

Statement of Robert Corn-Revere

MM 99-360

Children's Television Programming and Public Interest Obligations of TV Broadcast Licensees

Federal Communications Commission
October 16, 2000

RECEIVED

OCT 25 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In a variety of proceedings the FCC is seeking to determine whether, and in what ways, it might define and enforce new public interest obligations of broadcast licensees. Much, but not all, of this effort has been associated with the transition to digital television. In December 1999, the Commission launched a Notice of Inquiry on this issue. 1/ The Commission's Notice drew substantially from the work of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (popularly known as the "Gore Commission"). 2/ More recently, the Commission adopted a Notice of Proposed Rulemaking to address the ways in which digital broadcasters must provide service to children. 3/ Chairman Kennard highlighted the issues raised in these notices in a recent speech suggesting that it is "high time that we rethink the terms of broadcasters' compact with the

1/ *In the Matter of Public Interest Obligations of TV Broadcast Licensees*, 14 FCC Rcd. 21,633 (1999).

2/ *See Charting the Digital Broadcasting Future: Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters* (December 1998) ("Gore Commission Report").

3/ *See In the Matter of Children's Television Obligations of Digital Television Broadcasters*, FCC 00-344 (released October 5, 2000).

No. of Copies rec'd 1
List A B C D E

American people.” ^{4/} Possible new public interest obligations could include free time for political candidates, mandatory carriage of political debates, rules governing the amount and placement of public service announcements, heightened children’s programming requirements, and, perhaps, revised political editorial rules. ^{5/}

In addition to affirmative programming mandates, there are growing demands to restrict various types of programs as well. Noting the “inappropriate content permeating primetime,” Chairman Kennard has stated that broadcasters’ public interest obligations do not stop with educational and informational programming requirements, and that licensees “should not air inappropriate programming [or advertising] at times when a significant number of children would reasonably be expected to be in the audience.” ^{6/} In this regard, the Senate Commerce Committee last month approved an amended version of S. 876, the

^{4/} Remarks by FCC Chairman William E. Kennard at the Museum of Television and Radio, “*What Does \$70 Billion Buy You Anyway?*” *Rethinking Public Interest Requirements at the Dawn of the Digital Age* (October 10, 2000) (“*Rethinking Public Interest Requirements at the Dawn of the Digital Age*”).

^{5/} After the United States Court of Appeals for the District of Columbia Circuit ordered the Commission to repeal immediately the personal attack and political editorial rules last week, see *Radio-Television News Directors Assn. v. FCC*, No. 98-1305 (D.C. Cir. October 11, 2000) (per curiam) (granting writ of mandamus), Chairman Kennard pledged to move forward with a Notice of Inquiry to “study the public interest obligations of broadcasters in the digital age, including whether these rules should be reinstated.” Statement of FCC Chairman William E. Kennard (October 11, 2000). See generally *In the Matter of Repeal or Modification of the Personal Attack and Political Editorial Rules*, FCC 00-360 (released October 4, 2000).

^{6/} See *Rethinking Public Interest Requirements at the Dawn of the Digital Age*.

Children's Protection From Violent Programming Act. If enacted into law, the bill would prohibit distribution of "any violent video programming not blockable by electronic means (*e.g.*, V-chip) specifically on the basis of violent content during hours when children are reasonably likely to comprise a substantial portion of the audience. And it would require the FCC to conduct a rulemaking and to adopt rules within 9 months of enactment to define the term "violent video programming" and to determine the hours in which "children are likely to comprise a substantial portion of the audience."

Regardless of whether the Commission is considering implementing new affirmative obligations or laying down rules to restrict disfavored content, it will be necessary to conduct a thorough First Amendment analysis. For the record I am attaching several articles and other of my writings that touch in the constitutional questions in greater depth than time here permits. *See Attachments 1-6.* Suffice it to say that if *any* of the proposed content regulations described above would be suggested for any medium other than broadcast television, the answer to the constitutional inquiry would be obvious. Any effort on the part of the government to compel the presentation of speech it considers "meritorious" would be held unconstitutional, as would any plan to restrict "inappropriate" material. The question, then, is whether the theories that have operated in the past to reduce the level of First Amendment protection for broadcasting will persist into the Digital Age.

The Once and Future Public Interest Standard?

Historically, the public trustee doctrine and the public interest standard by which it has been implemented have operated only as limited exceptions to traditional First Amendment analysis. The Supreme Court in *Turner Broadcasting System v. FCC*, 512 U.S. 622, 652 (1994) stressed “the minimal extent” the government may influence the programming choices of licensees, noting “the FCC’s oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations.” The United States Court of Appeals for the District of Columbia Circuit similarly has emphasized that the “power to specify material which the public interest requires or forbids to be broadcast . . . carries the seeds of the general authority to censor denied by the Communications Act and the First Amendment alike.”^{7/} in this regard, the Gore Commission acknowledged that:

The FCC’s authority, while extensive, is constrained by First Amendment principles. The federal government may not censor broadcasters, for example, nor may it regulate content except in the most general fashion, including favoring broad categories of programming such as public affairs and local programming. The FCC can intervene to correct perceived inadequacies in overall industry performance, but it cannot trample on the broad editorial discretion of licensees.

^{7/} *Banzhaf v. FCC*, 405 F.2d 1082, 1095 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

See *Gore Commission Report* at 19. Accordingly, even when the public trustee exception was in full flower, there were limits on how far the Commission could go in regulating broadcast content.

But it is difficult to maintain that the public trustee concept and the reduced First Amendment status that comes with it are viable in the new media environment. It is important to understand that the constitutional balance struck in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) was based on “the present state of commercially acceptable technology’ as of 1969.” ^{8/} The Supreme Court has noted that “because the broadcast industry is dynamic in terms of technological change[,] solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded ten years hence.” ^{9/} And the D.C. Circuit has warned that “some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets.” ^{10/} With this perspective in mind, the traditional justifications for the reduced constitutional status of broadcasters must be reviewed under current conditions. Below, I briefly discuss three principal rationales frequently given for reduced First Amendment scrutiny of broadcast content regulations: spectrum scarcity, the “social compact,” and support for deliberative democracy.

^{8/} *News America Publishing, Inc. v. FCC*, 844 F.2d 800, 811 (D.C. Cir. 1988), quoting *Red Lion*, 395 U.S. at 388.

^{9/} *CBS v. Democratic National Committee*, 412 U.S. 94, 102 (1973).

^{10/} *Banzhaf*, 405 F.2d at 1100.

Spectrum scarcity. As the Commission recently noted, “the long-standing basis for the regulation of broadcasting is that ‘the radio spectrum simply is not large enough to accommodate everybody.’” ^{11/} But the legislative history to the Telecommunications Act of 1996 recognized that the theoretical underpinnings that support FCC regulation of mass media content have changed. The Senate Report noted that “[c]hanges in technology and consumer preferences have made the 1934 [Communications] Act a historical anachronism.”

The Senate Report explained that “the [Communications] Act was not prepared to handle the growth of cable television” and that “[t]he growth of cable programming has raised questions about the rules that govern broadcasters” among others. ^{12/} The House of Representatives’ legislative findings were even more emphatic. The House Commerce Committee pointed out that the audio and video marketplace has undergone significant changes over the past 50 years “and the scarcity rationale for government regulation no longer applies.” ^{13/} President Clinton further underscored this point when he described the differences between the constitutional treatment of broadcasting and the print media shortly before the 1996 election:

^{11/} *In the Matter of Repeal or Modification of the Personal Attack and Political Editorial Rules*, FCC 00-360 at ¶ 18, quoting *NBC v. United States*, 319 U.S. 190, 213 (1943).

^{12/} Telecommunications Competition and Deregulation Act of 1995, S. Rpt. 104-23, 104th Cong. 1st Sess. 2-3 (Mar. 30, 1995).

^{13/} Communications Act of 1995, H. Rpt. 104-204, 104th Cong. 1st Sess. 54 (July 24, 1995).

As you know, the distinction between broadcasting and publishing in terms of the First Amendment is based on the scarcity principle. Free over-the-air broadcasting will continue to be a vital part of our media, and availability of licenses will continue to be limited. When that changes, the distinction between broadcasting and print will change too. 14/

The FCC, on the other hand, has asserted that the raw number of broadcast outlets is not important and that scarcity is an inherent attribute of broadcast licensing. This is because “there are substantially more individuals who want to broadcast than there are frequencies to allocate.” 15/ But this fails to distinguish the broadcast spectrum from any other economic good. As Professor Ronald Coase wrote in a seminal 1959 essay, it is a “commonplace of economics” that “almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists.” 16/ Similarly, Judge Robert Bork wrote that “[a]ll economic goods are scarce, not least the newsprint, ink, delivery trucks, computers and other resources that go into the production and dissemination of print journalism.” Since “scarcity is a universal fact,” he pointed out, “it can hardly explain regulation in one context and not the other.”17/ Moreover, whether or not

14/ *Clinton on Communications*, BROADCASTING & CABLE, Sept. 23, 1996 at 22.

15/ *In the Matter of Repeal or Modification of the Personal Attack and Political Editorial Rules*, FCC 00-360 at ¶ 18, quoting *Red Lion*, 395 U.S. at 388.

16/ Ronald H. Coase, *The Federal Communications Commission*, 2 J. LAW & ECON. 1, 14 (1959).

17/ *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986).

spectrum is “scarce” in any meaningful sense, various forms of interchangeable mass media are now abundant, thus draining the scarcity concept of its former significance.

The Social Compact. The reduced level of constitutional protection for broadcasters has also been defended as a condition of license: use of a public resource is said to entitle the government to demand specific programming obligations. Greg Simon, when he was chief domestic policy advisor to Vice President Gore, defended this “quid pro quo” arrangement, noting that “[y]ou don’t say to the broadcasters, ‘we’re going to give you a public resource and ask nothing of you in return.’” He said that “part of the role of the FCC is to redistribute income and put political pressure on broadcasters,” adding that the government was entitled to demand such things from licensees as a right of reply, children’s programming and limitations on indecency.^{18/} As Chairman Kennard recently put the question, “What does \$70 billion buy you anyway?” ^{19/}

Although this social compact theory has become more popular as the scarcity doctrine has become less defensible, it is far afield from traditional First Amendment theory. When Justice Oliver Wendell Holmes wrote of a “marketplace of ideas,” he was not suggesting that the government could be the purchaser, or that media companies could be the sellers, of constitutional guarantees.

^{18/} *Administration Official Defends FCC Role in Content Regulation*, WASHINGTON TELECOM WEEK, April 19, 1996 at 1, 2. See Harry Jessell, *The Fall of the First*, BROADCASTING & CABLE, Aug. 12, 1996 at 12.

^{19/} See *Rethinking Public Interest Requirements at the Dawn of the Digital Age*.

At base, social compact theory boils down to this: government licenses to use the spectrum and other regulatory “benefits” are considered to be a form of subsidy, which entitles the government to demand specific programming commitments in return. The FCC made exactly this claim in its *Children’s Television Order*. Although the *Order* relied primarily on *Red Lion*, it noted that Congress’ decision to retain public ownership of the spectrum and “to lease it for free to private licensees for limited periods carries significant First Amendment consequences.”^{20/}

Contrary to this rather facile analysis, the government’s decision to treat its licensing policies as a form of subsidy does not give it greater authority to control speech. The fact that the government nationalized the physical properties that make up the broadcast spectrum and labeled them “public resources” does not entitle it to reshape the First Amendment. Cities build and own public parks, but cannot demand that demonstrators who speak therein give public service announcements;^{21/} municipalities issue parade permits, but cannot demand that the marching bands play military music or that certain groups be allowed to join the procession;^{22/} cities allow (and even license) newsboxes on public rights of way,

^{20/} *Policy and Rules Concerning Children’s Television Programming*, 11 FCC Rcd. 10,660, 10,729 (1996).

^{21/} *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988).

^{22/} *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338, 2347-2348 (1995).

but are barred by the First Amendment from regulating the content of the publications placed inside.^{23/}

Cases involving the constitutional status of public broadcasters are especially relevant to this analysis. Such broadcasters, after all, receive a double subsidy (assuming you agree with the FCC's current characterization of its licensing power). First, like commercial broadcasters, public stations are licensed to use the radio spectrum for free. Additionally, such stations receive direct payments from the government supporting their programming. The FCC considers the two "subsidies" to be indistinguishable. Indeed, in a brief filed in the U.S. Court of Appeals for the Eighth Circuit, the Commission noted that "Congress and the FCC have made substantial commitments of public resources, in the form of federal funds and frequency allocations, to the development of a system of noncommercial educational broadcasting." ^{24/}

Because of the financial subsidy, public broadcasters have long been subjected to the same types of pressures that are now arising under the rhetoric of the "social compact." Nevertheless, public stations "are subject to no more intrusive content regulation than their commercial counterparts." ^{25/} In *FCC v. League of Woman Voters of California*, the Supreme Court held that a rule prohibiting public broadcast stations from editorializing violated the First Amendment. The

^{23/} *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993).

^{24/} Brief Amicus Curiae for the Federal Communications Commission, *Marcus v. Iowa Public Television*, No. 96-3645 (8th Cir., filed January 15, 1997) at 3.

^{25/} *Turner Broadcasting System*, 512 U.S. at 650.

government had argued that the restriction was based on “the proper exercise of its spending power,” and that the government was not obligated to “subsidize public broadcasting station editorials.”^{26/} The Supreme Court rejected this argument, holding that the funding limitation was far too restrictive of the First Amendment rights of public station licensees. And in *Turner Broadcasting System v. FCC* the Court noted that educational stations, in addition to being granted the free use of spectrum, also received funding through the Corporation for Broadcasting. Nevertheless, it found that “the Government is foreclosed from using its financial support to gain leverage over any programming decisions.”^{27/}

In short, reconceptualizing the scarcity doctrine into an argument that subsidies create an exception to traditional First Amendment analysis is unavailing. This is particularly true in the case of broadcasting, where the government nationalized the spectrum and controls a monopoly in licensing its use.

Promotion of Deliberative Democracy. A more recent theory suggests that broadcast public interest obligations can be said to be consistent with the First Amendment so long as they arguably promote “deliberative democracy.” The Gore Commission Report describes “tensions in First Amendment jurisprudence” between a free market place of ideas model versus a “public interest” model intended to support democratic values. ^{28/} It suggests that the public interest

^{26/} 468 U.S. 364, 399 (1984).

^{27/} 512 U.S. at 651.

^{28/} *Gore Commission Report* at 20.

approach would be supported by James Madison, “the great champion of free speech during the framing of the Constitution and Bill of Rights.” 29/ It goes on to describe Madison’s conception of the First Amendment “as a way to assure political equality, especially in the face of economic inequalities, and to foster free and open political deliberation.” 30/ The Report states that, in Madison’s view, free speech “expresses the sovereignty of the people.” 31/

Using this analytic framework, the Report appears to suggest that, had Madison been alive in 1969 and a Justice of the Supreme Court, he would have voted for (if not written) the opinion in *Red Lion*. It states that the “Madisonian notion of deliberative democracy . . . lies at the heart of the public interest standard in broadcasting,” and that the “Madisonian” concept of free speech clarifies “why public interest obligations have been seen as vital to broadcast television.” 32/ By this reasoning, the First Amendment supports -- if not requires -- more government regulation of speech.

This is not a mainstream view of First Amendment jurisprudence. As Professor Jack Balkin has written, this “Madisonian’ theory of the First Amendment is about as Madisonian as Madison, Wisconsin: It is a tribute to a great

29/ *Id.*

30/ *Id.*

31/ *Gore Commission Report* at 20. The Report does not cite any works of James Madison to support this interpretation. Rather its only reference is to a book by Commission member Professor Cass R. Sunstein. See Sunstein, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (New York: The Free Press, 1993), p. xvii.

32/ See *Gore Commission Report* at 21.

man and his achievements, but bears only a limited connection to his actual views.” ^{33/} Other First Amendment scholars agree with this assessment. ^{34/} In challenging this reworking of First Amendment theory, Professor John O. McGinnis of Benjamin & Cardozo Law School has written that James Madison believed that “individuals possessed a property right in their ideas and opinions just as surely as they possessed a property right in the material goods they fashioned. Madison also understood that the ability to transmit information, either through one’s own person (free speech) or through the use of other material property (free press) needed special protection from government interference.” ^{35/} Similarly, Professor Burt Neuborne has written that such revisionist theories represent “a radical change in the way we think about the First Amendment.” ^{36/}

Contrary to the revisionist view of James Madison, that free speech “expresses the sovereignty of the people” to regulate the press, the historical record suggests just the opposite. Indeed, when Madison introduced the Bill of Rights in the House of Representatives on June 8, 1789, he did not claim that speech could be

^{33/} J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L. J. 1935, 1955 (1995).

^{34/} *E.g.*, David M. Rabban, *Free Speech in Progressive Social Thought*, 74 TEXAS L. REV. 951, 1038 n.659 (April, 1996); Ronald W. Adelman, *The First Amendment and the Metaphor of Free Trade*, 38 ARIZ. L. REV. 1125, 1132-33 (Winter 1996).

^{35/} John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHIC. L. REV. 49, 56-57 (Winter 1996).

^{36/} Burt Neuborne, *Blues For the Left Hand: A Critique of Cass Sunstein’s Democracy and the Problem of Free Speech*, 62 U. CHIC. L. REV. 423 (1995).

regulated in the name of “the people” to promote deliberative democracy. According to contemporary accounts, he rejected any such notion:

[Mr. Madison stated that] the freedom of the press, and the rights of conscience, those choice flowers in the prerogative of the people, are not guarded by the British Constitution. With respect to these, apprehensions had been entertained by their insecurity under the new Constitution; a Bill of Rights, therefore, to quiet the minds of people upon these points, may be salutary. He then averted to the several Bills of Rights, which were annexed to the Constitutions of individual states; the great object of these was, to limit and qualify the powers of government -- to guard against encroachments of the executive. In the federal government, the executive is the weakest -- *the great danger lies not in the executive, but in the great body of the people -- in the disposition which the majority always discovers, to bear down, and depress the minority.* 37/

As Madison described the purpose of Bill of Rights, “[t]he rights of conscience; liberty of the press; and trial by jury, should be so secured, as to put it out of the power of the Legislature to infringe them. 38/

Professor Sunstein has acknowledged that his “Madisonian” interpretation represents a significant deviation from traditional First Amendment theory. He has written, for example, that his views of the First Amendment “would produce significant changes in our understanding of the free speech guarantee. It would call for a large-scale revision in the view about when a law ‘abridges’ the freedom of speech.” 39/ In particular, he has suggested that press autonomy “*may*

37/ THE PENNSYLVANIA PACKET AND DAILY ADVERTISER, June 15, 1789 (emphasis added).

38/ *Id.*

39/ Cass Sunstein, DEMOCRACY AND THE PROBLEM OF FREE SPEECH xix (New York: The Free Press 1993).

itself be an abridgement of the free speech right.” And Professor Sunstein acknowledged that to accept his theories, “it will be necessary to abandon or at least to qualify the basic principles that have dominated judicial, academic, and popular thinking about speech in the last generation.” 40/

While this self-assessment demonstrates the virtue of candor, it also reveals a gift for understatement. The “Madisonian” theory literally turns the First Amendment upside down. In short, the “tension” in First Amendment theories described in the *Gore Commission Report* is not so much a conflict in accepted constitutional interpretations as it is an attempt to revise history and rewrite the First Amendment.

Prospects for the Future

It has been a long time since the Supreme Court has directly confronted the constitutional status of broadcasting. That, plus the fact that the usual justifications for reduced First Amendment protection are showing a great deal of wear, make past precedents such as *Red Lion* a rather shaky foundation upon which to build new or expanded public interest obligations. In the most recent cases, the Court has expressly rejected the government’s attempts to extend the

40/ *Id.* at xix, xx (emphasis added).

rationale for broadcast regulation to the newer technologies of cable television 41/ and the Internet. 42/

Where it has discussed the level of First Amendment protection provided for broadcasters, the Court has appeared less than enthusiastic about maintaining the exception to traditional constitutional analysis. After noting the Commission's "minimal" authority over broadcast content, for example, the Court in *Turner Broadcasting System* gave only backhanded support for *Red Lion* and its progeny. It pointed out that "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, *whatever its validity in the cases elaborating it*, does not apply in the context of cable television." 43/ In other cases, the Court has indicated its willingness under the right circumstances to reconsider *Red Lion*. 44/

In the meantime, the Commission has assumed that it has the authority to maintain or expand public interest requirements based on the few lower court rulings that are on point. In particular, the FCC has relied on the decision of the D.C. Circuit upholding DBS public interest set-asides as a case that

41/ See *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878 (2000); *Turner Broadcasting System*, 512 U.S. at 639 ("application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation").

42/ *Reno v. ACLU*, 521 U.S. 844, 870 (1997) ("our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium").

43/ *Turner Broadcasting System*, 512 U.S. at 637 (emphasis added).

44/ *League of Women Voters*, 468 U.S. at 376 n.11.

“not only applied but extended *Red Lion*.” ^{45/} But the Commission has overlooked the highly fragmented views of the appellate court in that case. A deadlocked court denied rehearing in that case, and five judges endorsed a dissenting statement that casts a shadow over *Red Lion*’s continuing vitality. Judge Steven Williams, joined by Chief Judge Edwards and Judges Silberman, Ginsburg, and Sentelle, sharply questioned the central premises of extending the constitutional rationale of broadcast regulation. ^{46/}

The five dissenting judges pointed out that “[e]ven in its heartland application, *Red Lion* has been the subject of intense criticism,” noting that the assumptions underlying spectrum scarcity are suspect in light of the scarce nature of all economic goods. ^{47/} The opinion suggested that it seems more reasonable to read *Red Lion* as being limited only “to cases where the number of channels is genuinely low.” ^{48/} But “[w]hile *Red Lion* is not in such poor shape that an intermediate court of appeals could properly announce its death,” the dissenters cautioned that “we can think twice before extending it to another medium.” ^{49/}

^{45/} See *In the Matter of Repeal or Modification of the Personal Attack and Political Editorial Rules*, FCC 00-360 at ¶ 17, citing *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996).

^{46/} *Time Warner Entertainment Company v. FCC*, 105 F.3d 723 (D.C. Cir.) (Williams, J., dissenting).

^{47/} *Id.* at 724 nn.1-2.

^{48/} *Id.* at 726.

^{49/} *Id.* at 724 n.2.

In providing some second thoughts, Judge Williams canvassed the emerging justifications for perpetuating *Red Lion's* First Amendment exception. His dissent pointed to “fatal defects” in the panel’s approach, noting that “DBS is not subject to anything remotely approaching the ‘scarcity’ that the Court found in conventional broadcast in 1969 and used to justify a peculiarly relaxed First Amendment regime for such broadcast.” 50/ Judge Williams noted that the *Red Lion* Court suggested that the reason for such relaxed treatment would vanish along with the end of scarcity, and pointed out that, even in its nascent state, “[t]he new DBS technology already offers more channel capacity than the cable industry, and far more than traditional broadcasting.” 51/

The dissent further reasoned that the DBS set-aside requirement for “educational” or “informational” programming is content-based, and that “as a simple government regulation of content, the DBS requirement would have to fall.” 52/ It discussed the possibility of applying public forum doctrine to conditioned grants of government property, and noted that judicial analysis must focus on the constitutional limits for such demands. It also examined the subsidy theory underlying the social compact and found “good reason for the Court to have hesitated to give great weight to the government’s property interest in the

50/ *Id.* at 724.

51/ *Id.* at 725.

52/ *Id.* at 726.

spectrum.” 53/ Among other things, the opinion foresaw “rather serious First Amendment problems if the government used its power of eminent domain to become the only lawful supplier of newsprint and then sold the newsprint only to licensed persons, issuing the licenses only to persons that promised to use the newsprint for papers satisfying government-defined rules of content.” 54/

The 5-5 deadlock among the D.C. Circuit judges prevented the court from addressing these questions that go to the heart of the continuing validity of second-class constitutional status for broadcasting. For that reason, the FCC should not assume that it has *carte blanche* authority to impose new public interest obligations on broadcasters. A hung jury is not the same thing as a constitutional mandate, as the Commission recently learned in the personal attack/political editorial proceeding. 55/ The court’s decision only put off the day of constitutional reckoning for the FCC. But that day may come sooner rather than later if the FCC asserts new authority over broadcasting content.

53/ *Id.* at 727.

54/ *Id.* at 728.

55/ *Radio-Television News Directors Assn. v. FCC*, No. 98-1305 (D.C. Cir. October 11, 2000) (*per curiam*).

Attachments

1. *Red Lion* and the Culture of Regulation, RATIONALES & RATIONALIZATIONS (Media Institute, 1997).
2. Regulation and the Social Compact , RATIONALES & RATIONALIZATIONS (Media Institute, 1997).
3. Regulation in Newspeak: The FCC's Children's Television Rules, CATO Institute Policy Analysis No. 268 (feb. 19, 1997).
4. Self-Regulation and the Public Interest, DIGITAL BROADCASTING AND THE PUBLIC INTEREST (Aspen Institute, 1998).
5. Testimony of Robert Corn-Revere on S. 876, the Children's Protection from Violent Programming Act (May 18, 1999).
6. *Bam! Whap! Thunk!*, LEGAL TIMES, Sept. 25, 2000 at 75-76.



Regulating the Electronic Media

EDITED BY Robert Corn-Revere

WITH AN
INTRODUCTION BY
Senator Patrick J. Leahy

The
Media
Institute

Washington, D.C.

CHAPTER 1

Red Lion and the Culture of Regulation

Robert Corn-Revere

The First Amendment is the immune system of the body politic. Just as the AIDS crisis has taught the tragic and sobering lesson that damage to the body's natural defenses leaves it susceptible to contagions from a wide variety of sources, the culture of regulation associated with electronic media makes the concept of free speech vulnerable to bureaucratic manipulation. Censorship is contagious, and experience with this culture of regulation teaches that regulatory enthusiasts herald each new medium of communications as another opportunity to spread the disease.

The First Amendment commands that Congress shall make no law abridging freedom of speech or of the press. The courts, however, historically have allowed a greater degree of governmental intervention with respect to broadcast content than with traditional print media on the theory that "differences in the characteristics of new media justify differences in the First Amendment standard applied to them." As the Supreme Court stated in *Red Lion Broadcasting Co. v. FCC*: "Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of" the public's

“collective right to have the medium function consistently with the ends and purposes of the First Amendment.”¹

This difference in treatment carries significant constitutional ramifications. As Dean Lee Bollinger has noted, the Supreme Court decisions regarding broadcasting and the First Amendment amount to a “virtual celebration of public regulation” representing “[n]othing less...than a complete conceptual reordering of the relationships between the government, the press, and the public that was established with *New York Times v. Sullivan*.”² To read cases like *Red Lion Broadcasting* is to “step into another world,” where the press itself represents the greatest threat to First Amendment values, and government intervention in editorial choices is the preferred method of salvation.³ It is a vision of the First Amendment, in the words of the late Supreme Court Justice William O. Douglas, “that is agreeable to the traditions of nations that have never known freedom of the press.”⁴

Alarm about the transformation of the First Amendment from individual liberty to “collective right” has been moderated somewhat by the thought that the system damage was quarantined within the broadcast industry. Thus, Dean Bollinger championed what he called “a system of partial regulation,” in which limited control over broadcasting content was constitutionally acceptable, so long as it was not too aggressive and traditional media remained fully protected.⁵ The balance struck by this theory was based on the understanding that the Federal Communications Commission “has been extraordinarily circumspect in the exercise of its powers” (except in the regulation of “indecenty,” where it has “seriously ignored important free speech interests”) and that preserving an “unregulated sector” would maintain a check on government power.⁶

Concern also was minimized because the patient was promised a full recovery. The intrusions permitted by *Red Lion* were not enshrined as immutable principles of constitutional law, but were intended to last only until technological innovation rendered them unnecessary. The Supreme Court noted that “because the broadcast industry is dynamic in terms of technological change, solutions adequate a decade ago are not necessarily so now, and those acceptable