement of rather overt forms of censorship, and should be rejected out of hand both by the academy and the federal courts.⁸

Academic criticism of the Commission's efforts to serve as a national censor⁹ has been both consistent and harsh,¹⁰ no useful purpose would be served by revisiting these materials in great detail here. Contrary to the Chairman's suggestions,¹¹ we do not need a government agency to protect us from ourselves by bowdlerizing the nation's television programming.¹² If television or radio programming offends the sensibilities of a

questions regarding governmental censorship. If the government itself attempted to label the television programming, the First Amendment analysis would obviously be more difficult. Cf. The Telecommunications Act of 1996, Pub. L. 96-____, 10 Stat. _____, § _____.

⁸ But see Hundt, supra, at ____; Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) (en banc). I am somewhat baffled by the Chairman's failure to so much as mention an "indecent" chip, given his enthusiasm for a "violence" chip. The Commission could easily approach "indecent" television programming in a fashion consistent with Chairman Hundt's proposed treatment of "violent" programming; such an approach would largely avoid the First Amendment difficulties associated with the Commission's current program of naked censorship.

⁹ Cf. 47 U.S.C. § 326.

¹⁰ See, e.g., Krattenmaker & Powe, Regulating Broadcast Programming 36-45, 229-36, 324-31 (1994); L. Powe, Jr., American Broadcasting and the First Amendment 162-90 (1987); cf. Sunstein, Democracy and the Problem of Free Speech 17-23, 54-77, 119, 244-45 (1994).

¹¹ See Hundt, supra, at ____.

¹² See infra note ____.

particular community or the nation as a whole, the citizenry is more than capable of taking corrective action without the active "assistance" of the federal government.¹³

Chairman Hundt's third proposal, establishing quantitative and qualitative standards for children's educational programming, merits closer attention. Unlike the proposals regarding violence and indecency, the Chairman's observations about the paucity of children's educational programming raise an issue of considerable complexity.¹⁴

On the one hand, as a society we have an obligation to ensure that the educational needs of our children do not go unmet. Concurrently, however, the notion of the government commanding broadcasters to air certain kinds of programming strongly cuts against the grain of the constitutional guarantee of freedom of expression. Because of the importance of the Chairman's children's programming initiative, and the difficult legal and policy issues associated with it, the remainder of this article will focus on this issue.

¹³ See Krattenmaker & Powe, supra note ____, at 245-46, 278-80; "Network Programming Chiefs Face Views for Quality TV," Broadcasting, October 2, 1989, at 49. Indeed, the Chairman's obsession with indecent programming appears to be an odd attempt to establish that Democrats, like many Republicans (e.g., Bob Dole, Rush Limbaugh), favor government censorship of materials that politicians deem unfit for public consumption. Chairman Hundt would better serve both the public and his agency if he refocused his efforts on matters of a more pressing nature -- such as the snail's pace of most Commission proceedings (including rulemakings, licensings, transfer applications, and various petitions for waivers).

¹⁴ See Hundt, supra, at ____.

I. The Journey Begins: Chairman Hundt's Proposals to Establish Quantitative and Qualitative Standards for Children's Educational Programming.

At the outset, it seems worthwhile to identify some common ground. No one disagrees that children should enjoy reasonable access to educational programming. Furthermore, no one seriously argues that broadcasters have an absolute First Amendment right to air, or not air, the programming they think best or most profitable.¹⁵ Most would also agree that ensuring that high quality educational children's television programming is available nationally through the free, over-the-air television broadcasting service is a critically important public policy objective.¹⁶

Research conducted by Dr. Dale Kunkel of the University of California-Santa Barbara has established that commercial broadcasters are showing little, if any, educational children's programming.¹⁷ Indeed, much of what appears on late afternoon television -- when most children watch television -- is hardly

¹⁵ For example, should the FOX network decide that a regular dose of soft-core pornography would generate the highest rents, it would not necessarily be free to implement this decision, regardless of the strength of its First Amendment claim.

¹⁶ See generally Fiss, "Why the State?," 100 Harv. L. Rev. 781, 787 (1987) ("[t]he state, like any other institution, can act either as a friend or enemy of speech and, without falling back on libertarian presumption, we must learn to recognize when it is acting in one capacity rather than another.").

¹⁷ See Comments of Dr. Dale Kunkel, MM Docket No. 93-48 (Oct. 16, 1995); Kunkel & Goette, Broadcasters Response to the Children's Television Act (Oct. 12, 1994); Kunkel, Broadcasters' License Renewal Claims Regarding Children's Educational Programming (May 7, 1993).

suitable fare.¹⁸ Describing the problem is relatively simple; proposing a viable solution is quite another matter.

Chairman Hundt has advocated the adoption of new regulations that would clarify commercial television broadcasters' obligations to serve the educational programming needs of the nation's youth. Given the importance of the stakes, the Chairman's proposals seem quite modest -- indeed, almost embarrassingly so. Under the scheme set forth in the Commission's pending Notice of Proposed Rulemaking ("NPRM") and endorsed by Chairman Hundt,¹⁹ the Commission would require broadcasters to air as little as three hours per week of "core" educational children's programming.²⁰ To avoid shirking by the broadcasters, the Commission also proposes establishing some minimal standards for defining "educational" programming,²¹ and

¹⁸ N. Minow, supra note __, at 35-40.

¹⁹ In the Matter of Policies and Rules Concerning Children's Television Programming, 10 FCC Rcd 6308 (1995) [hereinafter "Children's Programming"].

²⁰ Id. at 6311-12, 6327-31, 6337-39. "Core" educational programming may have entertainment value, but a "significant" purpose of the programming must be educational. Id. at 6328.

²¹ Specifically, the Commission would require educational children's programming to meet six standards: (1) such programming must be specifically designed to meet the educational and informational needs of children under age 16; (2) a significant educational purpose must be identified in a written programming report to be filed with the Commission at license renewal time; (3) the programming must air between the hours of 6:00 AM and 11:00 PM; (4) it must be regularly scheduled; (5) it must be of substantial length; and (6) it must be identified at the time it airs and elsewhere as "educational" programming. See Children's Programming, 10 FCC Rcd at 6327-31.

The need for such standards arises from the commercial broadcasters' current practice of counting programs like "G.I.

may require that the programming air during time periods when significant numbers of children actually watch television.²²

According to formal submissions by the National Association of Broadcasters, most stations already should be meeting both the quantitative and qualitative standards proposed in the NPRM.²³ However, as the Chairman is well aware, the response of the broadcasting community to the proposed standards has been less than enthusiastic.²⁴ Moreover, two of the Chairman's colleagues have raised First Amendment objections to the adoption of such

Joe," "Yogi Bear," and "Muppet Babies" as "educational." See Comments of Dr. Dale Kunkel, MM Docket No. 93-48, at 1-3 (Oct. 16, 1995); Kunkel, Broadcaster's License Renewal Claims Regarding Educational Children's Programming 1-4 (March 7, 1993).

²² Children's Programming, 10 FCC Rcd at 6329-30. These proposals are not really new. The Commission considered -- and rejected -- remarkably similar proposals in 1978-1979. See In the Matter of Children's Programming and Advertising Practices, 68 FCC 2d 1344, 1349-52 (1978).

²³ In formal comments filed in response to the Commission's initial Notice of Inquiry, the NAB asserted that each of the four major networks show an average of 3.6 hours per week of educational children's programming. See En Banc Reply Comments of the NAB, MM Docket No. 93-48, at 2-4 & attachment 1 (date); see also Reply Comments of the NAB, MM Docket No. 93-48, at 5-8 (June 7, 1993); Reply Comments of the Dr. Dale Kunkel, MM Docket No. 93-48, at 2-5 (June 7, 1993). More recently, the broadcasting industry claimed that most commercial television stations are showing in excess of four hours of children's educational programming. See Comments of the NAB, MM Docket No. 93-48, at 3-9 (Oct. 16, 1995). By way of contrast, public television stations air an average of thirty-five hours per week of educational children's programming. See Comments of the Office of Communication, United Church of Christ, MM Docket No. 93-48, at 4 (Oct. 16, 1995).

²⁴ See Comments of the NAB, MM Docket No. 93-48 (Oct. 16, 1995); Reply Comments of the NAB, MM Docket No. 93-48 (Nov. 20, 1995); see also Comments of NBC, MM Docket No. 93-48 (Oct. 16, 1995); Comments of CBS, MM Docket No. 93-48 (Oct. 16, 1995); Comments of Capital Cities/ABC, MM Docket No. 93-48 (Oct. 16, 1995).

standards,²⁵ and a third Commissioner has indicated that she is sympathetic to this point of view.²⁶

As a practical matter, any reform proposal must enjoy the support of a majority of the five Commissioners.²⁷ Accordingly, given the publicly-stated objections of three of the five Commissioners, Chairman Hundt seems to face something of an uphill battle. Furthermore, even if he ultimately is able to convince one of his three skeptical colleagues to support the adoption of quantitative and qualitative standards for children's educational programming,²⁸ some element of the commercial

²⁵ See Children's Programming, 10 FCC Rcd 6308, 6359-60 (separate statement of Commissioner Quello); id. at 6362-65 (concurrence/dissent of Commissioner Barrett); see also "Enough Already!," Address by Commissioner James H. Quello to the NAB's Children's Television Symposium, at p. 3-4 (September 21, 1995) ("In my opinion, any governmentally-imposed quantitative program requirement would constitute unnecessary, objectionable government intrusion and would never pass a First Amendment court challenge."); cf. Entman, "Putting the First Amendment in its Place: Enhancing American Democracy through the Press," 1993 U. Chi. L. Forum 61, 73-74 (arguing that the Commission has "used the First Amendment narrowly and simplistically" when considering its impact on public policy choices).

²⁶ See Andrews, "A Bitter Feud Fouls Lines at the FCC," The New York Times, November 20, 1995, § D, p. 1; see also Address by Commissioner Rachele Chong to Women in Cable and Telecommunications, Washington, D.C., at 8 (Oct. 30, 1995) ("I am troubled by the notion that public interest obligations of our broadcasters should be quantified.").

²⁷ As currently constituted, the Commission consists of five members, one of whom the President designates to serve as Chairman. See 47 U.S.C. § 154(a). Thus, when all five Commissioners participate in a proceeding, the support of three commissioners is necessary for the Commission to act. See WIBC, Inc. v. FCC, 259 F.2d 941 (D.C. Cir. 1958).

²⁸ Of course, the Children's Television Act, 47 U.S.C. §§ 303a, 303b, presupposes that the Commission will monitor broadcasters' compliance with the Act. See 47 U.S.C. § 303b. As a practical matter, the Commission must maintain some sort of

broadcasting community will likely attack the legality of the new regulations in federal court.²⁹

Moving beyond political considerations, any regulatory initiative designed to increase the amount or quality of children's programming must meet two basic criteria: it must be legal (i.e., constitutional and consistent with the Commission's organic statutes) and it must be effective (i.e., it must work). Of course, it also must have the political support of three Commissioners. I will leave to Chairman Hundt the task of mustering the political arguments necessary to garner the three votes,³⁰ and will focus instead on the legal and policy questions that his children's programming initiative raises.

The first question to be resolved is the basic legality of the proposal. Although reasonable minds might differ, I believe that the Commission's proposed children's programming rules do

internal processing guideline for establishing compliance with the Act. See [Hundt paper]. Thus, Commissioners Quello and Barrett's objections to "qualitative" standards are grossly overstated. The real question is not whether to maintain a qualitative standard; it is whether the Commission's standard should be a matter of public record. See id. at ____.

²⁹ See, e.g., Comments of the NAB, MM Docket No. 93-48 (Oct. 16, 1995); McCord, "Hundt Pitches Kids Standards," Broadcasting & Cable, January 29, 1996, at 18, 22.

³⁰ It has been said that "politics is the art of the possible." This maxim holds true not only of legislative bodies, like the Congress, but also applies to administrative agencies that must balance the interests of competing interest groups, which often hold diverse -- and fundamentally incompatible -- policy preferences.

not violate the First Amendment rights of broadcasters.³¹ I reach this conclusion even though I firmly believe that broadcasters should enjoy the same First Amendment rights as newspapers and other kinds of media.³²

Positing a unitary theory of the First Amendment does not necessarily imply that government cannot regulate television broadcasters in significant ways. Even under a unitary model of the First Amendment, certain kinds of speech receive varying degrees of protection from government regulation: obscene, indecent, and commercial speech all enjoy reduced First Amendment protection. Much of what broadcasters do seems more akin to commercial than noncommercial speech³³ -- at least insofar as children's programming issues are concerned. In consequence, government regulations of the sort permissible under Central

³¹ Nor do I think that the Children's Television Act of 1990 precludes the Commission from adopting quantitative and qualitative standards. Cf. 47 U.S.C. §§ 303a, 303b. The CTA in no way restricts or circumscribes the Commission's powers under other provisions of the Communications Act of 1934. In turn, the Communications Act of 1934 vests the Commission with very broad discretion -- discretion sufficient to authorize the adoption of rules of this sort. See 47 U.S.C. §§ 154(i), 303, 307(a).

³² See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 387-90 (1969); cf. Krattenmaker & Powe, "Converging First Amendment Principles for Converging Communications Media," 105 Yale L.J. 1719, 1726-33 (1995) (arguing that broadcasters should not be subject to a special First Amendment framework); Fowler & Brenner, "A Marketplace Approach to Broadcast Regulation," 60 Tex. L. Rev. 209-13, 221-30 (1982) (arguing that the public trusteeship model of broadcasting has failed and should be replaced with a pure market-based approach).

³³ See infra text and accompanying notes ___ to ___.

Hudson³⁴ should survive constitutional scrutiny, and the current proposals appear to be consistent with Central Hudson.³⁵

The second question, whether the proposals will actually work, goes to the desirability of the proposed rules as a matter of sound public policy. It is only reasonable to inquire into whether the Commission's initiative actually will achieve the substantive goals that it has set forth.³⁶ Because this issue is one of public policy, rather than law, the Commission enjoys broad discretion in deciding whether or not the rules are satisfactory.³⁷ Notwithstanding this discretion, if the Commission wishes to enjoy the continued support of both the industry it regulates and the general public, it must choose wisely among its available regulatory options.

This article concludes that the market has failed to provide an adequate supply of children's educational programming.³⁸ However, good reasons exist to question whether the Commission's current proposals reflect the best regulatory response to this market failure.³⁹ Accordingly, the Commission should consider

³⁴ See Central Hudson Gas & Elec. Corp. v. PSC, 447 U.S. 557 (1980); see also infra text and accompanying notes ___ to ___.

³⁵ See infra text and accompanying notes ___ to ___.

³⁶ See generally Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Ins. Co., 463 U.S. 29, 41-44, 57 (1983).

³⁷ See Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 860-66 (1984).

³⁸ See infra text and accompanying notes ___ to ___.

³⁹ See infra text and accompanying notes ___ to ___.

pursuing alternative solutions, including taking actions that would increase cooperation between commercial and public television broadcasters in meeting the educational programming needs of children.⁴⁰

Former Chairman Minow once described the Commission as "a vast and sometimes dark forest, where FCC hunters are often required to spend weeks of [their] time shooting down mosquitoes with elephant guns."⁴¹ If Chairman Hundt is indeed serious about addressing the paucity of children's educational programming, he would do well to consider former-Chairman Minow's metaphor, for the mosquitoes are sure to be thick.⁴² As we enter the thicket, we must keep in mind the stakes of the game: our children and our First Amendment. I firmly believe that we need not sacrifice one in order to safeguard the other.

II. The Big Bad Wolf, Grandmother, and Little Red Riding Hood: Rent-Seeking Broadcasters and the First Amendment.

Television broadcasters routinely have attempted to cloak themselves in granny's clothing by arguing that they oppose government regulation of their programming decisions only because

⁴⁰ See infra text and accompanying notes ___ to ___.

⁴¹ Minow, Equal Time: The Private Broadcaster and the Public Interest 258-59 (1964).

⁴² The Commission began admonishing broadcasters about the children's programming component of their "public interest" duties as early as 1952. See Comments of the United States Catholic Conference, MM Docket No. 93-48, at 3 (May 7, 1993). It began a concerted campaign for improvement in 1971. See id. at 4. For a brief history of the Commission's efforts in this area, see id. at 3-5; see also In the Matter of Children's Television Programming and Advertising Policies, 96 FCC 2d 634, 634-38 (1983) [hereinafter "Children's Programming and Advertising Policies"].

of their strong commitment to defending core First Amendment principles.⁴³ With respect to the current children's programming debate, at least one member of the Commission appears to view these arguments as dispositive of the Commission's ability to impose quantitative and qualitative children's programming standards.⁴⁴ Moreover, the broadcasters' position also has enjoyed the support of at least some in the academic community.⁴⁵ Nevertheless, even if one posits a unitary, market-based paradigm of the First Amendment that is fully applicable to broadcasters,⁴⁶ it is unclear that broadcasters'

⁴³ See Comments of the NAB, MM Docket No. 93-48, at 25-33 (Oct. 16, 1995); Comments of the NAB, MM Docket No. 93-48, at 13-17 (June 7, 1993).

⁴⁴ See Children's Programming, 10 FCC Rcd 6308, 6359-61 (separate statement of Commissioner James H. Quello); "Enough Already!," Address by Commissioner James H. Quello to the NAB's Children's Television Symposium, at 3-4, 14, 23 (September 21, 1995).

⁴⁵ See Statement of Professor Rodney A. Smolla In Support of the Comments of the NAB (1995) (arguing that the Commission's proposals violate the First Amendment) (attachment 6 to the NAB's Comments of October 16, 1995); see also Krattenmaker & Powe, Regulating Broadcast Programming 55-57, 305-31 (1994); Krattenmaker & Powe, supra note ___, at 1721-33; Krattenmaker & Powe, "Televised Violence: First Amendment Principles and Social Science Principles," 64 Va. L. Rev. 1123, 1268-70 (1978); cf. Entman, "Putting the First Amendment in Its Place: Enhancing American Democracy through the Press," 1993 U. Chi. L. Forum 61, 73.

⁴⁶ See, e.g., Krattenmaker & Powe, supra note ___, at 229-36, 324-25; Fowler & Brenner, supra note ___, at 230-42; cf. Ferris & Leahy, "Red Lions, Tigers, and Bears: Broadcast Content Regulation and the First Amendment," 38 Cath. U. L. Rev. 299, 319-26 (1989).

selection of children's programming constitutes non-commercial speech activity.⁴⁷

A. Deconstructing Broadcasters' Claims to First Amendment Protection for Their Programming Selections

The modern history of commercial television broadcasters and the First Amendment begins with Red Lion Broadcasting Co v. FCC.⁴⁸ Red Lion involved a challenge to the constitutionality of one aspect of the Commission's "fairness doctrine," the right to reply to a personal attack broadcast by a radio or television station.⁴⁹

The Commission licensed Red Lion to operate WGCB, a radio station in rural Pennsylvania. The station aired a broadcast by the Reverend Billy James Hargis, in which Hargis attacked the character of Fred J. Cook, the author of a critical biography of then-Senator Barry Goldwater.⁵⁰ The Commission ordered the station to provide Cook with free airtime to respond to Hargis' disparaging remarks; WGCB refused to comply with the order. The dispute ultimately reached the Supreme Court, which had to decide whether the Commission could constitutionally order a broadcaster to provide free airtime to a person subjected to a personal attack.

⁴⁷ See infra notes ___ to ___ and accompanying text.

⁴⁸ 395 U.S. 367 (1969).

⁴⁹ See 47 C.F.R. § 73.1920 (1995); see also 47 U.S.C. §§ 312, 315.

⁵⁰ See Red Lion, 395 U.S. at 371-72. For a more complete history of the facts and circumstances surrounding Red Lion, see L. Powe, Jr., American Broadcasting and the First Amendment 37-45, 111-17 (1987).

Without a single dissent, the Supreme Court concluded that the Commission's fairness doctrine policies "enhance[d], rather than abridge[d] the freedoms of speech and press protected by the First Amendment."⁵¹ Relying upon a theory of spectrum scarcity, the court reasoned that not everyone wishing to operate a television or radio station could procure a license to do so.⁵² Accordingly, those who do procure such licenses have an obligation to operate in the "public interest." Operation consistent with this duty implied airing diverse points of view and refraining from using the license to promote the licensee's own particular political or ideological point of view to the exclusion of differing points of view.⁵³

The court explained that in order to ensure a robust marketplace of ideas over the airwaves, government must regulate the programming decisions of broadcasters.⁵⁴ "There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all."⁵⁵ Thus, unlike those publishing newspapers, broadcasters "using scarce radio frequencies" serve as "proxies for the entire community,

⁵¹ Red Lion, 395 U.S. at 375.

⁵² Id. at 375-76.

⁵³ Id. at 386-90.

⁵⁴ Id. at 390-92.

⁵⁵ Id. at 392; see also National Broadcasting Co., Inc. v. United States, 319 U.S. 190, 226-27 (1943).

obligated to give suitable time and attention to matters of general public concern."⁵⁶

Red Lion seemed to imply that radio and television broadcasters did not enjoy the same First Amendment protection as other media, including newspapers. The Supreme Court made this implicit premise explicit in Miami Herald Publishing Company v. Tornillo.⁵⁷

In Tornillo, the Supreme Court considered the constitutionality of a Florida statute that created a right of reply for political candidates disparaged or merely dispreferred in newspapers published within the state.⁵⁸ The Supreme Court unanimously held that the statute violated the First Amendment rights of newspaper publishers.⁵⁹ The court made no effort to square this holding with its prior decision in Red Lion, perhaps because it viewed the distinction between broadcasting and newspaper publishing as self-evident. Because anyone may establish a newspaper, government cannot constitutionally require that existing newspapers print replies from disgruntled candidates for political office.⁶⁰

Notwithstanding Red Lion, commercial television broadcasters' basic claim to full First Amendment protection is

⁵⁶ Id. at 394.

⁵⁷ 418 U.S. 241 (1974).

⁵⁸ Id. at 244-45.

⁵⁹ Id. at 254-58.

⁶⁰ See Powe, supra note ____, at 228-30, 239.

relatively straightforward and has strong superficial appeal: broadcasters, like any other participant in the marketplace of ideas,⁶¹ have a First Amendment right to select material that they deem best for broadcast on their licensed channels. Supporters of this approach argue for a unitary First Amendment; i.e., they reject the notion that the public nature of the airwaves, or the scarcity of television licenses, justifies placing a higher regulatory burden on the editorial policies of broadcasters.⁶²

Under this approach, any non-trivial restrictions on broadcasters' editorial choices are an impermissible violation of core First Amendment values.⁶³ Furthermore, there is no reason to believe that the government knows better than broadcasters what programming the public wants to see. The market, rather than the government, should decide what the public shall view.⁶⁴

⁶¹ See Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting); Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., dissenting).

⁶² Krattenmaker & Powe, Regulating Broadcast Programming, supra note ___, at 229-36, 317-25; cf. Turner Broadcasting Sys., Inc. v. FCC 114 S. Ct. 2445 (1994); FCC v. League of Women Voters, 468 U.S. 364 (1984); Red Lion Broadcasting, Inc. v. FCC, 395 U.S. 367 (1969).

⁶³ See, e.g., Smolla, supra note ___, at 14-23.

⁶⁴ See Krattenmaker & Powe, Regulating Broadcast Programming, supra note ___, at 245-46, 309-15; Krattenmaker & Powe, "Converging First Amendment Principles," supra note ___, at 1728-30; but see Entman, supra note ___, at 80 ("[i]f a proposed communications law or policy seems to violate the First Amendment, little additional investigation into its actual impact occurs [at the Commission]").

These arguments are not without persuasive force. In many respects, a unitary First Amendment makes sense, for if scarcity is the rationale for Red Lion, Tornillo was wrongly decided.⁶⁵ Furthermore, new technologies that provide myriad means of program delivery make continuing reliance on Red Lion's scarcity rationale at best dubious and at worst ludicrous.⁶⁶

⁶⁵ Compare Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) with Miami Herald Publishing Corp. v. Tornillo, 418 U.S. 241 (1974); see also W. Van Alstyne, Interpretations of the First Amendment 68-85 (1984). In most major markets, only a single newspaper exists. Moreover, the practical barriers to market entry are steep. It borders on the ludicrous to suggest that there is a meaningful ability to establish a paper to rival, say, the Washington Post or New York Times. The dominant paper in a given market enjoys a larger circulation, higher visibility, and easier access to advertising revenue. See Krattenmaker & Powe, Regulating Broadcast Programming, *supra* note ____, at 214-16. Moreover, even if one could establish a rival paper with an alternate editorial point of view (e.g., the Washington Times), stories appearing in the rival publication will not reach the same audience, or have the same impact, as stories appearing in the dominant newspaper. Hence, a "balanced" story in the Washington Post has more punch than a "correction" or "alternate point of view" story in the Washington Times. With the exception of Washington and New York, most American cities have only a single newspaper.

⁶⁶ With the near universal access of cable, the development of video cassette technologies, CD-ROMs, and laser discs, in addition to other alternative means of program delivery including direct broadcast satellite and wireless cable services, the notion that one must have a broadcast television channel to serve as a platform in order to place a message in the marketplace of ideas is badly outdated. Near-term developments, including video dialtone, digital broadcasting, and digitally-compressed cable systems will expand further consumer's access to programming. Accordingly, concern about effective "private censorship" by broadcasters no longer seems relevant. But see FCC v. League of Women Voters, 468 U.S. 364, 376 n.11 (1984); Red Lion Broadcasting Co., 395 U.S. at 392-95. The Supreme Court appears to be well aware of the intellectual infirmities of the scarcity rationale, but has not yet been willing to abandon the doctrine. See Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2457 (1994). For more specific criticism of the scarcity rationale, see Mayton, "The Illegitimacy of Public Interest Standard at the FCC," 38 Emory L.J. 715, 718-19 (1989); Spitzer,

Those who have attempted to defend Red Lion generally have done so on the basis that a broadcast license empowers the holder to participate in the marketplace of ideas in ways not comparable to other speakers.⁶⁷ Because one generally cannot broadcast a message without access to an assigned band of spectrum, the government is justified in imposing a variety of public interest limitations on those holding such licenses.⁶⁸ This view fails to take into account the seismic changes that have occurred in the technologies that facilitate the dissemination of a message.

In addition to broadcast television, cable now offers literally dozens (and soon hundreds) of potential platforms for speech activity, often including local "public access" channels.⁶⁹ In addition, direct broadcast satellite ("DBS"), wireless cable, and video dialtone services all offer (or soon

"The Constitutionality of Licensing Broadcasters," 64 N.Y.U. L. Rev. 990, 1007-1020 (1989); Winer, "The Signal Cable Service Sends-Part I: Why Can't Cable Be More Like Broadcasting?," 46 Md. L. Rev. 212, 215-40 (1987).

⁶⁷ See Van Alstyne, Interpretations of the First Amendment 85-90 (1984); Fiss, "Free Speech and Social Structure," 71 Iowa L. Rev. 1405 (1986); Fiss, "Why the State?," supra note ___, at 786-88.

⁶⁸ Sunstein, "Half-Truths About the First Amendment," 1993 U. Chi. L. Forum 25, 32-36; Van Alstyne, supra note ___, at 88-90; Fiss, "Why the State?," supra note ___, at 785-88.

⁶⁹ For example, the local public access channel in Indianapolis appears to have more than ample capacity to accommodate all comers. For large period of prime time, the channel is unused or simply reruns the same show over and over again. See generally Winer, supra note ___, at 241-45, 277 (arguing that universal cable service, including public, educational, and government channels, has significantly weakened Red Lion's scarcity rationale by providing "considerable opportunity for public access, whether or not mandated").

will offer) platforms for program delivery. Perhaps the most democratic platform for the dissemination of ideas is the Internet. Anyone can create a home page, including both video and audio materials.⁷⁰ Today, a would-be "broadcaster" has far more effective tools readily at hand to disseminate his message effectively to a wide audience than does a would-be publisher. It therefore makes little sense to continue holding television broadcasters hostage to some sort of second class status under the First Amendment on the theory that they hold an effective monopoly on access to the marketplace of ideas.⁷¹

The "public" nature of the spectrum argument also tends to prove too much. Virtually every "private" activity relies upon

⁷⁰ Significantly, all of the major presidential campaigns have established home pages on the Internet. Reid, "The Candidates Invite You to Their Home Page," The Washington Post, November 13, 1995, at § F, p. 17; Sheppard, "New Technology Offers Avenue for Old-Time Political Pranks," The Chicago Tribune, November 1, 1995, at § 1, p. 23. Indeed, the ubiquity of the Internet has become a subject of Gary Trudeau's social satire. In a recent series, Mike Doonesbury's employer charges Mike with developing an Internet home page for the firm. Doonesbury relies upon his daughter, a child of about eleven years, for assistance with this task. Doonesbury is thrilled after a few hundred 'Net surfers browse his site; by contrast, his daughter's home page, which features software reviews, received 165,000 visits in a single week. Trudeau, "Doonesbury," The Chicago Tribune, December 10, 1995, § 9, at 2. The Internet makes the dissemination of ideas virtually cost-free, and represents the 21st century's equivalent of the streetcorner of yore. Those with a serious interest in First Amendment jurisprudence will need to adjust their paradigms accordingly. See, e.g., Fiss, "In Search of a New Paradigm," 105 Yale L.J. 1613, 1614-18 (1995).

⁷¹ Indeed, cablecasters have avoided the Red Lion trap. Unlike broadcasters, cablecasters enjoy full First Amendment rights. See Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2456-57 (1994) (declining to apply the scarcity rationale to justify lessened First Amendment rights for cablecasters).

some form of indirect government assistance to facilitate its operations: the use of the city streets and sidewalks, reliance on public fire and police protection services, etc. These are not unlimited resources, and the finite nature of these resources generally is not thought to justify the government in establishing content-based speech regulations incident to their use.⁷²

Finally, the convergence of telecommunications services has overtaken the press/broadcaster rationale of Red Lion. National newspapers, like the New York Times, the Wall Street Journal, and USA Today rely on access to wireline and wireless communications to facilitate their newsgathering, printing, and distribution operations. Absent access to spectrum, they would be unable to maintain their national newsgathering, production, and distribution systems.⁷³ If the mere use of "scarce" electro-

⁷² For example, if a municipality permitted candidates for political office to post signs on publicly-owned utility poles, could it condition the grant of such permission on the inclusion of "no smoking" slogan on the political materials? Assume further that there are a larger number of candidates seeking to use the poles designated for this use than there are available utility poles. The government may be free to permit or prohibit the use of the utility poles for the posting of signs as it thinks best, but is cannot use the scarcity rationale to justify imposing content-based speech regulations on the potential users of the poles. See City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 808-09 (1984).

⁷³ Kerver, "Printing By Satellite," Satellite Communications, August 1989, at 29 (reporting on major newspaper's reliance on satellite communications); "Electronic Delivery Without the Internet," The Seybold Report on Publishing Systems 19 (September 1995) (describing a wireless newspaper delivery system); Wilder, "The Media's New Message," Informationweek, October 10, 1994, at 128 (reporting that the Gannett and Knight-Ridder newspaper chains "use satellite transmission and electronic publishing technology to distribute

magnetic spectrum justifies the imposition of government regulation, these newspapers should be subject to greater government control.⁷⁴

Moreover, from an economic perspective the scarcity rationale has never withstood close scrutiny.⁷⁵ As early as 1959, Professor Ronald Coase debunked the notion that the spectrum was any scarcer than any other kind of finite resource in the economy.⁷⁶ Spectrum, like any other necessary component needed for the production or distribution of a product, theoretically could be bought and sold just like any other commodity.

By way of example, consider a particular commodity: newsprint. If the demand for newsprint exceeds the available

information and publish newspapers across the country"). Some newspapers, like the Washington Post, have gone "on-line," and provide subscribers with an electronic newspaper. See Jones, "Papers Try to Pick Up Wall Street's Beat," The Chicago Tribune, December 10, 1995, § C, p. 1. Again, these operations are likely to involve the use of spectrum at some point in the creation or distribution process. The accident of spectrum use should not, however, subject newspapers providing such services to burdensome government regulations.

⁷⁴ Ironically, it was just this sort of incidental use of the electromagnetic spectrum that led the Commission to assert jurisdiction over cable systems in the 1950s. See L. Powe, supra note ____, at 216-26.

⁷⁵ See Hazlett, "The Rationality of U.S. Regulation of the Broadcast Spectrum," 33 J. Law & Econ. 133 (1990); Coase, "The Federal Communications Commission," 2 J. Law & Econ. 1, 18-20 (1959). For a relatively recent dissenting point of view, see Ferris & Leahy, "Red Lions, Tigers, and Bears: Broadcast Content Regulation and the First Amendment," 38 Cath. L. Rev. 299, 315-17 (1989) (arguing for the continuing viability of the scarcity rationale).

⁷⁶ Coase, supra note ____, at 18-20.

supply, the price of newsprint will rise and those newspapers willing and able to pay a higher price will obtain the newsprint needed to publish. Marginally profitable publications, on the other hand, will be priced out of the market, with the probable consequence of ceasing publication -- at least until such time as prices fall. The fact that price effectively controls access would not justify government regulation of newsprint on the theory that newsprint is scarce. The same analogy holds true for electromagnetic spectrum.⁷⁷

In light of the foregoing, it would seem that the proponents of a market-based approach to the regulation of broadcasters are correct in positing a unitary theory of the First Amendment.⁷⁸ As noted above, technological advances and the phenomenon of convergence have largely, if not completely, undermined the scarcity rationale of Red Lion -- and the scarcity rationale long ago lost whatever patina of intellectual respectability it once possessed.⁷⁹

⁷⁷ See Coase, supra note ____, at ____; see also Powe, supra note ____, at 200-209.

⁷⁸ In my view, the "marketplace of ideas" paradigm for the First Amendment is the best model. To be sure, the Amendment does not guarantee a happy outcome; it is a gamble on the basic rationality of human beings. The principle competing vision of the First Amendment, the so-called "Civic Republican/"Madisonian" view smacks of Plato's Republic, in which the government works diligently to make its citizens good. See, e.g., Sunstein, Democracy and the Problem of Free Speech 67-77, 81-92, 241-52 (1993).

⁷⁹ See C. Sunstein, Democracy and the Problem of Free Speech 54-55 (1993) [hereinafter "Democracy"]; see generally N. Minow, supra note ____, at 66-67.

Nevertheless, the exact nature of commercial television broadcasters' First Amendment claims deserves closer scrutiny than either the Commission or the academy has undertaken.⁸⁰ In particular, the "marketplace of ideas" paradigm of the First Amendment⁸¹ presupposes that the person who is speaking actually advocates a particular idea or point of view. That is to say, it assumes that those in the marketplace actually mean what they say, and that their motivation for speaking is not merely to facilitate a commercial transaction. Thus, if I sell time share agreements through telemarketing, I engage in "speech" activity incident to each commercial transaction. However, the sort of speech (e.g., cold calling senior citizens in New Jersey) that I engage in incident to my business historically has never been thought to enjoy particularly strong First Amendment protection.⁸²

In the case of broadcasters, much of their speech activity exists largely, if not completely, to facilitate what are essentially commercial transactions: the bundling and sale of

⁸⁰ See Entman, supra note ____, at 73-75; cf. Smolla, supra note ____, at 6-10 (arguing for full First Amendment protection without any analysis of the proper First Amendment status of commercial broadcasters' speech activities).

⁸¹ See W. Van Alstyne, Interpretations of the First Amendment 34-35 & 34 n.38 (1984); see also Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., dissenting).

⁸² See Valentine v. Chrestensen, 316 U.S. 52 (1942); see also Kozinski & Banner, "The Anti-History and Pre-History of Commercial Speech," 71 Tex. L. Rev. 747, 755-69 (1993).