

significant increase in the amount of children's educational and informational programming carried by commercial broadcasters.""). Given this confession of current uncertainty, the Commission certainly has not at this stage established a record sufficient to withstand First Amendment scrutiny, and unless the nature of the record were to radically change, it is doubtful that the Commission ever could. This is thin ice for any administrative regulation; it comes nowhere near the quality of record evidence or administrative experience required of regulations that presume to constrict First Amendment freedoms. *Turner Broadcasting System, Inc. v. FCC*, *supra*, 114 S.Ct. at 2458.

E. The Government has Alternative Means to Foster Children's Programming

Finally, a point should be made about constitutional alternatives to the Commission's proposals. The worthy goal of encouraging high-quality children's programming can be pursued most directly and effectively by the government if it simply funds such programming, through support of PBS, the NEA, or other entities that financially contribute to the creation and production of children's programming. On this score, I fully support the views of Professor Cass Sunstein, who proposes such increased funding as a desirable reform. *See* Cass R. Sunstein, *Democracy and the Problem of Free Speech* 84 (1993). Chairman Hundt has cited the views of Professor Sunstein in support of the Commission's current proposals. *See* Chairman Reed E. Hundt, *A New Paradigm for Broadcast Regulation*, Conference for the Second Century of the University of Pittsburgh School of Law, September 21, 1995, *supra*. But with sincere respect, where Chairman Hundt and Professor Sunstein go wrong is in taking the next step, which assumes that the Commission

may, under the First Amendment, vigorously enforce the Children's Television Act in a manner that imposes specific affirmative programming requirements on broadcasters. See Cass R. Sunstein, *Democracy and the Problem of Free Speech*, *supra*, at 84-85 (1993).

The impulse for this second step is understandable--in today's political climate it may well be that Congress is highly unlikely to increase the funding for public broadcasting or the arts, and therefore the temptation exists to attempt to accomplish through regulatory fiat what cannot be obtained through congressional subsidy. The First Amendment, however, stands squarely in the way.

The Commission's proposals partake of a philosophical view that permeates much of the writings of Professor Sunstein and the speeches of Chairman Hundt: that the government may regulate public discourse in order to elevate it. Under this view, the government should play an affirmative role in elevating public debate and discussion, and may use its regulatory powers to that purpose. Moreover, this is not seen as creating tensions with the First Amendment, because the purpose of the First Amendment, under this philosophy, is to enhance public deliberation and self-governance. This is a classic and oft-repeated theme in scholarly discussion about the First Amendment.¹² But while this view states a respectable intellectual position on what some believe the First Amendment *ought to be*, it certainly does not accurately describe the First Amendment *as it is*.

Listening to Chairman Hundt or Professor Sunstein, the broadcast world sounds as

¹² Among its most famous adherents is Judge Robert Bork. See Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971).

if it should all look like NPR or PBS. But the First Amendment does not play such favorites; *The New York Post* enjoys the same constitutional protections as *The New York Times*, *Entertainment Tonight* as the *MacNeil, Lehrer News Hour*, and *Mighty Morphin Power Rangers* as *Sesame Street*. While political speech is certainly at the “core” of the First Amendment, the Supreme Court has repeatedly said that the First Amendment protects the emotional content of speech as well as the cognitive, the entertaining as well as the informing. See, e.g., *Winters v. New York*, 333 U.S. 507, 510 (1948) (“We do not accede to appellee’s suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man’s amusement, teaches another’s doctrine.”); *Joseph Burstyn, Inc., v. Wilson*, 343 U.S. 495, 501 (1952) (“The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.”); *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) (“guarantees for speech and press are not the preserve of political expression or comment on public affairs, essential as those are to healthy government.”); *United Mine Workers v. Illinois Bar Association*, 389 U.S. 217, 223 (1967). (the protections of the First Amendment “are not confined to any field of human interest.”); *Cohen v. California*, 403 U.S. 15, 26 (1971) (“We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.”).

IV. The First Amendment Infirmities in the Commission's Proposals are Exacerbated by the Absence of Congressional Endorsement

A. The Legislative History Does Not Support the Proposals

When an administrative agency, acting pursuant to powers allegedly delegated to it by Congress, claims the authority to promulgate regulations that encroach upon First Amendment rights, substantive First Amendment principles become intertwined with principles of administrative law, statutory construction, and separation of powers. In combination these principles work to place additional limitations on the agency's authority.

The legislative history of the Children's Television Act establishes that Congress was aware of the legislative option of instructing the Commission to prescribe quantitative programming requirements, but did not choose to so direct the Commission. Senator Inouye, for example, in explaining the intent of the bill, stated:

The committee does not intend that the FCC interpret this legislation as requiring or mandating quantification standards governing the amount or placement of children's educational programming that a broadcast licensee must air to pass a license renewal review pursuant to this legislation.

101st Cong., 2d Sess., 136 Con. Rec. S. 10121, 10122 (July 10, 1990) (remarks of Sen. Inouye). Representative Markey similarly explained that:

The bill provides the Commission broad discretion, during the

license renewal process, to review a station's commitment to educational and informational programming for children. The legislation does not require the FCC to set quantitative guidelines for educational programming, but *instead, requires* the Commission to base its decision upon an evaluation of a station's *overall service to children*.

101st Cong., 2nd Sess., 136 Cong. Rec. H. 8536, 8537 (October 1, 1990) (remarks of Rep. Markey) (emphasis supplied). And it is quite clear that Congress was aware that its own circumspection and restraint was mandated by limitations imposed by the First Amendment.

As Representative Lent explained:

The bill also directs the FCC to consider whether a TV station has served the educational and information needs of children in its overall programming. Of course, TV stations already are required to serve their children audiences. But now, the FCC will be directed to gauge whether TV stations are actually meeting that obligation. While this may be a special provision, it is meant to improve programming to children, who unquestionably are a special audience with distinct programming needs.

This is not a cure all. It does not pretend to be. Rather, the Committee has taken a hard look at children's TV in the last

two congresses, and has tried to encourage sensible behavior toward children by television licensees. *We can do no more and still be consistent with the First Amendment.*

101st Cong., 2nd Sess., 136 Cong. Rec. H. 8536, 8537 (October 1, 1990) (remarks of Rep. Lent) (emphasis supplied). Because both Congress and the Commission are regulating in First Amendment territory, this legislative history takes on a pressing constitutional dimension.

B. The Legislative History Exposes Serious Constitutional Difficulties with the Commission's Proposals

1. Delegation and Separation of Powers: The Clear Statement Principle

At the broadest level of generality, the tension between the Commission's proposals and the legislative history of the Children's Television Act implicate the separation of powers principle counseling against interpretations of a statute that treat it as authorizing action by the executive branch or an administrative agency that Congress could have but did not impose. *See Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 585-87 (1951) (refusing to find statutory authorization for President Truman's seizure of steel mills, relying in part upon Congress' prior refusal to enact seizure techniques during consideration of the Taft-Hartley Act of 1947).

As already emphasized, the imposition of specific programming requirements would run contrary to the regulatory regime in place for broadcasting since the first Radio Act, and would thus represent a dramatic philosophical break with the past. Because this departure

implicates serious First Amendment concerns, it should not be deemed authorized by Congress in the absence of a clear congressional statement *affirmatively requiring* it. See *National Cable Television v. United States*, 415, U.S. 336, 342 (1974) (narrowly construing statute, and thus limiting the grant of power to the FCC, because “the hurdles revealed” in prior decisions “lead us to read the Act narrowly to avoid constitutional problems”); *Kent v. Dulles*, 357 U.S. 116, 129-30 (1958) (refusing to find an implied delegation of power by Congress to Secretary of State, noting that: “We would be faced with important constitutional questions were we to hold that Congress . . . had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens’ right of free movement.”); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 115-16 (1976) (striking down, as beyond the authority of the Civil Service Commission, rule excluding aliens from civil service, holding that before such a deprivation of a liberty interest may be imposed by an agency, a clear statement requiring such regulations must be provided in the governing statute).

The general canon of statutory construction that statutes should be construed to avoid tension with constitutional principles whenever possible takes on a sharper focus in First Amendment jurisprudence, and the Supreme Court has adopted the practice of interpreting federal statutes so as to avoid difficult First Amendment conflicts whenever the statutory

language permits of such a construction.¹³ This is a powerful doctrine, for it bars administrative action in colorable tension with the First Amendment unless the administrative action is *plainly required* by explicit *affirmative intent* expressed by Congress. As the Court succinctly restated the rule in *DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568 (1988), “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *Id.* at 575.¹⁴ Similarly, in *National Labor Relations Board v. Catholic Bishop of Chicago*, *supra*, 440 U.S. 490 (1979) the Court stated:

The values enshrined in the First Amendment plainly rank high
“in the scale of our national values.” In keeping with the Court's

¹³ See *Hooper v. California*, 155 U.S. 648, 657, (1895) (“[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.”); *DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568 (1988) (“This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.”) *citing Grenada County Supervisors v. Brogden*, 112 U.S. 261, 269 (1884).

¹⁴ Tracing the distinguished pedigree of the maxim, the Court noted that “[t]his cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in *Murray v. The Charming Betsy*, . . . and has for so long been applied by this Court that it is beyond debate.” *Id.*, *citing Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804); *National Labor Relations Board v. Catholic Bishop of Chicago* 440 U.S. 490, 499-501(1979); *Machinists v. Street*, 367 U.S. 740, 749-750 (1961); *Crowell v. Benson*, 285 U.S. 22 (1932); *Lucas v. Alexander*, 279 U.S. 573, 577 (1929); *Panama R. Co. v. Johnson*, 264 U.S. 375, 390 (1924); *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 407-408 (1909); *Parsons v. Bedford*, 3 Pet. 433, 448-449 (1830) (Story, J.).

prudential policy it is incumbent on us to determine whether the Board's exercise of its jurisdiction here would give rise to serious constitutional questions. If so, we must first identify “the affirmative intention of the Congress clearly expressed” before concluding that the Act grants jurisdiction.

Id. at 501, quoting *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963).

The Commission’s proposals clearly cannot meet the standard enunciated in these decisions; the placing of affirmative quantitative obligations for children’s programming on broadcasters obviously is not “*the affirmative intention of the Congress clearly expressed*,” but precisely the antithesis of Congress’ expressed intent. The Commission is not free to argue in these circumstances that Congress did not actually say in so many words that the FCC could *not* impose quantitative standards. First, the statements in the legislative history come very close to explicitly barring such standards, with their repeated emphasis on Congress’ intent that the law not be construed by the Commission to require or mandate them. For example, as previously noted, Congressman Markey in his remarks stated that “*instead*” of requiring promulgation of quantitative guidelines, the Act “*requires*” the Commission to base its assessment on a licensee’s “overall” performance. 101st Cong., 2nd Sess., 136 Cong. Rec. H. 8536, 8537 (October 1, 1990) (remarks of Rep. Markey) (emphasis supplied).

Significantly, the Supreme Court’s pronouncements make it clear that when serious

constitutional doubts are triggered by an administrative regulation,¹⁵ a mere *general* grant of authority to an agency to regulate in an area will not do; the “affirmative intention of Congress clearly expressed” must speak to the specific regulatory action that colorably offends the Constitution. *See National Labor Relations Board v. Catholic Bishop of Chicago, supra*, 440 U.S. 490, 505-507 (1979) (stating that while, “[a]dmittedly, Congress defined the Board’s jurisdiction in very broad terms,” the absence of any clear authorization by Congress led the Court to construe the National Labor Relations Act as not extending NLRB jurisdiction to parochial school teachers).

2. The Commission’s Prior Construction of the Act Undercuts its Current Constitutional Authority to Now Construe its Mandate More Broadly

In its 1991 *Report and Order*, the Commission, in describing its approach toward the programming obligations placed on broadcasters by the Children’s Television Act, pointedly stated that “the legislative history suggest that Congress meant that no minimum criterion be imposed,” describing “[t]his strong legislative direction, and the latitude afforded broadcasters in fulfilling the programming requirement.” *Report and Order, In the Matter of Policies and Rules Concerning Children’s Television Programming and Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, MM Docket 90-570, 6 FCC Rcd 2111 (1991). Similarly, in its 1993 *Notice of Inquiry* the Commission noted that “[i]n

¹⁵ *See Machinists v. Street, supra*, 367 U.S. 740, 749 (1961) (applying the clear statement doctrine in order to avoid “serious doubt of [the Act’s] constitutionality.”).

accordance with the CTA's legislative history . . . no minimum amount of such programming has been prescribed." *Notice of Inquiry In the Matter of Policies and Rules Concerning Children's Television Programming Revision of Programming Policies for Television Broadcast Stations*, MM Docket 93-48, 8 FCC Rcd 1841 (1993). In that *Notice of Inquiry* the Commission further observed that "as Congress intended, television licensees enjoy substantial discretion both in determining *whether a particular program qualifies as educational and informational* and in fixing the *level or amount* of children's programming that it will air." *Id.* (emphasis supplied).

That the Commission itself first understood the Children's Television Act as direction from Congress not to impose specific programming requirements serves to underscore the precarious constitutional position in which the Commission would be placing itself were it now to adopt those requirements. It is well worth noting the stark contrast between the paucity of evidence of congressional endorsement of the regulatory approach now being considered by the Commission and the evidence of congressional endorsement found in such cases such as *Red Lion v. FCC*, *supra*, 395 U.S. 367, 381-86 (1969) and *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 569-58 (1990), prior cases testing major policy decisions by the Commission. In both *Red Lion* and *Metro Broadcasting* the Supreme Court devoted substantial effort in its opinions documenting how the policies adopted by the Commission in those two cases could legitimately be said to possess the imprimatur of Congress. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381-86 (1969) (finding that thirty years of consistent administrative construction left undisturbed by Congress until

that construction was expressly ratified reinforced Commission's authority); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 569-58 (1990) (finding extensive congressional support for minority ownership policies).¹⁶ In its current expansive proposals for implementation of the Children's Television Act, however, the Commission, standing alone, would be taking steps that Congress could have attempted but did not. It is vigorously argued here, of course, that Congress *could not* take these steps, consistent with the First Amendment. At the very least, however, the authorities cited above dictate that the Commission refrain from experimenting with the delicate constitutional balance unless Congress itself specifically requires such an incursion.

To the extent that the Commission suddenly doubts the efficacy of the license renewal process as a means of effectuating the purposes of the Children's Television Act, or indeed the Communications Act itself, those doubts are of its own making; for Congress and the courts clearly understand that "[l]icense renewal proceedings, in which the listening public can be heard, are a principal means of such regulation." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 110 (1973) citing *United Church of Christ v. FCC*, 359 F.2d 994, 123 U.S.App.D.C. 328 (1966); 425 F.2d 543, 138 U.S.App.D.C. 112

¹⁶ The substantive equal protection principles governing federal affirmative action programs adopted by the Supreme Court in *Metro Broadcasting* were overruled by the Court's recent decision in *Adarand Constructors, Inc., v. Peña*, 115 S.Ct. 2097, 2111-17 (1995). *Adarand*, however, does not detract from the administrative law and statutory construction principles applied in *Metro Broadcasting* or *Red Lion*, pursuant to which the Court expended prodigious effort to demonstrate that the Commission's actions enjoyed the endorsement of Congress.

(1969). There is no question that flexible application of the standards of the Children's Television Act through the license renewal process is precisely what Congress intended. *See* 101st Cong., 2nd Sess., 136 Cong. Rec. H. 8536, 8537 (October 1, 1990) (remarks of Rep. Markey), *supra*, ("The bill provides the Commission broad discretion, *during the license renewal process*, to review a station's commitment to educational and informational programming for children.") (emphasis supplied).¹⁷ The Commission is constitutionally bound to respect that intent.

IV. Conclusion: The Marketplace, Paternalism, and Children's Broadcasting

The impulse to improve the quality of children's educational and informational programming is laudable.¹⁸ Drawing on this commendable impulse, Chairman Reed Hundt recently advanced the view that the Commission's current proposals regarding children's programming do not run afoul of the First Amendment. The Chairman's theme was that the law sometimes does infringe on the natural freedom citizens enjoy in the open marketplace, particularly in the interest of protecting the interests of families and children; thus zoning

¹⁷ The Act itself, of course, speaks of enforcement entirely through the license renewal process. 47 U.S.C. § 303b ("(a) After the standards required by section 303a of this title are in effect, the Commission shall, in its review of any application for renewal of a commercial or noncommercial television broadcast license, consider the extent to which the licensee-- (1) has complied with such standards; and (2) has served the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs.").

¹⁸ There are extant today a growing number of eloquent pleas for more creative educational programming. *See* Newton N. Minow and Craig L. LaMay, *Abandoned in the Wasteland* (1995).

laws restrict land uses in residential neighborhoods, and safety laws require children to wear motorcycle helmets. *See* Chairman Reed E. Hundt, *Long Live Frieda Hennock*, Speech Delivered on August 24, 1995 (“Notwithstanding First Amendment challenges, courts have repeatedly held that government can require certain magazines on open newsstands to be in brown paper wrappers. Government can zone certain kinds of stores away from residential neighborhoods. Government can require kids on motorcycles to wear safety helmets. The FCC can forbid radio and television shows from broadcasting indecent material until after 10 PM, when almost all kids are or should be in bed. None of these actions are inconsistent with the First Amendment and reasonable steps to use the airwaves in a real, specific concrete way to provide public interest programs are also not barred by the First Amendment.”).

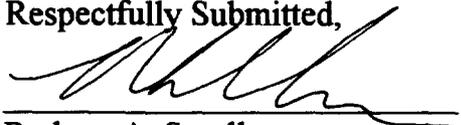
The philosophical view advanced by the Chairman is appropriate for vast areas of American economic and social life. Our Constitution and our traditions of governance do not require blind faith in the efficacy of the free market. Experience has taught us that laws often are necessary to protect the quality of life in residential neighborhoods, or children from head injuries in motorcycle accidents. But with great respect, the Chairman’s philosophy has been roundly rejected in matters dealing with freedom of expression. When the First Amendment is implicated, paternalism is the exception, not the rule. The regulation of freedom of expression is not the same as the regulation of land use or safety helmets. To repeat the Supreme Court’s recent admonition, “[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better

reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.” *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, *supra*, 115 S.Ct. at 2350. Although the First Amendment, at present, may countenance such narrow regulation of the content of broadcasting as the indecency proscriptions upheld in *Pacifica*, it has *never*, even in the special sphere of broadcasting, been understood to permit the government to commandeer the speech rights of independent speakers, forcing them to produce messages the government deems socially desirable. *See, e.g. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (striking down “highly paternalistic” advertising restrictions); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 790-91 (1988) (“[t]he State’s remaining justification--the paternalistic premise that charities’ speech must be regulated for their own benefit--is equally unsound. The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it.”) *citing Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 224 (1987). *See also First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791-792, and n. 31 (1978) (criticizing State’s paternalistic interest in protecting the political process by restricting speech by corporations); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 (1977) (criticizing, in the commercial speech context, the State’s paternalistic interest in maintaining the quality of neighborhoods by restricting speech to residents); *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (“The very purpose of the First Amendment is to foreclose public authority from assuming a

guardianship of the public mind through regulating the press, speech, and religion.”); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”).

The government is not powerless in this matter. The Children’s Television Act does impose obligations on broadcasters, and the Commission is directed, in license renewal proceedings, to treat those obligations seriously. The Commission may use its persuasive powers, and the Chairman the bully pulpit, to cajole broadcasters and encourage more innovative children’s programming. And ultimately, of course, if the government perceives deficiencies in the offerings of the marketplace, it may enter the market itself to sell its own wares.¹⁹ The government may directly or indirectly subsidize the creation and broadcast of high-quality children’s programming. But what the First Amendment does not permit is for government to pursue its objectives through the simple expedient of *fiat*.

Respectfully Submitted,



Rodney A. Smolla
College of William and Mary
Marshall-Wythe School of Law
P.O. Box 8795
Williamsburg, Virginia 23187-8795

¹⁹ See *Block v. Meese*, 793 F.2d 1303, 1313 (D.C. Cir. 1986) (Scalia, J.) (“Nor does any case suggest that “uninhibited, robust, and wide-open debate” consists of debate from which the government is excluded, or an “inhibited marketplace of ideas” one in which the government’s wares cannot be advertised.”).