

20. Broadcasting

Congress should

- prohibit the Federal Communications Commission from controlling the content of broadcasts,
- privatize the electromagnetic spectrum,
- repeal the Children's Television Act of 1990, and
- repeal the V-chip requirements.

Soon after printing presses were introduced to England, Henry VIII resolved to control the new medium by requiring that printing presses be licensed. Foreign books could only be distributed by the King's Stationer. Next, the government tried to ban unlicensed books. It lost that battle. Today we reap the benefits of privately owned, unlicensed presses and publishers everywhere in the Western world. In the United States that freedom is secured by the First Amendment, which declares that Congress "shall make no law . . . abridging the freedom of speech, or of the press."

The language of the First Amendment does not distinguish one medium of speech from any other. Despite that, the Supreme Court has held that broadcasters should receive less protection than the print media. And broadcasters, like the print media under Henry VIII, are licensed. The federal government's control over broadcasters' economic fortunes is easily leveraged into content controls. It is time to end this state of affairs.

Broadcasters' First Amendment Rights

Several unpersuasive arguments have been presented as to why broadcasters should not get full free speech rights. First, it is argued that broadcasters use public property. But so do speakers in public parks, and so do newspapers, which are delivered through the public streets and printed on paper made from trees that grew on federal lands. Furthermore, there is no sound reason that the electromagnetic spectrum should have

been seized by the government. Government ownership of the spectrum is inefficient and unnecessary.

As argued in Chapter 33, the spectrum should be auctioned off to private owners. If declaring the spectrum public property means that broadcasters cannot enjoy free speech rights, that is itself an excellent reason to privatize the spectrum.

Some also claim that broadcasters cannot enjoy full First Amendment rights because broadcasting is too powerful and too pervasive to be free. But broadcasters are hardly more powerful than newspapers were in the 19th and early 20th century. And broadcasting faces competition from a growing number of other media outlets, from cable television to Direct Broadcast Satellites, the Internet, movies, VCRs, and, as always, the print media. Furthermore, television and radio are pervasive only when we want them to be; nobody is forced to own a radio or television set, or to turn it on. Finally, *if we fear the power and pervasiveness of broadcasting, we should especially fear the power of government control of broadcasting.*

Ending the FCC's Power over Content

The Communications Act of 1934 gives the Federal Communications Commission power to regulate broadcast licensees in the "public interest." Over the years, the FCC has employed that broad, undefined power to enact an extraordinary series of content controls.

Early in the 1940s the FCC actually forbade broadcasters to editorialize. Then, from 1949 until 1987, the Fairness Doctrine was imposed on radio and television stations. Broadcasters covering controversial issues of public importance were required to offer their facilities to those with opposing views. So broadcasters stayed away from controversy. The FCC repealed the Fairness Doctrine in 1987. Since then, there has been a stunning increase in the amount of informational programming on radio and television.

The FCC also controls "indecent" on radio and television. Indecent material is defined as that which is "patently offensive." What does that mean? No one knows. D.C. Circuit Court of Appeals Judge Patricia Wald found that the definition could include programs on childbirth, AIDS, abortion, or almost any aspect of human sexuality. The FCC has admitted that it cannot describe exactly what material is "indecent," explaining that indecency rulings must be made on a "a case-by-case basis." In other words, something is indecent if it offends a majority of FCC commissioners.

It would be unthinkable for any agency to impose either the Fairness Doctrine or the vague, arbitrary indecency regime on newspapers. And newspapers, of course, would fight back with court challenges. But broadcasters are reluctant to protest, for they are economic hostages of the FCC. When the FCC (or the White House) suggests new content controls (such as the new rules mandating quotas of children's television), broadcasters fear to assert their First Amendment rights for fear of reprisals at license renewal time or in spectrum allocation proceedings.

Congress should privatize the electromagnetic spectrum, so no federal power can control the content of broadcasts by threats of economic deprivation. As an interim measure, Congress should remove the power to review any aspect of broadcast content from the FCC's jurisdiction.

Repealing the Children's Television Act of 1990

The Children's Television Act of 1990 requires the FCC to consider whether a broadcast licensee has served the educational needs of children in license renewal proceedings. Under this law, the FCC has determined to force-feed children three hours of "educational" programming a week. When the government rates speech, approving some speech and disapproving other speech, all of us are endangered, children as well as adults.

Children's vulnerability to what they read and see and hear is often cited as a reason to allow the government *more* control over speech directed at young audiences. In fact, that vulnerability makes any measure of government control over speech directed at children very dangerous. Children are susceptible to propaganda. Totalitarian governments from Hitler to Stalin have known that; the dictator's picture hangs on the walls of the classroom.

It seems like a long journey from Nazi Germany to today's child-friendly FCC. But hundreds of years of world history teach that powers given to government agents to do good can just as easily be used to do bad. We do not know what changes the future will bring in terms of personnel and policies.

The danger is underscored by pointing out how arbitrary the judgment to require "educational television" in the public interest really is. Psychologists have argued for years about how children learn best and what they should learn, and how much time they should spend "learning" as opposed to just having fun. The federal government is not well equipped to supply the answer to those questions. And rating certain material as "educational" misleadingly implies that parents need not be concerned if their children

sit staring at it for hours; kids are probably better off reading or playing outside. The Children's Television Act essentially allows the FCC to experiment on children, without any real evidence that it will do any good.

Fortunately, the First Amendment to the United States Constitution was written without special exceptions that permit controls on speech to children. The Children's Television Act of 1990 should be repealed.

Repealing V-Chip Requirements

The Telecommunications Act of 1996 requires the FCC to set a date by which manufacturers of television sets must begin installing "V-chips" capable of blocking violent programming in new sets. If the national networks fail to establish a satisfactory violence rating system on their own, the FCC is to establish an advisory committee to help them. Once ratings are established, the commission is empowered to require broadcasters to transmit them.

The V-chip regime represents a disingenuous attempt to evade the First Amendment. The law might look like the usual exercise of federal power over equipment, licensing, and transmissions, **but it** has one central purpose: to discourage the viewing of programming with a certain type of content. Clearly, it would be unconstitutional for Congress to direct the FCC to rate violent programming and refuse to renew the licenses of broadcasters who broadcast too much violence. The Supreme Court has declared government rating systems for movies unconstitutional. The V-chip regime uses subterfuge and threats to indirectly accomplish the same illegal objectives.

The V-chip does not restore civil society and private choice. Some advocates of the V-chip pretend that it is "voluntary." If that were true, the law would be unnecessary, and repealing the law would change nothing. But the system is not voluntary. Equipment manufacturers cannot choose whether to foist V-chips on consumers. Broadcasters cannot choose whether to have a ratings system, and whether to transmit it. Broadcasters who refuse to participate enthusiastically in the rating plan face reprisals at license renewal time.

The rating system the V-chip regime requires will offer parents little help in controlling what their children see and hear. There can be no consensus about what "violent" programming is. The news can be violent, as can reality-based shows like *Rescue 911*, slapstick humor like *I Love Lucy* and *The Three Stooges*, cartoons, social commentary like *Schindler's List*, and tales of heroes like Hercules and Xena. Even if violence could be meaningfully classified, there is simply too much television **program-**

ming to rate carefully. Political works like *Das Kapital* have probably caused more violence in the 20th century than the most explicitly violent television program; controls on violence are closely akin to political censorship.

Imagine a law that required printers to encode on the spines of books a bar code that could be used to record ratings for violent content. If, within a year, publishers and authors had not come up with a rating system for book violence, a federal agency would be empowered to craft guidelines on their behalf. Publishers would be required to attach a rating to all the books they published. No one would pretend for a moment that such a system was voluntary.

The V-chip requirements of the Telecommunications Act of 1996 should be repealed.

Conclusion

Most of the restrictions on broadcast speech have been ostensibly imposed to protect children. But we do not help children by letting parents think that the government can substitute for supervised television viewing. We can best set an example for children by showing them that the First Amendment is much more than a bothersome obstacle to government, to be gotten around by indirect threats and economic pressure.

Suggested Readings

- Corn-Revere, Robert. "'V' Is Not for Voluntary." Cato Institute Briefing Paper no. 24, August 3, 1995.
- Emord, Jonathan W. "The First Amendment Invalidity of FCC Content Regulations." *Notre Dame Journal of Legal Ethics & Public Policy* 6 (1992).
- Weinberg, Jonathan. "Vagueness and Indecency." *Villanova Sports & Entertainment Law Journal* 221 (1996).

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