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THE PUBLIC'S AIRWAVES: WHAT DOES THE PUBLIC INTEREST REQUIRE OF TELEVISION BROADCASTERS?

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INTRODUCTION

Since its enactment in 1934, the Communications Act has required the Federal Communications Commission to grant and renew licenses to use the electromagnetic spectrum only after determining whether "the public interest, convenience, and necessity will be served."[1] Accordingly, anyone who wants a license to broadcast by means of television—the medium on which I intend to focus—must satisfy that "public interest" standard.[2] In addition to that broad standard, Congress has provided specific guidance in four areas. First, in the Children's Television Act of 1990,[3] Congress directed the Commission, "in its review of any application for renewal of a commercial or noncommercial television broadcast license," to "consider the extent to which the licensee . . . has

† Chairman, Federal Communications Commission. This article is drawn from a series of three speeches originally delivered in 1995–96. The last of those speeches, on protecting children from media indecency and violence, was delivered at the Duke Law Journal's 27th Annual Administrative Law Conference on Feb. 9, 1996. The footnotes below were added later and are intended as an aid to the reader. I would like to thank my friends and colleagues Christopher J. Wright and Debra A. Weiner for their substantial contributions to the preparation of the original speeches and this article.

1. 47 U.S.C. § 309(a) (1988).

2. The Supreme Court has stated that the " 'public interest' to be served under the Communications Act is . . . the interest of the listening public in 'the larger and more effective use of radio.' " NBC v. United States, 319 U.S. 190, 216 (1943) (quoting 47 U.S.C. § 303(g) (1940)). Another element of the standard is "the ability of the licensee to render the best practicable service to the community reached by his broadcasts." *Id.* (quoting FCC v. Sanders Radio Stations, 309 U.S. 470, 475 (1940)).

3. Pub. L. No. 101–437, 104 Stat. 996 (codified as amended in scattered sections of 47 U.S.C.).

served the educational and informational needs of children."[4] Second, with respect to political campaigns, Congress has instituted a number of requirements, the most important of which are that candidates are entitled to pay only the "lowest unit charge" for campaign advertisements during the forty-five days preceding a primary election and the sixty days preceding a general election,[5] and that broadcasters who permit a potential candidate to use their stations also must provide "equal opportunities to all other such candidates for that office."[6] Third, Congress has prohibited indecent broadcasts outside of "safe harbor" hours, which currently extend from 10 p.m. to 6 a.m.[7] A fourth requirement has just been established: The Telecommunications Act of 1996 requires television manufacturers to install "V-chips" to assist parents in controlling their children's access to programming that contains "sexual, violent, or other indecent material about which parents should be informed before it is displayed to children."[8]

By providing news, sports, and entertainment for free, and by responding to market forces and providing programming that people want to watch and advertisers want to support, broadcasters undeniably serve the public. And broadcasters should certainly be praised for their creativity, particularly in bringing entertainment to the public. But it is clear that Congress meant to require broadcasters to do more than what they would do anyway in order to compete in the video marketplace for audience and for advertising revenue. There would be no need for the Commission to determine whether a licensee is serving the public interest if all that means is that the broadcaster is in business competing against other broadcasters and other providers of video programming, such as cable operators and operators of satellite systems. Clearly, broadcasters are subject to distinct public interest obligations not imposed on other media.[9]

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4. 47 U.S.C. § 303b(a) (Supp. V 1993).

5. 47 U.S.C. § 315(b)(1) (1988).

6. 47 U.S.C. § 315(a) (1988).

7. *See* Telecommunications Act of 1992, Pub. L. No. 102–356, § 16, 106 Stat. 949, 954 (1992) (codified as amended at 47 U.S.C. § 303 (Supp. V 1993)); Action for Children's Television v. FCC (*ACT III*), 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 701 (1996).

8. Telecommunications Act of 1996, Pub. L. No. 104–104, § 551(b)-(c), 110 Stat. 56, 139–42 (to be codified in scattered sections of 47 U.S.C.).

9. *See* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

The public interest obligations imposed by Congress do not necessarily imply heavy regulation. Rather, in giving meaning to the public interest standard, the FCC should balance Congress' determination that the private sector should be permitted to use the public airwaves with its further decision that this use must accord with the public's view on the desirable utilization of the public resource. In my view, this means the FCC should deregulate virtually all commercial aspects of broadcasting, because they are best left to the market, while we improve our rules in those areas where market forces will not deliver the services Congress and the public interest require.[10]

Congress has determined that market forces are unlikely to produce desirable amounts of children's educational programming and campaign information, and may produce a "race to the bottom" with respect to indecency and violence. Accordingly, its specific directives with respect to children's educational television, campaign advertising, and indecency, along with the new V-chip legislation, plainly require broadcasters to do something other than

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10. The FCC has already begun to deregulate the commercial aspects of television broadcasting by eliminating two unnecessary rules. Our decision on the Financial and Syndication Interest (Fin/Syn) Rules ended the process begun in 1993 to eliminate those rules, which restricted the ability of the established networks (ABC, CBS, and NBC) to own and syndicate television programming. Review of the Syndication and Financial Interest Rules, §§ 73.659–.663 of the Commission's Rules (Report and Order), 10 F.C.C.R. 12165 (1995); *In re* Evaluation of the Syndication and Financial Interest Rules (Second Report and Order), 8 F.C.C.R. 3282, *modified in part*, Memorandum Opinion and Order, 8 F.C.C.R. 8270 (1993), *aff'd sub nom.* Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309 (7th Cir. 1994). Similarly, our Prime Time Access Rule (PTAR) decision eliminated rules which, with certain exceptions, generally prohibited "network-affiliated television stations in the top 50 television markets . . . from broadcasting more than three hours of network programs . . . or former network programs . . . during the four prime time viewing hours." *In re* Review of the Prime Time Access Rule, § 73.658(K) of the Commission's Rules, Report and Order, FCC 95–314 (released July 31, 1995), 1995 WL 449873, at *2. We found that PTAR was "no longer needed to promote the development of non-network sources of television programming." *Id.* at *3.

In addition, in early 1995, the Commission proposed to loosen the national limits on ownership of television stations. Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules (Further Notice of Proposed Rulemaking), 10 F.C.C.R. 3524, 3567–68 (1995). Congress ultimately adopted the proposal in § 202(c) of the Telecommunications Act of 1996, by eliminating the numerical limit on ownership of stations by a single person or entity and raising the percentage share of the national audience that such stations may reach. Congress also adopted in § 202 a moderate loosening of radio ownership limits—a position that I proposed in an address at the National Association of Broadcasters Radio Show in September 1995. Chairman Reed E. Hundt, Remarks at the NAB Radio Show (Sep. 8, 1995) (transcript on file with author).

respond to market forces. Nevertheless, with respect to these four public interest areas: (1) the amount of educational programming for children on commercial broadcast stations is so limited that it falls below the levels prevailing prior to the FCC's rule changes in the early 1980s concerning children's educational programming;[11] (2) broadcasters make a lot of money from campaign advertising, but they leave the public, which relies predominantly on television for news, extremely dissatisfied with the connection between fundraising to buy broadcast time and breakdowns in our political process; (3) Congress asks the FCC to guarantee that indecent broadcasts will not run when children are likely to be in the audience—a mandate approved by the Supreme Court—yet broadcasters have devoted years of effort and millions of dollars in fees to litigate for the right to broadcast indecent shows whenever they wish, and subsequently to minimize the restrictions on such broadcasts that the courts will uphold;[12] and (4) researchers agree that television violence has been an important cause of the rise in violent crime during my lifetime,[13] and in March of this year broadcasters agreed for the first time to cooperate with government efforts to address this issue by pledging to develop a television rating system for use with the newly mandated V-chip.[14]

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11. *See* En Banc Hearings on Children's Television, MM Docket No. 93–48 (FCC June 28, 1994) (summary of remarks by Squire D. Rushnell, former ABC Vice President of Children's Television); NEWTON N. MINOW & CRAIG L. LAMAY, ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT 52 (1995).

12. *See* FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding FCC authority to sanction a broadcaster who airs indecent material when children are likely to be in the audience); Action for Children's Television v. FCC (*ACT I*), 852 F.2d 1332 (D.C. Cir. 1988) (upholding FCC's generic definition of indecency, but vacating FCC findings that two post–10 p.m. programs were indecent); Action for Children's Television v. FCC (*ACT II*), 932 F.2d 1504 (D.C. Cir. 1991) (upholding FCC's generic definition of indecency, but striking down statutory 24-hour ban on indecent broadcasts); Action for Children's Television v. FCC (*ACT III*), 58 F.3d 654 (D.C. Cir. 1995) (en banc) (upholding prohibition of the broadcast of indecent programming between 10 p.m. and 6 a.m.), *cert. denied*, 116 S. Ct. 701 (1996).

13. *See infra* notes 127–30 and accompanying text. The accumulated scientific evidence "strongly suggests that there is a link between violence on television and that in the real world." UCLA CENTER FOR COMMUNICATION POLICY, THE UCLA TELEVISION VIOLENCE MONITORING REPORT 10 (1995) [hereinafter UCLA VIOLENCE REPORT]. In addition, "[s]ome researchers have gone so far as to assign a numerical value to the connection between violence on television and violence in the real world. Leonard Eron has stated that 10% of societal violence is attributable to exposure to violent media images." *Id.*

14. *See infra* note 19.

Overall, it is fair to say that the broadcast industry has for many years opposed virtually all governmental efforts to improve the impact of broadcasting on society in the areas of educational television, nonviolent programming, family-friendly (as opposed to indecent) programming, and programming that promotes the political process through extensive coverage of issues and free access by candidates to voters. In general, broadcasters assert that they do enough already and that the government should not be involved in lawmaking or rulemaking that constrains their marketplace behavior.[15]

Lately, however, there are signs that broadcasters (and, to a greater extent, cable operators) are beginning to understand the need to support efforts that improve their service to the public. In 1993, some networks began broadcasting advisories about the violent or sexual content of their programming, and in 1994 broadcasters and cable operators established monitors to annually evaluate the violent content in their programming.[16] Most recently, broadcasters discussed the quality of their programming with President Clinton at a White House meeting where they announced their voluntary plan to develop a television rating system to work with the V-chip.[17] I hope this marks the beginning of a new understanding.

The public does not believe the current level of broadcasters' performance on any of these issues defines the full limit to use of

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15. This view has also been expressed by regulators. *See* Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 209–10 (1982).

16. An historical account of these efforts is set forth in UCLA VIOLENCE REPORT, *supra* note 13, at 12-13. That report stresses that the broadcast networks and the cable operators took these actions in response to a political climate that seemed particularly conducive to the enactment of legislation to address television violence, and in response to the Television Program Improvement Act of 1990, 47 U.S.C.A. § 303c (West 1991), legislation sponsored by Senator Simon that granted networks antitrust immunity for concerted action to address television violence. In June 1994, Senator Simon agreed to give broadcast and cable networks an opportunity to demonstrate their ability to regulate themselves and to work to forestall further Congressional efforts in return for their agreement to hire independent monitors to report annually for three years on television violence. The broadcast networks chose the UCLA Center for Communication Policy as their monitor and the cable networks chose MediaScope. The *UCLA Violence Report*, a product of this effort, states that it came about "only because of the 1994 agreement between governmental officials and the television industry. Were there not the fear of governmental legislation, the monitoring that we conducted over the past year probably never would have occurred." UCLA VIOLENCE REPORT, *supra* note 13, at 14.

17. *See infra* note 19.

the public's airwaves that is desirable for society.[18] Nor does the public accept the assertion that marketplace competition for audience and advertising revenues is all that should be asked from broadcasters in return for the privilege of holding a broadcast license. In fact, these concerns have become so prominent that the President took the occasion of the State of the Union Address to challenge the media to make programming they would want their "own children and grandchildren to enjoy," to state his support for V-chip legislation, and to invite broadcasters to the White House to discuss public concerns about their programming.[19] Congress and the Supreme Court repeatedly have rejected broadcasters' assertions that they ought not be subject to fair, simple, clear rules requiring more public interest efforts from them.

In the past fifteen years, the FCC has gotten dangerously out of step with the wishes of the public and the Congress on these issues. The FCC essentially dismantled the public interest standard in the early 1980s by conflating the "public interest" with anything sponsors will support.[20] Starting in the 1980s, the FCC also began the practice of renewing all broadcast licenses without ever finding a broadcaster to have failed to serve the public interest. In renewal proceedings every five years since the late 1970s,[21] the FCC has renewed almost every single broadcast license at least three times, and has taken away not one license for failure to provide public interest programming. In short, the FCC has eliminated rules that promoted public interest programming otherwise unprovided by marketplace competition. The FCC has also pulled the teeth out of enforcement powers that Congress asked it to use to obtain a guarantee from every broadcast station that they will

18. For example, one poll showed that 80% of Americans surveyed agreed that "violence on TV shows is harmful to society." 139 CONG. REC. S5050, S5051–52 (daily ed. Apr. 28, 1993) (statement of Sen. Simon, including summary of Times Mirror Poll).

19. *Prepared Text for the President's State of the Union Message*, N.Y. TIMES, Jan. 24, 1996, at A–14. Six weeks after the President's address, leaders of the television industry assembled at the White House to announce their cooperation in a voluntary plan to establish a television ratings system to work with the V-chip. *See* Alison Mitchell, *TV Executives Promise Clinton a Violence Ratings System by '97*, N.Y. TIMES, Mar. 1, 1996, at A–1.

20. *In re* Revision of Programming and Commercialization Policies, 98 F.C.C.2d 1076 (1984), *aff'd sub nom.* Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987).

21. Congress has just amended the Communications Act to provide for eight-year license terms. Telecommunications Act of 1996, § 203, 110 Stat. at 56, 112 (amending 47 U.S.C. § 307(c)).

make public interest programming (whether it relates to children or public affairs generally) available to all Americans over the air and for free.

In Washington, in the context of both the budget debate and the efforts that led to final passage of the Telecommunications Act of 1996, a discussion is now taking place about whether new spectrum—usable for digital broadcasting—should be auctioned.[22] Whether or not the digital spectrum licenses are distributed by auction, it would certainly be possible and desirable to hold the licensees of digital spectrum to clear, specific, concrete public interest obligations.

Meanwhile, it is useful to recall that broadcasters did not initially pay the Treasury for their licenses. Instead their bargain was part of a social contract in which they agreed to use the airwaves to compete in a commercial business and to serve the public interest in various ways, including educating the public (especially children) and providing access to news and information so that society and the political process would be bettered. Yet broadcasters in recent years have routinely made the argument that, under the First Amendment, any proposed requirement to serve the public interest in a specific way is unconstitutional.[23] Instead, the broadcast industry favors vague standards over specific requirements.

One advantage of vague requirements, from the industry's perspective, is that it is extremely difficult to justify a penalty—particularly a serious penalty, such as non-renewal of a broadcast license—for failure to comply with a vague standard. Thus, for example, broadcasters might argue that if the Commission fails to specify the minimum amount of children's educational programming necessary to satisfy the Children's Television Act and defines "educational programming" so broadly as to invite broadcasters to argue that cartoons from the 1960's qualify as "educational," it would be very difficult for the Commission to defend a decision

22. Christopher Stern, *No Doubt About Digital*, BROADCASTING & CABLE, Apr. 1, 1996, at 5.

23. *See, e.g.*, CBS v. FCC, 453 U.S. 367 (1981) (alleging a First Amendment violation in the FCC's finding that CBS had failed to provide equal access to a presidential candidate); FCC v. Pacifica Found., 438 U.S. 726 (1978) (challenging FCC's authority to sanction broadcasters airing indecent programming when children are likely to be in the audience); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (challenging the FCC's fairness doctrine on First Amendment grounds).

not to renew a license for failure to comply with the Act. This argument does not rule out case-by-case enforcement decisions based on a factual record, but points out the difficulty posed by vague requirements.

The argument for vague—and in practice unenforced—public interest requirements is not based on a sound reading of the Constitution. Nor do vague and unenforced standards fulfill congressional intent. Nor do they permit the FCC to act in a reliable, predictable manner in the renewal process. Nor do they lead to optimal results in terms of what is put on the air. Finally, arguing for vague and unenforced standards undercuts the broadcasters' claim that they should be entitled to their licenses because they serve the public interest.

It is time for a sea change in FCC policy and practice regarding the public interest standard. The Commission should aim to promulgate a few clear rules that set forth concrete requirements, are testable in court by any broadcaster who objects to their application, and are enforceable by the FCC in a predictable manner that makes license renewal proceedings efficient and meaningful. In particular, with regard to positive requirements, broadcasters should be required to provide a specific amount of educational programming for children. In addition, we need a new deal providing candidates with free access to the airwaves. With regard to negative requirements, broadcasters ought not show indecent or violent programs during the day or evening hours, when large numbers of children are likely to be in the audience. However, broadcasters might be permitted to show programming suitable only for adults at earlier times of night if they rate their shows so that they can be read and screened out by computer chips in televisions, set-top boxes, or other such devices.

These requirements are constitutional. In 1981, in *CBS v. FCC*,[24] the Supreme Court explained that "[a] licensed broadcaster is 'granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.' "[25] As I have stated, those obligations should be few but clear. The only coherent alternative to requiring broadcasters to live up to specific public inter-

24. 453 U.S. 367 (1981).

25. *Id.* at 395 (quoting Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (1966)).

est obligations would be to require them to pay for their spectrum and to use the proceeds to fund children's educational television and campaign advertising.

Broadcasters also should be subject to enforceable public interest obligations regarding indecency and violence. The Supreme Court dealt specifically with indecency in *FCC v. Pacifica Foundation*.[26] In that case, the Court recognized "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household.'"[27] The Court held that those concerns and "[t]he ease with which children may obtain access to broadcast material . . . amply justify special treatment of indecent broadcasting."[28] That is so, and the logic applies to violent programming as well as to indecent programming. Indeed, I think the only fair reading of the social science literature is that violent programming poses a greater hazard to society than does indecent programming.

The requirements outlined above, and discussed in more detail below, are not only constitutional; their implementation would *advance* First Amendment interests. As Professor Sunstein has explained, the drafters of the First Amendment designed it to advance "public deliberation and democratic self-government"—the First Amendment has "educational and aspirational functions."[29] For those reasons, the Supreme Court in the *CBS* case held that "[t]he First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.'"[30] Accordingly, a requirement to provide more campaign speech serves the goals of the First Amendment. So do a requirement designed to educate our children and requirements designed to assist parents in raising their children as they see fit by providing parents with more information about what is televised.

It is also important that broadcasters' duties be as specific as possible. The justification for clear rules regarding indecency and violence is easy to understand. Ambiguous rules have a chilling effect—they may lead broadcasters not to show programs that are

26. 438 U.S. 726 (1978).

27. *Id.* at 749 (quoting Ginsberg v. New York, 390 U.S. 629, 640, 639 (1968)).

28. *Id.* at 750.

29. Cass R. Sunstein, *Selling Children*, THE NEW REPUBLIC, Aug. 21, 1995, at 38 (reviewing NEWTON N. MINOW & CRAIG L. LAMAY, ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT (1995)).

30. CBS v. FCC, 453 U.S. 367, 396 (1981).

close to the line but on the permissible side of it. But it is also important that requirements regarding educational programming and access for candidates be clear. The Commission's current rules on political advertising, for example, are clear in their intent to limit the cost of such advertising.[31] But the rules themselves, which require broadcasters selling time to candidates during specified periods preceding primary and general elections to charge candidates a rate no higher than that paid for the same amount and class of time by the broadcaster's best commercial advertisers (the "lowest unit charge"), are anything but clear. The wide variation among broadcasters in the ways they set commercial advertising rates has resulted in complex rules, an expensive legal regime, and FCC involvement in the commercial activity of broadcasters.

The absence of clear guidelines can handicap broadcasters who take their public interest obligations seriously but compete with less conscientious broadcasters. Thus, vague guidelines lead some broadcasters to provide a meager amount of public interest programming or to use a questionable definition of what constitutes such programming. A number of broadcasters, for example, have claimed that "The Jetsons" and "Teenage Mutant Ninja Turtles" are educational.[32]

It may seem odd that I am focusing on the virtues of clarity, when clarity is so obviously preferable to vagueness. But a debate is currently raging at the FCC over the desirability of specific guidelines for implementing the Children's Television Act, and the broadcast industry has argued that vague rules are preferable to specific rules. Indeed, the broadcasters make the counterintuitive argument that specific rules are unconstitutional while vague rules are permissible, as I will discuss in more detail.

This Article argues that the Commission should promulgate a few clear rules to implement the public service obligations im-

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31. The Commission has explained the purpose of the Lowest Unit Cost Rule as follows:

> Congress added Section 315(b) in 1972 as part of a plan "to give candidates for public office greater access to the media and . . . to halt the spiraling cost of campaigning for public office." By adopting the lowest unit charge requirement, Congress intended to place candidates on a par with a broadcast station's most-favored advertiser.

Codification of the Commission's Political Programming Policies, 7 F.C.C.R. 678, 687 (1991) (citations omitted).

32. *In re* Policies and Rules Concerning Children's Television Programming, 10 F.C.C.R. 6308, 6317 n.32 (1995) [hereinafter Ongoing Children's TV Proceedings].

posed by Congress on television broadcasters. Such an approach would ensure that the public obtains something of value in exchange for granting broadcasters the exclusive use of a portion of the spectrum. That approach also implements the Communications Act, whereas the establishment of vague standards that are not enforced does not further Congress's goals. This approach also is fully consistent with the goals of the First Amendment, and more consistent than a regime that relies on vague rules.

I suggest that broadcasters should respond to public and congressional requests for improvement by funding one or more institutes, protected by principles of academic freedom, to continually advise broadcasters and the American people on the impact shows are having on children. Broadcasters and cable operators have already started down this road by establishing monitors to evaluate the violence in their programming and making use of academic and private expertise for this purpose. The broader advisory groups that I am suggesting would assist everyone, including the FCC, in determining what educates children and what does not, what is inappropriate violence and what is appropriate, and what is indecent for children. These issues are subtle and are not well handled by non-experts. Parents, who in a sense are the ultimate experts, know how hard these issues are. Lawyers like myself know that we should rely on psychologists and other social scientists for guidance. Broadcasters should seek, and guarantee, that guidance for everyone.

The next three sections of this Article discuss in greater detail the positive and negative public interest obligations that I believe the Commission should promulgate to implement the public service obligations that Congress has imposed on television broadcasters, and the defensibility of these obligations under the First Amendment. Part I contends that broadcasters should be required affirmatively, as a condition of their licenses, to provide free airtime for political candidates or, alternatively, that such airtime should be publicly funded, generally or out of the proceeds of spectrum auctions authorized by Congress. These requirements could be implemented in several ways; each would pass constitutional muster. Part II argues that broadcasters should be required, affirmatively, to present a minimum of three hours a week of educational and informational programming for children and that FCC action to impose such a requirement accords fully with both the Children's Television Act of 1990 and the First Amend-

ment. Such a requirement is also consistent with the public interest in the education and development of the nation's children, and the related interest in the development of an educated and motivated electorate. Finally, as described in Part III, broadcasters should be required to refrain from airing indecent and violent programming during hours in which children are likely to be watching, unless they provide parents with the tools to prevent children from watching such programming aired during those hours. This, too, serves the public interest and is fully consistent with the First Amendment.

I. PUBLIC INTEREST OBLIGATIONS TO REVITALIZE DEMOCRACY

Since the beginning of modern broadcasting following World War II, the FCC has asserted that the "public interest" necessitates that television be used to develop "an informed public opinion through the [public] dissemination of news and ideas concerning the vital public issues of the day."[33] As it has turned out, however, broadcasters can help develop "an informed public opinion" about candidates for political office principally by selling them huge amounts of advertising time. In the aggregate, political candidates at all levels spent $300 million on media advertising in 1992.[34] In 1994, the amount was $355 million.[35] In 1996, it is expected to top $500 million.[36]

The cost of television advertising makes fundraising an enormous entry barrier for candidates seeking public office, an oppressive burden for incumbents pursuing reelection, a continuous threat to the integrity of our political institutions, and a principal cause of the erosion of public respect for public service. According to the Committee for the Study of the American Electorate, in 1992 the average Senate candidate in a contested election spent $2.4 million on media expenses.[37] Like all averages, even this big

33. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 4 (1993) (quoting Editorializing by Broadcast Licensees (Report of the Commission), 13 F.C.C. 1246, 1249 (1949)).

34. Kevin Goldman, *Jump in Ad Outlays Should Make TV a Winner in 1996 Elections*, WALL ST. J., July 14, 1995, at B6 (citing figures provided by the Television Bureau of Advertising).

35. *Id.*

36. *Id.*

37. COMMITTEE FOR STUDY OF THE AMERICAN ELECTORATE, STUDY FOR THE CONFERENCE ON CAMPAIGN REFORM 2 (press release on file with author).

number conceals the magnitude of the problem. In a recent California Senate race, two candidates together spent more than $50 million on electronic media. The average House candidate in a contested election spent $250,000 on media expenses.[38] That candidate therefore needs to raise, on average, $2,500 a week every week for the two years between elections. The figure for Senators is a whopping $7,500 per week over six years. These targets typically must be met with lots of relatively small contributions obtained in days and nights of wearisome pleading. And there's no end in sight. Based on his study of this issue, Norman Ornstein of the American Enterprise Institute has concluded that "[t]he largest and fastest growing expense in House and Senate campaigns is television advertising."[39]

It is impossible to overestimate the harm to the legislative process caused by the sheer amount of time required to raise funds for television advertising. Former Congressman Bob Edgar, a Pennsylvania Democrat, said that during an election year, "Eighty percent of my time, 80% of my staff's time, 80% of my events and meetings were fundraisers."[40] As an aide to a Senator told the *National Journal* in 1990, "During hearings of Senate committees, you can watch Senators go to phone booths in the committee rooms to dial for dollars."[41] This system visits immeasurable frustration on our finest public servants. It's no coincidence that, as fundraising needs soar, incumbents decline to seek reelection in record numbers.

Efforts to reform this system are being pushed from various directions. Congress has attempted to address it in ongoing efforts in the context of campaign finance reform.[42] Broadcasters, too, have expressed interest in reforming the political process. In 1995, Fox Chairman Rupert Murdoch said that the time politicians must spend raising money is a "cancer we have to face up to."[43] He

38. *Id.*

39. Norman Ornstein, *Money in Politics*, *in* THE RIPON FORUM, July/Aug. 1992, at 15.

40. Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1188 (1994) (quoting Bob Edgar).

41. *Id.*

42. According to the Congressional Research Service, as of March 31, 1996, 66 bills on campaign finance reform had been introduced in the 104th Congress. JOSEPH E. CANTOR, CONGRESSIONAL RESEARCH SERVICE, REPORT FOR CONGRESS: CAMPAIGN FINANCE LEGISLATION IN THE 104TH CONGRESS Summary (Apr. 5, 1996).

43. Steve McClellan, *Businessmen/Broadcasters Speak Out*, BROADCASTING & CABLE,

added that "we have to look at systems in other countries where time is given to candidates."[44] Earlier this year he announced Fox's plans to provide free airtime to candidates in the 1996 presidential race: one hour on election eve for final presentations by the leading candidates, one minute breaks in prime time for those candidates to address issues in the three to four weeks prior to the election, and additional one hour or half-hour time periods in which the other networks will also devote time to statements by the candidates.[45]

Some suggest that strict caps should be placed on the amount of money spent on campaigns. Even if constitutional, such caps are misguided. We are all bombarded by a blizzard of media every day. Candidates need to compete with sales pitches for soap and software to get attention. They need more time to win that competition for the eyes and ears of voters. Limiting candidates' access to the audience will only limit the information voters get about candidates and issues.[46]

And we certainly cannot ignore the potential of electronic media as the primary source of information about political issues. Our country is far too big for candidates to reach most voters by personal contact.[47] In any event, most Americans get their news from television. A 1992 survey in the *Los Angeles Times* reported that 41% of Americans receive all campaign information from television alone, 38% from television and newspapers, and 80% mostly from television.[48] We must use television to improve campaigns, instead of turning away from the defects of today's process. To reform the campaign process, we need to embrace the communications revolution, not shun it. We need to find ways to make it *easier* for candidates to get their messages across and to challenge other candidates' messages, as opposed to hampering their ability to do so. The heart of a democratic society is an

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Apr. 17, 1995, at 48 (quoting Rupert Murdoch).

44. *Id.*

45. Rupert Murdoch, Chairman of the News Corp., Remarks at the National Press Club (Feb. 26, 1996) (transcript on file with author).

46. Ornstein, *supra* note 39, at 13–14.

47. *Id.* at 13.

48. Jeffrey A. Levinson, Note, *An Informed Electorate: Requiring Broadcasters to Provide Free Airtime to Candidates for Public Office,* 72 B.U. L. REV. 143, 146 n.10 (1992) (citing *Survey: Public Prefers Tyson to Politics*, L.A. TIMES, Mar. 5, 1992, at 13).

electorate that is provided with sufficient information to make informed choices.

Indeed, enhancing the ability of candidates to communicate their messages over television and radio is the policy that underlies the handful of obligations the Communications Act of 1934 already places on broadcasters with respect to campaign advertising. Three major statutory provisions govern broadcasters' current obligations to political candidates. First, Section 312(a)(7)[49] obligates broadcasters as a condition of their licenses to "allow reasonable access to or to permit purchase" of broadcast time by legally qualified candidates for federal office on behalf of their candidacies.[50] Second, when a broadcaster permits any political candidate (federal, state, or local) to use its broadcasting station, the broadcaster must provide "equal opportunities to all other such candidates for that office."[51] Third, when a broadcaster sells time to candidates during specified periods preceding primary and general elections, the rate must be set at the "lowest unit charge of the station for the same class and amount of time for the same period."[52]

In practice this system suffers from two major problems: It takes a lot of work to apply, and it does not work well. The system requires intense effort to apply because of the difficulty of identifying a broadcaster's "lowest unit charge." Broadcasters essentially auction off airtime, and each broadcaster seems to employ a unique system for doing so. The result is doubly bad: The FCC has to get intimately involved in the commercial activities of broadcasters in order to enforce the Lowest Unit Charge Rule and media access remains extremely expensive for candidates.[53]

Some broadcasters have found the Lowest Unit Charge Rule so difficult a way to meet their public interest obligations that they have tried to give free time to political candidates.

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49. 47 U.S.C. § 312(a)(7) (1988).

50. *Id.*

51. *Id.*

52. *Id.*

53. The Lowest Unit Charge Rule is intended to make available to the candidate who buys only one or a few spots the same rate paid by the broadcaster's best commercial customer, who buys in bulk. In actuality, however, candidates often pay higher rates than commercial advertisers. Unlike advertisers who can and do opt for spots that can be preempted, candidates subject to the now or never pressures of a campaign often purchase the higher priced "nonpreemptible" spots. Codification of the Commission's Political Programming Policies (Notice of Proposed Rulemaking), 6 F.C.C.R. 5707, 5709 (1991).

But—believe it or not—the current system actually *discourages* broadcasters from providing candidates with free time. Part of the problem is that broadcasters that permit a candidate to use their facilities are obligated by statute to provide equal opportunities for such use to all other candidates for the same office.[54] The scope of this obligation and the expense of complying with it becomes substantial in races with numerous third-party candidates, such as presidential elections. The problem is exacerbated by the federal election laws.

In 1992, EZ Communications, the owner of eight radio stations, offered free and equal time to federal candidates in each state in which it had stations. It asked the Federal Election Commission to approve the offer. Because of uncertainty in the law, the FEC still has not issued a ruling three years later,[55] and EZ Radio found out it was not at all easy to help further political debate. The same story is being repeated on the Internet. CompuServe recently offered free on-line services to candidates, but the FEC issued an advisory opinion stating that the offer would be considered a prohibited in-kind contribution.[56] The FEC may well be right in its reading of the election law. But as Dickens wrote in *Oliver Twist*, there are times when "the law is a ass—a idiot."[57]

In light of these circumstances, it seems to me that Congress should consider clarifying current laws to permit communications companies to give candidates free access to the public. As long as the companies are required to do so in an even-handed manner, there would appear to be little possibility of corruption. Whether or not Congress takes this step, campaigns inevitably will spread to all the lanes of the information highway: cable, broadcast, telephone, wireless, and satellite. Even with this proliferation of media outlets for political campaigning, however, broadcasters will undoubtedly remain the major source of campaign information for some time. Thus, I believe any short-term solution to the prob-

54. 47 U.S.C. § 315(a) (1988).

55. FEC Advisory Opinion Request 1992–26 concluded without an opinion when the Commission failed to approve Agenda Document #92–107 by a vote of 3 to 2 (Aug. 13, 1992).

56. Letter from the Federal Election Commission to Stephen M. Heaton, General Counsel, Compuserve, Inc. (Apr. 25, 1996) (on file with author).

57. CHARLES DICKENS, OLIVER TWIST 354 (Kathleen Tillotson ed., Oxford University Press 1966) (1838).

lems I have described must be based on obligating broadcasters to provide free time or finding alternative ways of reducing the cost of airtime to political candidates.

Of course, even if access to electronic media were cheaper and easier, many candidates would still raise money for other legitimate campaign purposes. But if candidates could be guaranteed access to a reasonable amount of airtime, they could certainly cut back on their fundraising efforts and devote more time to the work for which the public hired them. I doubt there is an elected official who would not prefer such an outcome.

The concept of requiring broadcasters to donate free time for political purposes is not new. In 1968, Senator Al Gore, Sr., stated: "The public owns the airwaves which we give the television and radio stations permission to use, and . . . we could reserve a certain percentage of time for civic purposes."[58] In 1988, his son—now our Vice President—introduced a bill to require broadcasters to provide a total of 6½ hours of free airtime in the weeks before a presidential election.[59] The Center for Responsive Politics, Common Cause, Henry Geller, Delmer Dunn, John Ellis, Paul Taylor, Newton Minow and others have all made wise proposals and recommendations regarding free airtime for political campaigns.[60]

One technique for providing free time would be to establish a time bank—broadcasters and all other media providers would donate airtime to the bank and candidates could draw airtime from the bank during their campaigns. Donations of time with a market value of, say, $500 million a year would greatly lighten the burden on candidates to raise money. As I have stated, $500 million is the total amount all candidates are expected to spend on media advertising in 1996. Yet $500 million is a tiny fraction of the amount

58. DELMER DUNN, FINANCING PRESIDENTIAL CAMPAIGNS 119 (1972) (quoting *Political Campaign Financing Proposals: Hearings Before the Senate Finance Comm.*, 90th Cong., 1st Sess. 130 (1967) (statement of Sen. Gore, Sr.)).

59. S. 2923, 100th Cong., 2d Sess. (1988).

60. *See* Petition of Common Cause et al. for Inquiry or Rulemaking to Require Free Time for Political Broadcasts, (Oct. 21, 1993) (undocketed and on file with FCC); CENTER FOR RESPONSIVE POLITICS, BEYOND THE 30-SECOND SPOT: ENHANCING THE MEDIA'S ROLE IN CONGRESSIONAL CAMPAIGNS 42–65 (1988); DUNN, *supra* note 58, at 82; JOHN ELLIS, NINE SUNDAYS 18 (1991); NEWTON N. MINOW ET AL., PRESIDENTIAL TELEVISION 159–66 (1973); PAUL TAYLOR, SEE HOW THEY RUN: ELECTING THE PRESIDENT IN AN AGE OF MEDIAOCRACY 270–81 (1990).

broadcasters earn from advertising. Indeed, it is less than 2% of the annual advertising revenues of television broadcasters alone.[61]

How would we divide the time contributed to a time bank? One approach would be to grant each eligible candidate a right to a specific dollar amount of free time. Candidates would then negotiate with broadcasters for advertising time, just as they currently do, but would pay with time bank credits rather than actual dollars. Why would broadcasters accept credits? Because they would be required to provide free time worth, say, 2% of their annual advertising revenues as a condition of using the public airwaves for free. Indeed, it would be important for broadcasters to provide time to candidates lest they lose their licenses.[62]

And again technology gives us new solutions. Digital broadcasting has just been invented. Within one or two years, digitally broadcast programs will be offered on currently unused spectrum. Digital broadcasters will have thousands of hours to fill with entertainment, news, educational television and—if we take the right steps—enhanced access to candidates, issues, and public debate. Suppose the assignees of the new spectrum used for digital broadcast were asked to deposit time into a time bank for campaign advertising? The service is new. No patterns or practices are set. This is the right time and digital broadcast could be the right place to stake out a claim for free and fair political debate.

William Safire recently suggested another way to create a time bank. He suggests that, in conjunction with auctioning broadcast licenses, we might offer bidding credits to broadcasters willing to provide free time.[63] Under that approach, broadcasters could decide to reduce the cash price of their licenses by agreeing to provide "in kind" public service. There are numerous merits to such an approach, including the fact that it would seem to diminish the likelihood of litigation—how could a broadcaster voluntarily elect a bidding credit in return for providing free campaign advertising and then claim that it cannot be forced to comply with its promise? On the other hand, the amount of the deposit in the

61. *Marketing & Media Ad Notes . . .*, WALL ST. J., Feb. 22, 1995, *available in* Westlaw, 1995 WL-WSJ 2113639 at *1.

62. This is a requirement that ought to apply to radio and to any other spectrum users as well as television broadcasters.

63. William Safire, *Good Guys Win 2*, N.Y. TIMES, Jan. 29, 1996, at A17.

time bank would depend on bidders' decisions, and it might not be enough.

Many of the implementation questions raised by a time bank would disappear if instead we relied on a trust fund method to reduce the cost of airtime to political candidates. Moreover, providing candidates access to monies in a trust fund might provide additional flexibility in the distribution of airtime and in allowing candidates to use whatever means of communication they deem best. With a trust fund candidates could and should be afforded the freedom to select the means of access to their voters, be it Internet, telephony, cable, satellite, broadcast television, or radio.

Even in these times of federal budget cutting, establishing a trust fund for these purposes is not out of the question. At the FCC we have already raised more than $9 billion in spectrum auctions. Wouldn't it be nice if we could place even a modest part of that money in a trust fund, and use the interest to provide matching funds to candidates? The annual interest on $9 billion, if we had put it in a trust fund, would easily be enough to fund the current rate of federal congressional media spending. Moreover, as Senator Dole has been emphasizing recently,[64] the broadcasters have been asking for more free spectrum that may be worth as much as $70 billion. Even if Congress sends all auction revenues to the Treasury for deficit reduction, trust fund revenues can be raised in other ways. Income tax returns have a box for contributing matching funds for Presidential races. It certainly seems feasible to use the same method to build a trust fund for political advertising by providing boxes that taxpayers can check to contribute to a fund that could help reform the political process.

Some think that if a candidate got time from a time bank or bought it with public trust monies, then the candidate's use of the airtime should be regulated—thirty-second attack ads, for example, could be banned.[65] I disagree. Candidates, like it or not, compete for attention against the most creative people in the world: those who invent broadcast television shows and ads. We must give candidates and their advisers the room to use their own ingenuity to attract an audience and to get their message across. But the

64. *See* Katia Hetter, *Bob Dole Breathes Fire on Broadcasters*, U.S. NEWS & WORLD REP., Feb. 5, 1996, at 51.

65. Paul Taylor has proposed five-minute segments in which the format would be limited to pictures of the candidate. TAYLOR, *supra* note 60, at 268–69 (1990).

FCC would not violate this principle by giving candidates a clear right to buy time in longer blocks than the much maligned 30-second ads. We could write rules to give broadcasters a real incentive to grant candidates' requests to buy, for example, five-minute blocks.

Some claim that proposals such as time banks and trust funds infringe on free speech. In my view, time banks and trust funds are clearly constitutional. There would be no viewpoint discrimination and no attempt to suppress speech on any particular topic. To the contrary, the goal—reforming our political system to better inform and motivate the electorate, and to reduce the pressure on candidates to spend the majority of their time raising money—is of the highest order and requires constitutional support, not rejection. As Professor Cass Sunstein of the University of Chicago Law School has shown, the original and enduring purpose of the First Amendment is to ensure an educated citizenry able to participate in our great continuing experiment of democratic self-governance.[66]

Moreover, the Supreme Court in the *CBS* case upheld Section 312(a)(7), which it described as "creat[ing] a *limited* right to 'reasonable' access that pertains only to legally qualified federal candidates."[67] The Court held that "[t]here is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others"[68] because—and the Court emphasized this portion of its decision—"[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[69]

For that reason, the Court explained, the free speech interests at issue in that case were on the government's side, not on the broadcasters'. The Court said that section 312(a)(7) "makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process."[70] The Court's decision was squarely in line with the views of James Madison, who drafted the First Amendment: "The right

66. SUNSTEIN, *supra* note 33, at 18–20.

67. CBS v. FCC, 453 U.S. 367, 396 (1981).

68. *Id.* at 395 (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389 (1969)).

69. *Id.* (quoting *Red Lion*, 395 U.S. at 390 (citations omitted)).

70. *Id.* at 396.

of electing the members of the Government constitutes . . . the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust."[71]

A time bank would differ from the proposal at issue in *CBS* in that broadcasters would provide a substantial portion of time to candidates for free rather than at the "lowest unit charge." But that difference does not implicate the First Amendment. Nor does a time bank proposal, which in effect might amount to a 2% tax on the advertising receipts of companies granted the free use of the public spectrum, raise any substantial question under the Takings Clause of the Fifth Amendment. That is because the financial impact of a time bank would be insubstantial and would be justified as payment in kind for use of the spectrum. Moreover, under the Communications Act it is crystal clear that broadcast licensees have no property claim to the airwaves or to a particular frequency.[72] Takings claims are fatally undermined by this fact.[73]

Nonetheless, there are remaining questions of equity, implicated by the idea that time would be taken away from the one channel a broadcast licensee operates in a given town. But providing incentives for broadcasters to contribute that time would certainly address any equitable claims. Congress could give broadcasters and other donors tax deductions for their contributions to the political process. At the FCC we could consider giving ownership limit waivers to stations that donate time to be used by candidates for debates or other public-issue programming. Wouldn't that further the underlying purpose of our ownership rules: to promote the presentation of diverse programming? To put it another way, what could more clearly be in the public interest?

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71. See Sunstein, *supra* note 29, at 38.

72. Congress has explicitly notified broadcasters of their lack of any ownership interest in the spectrum they are permitted to use. Section 304 of the Communications Act requires a broadcaster seeking a license expressly to state that he or she has no property interest or claim to the frequency:

> No station license shall be granted by the Commission until the applicant therefor shall have waived any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

47 U.S.C. § 304 (Supp. V 1993).

73. For further analysis, see Levinson, *supra* note 48, at 172–76 (arguing that the Takings Clause does not bar legislation requiring free airtime for political candidates).

II. IMPLEMENTING THE CHILDREN'S TELEVISION ACT OF 1990

The need for a clear, specific, and concrete public interest obligation could not be more evident than in the Commission's implementation of the Children's Television Act of 1990 (CTA). Yet the proposed requirement that broadcasters air at least three (or some other specific number of) hours of educational programming for children each week is at the center of intense debate as the Commission struggles to determine how the Act should be implemented.[74]

Congress was aware of the shrinking availability of programming designed for children when it adopted the CTA. When I was a child, in television's early days, the networks were trying to persuade families to buy television sets, so they scheduled family-style programming. In 1951 the networks scheduled 27 hours of children's television a week: "Kukla, Fran, and Ollie," "Captain Kangaroo," "Ding-Dong School," and many others. Thereafter, as former FCC Chairman Newton Minow documents in his recent book, *Abandoned in the Wasteland*, educational programming for children provided by the three historic networks dropped—from more than eleven hours per week in 1980 to about 4½ hours per week in 1983 and down to fewer than two hours per week in 1990.[75] Former Chairman Minow explains that the educational television of yesterday was not swept away by a force of nature. It disappeared when the FCC repealed public interest programming guidelines in the early 1980s.[76]

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74. *See* Ongoing Children's TV Proceedings, *supra* note 32, at 6315.

75. MINOW & LAMAY, *supra* note 11, at 52.

76. In 1984, the Commission eliminated routine review of television licensees' programming and levels of commercialization in the uncontested renewal context. It also eliminated the non-entertainment programming processing guidelines used in connection with television renewal applications. Television Deregulation Report and Order, 98 F.C.C.2d 1076 (1984). In denying reconsideration of its decision, the Commission clarified that its elimination of commercialization restrictions extended beyond general programming to advertising on children's programming as well. Television Deregulation Recon. Order, 104 F.C.C.2d 357 (1986), *aff'd sub nom.* Action for Children's Television, 821 F.2d 741 (D.C. Cir. 1987) (remanding to the FCC for further explanation of its decision to eliminate children's television commercialization limits).

In 1989 the Commission amended the application form for permits to construct new commercial AM, FM, or television stations by requiring the applicant to state only that it is cognizant of and intends to comply with Commission programming policies, rather than to describe its plans for addressing public issues of concern to the community, including the unique needs of children. Revision of Application for Construction Permit for Commercial Broadcast Station, 4 F.C.C.R. 3853 (1989), *aff'd sub nom.* Action for Children's

Congress passed the CTA, in part, to reverse the FCC's retreat from children's programming during the 1980s.[77] A major provision of the law orders the Commission to consider, when deciding whether to renew the licenses of broadcasters, "the extent to which the licensee . . . has served the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs."[78] Thus Congress explicitly directed the Commission to consider the amount of children's educational programming provided by a broadcaster when determining whether renewal of its license is consistent with the public interest.[79]

Yet ever since the CTA became law there has been a heated dispute at the Commission about setting minimum requirements for compliance with the Act. Minimums are fiercely supported by citizens' groups and just as fiercely opposed by broadcasters.[80]

Television v. FCC, 906 F.2d 752 (D.C. Cir. 1990).

77. The Senate Committee on Commerce, Science, and Transportation report on the CTA states: "It was because of the FCC's reluctance to act to enhance children's television that the Congress believed a legislative remedy was necessary." S. REP. NO. 227, 101st Cong., 1st Sess. 5 (1989).

78. 47 U.S.C. § 303b(a)(2) (Supp. V 1993). Another provision of the CTA limits the amount of time that may be devoted to commercial advertising in children's programming to "not more than 10.5 minutes per hour on weekends and not more than 12 minutes per hour on weekdays." *Id.* at § 303a(b). Finally, the CTA established the National Endowment for Children's Educational Television. 47 U.S.C. § 394 (1988 & Supp. V 1993).

79. In addition to the broadcaster's programming, the Commission may also consider:

> (1) any special nonbroadcast efforts by the licensee which enhance the educational and informational value of such programming to children; and
>
> (2) any special efforts by the licensee to produce or support programming broadcast by another station in the licensee's marketplace which is specifically designed to serve the educational and informational needs of children.

47 U.S.C. § 303b(b)(1) & (2) (Supp. V 1993).

80. This is demonstrated most recently in comments filed with the Commission in MM Docket No. 93–48 in response to Ongoing Children's TV Proceedings, *supra* note 32. Comments in MM Docket No. 93–48 advocating minimums include: Reply Comments of the American Psychological Association (FCC Nov. 15, 1995) at 5; Comments of the Center for Media Education et al. (FCC Oct. 16, 1995) at ii-iii, 24, 32–39 (joined by Peggy Charren, the American Academy of Child and Adolescent Psychiatry, the National Parent Teacher Association, and more than twenty organizations whose purpose is to promote the education, health, and welfare of children); Comments of the American Academy of Pediatrics (FCC Oct. 12, 1995) at 3.

Comments in MM Docket No. 93–48 filed in opposition to minimums include: Reply Comments of Capital Cities/ABC, Inc. (FCC Nov. 15, 1995) at 1–2; Ex Parte Presentation on behalf of Fox Broadcasting Co. (FCC Oct. 26, 1995) at 7–9; Comments of NAB (FCC Oct. 16, 1995) at 10–14, 26–35; Comments of CBS (FCC Oct. 16, 1995) at ii-iii, 12–33; Comments of NBC (FCC Oct. 16, 1995) at 2, 23–24; Comments of Westinghouse Broadcasting Co. (FCC Oct. 16, 1995) at ii-iii, 7–12.

Currently, our rules require no minimum amount of educational programming.[81] This situation prevails despite the fact that minimums are essential to the Commission's equitable and efficient enforcement of the CTA through the license renewal process. The Commission certainly would have grounds to deny renewal to a station that provided zero hours of children's educational programming and took no special steps otherwise to promote educational programs. But is renewal justified for television stations that air some, but very little, educational programming for kids?

Faced with this dilemma during the 1992–94 renewal cycle, Commission staff responded by adopting an internal and unpublicized minimum standard as a guideline for license renewals under the Act. Internally the staff treated one half-hour a week as an adequate amount of children's educational programming to justify renewal.[82] In view of the Commission's decision in the Children's Report and Order that broadcasters must air "some [standard length] educational and informational programming 'specifically designed' for children,"[83] the staff had few options. How could the staff recommend nonrenewal of the license of a broadcaster that provided "some" standard length programming (however minimal) of this type? The Commission did not publish this staff standard. If it had, the public and Congress undoubtedly would have been shocked and unhappy—one half-hour a week is a star-

81. The Commission's implementing rules incorporate the language of the statute and define educational and informational programming as "programming which furthers the positive development of children 16 years of age and under in any respect, including the child's intellectual/cognitive or social/emotional needs." 47 C.F.R. § 73.671 note (1995). Broadcasters are required to air an unspecified amount of standard-length programming of this type that is specifically designed for children 16 years of age and under. Policies and Rules Concerning Children's Television Programming (Report and Order), 6 F.C.C.R. 2111, 2115 (1991) [hereinafter Children's Report and Order]; Policies and Rules Concerning Children's Television Programming (Memorandum Opinion and Order), 6 F.C.C.R. 5093, 5100 (1991). As the Commission recently explained:

> We have adopted no other guidelines regarding the types of programming that may contribute to satisfying a station's renewal review requirement, and our rules contain no requirement as to the number of hours of educational and informational programming that stations must broadcast or the time of day during which such programming may be aired.

Ongoing Children's TV Proceedings, *supra* note 32, at 6315.

82. This figure was used as an internal processing guideline. Renewal applications meeting this criterion and otherwise complying with the Communications Act were granted without further action by the full Commission. Other applications were referred to the full Commission for decision.

83. Children's Report and Order, *supra* note 81, at 2115.

tlingly low requirement. Moreover, this requirement does not advance the CTA's stated purpose of increasing the amount of informational and educational programming specifically designed for children.[84] Its effect seems to be just the reverse.

But, as a practical matter, any license renewal process inevitably leads to quantification. This quantification takes place either in a public statement of policy, or in a behind-closed-doors practice, or in a case-by-case process of adjudication. The licensing body must have criteria that can be uniformly and objectively applied.

The cost of a vague or clandestine implementation of the public interest standard can be frighteningly high. Imagine a broadcast licensee whose renewal is denied because it has not aired enough educational children's programming. Without an explicit, public standard, the licensee is left to wonder whether the Commission denied the renewal for some other reason, such as in retaliation for an anti-government slant in the station's news broadcasts.

Too fantastic a possibility? For this Commission, yes. But recent history shows that the potential for such mischief is not a mere hypothetical. In 1974 President Nixon and his top aides discussed using the FCC's vague and ambiguous license renewal process to punish the *Washington Post* for its Watergate coverage. On being informed that the *Post* owned two television stations in Florida that would soon be seeking renewal, President Nixon is reported to have said, "The main thing is the *Post* is going to have damnable, damnable problems out of this one . . . . They have a television station . . . and they're going to have to get it renewed."[85] Bob Haldeman and John Dean informed Nixon that the *Post* also owned a radio station and that the practice by nonlicensees of filing competing applications at renewal time had increased. Nixon reportedly responded by stating that "it's going to be goddamn active here . . . . Well, the game has to be played awfully rough."[86]

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84. The Senate Report on the CTA states that the "objective of this legislation is to increase the amount of educational and informational broadcast television programming available to children." S. REP. NO. 227, 101st Cong., 1st Sess. 1 (1989).

85. *Watergate Tape Points to White House Complicity in Challenges to Post-Newsweek*, BROADCASTING, May 20, 1974, at 25.

86. *Id.*

Three months after this conversation, three applications were filed against the renewal application of the *Post*'s Jacksonville station, and one was filed against the renewal application of its Miami station. Participants in one of the Jacksonville applications and in the Miami application included a number of individuals identified as friends and supporters of the President and his Administration.[87] Whether these applications were part of an effort to carry out President Nixon's threats is unclear. Even so, they demonstrate the potential for abuse inherent in vague, ominous, and empty standards that can be manipulated in a pernicious manner by an ill-motivated Commission. As the Supreme Court stated in *City of Lakewood v. Plain Dealer Publishing Co.*,[88] "the absence of express standards makes it difficult to distinguish . . . between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech."[89]

If the Constitution favors the establishment of standards that provide guideposts, what should those standards be? One of the options proposed in our ongoing children's television proceedings—an option I support—is to set a minimum number of hours per week of children's educational programming. But other quantifiable standards could be clear, concrete, and supportable as well. We could say that any station delivering less than the aver-

87. *Id.*

88. 486 U.S. 750, 758 (1988) (holding that an ordinance which required annual permits for coin-operated newsracks violated the First Amendment by granting mayor unbounded discretion to grant, condition, or deny a permit).

89. *Id.* In National Black Media Coalition v. FCC, 589 F.2d 578 (D.C. Cir. 1978), the D.C. Circuit rejected the argument that the First Amendment *compelled* the Commission to adopt percentage standards governing the amount of local programming, news, and public affairs programming a licensee must provide. *Id.* at 581. (The Commission had proposed, but decided not to require, licensees to provide 10–15% local programming, 8–10% news, and 3–5% public affairs programming. *Id.* at 579–80.) I do not quarrel with that holding. Moreover, the Commission's approach in that case did not have the benefit of providing certainty because, even if the Commission had adopted the percentage standards, it intended to conduct "an *ad hoc* hearing . . . to weigh the effect of other factors in each individual case." *Id.* at 581. Thus, the adoption of quantitative standards in that case would not have eliminated problems arising from ad hoc weighing of factors. But even though the First Amendment does not necessarily require the adoption of quantitative standards, it is more First Amendment-friendly to do so, especially if the quantitative standards make it possible to avoid ad hoc balancing.

age number of hours of educational television, using the current, broad definition would not get renewed. Or should it be only the bottom third in performance? Or the bottom tenth? Or just the worst television station in the country in terms of children's educational television?

Whatever the standard, letting broadcasters know what it is ahead of time is the proper thing to do.[90] Indeed, if the FCC's approach to the public interest standard is to be at once aggressively deregulatory, market-oriented, and consistent with the First Amendment, the Commission must state clearly what it expects from broadcasters.

I am absolutely convinced that broadcasters would willingly comply with any reasonable quantification of their public interest standards and they would compete aggressively to attract audiences to their educational television shows. In addition, requiring a certain amount of educational programming is not only fairer to all broadcasters than a failure to state any minimum, it is also in their financial interest. Without a clear minimum standard, broadcasters who do more to fulfill their obligations will suffer financially, because sports and other entertainment programming attract larger audiences than educational television. In the absence of clear standards, competitive pressures could drive some broadcasters to react to the absence of a mandatory minimum by reducing their educational children's programming to zero for several months in a row. A quantifiable minimum standard could eliminate, or at least lessen, the potential that such a problem will arise.

Some say that quantitative children's television standards would violate the First Amendment. A frequently cited case in

90. The Supreme Court has made it clear that regulating speech by an "unascertainable standard" chills protected expression and is neither wise nor constitutionally tolerable. Coates v. Cincinnati, 402 U.S. 611, 611, 614 (1971) (holding that an ordinance that prohibited the assembly of three or more persons on the sidewalks, except at a public meeting, who "conduct themselves in a manner annoying to persons passing by" was unconstitutionally vague and violated the constitutionally protected right of free assembly and association). "The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform . . . what is being proscribed." Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967) (finding that statutes were unconstitutionally vague and violated the First Amendment where they required removal from state employment for "the utterance of any treasonable or seditious . . . words or the doing of any treasonable or seditious acts," and removal and disqualification of persons who distribute material advocating forcible overthrow of the government or who advocate, embrace, or transmit that view themselves).

support is the Supreme Court "must-carry" decision in *Turner Broadcasting System, Inc. v. FCC*.[91] It is an odd citation. That case did not vindicate a First Amendment claim. Instead it upheld the principle that Congress and the FCC may require cable operators to carry broadcast stations—over the cable operators' First Amendment objections—as long as the evidence shows that broadcast stations would really be harmed in the absence of a must-carry requirement.

In *Turner Broadcasting*, the Court stated that "broadcast programming . . . is subject to certain limited content restraints imposed by statute and FCC regulation."[92] Moreover, the Court noted that the CTA directs the FCC to consider whether a license renewal applicant has served the educational needs of children.[93] Thus, the Court explicitly recognized that a broadcaster may lose its license if it does not air enough children's educational programming, and the Court appeared to approve of that requirement. The Court did note that broadcasters were not currently required to carry any particular quantity of educational broadcasting,[94] but it did not say that such a requirement would be impermissible. To the contrary, the Court recognized that broadcasters are subject to "certain limited content restraints,"[95] including those imposed by the CTA, as well as obligations relating to political campaigns.[96]

In my view, a rule requiring three hours a week of educational programming for children—which amounts to 1.8 percent of the broadcast week—is precisely what the Court had in mind by a "limited" restraint. Any content restrictions imposed by such a rule exist only at the highest level of generality. Under the FCC's proposed rule, broadcasters would not be told what to say or even what topics to address, but simply would have to provide some programming on any subject fairly termed "educational."[97]

This reading of *Turner Broadcasting* is compelled by the *CBS* decision which, unlike *Turner Broadcasting*, directly concerned broadcasters' obligations. As explained in more detail above,[98] in

91. 114 S. Ct. 2445 (1994).
92. *Id.* at 2462.
93. *Id.* at 2462 n.7.
94. *Id.* at 2463.
95. *Id.* at 2462.
96. *Id.* at 2462 n.7.
97. Ongoing Children's TV Proceedings, *supra* note 32, at 6327–28.
98. *See supra* notes 67–70 and accompanying text.

CBS the Court held that broadcasters may be forced to carry campaign advertising. The Court explained that "[a] licensed broadcaster is 'granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.' "[99] One of those obligations is to serve the educational needs of children. Through the CTA, Congress has made clear that broadcast licenses should not be renewed in the absence of evidence that the licensee has provided educational programming. The *CBS* decision squarely supports any rules establishing quantified minimum guidelines for compliance with the CTA.

A reading of the First Amendment that permits educational programming requirements is fully consistent with the Amendment's purposes. As Justice Louis Brandeis said in *Whitney v. California*,[100] "the greatest menace to freedom is an inert people."[101] The author of the First Amendment, James Madison, believed that its freedoms were designed to produce a dynamic democracy that would require and should encourage a certain kind of citizen—one who takes his or her citizenship seriously.[102] Alexander Meiklejohn, perhaps the most influential twentieth-century philosopher of the First Amendment, similarly asserted that the First Amendment should promote a public capable of engaging in public debate on public issues, not one that engages in whatever sort of speech is most remunerative.[103] His spiritual progeny include the brilliant Cass Sunstein at Chicago Law School, who makes similarly astute arguments from history and the Constitution. It is constitutional to mandate that a reasonable amount of time on the public airwaves be used to provide education for our children. Such requirements would be in the tradition of Brandeis and Meiklejohn, and would help produce the kind of citizens of whom Madison would be proud.

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99. CBS v. FCC, 453 U.S. 367, 395 (1966) (quoting Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (1966)).

100. 274 U.S. 357 (1927) (Brandeis, J., concurring).

101. *Id.* at 375.

102. SUNSTEIN, *supra* note 33, at xvi-xvii.

103. *Id.* at 38, 122, and accompanying notes.

III. REGULATING TELEVISION INDECENCY AND VIOLENCE

With respect to indecency and violence on television, I have two related messages, one primarily for academics and one primarily for the television industry. To academics: Please understand that there are some programs society is rightfully not going to allow to be broadcast into people's homes unless parents can ensure that their children will not be able to watch them. If your constitutional theory cannot accommodate regulation of that sort, there is something wrong with your constitutional theory, as the Supreme Court's decision in *FCC v. Pacifica Foundation* shows.[104] To the industry: If you want to show indecent or violent television shows, you are going to have to take steps to allow parents to have some real control over what their children see. You have taken a very important first step by pledging to develop a television rating system to be used with the V-chip. I hope it will be followed by other steps to promote use of the V-chip and similar mechanisms to enhance parental control.

The Supreme Court established the fundamental framework for analyzing indecency and violence on television in its 1978 decision in *Pacifica*. *Pacifica* involved George Carlin's "seven dirty words" monologue. A father was driving in his car with his child at two o'clock in the afternoon when they heard part of the monologue. It's a funny routine, but it's not suitable for children. As my colleague Commissioner James Quello has stated on numerous occasions with respect to a certain word used frequently in Carlin's monologue, "I've heard it, I've said it, I've done it. But not around kids." The Court recognized that the monologue was not obscene[105] and that adults could not be prevented from listening to it.[106] It also recognized that the routine had been preceded by a statement that the monologue was not suitable for children.[107] But the Court held that the broadcaster could be penalized—perhaps even lose its license—if it played such material when children were likely to be in the audience.[108]

The Court did not elaborate on its standard of review, but it did not apply strict scrutiny. It instead held that broadcasting is

104. 438 U.S. 726 (1978).
105. *Id.* at 735.
106. *Id.* at 750 n.28.
107. *Id.* at 730.
108. *Id.* at 748–51.

unique for two reasons: Radio and television have a "uniquely pervasive presence in the lives of all Americans,"[109] and they are "uniquely accessible to children, even those too young to read."[110] As Justice Stevens explained in his opinion for the Court, and as Justice Powell emphasized in his concurring opinion, those factors distinguish broadcasts from the media and justify special steps to control indecent material carried on television and radio.[111]

In the *Pacifica* opinion, the Supreme Court recognized that adults have sources other than the broadcast media for obtaining access to indecent materials, so that restrictions on broadcasting indecent material are not particularly burdensome.[112] Technological developments have strengthened the force of that argument. In 1978, when *Pacifica* was decided, there were no video stores and almost no premium cable channels. Today both are plentiful. Thus, technological developments make it easier to justify restrictions on indecent broadcasting today.

It also is useful to recall that indecent publications are treated somewhat differently than others. The Supreme Court held in *Ginsberg v. New York*[113] that the owner of a newsstand could be punished for selling an indecent magazine to an adolescent, even though the magazine was not obscene. The magazine in question was *Sir*, a competitor to *Playboy*. So although broadcasters often complain that they are treated as second-class citizens, that complaint is overstated. All sorts of "speakers"—including the traditional print media—face limitations designed to prevent children from obtaining access to indecent material without their parents' permission.

In any event, as the Supreme Court recognized in *Pacifica,* the analogy between broadcasters and magazine publishers is somewhat strained. Former FCC Commissioner Mark Fowler compared television to a "toaster with pictures,"[114] but I think television is more like a constantly changing billboard in your family room. I am confident that it would be constitutional to prohibit

109. *Id.* at 748.
110. *Id.* at 749.
111. *Id.* at 748–49, 758–59.
112. *Id.* at 750 n.28.
113. 390 U.S. 629 (1968).
114. MINOW & LAMAY, *supra* note 11, at 26.

billboards from showing pictures that are indecent but not obscene. That is, society would not tolerate billboards of centerfolds on Main Street, even though it would be impermissible to prohibit the sale of *Playboy* to adults. In the case of such a billboard, the Court would hold that "a pig has entered the parlor," just as it did in *Pacifica*.[115]

In my view, broadcasters should be permitted to show indecent material on television if they do so late at night or if they provide electronic ratings so that parents can block out shows they don't want their children to see. The first restriction—allowing indecent broadcasts, but only late at night—was upheld last summer by the *en banc* D.C. Circuit in *Action for Children's Television v. FCC* (*ACT III*). The Supreme Court recently denied the plaintiff broadcasters' petition for a writ of certiorari.[116] In that case, the court of appeals upheld a ban that extends from 6 a.m to 10 p.m., and made clear that a ban from 6 a.m. to midnight would be constitutional.[117] Moreover, even though the Supreme Court has never applied strict scrutiny in a broadcast case, the court of appeals held that a 6 a.m. to midnight ban would be constitutional even if tested under strict scrutiny. The government's compelling interest, the court held, is the protection of children from materials that would impair their ethical and moral development. The court found that there is currently no effective means of advancing that interest other than a fairly extensive restriction on the hours during which indecent programming may be aired.

If broadcasters want to show indecent material at other times of the day, they are going to have to embrace technology. They could argue, for example, that they should be allowed to broadcast indecent material outside of the current safe harbor hours if the programming were electronically labeled. If circuitry that could effectively block such labeled material were widely available, they could further argue that children would be adequately protected, even if the show were aired when a substantial number of children were in the audience.

As it happens, Congress has just enacted legislation requiring that all television sets larger than thirteen inches contain chips

115. *Pacifica*, 438 U.S. at 750.
116. 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 701 (1996).
117. *Id.* at 664.

capable of reading such electronic tags.[118] Although these have been called "V-chips" by proponents who hope they will be used to allow parents to prevent their children from watching excessively violent shows, any sort of electronic "label" can be read by the chip. Broadcasters who want to air indecent programming therefore should be developing labeling systems and trying to persuade Congress and the Commission to allow indecent programming outside of the current 10 p.m. to 6 a.m. safe harbor if the programming is labeled.

Let me turn to definitional matters for a moment. What is indecent? The Supreme Court in *Pacifica* approved the Commission's long-standing definition,[119] which focuses on whether a broadcast "describes 'sexual or excretory activities and organs' in terms that are patently offensive as measured by contemporary community standards for the broadcast medium."[120] Although law professors find it hard to get past the problem that this definition can be difficult to apply to some cases—particularly to hypothetical situations unlikely to actually occur—in the "real world" there is little doubt about how to classify most programming. For example, as the D.C. Circuit noted in its recent en banc decision, one 1987 case involved a radio broadcast "contain[ing] 'explicit references to masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy, bestiality, menstruation and testicles.' "[121] And as the court also noted, "it is important to understand that hardcore pornography may be deemed indecent rather than obscene."[122]

The Commission's indecency decisions show that the primary factors to be considered when determining whether a broadcast is indecent include the explicitness of the material; whether it dwells on sexual or excretory matters; whether the material panders or is presented for shock value; and whether it appears in a work that

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118. § 551(c), 110 Stat. at 141.

119. *Pacifica*, 438 U.S. at 739–41, 743.

120. Pacifica Found., 56 F.C.C.2d 94, 98 (1975); *see also* Infinity Broadcasting, 2 F.C.C.R. 2705, 2705 (1987).

121. *ACT III*, 58 F.3d 654, 657 (D.C. Cir. 1995) (quoting *In re* Infinity Broadcasting Corp. of Pa., 3 F.C.C.R. 932 (1987)). The court noted that two other 1987 cases "were similarly objectionable." *Id. See* Regents of the University of California, 2 F.C.C.R. 2703 (1987); Pacifica Radio, 2 F.C.C.R. 2698, 2700 (1987).

122. *ACT III*, 58 F.3d at 660.

has serious merit. Of course, it is not possible to apply those factors mechanically, and broadcasters will in some cases try to come as close to the line as possible without crossing it. However, I think that it is useful to focus on cases that have actually arisen rather than cases that can be hypothesized. And if the focus is on the real world rather than the hypothesized world, it becomes clear that the Commission has not been applying the indecency rules in an unpredictable manner. Indeed, not a single indecency determination by the Commission has been overturned by the courts on the ground that the Commission incorrectly determined that a program was indecent.[123]

One might think that a liberalizing of societal standards will render indecency a non-issue. In fact, a liberalizing of standards may exacerbate the problem. Perhaps the entire nation will one day have a standard similar to that of New York, as discerned by the Second Circuit in the case involving "Deep Throat,"[124] and nothing will be considered obscene. Whatever the standard, in my view adults should be able to watch whatever they choose, provided they have an opportunity to make a reasonably informed choice to avoid shows that will offend them. Let me make clear that I am not interested in restricting adult choice and let me dissociate myself from anyone who is. Nor do I mean to suggest that there are no real definitional issues. There are. And we should take every care to be attentive to even the scintilla of a possibility that in an indecency case the Commission might be censoring political expression or suppressing in any way something that James Madison would recognize as a First Amendment interest. But notwithstanding my commitment to freedom of viewing choice for adults, neither I nor virtually any other adult in this country believes that it is acceptable for twelve-year-olds to watch "Deep Throat" on television. And even if you think "Deep Throat" is acceptable for children, I think you will draw the line somewhere. In short, there are some things that are clearly inappropriate to broadcast when children are likely to be in the audience. The First Amendment is not a cultural suicide pact for a

123. In addition, the D.C. Circuit recently upheld the validity of the Commission's procedure for enforcing the indecency rules by imposing forfeitures. Action for Children's Television v. FCC, 59 F.3d 1249, 1257 (D.C. Cir. 1995), *cert. denied*, 64 U.S.L.W. 3484 (Jan. 16, 1996).

124. United States v. Various Articles of Obscene Merchandise, 709 F.2d 132 (2d Cir. 1983).

value-oriented society. It does not prohibit any and all government efforts to help parents control what their children watch.

With respect to indecency, basic cable television is just like broadcast television. In another *en banc* decision handed down last summer, *Alliance for Community Media v. FCC*, the D.C. Circuit correctly held that "cable television is sufficiently pervasive and easily accessible to children to justify the government's attempts to regulate indecency" on non-premium channels.[125] The Supreme Court has decided to review that decision. If it reaches the issue (the focus of the case is on a state action question), I think the Court will agree with the D.C. Circuit that cable television is pervasive, now that about 65 percent of Americans subscribe. In 1991, Congress called cable "our Nation's dominant video distribution medium,"[126] as the Court recognized in the "must-carry" case.[127] Premium channels are another matter. If you don't want your kids to watch indecent shows, don't subscribe to the Playboy Channel. But many cable systems carry fifty or sixty non-premium channels, and it is impossible for even the most attentive parent to know what is on all of those channels even most of the time.

The above arguments—regarding the Commission's mandate, specific regulatory options, and the proper approach to definitional issues—apply with even greater force to issues of violence on television. Dissenting in the *Alliance for Community Media* case, Judge Edwards described as "curious . . . Congress's failure to address violence on television," in part because "there is significant evidence suggesting a causal connection between viewing violence on television and antisocial violent behavior."[128] As Judge Edwards stated, there is an impressive body of evidence suggesting that television violence presents a real social problem.[129] In light of that evidence, I think the only real question is

125. 56 F.3d 105, 125 (D.C. Cir. 1995), *cert. granted sub nom.* Denver Educ. Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 471 (1995).

126. S. REP. NO. 92, 102d Cong., 1st Sess. 3 (1991).

127. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2454 (1994) (addressing the constitutionality of statutory requirements that required cable systems to carry local broadcast stations).

128. *Alliance for Community Media*, 56 F.3d at 149 (Edwards, J., dissenting in part).

129. *Id.* at 149 n.1; UCLA VIOLENCE REPORT, *supra* note 13, at 10 (reviewing the literature and concluding that the "[s]cientific evidence strongly suggests that there is a link between violence on television and that in the real world. The degree and nature of that link is not so clear"). Others find that the existing research demonstrates a strong link. In its report, the American Psychological Association concludes that:

the extent to which television violence has contributed to the rising rate of violence in our society over the last half-century. Some estimates are sobering. Dr. Brandon Centerwall, in a cross-cultural study published in the *Journal of the American Medical Association*, stated that "if, hypothetically, television technology had never been developed, there would today be 10,000 fewer homicides each year in the United States, 70,000 fewer rapes, and 700,000 fewer injurious assaults."[130] I do not know if those estimates are accurate. But even some in the television industry have acknowledged that the whole premise of television advertising is that television affects behavior, and they concede that watching extensive amounts of televised violence must have a negative effect on children.[131]

Senator Ernest Hollings, a long-time leader on this matter, advocates channeling violent shows into safe harbor hours. In 1993, and again in 1995, he introduced legislation calling on the Commission to restrict violent programming to hours when children are unlikely to comprise a substantial portion of the viewing audience.[132] He explained that his approach "is consistent with Supreme Court decisions recognizing the compelling nature of the Government's interest in helping parents supervise their children and in independently protecting the well-being of its youth."[133] In support of that conclusion, Senator Hollings cited on the Senate floor the American Psychological Association's estimate "that a typical child will watch 8,000 murders and 100,000 acts of violence before finishing elementary school" and reviewed the "overwhelm-

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> The accumulated research clearly demonstrates a correlation between viewing violence and aggressive behavior. Children and adults who watch a large number of aggressive programs also tend to hold attitudes and values that favor the use of violence.

Id. (quoting from AMERICAN PSYCHOLOGICAL ASSOCIATION, BIG WORLD, SMALL SCREEN: THE ROLE OF TELEVISION IN AMERICAN SOCIETY (1992)). For another literature review also expressing this positive view of the existing research, see John P. Murray, *The Impact of Televised Violence,* 22 HOFSTRA L. REV. 809, 825 (1994) (finding "extensive, cumulative evidence of potential harmful effect[s]" of viewing televised violence).

130. Brandon S. Centerwall, *Television and Violence: The Scale of the Problem and Where to Go From Here*, 267 JAMA, June 10, 1992, at 3059, 3061.

131. The cable industry funded a study that has just concluded that " 'psychologically harmful' violence is pervasive" on television. *See* Paul Farhi, *Study Finds Real Harm in TV Violence; Programs Cited for Failure to Show Consequences*, WASH. POST, Feb. 6, 1996, at A1.

132. S. 1383, 103d Cong., 1st Sess. (1993); S. 470, 104th Cong., 1st Sess. (1995).

133. 141 CONG. REC. S3059 (daily ed. Feb. 23, 1995).

ing" body of social science evidence "conclusively find[ing] a link between television violence and real-world violence."[134]

While Commissioner James Quello was Chairman, he urged Congress to restrict violent shows to a safe harbor like that proposed by Senator Hollings if the broadcasters will not adopt an effective solution on their own.[135] I agree that a private solution, rather than governmental regulation, would be the preferable response to the problems presented by television violence. That is particularly so because the problems presented by television violence may be intimately tied to content. Although some researchers, such as Dr. Centerwall, believe that we should be wary of all types of video violence, many other researchers think that different sorts of shows have different effects. The most harmful, these researchers think, are realistic shows where violence is portrayed in a positive manner. Shows where violent behavior is punished may actually discourage violent behavior, and truly gratuitous violence may have a negligible effect.[136] Government regulation of television violence, which would necessarily be somewhat general in nature, might not be as effective as a more nuanced private approach.

However, channeling violence to safe harbor hours would be constitutional. The *ACT III* decision upheld the channeling of indecency, and the main difference between violence and indecency, as Judge Edwards has stated, is that the harmful effects of violence are better established, so that the governmental interest is even clearer.[137] A second difference is that indecency often involves language, whereas violence usually does not. Accordingly, the depiction of violence is farther from the core of the First Amendment. Indeed, although I see why burning a draft card is a form of symbolic speech,[138] it is hard to see, for example, how

134. *Id.*

135. Statement of James H. Quello, Chairman, FCC, before the Senate Commerce Committee (Oct. 20, 1993).

136. *See* UCLA VIOLENCE REPORT, *supra* note 13, at 21–22.

137. *ACT III*, 58 F.3d 654, 671 (en banc) (D.C. Cir. 1995) (Edwards, J., dissenting); Action for Children's Television v. FCC, 11 F.3d 170, 185 (D.C. Cir. 1993) (Edwards, J., concurring) (citing studies demonstrating that prolonged childhood exposure to television violence correlates with increased levels of physical aggressiveness and violence). *See also* H.R. REP. NO. 101–123, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 6901–6914 (reviewing the evidence on the impact of television violence on children).

138. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) (referring to O'Brien's argument that burning draft card is symbolic speech).

the visual depiction in "Friday the 13th" of someone wearing a mask beheading someone else in an extraordinarily gruesome fashion has much of anything to do with free speech. James Madison would have trouble understanding that the television industry is relying on his handiwork to defend their right to show such movies at any time and without any advisories. The differences between violence and indecency support the proposition that, as a matter of constitutional law, regulation of violence is less objectionable than regulation of indecency. Because the Supreme Court made clear in *Pacifica* that indecent material may be regulated, as the *en banc* D.C. Circuit has just confirmed in *ACT III*, it is therefore permissible to regulate television violence.

The V-chip legislation has now been signed into law. It is useful to understand just how narrow the V-chip legislation is. It requires that V-chips be installed in new television sets larger than thirteen inches,[139] but little beyond that. The FCC is directed to determine whether, a year after enactment, the industry has established acceptable voluntary rules for rating video programming that contains violent or sexual material.[140] If the Commission determines that the industry has not established acceptable rules,[141] it is directed to appoint an advisory committee to develop a rating system.[142] The Commission is not directed to force broadcasters (or anyone else) to label their programming for violent content.

While broadcasters are developing a rating system to label their material, and the public awaits the sale of televisions equipped with the V-chip, Congress should consider channeling violent shows that do not contain an electronic tag into safe harbor hours when children are unlikely to be watching and permitting violent shows that are labeled to be shown at other times. This is an approach that would satisfy any judicial standard, even strict scrutiny.[143] The industry had previously argued that V-chips

139. Telecommunications Act of 1996, § 551(c), 110 Stat. at 141.

140. *Id.* at § 551(e)(1)(A).

141. *Id.*

142. *Id.* at § 551(b).

143. Judge Edwards has argued that V-chip legislation can be written in a way that is content-neutral and thus not subject to strict scrutiny, particularly if it "neither requires 'transmission' of ratings nor imposes any specific ratings categories." Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 NW. U. L. REV. 1487, 1566 (1995). At the same time, he argues that rules requiring labeling of programming according to its violent content are subject to strict scrutiny and that such labeling used in conjunction with a blocking system like the V-chip would serve a compelling state interest in

raise "prior restraint" and "compelled speech" issues, but there is no merit to those claims. With respect to the prior restraint argument, there need be no delay resulting from labels. To the extent that delay is a possibility, unlabeled shows may be shown during safe harbor hours. To the extent that there is any compelled speech claim, broadcasters should be free to disown any label attached to their programs. Allowing the broadcaster to identify the label as the product of a rating body with which the broadcaster does not (necessarily) agree goes a long way toward eliminating a compelled speech argument.[144] Alternatively, broadcasters could air the show during safe harbor hours without a label.

A labeling requirement—even one calling for mandated government labels—would be less questionable constitutionally than the requirement upheld in *Meese v. Keene*.[145] That case involved three Canadian films about nuclear war and acid rain classified as "political propaganda" under the Foreign Agents Registration Act of 1938.[146] The films therefore had to be provided to the Attorney General and labeled before they were shown. The standard label states that a film has been registered under the Foreign Agents Registration Act and ominously adds that "[r]egistration does not indicate approval of the contents of [the film] by the United States Government."[147] The Court rejected the constitutional attack on the Act even though the appellant argued was "a Classic Example of Content-Based Government Regulation of Core-Value Protected Speech" and noted the Act's reporting and disclosure requirements apply only to speech with a "political or public-policy content."[148] With respect to the labeling require-

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"facilitating parents' ability to control how much violent programming their children watch." *Id.* at 1563. In addition, the V-chip could be shown to be the least restrictive means of furthering this interest. Both Judge Edwards and Judge Wald have argued that the use of V-chip circuitry constitutes a less restrictive alternative to time channeling. *ACT III*, 58 F.3d 654, 683 n.35 (D.C. Cir. 1995) (Edwards, J., dissenting); *id.* at 687 n.4 (Wald, J., dissenting).

144. The Court has rejected the argument that requiring cable operators to carry broadcast stations amounted to compelled speech, in part because, "[g]iven cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable station convey ideas or messages endorsed by the cable operator." Turner Broadcasting Sys. v. FCC, 114 S. Ct. 2445, 2465 (1994).

145. 481 U.S. 465 (1987).

146. 52 Stat. 631–33 (codified as amended at 22 U.S.C. §§ 611–21 (1994)).

147. 481 U.S. at 471.

148. *Id.* at 478.

ment, the Court twice explained that labels advance free speech interests and that suppression of labels injures free speech interests: It described the labels as calling for "additional disclosures that would better enable the public to evaluate the import of the propaganda," and concluded that "[i]ronically, it is the injunction entered by the District Court that withholds information from the public."[149]

Thus, a mandatory V-chip labeling requirement would be permissible under *Meese v. Keene*.[150] On the one hand, any burden imposed by a V-chip labeling requirement would not be imposed on core political speech. On the other hand, the purpose of the V-chip is to provide useful information to parents. Thus, it seems doubtful, or at least ironic, that the First Amendment could be relied upon to justify suppression of this information.

In February, when I presented an earlier version of this Article at the Duke Law Journal's 27th Annual Administrative Law Conference, it seemed more likely that broadcasters would raise these types of constitutional objections, given their initial opposition to the V-chip legislation.[151] With the broadcasters' subsequent agreement to develop a rating system for the V-chip, however, they have turned to potentially more difficult and, from my perspective, more fruitful issues. One such issue is how violence should be defined.

Finding an answer will present some novel questions. But the monitors established in 1994 by the broadcast and cable industries to evaluate the violent content of their programming have been working on this problem for more than a year. I hope their work will suggest a way to translate and apply the academic literature. Based on preliminary reports, it appears they are well on their way to doing so. Their experience shows that it is possible to differentiate between many different types of violence[152] and

149. *Id.* at 480, 481.

150. Moreover, as noted above, the recently enacted V-chip legislation does not authorize the government to label videos, but merely directs it to develop a labeling system if the industry does not do so. Accordingly, it presents no serious constitutional issue at all.

151. The press reported that despite President Clinton's support for the V-chip in the State of the Union Message and broadcasters' intent to accept his invitation to the White House to discuss the quality of their programming, broadcasters initially continued to object to the V-chip. Alan Bash, *Networks Unmoved by Clinton's Call for V-chip*, USA TODAY, Jan. 25, 1996, at 8D.

152. *See, e.g.*, UCLA VIOLENCE REPORT, *supra* note 13, at 22 (listing sports violence, cartoon violence, slapstick violence, and "anything that involves physical harm of any

technology would allow parents to decide which categories to invite into their homes. I would like nothing better than to adopt a valid rating system developed by the industry.

I would also like to "outsource" determinations of what is violent or indecent—I hope that the industry will develop the basic standards. After that, I envision panels of experts composed of academics, parents, and industry members helping the Commission to determine close cases where, for example, our indecency rules are allegedly violated. The Commission would probably have to make an independent judgment, but it would be well-advised to rely on the panel's conclusions.

CONCLUSION

In closing, it is useful to recall the virtues of free broadcast television. As I have stated, the news, sports, and entertainment programming provided by broadcasters is of great value. But Congress has provided that users of the airwaves must serve the public interest in other ways. Broadcasters ought to provide specific amounts of educational television for children and specific amounts of free campaign coverage. And television should not disserve the public interest by making it difficult for parents to monitor their children's access to indecent and violent shows. In fact, by pledging to develop the ratings that the V-chip will transmit, broadcasters have taken the first step in assisting parents in monitoring their children's television viewing. I look forward both to seeing the broadcasters' rating system and welcoming their additional work with the Commission on making V-chip technology useful to parents.

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sort, intentional or unintentional").