Television Violence and the Limits of Voluntarism

Robert Corn-Revere

Follow this and additional works at: http://digitalcommons.law.yale.edu/yjreg

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.yale.edu/yjreg/vol12/iss1/8

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Journal on Regulation by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
Essay

Television Violence and the Limits of Voluntarism

Robert Corn-Revere†

_During periods of concern about the content of television programming, Congress often threatens to legislate standards. In response to such threats, the entertainment industry has often adopted its own standards. Mr. Corn-Revere suggests that this raises First Amendment concerns: The threat of legislation can limit free speech as much as actual legislation._

Introduction .................................... 187

I. The Recurring Campaign Against Television Violence ........ 189

II. The Jurisprudence of Informal Censorship: The First Amendment 194

III. The FCC's Family Viewing Policy: _Writers' Guild of America, West v. FCC_ .................................. 200

Conclusion ..................................... 204

Introduction

What if the government decided that the practice of religion is in some way contrary to the national interest? Suppose it concluded that religion is the opiate of the masses, that the "seventh day of rest" is a drag on the national economy, that TV evangelists bilk the uneducated of their meager earnings, or that sectarian disputes contribute to social unrest and violence. An unlikely scenario, certainly, but what if it happened?

†Partner, Hogan & Hartson, Washington, D.C.; Former Chief Counsel to Chairman James H. Quello, Federal Communications Commission, 1993. B.A. Eastern Illinois University, 1977; M.A. University of Massachusetts, 1980; J.D. Catholic University, 1983. This Essay was initially presented as a paper at the ABA Forum on Communications Law and NAB Conference Representing Your Local Broadcaster, Las Vegas, Nevada, March 20, 1994. The views expressed in this Essay are those of Mr. Corn-Revere and do not necessarily reflect those of his clients or other parties.
Government officials could give speeches setting out these positions, to be sure, but could they do more? Would it be permissible, for example, for key lawmakers to threaten punitive legislation if the National Council of Churches did not announce plans to close up shop? Could top Administration officials stage back-room meetings with church leaders to jawbone for change that would be consistent with the new policy? And, at the end of all this, could the President appear in a Rose Garden ceremony with the heads of the major denominations and minor sects to announce that for the good of the nation the parties had voluntarily agreed to phase out religion in America?

Of course this could never happen. Americans would never tolerate such a frontal assault on cherished First Amendment freedoms. But why do Americans seem to feel differently about the third and fourth clauses of the First Amendment, which command that "Congress shall make no law . . . abridging the freedom of speech, or of the press?" For some reason, the public is not outraged when the government uses heavy-handed tactics to curtail freedom of expression. In fact, a survey by the Times-Mirror Center of the People and the Press reported that fifty-two percent of respondents favored governmental restrictions on televised portrayals of "unnecessary violence."

No one knows for certain why most Americans appear to favor increased regulation of speech. Paul McMasters, Executive Director of the Freedom Forum First Amendment Center, has suggested that "when it comes right down to it," most people do not believe in free speech. Or perhaps it is simply that every act of censorship has its constituents. Or, in the case of televised violence, maybe Hillary Rodham Clinton is correct that an over-emphasis on crime stories in television news coverage has created exaggerated fears of violence in society.

This Essay, in Part I, examines both historical and current efforts to curtail violence on television. Part I also describes various types of informal regulation of speech. Part II describes how courts have in some cases restricted the government's ability to apply such informal pressure. Part III discusses an important application of this jurisprudence to the FCC's "family viewing policy" of the mid-1970s. This Essay is not intended to suggest that

2. Id.
3. See Steve Twomey, TV Fans Get Panned, WASH. POST, Mar. 17, 1994, at Cl ("Think of America as a neighborhood homeowners' association, but on a massive scale: Anyone different living among us must be crushed.")
4. Hillary Clinton Decrees Excess Violence in TV News, BROADCASTING & CABLE, Mar. 14, 1994, at 47. This concern was supported by a recent study conducted by the Center for Media and Public Affairs. It found that the three networks doubled their coverage of crime and violence during the past year even though the national crime rate has not changed. See Ellen Edwards, Networks Make Crime Top Story: Survey Says Courage Fanned Public Fear, WASH. POST, March 3, 1994, at Cl. See also Edward Fouhy, Toward a New Agenda in TV News, BROADCASTING & CABLE, January 10, 1994, at 32.
government jawboning for communications industries to "clean up their act" necessarily creates a constitutional problem. But it can, and it has done so on enough occasions to belie the complacency of some federal policymakers who appear to believe that any concession they can wring out of regulated industries is permissible so long as it can be characterized as voluntary.

I. The Recurring Campaign Against Television Violence

The American public's general tolerance for censorship has created a ritual in American politics: a responsible group of organizations announces that some medium or message poses a threat to society, or at least to vulnerable segments of the population, and seeks to have that bad influence curtailed. The campaign is then picked up by public officials who either pass laws or use their bully pulpit to convert any doubters. In the period after World War III, there was great concern with the impact of cinema, particularly with its depictions of sex and violence. In the 1940s there was great concern over crime magazines, with their emphasis on "bloodshed, lust or crime." Such publications were believed to encourage or incite social violence. In the 1950s, this concern was focused on comic books, with Senate hearings investigating the supposed link between violent comics and juvenile delinquency. Of course, there have been continuing campaigns against obscenity, broadcast indecency, rock music, gangsta rap, and, most recently, video games.

In this long history of censorship, perennial campaigns against television violence have appeared with the regularity of the thirteen-year locust. Senate Judiciary Committee hearings on juvenile delinquency in the mid-1950s and early 1960s examined the effects of television on young people; in the mid-1970s, both Congress and the FCC again expressed concerns about depictions of violence on TV. This culminated in the creation of the "family viewing policy" in which the networks and the National Association of Broadcasters

5. To head off legislation by the states to allow film censorship, Hollywood established the Motion Picture Producers and Distributors of America, headed by former Postmaster General Will H. Hays. The Hays office was set up to be the "industry's own censorship bureau." A study of censors in 1928 found that 56.4 percent of deletions related to depictions of crime. See Thomas G. Krattenmaker & L.A. Powe, Televised Violence: First Amendment Principles and Social Science Theory, 64 VA. L. REV. 1123, 1289 (1978).


(NAB) agreed to move violent and sexually-oriented programming to the later evening hours.9

The campaign against television violence has been renewed in the past two years and has taken on a heightened urgency.10 High level officials of the Executive Branch, key lawmakers, and FCC officials have all identified the issue as a top priority. At least ten bills were introduced in the 103d Congress to control televised violence, and policymakers have urged the industry to

---


10. The concern is driven by the conviction that television viewing, particularly by young people, leads to greater violence in real life. Some, including the current Chairman of the FCC, have suggested that there no longer is any scientific debate about whether TV viewing causes violence, and for policymaking purposes the proposition has been accepted as fact. See FCC Chairman Reed E. Hundt, Speech before the American Psychological Association Annual Convention (Aug. 13, 1994). Although it is beyond the scope of this essay to debate the scientific literature on televised violence, it should be noted that most social science studies of the subject have found no connection between television viewing and violence. The few studies that reported a link generally found a very weak correlation between viewing and behavior. And any possible effect attributable to children's TV viewing is greatly overshadowed by other factors, such as rejection by parents, harsh discipline or lack of supervision. For excellent reviews of the social science literature, see MARCIA PALLY, SEX & SENSIBILITY 87-115 (1994); Krattenmaker & Powe, supra note 5.
Television Violence

engage in voluntary self-regulation. At a broadcast industry convention in 1994, FCC Chairman Reed Hundt praised efforts by the broadcast and cable industries to regulate themselves. He described the cable industry’s support for a system of ratings, independent monitoring, and technological controls as “a watershed event,” and the networks’ acceptance of monitoring as the “beginning of a breakthrough.” While Chairman Hundt noted the commitment of independent broadcast stations to use programming guidelines and to provide advisory messages, he also added: “I know that you recognize that you have not fully addressed the problem.”

Other officials have been more direct. Attorney General Janet Reno testified last fall that the proposed legislation on televised violence would be constitutional and stated that “the time has come for a very specific proposal to be made by all aspects of the industry with immediate deadlines and means of monitoring compliance.” If the industry decides not to act, the Attorney General added, then “Government will have no alternative but to address these


With a shift to Republican control of Congress, the 104th Congress appears less likely to emphasize the issue of television violence. Senator Larry Pressler, the new Chairman of the Communications Subcommittee of the Senate Commerce Committee has reportedly said that he opposes legislative approaches to control TV programming. See Pressler Asks Concentrated Effort to Pass Telecom Bill, COMM. DAILY, Nov. 21, 1994, at 2. It is worth noting however, that certain legislative proposals of the 103d Congress were sponsored or co-sponsored by Republican Members. H.R. 2888, for example, which would require V-chip technology, was co-sponsored by Rep. Jack Fields, the new Chairman of the House Telecommunications Subcommittee. Additionally, former Chairman Markey, who will continue as the ranking minority member of the Subcommittee, has pledged to continue advocating the V-chip. See Markey Looks to Maintain Agenda in New Role, COMM. DAILY, Dec. 2, 1994, at 4. On February 2, 1995, Sen. Conrad of North Dakota introduced the Children’s Media Protection Act of 1995. S. 332, 104th Cong., 1st Sess. Among other things, the Act would require V-chip technology, a ratings system for broadcast and cable television content, and a prohibition on transmission of “programming that contains gratuitous violence” between 6 AM and 10 PM. Id.

12. FCC Chairman Reed Hundt, Speech before the NATPE/INTV Convention (January 24, 1994).
problems through legislation." She said that she wanted to see a reduction in violent programming within "one year's time."\(^{13}\)

At the same hearing, Senator Paul Simon of Illinois gave the networks until January 1, 1994, to reduce the amount of violence in their programming.\(^{14}\) In a speech before the National Press Club, Senator Simon emphasized the deadline and warned that "the threat hangs like Damocles' sword over programmers' necks." He added that "there is a line in the sand, and I think the line in the sand will be a monitoring committee." Without some "positive response" from the industry in setting up a monitoring group, he said, "there will be a legislative effort."\(^{15}\)

In another hearing, former Surgeon General Joycelyn Elders blamed television violence for a rise in real violence and urged the industry to change its programming.\(^{16}\) The former Surgeon General also complained that the networks had failed in their promise to air parental advisories for programs containing violent content. "The networks obviously did not do what they said they were going to do," she testified.\(^{17}\)

As the policy debate over televised violence has progressed, there has been no shortage of specific proposals about what steps the television industry should take. In a private meeting with network officials, Attorney General Reno reportedly advocated a 6 to 9 p.m. safe harbor and called for "at least six hours of inspirational programming,"\(^{18}\) In another setting, she described the type of television programming she would like to see. She gave the example of a hypothetical show in which a teenager helped raise his siblings

---

13. See Reno Endorses Bills to Deal With TV Violence, COMM. DAILY, October 21, 1993, at 2; Kim McAvoy and Steve Coe, TV Rocked by Reno Ultimatum, BROADCASTING & CABLE, October 25, 1993, at 6. The Attorney General's blanket assessment of the constitutionality of various bills may have been somewhat premature. Questioning revealed that her opinion was based entirely on the Supreme Court's 1978 decision in FCC v. Pacifica Foundation, 438 U.S. 726 (1978). She was uninformed about subsequent court of appeals decisions striking down FCC safe harbor rules similar to some of the legislative proposals. See Action for Children's Television v. FCC, 932 F.2d 1332 (D.C. Cir. 1988) (hereinafter "ACT I") (12 a.m. to 6 a.m. safe harbor period rejected). Moreover, it is not entirely clear that precedent on the narrow question of broadcast indecency would necessarily extend to the issue of violence or to other media, such as cable. See, e.g., Winters v. New York, 333 U.S. 507 (1948); Video Software Dealer's Association v. Webster, 968 F.2d 684 (8th Cir. 1992).


while his mother recovered from her drug problem. In the end, the mother went to law school and the son graduated from high school as valedictorian.\footnote{19}{Hanna Rosin, The Producers: Congress Fights TV Violence, \textit{THE NEW REPUBLIC}, December 13, 1993, at 12.}

The Attorney General is by no means the only federal official who has made specific programming suggestions. Senator Simon told a group of broadcasters that cartoons such as \textit{Tom and Jerry} are too violent and that he “would like to see a little less of that.” On the other hand, a film such as \textit{Schindler’s List} would be permissible so long as it is not aired “at eight o’clock when a lot of kids are watching.”\footnote{20}{Kim McAvoy, \textit{Washington Watch}, \textit{BROADCASTING \\& CABLE}, March 7, 1994, at 58.} Senator Ernest Hollings complained about the violence level in the CBS sitcom \textit{Love and War} in which the characters throw popcorn at each other in a spoof on televised violence. Hollings reportedly was disturbed by the ruckus and aired a film clip of the program at a Senate hearing.

But while it may seem that every policymaker is a critic, few agree on how television programming should be improved. Former Surgeon General Elders has testified that presentations of violence should not be sanitized and should realistically portray the consequences of such violence—“that you really do bleed.”\footnote{21}{See Rosin, supra note 19.} Congressman Carlos Moorhead, on the other hand, objected to programs in which “people are shot and get hurt and are writhing in pain,” and concluded: “Cowboy movies were better.”\footnote{22}{Id.} Senator John Kerry has cited reality-based shows like \textit{Cops} as being objectionable, while other lawmakers have declined to differentiate between the various types of violent programming. Senator John Danforth reportedly has stated: “Shakespeare, Beavis and Butthead, Schwarzenegger, it’s all the same.”\footnote{23}{Id.}

While the legislative proposals are matters of public record, the informal plans for voluntary self-regulation are somewhat harder to track and are more diverse. At a minimum, however, they have included the following demands: (1) a rating system for violent programming; (2) independent monitors to assess programming violence; (3) reduced levels of violence on TV; (4) a safe harbor until either 9 or 10 p.m. during which time unacceptable violence would not be presented; (5) the airing of parental advisories to warn of violent programming; (6) increased presentation of pro-social programming; (7) fewer violent cartoons; (8) fewer violent reality shows; (9) more graphic portrayals of violence; and (10) less graphic portrayals of violence.

In response, both the broadcast and cable industries have announced self-regulation plans. In February, the cable industry agreed to: (1) adopt a violence rating system; (2) employ an outside monitor to assess violent

\begin{itemize}
\item \footnote{19}{Hanna Rosin, The Producers: Congress Fights TV Violence, \textit{THE NEW REPUBLIC}, December 13, 1993, at 12.}
\item \footnote{20}{Kim McAvoy, \textit{Washington Watch}, \textit{BROADCASTING \\& CABLE}, March 7, 1994, at 58.}
\item \footnote{21}{See Rosin, supra note 19.}
\item \footnote{22}{Id.}
\item \footnote{23}{Id.}
\end{itemize}
programming; (3) alter scheduling practices to move violent programs to a time slot later in the evening; (4) adopt standards and practices for programming and employ parental advisories; (5) limit the presentation of violence in promotional advertising; (6) conduct a viewer education program; and (7) present programming to address the issue of violence in society.24 The networks agreed on their own to provide parental advisories to warn viewers about violent programs, present more pro-social programming, devote additional news coverage to the issue of violence, employ public service announcements and, like the cable initiative, commission an outside expert to conduct an annual qualitative assessment of the amount and type of violence on network shows.

These efforts apparently appeased some lawmakers. Senator Simon announced that industry efforts showed promise and that no legislation would be needed—at least not this term. Others, however, were less impressed. Congressman Edward Markey, for example, sponsor of the so-called V-chip bill, said that “[u]nless the broadcasting industry accepts some rating system along with some sort of violence-chip block voluntarily, I don’t believe legislation is avoidable.”25 Similarly, Senator Hollings, whose bill would prohibit violent programs at times when children are likely to be watching, said that industry efforts were not adequate and that he would continue to press for legislation. It remains to be seen the extent to which the television industry will engage in further self-regulation.

So what, exactly, is the problem? One view is that these events represent the system at its best, with policymakers identifying and solving a problem without having to adopt a law. What possible constitutional objection could there be if no law is actually passed? After all, legislators and other federal officials merely have given speeches and debated proposals that clearly are within their jurisdiction. How could anyone object to the fact that they are merely performing their lawful duties?

II. The Jurisprudence of Informal Censorship: The First Amendment

The answer to these questions, to the extent there is one, is embedded in the fundamental nature of First Amendment rights. Considering the hypothetical question posed at the beginning of this Essay, most Americans presumably would be outraged at governmental efforts—even informal ones—to restrict the practice of religion. The constitutional infirmity could be even more serious in the absence of official action, because there would be no record to determine whether Congress had actually found a justification sufficient to limit

24. NCTA Press Release, Cable Networks Announce Voices Against Violence (February 1, 1994).
Television Violence

fundamental rights. Nor would there be an adequate standard by which to conduct judicial review, since there would be no law against which to assess conduct. Some may feel that hypothetical restrictions on religion inflate the importance of the question. We are dealing, after all, with TV shows, not the Vatican. Should the analysis be different when the target of the government's wrath is mere entertainment programming?

So far, the courts have answered this question in the negative. For example, in *Winters v. New York*,26 the Supreme Court invalidated a state law that curbed the publication of magazines “devoted principally to criminal news and stories of bloodshed, lust or crime.” In striking down the law, the Court pointedly stated: “What is one man’s amusement, teaches another’s doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.”27 In a more recent case invalidating restrictions on videotape rentals to minors, the U.S. Court of Appeals for the Eighth Circuit held, first, that violent video programming to be “entitled to the highest degree of First Amendment protection,” and second, that it “cannot be regulated in the same way as broadcast indecency.”28

But there is still the need to define the relevant constitutional standard when the government acts informally rather than through passage of a law. In this regard, it is vital to understand that abridgement of free speech does not always require an official government decree, injunction or licensing decision. Less formal governmental actions can also have the effect of burdening or otherwise limiting speech. Such actions manifest themselves in a wide variety of ways.

In *Lombard v. Louisiana*,29 for example, the Supreme Court held that speeches given by executive branch officials can have “at least as much coercive effect as an ordinance.”30 In *Lombard*, the mayor and police superintendent had made widely publicized statements that no sit-in demonstrations would be permitted in the city. Subsequently, when civil rights demonstrators were arrested for trespassing in violation of the public pronouncements, the Court overturned the convictions. It brushed aside the assertions by local officials that sit-in demonstrations were not in the public interest of the community, and held that informal statements “must be treated exactly as if [the city] had an ordinance prohibiting such conduct.”31 The

27. Id. at 510-11.
30. Id. at 273.
31. Id.
Court ruled that the government could not be permitted to do indirectly what it was barred from doing directly.

That same year, the Court decided *Bantam Books, Inc. v. Sullivan*, a paradigmatic example of informal censorship. There, the Rhode Island legislature established an advisory committee called the Rhode Island Commission to Encourage Morality in Youth. Members of the Commission would notify bookstores that certain books and magazines were considered objectionable for sale or display to youths under the age of 18. The written notice included a reminder that the Commission also had a mandate to recommend prosecution for purveyors of obscenity. Soon after the Commission’s notice was sent, a local policeman visited bookstores to determine what action they took in response, if any. The Supreme Court described the Commission’s practice as “blacklist[ing],” and found that “informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief.” The Court discounted the Commission’s claim that it was only providing legal advice, concluding that “the Commission deliberately set about to achieve the suppression of publications deemed ‘objectionable’ and succeeded in its aim.”

This does not mean, however, that the government is powerless to categorize different types of speech. In *Meese v. Keene*, the Court upheld the government’s authority to label films as “political propaganda” under the Foreign Agents Registration Act of 1938. The Court, in assessing the claim of a California state legislator that the official designation impeded his ability to exhibit three Canadian films dealing with environmental issues and with nuclear war, found that use of the term “political propaganda” threatened the appellee with “cognizable injury” and not just a “subjective chill.” But while this finding was sufficient to confer standing, the Court said it was a “separate matter” whether it rose to the level of a constitutional infirmity. The Court held that there was no First Amendment violation on the facts presented because the term “propaganda” was used in a neutral sense in the statute and because there was no demonstration that the designation had any actual adverse impact on the distribution of foreign advocacy materials. This holding, however, falls far short of approving governmental actions undertaken

---

33. *Id.* at 67-68 (footnote omitted).
34. *Id.* at 67. The Court found that the Commission’s practices plainly served as instruments of regulation independent of the law against obscenity. *Id.* at 68-69 (footnote omitted).
35. 481 U.S. 465, 467 (1987). Justice Scalia took no part in the consideration or decision of the case.
36. *Id.* at 473.
37. *Id.* at 479 n.14.
38. *Id.* at 484. The Court expressly disavowed any decision on the permissible scope of Congress’ right to speak.

196
with the intent and having the effect of substantially curtailing a publication's circulation.

Nevertheless, the facts of Keene suggest that the government may employ a wide variety of tactics that can have the effect of discouraging speech. In this regard, official investigations historically have served as an effective means of "off-the-books" censorship. Although the courts generally accord broad deference to such investigations, there are constitutional limits to government inquiries. This issue typically arose in cases involving investigations of subversive activities in which the government's investigative power was upheld. In Barrenblatt v. United States,\(^\text{39}\) for example, the Supreme Court held that there was no First Amendment right to refuse to testify before the House Committee on Un-American Activities.\(^\text{40}\) In the circumstances presented in that case, the Court held that the legitimate congressional inquiry outweighed the free speech interest involved.\(^\text{41}\)

Although the Court typically has upheld the ability to investigate, it also has made clear that "[n]o inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress."\(^\text{42}\) Moreover, "[i]nvestigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible."\(^\text{43}\) Thus, the Court generally requires that investigations be conducted in pursuit of a legitimate legislative objective and within the scope of a valid authorizing resolution.\(^\text{44}\) There must be a substantial relation between the governmental interest and the inquiry, and the interest must outweigh the First Amendment interests involved. In Watkins v. United States, for example, the Court struck down a contempt of Congress conviction on the argument that a vague authorizing resolution deprived Watkins of due process.\(^\text{45}\) The Court has also stressed that "an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition [is] that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest."\(^\text{46}\) Under this requirement, the Court invalidated


\(^{40}\) Id. at 134.

\(^{41}\) Id. at 126-28. See also Uphaus v. Wyman, 360 U.S. 72 (1959).


\(^{43}\) Id.

\(^{44}\) See Hentoff v. Ichord, 318 F. Supp. 1175, 1182 (D.D.C. 1970) ("If a report has no relationship to any existing or future proper legislative purpose and is issued solely for sake of exposure or intimidation, then it exceeds the legislative function of Congress.").

\(^{45}\) See Watkins, 354 U.S. at 209.

a state legislative committee's attempts to inquire into NAACP membership lists in order to ferret out suspected Communists. 47

To whatever extent such constitutional safeguards have been speech-protective, their effectiveness has depended on the scope of appropriate congressional concern. Where legislative power is more expansive, the ability to conduct investigations similarly is enlarged. Consequently, Congress has greater power to inquire into the content of the electronic media, which are subject to more intrusive regulations than traditional publishers.

Like the congressional concern with subversive speech in the 1950s and early 1960s, legislative interest in broadcast programming has generated a large number of hearings over the years. Through its power to investigate purported abuses, Congress has examined numerous broadcast practices including the content of various network documentaries, news coverage of the 1968 Democratic National Convention, violent and sexually-oriented programs, coverage of Olympic games, and the broadcast of election projections. 48 Such investigations often have taken place without regard to any apparent connection to legislative action. In fact, "congressional committees have often investigated individual programs with the apparent purpose of publicly castigating broadcasters rather than of enacting legislation." 49 Given the extent of government control over broadcast licensing, such inquiries have led broadcasters to alter their programming. 50 Consequently, "few doubt that congressional investigations have a significant impact on broadcasters." 51

In addition to the stick of occasional investigations, government may also hold out the carrot of various benefits to keep regulated industries in line. For example, a number of legislators, including Congressman Markey, threatened to withhold passage of broadcast hearing reform legislation in response to criticism by radio talk shows of a Congressional pay raise. 52 Of course, where the government can offer sufficient benefits, it may be able to affect even the practices of unregulated industries. In 1985, for example, a Senate

---

47. Gibson, 372 U.S. at 546.
49. Id. at 630.
50. The so-called "family viewing policy," which ultimately was invalidated in court, arose from a report of the House Appropriations Committee that required the FCC to outline the ways in which it would deal with violent and sexually-oriented programming. Id. at 636. See Writers Guild of America, West v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976), vacated and remanded on jurisdictional grounds sub nom. Writers Guild of America, West v. ABC, 609 F.2d 355 (9th Cir. 1979), cert. denied, 449 U.S. 824 (1980).
51. Dyk and Goldberg, supra note 48, at 635-36 n.48.
Subcommittee conducted hearings on “indecent” rock music and record labelling.\textsuperscript{53} Although no regulation was proposed, at least one witness pointed out that the hearings coincided with Congressional consideration of record piracy legislation that would benefit the recording industry.\textsuperscript{54} At the same time, the President of the Recording Industry Association of America announced that twenty-four of its member companies had “reached consensus” regarding a record labelling proposal in response to content concerns.\textsuperscript{55} Even newspaper publishers have acknowledged altering their editorial activities in order to obtain government benefits. In 1988, while awaiting Justice Department approval of an antitrust exemption, the editor and publisher of the Detroit Free Press admitted rejecting editorial cartoons critical of former Attorney General Edwin Meese.\textsuperscript{56}

Such tactics have been particularly prominent in the quest to reduce television violence. In 1991, for example, former FCC Chairman Alfred Sikes urged broadcasters to alter their programming as a prerequisite to further deregulation of ownership and business practices. After referring to congressional enactments relating to televised violence, “indecent” programming and children’s programming, the Chairman said that “there is a tacit—if not explicit—linkage between necessary reforms that would help broadcasting compete, and Congress’ attitude toward your programming.”\textsuperscript{57}

More recently, Congressman Markey informed one witness at a hearing that broadcasters would be unlikely to receive favorable consideration in legislation to reform communications infrastructure unless the industry supported his “V-chip” proposal.\textsuperscript{58} He has described broadcasting regulation as a “social compact” based on an explicit “quid pro quo.”\textsuperscript{59} Thus, Congressman Markey emphasized that any effort to review current restrictions on broadcast ownership must “affirmatively address both halves of the social

\textsuperscript{53.} See Hearings Before the Senate Comm. on Commerce, Science, and Transportation, 99th Cong., 1st Sess. (1985). The hearings represented nothing more than a congressional expression of concern. No legislation was considered.

\textsuperscript{54.} See id. at 53 (statement of Frank Zappa) (“Is it proper that the husband [then-Senator Albert Gore] of a [Parent’s Music Resource Center founder] sits on any committee considering business pertaining to the blank tape tax or his wife’s lobbying organization?”).

\textsuperscript{55.} Id. at 95 (statement of Stanley M. Gortikov). RIAA members account for approximately 85 percent of the sales of prerecorded music in the United States.

\textsuperscript{56.} Newspaper Tells of ‘Cautious’ Stance on Meese, \textit{WASH. POST}, July 21, 1988, at A21. See also Stephen R. Barnett, \textit{Newspapers Wither as Monopolies Blossom}, \textit{LEGAL TIMES}, October 23, 1989, at 20, 22 (detailing additional changes in news coverage). The newspaper was seeking a joint operating agreement that would permit consolidation with the business operations of the Detroit News.


\textsuperscript{58.} See \textit{COMM. DAILY}, Feb. 3, 1994, at 1-2. Markey reportedly told McGraw-Hill Broadcasting President Edward Reilly that it is “difficult for broadcasters to claim that they will use the new spectrum for the public interest when they are unwilling to use a scintilla of spectrum for V-chips.” \textit{Id.}

compact" and include a strengthening of children's TV programming rules, violence limits and a greater commitment to minority programming.\textsuperscript{60} FCC Chairman Hundt similarly has described the government/broadcaster relationship as a social compact, and has warned that if broadcasters fail to meet their responsibilities to admit "the real impact of TV violence" and to take steps to deal with it, then "America will ask what broadcasters are giving back to the public that justifies their deal."\textsuperscript{61}

III. The FCC's Family Viewing Policy: Writers' Guild of America, West v. FCC

To assess whether the government's campaign to reduce television violence represents an excessive intrusion into First Amendment rights, it is vital to recognize that this precise question has been addressed before. In the mid-1970s broadcasters adopted the "family viewing policy" as a result of a concerted effort by Congress and the FCC. Then-Chairman Richard Wiley, pursuant to a congressional directive, initiated a series of meetings with network, independent television, and NAB officials "to serve as a catalyst for the achievement of meaningful self-regulatory reform."\textsuperscript{62} As part of this initiative, the Chairman outlined four specific proposals for broadcasters to consider: (1) making a new commitment to reducing the level and intensity of violent and sexually-oriented material; (2) scheduling more adult-oriented programming after 9 p.m.; (3) airing video and audio warnings before and during programs with violent or sexual content; and (4) publishing warnings in advance television programming listings.\textsuperscript{63} The Chairman's message was amplified in speeches before broadcast groups and in suggestions to the press that public hearings would be convened if voluntary action was not forthcoming.\textsuperscript{64} The FCC's "suggestions" were adopted by the networks and were to be enforced through the NAB Code. The self-regulation program was adopted just in time for the FCC to report to Congress on the status of televised sex and violence.

In a lawsuit brought by writers and producers of television programs, the U.S. District Court for the Central District of California invalidated the policy. The court held that "[t]he existence of threats, and the attempted securing of

\textsuperscript{60. Id.}

\textsuperscript{61. FCC Chairman Reed E. Hundt, Speech before the American Psychological Association Annual Convention (Aug. 13, 1994); Chairman Reed E. Hundt, Speech before the International Radio and Television Society (Oct. 19, 1994).}

\textsuperscript{62. Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418, 420 (1975).}

\textsuperscript{63. Id. at 420-21.}

\textsuperscript{64. Writers Guild of America, West v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976), vacated and remanded on jurisdictional grounds sub nom. Writers Guild of America, West v. ABC, 609 F.2d 355 (9th Cir. 1979), cert. denied, 449 U.S. 824 (1980).}
commitments coupled with the promise to publicize noncompliance . . . constituted *per se* violations of the First Amendment."65 The informal nature of the government’s actions heightened the court’s concern. To the extent the Commission sought to control entertainment programming, the court ordered that “it shall do so not in closed-door negotiating sessions but in conformity with legislatively mandated administrative procedures.”66 The court characterized the FCC’s tactics as “backroom bludgeoning,”67 and found them to be in violation of the First Amendment, the Communications Act, and the Administrative Procedure Act.68

The District Court opinion was vacated on appeal because the Court of Appeals concluded that the FCC should have been given the initial opportunity to rule on the charges against it pursuant to the primary jurisdiction doctrine.69 However, the appellate court agreed that “the use of these techniques by the FCC presented serious issues involving the Constitution, the Communications Act and the APA.”70 The Supreme Court denied certiorari,71 and those “serious issues” remain open questions.

Some have suggested that these issues are not so serious, that the special constitutional status of broadcasting allows the government broad discretion to regulate televised violence. In particular, Attorney General Reno and FCC Chairman Hundt have asserted that the decision in *FCC v. Pacifica Foundation*72 gives the FCC authority to regulate violent programming as well as indecent content.73 Indeed, the aggressive tone of the current campaign against violence stands in sharp contrast to the campaign twenty years ago. At that time, the FCC expressed concern about involving the government “too deeply in programming content, raising serious constitutional questions.”74 Accordingly, it stressed that “the decision as to which programs are so excessively violent . . . as to be inappropriate for young children would remain in the broadcaster’s sound discretion.”75 Such cautionary language is conspicuously absent from the current debate over violence.

Additionally, the complacent reliance on existing broadcast precedents may be inappropriate. Leaving aside the fact that the constitutional ability to enforce validly-promulgated indecency regulations does not necessarily justify

65. *Id.* at 1151.
66. *Id.* at 1073.
67. *Id.* at 1143. The court also held that the networks and NAB were liable for damages for acting in concert with the government to suppress speech.
68. *Id.* at 1149-50, 1153.
69. 609 F.2d 355, 366 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980).
70. *Id.* at 365.
73. See supra notes 10-13.
74. Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d at 419.
75. *Id.* at 421.
under the table rules, that indecent programming is not the same thing from a constitutional perspective as violent material, or that Pacifica does not extend to cable TV programming, the special status of broadcasting could well make the government’s campaign against violence even more vulnerable.

Broadcasters are special in that they are a licensed medium, and as such, they are particularly susceptible to informal pressure in licensing proceedings. This pressure, potentially, can have a chilling effect on speech. For this reason, the D.C. Circuit struck down a requirement that noncommercial radio stations make audio tapes of programs in which any “issue of public importance” was presented. It found that both commercial and noncommercial broadcasters are subject to “a variety of sub silentio pressures and ‘raised eyebrow’ regulation of program content.” Accordingly, even a seemingly neutral regulation could be invalid to the extent it increases the likelihood that broadcasters “will censor themselves to avoid official pressure and regulation.”

Twenty years ago, Judge David Bazelon of the D.C. Circuit described the in terrorem effect of the regulatory scheme and concluded that “the use of ‘raised eyebrow’ tactics presents serious issues which should at least engage our undivided attention as we review communications policy and the Constitution.” To underscore his concern, Judge Bazelon published White House memoranda from the Watergate era. The documents outline the efforts of the Nixon White House to use the FCC and other institutions to intimidate the broadcast networks. An October 17, 1969 memorandum from Jeb Magruder to H.R. Haldeman identified 21 requests from the President in a 30 day period “requesting specific action relating to what could be considered unfair news coverage.” Magruder had some ideas. Among them:

Begin an official monitoring system through the FCC as soon as Dean Burch is officially on board as Chairman . . . This will have much more effect than a phone call from Herb Klein or Pat Buchanan.

---

77. Community-Service Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1104 (D.C. Cir. 1978) (en banc).
78. Id. at 1116.
79. Id.
81. Id. at 247.
Television Violence

Use the anti-trust division to investigate various media relating to anti-trust violations. Even the possible threat of anti-trust action I think would be effective in changing their views in the above matter.\textsuperscript{82}

Similarly, Charles Colson was quite candid about the government’s intentions in a memo to H.R. Haldeman on September 25, 1970:

The networks are terribly nervous over the uncertain state of the law, i.e., the recent FCC decisions and the pressures to grant Congress access to TV. They are also apprehensive about us. Although they tried to disguise this, it was obvious. The harder I pressed them (CBS and NBC) the more accommodating, cordial and almost apologetic they became . . . They were startled by how . . . we have so thoroughly monitored their coverage and our analysis of it . . . I think we can dampen their ardor for putting on “loyal opposition” type programs.\textsuperscript{83}

During this same period the District Court in \textit{Writers’ Guild} found that informal pressure tactics of the FCC at the behest of Congress were a per se violation of the First Amendment.\textsuperscript{84} Although this conclusion was reopened by the reviewing court’s jurisdictional ruling,\textsuperscript{85} the Commission’s constitutional authority to control programming content most certainly has diminished in the intervening years.

As policymakers ponder whether to impose new content controls, it is worth remembering that the constitutionality of broadcast regulation is not an immutable fact; it is based on “‘the present state of commercially acceptable technology’ as of 1969.”\textsuperscript{86} The Supreme Court has noted that “because the broadcast industry is dynamic in terms of technological change[,] solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence.”\textsuperscript{87} Both courts and commentators have

\begin{footnotesize}
\begin{enumerate}
\item Id. at 248.
\item Id. at 244-47.
\item 423 F. Supp. at 1073-74.
\item Id. at 1073.
\end{enumerate}
\end{footnotesize}
The Yale Journal on Regulation

questioned the continuing validity of the scarcity rationale for the constitutionality of regulating broadcast content.\textsuperscript{88}

The Supreme Court thus far has avoided a direct reexamination of\textit{Red Lion} and other cases that apply "a less rigorous standard of First Amendment scrutiny to broadcast regulation."\textsuperscript{89} But it has shown no enthusiasm for preserving that line of precedent. Indeed, last summer in\textit{Turner Broadcasting System v. FCC}, the Court again declined to review the cases but also refused to endorse them.\textsuperscript{90} The Court also minimized the potency of any government jurisdiction over broadcast content. It noted the "minimal extent to which the FCC and Congress actually influence the programming offered by broadcast stations," and emphasized that "the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations."\textsuperscript{91} Nor may the government "impose upon [broadcasters] its private notions of what the public ought to hear."\textsuperscript{92}

In this context, an overtly aggressive campaign to reduce television violence, whether official or informal, could cause the aging justifications for broadcast content regulation to unravel. It is rather ironic that two decades ago, when the constitutionality of such regulation was far more secure, public officials seemed to be more circumspect, at least in their rhetoric. Now, as regulatory justifications are fading away, the government is seeking to impose a growing array of content controls, including children's programming requirements, more stringent indecency enforcement, advertising limits, the possibility of a renewed fairness doctrine, and so on. With the addition of violence restrictions, perhaps the cumulative drag on editorial freedom will trigger a long overdue judicial revisitation of broadcasters' constitutional status.

Conclusion

Last summer, \textit{Juliana's}, a popular Tokyo disco featuring scantily-clad dancers on raised platforms, closed its doors. The club's demise resulted from government disapproval, although no law was ever passed, and no edict issued.

\textsuperscript{88} See, e.g., FCC v. League of Women Voters of California, 468 U.S. 364, 376-77 n.11 (1984); Arkansas AFL-CIO v. FCC, 11 F.3d 1430, 1142 (8th Cir. 1993) (Arnold, C.J., concurring); News America Publishing, Inc., 844 F.2d at 811 ("The Supreme Court \ldots has recognized that technology may render the [scarcity] doctrine obsolete\textemdash indeed, may have already done so."); Telecommunications Research and Action Center v. FCC, 801 F.2d 501, 506-09 (D.C. Cir. 1986), cert. denied, 482 U.S. 919 (1987); see also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1005-06 (2d ed. 1988) ("reconsideration of the scarcity argument for broadcast regulation seems long overdue.").

\textsuperscript{89} Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445, 2456 (1994).

\textsuperscript{90} \textit{Id.} ("the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, \textit{whatever its validity in the cases elaborating it}, does not apply in the context of cable regulation.") (emphasis added).

\textsuperscript{91} \textit{Id.} at 2463, 2464.

\textsuperscript{92} \textit{Id.} at 2463 (quoting \textit{En Banc Programming Inquiry}, 44 F.C.C.2d 2303, 2312 (1960)).
Authorities had merely provided “guidance” to the owners about the entertainment value of Juliana’s. The closure underscored the “extraordinary deference that Japanese business people tend to show toward government officials.” The episode raises the familiar tree-falling-in-the-woods question: is a regulator really regulating when there is no regulation? Sometimes, the answer is yes.

The United States, with its cultural diversity and First Amendment protections, is not always profitably compared to the more rigid, command-driven Japanese society. But in the case of raised eyebrow regulation of licensed media in the United States, large industries often show extraordinary deference to government officials’ whims and preferences. While genuinely voluntary decisions to make editorial changes that happen to coincide with policy initiatives do not present a constitutional problem, they may do so when the “volunteers” are given little alternative but to comply.

The current crusade against television violence is notable for the virtual absence of sensitivity toward First Amendment values. Policymakers at the highest levels of the federal government have summoned media executives to Washington, expressed concerns about specific programs and have set timetables for compliance with their demands. All the while, various legislative and administrative proposals have, in the words of Senator Simon, hung “like Damocles’ sword over programmers’ necks.” Such rhetoric contrasts sharply with the FCC’s expressed concern in the 1970s that its family viewing policy not intrude “too deeply in programming content, thus raising serious constitutional questions.”

The Commission’s professed regard for the First Amendment did not salvage the family viewing policy, even at a time when the government was generally given great latitude in regulating broadcast content. Now, however, as courts are becoming increasingly skeptical about the use of such regulatory power, the relatively unvarnished sentiments of federal policymakers are unlikely to play well if broadcasters and other media enterprises are strong-armed into accepting a specific deal to limit programming content. Under such circumstances, the courts should take steps to defend the Constitution and defend cherished First Amendment freedoms from legislative and regulatory assault.
