

today may well be outmoded ten years hence.”<sup>7</sup> The constitutional balance struck in *Red Lion* was based on “‘the present state of commercially acceptable technology’ as of 1969.”<sup>8</sup> As the U.S. Court of Appeals for the D.C. Circuit found: “It may well be 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.”<sup>9</sup>

President Clinton underscored this point when he described the differences between the constitutional treatment of broadcasting and the print media shortly before the November 1996 election:

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.<sup>10</sup>

Passage of the Telecommunications Act of 1996 promised to eliminate this constitutional anomaly and restore traditional First Amendment understandings. As the first comprehensive rewrite of communications law in over six decades, the law was intended to remove regulation and free up competition. The Senate Report on the legislation noted that “[c]hanges in technology and consumer preferences have made the 1934 [Communications] Act a historical anachronism.” It noted that “the 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.<sup>11</sup>

The House of Representatives’s 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.”<sup>12</sup> The Committee Report noted that there are more than 11,000 radio stations and 1,100 commercial television stations — a 30-percent increase over the past decade. During this time, a fourth broadcast network came into existence and two other networks are emerging. The report also pointed to additional

competition from cable television. It stated that cable systems pass more than 95 percent of television households and that 63 percent subscribe. In addition, it pointed to other technologies such as wireless cable, low-power television, backyard satellite dishes, satellite master antenna television service, and VCRs, all of which “provide customers with additional program distribution outlets that compete with broadcast stations.”<sup>13</sup> Finally, the report pointed to the strong interest by telephone companies in providing video programming. “This explosion of programming distribution sources,” the House Report found, “calls for a substantial reform of Congressional and Commission oversight of the way the broadcasting industry develops and competes.”<sup>14</sup>

President Clinton signed the Telecommunications Act into law on Feb. 8, 1996, appearing to give life to the pronouncement from his 1996 state of the union address that “the era of big government is over.”

#### *Promise versus performance*

Like many vices, however, the government’s penchant for tinkering with the editorial decisions of broadcasters and others has proved hard to break. The details of the Telecommunications Act, as well as a number of subsequent FCC actions, demonstrate that the government has no intention of letting go of its bad habits.

Despite the general characterization of the Telecommunications Act as a deregulation measure, *every provision* of the new law that relates to speech content is *re-regulatory*. Under Title V, the so-called Communications Decency Act, the new law implements the V-chip scheme to regulate television content, imposes onerous scrambling and time-shifting requirements on “adult” video services, and adopts the notorious Exon amendment, which purports to regulate “indecent” speech in the on-line context. In addition, Section 713 of the Act requires the FCC to establish regulations and implementation schedules requiring closed captioning for video programming.<sup>15</sup>

Such regulatory initiatives are by no means limited to the Telecommunications Act. In August 1996, the FCC adopted rules that, in essence, require television stations to transmit three hours per week of programming “specifically designed to serve the educational and informational needs of children.”<sup>16</sup> Under this rule, the government directed that qualifying programming must be aired between the hours of 7 a.m. and 10 p.m., regularly scheduled at least weekly, and at least 30 minutes in length. The educational or informational objective and the target child audience must be specified in writing by the broadcaster in advance, and the licensee must list such “core” educational shows in programming guides. As the FCC explained it, the new rules were designed “to reduce the role of government in enforcing compliance.”<sup>17</sup>

In addition to the children’s television rules, other content regulations have emerged as the focal point of federal broadcasting policies. In many cases, regulatory initiatives begin as spontaneous private efforts and evolve into bureaucratic expectations. For example, during the 1996 election cycle a number of broadcast licensees, led by the Fox Network, announced that they would provide free television time for presidential candidates. To some federal officials, this seemed to be such a good idea that they suggested it would also be good law.<sup>18</sup>

FCC Chairman Reed Hundt, for example, in announcing the offer of free time by television group owner A.H. Belo, suggested that free time for political debate is a “key part of the social compact between broadcasters and the public.”<sup>19</sup> Chairman Hundt compared the United States unfavorably with other nations that require “massive amounts of free time on media for direct communications between candidates and the public,” and advocated the adoption of quantitative requirements to be imposed on broadcasters. He had previously advocated setting aside 5 percent of digital spectrum authorizations for political and educational programming, and suggested that the government should be “embarrassed” for asking so little.<sup>20</sup>

Chairman Hundt similarly has advocated withholding or conditioning regulatory approvals for other licensing matters upon broadcaster pledges of government-approved programming. In early

1996, for example, the FCC denied several ownership waiver requests that were part of the Disney merger with Capital Cities/ABC, Inc. It had earlier granted similar waivers in the CBS/Westinghouse merger, after Westinghouse pledged to provide three hours per week of educational programming.

Just before the vote on the ABC transaction, Chairman Hundt noted: "If Disney had committed to provide over the ABC network, in a reliable guaranteed manner, the same amount of children's educational programming it now provides over [its Los Angeles station], I would have taken that into serious account in considering whether to grant these waivers."<sup>21</sup> Chairman Hundt added: "We know how to take account of promises to provide public interest programming."

As they used to say in the movies, "we have ways of making you talk."

The chairman further advocated making such deals standard agency practice. "I think we should consider revising our ownership rules so that broadcasters will have incentives to provide public interest programming," he said. "Why shouldn't our rules contain clear and predictable and reliable guidelines that will cause us to grant ownership waivers to broadcasters in return for their commitment to provide concrete amounts of public interest programming that the market under-provides, such as children's educational programming and free air time for political candidates?"<sup>22</sup> Generally, Chairman Hundt has advocated "reinventing the social compact," claiming that "it is going to be necessary to quantify public interest obligations."<sup>23</sup> He has described the advent of digital broadcast technology as an "opportunity to order up from a wish list what we think is best for the country."<sup>24</sup>

### *A culture of regulation*

The current reemphasis on content-based regulation of the media oddly reverses a traditional presumption underlying federal controls. Broadcast licensing was deemed to be necessary because of the economic and technological factors unique to broadcasting.

Consequently, in *NBC v. United States*, the Supreme Court held that, because the economic regulation of broadcasting was necessary, the FCC could also exert some control over broadcasting content.<sup>25</sup> The Telecommunications Act of 1996, however, takes the opposite approach. The Act is based on the premise that economic regulation is less necessary, that we have entered an era of media abundance, and that marketplace forces should replace regulatory commands. In the past, the FCC, backed by the Supreme Court, has considered such conditions a reason to reduce content controls over licensed media.<sup>26</sup> Now, however, content controls have taken center stage even as economic regulation has begun to wither away (at least in theory). This is the culture of regulation.

Not only has the demand for content regulation intensified; it is extending beyond broadcast television. Key regulatory provisions of the Communications Decency Act, including the V-chip and closed captioning requirements, apply to cable television and other video providers in addition to broadcast television. More importantly, the Act's regulation of on-line "indecentcy" has nothing to do with television, except for borrowing its regulatory justifications, and applies to a medium of abundance, not of scarcity. In other words, the types of speech regulation that represent "a complete conceptual reordering" between the government and the press and a "virtual celebration of public regulation" have broken free of their broadcast moorings and are being applied to all electronic media.

It is not necessary to read between the lines to see this trend. The 1992 Cable Act requires direct broadcast satellite providers, who may transmit hundreds of video channels, to set aside 4 to 7 percent of their capacity for "noncommercial programming of an educational or informational nature."<sup>27</sup> The U.S. Court of Appeals for the D.C. Circuit rejected a facial challenge to this provision, uncritically accepting the continuing validity of *Red Lion*.<sup>28</sup>

FCC Chairman Hundt has been quite clear in promoting the culture of regulation. In a speech in the fall of 1996, he said that it is "reasonable to put all media under some obligation to serve the public interest. Indeed, all media have typically been party to some sort of social compact."<sup>29</sup> He referred to the 4-to-7-percent set-aside for

DBS, as well as obligations imposed on cable operators because of their use of public rights-of-way. The obligations include leased access requirements, set-asides for public, educational, and governmental channels, and must-carry obligations. One reason he advocated imposing regulations on all media is that “[i]t isn’t fair or sustainable to put obligations on broadcast and cable that cannot be sustained amid the increasing competition among broadcast, cable, DBS, LMDS, [and] wireless cable.” Consequently, government control should apply to all, and “it is going to be necessary to *quantify* public interest obligations.”<sup>30</sup>

*Target: Internet*

It is clear, then, that the debate over the future of broadcast regulations has ramifications far beyond that medium. For example, what effects might there be on the Internet and the World Wide Web, “a unique and wholly new medium of world wide human communication?”<sup>31</sup> Judge Stuart Dalzell has described the Internet as “a never-ending world wide conversation,” the “most participatory form of mass speech yet developed.”<sup>32</sup> Given the nature of the new medium, what possible rationale exists for imposing content controls?

The short answer is contained in the Communications Decency Act and its legislative history, in which Congress concluded that the constitutional rationale for radio regulation embedded in *FCC v. Pacifica Foundation*<sup>33</sup> applies equally to a medium of unlimited abundance. Two federal district courts thus far have disagreed with this approach, but the matter will be resolved by the Supreme Court in 1997.<sup>34</sup> It is important to understand, however, that litigation over the constitutionality of the Communications Decency Act is only one skirmish in what will be a long, drawn-out campaign. The culture of regulation already is marshaling its forces for a multi-faceted assault on Internet freedom.

Take, for example, the FCC’s justification for its children’s television rules. Pointing to the government’s interest in the well-being of youth, and judicial approval of indecency regulations in *Pacifica* and

its progeny, the Commission concluded that it is not limited to shielding children from “inappropriate” programming; it may also constitutionally compel “appropriate” programming. If some measure of governmental authority ultimately is upheld for regulation of “indecent” on the Internet under a *Pacifica* rationale, does this mean that the government may also compel beneficial speech on that medium?

Advocates of regulatory culture seem to think so. Chairman Hundt has discussed the possibility of extending the Universal Service Fund (which subsidizes the availability of telecommunication services) to Internet services.<sup>35</sup> Presumably, doing so would be a federal “benefit” for Internet service providers that would establish a “social compact” between the government and service providers. For example, Chairman Hundt has cited the children’s television precedent and free time offers for political broadcasting, and has called upon Internet access providers to “give some thought to their abilities to contribute to the public good.” Pointing to the \$10-billion price tag associated with wiring schools for Internet access, he said that it “may seem like a big number but it’s actually less than two-tenths of 1 percent of the revenues of the information technology industry.” He concluded: “[T]here is no more appropriate time...to think about renewing the social compact between the communications industries and the public.”<sup>36</sup>

The history of broadcast regulation suggests that such a “compact” would bring with it “enforceable public obligations” that extend beyond the current “requests” for educational services. Indeed, some theorists steeped in regulatory culture have advocated imposing the FCC’s political broadcasting rules on on-line services.<sup>37</sup> Some influential lawmakers already seem willing to go even further, and are not waiting for any new rationale. Key legislators, including Rep. John D. Dingell (D-Mich.) and Rep. Edward J. Markey (D-Mass.), father of the V-chip, have opposed legislation that would exempt the Internet from FCC content regulation. Rep. Markey has stated that the Internet should not be given special status and that services provided over the medium should be regulated in the same manner, and to the same degree, as services offered by other media. Rep. Dingell,

pointing to the possibility of “cable programming over the Internet,” said he opposed any measures that would “preclude the FCC from applying local franchising requirements to the Internet.”<sup>38</sup>

Any observer who doubts the direct connection between advocacy of direct censorship and that of warmer and fuzzier sounding public interest commitments should listen more closely to the advocates of regulatory culture. The Family Research Council, a pro-censorship organization, described the Communications Decency Act as “a once-in-a-generation opportunity to set ground rules for the next great communications medium.”<sup>39</sup> In an eerie parallel, FCC Chairman Hundt described the advent of digital broadcast spectrum, which ultimately will merge computers with broadcasting, as “a once-in-a-generation opportunity to order up from a wish list what we think is best for the country.”<sup>40</sup> The relative attractiveness of wish lists, like beauty in general, is in the eye of the beholder. Regardless of ideological differences between liberals and conservatives, however, there really is only one wish — to control the medium.

### *Regulatory culture v. technologies of freedom*

First Amendment visionary Ithiel de Sola Pool wrote 14 years ago in his classic work *Technologies of Freedom* that “computers [will] become the printing presses of the twenty-first century” and that “[n]etworks of satellites, optical fibers, and radio waves will serve the functions of the present-day postal system.” Most importantly, he concluded that “[s]peech will not be free if these [technologies] are not also free.”<sup>41</sup>

Noting the “insidious bent” of prior regulatory justifications that “outlive their need [and] tend to spread,” Pool proposed four principles that should guide freedom of expression in the digital age:

- “[T]he First Amendment applies fully to all media,” electronic as well as print, because the Constitution protects “the function of communication” and not just the means used to transmit it.

- “There may be no licensing, no scrutiny of who may produce or sell publications or information in any form.”
- Any “enforcement of the law must be after the fact, not by prior restraint.”
- Regulation must be applied only as “a last recourse,” and “the burden of proof is for the least possible regulation of communication.”<sup>42</sup>

These four principles are the antithesis of the culture of regulation, and it is small wonder that the political branches and their regulatory appointees take the opposite approach. Indeed, the guiding principles of the regulatory culture may be seen as the following:

- Regulation applies fully to all media.
- Speakers must submit to government licensing.
- Government will establish quantitative, concrete, and enforceable obligations relating to content.
- The ability to regulate is presumed, and the burden of proof for the exercise of free speech is on the speaker.

The stark contrast between these two approaches is probably best explained by the fact that the culture of regulation is motivated more by political imperatives than by constitutional values. Thus, the special urgency with which the FCC and the White House approached the children’s TV issue was not unrelated to the fact that 1996 was a presidential election year. The long deadlock in the proceeding at the FCC ended only after the White House scheduled a “summit” on children’s TV and engaged in down-to-the-wire negotiations with the National Association of Broadcasters.<sup>43</sup> These issues, including the V-chip and the new FCC rules, were a key part of President Clinton’s campaign for reelection, and were incorporated into the Democratic platform.<sup>44</sup>

Government control over the media in the name of children has become the ultimate “motherhood” issue, making politicians quake lest they be labeled anti-kid. A WASHINGTON POST headline in July proclaimed: “Culture War Score: Dems 5, GOP 0.”<sup>45</sup> The story claimed that the Democrats had hijacked the “culture war” and

“family values” issues, thus preempting traditional Republican campaign fodder. The story characterized the phenomenon as “one of the shrewdest political heists in years.” Similarly, a headline for a story on the White House deal on children’s programming in the trade magazine *BROADCASTING & CABLE* stated simply: “Clinton preempts Dole on family-friendly TV.”

But while politicians and their appointees are bound only loosely by constitutional reasoning, judges necessarily must be more focused on such concerns. Consequently, the judicial response to the growth of regulation has been as encouraging as the political machinations have been discouraging.

First, courts have generally been skeptical about the continuing validity of *Red Lion* and the rationale for content regulation. Many observers have concluded that the original justification for different treatment of broadcasting — the purported scarcity of frequencies — has for years been nothing more than a legal fiction.<sup>46</sup> Along with this scholarly trend, a growing number of courts have questioned *Red Lion*’s continuing validity.<sup>47</sup> Even with respect to broadcasting, the Supreme Court has held that the FCC cannot intrude too far into the editorial discretion of its licensees.<sup>48</sup>

Second, courts have emphasized that the FCC’s regulatory power does not automatically extend to new non-broadcast technologies. Although “[e]ach method [of communication] tends to present its own peculiar problems,” the Supreme Court has emphasized that “the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary. Those principles...make freedom of expression the rule.”<sup>49</sup> For example, efforts to extend the lesser constitutional regimen of *Red Lion* to the newer technologies of cable television and the Internet have so far not been successful. In *Turner Broadcasting System*, the Court explained 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 regulation.”<sup>50</sup>

Early judicial tests of government regulation of the Internet suggest a similar outcome. In *ACLU v. Reno*, the three-judge court in the Eastern District of Pennsylvania emphatically rejected broadcast-

type regulation of “indecent” Internet communications. Judge Dalzell concluded that “the Internet deserves the broadest possible protection from government-imposed, content-based regulation.” Any such regulation, he concluded, “could burn the global village to roast the pig.” To the extent that “the Internet may fairly be regarded as a never-ending worldwide conversation,” Judge Dalzell wrote, “[t]he government may not...interrupt that conversation.”<sup>51</sup>

These decisions suggest that the judiciary has not bought in to the culture of regulation. Nevertheless, these trends raise the following questions: (1) Is the public trustee concept of *Red Lion* still valid, and what are its limits? (2) To what extent will the First Amendment permit regulation of other new technologies? (3) What regulatory theories are emerging to replace *Red Lion*, and do they justify a lower level of constitutional protection for new media than would otherwise exist under a traditional understanding of the First Amendment?

This book addresses these questions, with special emphasis on the final one, given that policymakers have been churning out additional constitutional rationalizations at the same rate as their interventionist proposals. If nothing else, the growing number of theories being touted as replacements for *Red Lion* bears witness to the lack of faith placed in that precedent by those who favor media regulation.

This book rejects the culture of regulation embodied in *Red Lion*, and maintains that all media should be fully protected by the First Amendment. Whatever validity the public trustee concept of *Red Lion* may have had in the past, its time is surely over and it has no relevance to the newer media. In addition, none of the emerging rationalizations for content regulation justifies diluting the First Amendment. These concepts are explored in the following chapters:

- Chapter 2 examines *Red Lion* at the end of the 20th century and the search for new regulatory rationalizations;
- Chapter 3 examines the new terminology for *Red Lion*'s public trustee concept — the “social compact” — and whether the content-for-government-benefit quid pro quo demand can withstand constitutional scrutiny;

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- Chapter 4 examines the use of children as a constitutional blank check to justify various forms of content control over new media;
- Chapter 5 examines whether regulated media can be characterized as “public fora” under the First Amendment, and thereby subjected to expanded access requirements;
- Chapter 6 examines allegations of “market failure” and other quasi-antitrust theories to justify governmental intervention; and
- Chapter 7 examines the triumph of the euphemism embodied in what the government describes as “voluntary” self-regulation among the licensed media.

None of the foregoing theories described above has ever been considered sufficient to justify expanded regulation of traditional print media. These theories are being discussed increasingly now because of the government’s expanded interest in content control and because it is not clear that it can count on *Red Lion’s* scarcity theory forever. But the regulatory culture embodied in *Red Lion* lives on, at least among those who write the laws. This book is an effort to address these theories before they become too entrenched in the never-ending debate between freedom of expression and regulation.

## Notes - Chapter 1

- <sup>1</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386, 390 (1969).
- <sup>2</sup> Lee C. Bollinger, *Images of a Free Press* (1991) at 66, 71.
- <sup>3</sup> *Id.* at 72.
- <sup>4</sup> *CBS, Inc. v. Democratic National Comm.*, 412 U.S. 94, 163 (1973) (Douglas, J. concurring).
- <sup>5</sup> Bollinger, *supra* note 2 at 133-51. *See also* Lee C. Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976).
- <sup>6</sup> Bollinger, *supra* note 2 at 33, 97, 114-15.
- <sup>7</sup> *CBS, Inc. v. Democratic National Comm.*, 412 U.S. at 102.
- <sup>8</sup> *News America Publishing, Inc. v. FCC*, 844 F.2d 800, 811 (D.C. Cir. 1988), quoting *Red Lion*, 395 U.S. at 388. *See Meredith Corp. v. FCC*, 809 F.2d 863, 867 (D.C. Cir. 1987).
- <sup>9</sup> *Banzhaf v. FCC*, 405 F.2d 1082, 1100 (D.C. Cir. 1968), *cert. denied sub nom. Tobacco Institute, Inc. v. FCC*, 396 U.S. 842 (1969).
- <sup>10</sup> *Clinton on Communications*, BROADCASTING & CABLE, Sept. 23, 1996 at 22.
- <sup>11</sup> Telecommunications Competition and Deregulation Act of 1995, S. Rep. No. 104-23, 104th Cong. 1st Sess. at 2-3 (Mar. 30, 1995).
- <sup>12</sup> Communications Act of 1995, H.R. Rep. No. No. 104-204, 104th Cong. 1st Sess. at 54 (July 24, 1995).
- <sup>13</sup> *Id.* at 55.
- <sup>14</sup> *Id.*
- <sup>15</sup> *See generally* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).
- <sup>16</sup> *Policy and Rules Concerning Children's Television Programming*, FCC 96-355 (released Aug. 8, 1996).
- <sup>17</sup> *Id.* at ¶142.

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- <sup>18</sup> Harry A. Jessell, *Hundt Calls for Free Time*, BROADCASTING & CABLE, Sept. 30, 1996 at 26.
- <sup>19</sup> FCC, *Chairman Hundt Says More Campaign Free Political Time and Direct Communications Between Candidates and Public Is Needed; Praises Belo Broadcasting Initiative* (news release), Sept. 24, 1996.
- <sup>20</sup> Reed E. Hundt and Karen Kornbluh, *Renewing the Deal Between Broadcasters and the Public: Requiring Clear Rules for Children's Educational Television*, 9 HARV. J. LAW & TECHNOLOGY 11, 16-17 (Winter 1996).
- <sup>21</sup> Transcript from FCC open meeting, Feb. 8, 1996.
- <sup>22</sup> *Id.*
- <sup>23</sup> Speech by FCC Chairman Reed E. Hundt, *Reinventing the Social Compact*, Broadcasting & Cable Interface Conference, Washington, D.C. (Sept. 24, 1996).
- <sup>24</sup> Garry Abrams, *Censor Chip?* CALIFORNIA LAW BUSINESS, March 18, 1996 at 20, 21.
- <sup>25</sup> *NBC v. United States*, 319 U.S. 190 (1943).
- <sup>26</sup> *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981).
- <sup>27</sup> Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §335(b)(1).
- <sup>28</sup> *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996).
- <sup>29</sup> Speech by FCC Chairman Reed E. Hundt, *Reinventing the Social Compact*, *supra* note 23.
- <sup>30</sup> *Id.*
- <sup>31</sup> *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996).
- <sup>32</sup> *Id.* at 883 (Dalzell, J.).
- <sup>33</sup> *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).
- <sup>34</sup> *Id.*; *Shea v. Reno*, 930 F.Supp. 916 (S.D.N.Y. 1996).
- <sup>35</sup> Speech by FCC Chairman Reed E. Hundt, Wall Street Journal Business and Technology Conference, Washington, D.C. (Sept. 18, 1996); speech by FCC

Chairman Reed E. Hundt, *Competition: Walking the Walk and Talking the Talk*, Media & Communications '96 Conference, New York (Sept. 17, 1996).

- <sup>36</sup> Speech by FCC Chairman Reed E. Hundt, *Children and the Information Superhighway: Directions for the Future*, Children Now Conference, Menlo Park, Calif. (Sept. 27, 1996).
- <sup>37</sup> Angela J. Campbell, *Political Campaigning in the Information Age: A Proposal for Protecting Candidates' Use of On-Line Computer Services*, 38 VILL. L. REV. 517 (1993).
- <sup>38</sup> Ted Hearn, *Internet Regulation Is on Hill Agenda*, MULTICHANNEL NEWS, Sept. 23, 1996 at 80. The House Subcommittee on Telecommunications and Finance voted 13-6 to support the FCC reform bill that would have restricted FCC regulatory authority. However, the bill died with the end of the 104th Congress. In any event, the bill was notable because of the views — and prominence — of its opponents.
- <sup>39</sup> Family Research Council, WASHINGTON WATCH, Vol. 7, No. 4 (Charles A. Donovan, Sr., ed.), Feb. 26, 1996.
- <sup>40</sup> Garry Abrams, *Censor Chip?* CALIFORNIA LAW BUSINESS, March 18, 1996 at 20, 21.
- <sup>41</sup> Ithiel de Sola Pool, *Technologies of Freedom* (1983) at 226.
- <sup>42</sup> *Id.* at 246.
- <sup>43</sup> Chris McConnell, *Burning the Midnight Oil Over Kids TV*, BROADCASTING & CABLE, Aug. 5, 1996 at 8.
- <sup>44</sup> Heather Fleming, *TV Gored in Chicago*, BROADCASTING & CABLE, Sept. 2, 1996 at 6; *Democrats' Platform Celebrates V-Chip, Kids TV Deal*, BROADCASTING & CABLE, Aug. 12, 1996 at 16.
- <sup>45</sup> Paul Farhi, *Culture War Score: Dems 5, GOP 0*, WASHINGTON POST, July 7, 1996 at C1.
- <sup>46</sup> See, e.g., H. Geller, *Fiber Optics: An Opportunity for a New Policy?* (1991) at 15 (“the broadcast regulatory model is a failed concept” and “the public trustee scheme...is a joke”); L. Bollinger, *Images of a Free Press* (1991) at 88-90 (describing the rationale of *Red Lion* as having “devastating — even embarrassing — deficienc[ies],” as “illogical,” and as being based on “the simple-minded and erroneous assertion that public regulation is the only allocation scheme that can avoid chaos in broadcasting”); Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEXAS L. REV. 207, 221-26 (1982).

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- <sup>47</sup> *E.g.*, *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1443 (8th Cir. 1993) (*en banc*) (Arnold, C.J., concurring); *see also Syracuse Peace Council v. FCC*, 867 F.2d 654, 684-85 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990) (Starr, J., concurring) (*Red Lion* has been undermined by technological and market developments).
- <sup>48</sup> *FCC v. League of Women Voters of Calif.*, 468 U.S. 364 (1984); *CBS, Inc. v. Democratic National Comm.*, 412 U.S. 94, 117 (1973).
- <sup>49</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952). *See Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994).
- <sup>50</sup> *Turner Broadcasting System v. FCC*, 114 S. Ct. at 2456 (emphasis added).
- <sup>51</sup> *ACLU v. Reno*, 929 F. Supp. at 881-83.





# Regulating the Electronic Media

EDITED BY Robert Corn-Revere

WITH AN  
INTRODUCTION BY  
Senator Patrick J. Leahy

The  
Media  
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Washington, D.C.

## CHAPTER 3

### *Regulation and the Social Compact*

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Robert Corn-Revere

References to *Red Lion's* "public trustee" concept of media regulation are increasingly scarce these days in Washington. As *Red Lion* has become more threadbare as a precedent for the future, proponents of regulatory culture have promoted a new vocabulary to revitalize old regulatory concepts. Exit, "public trustee"; Enter, the "social compact."

A few months after Chairman Reed Hundt arrived at the Federal Communications Commission, he announced his intention "to reexamine, redefine, restate, and renew the social compact between the public and the broadcasting industry."<sup>1</sup> He followed this with a speech proposing "A New Paradigm for Broadcast Regulation" in which licensees would be required to comply with "clear and concrete" programming requirements. Noting that "the balance has swung too far in the direction of private commercial use" of the spectrum, the chairman complained that "the Commission has for at least 15 years not taken away a single one of the approximately 1,500 TV licenses or 10,000 radio licenses in this country for failure to serve the public interest."<sup>2</sup> Promising to avoid the "low road" of programming content deregulation, which he described as "a mean-

ingless hoax on the American public,” Chairman Hundt proposed to follow the “high road,” in which the public interest obligation would be translated into “a few specific actions that should be performed to more fully benefit society.”<sup>3</sup>

*The FCC: Just looking for a few good mandates*

The “few specific actions” that make up the broadcasters’ side of the social compact have been expressed in various ways, as both general licensing requirements and specific concessions. First, there is the condition of license: Use of a public resource is said to entitle the government to demand specific programming obligations. Greg Simon, who until recently was chief domestic policy advisor to Vice President Albert Gore, defended this “quid pro quo” arrangement: “You 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.<sup>4</sup> Chairman Hundt similarly bases his demands for programming requirements on spectrum usage, both for existing analog frequencies and the digital spectrum. Calling it “only right that the public should claim for itself a concrete benefit arising from the new, digital use of the spectrum,” he has advocated specific set-asides for public interest programming, including free time for political advertising and children’s shows.<sup>5</sup>

Second, broadcaster commitments to provide particular types of programming have been described as the price licensees should pay to obtain favorable FCC rulings on waiver requests, transfers, and initial license grants. One way of selecting among competing applicants for a broadcast license, the chairman has suggested, would be to choose the one who made the largest offer of “free time for candidates, children’s educational television, shows for minorities or other underserved segments of the community, and other valuable programming.”<sup>6</sup> He also has advocated adopting a rule “explicitly

permitting broadcasters who pledge to provide concrete amounts of public interest programming to receive certain ownership waivers.”<sup>7</sup> Indeed, there are strong indications that such a policy has already been applied, at least informally. CBS/Westinghouse was granted the ownership waivers requested in its merger application after agreeing to provide specific amounts of children’s programming, while ABC/Disney was denied similar relief. Chairman Hundt said at the time that “if Disney had committed itself to continue to provide a guaranteed minimum of children’s educational programming, as Westinghouse did a few months ago and as children’s advocates urged here, that would have greatly strengthened Disney’s waiver requests.”<sup>8</sup>

Third, the social compact’s quid pro quo is sometimes held out as a stick, prodding broadcasters generally into providing programming considered to be more socially acceptable. Early in his tenure, Chairman Hundt warned that if broadcasters fail to meet their responsibilities to admit “the real impact of TV violence” and to take steps to deal with it, then “America will ask what broadcasters are giving back to the public that justifies their deal.”<sup>9</sup> The chairman more recently suggested that it would breach the social compact for broadcasters to accept advertisements for distilled spirits, adding that “[i]f the TV business refuses to take hard liquor advertisements, there won’t be a need for FCC or FTC action.”<sup>10</sup>

### *Rationale or rationalization?*

Such arrangements are not unknown in the law. Indeed, under Title VII of the Civil Rights Act, courts have described the situation in which an employer demands sexual favors as a condition of employment or advancement as an “economic quid pro quo.”<sup>11</sup> The power relationship between employer and employee is such that an unscrupulous boss is in a position to demand concessions that violate a worker’s legal rights. In these circumstances, assertions that the victim capitulated “voluntarily” to the demands have been held

as having “no materiality whatsoever.”<sup>12</sup> (More on the meaning of the word “voluntary” appears in Chapter 7.)

And so it is in the case of the FCC’s “social compact.” It is not so much a constitutional rationale for content regulation as it is an acknowledgment that the Commission has great control over the economic well-being of licensed media, and that it is willing to use that power. Only in recent years have policymakers sought to elevate the quid pro quo to anything more than the naked threat it is. Before the “new paradigm” came into vogue, notions of “social compacts” and “quid pro quo” deals were not matters of constitutional discourse. They simply were part of the *real politik* dialogue that took place between broadcasters and bureaucrats. References to a quid pro quo were what put the “bully” in the “bully pulpit.” For example, in 1991, then-FCC Chairman Alfred Sikes urged broadcasters to alter their programming as a prerequisite for further deregulation of ownership and business practices. After referring to congressional enactments relating to televised violence, “indecent” programming, and children’s programming, Chairman Sikes said that “there is a tacit — if not explicit — linkage between necessary reforms that would help broadcasting compete, and Congress’ attitude toward your programming.”<sup>13</sup>

Rep. Edward J. Markey (D-Mass.) similarly has described broadcasting regulation as a “social compact” based on an explicit “quid pro quo,”<sup>14</sup> and lectured industry witnesses at congressional hearings that broadcasters would be unlikely to receive favorable consideration in legislation to reform communications infrastructure unless the industry supported his “V-chip” proposal. Rep. Markey reportedly told McGraw-Hill Broadcasting President Edward Reilly that it is “difficult for broadcasters to claim that they will use the new spectrum for the public interest when they are unwilling to use a scintilla of spectrum for V-chips.”<sup>15</sup> As the Telecommunications Act of 1996 was being formulated, Rep. Markey emphasized that any effort to review restrictions on broadcast ownership must “affirmatively address both halves of the social compact,” and include a strengthening of children’s TV programming rules, violence limits, and a greater commitment to minority programming.<sup>16</sup>

As noted above, some of the pronouncements coming from the current FCC are much like these examples. They simply are instances of policymakers using their perceived authority to practice a little behavioral modification on the industry. Thus, Chairman Hundt has suggested that broadcasters could avoid regulatory costs such as spectrum fees by pledging to provide specified amounts of “public interest” programming.<sup>17</sup> But proposals to change the FCC’s licensing rules based on notions of a social compact are distinctly different: They would institutionalize (and quantify) the First Amendment price that licensees must pay in exchange for favorable governmental actions. Returning to the Title VII analogy, such an approach would be akin to setting out a specific schedule of sex acts that would be necessary to win a promotion. The question is, would that be wrong? Or, unlike the lusty employer’s desires, are the FCC’s programming demands a legitimate exercise of its authority?

To frame the question in First Amendment terms, does the social compact rationale add anything to the government’s constitutional authority beyond that established in *Red Lion*? There is a separate question of whether *Red Lion* can be extended so far as to approve the FCC’s expanded claims of programming power — a rather dubious proposition addressed elsewhere.<sup>18</sup> There is also the question of when *Red Lion* eventually will fade away, a subject covered in Chapter 2. This chapter asks whether the “social compact” has any substance without *Red Lion*: Can it stand on its own as a constitutional theory that would support lesser First Amendment protection for regulated media?

In his initial speech on the issue, Chairman Hundt seemed to base the regulatory justification of the new paradigm squarely on the scarcity rationale of *Red Lion*. “What Justice Frankfurter said in 1943 and what the unanimous Supreme Court said in 1969 remains true: The radio spectrum is not large enough to accommodate all who wish to use it....” Accordingly, the chairman concluded that “strict [First Amendment] scrutiny does not apply under *Red Lion* and should not apply because the spectrum is scarce.”<sup>19</sup> This early statement suggested that the government’s expanded regulatory authority will die along with *Red Lion*. Thus, when Chairman Hundt

first announced that it was time to “reexamine, redefine, restate, and renew the social compact,” he told *BROADCASTING & CABLE* magazine that this regulatory approach would not apply to cable, but only to those media that have been given free spectrum in return for their obligation to serve as public trustees.<sup>20</sup>

Subsequent formulations portray the social compact theory in a very different light. Now, all media are fair game. In a speech entitled “Reinventing the Social Compact,” Chairman Hundt said that it is “reasonable to put *all media* under some obligation to serve the public interest,” and that “all media have typically been party to some sort of social compact.” He added, moreover, that “it is going to be necessary to quantify public interest obligations.”<sup>21</sup> This new vision extends far beyond just those media licensed to use the spectrum. In setting out his regulatory agenda for 1997, “The Hard Road Ahead,” Chairman Hundt said that the rewrite of universal service under the 1996 Telecommunications Act “should revitalize the social compact between the communications industry and society.” He described the Federal-State Joint Board’s proposal of having the telecommunications industry provide a \$2.25-billion annual subsidy to schools as “a visionary social compact between the communications industry and the public.”<sup>22</sup>

It now appears that any interaction between a communications business and the government can be the basis for a “social compact.” As a consequence, if a business is regulated, it potentially has lesser constitutional rights. For example, the FCC recently proposed to retain the current system of telecommunications access charges, which excludes “information service” providers (such as Internet access companies), from paying such fees. It noted that, as a result of this policy, information service providers pay local exchange carriers a flat rate that is “significantly lower than the equivalent interstate access charges.” It also issued a notice of inquiry to determine “how our rules can provide incentives for investment and innovation in the underlying networks that support the Internet and other information services.”<sup>23</sup>

This proposal has all the earmarks of being the bait for future “public interest” demands. The government already believes that it

may extract specific programming commitments from broadcasters because they benefit from particular regulatory actions, such as spectrum allocation policies and must-carry rules.<sup>24</sup> Likewise, the government most certainly believes that it may impose obligations upon other communications businesses — such as Internet access providers — when it adopts favorable pricing policies to avoid “potentially detrimental effects on the growth of the still-evolving information services industry.”<sup>25</sup> Accordingly, Chairman Hundt has called upon Internet access providers to “give some thought to their abilities to contribute to the public good,” and said that “there is no more appropriate time...to think about renewing the social compact between the communications industries and the public.”<sup>26</sup> In this connection, he downplayed the \$10-billion price tag associated with wiring schools for Internet access as “less than two-tenths of 1 percent of the revenues of the information technology industry.” (It just “seem[s] like a big number,” he added.)

As Internet service providers “give some thought” to their public obligations, it is eminently foreseeable that they will be asked to restrict children’s access to “indecent” or other material considered harmful to minors. The broadcast social compact contains just such an obligation, according to its proponents. Thus, if “social compact” theory were to be accepted as a constitutional rationale, Chairman Hundt could do to the Internet (in his role as its friendly promoter) what Sen. James Exon (D-Neb.) so far has been unable to achieve (as its chief antagonist and father of the Communications Decency Act). To be fair, Chairman Hundt has not advocated the regulation of Internet indecency, so he may not be the one to drop this particular bomb. He is merely designing it.

In the end, social compact theory boils down to this: Government licenses to operate communications businesses and other regulatory “benefits” are considered to be a form of subsidy, the granting of which entitles the government to demand specific programming commitments in return. The FCC made exactly this claim in last year’s *Children’s Television Order*. Although the order relied primarily on *Red Lion*, it noted that Congress’s decision to retain public ownership of the spectrum and “to lease it for free to private