1997

The Culture of Regulation

Rodney A. Smolla

Repository Citation
http://scholarship.law.wm.edu/facpubs/1629
The Culture of Regulation

Rodney A. Smolla*

INTRODUCTION

The book Rationales and Rationalizations documents well the “culture of regulation” that pervades much of the discussion of law and public policy governing electronic media. Several philosophical and public policy impulses, doctrinal devices, and political realities have coalesced to produce this culture. This commentary applauds Rationales and Rationalizations for its critique of the current impulse to over-regulate electronic media and then focuses on one recent episode—the promulgation of new affirmative standards for children’s educational television—as a “case study” in the threat to the First Amendment posed by this regulatory culture.

The Philosophical and Policy Engines That Drive the Culture of Regulation

There are a number of philosophical and policy arguments that have recently gained popular currency that combine to form the engines that drive the culture of regulation. These include: (1) the metaphor of the “social compact;” (2) the ideal of broadcasters as “public trustees;” (3) the conceptualization of broadcasters as engaged in a “joint venture” with government; (4) the faith that the Federal Communications Commission (“FCC” or “Commission”) exists to elevate public discourse; (5) the proposition that the airwaves should be used to educate children; and (6) the philosophy that as forms of electronic media converge, so do the theories under which government may claim the right to regulate them.

Reed Hundt, Chairman of the FCC, has grown fond of invoking the notion of “social compact” in discussing the obligations of broadcasters. The Chairman is doing more than playing a clever rhetorical device here; he is invoking an entire belief structure. Western philosophy’s original social compact thinkers, natural law philosophers like John Locke and Thomas Hobbes, posited that the original condition of human beings is the state of nature, a place where there is no law and no security for life, liberty or property. The state of nature is an ugly and violent place, a jungle of murder and mayhem, where life is “solitary, poor, nasty, brutish, and short.” To escape this natural state of terror human beings come together and form the social compact in which individuals surrender their absolute freedom for the rule of law, creating a sovereign that will keep order and secure the blessings of liberty.

Particularly in the philosophy of Thomas Hobbes there is an inexorable quality to the social compact, an automaticity, an inevitability. We begin in the state of nature and we move to the social compact, swept by the natural currents of the universe. The social compact will always come about because as rational beings humans we will inexorably chose security, law and order over chaos and fear.

The invocation of the phrase “social compact” in the context of the regulation of electronic media is, of course, not so grandiose or profound as

* Professor of Law and former Director of the Institute of Bill of Rights Law at the Marshall-Whyte School of Law, College of William and Mary

1 Robert Corn-Revere, Rationales and Rationalizations (forthcoming 1997).


4 Hobbes, supra note 3, at 100.
the compact that forms the origins of government, but it partakes of the same essential analytic elements. The case for the regulation of broadcasting begins with a "state of nature" argument. The natural laws of physics produce scarcity in the electro-magnetic spectrum. Without governmental rules to assign frequencies and licenses on the spectrum, it is reduced to the chaos of a war of all against all.\(^5\) The Federal Communications Commission may be seen to exist by necessity, as part of the natural order, as inevitable as governmental itself if human beings are to behave rationally. Once the electro-magnetic spectrum was discovered and invention made it exploitable, the need for the imposition of the rule of law was self-evident.

If the basic need for a social compact governing use of the electro-magnetic spectrum was self-evident, however, the terms of that compact were not. A stark, minimalist compact would require little more than the assignment of frequencies. However the frequencies were assigned, whether by auction or governmental grant, and whether they would exist in perpetuity or for limited terms, such a minimalist contract would require very little ongoing supervision by government. The only significant governmental task would be to police encroachment by users into parts of the spectrum not assigned to them. A Federal Communications Commission would not be necessary to do this job; it could be assigned to a cadre of "frequency police," perhaps located in a special division of the FBI.

Our history, however, has been otherwise. We have embarked on a more elaborate social compact, one in which valuable frequencies are given away by the government licensees, who in return sign on to a regime of laws that impose a number of restrictions on the content of speech that may be broadcast, as well as several broad and gauzy affirmative obligations. Broadcasters are perceived as "public trustees," with affirmative responsibilities to broadcast in the "public interest."

In its most extreme manifestations, this notion of the broadcaster as public trustee seems to contemplate that government and broadcasters are participants in an ambitious joint venture, a venture aimed at elevating public discourse, educating children and enlightening political debate. The FCC exists not merely to rescue us from the physical chaos of an unregulated spectrum; it exists to secure a more profound redemption. The FCC will regulate the marketplace of ideas in order to save it. One at times gets the sense that deep in the soul of the contemporary FCC there resides a hope that springs eternal: that someday all television would look like PBS.

There is a ratchet mechanism at work in the culture of regulation. Each regulatory step provides momentum for the next one. Out of the need for physical space regulation sprang a claimed right to regulate content. Out of the need to regulate the broadcast spectrum sprang a claimed right to regulate other forms of electronic communication, such as computer communication over the Internet. As forms of media converge so do regulatory theories. If we have an FCC for radio and television, why not for communication on-line?

THE DOCTRINAL DEVICES USED TO JUSTIFY THE CULTURE OF REGULATION

The philosophical and policy impulses that nourish the culture of regulation require legal doctrines to justify them. The doctrines that have been prominent in recent debates include: (1) the claim that many forms of current "regulation" are nothing but "voluntarism" by players in the private sector, such as broadcasters agreeing to air a specified number of educational children's programs;\(^6\) (2) the argument that the doctrines emanating from FCC v. Pacifica\(^7\) apply to media other than broadcasting;\(^8\) (3) the argument that the doctrines emanating from FCC v. Pacifica apply to areas of speech other than "indecency;" (4) the use of "any obscene, indecent, or profane language by means of radio communications." A divided Supreme Court affirmed the Commission. A majority of the Court agreed that the First Amendment rules governing the content regulation of broadcasting were less stringent than those governing print media. The Court was divided, however, on the rationale for this holding, as well as the contours of the type of "indecent speech" that could be kept off the airwaves.

\(^6\) CORN-REVERE, supra note 1.
\(^7\) In FCC v. Pacifica Found., 438 U.S. 726 (1978), the Supreme Court decided a case arising from the broadcast of a satirical 12-minute comedy monologue by George Carlin, entitled "Filthy Words." Carlin made fun of the "words you can't say on the airwaves" by discussing them in endless comic permutations. The FCC ruled that Carlin's routine was indecent, in violation of 18 U.S.C. § 1464, which forbids the use of "any obscene, indecent, or profane language by means of radio communications." A divided Supreme Court affirmed the Commission. A majority of the Court agreed that the First Amendment rules governing the content regulation of broadcasting were less stringent than those governing print media. The Court was divided, however, on the rationale for this holding, as well as the contours of the type of "indecent speech" that could be kept off the airwaves.
\(^8\) In 1987, the FCC first suggested that broadcasters should no longer assume that it was safe to broadcast inde-
claim that special First Amendment rules apply anytime government acts for the well-being of children; (5) the assertion that rules aimed at requiring warnings, labels, ratings, and disclosures all enhance First Amendment values by placing adding to the information available in the marketplace of ideas; (6) the claim that many forms of regulation merely "empower" consumers, particularly parents, to make intelligent choices in the marketplace; and (7) the assertion that specific governmental regulatory standards promote First Amendment values by employing precision in regulation, a positive value that reduces the chilling effect on speech by reducing uncertainty.

The Supreme Court provided some doctrinal momentum to the culture of regulation in its hopelessly inescrutable decision last term in Denver Area Educational Telecommunications Consortium, Inc., v. FCC. In Denver Area the Supreme Court struck down two sections and upheld one section of the Cable Television Consumer Protection and Competition Act of 1992. The decision was highly splintered, with Justice Breyer announcing the judgment of the Court. Some parts of his opinion carried a majority of Justices, others a plurality, and a total of six Justices issued opinions. By a vote of 5-4, the Court held that the provisions of the law which permit cable operators to refuse to air indecent programming (defined as "sexually explicit" or "patently offensive" material) on "public access channels" violated the First Amendment. (Public access channels are channels that, over the years, local governments have required cable system operators to set aside for public, educational, or governmental purposes as part of the consideration an operator gives in return for permission to install cables under city streets and to use public rights-of-way.) In contrast, by a vote of 7-2, the Court upheld sections of the Act allowing cable operators to refuse indecent programming on "leased access channels," which are paid for by independent programmers. (A leased channel is a channel that federal law requires a cable system operator to reserve for commercial lease by unaffiliated third parties. About ten to fifteen percent of a cable system's channels would typically fall into this category.) The Justices found that the term "indecent" was not unconstitutionally vague and that the leased access provisions were constitutionally appropriate means of addressing the interest in protecting children from indecent material and balancing the relative interests of cable operators and programmers. Finally, by a vote of 6-3, the Court held unconstitutional the provisions of the law that require cable operators to place indecent material on leased access channels on segregated channels that are initially "blocked," requiring the customer to have them un-blocked by filing a written request.

Justice Breyer made a number of relatively loose statements in Denver Area that are particularly troubling with regard to the question of the government's power to regulate electronic media.
to protect children. Justice Breyer thus spoke approvingly of Pacifica, and noted that protecting children from exposure to patently offensive sex-related material was an "extremely important" and a "compelling" justification.\(^\text{11}\)

It is difficult to decipher what the Denver Area case portends. Because it is a case dealing with sexual material, it may well be possible to cabin the decision within the narrow Pacifica line of cases. The Denver Area decisions does seem to signal, however, that there is a great deal of fluidity on the current Supreme Court with regard to issues concerning electronic media and children, a fluidity than only encourages the culture of regulation.

**POLITICAL REALITIES THAT DRIVE THE CULTURE OF REGULATION**

Sigmund Freud claimed that all behavior is over-determined, and that presumably applies to political behavior as much as any other. There are probably many political factors that make the climate today hospitable to the culture of regulation. One political reality of the day, however, strikes me as especially significant: the success of the Bill Clinton centrist strategy to co-opt much of the Republican Party's appeal to family values by an agenda that emphasizes making the world of electronic communication friendly to children.\(^\text{12}\)

The Democrats played their family values hand brilliantly, and their trump card was protecting kids from bad speech – on television and on the Internet, and in the form of sheltering them from excesses of violence, sex, and bad habits such as smoking and drinking.\(^\text{13}\) One interesting and largely uncharted constitutional question is the extent to which "deals" brokered by the White House pressuring broadcasters to acquiesce in some forms of regulation might themselves violate the First Amendment.\(^\text{14}\)

**A CASE STUDY IN THE CULTURE OF REGULATION: CHILDREN'S TELEVISION**

Rationales and Rationalizations does an excellent job of mapping out the primary lines of attack on the culture of regulation. I wish to take one specific recent example of the triumph of the culture of regulation – the FCC's promulgation of standards for educational children's television – and use it as a lesson in how the culture of regulation works, and how it might be countered in a judicial attack.\(^\text{15}\)

The FCC launched its new approach to improving the quality of children's educational programming by issuing a *Notice of Proposed Rulemaking* in which it proposed to take one of three courses of action: (1) the monitoring of broadcasted programming specifically designed to serve the educational needs of children to determine if there is a significant increase in such programming; (2) establishment of a safe harbor quantitative processing guideline for children's educational programming; or (3) promulgation of a programming standard setting forth a specified average number of hours for children's educational programming. These alternatives were in turn anchored by a proposed definition of "core" educational programming setting forth requirements for the design, purpose, hours, scheduling regularity, programming length and identifying information that such programming must contain. Broadcasters at first fought the proposed actions vigorously, but in August 1996, pushed hard by pressure from the White House, the broadcasters

\(^{11}\) *Denver Area*, 116 S. Ct. at 2386.

\(^{12}\) *Corn-Revere*, *supra* note 1.

\(^{13}\) Some might argue that a second political reality of importance is the changing face of the communications industry. As the corporate ownership of the major broadcast and cable companies has changed, some may believe, so has the willingness to work with the government on social policies such as protecting kids. Thus it is sometimes claimed that to many of the new owners of major broadcast and cable media, freedom of speech and editorial autonomy are not the values they used to be. Good public relations and good governmental relations are becoming more important than stubborn independence. I do not know how to evaluate this argument; I suspect that there is still a great deal of contrariness and First Amendment spunk left in the communications industry, but it is, as it probably always has been, blended with a healthy dose of economic pragmatism.

\(^{14}\) In *Writers Guild v. FCC*, the court held unconstitutional a plan that arose when the FCC pressured the National Association of Broadcasters into accepting a plan that would place program material unsuitable for children after 9 p.m. and be accompanied by warnings. *Writers Guild v. FCC*, 423 F. Supp 1064 (C.D. Cal. 1976)

\(^{15}\) I opposed the FCC's new proposals for children's television, and filed a statement on behalf of the National Association of Broadcasters arguing against the Commission proposals, echoing the views expressed in this commentary.

and the Commission reached a deal agreeing to acceptance of minimal children's programming requirements.\(^\text{17}\)

Now it is very difficult to argue without embarrassment against governmental regulations aimed at enhancing children's programming. Nobody is going to take the position that we need \textit{poorer} quality children's programming. If there is a case to be made against what the FCC did with regard to children's television, it must be not the goal but the method that is attacked, the method of using governmental power and leverage to exact concessions from the private sector.

We should begin by laying out with greater specificity the philosophical impulses that lead to the Commission's original proposals. All are familiar themes in the culture of regulation. The proposals were driven by the judgment that economic market forces operate to deter broadcasters from providing what the Commission believed was sufficient educational programming for children. Broadcasters thus had to be forced more directly through regulation to provide additional programming.\(^\text{18}\)

I submit, however, that to the extent that the Commission's proposals are motivated by the judgment that "you can't... get this kind of programming unless you oblige it," they were predicated on a governmental interest that, as a matter of law, was not a permissible basis for FCC regulation.

"At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence."\(^\text{19}\) This is not some featherweight precept floating on the periphery of First Amendment doctrine, but a core constitutional principle; government action "that requires the utterance of a particular message favored by the Government, contravenes this essential right."\(^\text{20}\) Indeed, in \textit{Turner Broadcasting} the Supreme Court sternly instructed that such laws "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."\(^\text{21}\)

Now it must be conceded that the Commission's proposals for enhancing children's television were not an attempt at censorship in the traditional sense. The Commission clearly was not attempting to "suppress unpopular ideas or information." However, the Commission was quite unabashedly considering strategies that "manipulate the public debate through coercion rather than persuasion." This is something the Commission should not have been permitted to do under the First Amendment

First Amendment principles do not permit the FCC to exercise at-large authority to regulate the programming of broadcasters for the purpose of correcting perceived deficiencies in the programming generated by broadcasters within the environment of the competitive commercial marketplace. The Supreme Court has repeatedly emphasized that the regime of \textit{Red Lion} does not grant the Commission carte blanche over the programming choices of broadcasters. "Government regulation over the content of broadcast programming must be narrow, and that broadcast licensees must retain abundant discretion over programming choices."\(^\text{22}\)

Pointedly, the Supreme Court in \textit{Turner Broadcasting} specifically rejected the "market dysfunction" justification for the regulation of broadcasters. In direct response to the Government's argument in \textit{Turner} that the foundations for the \textit{Red Lion} standard of review are not the physical limitations of the electro-magnetic spectrum but rather the alleged "market dysfunction" of the

\(^{17}\) Paul Farhi, \textit{Broadcasters Pledge 3 Hours of "Educational" TV a Week}, Wash. Post, July 30, 1996, at A1. Broadcasters agreed to a compromise plan whereby stations must air three hours per week of "educational" programming. Stations that air less than three hours per week of regularly scheduled programming may offer an equivalent amount by running specials and public-service announcements or by financing educational programs that air on other stations. Broadcasters that fall below the standard would have to justify their programming choices to the Commission.

\(^{18}\) This rationale was been forcefully advanced as the predicate for the Commission's proposals by Chairman Reed Hundt in numerous speeches and interviews. See Don Oldenburg, \textit{Tuning in the Future of Kids' TV}, Wash. Post, Sept. 12, 1995, at B5 ("You can't expect in the normal workings of the marketplace to get this kind of programming unless you oblige it,' says FCC Chairman Reed Hundt, who has championed the proposal for new rules that would require commercial networks to schedule a minimum of high-quality and innovative children's educational shows and is actively seeking the public's support for it.").

\(^{19}\) Id.

\(^{20}\) Id.

\(^{21}\) Id. (emphasis added).

broadcast market, the Supreme Court sharply replied that "the special physical characteristics of broadcast transmissions, not the economic characteristics of the broadcast market, are what underlies our broadcast jurisprudence."\textsuperscript{23}

The current First Amendment standard governing broadcast regulation, as distilled in \textit{FCC v. League of Women Voters}, \textsuperscript{24} is that a regulation will be upheld only when "the restriction is narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues."\textsuperscript{25} In applying this standard, a standard grounded \textit{exclusively} in the spectrum scarcity rationale emanating from \textit{Red Lion}, the Supreme Court has \textit{never} countenanced government regulations that impose specifically defined affirmative programming requirements on broadcasters. To the contrary, the First Amendment "window" opened by \textit{Red Lion} and its progeny has been limited to regulations aimed narrowly at ensuring equality of access in public debate and the channeling of indecent programming.\textsuperscript{26} No matter how vigorously the Commission may disclaim any intent to become a federal "Office of the Censor," the inevitable regulatory response of specific program requirements will be program-by-program review of the content of children's offerings aired by broadcasters, to determine if those programs meet the definition imposed by the Commission. Specific programming requirements are senseless without specific regulatory enforcement. Such program-by-program review would mark a fundamental shift in the philosophy governing broadcast regulation at odds with statutory limitations, prior Court sanctioned Commission practice, and core First Amendment principles.

The spectrum scarcity rationale upon which First Amendment doctrine governing the content-based regulation of broadcasting is currently grounded does not provide the Commission with plenary power to impose its views of wise social policy on the programming choices of broadcasters. To the contrary, the Supreme Court has drawn a sharp distinction between potential regulatory schemes. On the one hand are regulations implemented to ensure reasonable balance and access equity in the presentation of views on issues of public concern or the political process. Regulations that intrude on the independence and discretion of broadcasters, particularly in the selection of actual programming sources, are markedly distinct. Thus the Court has observed that "although the Government's interest in ensuring balanced coverage of public issues is plainly both important and substantial, we have, at the same time, made clear that broadcasters are engaged in a vital and independent form of communicative activity."\textsuperscript{27}

Because of spectrum scarcity, the Supreme Court has instructed the Commission to require a degree of balance and access in the presentation of diverse views on public controversies and elections. However, spectrum scarcity does not justify turning broadcasters into common carriers, or subjecting broadcasters to specific governmental mandates with regard to particular types of programming. In those cases in which the Court has permitted regulation under the balance and access rationales, it has heavily emphasized the limited scope of such incursions. When the Court sustained a right of access for federal candidates, for example, it noted that this was a "\textit{limited} right to 'reasonable' access."\textsuperscript{28} The Court noted that this right that did "not impair the discretion of broadcasters to present their views on any issue or to carry any particular type of programming."\textsuperscript{29}

The Court has referred to this tension between the obligations of broadcasters and their independence as members of a free press in our constitutional system as a "tightrope" calling for "delicate balancing":

This role of the Government as an "overseer" and ultimate arbiter and guardian of the public interest and the role of the licensee as a journalistic "free agent" call for a delicate balancing of competing interests. The maintenance of this balance for more than forty years has called on both the regulators and the licensees to walk a "tightrope" to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act.\textsuperscript{30}

\begin{itemize}
  \item \textsuperscript{24} 468 U.S. 564 (1984).
  \item \textsuperscript{25} \textit{Id.} at 380.
  \item \textsuperscript{26} See, e.g., supra text accompanying note 22.
  \item \textsuperscript{27} \textit{League of Women Voters of Cal.}, 468 U.S. at 378.
  \item \textsuperscript{28} \textit{CBS v. FCC}, 453 U.S. 367, 396 (1981).
  \item \textsuperscript{29} \textit{Id.} at 397 (emphasis added).
  \item \textsuperscript{30} \textit{CBS v. Democratic Nat'l Comm.}, 412 U.S. 94, 117 (1973).
\end{itemize}
Following the general trend of the current culture of regulation, the FCC lost its constitutional balance and fell off the tightrope with its children's television rules.

If the FCC's approach to children's television were challenged in court, the Commission would be hard pressed to reconcile its rules with a number of statements made by the Supreme Court in *Turner Broadcasting*.

In the critical passage of the *Turner Broadcasting* opinion, the Court began with the concession "that broadcast programming, unlike cable programming, is subject to certain limited content restraints imposed by statute and FCC regulation." 31 In a footnote the Court then cited, as its first illustration, the Children's Television Act, which it characterized as "directing [the] FCC to consider extent to which license renewal applicant has 'served the educational and informational needs of children.'" 32 It is worth underscoring that by this characterization, the Court clearly understood the Commission's statutory authority as limited to consideration of the extent to which licensees have satisfied this obligation as part of the license renewal process. Far more importantly, the Court then went on to explain, in quite sweeping terms, the jurisprudential principles that constrain the Commission's power to regulate the content of broadcasting. In this decisive segment of its opinion, the Court observed that the argument against must-carry "exaggerates the extent to which the FCC is permitted to intrude into matters affecting the content of broadcast programming." 33 This exaggerated characterization of the FCC's authority, the Court explained, failed to take into account the doctrine that the FCC may not prescribe any particular type of programming that must be offered by broadcast stations. The Commission may in license renewal inquire as to what licensees have done to meet their statutory obligations, but it may not through rule impose programming requirements:

"In particular, 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; for although 'the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.'" 34

Not content to let matters rest there, the Court then made its point a second time, using as its example the limitations on the Commission's authority over noncommercial educational stations. The Court's discussion on this issue is particularly relevant to the current proceedings, for the Court was parsing the statutory and constitutional confines of the Commission's authority to define educational programming:

"What is important for present purposes, however, is that noncommercial licensees are not required by statute or regulation to carry any specific quantity of "educational" programming or any particular "educational" programs. Noncommercial licensees, like their commercial counterparts, need only adhere to the general requirement that their programming serve "the public interest, convenience or necessity."" 35

In these passages, the Court was thus underscoring a long-standing limitation, a limitation that Congress has understood and endorsed and, more importantly, that Congress, the Commission, and the courts have all previously understood as undergirded by limitations in the First Amendment itself. Indeed, in describing these limits on FCC authority, the Court in *Turner Broadcasting* quoted liberally from the Commission's own prior acknowledgments that more intrusive regulation would violate First Amendment principles. 36

Chairman Hundt has suggested that specific programming standards would actually enhance First Amendment values, citing the general First Amendment doctrine favoring precise over vague standards. 37 This argument, however, is sleight of hand, for it invokes the precision principle entirely out of context, and in so doing turns existing First Amendment doctrine upside down.

32 Id. at 649 n.7.
33 Id. at 650.
36 Turner, 512 U.S. at 651 (1994) ("The FCC itself has recognized that 'a more rigorous standard for public stations would come unnecessarily close to impinging on First Amendment rights and would run the collateral risk of stifling the creativity and innovative potential of these stations.'"") quoting Public Broad., 98 F.C.C.2d 746, 751 (1989).
37 Chairman Reed E. Hundt, A New Paradigm for Broadcast Regulation, Address at the Conference for the Second Cen-
When government is engaging in negative regulation, proscribing certain speech and establishing penalties for its utterance, doctrines such as "overbreadth" and "vagueness" do work to require precision in drafting.\(^8\) Similarly, laws that presume to restrict speech must be precisely tailored, sweeping no more broadly than necessary to effectuate the government's purposes.\(^9\) But these First Amendment axioms have never been applied in the opposite direction: there is simply no such thing as a requirement that government act precisely when ordering speakers what to say, because the very notion of ordering speakers to speak to suit the government's purposes is antithetical to free speech. The premise of the Chairman's argument is thus profoundly flawed; the precision principle, designed to protect speakers from government overreaching, cannot be invoked to aid and abet it. The Supreme Court's many ringing pronouncements that the government may not impose obligations on speakers to speak certain messages pleasing to the government are not magically mooted merely because the government is careful to be precise in its marching orders.

Indeed, when the government is enforcing affirmative obligations to speak, the greater the specificity, the greater the offense. This independence and autonomy of speakers under our constitutional system to decide for themselves what to say and what not to say is a universal theme in First Amendment jurisprudence, cutting across various forms of media and subject matter.\(^10\)

Most recently, in Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston,\(^11\) the Supreme Court, drawing heavily on Turner Broadcasting, spoke eloquently of the centrality of this autonomy principle in our First Amendment tradition:

> "Our tradition of free speech commands that a speaker who takes to the street corner to express his views in this way should be free from interference by the State based on the content of what he says. . . . The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis . . . . While 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.\(^{42}\)

In short, the spectrum scarcity rationale endorsed in Red Lion grants the government limited authority to impose on broadcast licensees a narrowly circumscribed obligation to present contesting viewpoints. But it does not authorize government to impose on licensees any obligation to present certain kinds of programming beyond these limited requirements of balanced public debate, however enlightened the government's purposes may be.\(^43\) The Commission's rules dictate to broadcasters significant elements of the mix and makeup of their programming schedules. This use of the government's power "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."\(^44\)

Finally, a point should be made about constitutional alternatives to the Commission's proposals. The worthy goal of encouraging high-quality chil-

---

\(^1\) Sable Communications of Cal. v. FCC, 492 U.S. 115, 126 (1989).

\(^2\) See e.g., Pacific Gas & Elec. v. Public Util. Comm'n of Cal., 475 U.S. 1, 11 (1986) (commercial speech case striking down forced inclusion of messages of others, noting that "all speech inherently involves choices of what to say and what to leave unsaid"); McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1516, 1519 (1995) (striking down ban on anonymous campaign literature, emphasizing First Amendment right of speakers to make their own "decisions concerning omissions or additions to the content of a publication," and to choose for themselves what to "include or exclude"); Turner Broad., 512 U.S. 622, 650 (noting that "the FCC's over-
sight responsibilities do not grant it the power to ordain any particular type of programming"); Wooley v. Maynard, 430 U.S. 115, 119 (1977) ("However, where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.").

\(^3\) See CBS v. Democratic Nat'l Comm., 412 U.S. 94, 110 (1973) ("Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations.").

\(^4\) Hurley, 115 S. Ct. at 2347.
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. Chairman Hundt has cited the views of Professor Sunstein in support of the Commission's current proposals. But with sincere respect, where Chairman Hundt and Professor Sunstein go wrong is in taking the next step, which assumes that the Commission may, vigorously enforce the Children's Television Act in a manner that imposes specific affirmative programming requirements on broadcasters in a manner consistent with the First Amendment.

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, under this philosophy, the purpose of the First Amendment is to enhance public deliberation and self-governance. This is a classic and oft-repeated theme in scholarly discussion about the First Amendment. 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 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.

The impulse to improve the quality of children's educational and informational programming is laudable. 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 laws restrict land uses in residential neighborhoods, and safety laws require children to wear motorcycle helmets.

46 New Paradigm Speech, supra note 37.
47 Sunstein, supra note 45, at 84-85.
49 See, e.g., Winters v. New York, 333 U.S. 507, 510 (1948) ("We do not [agree] 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, 344 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. 347, 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 Assoc., 389 U.S. 217, 225 (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.").
50 There are extant today a growing number of eloquent pleas for more creative educational programming. See Newton N. Minow & Craig L. LaMay, Abandoned in the Wasteland (1995).
51 See Chairman Reed E. Hundt, Long Live Frieda Hennock, Address at the Women in Government Relations Conference (August 24, 1995) (transcript available at FCC) ("Notwithstanding First Amendment challenges, courts have repeatedly held that government can require certain
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. Yet, 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.”

Although the First Amendment, at present, may countenance such narrow regulation of the content of broadcasting as the indifference 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.

The government is not powerless in this matter. The Children’s Television Act does impose obligations on broadcasters, and the Commission is directed to treat those obligations seriously during license renewal proceedings. 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. 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.

---

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 p.m., 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.”.


53 See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976) (striking down “highly paternalistic” advertising restrictions); Riley v. National Fed’n of the Blind of N.C., 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 Conn., 479 U.S. 208, 224 (1987))). See also First Nat’l 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 Assocs. v. Willingboro, 431 U.S. 78, 97 (1977) (criticizing, in the commercial speech context, the State’s paternalistic interest in maintaining the quality of neighborhoods by restricting speech to residents). See also 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.”). See also West Virginia State Bd. of Educ. 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.”).

54 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 `uninhibited marketplace of ideas’ one in which the government’s wares cannot be advertised.”).