Even those who champion the speech rights of broadcasters stipulate that broadcasters' programming decisions are largely, if not completely, driven by the market.[158] If broadcasters are largely passive reactors to the public taste, their claim to exercising meaningful editorial judgments about the content of their programming rings rather hollow.

Essentially, their First Amendment claim boils down to the assertion that they should be free to bundle and sell audiences free of government regulation; framed in these terms, it is more an argument for economic due process than for serious First Amendment protection.[159] "[T]he market brings to bear on editorial and programming decisions factors that might have a great deal to do with profitability or allocative efficiency (to look at matters from a societal point of view) but little to do with the democratic needs of the electorate."[160]

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be swept off the schedule by next fall." Saudners, supra. Broadcasters are largely, if not completely, indifferent to the content of these shows, so long as they reap the expected rents from the sale of advertising time; if the advertising support dries up, the broadcaster drops the show. See N. Minow, supra note ___, at 37-39; see generally Ferris & Leahy, supra note ___, at 324 ("Rather than generating a wider range of programming choices for the public, the newly-competitive market-place appears, at least in some cases, to generate programming that falls to the lowest common denominator that will attract the largest audience.").

[158] See Krattenmaker & Powe, Regulating Broadcast Programming, supra note ___, at 40-42, 70-74; 140-41, 245-46, 278-83, 313-16; Krattenmaker & Powe, "Converging First Amendment Principles," supra note __, at 1728-30, 1734.

[159] See Lochner v. New York, 198 U.S. 45 (1905); cf. Nebbia v. New York, 291 U.S. 502 (1934); see generally Kozinski & Banner, "Anti-History," supra note ___, at 767-74.

[160] Fiss, supra note __, at 788.

C. A New Paradigm for Evaluating Broadcasters' Free Speech Claims.

Both the Commission and the federal courts should reconsider the First Amendment pretensions of television and radio broadcasters. Where programming decisions reflect nothing more than a desire to maximize rents, the basis for broadcasters' claim to First Amendment rights equal to those of political candidates, Hare Krishnas, or even mainstream newspapers is difficult to discern.[161]

To be sure, this is not always the case; the production of national and local news involves the exercise of editorial judgment about precisely what is "newsworthy," and broadcast journalists are famous for the seriousness with which they take their role of "setting the public policy agenda."[162] However, with respect to their selection of children's programming, most broadcasters, in most instances, would be hard pressed to explain

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[161] By way of example, the New York Times never would sell its front page for a risque Calvin Klein advertisement, i.e., the New York Times greets its daily readers with a masthead and a spread-eagle teenager in bikini briefs. Such a turn of events is simply unthinkable. Now, ask whether ABC, CBS, or NBC would preempt their national news programming if Calvin Klein offered a sufficiently juicy pot of money. Unlike the newspaper, the network likely would sell out. (Indeed, Dan Rather might even be required to introduce the waif -- or, worse yet, serve as a model for the product!) This "everything is for sale" attitude underscores the essentially commercial nature of commercial television broadcaster's editorial decision making.

[162] See Bennett, News: The Politics of Illusion (1988); C. Sunstein, Democracy, supra note ___, at 62. Of course, broadcast journalists, particularly at the local level, sometimes tend to overstate their independence from crass commercial concerns. The broadcast newsroom aphorism that "if it bleeds, it leads" demonstrates broadcast journalists' conflicting objectives. See Bennett, supra.

their programming choices in other than purely economic terms.[163] Accordingly, the federal courts and Commission should abandon Red Lion as a justification for public-interest regulation of television and radio broadcasters in favor of reliance on the commercial speech doctrine.

Although the Supreme Court has not clearly defined "commercial speech,"[164] it has clearly defined the limits of the government's ability to regulate commercial speech. Under Central Hudson, a four-part test governs the legality of government-imposed burdens on commercial speech:

(1) the speech must not be misleading or false, or concern unlawful activity;

(2) the government must proffer a substantial interest in restricting or regulating the speech;

(3) The restriction or regulation must directly advance the government's substantial interest; and

(4) The restriction must be narrowly tailored to achieve the government's objective.[165]

Thus, "commercial speech" enjoys significant First Amendment protection, though less protection than non-commercial speech.[166]

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[163] N. Minow, supra note ___, at 52-57; C. Sunstein, Democracy, supra note ___, at 65-66: Charren, supra note ___, at 1252-57.

[164] See supra text and accompanying notes ___ to ___.

[165] Central Hudson Gas & Elec. Co. v. PSC, 447 U.S. 537, 561-66 (1980).

[166] See, e.g., Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 112 S. Ct. 501, 508-09 (1991) (applying strict scrutiny to a content-based speech restriction, and requiring a "compelling state interest" to justify the burden).

Under the Red Lion line of cases, burdens on broadcasters' First Amendment rights are subject to an intermediate level of scrutiny.[167] "[T]hese restrictions have been upheld only when we have been satisfied that the restriction is narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues."[168] This test is, of course, remarkably similar to the Central Hudson test for burdens on commercial speech. Indeed, although the League of Women Voters Court did not explicitly require "narrow tailoring," it ultimately struck down a government-imposed restriction on editorializing by public broadcasting stations because "its proscription is not sufficiently tailored to the harms it seeks to prevent to justify its substantial interference with broadcasters' speech."[169]

If the tests are largely indistinguishable as a practical matter, one might reasonably ask why a doctrinal shift to the Central Hudson test is necessary. There are several reasons, foremost among them the intellectually bankrupt "scarcity" rationale on which Red Lion and its progeny (uncomfortably) rest.[170]

Furthermore, and equally as important, the current Red Lion regime inadequately protects broadcasters when they do espouse a

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[167] See FCC v. League of Women Voters, 468 U.S. 364, 380-81 (1984).

[168] Id. at 380.

[169] Id. at 392; see also id. at 395.

[170] See supra text and accompanying notes ___ to ___.

political, philosophical, aesthetic, or similar kind of viewpoint. Indeed, under the Commission's regulations, such programming might trigger a right of reply.[171] Broadcasters should enjoy the full protection of the First Amendment when they are engaged in non-commercial speech activities.

Even under a unitary theory of the First Amendment, in which the commercial speech doctrine, rather than Red Lion, justifies some government regulation of broadcasting, courts should remain vigilant against attempts to use the regulation of broadcasters as an indirect means of restricting or suppressing disfavored kinds of speech. Although a broadcaster's decision to air a particular show is essentially commercial in nature, the producers of that show probably have a valid claim to full First Amendment protection of their work-product as "non-commercial" speech.

A regulation that burdens or prohibits a particular kind of show from being broadcast not only impinges on a broadcaster's commercial speech rights, but also affects the non-commercial speech of the program's creators. In consequence, government regulations that directly burden the speech rights of those

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[171] Although the Commission has abandoned the Fairness Doctrine, which required stations to provide free air time whenever a station aired a position on a controversial issue, it has retained two corollary doctrines: the personal attack rule, 47 C.F.R. § 73.1920, and the political editorials rule, 47 C.F.R. § 73.1930. If a station airs a personal attack incident to discussion of a controversial issue, it must permit the person attacked to respond. 47 C.F.R. § 73.1920. Likewise, if a station editorially endorses or opposes a candidate for public office, it must permit other candidates running for the same office or the candidate opposed by the station to respond. 47 C.F.R. § 73.1930.

producing programming should be subject to First Amendment attack on the ground that such regulations have a chilling effect on the dispreferred speech.

For example, the Commission currently has rules prohibiting the broadcast of "indecent" programming outside certain safe-harbor periods, severely restricting the times during which such programming may be aired.[172] These restrictions have been upheld under the Red Lion scarcity rationale, because "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences," rather than the broadcaster's interest in editorial freedom, "which is crucial here."[173] Thus, consistent with Red Lion, the public's interest in being free from offensive material both outweighs a broadcaster's interest in disseminating such material, and a producer/director's interest in creating such materials.[174]

In a post-Red Lion world, the Commission should not be permitted to adopt regulations that directly burden particular types of speech, even if the broadcaster does not select the programming in order to promote a particular political, philosophical, or aesthetic viewpoint. For example, booksellers

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[172] See Hundt, supra at ___; see also Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) (en banc); see also FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

[173] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

[174] FCC v. Pacifica Foundation, 438 U.S. 726, 748-49 (1978).

routinely challenge local regulations that preclude them from selling certain kinds of materials.[175] Most large commercial booksellers are largely, if not completely, indifferent to the materials they sell. If they could achieve the highest possible return by selling only Howard Stern's Miss America, they would stock only this book.[176]

Notwithstanding most booksellers' commercial motivations, the federal courts permit them to challenge restrictions on their ability to offer particular kinds of material for sale. I submit that a bookseller's success in such a case does not reflect concern for the ability of the bookseller to complete a commercial transaction, but rather is necessary to protect the speech prerogatives of those who actually create the materials at issue. If a bookstore cannot sell a particular class of materials (e.g, "indecent" books), the speech rights of those

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[175] See, e.g., American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), summarily aff'd, 475 U.S. 1001 (1986).

[176] There are, of course, booksellers that have particular ideological points of view. For example, the Feminist Attic or Pink Triangle Books probably forgoes opportunities to make sales in order to maintain their ideological purity, i.e., the Feminist Attic probably does not stock Penthouse, and one would likely be hard pressed to find Anita Bryant's official biography in Pink Triangle Books. Nominally commercial entities engaged in significant non-commercial speech activity incident to their commercial operations should be permitted to use the First Amendment to protect their ideological mission from government regulation, even though this ideology is annexed to a commercial or economic activity. The test should be whether the particular speech activity at issue involves or implicates non-commercial speech activity, given the context in which the speech occurs and the probable intent/motivation of the speaker. See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-68 (1983); see generally Hoffman Estates v. Flipside, 455 U.S. 489 (1982).

engaged in the creation of works falling within the prescribed class will be substantially burdened; the prohibition will significantly chill their speech activities.[177]

One could also conceptualize the interest as that of the public in receiving or having access to the materials.[178] Courts are not acting to protect the booksellers' ability to make profitable sales -- instead, they are protecting the derivative speech rights of writers and the general public. Broadcasters should be permitted to raise the speech rights of those producing particular kinds of programming and those who wish to watch it.[179]

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[177] The same analysis would apply to most commercial exhibitors of motion pictures. See Freedman v. Maryland, 380 U.S. 51, 57-60 (1965); see also 414 Theater Corp. v. Murray, 499 F.2d 1155, 1159 (2d Cir. 1974).

[178] See generally Virginia State Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976).

[179] PBS sponsored the production of Armistead Maupin's Tales of the City, which aired nationally on local-PBS affiliates. The program featured drug use, nudity, and provided overt examples of gay and lesbian affection. Notwithstanding its treatment of controversial subjects, it is undoubtedly one of the best made-for-television series in recent memory; "Tales of the City" was intelligent, challenging, and entertaining fair for adults. It was also, at least arguably, "indecent," and a number of affiliates objected to airing it. See generally Carman, "New PBS Chief Says Maupin Should Be Grateful, Not Upset," The San Francisco Chronicle, July 28, 1994, at § A, p. 1 (reporting problems associated with airing the series because of content); Sharkey, "Maupin's Dream of the Future, Set in the Past," The New York Times, February 28, 1993, § 2, p. 27, col. 1 (reporting difficulties with producing Tales of the City because of its content). The adult viewing audience should not expect fare of this quality under the current command and control regime.

Under a unitary theory of the First Amendment, broadcasters should be free to shock, offend, or alienate their audiences.[180] Of course, if a broadcaster offends too many viewers too often, it will soon lack an audience, because advertisers will withdraw their support.[181] The market would largely serve as an effective regulator of the content of broadcast radio and television.[182] Government would retain the power to regulate

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[180] Some might suggest that broadcasters are already free to do this. For example, Howard Stern and G. Gordon Liddy appeal to particular segments of the listening public. However, the FCC has assessed significant fines against Stern's syndicator, Infinity Broadcasting. See, e.g., Letter to Mr. Mel Karmazin, President, Infinity Broadcasting from Roy Stewart, Chief, Mass Media Bureau (May 20, 1994), reprinted in 9 FCC Rcd 6442 (1994). These fines represent a disincentive for airing Stern's morning show; because the show is wildly profitable, however, Infinity paid the fine and Mr. Stern remains safely ensconced behind his microphone. However, those whose programming does not enjoy the phenomenal popularity of a Howard Stern will find it much harder to get their material broadcast, even if there is a non-trivial audience that wishes to receive such programming.

[181] See, e.g., "Network Programming Chiefs Face Viewers for Quality TV," Broadcasting, October 2, 1989, at 49; see also Krattenmaker & Powe, Regulating Broadcast Programming, supra note ___, at 246, 278-83, 313-15; Fowler & Brenner, supra note ___, at 209-10..

[182] A number of academics have suggested a Civic Republican model for justifying government regulation of broadcasters. See, e.g., Sunstein, Democracy, supra note ___, at 17-23, 48-51, 67-92, 241-52; Sunstein, "The First Amendment in Cyberspace," 105 Yale L.J. 1757, 1759-65 (1995). Sunstein and company appear quite willing to trust in the government's ability to make us good, virtuous, etc. The First Amendment reflects a gamble on the good sense of the population; if we permit broadcasters, publishers, and evil politicians to debase our culture to the point that we are no longer capable of self-government, the experiment obviously will have been a failure.

In any event, it requires rather circular logic to argue that the First Amendment exists to facilitate democratic self-government (a proposition with which I agree) and to conclude from this premise that democratically-elected majoritarian bodies should be permitted to enact regulations of speech which they

television and radio broadcasters' speech in ways consistent with Central Hudson, provided that the regulations would not directly burden a particular category of speech that artists and performers wish to create and the public wishes to receive. Under this approach, the Commission would continue to possess broad discretion to promote the "public interest, convenience, and necessity."[183]

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believe will facilitate effective or virtuous self-government. Sunstein, supra, at 1803-04 ("instead of allowing new technologies to use democratic processes for their own purposes, constitutional law should be concerned with harnessing those technologies for democratic ends -- including the founding aspirations to public deliberation, citizenship, political equality, and even a certain kind of virtue"). A more logical conclusion is that the words of the First Amendment in large part actually mean what they seem to say: "no law abridging the freedom of speech." Sunstein's version, by way of contrast, appears to prohibit government from enacting any "anti-democratic" or "poorly conceived" laws abridging the freedom of speech. I prefer the original text to Sunstein's proposed "new, improved, and updated" version.

Finally, I do not understand Sunstein's confidence in the ability of government to promote "virtue." Indeed, if history is any guide in matters of this sort, government tends to seek its own perpetuation, and those in office the continuation of their sinecures. See Epstein, supra note __, at 54. The history of government regulation of speech is particularly telling: from the Alien and Sedition Act of 1789, to the persecution of presumed communists in the 1950s, government has shown an uncanny knack for squelching speech that it deems inimical to its well-being and comfort. In light of this track record, we should view with great skepticism suggestions that the government be empowered to enact laws that will make us good. As Professor Owen Fiss has observed, "[t]he state has no corner on virtue." Fiss, supra note __, at 789. In consequence, there is no reason to believe that those persons we elect to public office possess any greater perspicacity than we ourselves do in deciding questions of virtue and morality. See generally Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment," 79 Harv. L. Rev. 1, 11-16 (1965).

[183] For example, the rules governing political candidates' right of "reasonable access" to advertising time on commercial television and radio stations would remain constitutional. See

This jurisprudential shift likely would have the salutary effect of strengthening the commercial speech doctrine. By expanding the scope of the doctrine's application, the federal courts probably would apply the doctrine more aggressively.

Relatedly, there is little reason to believe that shifting from Red Lion to Central Hudson would decrease broadcasters' net speech rights in any meaningful way. Indeed, parties bringing commercial speech claims before the Supreme Court have often prevailed. This has not always been the case for those with non-commercial speech claims.[184]

Finally, the shift in paradigm would free public broadcasters and those commercial broadcasters who are routinely engaged in non-commercial speech from burdensome government

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47 C.F.R. § 73.1944 (1995). By definition, these regulations pertain to commercial speech -- broadcasters generally sell their advertising time to the highest bidder, through the use of an auction-based preemption scheme. Likewise, Commission efforts to diversify the content of programming by encouraging broadcasters to air particular kinds of programming would also pass muster, because such rules do not generally impose any direct burden on other speakers or the public. Other kinds of "thou shalt" rules that do not directly burden particular kinds of speech would also be permissible (e.g., broadcasters obligation to produce local programming on politics and community affairs).

[184] See United States v. Kokinda, 497 U.S. 720 (1989); Society for Krishna Consciousness v. Lee, 505 U.S. 672 (1992); Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985); Barnes v. Glen Theater, Inc., 501 U.S. 560 (1991); City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984). Indeed, with the notable exception of Posadas and Edge Broadcasting, the Supreme Court has routinely vindicated the speech claims of those with "commercial" speech cases. See Rubin v. Coors Brewing Corp., 115 S. Ct. 1585 (1995); Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 604 (1983); Bigelow v. Virginia, 421 U.S. 809 (1975); see also Smolla, "Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech," 71 Tex. L. Rev. 777, 791 (1993).

regulation. Public broadcasters are not "commercial" in any meaningful sense, and therefore would be able to claim the full benefit of the First Amendment.[185] Commercial broadcasters who engage in non-commercial speech activity also could claim such benefits.[186]

D. The Chairman's Proposals Should Be Deemed Constitutional

A unitary, market-based approach to evaluating the First Amendment claims of broadcasters would not preclude the Commission from adopting its proposed children's educational programming rules. Contrary to the suggestions of some commentators,[187] there still would be an active role for the Commission to play under such a regime.

Government is free to regulate commercial speech in order to achieve "substantial" public policy objectives. Furthermore, such regulations need not directly burden those producing particular kinds of programming, nor the ability of the viewing public to see such programming. In short, the Commission should be free to adopt viewpoint-neutral but content-sensitive regulations that channel or restrict commercial television

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[185] Cf. FCC v. Pacifica Foundation, 438 U.S. 726 (1978); Alliance for Community Media v. FCC, 56 F.3d 105 (D.C. Cir. 1995) (en banc).

[186] For example, a commercial television station dedicated to broadcasting French language programming would enjoy enhanced speech rights, at least insofar as its claims to being free from regulation relates to its decision to promote the use of French.

[187] See, e.g., Smolla, supra note ___, at 6-26.

broadcasters' programming decisions, provided such regulations serve substantial public policies.[188]

Broadcasters would find it difficult to provide any non-commercial rationale for the selection of most, if not all, of their children's programming.[189] Accordingly, the proposed children's programming rules should be deemed a regulation of "commercial" speech.[190]

Furthermore, the only burdened party is the broadcaster, who must show "children's educational programming," rather than some other type of programming. As noted above, broadcasters' First Amendment claims against regulations that only indirectly burden particular kinds of programming are significantly less compelling than complaints about programming rules that directly burden particular types of programming. This is so because of the impact that direct burdens have on the production of programming and on the ability of the public to receive such programming. Given that the proposed educational children's programming

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[188] "With respect to noncommercial speech, this Court has sustained content-based restrictions only in the most extraordinary circumstances. . . . [b]y contrast, regulation of commercial speech based on content is less problematic." Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983).

[189] Capital Cities/ABC's decision to drop "CRO" in favor of "Dumb and Dumber" once again provides an instructive example. See generally N. Minow, supra note ___, at 10-11, 19-21.

[190] Indeed, at least with respect to children's programming, there is sometimes a direct tie-in between programming and a particular line of products. See, e.g., Littleton, "Kids-Show Rush for Fall," Broadcasting & Cable, January 1, 1996, at 26-27 (describing "Pillow People," a show based "on a line of bed sheets and home furnishings"); see generally N. Minow, supra note ___, at 45-46, 52-57; Charren, supra note ___, at 1252-55.

regulations do not directly burden other kinds of programming, broadcasters would be hard pressed to argue persuasively that the proposed rules will have a chilling effect on the speech rights of others, or that the rule will deny the viewing public access to a particular category of programming.[191]

It therefore seems appropriate to rely on Central Hudson to evaluate the legality of the proposal.[192] Under Central Hudson, the government is free to regulate commercial speech if the regulation furthers a substantial government interest, is narrowly tailored, and directly furthers the interest

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[191] In his formal statement of support of the NAB's comments, Professor Smolla argues quite vigorously that the government cannot coerce speech, and that the proposed regulations would do just that. See Smolla, supra note __, at 6-10. Professor Smolla's argument reflects a basic misunderstanding of the current state of the law. Consistent with Red Lion, commercial television broadcasters are subject to mandatory forms of speech that could not be imposed on newspapers or individual citizens. For example, broadcasters must identify program sponsors, and must do so in specific ways. See 47 C.F.R. § 73.1212; see also 47 U.S.C. § 317; cf. McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995) (holding that a private citizen need not identify herself as the author of a political tract). They must also air political advertisements for federal candidates, even if the content of these advertisements violates their usual editorial standards. See 47 C.F.R. § 73.1944 (1995); see also 47 U.S.C. § 315; Gillett Communications of Atlanta, Inc., v. Becker, 807 F. Supp. 757 (N.D. Ga. 1992), aff'd, 5 F.3d 150 (11th Cir. 1993). Finally, the government has mandated warning statements for advertisements touting tobacco products -- a form of affirmatively compelled speech that the federal courts have approved. See 15 U.S.C. §§ 1331, 1333, 1335; Capital Broadcasting v. Mitchell, 333 F. Supp. 582, 588 (D.D.C. 1971). The notion that the Congress and the Commission are constitutionally limited to promulgating only negative rules regulating speech is demonstrably false.

[192] See supra text and accompanying notes ___ to ___.

asserted.[193] The Chairman's proposals satisfy all three requirements.

Ensuring that America's children have access to meaningful educational programming is a substantial government interest.[194] "[T]he government's interest in the 'well being of its youth' . . . [has] justified the regulation of otherwise protected expression."[195] Indeed, this interest might even be deemed "compelling."[196]

The regulation is narrowly tailored; in its strongest form, it would require commercial television broadcasters to air no less than three hours per week of educational children's programming and no more than five hours per week between the hours of 6:00 AM and 11:00 PM. In this time period, broadcasters have over 105 hours to program during a seven day week; the government would at most require broadcasters to use less than 5% of their total available time to meet the educational needs of children. Furthermore, commercial broadcasters already claim that they provide over four hours per week of children's

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[193] Central Hudson, 447 U.S. at 563-66.

[194] See FCC v. Pacifica Foundation, 438 U.S. 726, 749 (1978); Ginsberg v. New York, 390 U.S. 629, 639-40 (1968); see also Comments of the United States Catholic Conference, MM Docket No. 93-48, at 2-4 (Oct. 16, 1995).

[195] Pacifica Foundation, 438 U.S. at 749.

[196] See Note, "See No Evil, Hear No Evil: Television Violence and the First Amendment," 81 Va. L. Rev. 175, 209-11 (1995); see also N. Minow, supra note ___, at 175. For a description of the importance of educational children's programming, see Comments of the Center for Media Education, et al., MM Docket No. 93-48, at 20 & 20 n.60 (Oct. 16, 1995).

educational programming.[197] At most then, the proposed regulation would require broadcasters to modify the kind of children's programming that they provide by airing "educational" shows.[198] In addition, the proposed regulations would leave broadcasters free to select whatever programming they think best; the proposals are content neutral, at least if judged by the Turner Court's definition of the term.[199]

Finally, there can be little doubt that the regulations would increase the quality and quantity of educational children's programming. Thus, the regulations would directly advance the government's interest in this objective.

In sum, the regulations pass muster under the Central Hudson test. Accordingly, there is no serious First Amendment objection to their promulgation.[200]

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[197] See Comments of the NAB, MM Docket No. 93-48, at 7-9 (October 16, 1995); En Banc Reply Comments of the NAB, MM Docket No. 93-48, at 2-4 & attachment 1 (date) (asserting that in 1991 and 1992, broadcasters aired 3.6 hours per week of children's educational programming).

[198] See supra note ___.

[199] See Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2460-61 (1994). The Commission's proposed regulations direct broadcasters to show three hours of educational children's programming without mandating that any particular viewpoint be advanced or that any particular subject be canvassed in the children's programming.

[200] As noted above, the Red Lion/League of Women Voter's test for regulations that restrict the speech rights of broadcasters is virtually identical to the Central Hudson test for commercial speech. Thus, even if one were to reject my suggestion that Red Lion be abandoned in favor of a unitary model of the First Amendment, the same conclusion would obtain, i.e., the proposed regulations are constitutional under Red Lion and League of Women Voters.

III. Willie Wonka and the Policy Factory: Will Chairman Hundt's Proposals Actually Help Children?

In Part I, I posited that two simple questions need to be answered before one can reach a conclusion regarding the merits of Chairman Hundt's proposals to improve the quantity and quality of children's educational programming. The first, whether the proposals are lawful, has been answered affirmatively. Accordingly, one must proceed to the second question, which takes up the probable efficacy of the Chairman's reforms.

In this regard, two separate policy issues must be analyzed. First, is there really a problem that the Commission needs to address? The NAB and the commercial broadcasting community assert that they are in compliance with their legal obligations.[201] However, others have sharply criticized this assertion.[202] As a baseline matter, one must know whether there is a problem in need of a solution.

Second, assuming that some sort of regulatory action is needed, one must inquire into whether these proposals are the best response to the problem identified. A bad regulatory response can often be worse than no response at all.[203]

A. Jack and the Beanstalk: Magic Beans and Market Failure.

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[201] See, e.g., Comments of the NAB, MM Docket No. 93-48, at 6-12 (October 16, 1995).

[202] Hundt, supra, at ___; see also Comments of Dr. Dale Kunkel, MM Docket No. 93-48 (October 16, 1995).

[203] Regulators would do well to observe the Hippocratic oath's admonition that first and foremost, they must "do no harm." See generally Jaffe, "James Landis and the Administrative Process," 78 Harv. L. Rev. 319, 320 (1964).

As we all know, Jack traded the family's beloved cow for a handful of "magic" beans. The results were mixed; Jack obtained rents through the felonious reallocation of a certain giant's personal chattels, but the result was not an entirely happy one. All in all, Jack's family was probably better off keeping the cow.

One could analogize the cow to reliance on the market, and the magic beans to regulatory command and control initiatives. Good arguments can be made in favor of relying, to the maximum extent possible, on market-based solutions to the provision of children's programming. Perhaps most significantly, reliance on the market is efficient.[204] The market puts goods and services together with willing purchasers with lower transaction costs than the government's command and control efforts.

However, Chairman Hundt claims that the market has failed to provide a satisfactory amount of educational children's programming.[205] He asserts that incident to the Commission's

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[204] See Geller & Lampert, supra note __, at 11-17 (explaining that a spectrum fee "achieve[s] public interest objectives more directly than by the indirect and ineffective methods of the present public trustee scheme"); Ferris & Leahy, supra note ___, at 321-22 ("[t]he marketplace approach to broadcast regulation springs from the view that consumers are best off when society's resources are allocated in a manner that permits them to seek their own wants and desires as fully as possible"); Fowler & Brenner, supra note __, at 210-13, 230-31 (explaining that "consumers are best off when society's economic resources are allocated in a manner that enables people to satisfy their wants as fully as possible," and arguing that reliance on the marketplace best facilitates this result); see also Coase, supra note ___, at 16-20.

[205] See "Reading the First Amendment in Favor of Children," Address by Chairman Reed E. Hundt to the faculty and students of Brooklyn Law School, Brooklyn, New York, at 1-3, 6-7 (Dec. 4,

broad residual powers to manage the electromagnetic spectrum in a fashion consistent with the public interest, it could impose command and control regulations on broadcasters to remedy the perceived market failure.[206] In the Chairman's view, the Commission is not legally required to defer to the market.[207]

At the outset, it bears noting that the legislative history of the Children's Television Act specifically rejects continued reliance on the market as an acceptable means of securing an adequate amount of educational children's programming.[208] Accordingly, Chairman Hundt's claim that the Commission cannot rely solely on market forces to provide the desired goods seems legitimate -- if not compelled. Moreover, he is also correct in

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1995); "Long Live Frieda Hennock," Address by Chairman Reed E. Hundt to Women in Government Relations, Washington, D.C., at 6-7 (August 24, 1995).

[206] See 47 U.S.C. §§ 303(a), 303(b).

[207] Unsurprisingly, the commercial broadcasters believe that continued reliance on the market will resolve the problem. See Comments of the NAB, MM Docket No. 93-48, at ___ (September 17, 1995); Comments of the NAB, MM Docket No. 93-48, at ___ (May 7, 1993). In fact, the light at the end of the tunnel appears to have always been in sight. In 1980, broadcasters told the Commission that "responsible self-regulation and reliance upon marketplace forces are the most effective means of meeting their obligation to the child audience." Children's Programming and Advertising, 96 FCC 2d 634, 638 (1983). According to ABC, "the steady progress of marketplace changes [will] continue to enhance the overall diversity and availability of children's programming." Id. Some fifteen years later, little has changed on commercial television; if anything, broadcasters are showing less educational children's programming. See Reply Comments of Dr. Dale Kunkel, MM Docket No. 93-48, at 3-5 (June 7, 1993).

[208] Id.; see also H. Rep. No. 385, 101st Cong, 2d Sess. 2-8 (1990), reprinted in 1990 U.S. Code Cong. & Admin. News. 1605, 1606-12; S. Rep. No. 66, 101st Cong., 2d Sess. 1-14 (1990), reprinted in 1990 U.S. Code Cong. & Admin. News 1628, 1628-40.

positing that the market has done a relatively poor job of providing educational children's programming.[209]

In fact, there is much to recommend Chairman Hundt's assertion that the market has failed to provide sufficient educational children's programming. The market often fails to provide so-called "public goods," because the true demand for such goods is often difficult to measure.[210] Moreover, markets often act in a reactive, rather than a proactive fashion. As Professor Owen Fiss has observed, "[a] fully competitive market might produce a diversity of programs, formats, and reportage, but . . . it will be the diversity of 'a pack going in essentially one direction.'"[211]

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[209] Of course, there are a number of probable reasons for this state of affairs. Educational programming must produce lower rents for broadcasters than programming designed to entertain children. This may be because advertisers believe that more children will watch entertaining programs, it may be because it is more expensive to produce educational children's programming, or the cause may involve both reasons. Perhaps the most likely rationale is that producing high-quality educational children's programming is more time consuming, requires expertise not generally available, and has a smaller market. See generally N. Minow, supra note ___, at 36-52. Thus, high quality educational programming would be scarcer and therefore more expensive than the standard schlock programming that fills most early Saturday morning time slots. Although an ample supply of low quality educational children's programming is probably available, such shows are unlikely to generate significant audiences. Accordingly, advertisers will not purchase advertising slots for these shows, and broadcasters will have no incentive to show them.

[210] See Krattenmaker & Powe, Regulating Broadcast Programming 40-41 (1994); C. Sunstein, Democracy, supra note ___, at 68-71; Ferris & Leahy, supra note ___, at 323-24; Noll, Peck & McGowan, supra note __, at 27-29.

[211] Fiss, "Why the State?," supra note ___, at 787; see also Noll, Peck & McGowan, supra note __, at 211-29 (explaining the economic and policy rationales for public television); but

The work of Dr. Dale Kunkel persuasively demonstrates that commercial television broadcasters are not meeting the educational programming needs of children.[212] His work establishes that, absent regulation, broadcasters will seek to maximize rents by airing inexpensive cartoons featuring violence and mayhem, or will simply declare non-targeted programming, such as "America's Funniest Home Videos," to be "educational children's programming."[213] Left to their own devices, it appears highly unlikely that commercial television broadcasters will change their ways.

A government mandate might successfully incentivize both program producers and commercial television broadcasters to provide more and better educational children's programming. With respect to the Chairman's proposals, "[t]he purpose of the state is not to supplant the market (as it would be under a socialist theory), nor to perfect the market (as it would under a theory of market failure), but rather to supplement it."[214]

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see Williams, "Background Norms in the Regulatory State," 58 U. Chi. L. Rev. 419, 427-28 (1991) (arguing that ostensible "public goods" are really the aesthetic preferences of certain elites).

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

[213] Comments of Dr. Dale Kunkel, at 1-2 (Oct. 16, 1995).

[214] Fiss, supra note ___, at 788; see also Ferris & Leahy, supra note ___, at 322 ("Markets, however, do not offer a talismanic solution to the problems of broadcast regulation.").

In short, there is a market-based problem in need of a regulatory solution. The question that now must be answered is whether Chairman Hundt's proposals represent the best response to the shortcomings of the market.

B. Hansel and Gretel: Substituting Brussels Sprouts for the Gingerbread House?

Even if the Commission can lawfully mandate quantitative and qualitative standards for educational children's programming -- and assuming that the market has failed to meet the nation's need for this sort of programming -- it is unclear whether, as a practical matter, the proposed regulations will achieve their desired objective effectively.[215] Legality coupled with the need for government action does not mean that a particular policy actually will work. At this level, rather than at the constitutional level, Chairman Hundt's reform proposals may be misguided.

Obviously, if the Commission mandates qualitative and quantitative standards for children's educational programming, broadcasters will have to comply. In the strictest sense, the proposals cannot fail. However, for a variety of reasons, I am not sure that the Chairman's proposals will succeed in a larger sense.

Meaningful success implies that broadcasters will air programming that children actually watch. If forced to air educational children's programming, commercial television

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[215] For a history of the Commission's efforts at improving the quantity and quality of educational children's programming, see Winer, supra note __, at 278-82.

broadcasters face two choices: they can attempt to produce and air high quality children's programming that will draw significant advertiser support, or they can seek out inexpensive, low quality educational programming and air it during their least profitable time slots.[216]

If producing and airing high quality educational children's programming were profitable, broadcasters already would be disseminating this type of programming. Indeed, at a speech last summer to the National Press Club, Chairman Hundt admitted that broadcasting educational children's programming is not a profitable activity for most commercial broadcasters, or is, at the very least, significantly less profitable than airing other kinds of programming.[217] The current proposals will not affect this economic fact -- a state of affairs that the Chairman has acknowledged.[218]

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[216] Those who saw the movie "Mrs. Doubtfire" may recall the science show that Mrs. Doubtfire's show replaced. It featured an ancient academic, seated behind a metal desk, droning on in a monotone about the history of dinosaurs. I fear that the Commission's proposal may prove to be an unintended windfall for the producers, directors, and cast members of such shows. See N. Minow, supra note ___, at 57. They are inexpensive to produce and would satisfy the "core" programming requirements of the Chairman's proposal.

[217] Address by Chairman Reed E. Hundt to the National Press Club, Washington, D.C., at 3-8 (July 28, 1995); Comments of the Center for Media Education, et al., MM Docket No. 93-48, at 6 (Oct. 16, 1995); see also Entman, supra note __, at 78-79 ("the policy of deregulation, by exposing media owners to the full force of market competition and consumer demand, greatly affects the ideas the [commercial] broadcasters can practically choose to produce and distribute if they want to stay in business").

[218] Address by Chairman Reed E. Hundt to the National Press Club, Washington, D.C., at 6-8 (July 28, 1995); see also Noll, Peck & McGowan, supra note __, at 12-13 (noting that "public

Again, the example of "CRO" is instructive. ABC obviously determined that including "CRO," an educational cartoon, in its Saturday morning line up was less profitable than airing the cartoon version of "Dumb and Dumber." Chairman Hundt has not cited any reasons that would suggest that ABC would reach a different conclusion under his proposed reforms. Simply put, broadcasters are unlikely to make a real commitment to producing and airing high quality children's educational programming in the absence of significant changes in the market.

Replacing entertaining children's programming with educational programming of low quality will not materially advance the interests of either children or parents.[219] For the last forty years, the Commission's efforts to improve the amount and quality of children's programming have not been particularly successful.[220] There is little reason to believe that the current initiative will be meaningfully different in its ultimate effects, notwithstanding Chairman Hundt's best efforts and his unquestionably laudable objectives.

Furthermore, even if the Chairman's proposals are effective, and broadcasters do seek out and air high quality children's programming, unless doing so becomes more profitable than airing

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interest" programming "accounts for less than 5 percent of network prime time simply because [it is] not as profitable as light entertainment").

[219] See Children's Programming and Advertising Practices, 96 FCC 2d 634, 653-54 (1983); see also N. Minow, supra note ___, at 57.

[220] See Address by Chairman Reed E. Hundt to the National Press Club, Washington, D.C., at 6-7 (July 28, 1995).

alternative programming, they will likely revert to their old ways as soon as a new chairman is in place. The Commission's staff, although professional, is sensitive to the priorities of the Chairman's office. The sad truth is that in terms of compliance with the proposed reforms, the Commission must expect broadcasters to do the least amount possible to comply for the shortest period of time.[221]

If short term compliance was likely to lead to fundamental changes in advertiser support patterns, there might be some cause for optimism.[222] However, the current paucity of educational programming must reflect higher opportunity costs associated with the production of such programming -- it is easier to produce and market the "Itchy and Scratchy Show" successfully than to make and sell "Bill Nye -- The Science Guy."[223] Because creating and producing entertaining educational children's programming is harder than seeking merely to entertain through mindless violence, it seems probable that it will always be more

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[221] See Comments of the Center for Media Education, MM Docket No. 93-48, at 4-6, 10-13, 15-17 (Oct. 16, 1995); see also McConnell, "Hundt Pitches Kids Standards," Broadcasting & Cable, January 29, 1996, at 18, 22 (reporting on commercial broadcasters' reluctance to air educational children's programming).

[222] Thus, if the ratings for these shows were comparable to, or higher than, the ratings for other kinds of children's programming, advertisers might begin supporting such programming.

[223] Again, the Chairman appears to be well aware of the Commission's "long and undistinguished history of failing to apply responsibly its mandate to make sure broadcasters use the airwaves to serve the public, and specifically, to guarantee that television helps educate our children." "Long Live Frieda Hennock," Address by Chairman Reed E. Hundt to Women in Government Relations, Washington, D.C., at 2 (Aug. 24, 1995).