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# RATIONALES AND RATIONALIZATIONS – CHAPTER 1: *RED LION* AND THE CULTURE OF REGULATION

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

The First Amendment commands that Congress shall make no law abridging freedom of speech or of the press, but the courts historically have allowed a greater degree of governmental intervention with respect to broadcast content than with traditional print media on the theory that "differences in the characteristics of new media justify differences in the First Amendment standard applied to them."<sup>1</sup> As the Supreme Court stated in *Red Lion Broadcasting Co. v. FCC*, "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of . . . [the public's] collective right to have the medium function consistently with the ends and purposes of the First Amendment."<sup>2</sup>

This difference in treatment carries significant constitutional ramifications. As Dean Lee Bollinger has noted, the Supreme Court decisions regarding broadcasting and the First Amendment

amount to a "virtual celebration of public regulation"<sup>3</sup> representing "[n]othing less . . . than a complete conceptual reordering of the relationships between the government, the press and the public that was established with *New York Times v. Sullivan*."<sup>4</sup> To read cases like *Red Lion* is to "step into another world," where the press itself represents the greatest threat to First Amendment values, and government intervention in editorial choices is the preferred method of salvation.<sup>5</sup> It is a vision of the First Amendment, in the words of the late Supreme Court Justice William O. Douglas, "that is agreeable to the traditions of nations that never have known freedom of press."<sup>6</sup>

Alarm about the transformation of the First Amendment from individual liberty to "collective right" has been moderated somewhat by the thought that the system damage was quarantined to the broadcast industry. Thus, Dean Bollinger championed what he called a "partial regulatory system,"<sup>7</sup> in which limited control over broadcasting content was constitutionally acceptable, so long as it was not too aggressive and traditional media remained fully protected.<sup>8</sup> The balance struck by this theory was based on the understanding that the Federal Communications Commission ("FCC" or "Commission") has "been extraordinarily circumspect in the exercise of its powers"<sup>9</sup> (except in the regulation of "indecenty," where it has "seriously ignored important free speech interests")<sup>10</sup> and that preserving an "unregulated sector" would maintain a check on government

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<sup>1</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969) (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

<sup>2</sup> *Id.* at 390.

<sup>3</sup> LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 71 (Univ. of Chicago Press) (1991).

<sup>4</sup> *Id.* at 66.

<sup>5</sup> *Id.* at 72.

<sup>6</sup> *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 163 (1973) (Douglas, J. concurring).

<sup>7</sup> BOLLINGER, at 142.

<sup>8</sup> BOLLINGER, *supra* note 3, at 133-51. See also Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976).

<sup>9</sup> BOLLINGER, *supra* note 3, at 115.

<sup>10</sup> *Id.* at 115 n.21.

power.<sup>11</sup>

Concern also was minimized because the patient was promised a full recovery. The intrusions permitted by *Red Lion* were not enshrined as immutable principles of constitutional law, but were intended to last only until, as the old joke goes, "til the government needs glasses." The Supreme Court noted that "because the broadcast industry is dynamic in terms of technological change[,] solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded ten years hence."<sup>12</sup> The constitutional balance that *Red Lion* struck was based on "the present state of commercially acceptable technology' as of 1969."<sup>13</sup> As the U.S. Court of Appeals for the D.C. Circuit found, "[i]t 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>14</sup>

President Clinton underscored this point when he described the differences between the constitutional treatment of broadcasting and the print media shortly before last November's 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>15</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>16</sup>

The House of Representatives' legislative findings were even more emphatic. The House Commerce Committee pointed out that "[t]he audio and video marketplace . . . has undergone significant changes over the past 50 years and the scarcity rationale for government regulation no longer applies."<sup>17</sup> The Committee Report noted that there are more than 11,000 radio stations and 1,100 commercial television stations – a 30% 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 passed more than 95% of television households and that 63% 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>18</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>19</sup>

President Clinton signed the Telecommunications Act into law on February 8, 1996, appearing to give life to 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

<sup>11</sup> *Id.* at 33, 97, and 114.

<sup>12</sup> *CBS Inc. v. Democratic Nat'l Comm.*, 412 U.S. at 102 (1973) (Douglas, J. concurring).

<sup>13</sup> *News Am. Publ'g. v. FCC*, 844 F.2d 800, 811 (D.C. Cir. 1988) (quoting *Red Lion*, 395 U.S. at 388); see *Meredith Corp. Co. v. FCC*, 809 F.2d 863, 867 (D.C. Cir. 1987).

<sup>14</sup> *Banzhaf v. FCC*, 405 F.2d 1082, 1100 (D.C. Cir. 1968).

<sup>15</sup> *Clinton on Communications*, BROADCASTING & CABLE,

Sept. 23, 1996, at 22.

<sup>16</sup> TELECOMMUNICATIONS COMPETITION AND DEREGULATION ACT OF 1995, S. REP. NO. 23, 104th Cong., 1st Sess. 2-3.

<sup>17</sup> COMMUNICATIONS ACT OF 1995, H.R. REP. 204, 104th Cong., 2nd Sess. 54.

<sup>18</sup> *Id.* at 55.

<sup>19</sup> *Id.*

Act, as well as a number of FCC actions over the past year, demonstrate that the government has no intention of letting go of its bad habits. Quite to the contrary, new regulatory proposals are emerging as if fueled with the hormonal intensity of an adolescent's sex drive.

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 of the law, 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, the Telecommunications Act requires the FCC to establish regulations and implementation schedules requiring closed captioning for video programming.<sup>20</sup>

Such regulatory initiatives are by no means limited to the Telecommunications Act. Last August, 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>21</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 be at least thirty 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>22</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 sponta-

neous 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>23</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>24</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 five percent of digital spectrum authorizations for political and educational programming, and suggested that the government should be "embarrassed" for asking so little.<sup>25</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 Cap Cities/ABC. 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 that "[i]f 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>26</sup> Chairman

<sup>20</sup> See generally Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

<sup>21</sup> *In re Policy and Rules Concerning Children's Television Programming, Report & Order*, 11 F.C.C. Rcd. 10,660, para. 1 (1996).

<sup>22</sup> *Id.* para. 3.

<sup>23</sup> Harry A. Jessell, *Hundt Calls for Free Time*, BROADCASTING & CABLE, Sept. 30, 1996, at 26.

<sup>24</sup> *Chairman Hundt Says More Campaign Free Political Time*

*and Direct Communications Between Candidates and Public is Needed*, Unofficial Announcement of Commission Action, at 1 (Sept. 24, 1996) (transcript available at the FCC).

<sup>25</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.L. & TECH. 11, 16-17 (Win. 1996).

<sup>26</sup> FCC Open Meeting (Feb. 8, 1996) (video tape available at the FCC).

Hundt added, “[w]e 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>27</sup> Generally, Chairman Hundt has advocated “reinventing the social compact,” claiming that “it is going to be necessary to quantify public interest obligations.”<sup>28</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>29</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*,<sup>30</sup> the Supreme Court held that, because the economic regulation of broadcasting was necessary, the FCC could also exert some control over broadcasting content.<sup>31</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>32</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,<sup>33</sup> 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 four to seven percent of their capacity for “noncommercial programming of an educational or informational nature.”<sup>34</sup> The United Court of Appeals for the D.C. Circuit rejected a facial challenge to this provision, uncritically accepting the continuing validity of *Red Lion*.<sup>35</sup>

FCC Chairman Hundt has been quite clear in promoting the culture of regulation. In a speech last fall 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>36</sup> He referred to the 4 to 7% 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

<sup>27</sup> *Id.*

<sup>28</sup> Chairman Reed Hundt, *Reinventing the Social Compact*, Address at the BROADCASTING & CABLE Interface Conference (Sept. 24, 1996) (transcript available on-line, (visited Apr. 1, 1997) <<http://www.fcc.gov/Speeches/Hundt/spreh637.txt>>).

<sup>29</sup> Gary Abrams, *Censor Chip?*, CALIFORNIA LAW BUSINESS, Mar. 18, 1996, at 20, 21.

<sup>30</sup> 319 U.S. 190 (1943).

<sup>31</sup> *Id.*

<sup>32</sup> *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981).

<sup>33</sup> 47 U.S.C.A. § 609 (West. Supp. 1996).

<sup>34</sup> 47 U.S.C. § 335(b)(1) (1994).

<sup>35</sup> *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 977 (D.C. Cir. 1996).

<sup>36</sup> Chairman Reed Hundt, *Reinventing the Social Compact*, *supra* note 28.

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>37</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 worldwide human communication?"<sup>38</sup> Judge Stuart Dalzell has described the Internet as "a never-ending worldwide conversation," the "most participatory form of mass speech yet developed."<sup>39</sup> Given the nature of the new medium, what possible rationale exists for imposing content controls?

The short answer to this question 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>40</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 this year.<sup>41</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 multifaceted 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 "indecency" 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 supporting Internet services.<sup>42</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 called upon Internet access providers to "give some thought to their abilities to contribute to the public good."<sup>43</sup> Pointing to the \$10 billion price tag associated with wiring the schools for Internet access, he said it "may seem like a big number but it's actually less than two tenths of one percent of the revenues of the information technology industry."<sup>44</sup> He concluded: "[T]here is no more appropriate time . . . to think about renewing the social compact between the communications industries and the public."<sup>45</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>46</sup> Some influential lawmakers already seem willing to go even further, and are not waiting for any new rationale. Key legislators, including John Dingell

<sup>37</sup> *Id.*

<sup>38</sup> *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996) (Dalzell, J.).

<sup>39</sup> *Id.* at 883.

<sup>40</sup> 438 U.S. 726 (1978).

<sup>41</sup> *ACLU*, 929 F. Supp. at 883; *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996).

<sup>42</sup> Chairman Reed Hundt, Address at the WALL STREET JOURNAL Business and Technology Conference (Sept. 18, 1996) (transcript available at the FCC); Chairman Reed Hundt, *Competition: Walking the Walk and Talking the Talk*, Ad-

dress at the *Media & Communications 96 Conference* (Sept. 17, 1996) (transcript available at the FCC).

<sup>43</sup> Chairman Reed E. Hundt, *Children and the Information Superhighway: Directions for the Future*, Address at the *Children's Now Conference* (Sept. 27, 1996) (transcript available at the FCC).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</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).

and Edward Markey (the father of the *V-chip*) have opposed legislation that would exempt the Internet from FCC content regulation. Congressman 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. Congressman 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>47</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>48</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>49</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 VERSUS TECHNOLOGIES OF FREEDOM

First Amendment visionary Ithiel de Sola Pool wrote fourteen 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>50</sup>

Noting the "insidious bent"<sup>51</sup> of prior regulatory justifications that "outlive their need [and] tend to spread,"<sup>52</sup> Pool proposed four principles that should guide freedom of expression in the digital age:<sup>53</sup>

1. "The First Amendment applies fully to all media . . . electronic as well as print"<sup>54</sup> because the Constitution protects "the function of communication"<sup>55</sup> not just the means used to transmit it;
2. "There may be no licensing [and] no scrutiny of who may produce or sell publications or information in any form;"<sup>56</sup>
3. Any "enforcement of the law must be after the fact, not by prior restraint;"<sup>57</sup>
4. "[R]egulation [must be applied only as] a last recourse . . . [and] the burden of proof is for the least possible regulation of communication."<sup>58</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: (1) regulation applies fully to all media; (2) speakers must submit to government licensing; (3) government will establish quantitative, concrete and enforceable obligations relating to content; and (4) 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

<sup>47</sup> Ted Hearn, *Internet Regulation in 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>48</sup> *Smut Out-of-Line Online*, Family Research Council, WASHINGTON WATCH, Vol. 7, No. 4 (1996).

<sup>49</sup> Garry Abrams, *supra* note 29, at 20-21.

<sup>50</sup> ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 226 (Harvard Univ. Press) (1983).

<sup>51</sup> *Id.* at 245.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 246.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> POOL, *supra* note 50, at 246.

Broadcasters.<sup>59</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>60</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 July *Washington Post* headline proclaimed *Culture War Score: Dems 5, GOP 0*.<sup>61</sup> The story claimed that Democrats hijacked the "Culture War" and "family values" issues, thus preempting traditional Republican campaign fodder.<sup>62</sup> It characterized the phenomenon as "one of the shrewdest political heists in years."<sup>63</sup>

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>64</sup> Along with this scholarly trend, a growing number of courts have questioned *Red Lion's* continuing validity.<sup>65</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>66</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,"<sup>67</sup> 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>68</sup> For example, efforts to extend the lesser constitutional regime of *Red Lion* to the newer technologies of cable television and the Internet have so far not been successful. In *Turner Broadcast Systems v. FCC*,<sup>69</sup> 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>70</sup>

Early judicial tests of government regulation of the Internet suggest a similar outcome. In *ACLU v. Reno*,<sup>71</sup> the three-judge court in the Eastern District of Pennsylvania emphatically rejected broadcast-type regulation of "indecent" Internet communications.<sup>72</sup> Judge Dalzell concluded that "the Internet deserves the broadest possible protection from government-imposed, content-based regulation."<sup>73</sup> Any such regulation, he concluded, "could burn the global village to roast the pig."<sup>74</sup> To the extent that "the Internet may fairly be regarded as a never-ending worldwide conversation,"<sup>75</sup> Judge Dalzell wrote, "[t]he government may not . . . interrupt that conversation."<sup>76</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

<sup>59</sup> Chris McConnell, *Burning the Midnight Oil Over Kid's TV*, BROADCASTING & CABLE, Aug. 5, 1996, at 8.

<sup>60</sup> Heather Fleming, *TV Gored in Chicago*, BROADCASTING & CABLE, Sept. 2, 1996, at 6; *Democrats' Platform Celebrates V-Chip, Kid's TV Deal*, BROADCASTING & CABLE, Aug. 12, 1996, at 16.

<sup>61</sup> Paul Farhi, *Culture War Score: Dems 5, GOP 0*, WASH. POST, July 7, 1996, at C1.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at C2.

<sup>64</sup> See, e.g., H. Geller, *Fiber Optics: An Opportunity for a New Policy?*, A Report of the Annenberg Washington Program Communications Policy Studies Northwestern University, 1991, at 15 ("the broadcast regulatory model is a failed concept" and "the public trustee scheme . . . is a joke"). See also BOLLINGER, *supra* note 3, at 88-90 (describing the rationale of *Red Lion* as having "devastating – even embarrassing – deficiencies), 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").

<sup>65</sup> See, 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, 684-685 (D.C. Cir. 1989) (Starr, J., concurring) (asserting *Red Lion* has been undermined by technological and market developments).

<sup>66</sup> *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984); *CBS v. Democratic Nat'l Comm.*, 412 U.S. at 117.

<sup>67</sup> *Joe Burstyn Inc.*, 343 U.S. at 503.

<sup>68</sup> *Id.*

<sup>69</sup> 512 U.S. 622 (1994).

<sup>70</sup> *Id.* at 637 (emphasis added).

<sup>71</sup> *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996).

<sup>72</sup> *Id.* at 881-83.

<sup>73</sup> *Id.* at 881.

<sup>74</sup> *Id.* at 882.

<sup>75</sup> *Id.* at 883.

<sup>76</sup> *Id.* at 883.

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?

Various theories that now are being proposed as *Red Lion* replacements are examined in the book, *Rationales & Rationalizations*, from which

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<sup>77</sup> RATIONALES & RATIONALIZATIONS (Corn-Revere, ed., Media Institute 1997).

<sup>78</sup> If nothing else, the growing number of theories being

this essay is excerpted. <sup>77</sup> None of the theories has ever been considered sufficient to justify expanded regulation of traditional print media. They 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.<sup>78</sup> But the regulatory culture embodied in *Red Lion* lives on, at least among those who write the laws.

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touted as replacements for *Red Lion* bears witness to the lack of faith placed in that precedent by those who favor media regulation.