

RECONCEPTUALIZING RATINGS: FROM CENSORSHIP TO MARKETPLACE*

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As always, the constitutional question is: how much power shall the government have? Section 551 of the Telecommunications Act of 1996,¹ "Parental Choice in Television Programming," permits the Federal Communications Commission to establish a television rating code for the purpose of "identification and rating of video programming that contains sexual, violent, or other indecent material about which parents should be informed before it is displayed to children."² Video programming distributors are then required to transmit these ratings,³ and television manufacturers⁴ and shippers⁵ are required to include in television sets a feature that will enable viewers to block programs of a certain rating, the so-called "Violence Chip," or "V-Chip."⁶

Three tenets concerning the V-Chip legislation deserve our closest examination. The first two weigh in favor of the government's *purpose* in enacting the V-chip provisions. The last one weighs heavily against the *means* chosen: the coercion of a particu-

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¹ Pub. L. No. 104-104, § 551, 110 Stat. 56, 139-42 (1996).

² *Id.* § 551(b)(1).

³ *Id.* § 551(b)(2).

⁴ *Id.* § 551(c).

⁵ *Id.* § 551(d).

⁶ Since the date of this presentation, the television industry has adopted a voluntary television ratings system based, to the chagrin of many, merely on the appropriate age of the potential viewer. See Lawrie Mifflin, *TV Industry Leaders Unveil Technique of Rating Shows*, N.Y. TIMES, Dec. 20, 1996, at A18. In response to the television industry's action, Congress may again try to force broadcasters to label programming with descriptions of violent content. See S. 363, 105th Cong. (1997); 143 CONG. REC. S1670-71 (daily ed. Feb. 26, 1997) (statement of Sen. Hollings).

The V-chip legislation was intended to empower parents with the ability to block out objectionable content-specific programming. The ratings system does not accomplish this objective. To correct this, I have decided to reintroduce my safe-harbor legislation with the addition of a new provision. The new version requires confining the distribution of violent programming to hours of the day when children are not likely to comprise a substantial portion of the audience unless the broadcasters adopt a content-specific ratings system that allows parents to block out violent programming.

143 CONG. REC. S1671 (statement of Sen. Hollings). As outlined in the following presentation, this form of regulation is constitutionally suspect.

lar industry to set up a single ratings scheme that will be conveyed by a single monitoring device.

First: Most parents don't want their children to view excessive violence or sex.⁷ That's easy.

Second: The world, and especially the United States, is in the midst of an entertainment explosion—both in terms of the numbers of products and the media outlets by which to receive them. This explosion is making it increasingly difficult to monitor and control what children see and hear. Parents desperately need tools to help them make informed choices.

Third: A government-directed ratings system is repugnant to the Constitution. If one reads the historical record with care, it becomes quite clear that one end motivated the most influential Federalists—James Madison, James Wilson, and Alexander Hamilton. That goal is liberty. And one means of achieving liberty was preferred over all others: the decentralization of power.

Their underlying assumption was that power has a propulsive tendency toward tyranny and therefore any significant concentration of social power is to be avoided: whether the power resides in an individual or an institution—or belongs to the government, to religion, or even to publishers.⁸ The Framers chose a representative system that divides power between the people and their representatives;⁹ three federal branches;¹⁰ a federal-state system;¹¹ a bicameral legislature;¹² and later an explicit limitation on the union of church and state power.¹³ Reflecting the British Statute of Anne,¹⁴ the Framers also chose to give copyrights and patents to

⁷ See Telecommunications Act of 1996, Pub. L. No. 104-104, § 551(a)(7), 110 Stat. 56, 140 (1996) ("Parents express grave concern over violent and sexual video programming and strongly support technology that would give them greater control to block video programming in the home that they consider harmful to their children.").

⁸ See THE FEDERALIST NO. 47 (James Madison); see also Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 80-86 (1996) [hereinafter Hamilton, *Art Speech*]; Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357, 361 (1994); Marci A. Hamilton, *The First Amendment's Challenge Function and the Confusion in the Supreme Court's Contemporary Free Exercise Jurisprudence*, 29 GA. L. REV. 81, 85-90 (1994); Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. REV. 477, 540 (1994).

⁹ See U.S. CONST. art. I, §§ 2, 3.

¹⁰ See U.S. CONST. art. I, § 1; art. II, § 1.

¹¹ See, e.g., U.S. CONST. amend. X.

¹² See U.S. CONST. art. I, § 1.

¹³ See U.S. CONST. amend. I, cl. 1.

¹⁴ Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19, (Eng.), reprinted in 4 GREAT BRITAIN STATUTES AT LARGE 401-403 (1786). This statute was adopted for the purpose of reducing the monopoly power of the publishing industry and decentralizing that power by placing it in the hands of individual authors.

individuals—authors, not publishers.¹⁵

Calvinism dominated Federalist theorizing.¹⁶ For the Calvinists, liberty had a particular meaning. Liberty was not *license* but rather individual control in the face of a lush selection of options. The colonial society envisioned a future filled with a robust new American culture. It was widely assumed that this new country would—as a result of a constitutional plan that would effect the most free society ever to be seen on earth—result in an immediate renaissance of historic proportions.¹⁷

At the same time that the colonials hoped for a rich cultural marketplace, they also revered the duty and the obligation to test oneself in the face of choice—to make the *right* choice amidst the many cultural offerings.¹⁸ This paradigm—control in the midst of plenty—repeats itself in the meeting of the Information Age with the desire to institute some rating system.

The colonials' predicted renaissance did not pan out immediately. Yet, as a result of the commodification of intellectual property goods, we have in 1997 a market flooded with information and entertainment items. And the flood has just begun as we tear down nation-state trade barriers and increase the capacity of remote regions of the world to receive and to distribute creative goods.¹⁹ This explosion is a very good thing under almost any reading of the First Amendment. More information, more knowledge, more power lodged in citizens' hands.

Unfortunately, the number of hours in a day is not being mul-

¹⁵ See U.S. CONST. art. I, § 8, cl. 8. Antitrust law takes this constitutional norm into the marketplace. See James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional Conceptual Reach of State Antitrust Law 1880-1915*, 135 U. PA. L. REV. 495 (1987).

¹⁶ See Marci A. Hamilton, *Slouching Toward Globalization: Charting the Pitfalls in the Drive to Internationalize Religious Human Rights*, 46 EMORY L.J. 307 (1997) (book review).

¹⁷ See JOSEPH J. ELLIS, *AFTER THE REVOLUTION: PROFILES OF EARLY AMERICAN CULTURE* (Norton ed. 1979).

¹⁸ James Madison stated that, like the check between the two branches of the National Government, the General Government would "controul the centrigal tendency of the States; which, without it, will continually fly out of their proper orbits and destroy the order and harmony of the political system." JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787* 89 (Norton ed. 1987); *Id* at 84-85 (statement of John Dickinson); CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA* 79 (1966) (stating that Solar System image would dominate the Convention's thinking of the Constitution); James H. Smylie, *Presbyterian Clergy and Problems of "Dominion" in the Revolutionary Generation*, 48 J. PRESBYTERIAN HIST. 161, 167 (1970) (referring to the "interrelated checks and balances which may be found in a clock or a watch" as a "favorite image of the eighteenth century.").

¹⁹ See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex IC, reprinted in *THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS—THE LEGAL TEXT 1-19*, 365-403 (GATT Secretariat Ed., 1994), 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement]. See generally North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 (1992) [hereinafter NAFTA].

plied by the same factor that is multiplying available works. If we are to capitalize on this explosion and prevent chaos, information management is absolutely essential. Ratings are very useful tools in sifting through the many offerings available. They help us avoid what we do not want and to prioritize the items we do want. They assist us in raising our children in an environment seeded with intellectual and emotional landmines.

The Information Era reinforces the idea that true freedom demands control over the chaos of options—not government control but personal control. So long as ratings are not the edicts of a single centralized power, they cannot be an efficient means of controlling one's interface with the raw information environment. Control is a good; variety is a good; but centralized, top-down control—especially of artistic and political products—is a constitutional evil to be avoided.²⁰

Driven to no small degree by this perfectly rational desire for control *and* plenty, we are moving toward a *marketplace* of ratings. As the following illustrates, I take a broad view of the definition of ratings—they are information sources about the quality and appropriateness of any entertainment product for particular audiences.

When I make a decision whether to attend a movie or whether to send my children, Siskel and Ebert are as much a rating source as the Motion Picture Association's all-encompassing system.²¹ The same can be said for the announcements of acceptable and unacceptable motion pictures by the Vatican and this nation's Catholic Conference, among others.²² But for the Telecommunications Act, we just might develop a thriving marketplace that serves the tandem ends of control and plenty, in other words, a marketplace that serves the constitutional end of liberty.

Imagine a listing of all of the media entertainment products available, including movies, television, music, video games, and the Internet's web pages, and whatever else comes along. If you search

²⁰ See Hamilton, *Art Speech*, *supra* note 8 at 80-86.

²¹ See Michael Katz, *The Precursor: Movie Ratings, Origins of the Motion Picture Association of America Voluntary Ratings System*, BROADCASTING & CABLE, Feb. 19, 1996, at 8 (describing the Motion Picture Association of America's ratings system and its origins).

²² See Glen Elsasser, *Second Opinion; Catholic Church Has Been in the Ratings Game for Years*, CHI. TRIB., Apr. 7, 1996, at C-12 (describing the American Catholic Church's movie ratings system and noting that "if TV adopts a system comparable to the current movie rating system, the church is poised to expose what it considers the shortcomings"); see also Bill Broadway, *Hollywood as Babylon; Not Satisfied with Movie Industry's Rating System, Christian Groups Offer Their Own Warning Guides for Parents*, WASH. POST, Aug. 24, 1996, at D6 (same); Gustav Niebuhr, *Catholic Tastes; How the Church Chose the Best Films Ever*, N.Y. TIMES, Apr. 7, 1996, at 4-5 (describing the Vatican's identification of films "possess[ing] special artistic or religious merit").

by title, you can get a brief preview of a show, *or* a list of ratings assessments for that particular title. In the alternative, you could search for a particular rating and get every movie rated “G” in the last ten years, or more interestingly, every movie rated “G” *and* approved by the Church.

In this scenario, ratings systems overlap and challenge one another. Because ratings are subjective determinations, no two systems will rate all entertainment products identically. That is to everyone’s benefit. If three different organizations rank a motion picture as a picture inappropriate for children, a parent is going to feel well-informed to make a decision. If the marketplace provides conflicting information, the parent will have to make a judgment call based upon past experiences with the relevant ratings schemes.

This marketplace is infinitely preferable to a system of unclassified variety where one misses too much of the good and is involuntarily exposed to the bad. A ratings marketplace is also preferable to a single-source system that provides only a thin stream of information on each particular work.²³

This is the present and could be the future: a marketplace of ratings available to all in a concise format. The question is whether the ratings issue can be wrested from Congress’s eager grip at this point. Under the First Amendment, it is a very good thing. A ratings market would ensure bottom-up control. With a ratings market, no single centralized decisionmaker is choosing the items to be included in the spread of offerings or the rating system that will categorize them.

A ratings marketplace is an acceptable means of information control without the unacceptable component of centralized control that is evident in a government-crafted ratings system. Any particular ratings scheme is going to operate to chill speech on the margins of its categories, as creators labor to place their works in the most profitable categories—witness the disputes when a motion picture received the “X” and then the “NC-17” rating.²⁴ If the studio does not win the ratings battle, the movie is frequently edited, perhaps to the detriment of aesthetic criteria. A *multiplicity* of ratings undermines the hegemonic force of any single ratings system.

A centralized ratings scheme—whether from the government

²³ Indeed, the objections raised to the television industry’s age-only rating scheme boil down to the criticism that the information provided is too thin. See 143 CONG. REC. S1670-71 (daily ed. Feb. 26, 1997) (statement of Sen. Hollings).

²⁴ See, e.g., Bernard Weinraub, *Violent Melodrama of a Sizzling Movie Brings Rating Battle*, N.Y. TIMES, Jan. 30, 1992, at C15.

or a particular industry—violates the constitutional norm disfavoring concentrations of power.²⁵ When the government coerces a particular industry to take responsibility for classifying and judging the variety of entertainment works on broadcast airwaves or the Internet, it is taking a step away from liberty in violation of the First Amendment. True—the Telecommunications Act uses the term “voluntary,” but the legislation is in fact coercive. The President’s summit of broadcast insiders prior to its passage was not a salutary step toward a better world, but a harbinger of government’s natural but potentially tyrannical desire to micromanage the entry of the Information Era.²⁶

By requiring one rating scheme to be implemented by one technological device, the Telecommunications Act stunts the development of a market in ratings. The Telecommunications Act’s V-chip provision is perfectly understandable in light of our societal preference for control in the midst of profusion. But the means and the actors are all wrong. It simply goes too far.

The constitutional problem with the V-chip legislation is not that it singles out the broadcast industry. It is not an Equal Protection problem. The problem is closer to an Establishment Clause problem—the government coerces the industry into being its partner. The government should not be permitted to join forces with any one religion, because that is bad for the people, bad for government, and bad for religion. Likewise, we should be concerned when government coerces a particular industry to achieve its ends—for the sake of the people and the industry.

The Information Era places in high relief the Constitution’s tandem preference for personal control and for a rich, endless variety of creative works. This new era inevitably *demand*s ratings schemes and technology that will permit us to shut out whole segments of the plethora, indeed the chaos, of offerings. The market should and will take us to a marketplace of ratings and information management where bottom-up control is possible. Better to wait for that constitutionally-sanctioned, liberty-reinforcing world than to settle for the unacceptable top-down control of the V-chip ratings legislation.

²⁵ See *supra* note 8.

²⁶ See Alison Mitchell, *TV Executives Promise Clinton a Violence Ratings System by '97*, N.Y. TIMES, Mar. 1, 1996, at A1.